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OCT 05 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

S.C. SUPREME COURT

Certiorari to Cherokee County

Grace Gilchrist Knie, Circuit Court Judge

MITCHELL LEON HAMES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000614

APPENDIX

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STATE OF SOUTH CAROLINA)	IN THE COURT OF
)	GENERAL SESSIONS
COUNTY OF CHEROKEE)	OF THE SEVENTH
)	JUDICIAL CIRCUIT
)	
STATE OF SOUTH CAROLINA,)	
Plaintiff,)	TRANSCRIPT OF RECORD
)	2015-GS-11-0712
vs.)	2016-GS-11-0076
)	
MITCHELL LEON HAMES,)	
Defendant.)	
)	

March 22, 2016
Gaffney, South Carolina

B E F O R E:
HONORABLE J. MARK HAYES, II, Judge.

A P P E A R A N C E S:
CHRISTOPHER BAIN, SOLICITOR
For The State
DON THOMPSON, ESQUIRE
For Defendant

Julie A. Ashbrook,
Circuit Court Reporter
Seventh Judicial Circuit

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1	EXHIBITS		
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EXHIBITS

MARKED ENTERED

STATE'S EXHIBIT NO. 15 Photo of Baggie of Drugs	5
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THE STATE VS. MITCHELL LEON HAMES

(Whereupon, State's Exhibits 1-17 were marked for identification.)

THE CLERK: Please raise your right hand.
(Complies.)

Do you solemnly swear the information you give to this court to be the truth, the whole truth and nothing but the truth so help you God?

THE DEFENDANT: Yes, ma'am, I do.

THE CLERK: You can put your hand down.

MR. BAIN: Good morning, Your Honor, may it please the Court?

THE COURT: (Nods head.)

MR. BAIN: Your Honor, here before you is Mr. Mitchell Leon Hames, represented by defense attorney Mr. Don Thompson. He is here on Indictments 2015-GS-11-00712. It is a true bill indictment for possession with intent to distribute methamphetamine. The State has negotiated a 15-year sentence to run concurrent with the other indictment, Your Honor, which is 2016-GS-11-00076. That was a true bill indictment for trafficking methamphetamine.

The State is allowing him to plead to possession with intent to distribute methamphetamine. Both of these are third offenses, Your Honor, and both of these

1 are considered a serious crime under South Carolina law.
2 I'm handing up the sentencing sheet and the indictment.

3 THE COURT: You are Mr. Hames?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Sir, it is your intent to enter a
6 plea to the charges that were announced by the
7 solicitor?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: How old are you, sir?

10 THE DEFENDANT: Thirty-seven.

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

12 THE DEFENDANT: Eleventh grade. I got a GED.

13 THE COURT: You did get your GED?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Are you married, single, divorced or
16 widowed?

17 THE DEFENDANT: Single.

18 THE COURT: Do you have children?

19 THE DEFENDANT: Two.

20 THE COURT: How old?

21 THE DEFENDANT: 14 and 18.

22 THE COURT: Do you have a job outside the home?

23 THE DEFENDANT: Not now I don't.

24 THE COURT: What were you doing?

25 THE DEFENDANT: Landscaping.

1 THE COURT: Ever serve in the military?

2 THE DEFENDANT: No, sir.

3 THE COURT: On this charge before you got
4 arrested how long were you in jail before you made bond?

5 MR. THOMPSON: Judge, he was in jail 52 days
6 before he made bond. He was then out on house arrest
7 for 121. He's been back in jail on a bench warrant for
8 135. If you give him credit for the house arrest that
9 would be a total of 318 days.

10 THE COURT: Within the last 24 hours have you
11 consumed any type of substance that is adversely
12 affecting your ability to understand what we're doing
13 today?

14 THE DEFENDANT: No, sir.

15 THE COURT: Have you ever been treated for any
16 type of substance abuse for a drug or alcohol problem?

17 THE DEFENDANT: I went through ATU.

18 THE COURT: And was that for drugs or alcohol or
19 both?

20 THE DEFENDANT: It was, I guess, both because I
21 was told about decision making and it's in the same one
22 at the county corrections center.

23 THE COURT: And about how long ago was that
24 approximately?

25 THE DEFENDANT: Eleven years now.

1 THE COURT: And do you think it was successful?

2 THE DEFENDANT: At the time it was.

3 THE COURT: All right. Sir, are you satisfied
4 with the work that your lawyer has done for you?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Beyond that which has been stated to
7 this courtroom, has anybody come to you and promised you
8 anything or threatened you in any way in order to get
9 you to make the decision to enter this plea?

10 THE DEFENDANT: No, sir.

11 THE COURT: I am correct to conclude that your
12 decision to enter the plea that it is a free and
13 voluntary decision on your part?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Mr. Hames, I need for you to
16 understand that under the law you are presumed innocent
17 of both of these charges and you do have a right to a
18 jury trial on either or both of these charges. At any
19 jury trial that would take place it would be the State
20 that has the burden of proof and the State would have to
21 convince all 12 members of a jury that you are, in fact,
22 guilty beyond a reasonable doubt. Now, do you
23 understand that you have a right to that jury trial?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: And do you wish to have a jury trial

1 on either of these charges?

2 THE DEFENDANT: No, sir.

3 THE COURT: And, sir, do you understand that
4 there are other very important constitutional rights
5 that you are entitled to but that you have to give up in
6 order to enter these pleas? You have to give up your
7 right to confront or cross-examine the State's
8 witnesses. You also have to give up your right to
9 present evidence which you or your lawyer might be able
10 to establish a defense, and you have to give up your
11 right to subpoena as well as your right to remain
12 silent. Do you understand all those rights?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: And you wish to give them all up?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: All right. Mr. Hames, please listen
17 to the solicitor. He's going to tell us the facts and
18 then I'll have some more questions for you.

19 MR. BAIN: Thank you, Your Honor. Concerning
20 Indictment 15-00712, that occurred on May 16th, 2015.
21 Gaffney City police officers saw the subject walking
22 back and asked if they needed to speak with him. It
23 occurred here in Cherokee County. When the officer went
24 up to Mr. Hames, the subject pulled out a syringe, a
25 black tin foil in his pocket, which contained three

1 baggies which were a rock-like substance. They were
2 sent down to SLED and came back and tested positive for
3 methamphetamine. The net weight, Your Honor, is 3.55
4 grams.

5 Your Honor, just to make the Court aware, in my
6 incident report it does state that the subject was
7 charged with a first offense due to the fact he stated
8 he wanted to work and give in to optimum minimum weight.
9 He was advised if he didn't work that his charge would
10 be upgraded. Your Honor, I was not part of any of that
11 negotiation and when it was indicted. And if we did
12 move forward with a trial the State would move forward
13 on a possession with intent to distribute third offense.
14 And they never contacted me saying that Mr. Hames
15 cooperated with them or anything concerning that case.

16 Your Honor, concerning Indictment 2016-0076, Your
17 Honor, that was originally the trafficking. He's
18 pleading to PWID. That was the case the State was
19 prepared to go forward with this morning. It occurred
20 on May 26th, 2015. An under cover officer working with
21 the Cherokee County sheriff's office and the Union
22 County sheriff's office set up a buy with Mr. Hames here
23 in Cherokee County. That was recorded on video. You
24 can see Mr. Hames making the exchange and receiving
25 money in return.

1 He was later arrested on that same day about an
2 hour-and-a-half later, Your Honor. Some of the money
3 that he had in his possession were more bills that the
4 sheriff's office knew that they gave the under cover
5 operative and they could say that he had that in his
6 possession.

7 He sold approximately 6.88 grams of
8 methamphetamine. That did test positive down at SLED.
9 And when he was arrested later, they also arrested him
10 and found approximately about seven grams of meth on
11 him, which also tested positive for meth at SLED. He
12 also had digital scales on him, Your Honor.

13 THE COURT: Do you believe that as he stated the
14 facts that the solicitor is substantially correct?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Sir, do you understand that these
17 pleas are being presented to me as a negotiated plea,
18 therefore, if I accept the pleas I'll be bound by the
19 negotiation and will have to impose that 15-year
20 sentence that was announced by the solicitor?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: And that's what you want me to do?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: And, sir, do you understand that both
25 of these charges are classified as serious offenses

1 under the law?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: And you've been able to talk to your
4 lawyer as to the consequences and ramifications of these
5 offenses being classified as serious?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: And you still wish to enter these
8 pleas?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Sir, are you, in fact, guilty of both
11 of these charges of possession with intent to distribute
12 methamphetamines third offenses?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Have all your answers to my questions
15 been truthful?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Has discovery been shared with the
18 defense?

19 MR. BAIN: Yes, sir, Your Honor.

20 THE COURT: Prior record?

21 MR. BAIN: 1996 assault and battery, possession
22 of cocaine first offense and possession of -- simple
23 possession of marijuana. 2000, obsession of tools being
24 used in a crime, driving under suspension and simple
25 possession of marijuana. 2001, trafficking in ice crank

1 or crack. It looks like there are possibly two counts
2 of that, Your Honor. 2002, manufacturing and
3 distributing ice, crank, crack or cocaine and simple
4 possession of marijuana. 2011, assault and battery
5 third degree. And 2012 manufacturing a Schedule V drug
6 with intent to distribute and violation of probation.
7 2013, driving under suspension and giving false
8 information. And I believe that's it, Your Honor.

