

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JAN 28 2013

Appeal from Pickens County

S.C. Supreme Court

D. Garrison Hill, Circuit Court Judge

ALEX BRICE GRAHAM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212417

APPENDIX

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Appellate Defender

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South Carolina Commission on Indigent
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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA)

COUNTY OF PICKENS)

COURT OF GENERAL SESSIONS

2009-GS-39-1438

2009-GS-39-1439

2009-GS-39-1440

2009-GS-39-1446

2009-GS-39-1448

STATE OF SOUTH CAROLINA,)

vs.)

TRANSCRIPT OF RECORD

ALEX BRICE GRAHAM,)
DEFENDANT.)

ORIGINAL

September 23, 2009
Pickens, South Carolina

B E F O R E:

THE HONORABLE EDWARD W. MILLER, JUDGE.

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

CHRISTOPHER NEWTON, ESQ.
Assistant Solicitor

RICHARD H. WARDER, ESQ.
Attorney for the Defendant

HOLLIE M. JENKINS
Circuit Court Reporter

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits introduced.)

P R O C E E D I N G S

1
2 THE CLERK: 2009-GS-39-1448, the State v. Alex Brice
3 Graham, indicted for distribution of cocaine base within
4 one-half mile of a park. 2009-GS-39-1446, indicted for
5 distribution of cocaine base. 2009-GS-39-1440, indicted
6 for distribution of cocaine base. 2009-GS-39-1439,
7 distribution of cocaine base within one-half mile of a
8 park. 2009-GS-39-1438, indicted for resisting arrest with
9 assault.

10 2008-GS-39-0833, the State v. Rodney Rowland,
11 indicted for leaving the scene of an accident with
12 property damage.

13 Raise your right hands, please.

14 WHEREUPON,

15 ALEX BRICE GRAHAM,

16 RODNEY ROWLAND,

17 after first having been duly sworn, testified as follows:

18 THE COURT: Do you have some jail days for me?

19 MR. NEWTON: Yes, Your Honor.

20 On Mr. Graham, he has 116 days as of today.

21 THE COURT: Okay. How about Rowland?

22 MR. NEWTON: Rowland, Your Honor, has no days. It
23 looks like he was released the day he was arrested.

24 THE COURT: Which one is which?

25 MR. NEWTON: This is Mr. Rowland, Your Honor.

1 Mr. Graham is on that side. I'm sorry. They switched --

2 MR. WARDER: This is Mr. Graham. This is

3 Mr. Rowland.

4 Do you want them to switch?

5 THE COURT: Well, no, he's fine. We'll do it that
6 way.

7 All right. He had no days?

8 MR. NEWTON: No days, Your Honor.

9 THE COURT: Okay. In the last 24 hours, have you had
10 any drugs, alcohol, or medication, Mr. Graham?

11 DEFENDANT GRAHAM: No, sir

12 THE COURT: Mr. Rowland?

13 DEFENDANT ROWLAND: No, sir.

14 THE COURT: Have you ever been treated for the abuse
15 of alcohol, drugs, mental illness, or emotional problems,
16 Mr. Graham?

17 DEFENDANT GRAHAM: Yes, sir.

18 THE COURT: Go ahead and tell me.

19 DEFENDANT GRAHAM: I had some drug abuse classes not
20 too long ago.

21 THE COURT: Are you sober today?

22 DEFENDANT GRAHAM: Yes, sir.

23 THE COURT: Okay. How about you, Mr. Rowland?

24 DEFENDANT ROWLAND: No, sir.

25 THE COURT: All right. Mr. Graham, you're up here on

1 indictment 09-1448. It alleges you did -- well, before I
2 start this.

3 You've got indictments that have not been presented
4 to the Grand Jury. You have an absolute right to require
5 the State to present the cases to the Grand Jury where
6 they would have to prove more probably than not that a
7 crime was committed and you did it.

8 Do you want to give that right up, which would allow
9 you to go forward?

10 DEFENDANT GRAHAM: Yes, sir.

11 THE COURT: All right. This indictment, 09-1448,
12 alleges you did in Pickens County, between March 2 and 5,
13 of this year, distribute a quantity of crack cocaine
14 within a half-mile of Haygood Park. That carries up to 15
15 years -- well, 10 to 15 years, and no probation on that
16 one. It's a serious offense, which means if you get
17 convictions for three or more serious offenses, you're
18 eligible for life in prison without parole.

19 Do you understand that?

20 DEFENDANT GRAHAM: Yes, sir.

21 THE COURT: Okay. You're, also, up here on 09-1446.
22 It alleges you did in Pickens County, between March 2 and
23 5, of 2009, distribute to an undercover operative a
24 quantity of crack cocaine. That carries up to -- oh,
25 third offense. It carries 15 to 30 years.

1 Is that right?

2 MR. NEWTON: Yes, Your Honor.

3 THE COURT: 15 to 30 years, and a \$50,000 fine, no
4 suspended sentence, no probation. This is, also, a
5 serious offense.

6 Do you understand that?

7 DEFENDANT GRAHAM: Yes, sir.

8 THE COURT: You're, also, here on 09-1440. It
9 alleges you did in Pickens County on June 2, 2009,
10 distribute to an undercover operative a quantity of crack
11 cocaine. That's 15 to 30 -- and this is a third offense.
12 It is 15 to 30 years, \$50,000 fine, no suspended sentence,
13 no probation. It's a serious offense.

14 Do you understand all that?

15 DEFENDANT GRAHAM: Yes, sir.

16 THE COURT: You're, also, here on 09-1438. It
17 alleges you did in Pickens County on or about June 2,
18 2009, knowingly and unlawfully assault, beat, or wound
19 Jonathan Hamby of the Easley Police Department while
20 resisting arrest when you knew or should have known he was
21 a police officer. You're pleading to B, which is up to --

22 Is it B?

23 MR. NEWTON: It's up to 10 years, Your Honor.

24 THE COURT: It's up to 10 years.

25 Do you understand that?

1 DEFENDANT GRAHAM: Yes, sir.

2 THE COURT: And, finally, you're up here on 09-1439.
3 It alleges you did in Pickens County on June 2, 2009,
4 distribute a quantity of crack cocaine within a half-mile
5 of Haygood Park. Again, that's 10 to 15 years, no
6 suspended sentence, no probation. It's a serious offense.

7 Do you understand that?

8 DEFENDANT GRAHAM: Yes, sir.

9 THE COURT: Okay. Mr. Rowland, you're up here on
10 08-0833. It alleges you did in Pickens County on or about
11 January 11, 2008, drive a motor vehicle involved in an
12 accident resulting in damage to an attended vehicle. And
13 you left the scene without complying with the requirements
14 of the law. And that carries up to a year in jail.

15 Do you understand that?

16 DEFENDANT ROWLAND: Yes, sir.

17 THE COURT: To each of you, understanding the nature
18 of the charges against you and the maximum possible
19 punishment, how do you want to plead, Mr. Graham?