9 THE COURT: Anything else from the State?

10 THE SOLICITOR: Nothing further, Your Honor.

11 THE COURT: Yes, sir.

12 MR. THOMPSON: Judge, I'm going to be very brief,
13 unless I need to be more than brief, but we did in
14 negotiations. Mr. Hames has mostly been a drug user
15 most of his life. He got involved early on as a young
16 man. He got caught up in the state grand jury sweep
17 back in, I believe it was 2000 or around 2000. And
18 unfortunately his drug record has increased since that
19 time. And unfortunately the amount of drugs he's dealt
20 with has increased since that time.

21 In this trafficking case that we were going to
22 trial on today, prepared to, from the very beginning Mr.
23 Hames admitted to the distribution. He admitted too
24 after distribution when he was arrested he had drugs on
25 him. The issue was going to be whether or not he had

1 enough weight on him at the time of the distribution to
2 amount to trafficking. It was 6.88, is what he actually
3 sold.

4 Unfortunately the video when we looked at it, it
5 showed -- and the undercover said he still had other
6 drugs on him when he went to sell to her. We were going
7 to contest that, but unfortunately the video clearly
8 shows additional drugs in his hand, in the care, and
9 when he gets out of the car. We don't have a weight on
10 that, but it is a fairly decent size baggie.

11 And at this point I told him with this video we
12 really had no chance of really having a legitimate
13 argument anymore with his case. So he's chosen to
14 accept the offer and we would ask you to go along with
15 the negotiated 15 on both concurrent.

16 THE COURT: Mr. Hames, do you agree with the
17 statements that were just made by your lawyer?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Sir, is there anything else that you
20 would like to say or want me to know or consider?

21 THE DEFENDANT: No, sir, except I'd like to
22 apologize to my family for keep putting them through
23 this.

24 THE COURT: Thank you, sir.

25 MR. THOMPSON: And I think I told you 318 days.

1 We would ask for that, Judge.

2 THE COURT: I find that there is a substantial
3 factual basis for the plea and the defendant's decision
4 to enter the plea was made freely, voluntarily,
5 willingly and intellectually. On these cases, on each
6 case these are concurrent sentences or a like sentence
7 under each. It'll be a 15-year sentence at the
8 Department of Corrections. He'll receive credit for 318
9 days. Good luck to you, sir.

10 THE DEFENDANT: Thank you.

11 MR. BAIN: Thank you, Your Honor.

12 THE COURT: May I see the lawyers at the bench?

13 MR. BAIN: Yes, sir.

14 (Whereupon, an off-the-record bench conference
15 was held.)

16 (Whereupon, hearing concluded at 10:40 a.m.)

17 --- THIS ENDS REQUESTED TRANSCRIPT ---
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COURT REPORTER CERTIFICATE

I, the undersigned Julie A. Ashbrook, Court Reporter for the Seventh Judicial Circuit Court of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings and evidence introduced in the hearing and/or trial of the captioned case, relative to appeal, in the Court of General Sessions for Cherokee County, South Carolina, on the 22nd day of March, 2016.

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

s/Julie A. Ashbrook.
Julie A. Ashbrook
Circuit Court Reporter
Seventh Judicial Circuit

FORM 5

STATE OF SOUTH CAROLINA)
)
 County of Cherokee)
)
Mitchell James 282238)
 Full name and prison number (if any) of Applicant)
)
 v.)
)
 State of South Carolina)
)
)
)
)
)

IN THE COURT OF COMMON PLEAS

17 CP-110383

APPLICATION FOR
POST-CONVICTION RELIEF

FILED IN THE OFFICE
 CLERK OF COURT
 2017 MAY - 8 A 11:21
 CHEROKEE COUNTY VA

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 Broad River Correctional

2. Name and location of Court which imposed sentence Cherokee Court of General Sessions

3. Name(s) of co-defendant(s) (if any) N/A

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2016-GS-11-00076 - 44-53-0375(C)(1)(1)
 - (b) 2015-GS-11-00712 - 44-53-0375(B)

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) 3/22/2016 - 1.5 years

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty

(b) after a plea of not guilty _____

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

NO

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. N/A

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. N/A

ii. _____

iii. _____

(c) the date of each such result:

i. N/A

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. N/A

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) Counsel did not advise applicant that he could appeal conviction and sentence.

(b) applicant did not waive waive his Right To appeal.

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Newly Discovered evidence
- (b) Newly Discovered evidence
- (c) The conviction and sentence is otherwise subject to collateral attack upon any
strand of alleged error heretofore available under any common law.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) February, 2017, Respondent illegally enhanced 44-53-0375(B)
- (b) That evidence of material facts not previously presented and heard.
- (c) Newly obtained evidence will show that plea was giving under entrapment and duress.
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. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

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

(d) the date of each such disposition:

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

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

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

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

No.

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

(a) which grounds have been presented:

- i. ~~No~~ N/A
- ii. _____
- iii. _____

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

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

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

- (a) Trial Counsel Failed To Conduct a proper pretrial investigation.
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? yes.
- (b) your trial, if any? _____
- (c) your sentencing? yes.
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
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. _____
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. _____
 - ii. _____
 - iii. _____

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

New plea hearing, or Trial.

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

No.

STATE OF SOUTH CAROLINA)
County of Cherokee)

VERIFICATION

I, Mitchell Hames, 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.

Mitchell Hames

SWORN to and subscribed before me this 4 day of May, 2017.

[Signature] (L.S.)
Notary Public

My Commission Expires: 9/16/2026

FILED IN THE OFFICE
CLERK OF COURT
2017 MAY -8 A 11:24
CHEROKEE COUNTY, SC

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

I, Mitchell Hames, 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.

Mitchell Hames
Applicant

SWORN or affirmed to and subscribed before me this
4 day of May, 2017.

[Signature]
Notary Public

My Commission Expires: 9/16/2022

FILED IN THE OFFICE
CLERK OF THE COURT
2017 MAY -8 A 11: 24
CHEROKEE COUNTY, GA

STATE OF SOUTH CAROLINA)
 COUNTY OF CHEROKEE)
)
 Mitchell Hames, #282283,)
 Applicant,)
))
 v.)
))
 State of South Carolina,)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 IN THE SEVENTH JUDICIAL CIRCUIT

2017-CP-11-0383

**RETURN AND PARTIAL MOTION
 TO DISMISS**

Respondent, making its Return to the application for post-conviction relief (PCR) filed by Mitchell Hames (“Applicant”) on May 8, 2017, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. In August 2015, the Cherokee County Grand Jury indicted Applicant for possession with intent to distribute (PWID) methamphetamine (2015-GS-11-0712). Applicant was also indicted in January 2016 for trafficking in methamphetamine (2016-GS-11-0076). Don Thompson, Esquire, represented Applicant. Solicitor Christopher Bain, Esquire, prosecuted the case. On March 22, 2016, Applicant pled as indicted to PWID methamphetamine, third offense and to the lesser included offense of PWID, third offense for the trafficking charge before the Honorable J. Mark Hayes, II. Pursuant to a negotiated sentence, Judge Hayes sentenced Applicant to imprisonment for concurrent terms of fifteen years for each charge. Applicant did not appeal his convictions or sentences.

II.

In his current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Newly Discovered Evidence"
 - a. "February 2017, Respondent illegally enhanced 44-53-375(B)"
 - b. "That evidence of material facts not previously presented and heard."
 - c. "Newly obtained evidence will show that the plea was given under entrapment and duress."
 - d. Misadvised on parole eligibility- attorney told him it was 65% at the time of the plea and the Department Corrections later informed him it was an 85% offense.

Attached to this Return and incorporated by reference are the records of the Cherokee County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, plea transcript and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Applicant claims ineffective assistance of counsel for misadvising him regarding parole eligibility. Respondent contends Applicant's counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. 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's assertion that he is being held in custody unlawfully as a result of newly discovered evidence is without merit. The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if "there exists evidence of material facts, not

previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice[.]” S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of the actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C).

In South Carolina, a guilty plea is regarded as a waiver of non-jurisdictional defects and claims of violations of constitutional rights. State v. Rice, 401 S.C. 330, 331–32, 737 S.E.2d 485, 485–86 (2013) (citing Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Therefore, an applicant requesting a new trial based on after-discovered evidence following a guilty plea must show that;

“(1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the “interest of justice” requires the applicant's guilty plea to be vacated. In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.”

Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014).

In support of his claims Applicant references a letter he wrote to a staff member at the Department of Corrections in which he claimed that he was misadvised by his attorney regarding his parole eligibility. However, Applicant fails to establish what he actually discovered in his review that would constitute “newly discovered evidence.” In fact, the new information learned from SCDC regarding his parole eligibility is not “evidence” at all. Therefore, Applicant has failed to establish the elements required to show that he is entitled to a new trial based on newly

discovered evidence. Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make a *prima facie* showing that is in possession of newly discovered evidence. Therefore, this allegation should be summarily dismissed.

V.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a), SCRPC. All claims should be made well in advance of the evidentiary hearing. If Applicant has is represented by an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits, witnesses, and materials used to produce potential expert witness testimony be provided to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

VI.

Respondent therefore requests that this Court convene an evidentiary hearing on Applicant's allegation that he was misadvised regarding parole eligibility. As to all other allegations, Respondent moves for summary dismissal pursuant to § 17-27-70 of the South Carolina Code of Laws on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VII.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VIII.

WHEREFORE, Respondent requests an evidentiary hearing be held solely on the claim of ineffective assistance of counsel, specifically Applicant's claim he was misadvised about parole.

[Signature block on following page]

Respectfully submitted,

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Attorney General

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Assistant Attorney General

By: 
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November 22, 2017

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHEROKEE)	
)	
)	2017-CP-11-0383
)	
MITCHELL LEON HAMES, #282238,)	
)	
Applicant,)	
)	
vs)	AFFIDAVIT OF SERVICE BY MAIL
)	
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	

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

Rodney Wade Richey, Esquire
Richey & Richey, PA
Post Office Box 10916
Greenville, South Carolina 29603-0916

DATED this the 22nd day of November, 2017.


 Lindsey McCoy, Legal Assistant
 For Respondent

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

COURT OF COMMON PLEAS NONJURY

MITCHELL LEON HAMES,
APPLICANT,
vs.
STATE OF SOUTH CAROLINA,
RESPONDENT.

TRANSCRIPT
OF
RECORD
2017-CP-11-0383

January 29th, 2018
Spartanburg, South Carolina

B E F O R E :

THE HONORABLE GRACE GILCHRIST KNIE, Judge.

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

RODNEY W. RICHEY
ESQ.
Attorney for the Applicant

VALERIE GIOVANOLI
ASSISTANT ATTORNEY GENERAL
Attorney for the State

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

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EXHIBITS

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P R O C E E D I N G S

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MS. GIOVANOLI: Okay. May it please the Court?

THE COURT: Yes, ma'am.

MS. GIOVANOLI: Thank you.

This is Mitchell Hames versus The State of South Carolina. Docket Number 2017-CP-11-0383.

We're before the Court on an Application for Post-Conviction Relief filed May 8th, 2017. In August, 2015, Applicant was indicted for possession with intent to distribute methamphetamine. Applicant was also indicted in January, 2016 for trafficking in methamphetamine. Don Thompson represented the Applicant, and, on March 22nd, 2016, Applicant pled, as indicted, to possession with intent to distribute methamphetamine third offense, and to the lesser included offense of possession with intent to distribute third offense in -- for the trafficking charge. That was before the Honorable J. Mark Hayes, II.

Pursuant to a negotiated sentence, Judge Hayes sentenced him to concurrent terms of 15 years for each charge. He did not appeal his conviction or sentence. He, thereafter, filed an Application for Post-Conviction Relief alleging basically newly discovered evidence by way of a letter he received from SCDC in February, 2017, and he claims that he was illegally enhanced meaning, I think,

1 under Statute 44-53-375(b) that he's required to serve 85
2 percent of his sentence, and he also alleges newly
3 discovered evidence that he, he believes his plea was given
4 under entrapment and duress. He also alleges ineffective
5 assistance of counsel that counsel misadvised him regarding
6 parole eligibility.

7 The State is present, ready to proceed. Applicant is
8 also present and ready to proceed. He's represented by Mr.
9 Richey to whom I will hand it over.

10 THE COURT: Okay. Yes, sir.

11 MR. RICHEY: Thank you, Your Honor.

12 THE COURT: Mr. Richey.

13 MR. RICHEY: May it please the Court?

14 THE COURT: Yes, sir.

15 MR. RICHEY: Your Honor, we also talked to opposing
16 counsel regarding the discovery. I have shown these letters
17 that we're going to present. There's no objection to it,
18 but, essentially, it deals with the timing of them receiving
19 the discovery in the case prior to the plea. And so I've
20 shown these to counsel, and---

21 MS. GIOVANOLI: I, I have my own copy.

22 THE COURT: Okay. Do you want to pre-mark -- do you
23 want to go ahead and mark those---

24 MR. RICHEY: Yes, ma'am.

25 THE COURT: ---Mr. Richey?

1 MR. RICHEY: We can mark them as one, all of them
2 together as a --.

3 THE COURT: Okay.

4 MS. GIOVANOLI: And just for the record, so that we're
5 clear, I understand that these are part of his discovery
6 that he was provided by counsel. Not necessarily
7 after-discovered evidence, but --.

8 MR. RICHEY: Yes.

9 MS. GIOVANOLI: -- part of the original discovery.

10 MR. RICHEY: And, of course, we're ready to move
11 forward with -- I'm sorry.

12 (WHEREUPON, the letters were marked as Applicant's
13 Exhibit No. 1 and received into evidence at this time.)

14 MR. RICHEY: At this time we call Mr. Hames.

15 THE COURT: Yes, sir.

16 MITCHELL HAMES, being first duly
17 sworn, testified as follows:

18 THE COURT: Okay. Thank you, sir. You may be seated.
19 Make yourself comfortable and try to adjust that microphone.
20 Okay?

21 THE WITNESS: Yes, ma'am.

22 THE COURT: All right. Mr. Richey.

23 MR. RICHEY: Thank you, Your Honor.

24 DIRECT EXAMINATION

25 BY MR. RICHEY:

Mitchell Hames - Direct examination
by Mr. Richey

- 1 Q Sir, would you state your name please?
- 2 A Mitchell Hames.
- 3 Q And, Mr. Hames, are you currently incarcerated in the
4 Department of Corrections?
- 5 A Yes, sir.
- 6 Q And what are you incarcerated for?
- 7 A PWID meth third. Two counts.
- 8 Q And what type of sentence did you receive?
- 9 A Fifteen years. To my understanding, it's gonna be 65
10 with a parole date, and it was---
- 11 Q well, I'm gonna get into all that.
- 12 A Okay.
- 13 Q It -- so, you got a 15 year sentence?
- 14 A Yes, sir.
- 15 Q Okay. Who represented you on that?
- 16 A Don Thompson.
- 17 Q Okay. And did you -- was he appointed or retained to
18 represent you?
- 19 A Appointed.
- 20 Q Okay. And those 15 years, in your discussions with
21 him, did he talk to you about the parole eligibility of
22 those sentences?
- 23 A The, the morning of the trial.
- 24 Q And what was those conversations?
- 25 A All right. You want me to tell you about --?

Mitchell Hames - Direct examination
by Mr. Richey

1 Q Okay. Let me ask you -- let me rephrase it.

2 Did he talk to you about how much time you would have
3 to serve?

4 A Yes.

5 Q Okay.

6 A The, the morning of the trial, that the trial was to
7 begin was on March 22nd. We watched a video for about
8 five minutes, and then he told me that he had got me a deal.
9 He explained to me that the people had just -- the new law
10 had just went in effect the day before, and that I would be
11 serving 65 percent of my time, I'd have a parole date, and I
12 would be given credit for the time I had on house arrest and
13 jail.

14 Q Okay. So, he told you it was 65 percent?

15 A Yes, sir.

16 Q Okay. And when you went to the Department of
17 Corrections, was it 65 percent?

18 A Yes, sir.

19 Q And then what happened?

20 A I was 65 percent under good time work credits. My
21 parole date was March of 2018. My release date was
22 January -- February of 2022 for a whole period of one year.

23 February 8th, 2017, I was called to classification
24 and was -- to a due process hearing thing, and was advised
25 that, due to a clause in the law or something of that

Mitchell Hames - Direct examination
by Mr. Richey

1 matter, that I would no longer be serving 65 percent, that
2 my sentence would be 85 percent. My custody level went from
3 M01D to MI3. I was sent to Broad River. My max out date
4 changed by six years.

5 Q Okay. Had you known you'd be doing 85 percent, would
6 you have pled to that?

7 A No, sir.

8 Q Okay. If counsel had told you there's a possibility
9 you'd be serving 85 percent, would you have pled to it?

10 A No, sir.

11 Q So, your plea was based on this parole eligibility?

12 A Yes, sir.

13 Q After you got to the Department -- well, let me ask you
14 this.

15 During the case, you -- there were (sic) discovery in
16 your case, correct?

17 A Yes, sir.

18 Q There was information provided by law enforcement to
19 your lawyer?

20 A Yes, sir.

21 Q Did you -- I'm gonna give you what's been marked
22 Applicant's No. 1.

23 Can I approach the witness, Your Honor?

24 THE COURT: Yes, sir.

25 MR. RICHEY: Thank you.

Mitchell Hames - Direct examination
by Mr. Richey

1 I'm gonna give you -- you take these and you set them
2 down.

3 Okay. I'm gonna give you what's Applicant's No. 1.
4 These are a series of letters that you received from
5 your counsel.