20 DEFENDANT GRAHAM: Guilty, sir. ✓

21 THE COURT: Mr. Rowland?

22 DEFENDANT ROWLAND: Guilty, sir.

23 THE COURT: Has anybody forced you in any way, or
24 coerced you, threatened you, or promised you anything to
25 get you to enter this plea, Mr. Graham?

1 DEFENDANT GRAHAM: No, sir

2 THE COURT: Mr. Rowland?

3 DEFENDANT ROWLAND: No, sir.

4 THE COURT: Do you each understand you have an
5 absolute right to a trial by jury where you would be
6 presumed innocent, unless and until the State could prove
7 you guilty beyond any reasonable doubt of each and every
8 element of each offense that you're charged with. You'd
9 have a right to confront and cross-examine the witnesses
10 and the evidence put up against you by the State. You'd
11 have a right to compel in court all relevant and competent
12 evidence in your own defense, or you can remain silent.
13 Your silence cannot be held against you. And you can
14 never be compelled to incriminate yourself.

15 Do you understand all of those rights, Mr. Graham?

16 DEFENDANT GRAHAM: Yes, sir.

17 THE COURT: Mr. Rowland?

18 DEFENDANT ROWLAND: Yes, sir.

19 THE COURT: Do you want to give up all those rights
20 and enter this plea, Mr. Graham?

21 DEFENDANT GRAHAM: Yes, sir.

22 THE COURT: And Mr. Rowland?

23 DEFENDANT ROWLAND: Yes, sir.

24 THE COURT: Are you guilty, Mr. Graham?

25 DEFENDANT GRAHAM: Yes, sir.

1 THE COURT: Mr. Rowland?

2 DEFENDANT ROWLAND: Yes, sir.

3 THE COURT: Are you totally and completely satisfied
4 with the representation of your attorney, Mr. Graham?

5 DEFENDANT GRAHAM: Yes, sir. ✓

6 THE COURT: And Mr. Rowland?

7 DEFENDANT ROWLAND: Yes, sir.

8 THE COURT: And have you had enough time to review
9 the evidence the State has against you, Mr. Graham?

10 DEFENDANT GRAHAM: Yes, sir.

11 THE COURT: Mr. Rowland?

12 DEFENDANT ROWLAND: Yes, sir.

13 THE COURT: Okay. Tell us about it.

14 MR. NEWTON: Your Honor, with relation to Mr. Graham,
15 on or around March 5th of 2009, this Defendant sold a
16 quantity of crack cocaine to a confidential informant
17 working under the supervision of the Easley Police
18 Department. That transaction was observed, and recorded,
19 and occurred within a half mile of Haygood Park and Alice
20 Ball Field in the city of Easley.

21 On June 2nd, 2009, this Defendant sold a quantity of
22 crack cocaine to another confidential informant working
23 through an intermediary co-defendant named Dennis Scott.
24 Basically, Mr. Scott had walked to the car -- to the
25 Defendant's car to obtain the drugs and then handed them

1 to the confidential informant. All this was done while
2 under the surveillance and supervision of the Easley
3 Police Department.

4 The vehicle -- the Defendant's vehicle was stopped a
5 short distance from Westgate Apartments where the
6 transaction had taken place. And that transaction was,
7 also, located within a half mile of Haygood Park.

8 After the arrest and during the booking process
9 relating to these charges, Your Honor, the Defendant got
10 into a struggle with Officer Hamby. The Defendant was
11 attempting to swallow two plastic baggies containing drugs
12 that were being concealed on his person. During that
13 struggle, he struck and pushed Officer Hamby in his
14 attempts to dispose of the drugs.

15 All that occurred in Pickens County, Your Honor. The
16 State does have a recommendation.

17 THE COURT: Okay. What's that?

18 MR. NEWTON: 15 years, which is the minimum possible
19 sentence, Your Honor.

20 THE COURT: And what's his record?

21 MR. NEWTON: He has a North Carolina record, Your
22 Honor. There's nothing in South Carolina. From North
23 Carolina, he has a 1996 robbery and possession of a
24 controlled substance; 2001, possession with intent to
25 distribute cocaine. And then, in 2002, a trafficking

1 cocaine.

2 THE COURT: All right. Is all that true?

3 DEFENDANT GRAHAM: Yes, sir.

4 THE COURT: All right. Anything you want to tell me?

5 DEFENDANT GRAHAM: In '96, I wasn't nothing but like
6 17 years old, 16. I don't see the problem about -- what
7 happened in 2001, I was an adult then. But in 2001, I
8 wasn't but a juvenile -- I mean, the '96 conviction, Your
9 Honor.

10 THE COURT: Yes.

11 Mr. Warder.

12 MR. WARDER: Your Honor, Alex is not a bad person.
13 It's just that he got involved with drugs. He had friends
14 that were with him and used drugs, people he sold to. And
15 part of these cases were people that he used drugs with.
16 I mean, this informant was -- he regarded as a friend.
17 And, in his mind, he was just sharing with him what he
18 had, you know, so...

19 THE COURT: Go ahead.

20 MR. WARDER: It's got him in over his head, Your
21 Honor. And, certainly, I agree with the decision in this
22 case. I think that 15 is the minimum that he could get.

23 THE COURT: That's a long time.

24 MR. WARDER: Yes, sir.

25 And it's -- we've talked about it being 85 percent

1 and a most serious. And, you know, if he ever gets caught
2 again and messes with it, well, he could do a real life
3 sentence. It's just a terrible situation. I do believe
4 this is in his best interest. And I urge the Court to
5 take it.

6 THE COURT: Yes. And get the minimum sentence out of
7 it.

8 Anything else you want to tell me?

9 DEFENDANT GRAHAM: No, sir.

10 THE COURT: Do you figure you can quit when you get
11 out --

12 DEFENDANT GRAHAM: Yes, sir.

13 THE COURT: -- or you'll be right back at it?

14 Do you think you're strong enough?

15 DEFENDANT GRAHAM: Yes, sir.

16 MR. WARDER: Your Honor, I think he's a good man.

17 THE COURT: Well, I don't -- I mean, I don't doubt
18 that. Everybody has got good in them.

19 15 on everything, except 10 on the resisting arrest
20 case. They're all concurrent. Credit for the time he's
21 entitled to.

22 Good luck to you.

23 *****END OF TRANSCRIPT OF RECORD*****
24
25

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth 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 the evidence introduced in the captioned case, relative to appeal, in the Court of General Sessions for Pickens County, South Carolina, on the 23rd day of September, 2009.

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

March 26, 2010



Hollie M. Jenkins, Court Reporter

My Commission Expires: 11-17-10

FORM 5

STATE OF SOUTH CAROLINA)
County of PICKENS)

IN THE COURT OF COMMON PLEAS

Alex Brice Graham)
Full name and prison number (if any) of Applicant)

2010-CP-39-210

v.)

State of South Carolina)

APPLICATION FOR
POST-CONVICTION RELIEF

2010 FEB -5 A 10:39

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

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 Lieber Correctional inst.
P. O. BOX 205, Ridgeville, S.C. 9472
2. Name and location of Court which imposed sentence Pickens County
General Sessions Court.
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) (2009-GS-39-1446) (2009-GS-39-1440) Dist. cocaine (Crack)

- (b) {2009-GS-39-1439} (2009-GS-39-1438) Dist. cocaine 1/2 mile
- (c) of park. / 2009-GS-39-1438) (Resisting arrest

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

- (a) 9/23/09 Fifteen years
- (b) 9/23/09 Dist, near park, Fifteen years
- (c) 9/23/09 Resisting arrest w Assault, (Ten) an

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty xx
- (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:
N/A
 - i. _____
 - ii. _____
 - iii. _____
- (b) the result in each such Court to which you appealed:
N/A
 - i. _____
 - ii. _____
 - iii. _____
- (c) the date of each such result:
N/A
 - i. _____
 - ii. _____
 - iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
N/A
 - i. _____
 - ii. _____
 - iii. _____

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

- (a) Counsel never filed an appeal

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

- (a) Involuntary and unintelligent guilty plea
- (b) Involuntary plea based on ineffective assistance of counsel;
- (c) _____

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

- (a) Charges should have been dismissed at preliminary
- (b) hearings.
- (c) _____

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:

N/A

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

N/A

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

N/A

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

No.

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

(a) which grounds have been presented:

N/A

- i. _____
- ii. _____
- iii. _____

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

N/A

- i. _____
- ii. _____
- iii. _____

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

N/A

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

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

- (a) the name and address of each attorney who represented you:
 - i. Richard Warder, Esquire
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Richard Warder (Preliminary hearing and guilty plea
 - ii. _____
 - iii. _____

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

New Trial

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

NO

STATE OF SOUTH CAROLINA)
County of Ridgeville, S.C.)

VERIFICATION

I, ALEX Graham, 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.

Alex Graham

SWORN to and subscribed before me this 27th day of January, 2010.

Alyria Jones (L.S.)
Notary Public

My Commission Expires: 1/24/2018

2010 FEB - 5 A 10: 39
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

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

I, ALEX Graham, 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.

alex Graham
Applicant

SWORN or affirmed to and subscribed before me this

27th day of January, 2010.

Sylvia Jones
Notary Public

My Commission Expires: 1/24/2018

2010 FEB - 5 A 10: 39
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

1. Applicant contends that his plea of guilty was involuntary and unintelligently and based on ineffective assistance of counsel.

2. Applicant contends that his guilty plea was induced by ineffective assistance of counsel; and before the guilty plea, counsel was not present at applicant's preliminary hearing on September 18, 2009 and probable cause was never established. Then counsel made applicant involuntary plea guilty to the charges only weeks later and in doing that, applicant did not knowing and voluntary waive his right to a grand jury presentment of the indictments, to satisfy the South Carolina Constitution Art 1, section 14 and Art 1 section 3, Equal Protection Clause.

3. Applicant counsel was ineffective for not requesting a Frank's hearing on the arrest warrant which he know contained false statements knowingly and intelligently or has a reckless disregard for the truth to establish a Fourth Amendment violations. Applicant request a Franks hearing.

4. Applicant contends that he did not waive his right to a direct appeal and therefore he is entitled to White vs State hearing or new trial under Evitt v Lucy, to satisfy the Due Process Clause of the 14 Amendment and the Equal Protection Clause in State and Federal Constitution.

The test for determining the validity of a guilty plea based upon alleged ineffective assistance of counsel is whether counsel's advise was within the range of competence demanded of attorneys in criminal case and whether there is a reasonable probability that, but for counsel's errors, the defendant would not have plead guilty. Carter v State 329 S.C, 355,, 360, 495 S.E.2d 773, 775 (1998)quoting Hill v Lockhard 474 U.S. 52, 106 S.Ct. 366, 88 L. Ed.2d 203 (1985).

A defendant who pleads guilty upon advice of counsel may only attack the voluntary and intelligent charter of the guilty plea by showing the advise he received from counsel was not in range of competence demanded of a attorney in a criminal case. Richard v State 310 S.C. 360, 363 , 426 S..E.2d 795, 797 (1993). Because the defendant waives several constitutional rights by pleading guilty, the Due Process Clause require that guilty pleas are entered into voluntarily, knowingly and intelligently. Boykins v Alabama, 395 U. S. 238 (1969). Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possess an understanding of the law in relations to the facts. McCarthy v. United States 394 U. . 467, 89 S.Ct.1166 (1969). At a hearing applicant will show he didn't know the laws in relations to the facts and he is entitled to relief.

The applicant requested a preliminary hearing, the State has the burden of proving probable cause, but it is not required to call all of its potential witness, State v Dingle 306 S.E.2d 223 (S.C. 1983)(quoting State v Cunningham 275 S.C. 189, 268 S.E. 2d 289 (1980). In a preliminary hearing, the State must show that there was "probable cause" to arrest the defendant for the commission of some crime. Absent this showing the case must be dismissed. State v McClure 289 S.E. 2d 158, 277 S.C. 432 (1982). The Court have held failure to conduct a properly demanded preliminary hearing deprives a court of General Session of jurisdiction. State v Porter 273 S.C. 507, 257 S.E. 2d 505 (1979); Patrick Frank O'Neil v State 277 S.C. 230, 285 S.E.2d 352 (1981). Weeks later defense counsel voided his actions and induced applicant to pleas guilty without presentment of his indictments to the grand jury. Bonnette v State 282 S.E. 2d 597 (1981).

A defendant has no constitutional right to a preliminary hearing. State v Lullington 551 S.E. 2d 280, 346 S.C. 262.

In South Carolina Code Ann. § 17-23-130 (1985) provides that "the clerk shall have the defendant sign a waiver of presentment by the grand jury and his plea of guilty, similarly, S.C. Code § 17-23-140 (1985) provides that, "upon signing the waiver of presentment the defendant may plead guilty. We have held compliance with these sections is mandatory and further that they require a written waiver.

Applicant request a hearing pursuant to South Carolina Code §17-27-80 on issues one (1) and two (2). Applicant contends he did not sign a waiver of indictment. The waiver of those indictments for 2 counts) Distribution of cocaine base within ½ mile of a Park; 2 counts of Distribution of cocaine base and one counts of Risting Arrest with Assault were made by the solicitor's office. There is no valid waiver by me, and the waiver can not be knowingly and intelligently made.

Dated

Wed Jan 27th 2010

Alex Brice

Alex Brice Graham #337040
Lieber Correctional Inst
P.O BOX 205
Ridgeville, S.C. 29472

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF PICKENS)

2011-1-29-2011

ALEX BRICE GRAHAM, #337040)
Petitioner,)

C/A NO 2010-CP-39-210

vs,)

NOTICE AND MOTION FOR LEAVE TO

AMEND (PCR) APPLICATION

STATE OF SOUTH CAROLINA)

Defendant.)

COMES NOW Alex B. Granam, through his undersigned attorney moves this Court for an Order amending his (PCR) application pursuant to Rule 15(c) SCRCP. This amendment of pleading relates back to the date of the original pleading, because its is not barred by statute of limitations, and the claim asserted in the in the amended pleading arose out of the conduct, or occurrence set forth in the original.