6 Is that correct?

7 A Yes, sir.

8 Q And the discovery, when did you -- okay. When did you
9 first see the discovery?

10 A On March 17th, 2016.

11 Q And is that reflected on the letter from your counsel
12 that's marked -- that he gave you as -- that I have received
13 above from my attorney on March 17th?

14 Is that---

15 A Yes.

16 Q Is that---

17 A Yes, sir.

18 Q ---the first day you saw discovery?

19 A Yes, sir.

20 Q Did, did Mr. Thompson discuss that discovery with you
21 that day?

22 A He told me to go back and read over it, and he'd be
23 back to talk to me on the 19th.

24 Q Okay. And so, on the 19th, he came -- did he come back
25 and talk with you?

Mitchell Hames - Direct examination
by Mr. Richey

1 A He came and asked me was I -- did I want to plead and
2 he told me that -- first of all, he came on the 16th.
3 Before, before I even got my discovery, he came and offered
4 me 15 years for second offense trafficking. I told him I
5 would not take the 15 years. I hadn't even seen my
6 discovery yet. That's when he came back the next day and
7 brought me my discovery.

8 Q Okay. And so -- and so you got discovery on the
9 17th. He came back the, the 19th.

10 A Yes, sir.

11 Q Okay. The 19th, do you remember what date that was
12 on?

13 Was that on a---

14 A It was on a Saturday.

15 Q On a Saturday.

16 so, he came back and did he discuss the discovery with
17 you?

18 A We talked maybe ten minutes.

19 Q Ten minutes.

20 Okay. There were video -- CDs on here to showing
21 (sic), correct?

22 A Yes, sir.

23 Q Did y'all review the CDs?

24 A No, sir.

25 Q How many of them were there?

Mitchell Hames - Direct examination
by Mr. Richey

1 A They're seven CDs.

2 Q And is that reflected on this December 22nd, 2017,
3 letter?

4 A Yes, sir, two years later.

5 Q Okay. So, there were seven DVDs and, on the 19th,
6 y'all didn't review any of them?

7 A We didn't review none---

8 Q Did---

9 A ---whatsoever, no.

10 Q Did you, did you have the ability to review them at the
11 jail?

12 A I had no knowledge of them.

13 Q Okay. Okay. On the 22nd, you plead -- you go to
14 Court?

15 A Yes, sir.

16 Q Correct?

17 And you plead?

18 A Yes, sir.

19 Q Okay. Prior to that guilty plea that you would of --
20 you seen the CDs?

21 A I seen, I seen one CD for approximately five minutes.

22 Q Okay. One of the seven?

23 A Yes, sir.

24 Q And, and was that one -- did it show you dealing any
25 drugs, the part you watched?

Mitchell Hames - Direct examination
by Mr. Richey

1 A Well, when I first watched it, I really didn't watch
2 it, right?

3 When I got the CDs on -- in December of 2017, I was
4 able, able to watch them at Broad River Correctional.

5 Q Right.

6 A And where he advised me that I had sold drugs on that
7 camera, it's specifically a cell phone.

8 Q Okay.

9 A You can see it's a purple and black cell phone that I'm
10 handing her.

11 Q Okay.

12 A Okay. She never hands me no money like he says she
13 did. The money she seen me counting, it comes after I reach
14 in my pocket and get it and count it. So, the hand to hand
15 transaction was a cell phone.

16 Q Okay. So, so, is it your position that you didn't have
17 an opportunity to adequately review these, these CDs in this
18 discovery?

19 A No, sir, I did not.

20 Q Okay. So, you pled guilty still.

21 Is that correct?

22 A Yes, sir.

23 Q Okay. And once you got to SCDC and had an opportunity
24 to review the entire case file, do you believe it was in
25 your best interest to plead guilty?

Mitchell Hames - Direct examination
by Mr. Richey

1 A No, sir.

2 Q And do you believe the timeframe which you got the
3 discovery was adequate time for you to understand your case?

4 A No, sir, it was only five days.

5 Q Okay. Now, do you believe that Mr. Thompson did not
6 effectively represent you?

7 A I don't believe he did, no.

8 Q Okay. And had you had an opportunity to review this
9 information, would you have pled guilty?

10 A No, sir.

11 Q And it's your position that you should be entitled to a
12 new trial today?

13 A Yes, sir.

14 Q Okay. Thank you. Answer any questions the Attorney
15 General have (sic) for you.

16 MS. GIOVANOLI: Yes.

17 THE COURT: Yes, ma'am.

18 MS. GIOVANOLI: Thank you, Your Honor.

19 CROSS-EXAMINATION

20 BY MS. GIOVANOLI:

21 Q You're aware that you face 25 years to 30 years for the
22 trafficking offense, right?

23 A Yes, sir. Yes, ma'am.

24 Q And you also had another charge of possession with
25 intent to distribute methamphetamine.

Mitchell Hames - Cross-examination
by Ms. Giovanoli

1 Is that correct?

2 A Yes, ma'am.

3 Q Okay. And, on the day of trial, you were only looking
4 to go to trial on the possession with intent to distribute.

5 Is that correct?

6 A No, ma'am, I was going to trial on the trafficking.

7 Q Okay. The trafficking, but not the possession with
8 intent to distribute?

9 A Me and him never discussed the PWID charge.

10 Q Okay. But you accepted a plea offer to both charges,
11 to resolve them both with concurrent sentencing?

12 A Well, he told me they was just gonna throw that in. It
13 wouldn't change nothing. So --.

14 Q Okay. And you also testified that the first time you
15 saw the discovery was March 17th, 2017.

16 Is that correct?

17 A No, ma'am, March, March 17th, 2015.

18 Q I'm sorry, and I said 2017. You're right.

19 It's actually 2016 pursuant to these letters?

20 A Yes, 2016. My bad.

21 Q Okay. But you actually met with counsel before then
22 and to discuss the case.

23 Isn't that correct?

24 A Discuss the case?

25 Q Yes.

Mitchell Hames - Cross-examination
by Ms. Giovanoli

1 A No, we never discussed the case. We went, we went to
2 bond hearings. We had three different bond hearings, but,
3 discussing the case, no, we never did get -- he never got
4 the discovery until March the 16th is what he told me, and
5 then he gave to it to me the next day.

6 Q Okay. So, your testimony is that you guys never met
7 before and discussed the case?

8 A We never discussed the case. We went to bond hearings.

9 Q Okay. So, your only other time that you saw your
10 lawyer was at bond hearings?

11 A Or except the day he come over there and signed me up.

12 Q Okay. So, so, now, you met with him on a day to sign
13 you up I guess to be represented by a public defender?

14 A Yes.

15 Q And at bond hearings?

16 A Yes, ma'am.

17 Q Okay. Okay. I have no further questions. Thank you.

18 THE COURT: Redirect?

19 MR. RICHEY: No other questions.

20 THE COURT: Okay. Sir, thank you. You can step down.

21 Just watch your step.

22 Okay?

23 THE WITNESS: All right.

24 MR. RICHEY: We call Mr. Thompson.

25 THE COURT: Good morning, Mr. Thompson.

Don Thompson - Direct examination
by Mr. Richey

1 THE WITNESS: Good morning.

2 DON THOMPSON, being first duly
3 sworn, testified as follows:

4 THE COURT: Thank you, sir. Please be seated. Make
5 yourself comfortable.

6 (Witness complies.)

7 THE COURT: Thank you.

8 DIRECT EXAMINATION

9 BY MR. RICHEY:

10 Q Sir, would you state your name please?

11 A It's Don Anthony Thompson.

12 Q And, Mr. Thompson, where were you employed on March the
13 22nd, 2016?

14 A Cherokee County Public Defender's Office.

15 Q And did you have occasion to represent the Applicant?

16 A I did.

17 Q And do you recall that representation?

18 A I do.

19 Q Okay. And, and you were in the courtroom when he gave
20 his testimony. So, I'm gonna go through the -- kind of
21 hopefully in order.

22 He pled guilty to these cases, correct?

23 A That's correct.

24 Q And, at the time of his guilty plea, do you recall
25 discussing parole eligibility with him?

Don Thompson - Direct examination
by Mr. Richey

1 A I do not and I've gone through my file, and I don't see
2 where we've ever discussed parole eligibility.

3 Q Okay. You had -- you, at no point, told him it was 65
4 percent and all that stuff?

5 A I can't imagine I did. I know it's not 65 percent, and
6 I knew then it wasn't 65 percent, and there's no indications
7 in my file we even discussed parole eligibility.

8 Q So, at the time of the plea, it was 85 percent?

9 A That's correct.

10 Q Okay.

11 A Any A, B, or C Felony or felony that carries more than
12 15 years is a no parole offense, 85 percent.

13 Q And you are -- are you confident he understood that?
14 I mean is that part of the process that you do?

15 A I don't see where we discussed that at all.

16 Q Okay. All right. I'm gonna give you these exhibits.
17 Can I approach the witness, Your Honor?

18 THE COURT: Yes, sir.

19 MR. RICHEY: Thank you, ma'am.
20 And I'm gonna go through these letters with you.
21 These are letters produced by your office.
22 Is that correct?