Mr. Granam, received his transcript of this guilty plea on July 11, 2011, and found the following claim, of ineffective assistance of counsel during the sentencing phase of the proceedings..

CONCLUSION

I pray this Court would grant an Order to Amend this (PCR).

Date

July__ 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF PICKENS

FILED 10 29

ALEX BRICE GRAHAM, #337040

C/A NO 2010-CP-39-210

Petitioner,

vs,

PROPOSE AMENDMENT TO POST

CONVICTION APPLICATION

STATE OF SOUTH CAROLINA

defendant.

This is a Propose Amendment to (PCR) application filed with the motion to amend.

(1) The Petitioner's Counsel was ineffective for failing to file motion regarding the 15 on everything, except 10 on the resisting arrest case discrepancy between the oral pronouncement of the sentences and the written order.

LAW

In PCR proceedings, the burden of proof is on the applicant to prove the allegations in his application. Butler v State, 200 S.C.441, 442, 334 S.E.2d 813, 914 (1985).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v Washington, 466 U.S. 668, (1984); Lomax v. State, 379 S.C. 93, (2008). Courts used a two-prong test in evaluating allegations of ineffective assistance of counsel. Strickland v Washington, 466 U.S. at 687; First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687. Next, the applicant must show he was prejudice by counsel's performances such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, at 693.

In this case, the judge orally pronounced 15 on everything, except 10 on the resisting arrest case, from the bench, but signed the sentencing sheets ordering 15 yrs and 10 years current. Counsel did not make any objections or motions regarding this significant variance. (see sentencing sheets attached).

The oral pronouncement of a sentence controls over a conflicting written sentencing order. U.S. v Osborne, 345 F.3d 281 (4th Cir. 2003). U.S. v Martinez, 250 F.3d 941, 942 (5th Cir.

2001)(holding a defendant's constitutional right to be present at sentencing mandates an oral pronouncement prevail over a conflicting written sentence). In the background of most of those decisions is United States v. Gagnon, 470 U.S. 522 (1985). In which the United States Supreme Court stated that a defendant has a due process right to be present at all stages of the trial to the extent that a fair and just hearing would be thwarted by his absence.

Due process requires the judge's oral pronouncement control over a conflicting written sentencing order. Here the judge announced two sentences from the bench, "15 on everything, except 10 on the resisting arrest case," but later increase that sentence in his written order. Here counsel should have made the proper motion, especially after that term of court, then the judge's oral pronouncement would have control and petitioner would have had time served. Tr. p. 12, lines 19-21.

CONCLUSION

Petitioner prays for an Order amending this claim and a hearing pursuant to Title 17-27-80 of the South Carolina Code of Laws.

Dated

July__ 2011

STATE OF SOUTH CAROLINA)
)
 COUNTY OF PICKENS)
)
 Alex Brice Graham,)
 S.C.D.C. No. 337040,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2010-CP-39-0210

RETURN

In response to the post-conviction relief application filed February 5, 2010, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Pickens County Clerk of Court's orders of commitment. The Applicant waived presentment to the Pickens County Grand Jury on charges of resisting arrest with assault (2009-GS-39-1438), two (2) counts of distribution of cocaine base within 1/2 mile of a park (2009-GS-39-1439, -1448), and two (2) counts of distribution of cocaine base (crack cocaine) (2009-GS-39-1440, -1446). Richard H. Warder, Esquire represented the Applicant.

On September 23, 2009, the Applicant pled guilty. The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of ten (10) years for resisting arrest with assault, fifteen (15) years for each count of distribution of cocaine base within 1/2 mile of a park, and fifteen (15) years for each count of distribution of cocaine base, third offense. The Applicant did not appeal.

Attached herewith and incorporated herein by reference are the records of the Pickens

County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript.

II.

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

1. Ineffective assistance of counsel:
 - a. Failed to appear at preliminary hearing.
 - b. Failed to request "a Frank's hearing on the arrest warrant."
2. Involuntary guilty plea:
 - a. Did not "knowing and voluntary waive his right to a grand jury presentment of the indictments.
3. "Charges should have been dismissed at preliminary hearings."
4. Did not waive right to an appeal.

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a criminal defense attorney.

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 on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). 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, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Applicant’s assertion that his guilty plea was involuntary is without merit. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d

742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). An Applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the Applicant 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) (citations omitted). An Applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985); Bennett v. State, 371 S.C. 198, 204, 638 S.E.2d 673, 675 (2006).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a criminal defendant must be advised of the constitutional rights he is waiving. Id. at 243, 89 S. Ct. at 1712. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. Moreover, a criminal defendant entering a guilty plea "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citation omitted). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record, and may be accomplished by colloquy between court and defendant, between 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)).

When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

The Respondent submits the record fully supports the knowing and voluntary nature of the Applicant's plea. However, allegations regarding ineffective assistance of counsel and the voluntariness of the plea may raise a question of fact that is not conclusively refuted by the record. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. at 265, 305 S.E.2d at 248 (1983).

V.

The Respondent denies each allegation not expressly admitted, qualified or explained.

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

Respectfully submitted,

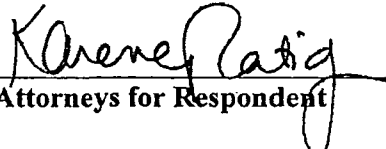
HENRY DARGAN McMASTER
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By: 
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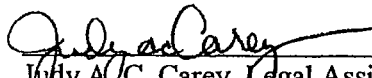
April 21, 2010

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS)	
)	
)	2010-CP-39-0210
ALEX BRICE GRAHAM, 337040)	
)	
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** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Alex Brice Graham, 337040
Lieber Correctional Institution
Post Office Box 205
Ridgeville SC 29472

DATED this 21st day of April, 2010.



 Judy A.C. Carey, Legal Assistant
 For Respondent

I N D E X

(AW) - Denotes Applicant's Witness
(RW) - Denotes Respondent's Witness

	<u>Page No.</u>
<u>(AW) ALEX BRICE GRAHAM:</u>	
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<u>(RW) RICHARD WARDER:</u>	
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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
	(Applicant's Exhibits)		
A-1	Amendment to PCR.....	3.....	17

All Exhibits were retained by the Clerk of Court for Pickens County.

P R O C E E D I N G S

(WHEREUPON, Applicant's Exhibit No. 1 was marked for identification only.)

THE COURT: This is Alex Graham v. the State, 2010-CP-39-0210.

Ms. Ratigan.

MS. RATIGAN: Thank you, Your Honor.

May it please the Court.

Mr. Graham waived presentment to the Grand Jury on the charges of resisting arrest with assault, two counts of distribution of cocaine base within proximity of a park, and two counts of distribution of cocaine base. He was represented on these charges by Mr. Warder. On September 23rd, 2009, he pled guilty to the charges before Judge Miller. He received concurrent sentences of 10 years for resisting arrest with assault, 15 years for each count of distribution of cocaine base within proximity of a park, and 15 years for each count of distribution of cocaine base third offense.

He did not file an appeal. And the State is ready to proceed at this time.

MR. DOVER: We are, too, Your Honor.

THE COURT: Yes, sir.