23 A Well, the letters are -- this top sheet is discovery
24 that was provided by the State, part of the discovery..

25 Q Okay. But those letters are, are transmitted through

Don Thompson - Direct examination
by Mr. Richey

1 your office?

2 A Yes.

3 Q Correct?

4 And I'm just gonna go through these letters.

5 Now, you heard the Applicant's testimony that he first
6 received the discovery on March the 17th.

7 A Of 2016, that's correct.

8 Q Yes, sir.

9 Do you dispute that he physically got it then?

10 A No, that's when I gave it to him.

11 Q Okay. Prior to that date, was there any discussion
12 with him about this discovery?

13 A Yes, the -- I was appointed at two different times to
14 represent him. Once on the PWID charge, and once on the
15 trafficking charge.

16 Q Okay.

17 A I was appointed in -- let's see. On the trafficking
18 charge, I was appointed in June of 2015, and on the PWID I
19 was appointed in November of 2015. I met with him, got his
20 story as to what happened, and I was actually provided
21 discovery -- I think it was actually March the 14th is when
22 I provided the discovery by the State.

23 Q Okay. So, so, he was going to trial on the 22nd.

24 Was that -- was this case called for trial on that
25 date?

Don Thompson - Direct examination
by Mr. Richey

1 Do you know or was it just a plea?

2 A Well, if, if the 19th, as he testified, was a
3 Saturday, I guess that Tuesday morning would of been the
4 19th, and, yeah, he was -- the trafficking case was being
5 called for trial.

6 Q Okay. And, and there was some DVDs that were supplied
7 to you along with this discovery.

8 Is that correct?

9 A No. Well---

10 Q CDs. CDs.

11 A Well, there were some CDs that -- some of the CDs just
12 simply contained the discovery. I had to print it off---

13 Q Yes, sir.

14 A ---which is what he got.

15 Q Yes, sir.

16 A And then there was video of the trafficking incident.

17 Q Okay.

18 A The State has a policy, which I don't agree with, but I
19 can't control the State, of they will not turn over a video
20 of an undercover buy until two or three days before trial at
21 the earliest.

22 Q Okay.

23 A Because they don't want to disclose who the undercover
24 is. So, I, I think he's probably right in that he didn't
25 see the video on the trafficking until probably the morning

Don Thompson - Direct examination
by Mr. Richey

1 of trial.

2 Q Okay. And did -- and do you believe that, if you had
3 of went forward with trial, would you have made any motion
4 for continuance on anything at that point?

5 A No.

6 Q Okay. So, the other DVDs were simply discovery
7 materials that were burned off by you, correct?

8 A Yes, sir.

9 Q And you sent this stuff to him in December down at
10 SCDC.

11 A He requested his file.

12 Q Is that correct?

13 A He sent me a letter late last year requesting his---

14 Q So---

15 A ---file, and I sent everything. I sent the written
16 material I had to him. I sent the DVDs to the warden
17 because I can't send those directly to him.

18 MR. RICHEY: One moment, Your Honor, please.

19 THE COURT: Yes, sir.

20 (Pause.)

21 MR. RICHEY: No more questions, Your Honor.

22 THE COURT: Okay. Yes, ma'am.

23 MS. GIOVANOLI: Thank you, Your Honor.

24 CROSS-EXAMINATION

25 BY MS. GIOVANOLI:

Don Thompson - Cross-examination
by Ms. Giovanoli

1 Q Mr. Thompson, how long have you been practicing?

2 For how long?

3 A Since November of 19 -- well, criminal law?

4 Q Yes.

5 A I was admitted to the Bar in November of 1980. I had a
6 general practice for, I guess, till 1990. I've been
7 exclusively practicing criminal law since 1990.

8 Q 1990.

9 And what is your current position?

10 A I'm the chief public defender in Cherokee County.

11 Q Okay. And were you in that same position at the time
12 you represented Applicant?

13 A Yes, I was.

14 Q Okay. So, regarding the parole eligibility, you don't
15 recall any discussions about parole eligibility, correct?

16 A I don't and I don't have any notes -- usually, when I
17 discuss that, I put notes in the file, and I don't have any
18 notes in the file whatsoever about that.

19 Q Okay. So, is it your general practice to discuss
20 parole eligibility?

21 A I generally do not discuss parole eligibility because,
22 if I do, and I'm wrong, I've created a problem. Usually
23 it's only once if I'm, if I'm asked.

24 Q Okay. And, in this case, these were Applicant's third
25 or subsequent drug charges, correct?

Don Thompson - Cross-examination
by Ms. Giovanoli

1 A They were.

2 Q Okay. And he was looking at 25 to 30 on a trafficking
3 charge, and do you know how much on the possession with
4 intent to distribute?

5 A Ten to thirty.

6 Q Ten to thirty.

7 okay. And you discussed those sentence, those
8 sentencing ranges with Applicant?

9 A I did.

10 Q Okay. You stated earlier, on direct testimony, that
11 you met with the Defendant, and you got his side of the
12 story.

13 First of all, do you remember about how many times you
14 met with him and when those meetings started taking place?

15 A I met with him several times. The first meeting -- I
16 honestly think he made bond on that -- he was arrested on
17 the trafficking first, and I believe he got out on that.
18 Then he was arrested on the PWID charge, and when I met with
19 him on that, we discussed it. I actually, on it, I had the
20 discovery earlier on, and we, we met about that, and he told
21 me what went on, and what he told me pretty much matched the
22 discovery.

23 Q Okay. Can I just clarify, the possession with intent
24 to distribute, you had the discovery on that, but he picked
25 up that charge while he was out on bond for the trafficking?

Don Thompson - Cross-examination
by Ms. Giovanoli

1 A Correct.

2 Q Is that -- okay. And you had the discovery on that,
3 and, when you met with him, he, in fact, admitted to the
4 possession with intent to distribute to you, didn't he?

5 A That's correct.

6 Q And what about the trafficking charge?

7 What was his version of events there?

8 A What we talked about -- we didn't really get into
9 version of events. What we talked about, on the trafficking
10 charge, was the weight of the drugs.

11 Q Okay.

12 A Whether or not there was enough weight there to make it
13 trafficking.

14 Q And in -- what was your conclusion there?

15 A Well, what the State alleged happened was he made a
16 sale of -- to an undercover of six point something grams.
17 They went straight back an hour later and arrested him. He
18 had the marked money on him, and he also had additional
19 drugs in his pocket, another seven something grams. So,
20 what they were doing were adding the six and the seven
21 together to get over then, and they were saying he had it
22 all at the same time that he made the initial sale.

23 What he and I talked about was that he had this, and
24 then, when he got money, he got more.

25 Q Yeah. Correct.

Don Thompson - Cross-examination
by Ms. Giovanoli

1 A So, that's what we talked about. That it was not
2 enough for trafficking.

3 Q And did he ultimately plead to possession with intent
4 to distribute, a lesser offense---

5 A He did.

6 Q ---trafficking?

7 A He did.

8 Q Okay. So, was that a defense that you guys discussed
9 pursuing on the trafficking charge?

10 A Well, that was the only defense we had on the
11 trafficking charge. It was whether or not there was enough
12 drugs there.

13 Q Okay. But, ultimately, he did plead guilty to both of
14 them and it was a negotiated sentence?

15 A That's correct.

16 Q And you, in fact, negotiated that sentence?

17 A Well, to a certain degree, yes.

18 Q And what do you mean by that?

19 A Mr. Hames made an offer to the State. The State
20 rejected it and made an offer back to him. He rejected it.
21 The morning we was getting ready to go to trial, and he
22 viewed the video, he told me he wanted the offer back that
23 the State made. The State has a policy, not only a policy
24 of not turning over video till a couple days before trial,
25 but a policy of, once they turn over a video, they refuse to

Don Thompson - Cross-examination
by Ms. Giovanoli

1 negotiate.

2 We wound up going back in chambers with Judge Hayes,
3 and Judge Hayes -- I mean Mr. Hayes -- Mr. Hames wanted the,
4 the 15 back, and the State refused to do it. We went back
5 in chambers with Judge Hayes. Judge Hayes basically
6 threatened to call solicitor Barnette over and hold people
7 in contempt if they didn't put the offer back on the table,
8 that he didn't feel it was fair that he couldn't see the
9 video while the offer was there.

10 Q Okay. So, he was, in fact, requesting that the offer
11 be reinstated?

12 A Yes.

13 Q And the State was there present and ready to proceed to
14 trial?

15 A Yes.

16 Q Okay. And it's regular practice for the State to
17 withhold confidential informant videos in order to protect
18 their identity.