You may call your first witness.

MR. DOVER: We call Alex Graham.

1 can hear you in this courtroom.

2 State your full name for the record.

3 A Alex Brice Graham.

4 Q Mr. Graham, were you formerly represented by
5 Mr. Richard Warder?

6 A Yes, sir.

7 Q And did you appear in this courtroom in Pickens
8 County on September the 23rd, 2009, for a guilty plea?

9 A Yes.

10 Q Now, is it from that guilty plea that you have filed
11 this application for post-conviction relief?

12 A Yes, sir.

13 Q Now, Mr. Graham, is it, also, true that I was just
14 recently appointed to represent you, sir?

15 A Yes, sir.

16 Q And we've only had a chance to meet today; is that,
17 also, true?

18 A Yes, it is.

19 Q Now, have I gone over the facts of the case with you
20 in our meeting today?

21 A Yes, sir.

22 Q And did I, also, share with you some case law in the
23 matter, and ask you some questions?

24 A True.

25 Q Now, I'm going to ask you -- today is your

1 opportunity to tell Judge Hill everything you believe that
2 Mr. Warder did incorrectly that led to your plea of guilty
3 on September 23rd, 2009.

4 Do you understand that?

5 A Yes, sir.

6 Q Did you send me an amendment to your previously filed
7 post-conviction relief application?

8 A Yes, I did.

9 Q And did you give me another copy of it today?

10 A Yes, I did.

11 Q And we've made that a part of the record here this
12 afternoon. Okay, sir.

13 A Thank you.

14 Q Now, as I understand it, you appeared in court and
15 you pled guilty. But, before that, you had had how many
16 conversations about your case with Mr. Warder?

17 A Like one conversation, sir, not many.

18 Q Did you meet with him in his office, or at the jail?

19 A At the jail, sir.

20 Q Was it the jail here in Pickens, or was it a jail
21 somewhere else?

22 A The jail here in Pickens, sir.

23 Q And did your family retain Mr. Warder to represent
24 you?

25 A Yes.

1 Q Now, how much time did you spend with Mr. Warder on
2 the one -- are you sure you only met with him one time in
3 jail?

4 A Yes, sir.

5 Q How much time did you spend with him on that
6 occasion?

7 A Probably 10 minutes.

8 Q You don't think it was any longer than 10 minutes?

9 A No, sir.

10 Q Are you aware that your family met with Mr. Warder
11 about your charge at anytime after that?

12 A Just over the telephone.

13 Q Your family discussed it with him over the telephone?

14 A After the guilty plea.

15 Q Okay. So, prior to the guilty plea, do you know of
16 any contact that your family had one-on-one with
17 Mr. Warder's office?

18 A No, sir.

19 Q Did you, also, meet Mr. Warder prior to entering the
20 guilty plea on September the 23rd, 2009?

21 A No. We hadn't met no time before. He had come to
22 the -- up here and had me in the back of the courtroom
23 when -- the back office back there. And we talked while I
24 signed the guilty plea papers, sir.

25 Q Now, how long had transpired -- how long had it been

1 since the first time you met with him and September 23rd,
2 when you met with him the second time?

3 A Just the one time when he came. I was in the county
4 jail approximately 116 days, and he came and seen me one
5 time. Then the next time I seen him was here.

6 Q My question was this, how long between the first time
7 you met him and the time you saw him in court on September
8 23rd? Do you have any idea?

9 A No, sir.

10 Q Was it more than a month? More than two months, or
11 can you give us an idea?

12 A Maybe about a month.

13 Q About a month?

14 A Yeah.

15 Q Now, when Mr. Warder met you on September the 23rd,
16 2009, what did he tell you that you believed in signing
17 the documents to plead guilty?

18 A On September the 23rd, he came to see me. Because he
19 had an appointment to see me on September the 18th for the
20 preliminary hearing that he never appeared. He abandoned
21 me at the preliminary hearing. Well --

22 Q Let's go back. And let me withdraw my question,
23 because I wanted to ask you that one first. You brought
24 it to my attention.

25 Prior to September the 23rd, did you have a

1 preliminary hearing scheduled?

2 A Yes, sir.

3 Q And had you been subpoenaed to that preliminary
4 hearing?

5 A Yes, I did.

6 Q And on what date was that preliminary hearing
7 scheduled to occur?

8 A September the 18th, '09.

9 Q And did you go to the preliminary hearing?

10 A Yes, I did.

11 Q Did Mr. Warder show up?

12 A No, he did not.

13 Q And, as a result, was your preliminary hearing
14 continued?

15 A No, it was not. The day of my preliminary hearing,
16 the Judge asked me did I want to move forward with my
17 preliminary hearing. I said, No, not without counsel. So
18 she got on the telephone and called Mr. Warder.
19 Mr. Warder never appeared. He abandoned me.

20 Q Well, do you know what the official status of the
21 preliminary hearing was? Was it continued to be reset, or
22 not?

23 A No. I don't know. The Judge never -- she never said
24 anything else. She just told them to take me back to the
25 county jail.

1 Q All right. So you went back to the county jail. And
2 that was on the 18th?

3 A Yes.

4 Q And did you try to call Mr. Warder's office --

5 A Yes.

6 Q -- to find out what was going on?

7 A Yes.

8 Q Did you ever get a response?

9 A No.

10 Q And so you appeared here on the 23rd, and Mr. Warder
11 met with you behind the courtroom?

12 A Yes.

13 Q The same place I met with you today in the holding
14 cell, or was it someplace else?

15 A The one right next door to the little dorm.

16 Q And what did -- now, I'm going to ask you, what did
17 Mr. Warder say that you believed prior to your entering
18 your guilty plea?

19 A When he came to see me on the 23rd, he said that he
20 had me a deal that would have been 15 years cut to seven.
21 And so I had asked him about my preliminary hearing. And
22 he said, Don't worry about that, because he got me such a
23 wonderful deal today. And if I take it, I would only do
24 seven years.

25 So I had believed what he had told me. So I had,

1 initially, signed the guilty plea, not knowing that I was
2 waiving valuable rights to myself. Because beside where I
3 was initialling it, there was an "X" already marked there,
4 when that box was supposed to have been checked by me.
5 Because that was me waiving my rights. He never explained
6 none of that to me.

7 Q Now, we're going to get into what Judge Miller
8 explained to you in a moment. But, prior to that, when
9 you met with Mr. Warder on the 23rd, behind the courtroom,
10 did he ever explain to you what a preliminary -- what a
11 Grand Jury was, as opposed to the jury that would be
12 hearing your case? .

13 A No, sir.

14 Q Did you know the difference?

15 A No, sir.

16 Q Did you ask me -- did you tell me today that it
17 wasn't until you got in jail that you understood that a
18 Grand Jury was different from the jury that would be
19 impanelled to hear your testimony?

20 A Yes, sir.

21 Q And you feel as though that was an error that
22 Mr. Warder did not explain that to you?

23 A Yes, sir.

24 Q And is it true you told me back there today he just
25 showed you the box and said, Sign here, I got you a sweet

1 deal, and you're going to get seven years?

2 A Yes, sir.

3 Q And when you -- is that the basis of -- is that the
4 majority of your conversation with Mr. Warder that day
5 prior to you appearing before Judge Miller?

6 A Yes, sir.

7 Q Did you trust and believe Mr. Warder when he told you
8 that you were going to be sentenced to 15 years, suspended
9 on the service of seven?

10 A Yes, sir.

11 Q And is that the reason you pled guilty?

12 A Yes, sir, on the advice of Mr. Warder.

13 Q And you believe that that advice was in error?

14 A Yes, I do.

15 Q Now, Mr. Graham, I shared with you some -- a recent
16 Supreme Court case that just came down this month from our
17 Supreme Court. And we've got a question Judge
18 Miller -- I mean, Judge Hill is going to -- he's very
19 familiar with that case and others that are similar to it.

20 No matter what Mr. Warder said to you behind that
21 door back there, you stood at this bar on September 23rd,
22 2009, and Judge Miller spent a lot of time going over
23 certain -- your rights. Do you understand -- you read
24 that in the transcript?

25 A Yes, I did.

1 Q And do you remember him asking you those questions?

2 A I don't remember, because I was only doing what I
3 thought was right on the advice of Mr. Warder to get the
4 deal. But if I would have knew that I wasn't getting the
5 deal, I might would have asked Mr. Warder and told him
6 that what you've got me doing, this is not what you said
7 behind -- back there in the back. This is not what's
8 going down as planned.

9 Q So you acknowledge to me and Judge Hill that Judge
10 Miller did, in fact, go through and ask you all the
11 appropriate questions?

12 A Yeah. He asked me --

13 Q And he says to you -- he tells you in the transcript
14 and everybody says that the minimum, the best deal you can
15 get, based on your record, was a 15-year deal?

16 A Yeah. That's what he said.

17 Q And you and I have looked over your RAP sheet today.
18 And I don't have the full RAP sheet. But I looked over
19 your sentencing sheet and the records from the Department
20 of Corrections, and it does appear that there are, at
21 least, two prior drug charges on your record prior to
22 entering the plea in front of Judge Miller. Is that a
23 correct statement?

24 A That is true.

25 Q Did I show you that?

1 A Yes, you did.

2 Q And did we go over that it appears that there are, at
3 least, two convictions, one in June of 2000, and one in
4 April of 2003, that would have pre-dated the plea in 2009?

5 A Yes, sir.

6 Q And, in reading the transcript, you can see where
7 everybody was telling you that while you were standing up
8 here?

9 A Yes. But --

10 Q But you told me you believed what your lawyer, who
11 you paid money to, what he told you behind that door was
12 going to happen to you?

13 A Yeah. He told me it was going to be dropped to a
14 second offense, if I pled guilty.

15 Q And you -- is that the reason why you didn't open
16 your mouth?

17 A That is true. Because I felt I was getting a deal
18 from my lawyer's advice.

19 Q And do you understand, looking at it in hindsight,
20 looking at it today, if your record is correct and if the
21 charges -- if you are, in fact, guilty of the charges they
22 had you charged with in 2009, that the best that this
23 Court could have ever done was give you the 15 years that
24 you got?

25 A Yes.

1 Q But that's not what you bargained for?

2 A That is not what I bargained for.

3 Q And that's not what your lawyer promised you?

4 A That is not what he told me.

5 Q And it was based on those promises that you signed
6 and pled guilty?

7 A That's what I did, sir.

8 Q Did I, also, advise you, Mr. Graham, that if Judge
9 Hill sees it your way and decides to give you a new trial
10 that things could get far worse for you in the future?
11 Did I explain that to you?

12 A Yes, you did, sir.

13 Q And if you got a new trial, you could get a lot more
14 than 15 years?

15 A I understand that.

16 Q But, knowing that, you wanted to tell Judge Hill and
17 this Court the wrong that you felt was perpetrated against
18 you by Mr. Warder?

19 A Yes, sir.

20 Q Now, sir, is there anything else that you want to
21 share with this Court about the way you were treated by
22 your lawyer, or anybody else?

23 A No. Just that he abandoned me at my preliminary
24 hearing, which he -- I didn't speak much on it. But if my
25 lawyer would have come to my preliminary hearing, there's

1 a strong probability that my case would have got dismissed
2 that day. I can never get that feeling back from that
3 judge what she was going to do to me, because my lawyer
4 abandoned me. He never came. He never put up a favorable
5 defense for me. And even if I came in here and pled
6 guilty, my guilty plea is still involuntary because she
7 might have dismissed a few charges that day. And I
8 wouldn't have had to pled guilty to five charges. I might
9 only have had to plead guilty to one, or none at all.

10 Q So you told me today you feel as though Mr. Warder
11 did the following things incorrectly, he failed to appear
12 at your preliminary hearing?

13 A Yes, sir.

14 Q He didn't spend enough time with you?

15 A Yes, sir.

16 Q He only met with you one time?

17 A Yes, sir.

18 Q He didn't explain the difference between a Grand Jury
19 and a petit jury?

20 A That's right, sir.

21 Q And he told you that if you signed those documents,
22 you would be sentenced to 15 years, suspended on the
23 service of seven, in which you would have to do 85 percent
24 of?

25 A That's what he told me.

1 Q Now, is there anything else, Mr. Graham, I missed?

2 A No, sir.

3 Q Anything else you want to complain about while you're
4 here today? Do you understand this is your one and only
5 opportunity?

6 A I understand this is the only time that I have, no.

7 Q Is there anything else?

8 A No, sir. I believe everything is taken care of.

9 Q Now, acknowledging that you and I haven't had the
10 most time to talk about it, but are you satisfied that
11 you've had enough time to talk to me and tell me
12 everything that you want me to present to Judge Hill on
13 your behalf this afternoon?

14 A Yes, sir.

15 Q And, sir --

16 MR. DOVER: Your Honor, I want to hand this up, for
17 the record.

18 I did, in fact, receive your application for
19 amendment. And I did file that with the Court earlier
20 today. And it was downstairs.

21 So I offer that up into the record.

22 THE COURT: All right.

23 (WHEREUPON, Applicant's Exhibit No. 1 was admitted into
24 evidence.)

25 MR. DOVER: And I've shared a copy with counsel.

1 That's all the questions we have, Your Honor.

2 THE COURT: Cross-examination.

3 MS. RATIGAN: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 BY MS. RATIGAN:

6 Q Did Mr. Warder represent you on other charges, or
7 just these charges?

8 A Just these, ma'am.

9 Q And your testimony is before you went to court to
10 plead guilty that day, you had just that one meeting?

11 A Yes, ma'am.

12 Q And your testimony is that it was about a 10-minute
13 meeting?

14 A Yes, ma'am.

15 Q What did y'all talk about during that 10-minute
16 meeting?

17 A The 10-minute meeting, we was talking about that he
18 was going to get me a plea for the 15 years cut to seven.
19 And he said that's about the best deal he could do for me.
20 And it would only be my second offense.

21 Q So, at that meeting, you weren't talking about the
22 State's evidence or anything like that, it was just about
23 pleading guilty?