19 Is that correct?

20 A I don't agree with it, but they do it, and the Courts
21 have upheld it.

22 Q But if he -- and it's a regular practice?

23 A It is.

24 Q Okay. So, with that evidence in the record already
25 that you provided discovery to Mr. Hames on -- in March of

Don Thompson - Cross-examination
by Ms. Giovanoli

1 2016, very shortly before his guilty plea, which is your
2 testimony today now that you also met with him previous to
3 that to discuss the discovery at least---

4 A Yes.

5 Q ---with regard to the possession with intent to
6 distribute methamphetamine case?

7 A Yes. Actually, on the possession to distribute meth
8 case, I met with him on that, November 27th, 2015.

9 Q And did you review the discovery at that point with
10 him?

11 A Let me see. I'm sure I did because I had received that
12 discovery it looks like September 28th, 2015.

13 Q So, your meeting with him in November after you'd been
14 provided with discovery, could you think of any other things
15 you would of been discussing other than discovery?

16 A Well, he had another -- he had a failure to stop charge
17 and then we discussed that. We discussed his bond
18 situation. He had -- he was being picked up on a bench
19 warrant. He informed -- to get that lifted. He had -- and
20 I'm not trying to throw him under the bus, but he had tried
21 to work with the State as a, as a cooperating witness, and
22 I'm not sure whether that worked out or not. Apparently it
23 did not because the prosecutor took the position that he
24 wasn't involved in it. So, he wasn't going to work with
25 anything the police officers tried to work out.

Don Thompson - Cross-examination
by Ms. Giovanoli

1 Q All right. So, going back to the discovery on the PWID
2 I'm gonna call it, that was received September 28th, 2015,
3 and is it your testimony that, at some point, you reviewed
4 that with Applicant?

5 A Well, it was -- it's dated September -- I'm -- it's
6 dated September 28th, 2015---

7 Q Okay.

8 A ---from the State.

9 Q Okay.

10 A So, that's, that's the date I'm sure I received it.

11 Q And then you had a meeting with Applicant---

12 A And then I met with him November 27th, 2015.

13 Q And where was that?

14 A In the jail.

15 Q Okay. And do you have any notes that indicate any
16 other meetings after that?

17 A Yes, there's meetings after that, and there was some
18 meetings that I don't even have notes on, but I'd be in jail
19 to see somebody else, and he'd want to know what was going
20 on---

21 Q Okay.

22 A ---and, you know, that type of thing. Actually I met
23 with him even before I got that discovery. I met with him
24 June 3rd, 2015, and this is concerning the trafficking
25 case, and he told me what went on with that.

1 Q Did he ever denying (sic) selling these drugs?

2 A No.

3 Q Did he ever deny. Excuse me.

4 A No. In fact, he admitted to selling them. The issue
5 was how much.

6 Q Okay.

7 A The weight.

8 Q All right. And I have no further questions. Thank
9 you.

10 THE COURT: Okay. Mr. Richey, redirect?

11 MR. RICHEY: Just one question, Your Honor.

12 REDIRECT EXAMINATION

13 BY MR. RICHEY:

14 Q Sir, these -- on these documents, he's got both the
15 discovery for both cases on the 17th,

16 Is that correct?

17 A That's correct.

18 Q Okay. Thank you. No other questions for him.

19 THE COURT: Okay. Mr. Thompson, sir, thank you. You
20 may step down.

21 May Mr. Thompson be excused?

22 MS. GIOVANOLI: No objection from the State.

23 MR. RICHEY: No objection.

24 THE COURT: All right.

25 THE WITNESS: You don't want me to stay for my next

1 one?

2 MS. GIOVANOLI: Oh.

3 MR. RICHEY: You've got another one.

4 MS. GIOVANOLI: Well, you're excused on this one.

5 THE WITNESS: Oh, okay. You're still under subpoena.

6 THE COURT: Okay. Counsel, anything else?

7 MS. GIOVANOLI: Nothing.

8 MR. RICHEY: Well, can I take one moment?

9 (Pause.)

10 THE COURT: Mr. Richey, I don't want you to feel
11 rushed. It's time for us to take a ten minute break anyway,
12 and so I'm happy for you to do that.

13 MR. RICHEY: I'm not rushed, Your Honor. I can---

14 THE COURT: Okay.

15 MR. RICHEY: I can do what the Court wants. I can do
16 either one.

17 THE COURT: No, just go ahead.

18 MR. RICHEY: Thank you, Your Honor.

19 Your Honor, I, I just ask the Court to grant this PCR.
20 I think the, the evidence is, is that this gentleman did not
21 receive his discovery until the 17th. I think that's not
22 disputed. That's a merely (sic) five days before trial in
23 this case.

24 It was a substantial case where we're facing all this
25 time that's been outlined by the State. I -- counsel

1 expressed if that is some of this is the policy of the
2 State, but, at some point, something has to be done that a
3 gentleman -- the video that supposedly shows him guilty is
4 shown to him five minutes before he's scheduled to go to
5 trial. There's no way that he can be prepared for that
6 trial. There's no way he can contradict that video because
7 clients -- the Applicant testified, once he got to SCDC, had
8 a time to review the video, that it shows some things that
9 actually was exculpatory for him.

10 So, I just believe just getting this information four
11 days before this substantial trial is, is, is not fair to
12 the Applicant, and I would say that our position would be
13 counsel should of filed a motion for continuance, and cited
14 the fact that the discovery was given to him within four
15 days, and he didn't -- had not watched the video.

16 I believe that the State may have a policy of hey,
17 we -- I don't think the State should be able to get away,
18 and I use that phrase, with a policy of showing you evidence
19 the morning of the trial. There's no way you can be
20 prepared for it.

21 Thank you, Your Honor.

22 THE COURT: Thank you, Mr. Richey.

23 Yes, ma'am.

24 MS. GIOVANOLI: Thank you, Your Honor.

25 I believe that the testimony was that he did see the

1 video on March 19th, which was a couple of days before his
2 March 22nd trial. But after -- March 19th was when he
3 saw five minutes of the video, and, after that, the record
4 is -- that, that was the testimony, correct?

5 MR. RICHEY: I believe that was---

6 MS. GIOVANOLI: He said March 19th he watched five
7 minutes of the video.

8 THE COURT: No, ma'am, I think that, that the testimony
9 was that there wasn't a way for him to watch this at the
10 jail, and that he watched it in the Department of
11 Corrections subsequent to being sentenced.

12 MR. RICHEY: I think there was testimony---

13 MS. GIOVANOLI: He watched the---

14 MR. RICHEY: ---of Judge Hayes getting upset.

15 MS. GIOVANOLI: And that he watched it the morning
16 before the trial, the five minutes. There was definitely
17 testimony that he watched five minutes of it prior to
18 pleading guilty, that he didn't review the entire thing,
19 that he reviewed the entire thing in SCDC where he realized
20 that it was a cell phone. Allegedly he was handing a cell
21 phone. Interestingly, though, he does not offer that video
22 today into evidence for us to see for ourselves.

23 Counsel did review the video and he also reviewed all
24 of the discovery that he did have with the Applicant prior
25 to trial, and it was actually Applicant who wanted the plea

1 offer to be put back on the table the morning of trial.
2 He -- and he did not request for counsel to take a
3 continuance, and he did not insist on going to trial. He
4 decided to plead guilty because, honestly, a 15 year
5 negotiated sentence for this -- the offenses that he was
6 facing was plenty generous. In fact, the State was ready
7 and present. They were actually ready to proceed to trial
8 the day that trial was called.

9 Also, with regard to the parole eligibility, I think
10 that the testimony from counsel is credible that is it's his
11 general practice not to discuss parole eligibility unless
12 the questions are asked, and in -- he has no notes
13 indicating that he reviewed -- discussed parole eligibility,
14 and it is not ineffective not to discuss parole eligibility.
15 It's only ineffective if counsel does misadvise, actively
16 misadvised a client regarding parole eligibility.

17 But with regard to the discovery, often times it's a
18 regular practice by the state, and a lot of people don't
19 agree with it, to turn over videos a couple of days before,
20 a confidential informant case, in order to protect their
21 identity, and that was the case in this case. Applicant had
22 the option to pursue trial or take the offer, and he
23 actually insisted that the offer be reinstated. Therefore,
24 I believe that Applicant is utterly failed to prove his case
25 of ineffective assistance of counsel or involuntary guilty

1 plea, and I would ask that you deny his application.

2 THE COURT: Anything else, counsel?

3 MR. RICHEY: No, ma'am.

4 THE COURT: Okay. Thank you.

5 Okay. First, let me thank counsel for their efficient
6 presentation of their evidence today.

7 And, and, Mr. Hames, sir, what I want you to understand
8 is that I'm going -- I've got a copy of the transcript from
9 the plea. I do have a copy of the application. I have a
10 copy of a return, and the sentencing documents. I want to
11 review that very carefully, and I want to review the law
12 again before I issue my decision in your case.

13 And so I just want you to understand, sir, I take this
14 very seriously. I know it's very important to you.

15 THE APPLICANT: Thank you.

16 THE COURT: Okay. I wish you the best of luck, sir.

17 Thank you, Mr. Richey.

18 MR. RICHEY: Thank you, Your Honor.

19 THE COURT: Thank you, Ms. -- Mr. Thompson and Ms.
20 Giovanoli.

21 MS. GIOVANOLI: Thank you.

22

23

24 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 29th day of January, 2018.