24 A No, ma'am. I never seen no evidence in my case.
25 When I tried to see him at the preliminary hearing, he

1 abandoned me.

2 Q Okay. So, during that first 10-minute meeting,
3 you talked about getting this plea deal; is that
4 correct?

5 A Yes. That's what he explained to me.

6 Q And when you came up to the courthouse on September
7 23rd, that's when Mr. Warder told you you've got this
8 deal?

9 A Yes, ma'am.

10 Q And your testimony is that he told you it would be 15
11 years cut to seven?

12 A Yes, ma'am.

13 Q And what did you think that meant, that it would be
14 15 years, suspended on the service of seven?

15 A Yes, ma'am --

16 Q Or did you -- okay.

17 A Yes, ma'am.

18 Q Well, when the Solicitor mentioned that the plea
19 recommendation was for 15 years and did not mention the
20 seven years suspended, why didn't you say anything at that
21 time?

22 A Because I figured that it was still going down
23 according to planned. I never knowed [sic] the relations
24 to the law and the language. Because I never went to
25 no [sic] law school.

1 So when he had told me that this is what was going
2 on, I never said nothing. But if I would have knew that
3 this wasn't going down according to planned, I would have
4 said something.

5 Q So even though the Solicitor said there was a 15-year
6 recommendation, you thought that you were still going to
7 get that seven years suspended?

8 A Yes, ma'am. I thought that was just the language of
9 the Court. Like I never knew that a preliminary hearing
10 and probable cause hearing was the same thing until I got
11 a Black's Law Dictionary and looked into it myself.

12 Q Now, you were, clearly, upset with Mr. Warder for not
13 showing up to the preliminary hearing, would that be fair
14 so say?

15 A That's true.

16 Q Well, why did you tell Judge Miller that day you were
17 satisfied with Mr. Warder, and you had had more than
18 enough time to review all of the evidence?

19 A Because -- I never said anything about the evidence.
20 I only said that I was satisfied with him. Because I
21 figured that he had gotten me a -- what he had told me, a
22 deal.

23 Q You don't recall the Judge asking you if you had
24 enough time to review the evidence against you? You don't
25 recall that?

1 A No, ma'am.

2 Q All right. But you told the Judge you were satisfied
3 because you just wanted to get that deal?

4 A Yes, ma'am. If he would have stood up to -- if
5 everything would have went down according to planned, I
6 wouldn't have came here today. But from what -- I didn't
7 find none of this out that it didn't go down like that
8 until I had got to the prison and went to go see the case
9 worker.. And she told me this is not what you have, young
10 man, you have 15 years, 85 percent.

11 Q And one of the things you said that Mr. Warder told
12 you is that you'd be pleading guilty to a second offense;
13 is that correct?

14 A That is true, ma'am.

15 Q Well, when they were talking about third offense
16 during the plea, why did you object or tell Mr. Warder at
17 that point, you know, I thought I was pleading guilty to
18 second offense?

19 A Because I thought that you had to put it out there as
20 a third offense, and then it would be dropped down and --
21 once you take the plea. But if you didn't take the plea,
22 this is what was going to happen, it was going to be a
23 third offense.

24 Q And, again, you told the Judge that you didn't have
25 any promises made to you to get you to plead guilty. Are

1 you saying now that that's not true, that Mr. Warder had
2 made you these promises about your sentence?

3 A Yeah. He just told me that I was going to take a
4 plea. So he didn't promise me that something else was
5 going to happen. This was the only thing that he told me.
6 And I figured that was in the guidelines, that he was
7 telling me about a plea that I was going to receive. But
8 that ain't what happened. So, yes, I guess he did promise
9 me something that didn't happen.

10 Q And your testimony today is if you had had that
11 preliminary hearing, you believe that some of these
12 charges just would have been dismissed?

13 A Yes, ma'am.

14 Q And did you tell that to Mr. Warder? Did y'all talk
15 about the fact that he didn't show up to your preliminary
16 hearing?

17 A Yes, ma'am.

18 Q What did he say when you asked him why he didn't
19 appear?

20 A He said he came.

21 Q He told you he had come to the preliminary hearing?

22 A Yeah. He told my family the same thing.

23 Q Well, why did you go ahead and plead guilty,
24 instead of waiting and getting a preliminary hearing
25 rescheduled?

DIRECT EXAMINATION

1
2 BY MS. RATIGAN:

3 Q Mr. Warder, do you recall representing Mr. Graham on
4 these charges?

5 A Yes, ma'am. There was three groups of charges. I
6 was, initially, hired on March the 3rd, to represent him
7 on a sale of crack cocaine.

8 Q March the 3rd of 2009?

9 A 2008.

10 Q Okay.

11 A And a warrant charge charging him with sale of crack
12 cocaine within the proximity of a school. And he was
13 released on bond. He was rearrested while out on bond on
14 March the 5th, 2009, on three more counts of sale of crack
15 cocaine that occurred while he was out on bond, three
16 counts of sale of crack cocaine within a public school or
17 park.

18 And then he was rearrested while out on bond from the
19 first and second on June 3rd of 2009. And, at that time,
20 he got three more counts of possession of cocaine base,
21 one count of possession of marijuana, one count of sale of
22 cocaine base within proximity of a park or school, and
23 assault on an officer while resisting arrest.

24 And then he -- my client came in and hired me. He
25 faced 30 years. When we went to court, he faced 191

1 years, 161 of which were picked up on the period he was
2 out on bond.

3 The preliminary hearing the client complains of was
4 on the third set of charges. And, in that particular
5 incident, he filled out a pro se request for a bond
6 hearing at the jail. I had not sent in a letter
7 representing him, because I had not contracted to
8 represent him on the last group of charges. And so the
9 first time I knew that there was a preliminary hearing
10 requested on them was when I received a call from the
11 Judge saying that they had him there for a preliminary
12 hearing, and he was saying I was his lawyer.

13 At that point in time, I informed the Court that I
14 represented him on other charges, that I would have to
15 take care of all the charges that fell together, and would
16 she, please, reschedule the hearing. She did that on
17 September 11th, 2009.

18 Q Let's back up just a little bit and make sure we hit
19 all the high points.

20 So it would be fair to say over the course of 18
21 months, he picked up charges as -- all along?

22 A Yes.

23 Q Did you file discovery motions for each set, or did
24 you just have continuing discovery?

25 A I think we filed motions for the first and the

1 second.

2 Q And, prior to his plea in September of 2009, had you
3 met with Mr. Graham to discuss all three sets of charges?

4 A Well, he was out on the charges -- group one and two.
5 And we had talked during that time. I had talked to him.
6 He was in jail after the third arrest.

7 Q So the charges we're talking about here today, the
8 ones that he pled to, which -- were they all from one
9 group of charges, or was it -- were they kind of spread
10 out? Do you recall?

11 A These were the whole three series of arrest charges.

12 Q And did you discuss with Mr. Graham the State's
13 evidence against him on these charges?

14 A Yes. We discussed -- each time that his charges
15 would come in, we discussed them with him.

16 Q And did you discuss with him the sentences he was
17 facing on each of these charges?

18 A Yes. I had, initially, on the first set of charges
19 worked out a 10-year recommendation from the State that --
20 the March 5th, 2009, rearrest negated that offer. I was,
21 finally, able to get a recommendation of everything for 15
22 years.