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

May 2nd, 2018



PAMELA E. GREEN, Court Reporter

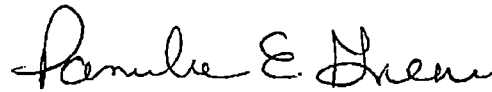
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May 2nd, 2018



PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Mitchell Hames, #282283,

2017-CP-11-0383

Applicant,

**ORDER OF DISMISSAL
WITH PREJUDICE**

v.

State of South Carolina,

Respondent.

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2018 MAR 30 AM 8:25
BRANDY HOFFE
CLOCKED IN ERROR

This matter comes before this Court by way of an application for Post-Conviction Relief (PCR) filed on May 8, 2017 by Mitchell Hames (Applicant). The State (Respondent) made its Return requesting an evidentiary hearing be convened. An evidentiary hearing into the matter was convened on January 29, 2018, at the Spartanburg County Courthouse. Rodney W. Richey, Esquire, represented Applicant. Valerie Garcia Giovanoli, Esquire, of the South Carolina Office of the Attorney General, represented Respondent.

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2018 APR -24 AM 4:11
BRANDY HOFFE

Applicant testified on his own behalf. Applicant's plea counsel, Don A. Thompson, Esquire, also testified. This Court had before it a copy of the records of the Cherokee County Clerk of Court regarding the subject convictions, Applicant's records from the Department of Corrections, the transcript from Applicant's guilty plea, the PCR application, and Respondent's Return. Following a review of the record and the testimony and evidence presented at the hearing, this Court finds Applicant has failed to meet his requisite burden of proof entitling him to relief and is denying and dismissing this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. In August 2015, the Cherokee County Grand Jury indicted Applicant for possession with intent to distribute (PWID)

methamphetamine (2015-GS-11-0712). Applicant was also indicted in January 2016 for trafficking in methamphetamine (2016-GS-11-0076). Don A. Thompson, Esquire, represented Applicant. Assistant Solicitor Christopher Bain, Esquire, prosecuted the case. On March 22, 2016, Applicant appeared in the Cherokee County Court of General Sessions before the Honorable J. Mark Hayes, II, where he pled as indicted to PWID methamphetamine, third offense and to the lesser included offense of PWID, third offense for the trafficking charge. Pursuant to negotiations between Applicant and the State, Judge Hayes sentenced Applicant to imprisonment for concurrent terms of fifteen years for each charge. Applicant did not appeal his convictions or sentences.

ALLEGATIONS RAISED IN PCR APPLICATION

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Newly Discovered Evidence"
 - a. "February 2017, Respondent illegally enhanced 44-53-375(B)"
 - b. "That evidence of material facts not previously presented and heard."
 - c. "Newly obtained evidence will show that the plea was given under entrapment and duress."
 - d. Misadvised on parole eligibility- attorney told him it was 65% at the time of the plea and the Department Corrections later informed him it was an 85% offense.

SUMMARY OF TESTIMONY PRESENTED AT HEARING

I. Applicant testified to the following:

Applicant testified Counsel talked to him the morning of trial about parole eligibility. His trial was set to begin March 22, 2016. Prior to trial, he only watched five minutes of the confidential informant (CI) buy video. Counsel told him he would serve sixty-five percent of any sentence and he would be given credit for any time on home detention or in jail. The South

Carolina Department of Corrections (SCDC) originally classified him as sixty-five percent, but later in February of 2017, SCDC advised him due to the law, he would be required to serve at least eighty-five percent of his sentence before being considered for supervised release. Applicant claims that had he known this, he would not have pled guilty.

Applicant admitted exhibit 1, which was a composite exhibit including a police incident report Applicant found in his discovery and three letters. The letters consisted of a letter dated March 16, 2016 written by Counsel to Applicant indicating he sent Applicant's discovery for his PWID methamphetamine case. Another letter is dated March 17, 2016 written by Counsel to Applicant indicating he sent Applicant's discovery for his trafficking and PWID methamphetamine case. The last letter is dated December of 2016 written by Counsel to the prison warden, and including the copies of the physical CDs in the discovery to be delivered to Applicant.

Based on these exhibits, Applicant testified he did not see his discovery until March 17, 2016. He testified Counsel gave him the discovery, told him to read it, and that Counsel would return to discuss it. Counsel also relayed the State's offer of fifteen years at that time, which Applicant rejected and told Counsel he wanted to see his discovery. Counsel returned March 17, 2016 and again March 19, 2016. Applicant testified there were seven CDs in his discovery, but he only reviewed five minutes of the CI buy video. Counsel told him the video showed a drug sell, but Applicant claims he watched it after his guilty plea and it only showed him giving the CI a cell phone. Applicant claims he pled guilty, without reviewing the entire video. Applicant also claims he did not have adequate time since he only got his discovery five days prior to trial.

II. Counsel testified to the following:

Counsel has been practicing law since 1980. He is currently, and was at the time he represented Applicant, the Chief Public Defender for Cherokee County. He testified he never had any discussions with Applicant regarding parole eligibility from what he recalled. Counsel testified his general he does not discuss parole issues unless asked by the client. In the cases he does talk about parole, he makes a note in his file. Counsel's file for Applicant has no notes regarding discussions about parole eligibility. Further, Counsel explained he is well versed in what crimes are categorized as eighty-five percent crimes and he would not have advised Applicant he would only have to serve sixty-five percent before being parole eligible.

Counsel was appointed on two separate criminal cases: one for PWID and the other for trafficking, both of which were third or subsequent drug offenses. After Counsel was appointed on the PWID charge, Counsel obtained a bond for Applicant. While Applicant was out on bond, he was arrested for trafficking. After he was appointed for the second charge, he met with Applicant and got his story – which was an admission to selling drugs. He had several meetings with Applicant. Counsel received the discovery for the PWID charge in September of 2015. During one meeting, he reviewed the discovery for the PWID. Counsel and Applicant also discussed the weight with regard to the trafficking charge. There were some plea negotiations back and forth that Applicant ultimately rejected. At the time of trial, Applicant wanted to accept the State's offer, but the State refused to reinstate the previous offer. Because of this, there was a conference in chambers in which Judge J. Mark Hayes, II, threatened contempt charges against the Solicitor if the offer was not put back on the table for Applicant to accept. Applicant had also tried to work with the State as a cooperating witness, but nothing ever came of it.

Although Applicant had two separate drug charges, only the trafficking charge was being called for trial. Counsel testified the usual practice in CI buy cases, the State turns over the videos shortly before trial to protect the CI's identity. While Counsel disagrees with this procedure, he concedes it is the regular practice and is lawful. Counsel testified he reviewed all of the discovery with Applicant prior to him pleading guilty.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency. A Post-Conviction Relief application is not a venue for questioning each and every action of counsel. Rather, the Applicant must demonstrate by a preponderance of the evidence that counsel was deficient. Applicant has failed to do so. Initially, this Court notes that there is overwhelming evidence establishing Applicant's guilt to the pled offenses. Moreover, this Court notes plea counsel's testimony was credible and persuasive.

Ineffective Assistance of Counsel

In his amended application filed by PCR counsel, Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so

undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

Misadvice regarding parole eligibility

This Court finds Applicant's testimony not credible that he was misadvised about parole eligibility. Applicant's testimony is self-serving. This Court finds Counsel's testimony on the issue was more credible. It is not Counsel's general practice to discuss parole eligibility. He testified this case was no different. In the instances Counsel does discuss parole eligibility, he annotates his file and there was no such annotation in Counsel's file for Applicant. Furthermore, as Chief Public Defender of Cherokee County, Counsel demonstrated he has a full understanding

of when an offense is categorized as an eighty-five percent offense. The record from the plea proceeding established the plea court questioned Applicant about whether he understood that both of these charges were classified as serious offenses under the law and also asked if Applicant had discussed with his lawyer the consequences and ramifications of these offenses being classified as serious, to which he answered affirmatively.

This Court finds Applicant has failed to meet his burden that Counsel was deficient in this regard. As such, this allegation is denied and dismissed with prejudice.

Involuntary guilty plea due to late discovery

Applicant alleges his guilty plea is invalid because he did not receive his discovery until shortly before the trial and thus was unduly pressured to plead guilty. The record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton, 376 S.C. 138, 654 S.E.2d at 874 (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Further, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton, 376 S.C. at 137-38, 654 S.E.2d at 874 (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Therefore, 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. (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

In PCR 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) (citations omitted). 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). 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. 52, 56 (1985). Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." McMann v. Richardson, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." Id. at 771.

Despite Applicant's self-serving testimony, the record fully supports the knowing and voluntary nature of Applicant's plea. Applicant has failed to give a sufficient reason to be allowed to depart from the truth of his statements made during his guilty plea. Counsel testified he reviewed with Applicant the discovery for both the PWID charge and trafficking charge for which he was facing trial. The record supports this testimony. Counsel told the plea court he had discussed with Applicant challenging the drug weight on the trafficking charge. Specifically, the evidence showed Applicant sold the CI 6.88 grams of meth, but the CI said Applicant had more drugs on him at the time of the sale. Counsel informed the plea court that

the CI buy video *clearly* showed Applicant had a "fairly decent size baggie" of drugs in his hands at the time of the sale. Counsel explained that the video destroyed their chances of success in arguing against the trafficking weight. (Plea Tr. p. 13, l. 21 – p. 14, l. 13). Even more compelling, Applicant was asked by the plea court, under oath, if he agreed with the statements made by his lawyer, to which he responded, "yes, sir." It's hard to believe Applicant was lying under oath to the plea court, after having insisted the State reinstate the expired plea offer, and is now telling the truth while serving his fifteen year sentence in prison.

The plea court fully apprised Applicant of his rights and the *negotiated* sentence he would face by pleading guilty. This Court further finds that Applicant was fully aware of his rights and those rights that he was waiving. Regardless of the exact dates at which discovery was provided and reviewed, the record also shows that Applicant and his Counsel reviewed discovery and discussed potential defenses. At that point, Applicant had the decision to plead guilty or proceed to trial. Not only did he choose to plead guilty, he insisted the State reinstate the fifteen year offer after he had previously rejected it. Because of this, Judge Hayes even threatened to hold the Solicitor in contempt if they did not reoffer the fifteen year sentence. This Court finds Applicant made the decision to plead guilty on his own accord, freely and voluntarily. Additionally, this Court finds the transcript of record includes a very thorough colloquy by the Court that indicates Applicant made this decision without any undue pressure or coercion. (Plea Tr. p. 8, ll. 6-14).

This Court finds credible Counsel's statements made during the plea hearing and Applicant's assent to those statements, while finding not credible Applicant's claim that the CI buy video did not show him selling any drugs. This Court notes Applicant did not present the actual video to support his contention. The record is clear that during the plea hearing, Counsel

indicated he was aware of a potential argument to present at trial regarding the trafficking weight, but that the CI buy video destroyed any chance of success in that argument. Applicant was also present at this plea hearing and did not rebut anything put forth to the plea court by Counsel.

This Court takes the time to recognize that many defendants are nervous and under pressure during a criminal court proceeding. However, there is no precedent for overturning a conviction or a guilty plea because a party to the action was nervous or under pressure. This Court is reluctant to second-guess a thorough trial court proceeding in favor of self-serving testimony by a PCR Applicant. Finally, this Court also finds Counsel provided effective assistance in this case. Therefore, the allegations of ineffective assistance and involuntary guilty plea are denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. This Court finds Applicant has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a

Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCF. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

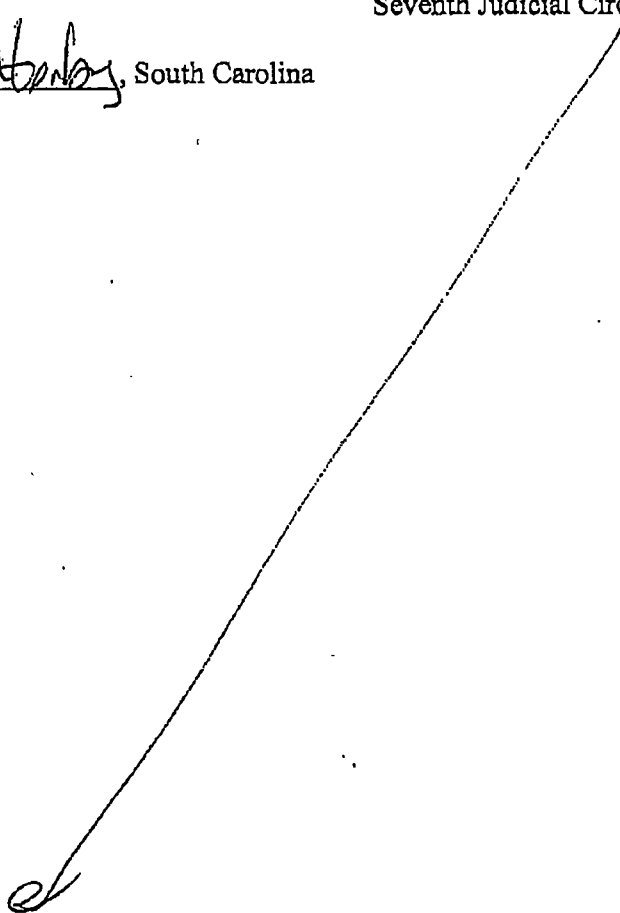
1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 27 day of March, 2018.



GRACE GILCHRIST KNE
Presiding Judge
Seventh Judicial Circuit

Spawley, South Carolina



THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

HONORABLE GRACE GILCHRIST KNIE

2017-CP-11-383

MITCHELL HAMES, SCDC# 282238

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

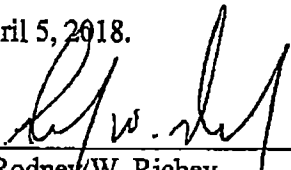
RECEIVED

APR 09 2018

S.C. SUPREME COURT

NOTICE OF APPEAL

Mitchell Hames appeals the denial of his Post- Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Grace Gilchrist Knie, Circuit Judge on January 29, 2018 and Order issued on March 27, 2018 and filed on April 2, 2018. The Appellant received notice of the judgment on April 5, 2018.



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Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA

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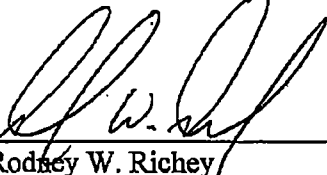
RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on April 5, 2018, addressed to their attorney of record, Valerie Garcia Giovanoli, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: April 5, 2018

RICHEY & RICHEY, P.A.



Rodney W. Richey
Attorney for the Appellant
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Greenville, South Carolina 29603
(864) 467-0503
(864) 467-0646 FAX

WITNESSES

Gaffney Police Dept.

[Signature]

ARREST WARRANT NUMBER

2015A1120200186

ACTION OF GRAND JURY

TRUE BILL

[Signature]
Foreperson of Grand Jury
Date: 8-6-15

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO.
15-GS-11-00712

The State of South Carolina

County of Cherokee

Barry Barnette, Solicitor

COURT OF GENERAL SESSIONS

AUG 06 2015

TERM

THE STATE

vs.

MITCHELL LEON HAMES

Indictment for

POSSESSION WITH INTENT TO
DISTRIBUTE METHAMPHETAMINE

SC Code: 44-53-375

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2015 AUG -6 A 10:32
BRANDY W. MCBEE

STATE OF SOUTH CAROLINA)

INDICTMENT

COUNTY OF CHEROKEE)

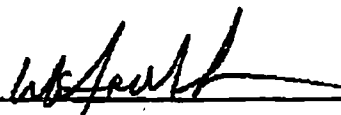
At a Court of General Sessions, convened on AUG 06 2015, the

Grand Jurors of Cherokee County present upon their oath:

POSSESSION WITH INTENT TO DISTRIBUTE METHAMPHETAMINE

That Mitchell Leon Hames did in Cherokee County on or about May 16, 2015, manufacture, distribute, dispense, deliver, purchase or aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with intent to manufacture, distribute, dispense, deliver, or purchase a controlled substance, to-wit: A quantity of Methamphetamine, a schedule II controlled substance under provisions of §44-53-375, CODE OF LAWS OF SOUTH CAROLINA, (1976), as amended, such possession not having been authorized by law.

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



ASSISTANT SOLICITOR

WITNESSES

Cherokee County Sheriff's Office

[Handwritten Signature]

ARREST WARRANT NUMBER

2015A1110100412

ACTION OF GRAND JURY

TRUE BILL

Dorothy R. Petty
Foreperson of Grand Jury
Date: 1-14-16

VERDICT

Foreperson of Petit Jury
Date:

DOCKET # **16-GS-11-00076**

The State of South Carolina

County of Cherokee

Barry Barnette, Solicitor

COURT OF GENERAL SESSIONS

JAN 14 2016

TERM

THE STATE

vs.

MITCHELL LEON HAMES

Indictment for

TRAFFICKING IN METHAMPHETAMINE

SC Code: 44-53-375

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)

INDICTMENT

At a Court of General Sessions, convened on JAN 14 2016, the
Grand Jurors of Cherokee County present upon their oath:

TRAFFICKING IN METHAMPHETAMINE

That Mitchell Leon Hames did in Cherokee County on or about May 26, 2015, knowingly sell, manufacture, deliver, purchase or bring into this State, or did provide financial assistance or did otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or did knowingly actually or constructively possess, or did knowingly attempt to actually or constructively possess (10) ten grams or more, but less than (28) twenty-eight grams of Methamphetamine, a schedule II controlled substance, in violation of §44-53-375, THE CODE OF LAWS OF SOUTH CAROLINA, (1976), as amended.

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



ASSISTANT SOLICITOR