23 Q And when did you get that 15-year recommendation?

24 A I honestly don't know. The plea had to be accepted,
25 I have a note in my file, before September 30th of 2009.

1 It had to be accepted and entered. And that was the
2 reason that we entered it as quick as we did on that day.

3 Q Now, was it a straight 15-year recommendation, or was
4 any part of it to be suspended?

5 A There was no suspended sentences. A great deal of
6 them you couldn't have a suspended sentence on.

7 Q Did you -- I'm sorry -- continue. Go ahead.

8 A But it was a third offense, a 15-year recommendation
9 of which he'd have to serve a minimum of 85 percent.

10 Q Now, did you tell Mr. Graham that any part of this
11 recommendation was suspended?

12 A No. I probably told him just the opposite, that no
13 part of it could be.

14 Q And did you communicate to him that he'd be pleading
15 guilty to a third offense?

16 A Yes.

17 Q And did you have the NCIC or RAP sheet in this
18 case?

19 A Yes.

20 Q In your opinion, was he validly charged as a third
21 offense?

22 A It might have been more, but it was, at least, a
23 third offense.

24 Q And you explained to Mr. Graham that he would be
25 pleading guilty to a third offense for a 15-year

1 recommendation?

2 A Yes. It was a minimum sentence. I'm sure I told him
3 that.

4 Q Did he ever -- let me go back a little bit.

5 After the issue about the preliminary hearing, did
6 you communicate to him that that hearing had been
7 rescheduled?

8 A I don't know. Because after that happened, the plea
9 had a deadline on it that we had to take it within about
10 15 days. I don't think we ever seriously considered
11 rescheduling it.

12 Q In your opinion, did you have any arguable issues for
13 a preliminary hearing?

14 A No. I mean, I don't think that I -- it would have
15 been of any value at all. Certainly, the 10-year offer
16 was only on the first year [sic]. I think that we were
17 getting the same offer on the three offenses that we could
18 get on two, and the third were just kind of thrown in. I
19 think it would have been nothing of any benefit.

20 And even if the Judge had thrown one of them out, it
21 would have been of no benefit. I don't think we could
22 have gotten better than the 15-year recommendation on
23 those two sets of facts anyway.

24 MS. RATIGAN: That's all I have, Your Honor.

25 THE COURT: Cross-examination.

CROSS-EXAMINATION

1
2 BY MR. DOVER:

3 Q Mr. Warder, do you know -- have any idea what
4 Mr. Graham is talking about when he -- I mean, you've
5 heard his testimony that he is certain that you told him
6 that it was going to be a suspended sentence to seven
7 years?

8 I mean, I know the law. I know the sentencing. Do
9 you have any justification why he would think that, or
10 heard that, or think you said that to him?

11 A You know, I've sat here and tried to think about
12 that. And, early on, when we had the 10 years, that would
13 have been eight and a half that he would have had to have
14 done on that. I don't know if somehow he thought that --
15 the number seven, I can't think of any way it could
16 have...

17 Q You don't -- as you sit here today, you don't recall
18 any opportunity or chance that you would have told him
19 that? I mean, that doesn't make sense to me. I'm just
20 asking you --

21 A No. I don't believe I said that. And that's -- if I
22 did -- well, I'm just sure I didn't. Because there's no
23 logical thing it referred to.

24 MR. DOVER: Excuse me just a moment.

25 (Pause.)

1 BY MR. DOVER:

2 Q Do you recall back in the first set of charges that
3 occurred back in March of 2008, was part of the sentence
4 structure or the recommendation a reduction to maybe
5 second offense, or were they holding firm to a third
6 offense? And, if so, how would they have been able
7 to give him 10 years on that? Do you remember,
8 Mr. Warder?

9 A I don't recall how the negotiations came about. I
10 might have some letter here showing you, but I don't
11 remember that.

12 Q Okay. You don't recall how that would have been --
13 it had to have been a year -- you would agree with me, it
14 would have had to have been reduced to a second offense,
15 or whatever at that time to get him to that level?

16 A But that offer went away with the second arrest.

17 Q And that's what Mr. Graham wanted me to ask you next,
18 and I will. He wanted to know what happened to the
19 10-year sentence. I know the answer. But what happened
20 to the 10-year recommendation?

21 A Well, the police were -- wanted a much bigger
22 sentence. The Solicitor felt like he could no longer
23 offer that. And so from that point, it was, you know,
24 we're going to try him and put him in jail for 25 years.
25 And then we got it back down to 15 years.

1 Q So he wanted to know what happened between the 10
2 years and the 15 years. The two subsequent arrests, did
3 the Solicitor pull the 10-year deal off the table?

4 A Yeah. And then after that, there became a third set
5 of arrests, so, I mean.

6 MR. DOVER: That's all.

7 THE COURT: Redirect?

8 MS. RATIGAN: No redirect, Judge.

9 And the State would rest at this time.

10 THE COURT: Thank you, Mr. Warder.

11 Any reply?

12 MR. DOVER: No reply.

13 THE COURT: Any closing argument or statements?

14 MR. DOVER: I don't have any closing -- now, I have
15 shared with the Applicant the recent holding in Holden v.
16 State. And I've given him a copy of that. It's from our
17 Supreme Court.

18 THE COURT: Okay. Thank you, Mr. Dover.

19 Ms. Ratigan.

20 MS. RATIGAN: I would just cite again Holden.
21 That's, actually, a Greenville case. That's, actually, my
22 case. Holden is very clear that what's in the plea
23 document -- the plea transcript is what carries.

24 Mr. Graham had an opportunity to make these
25 allegations during the plea and refute what was said, and

1 he chose not to do so. We'd state he hasn't met his
2 burden of proof.

3 THE COURT: Okay. I'm going to review the record in
4 light of what I've heard here today.

5 And thank you very much.

6 I'll let you know my decision as soon as I can.

7 *****END OF TRANSCRIPT OF RECORD*****
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CERTIFICATE OF REPORTER

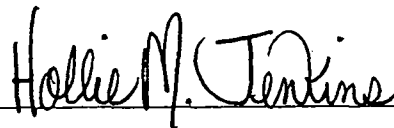
STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth 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 the evidence introduced in the captioned case, relative to appeal, in the Court of Common Pleas for Pickens County, South Carolina, on the 1st day of August, 2011.

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

November 5, 2012



Hollie M. Jenkins, Court Reporter

My Commission Expires: 09/24/20

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF PICKENS)

Alex Brice Graham,
S.C.D.C. No. 337040,

Applicant,

v.

State of South Carolina,

Respondent.

PICKENS COUNTY
SOUTH CAROLINA
Case No. 2010-CP-39-0210

231 AUG 19 P 1:01

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed February 5, 2010. The Respondent made its return on April 21, 2011. An evidentiary hearing into the matter was convened on August 1, 2011 at the Pickens County Courthouse. The Applicant was present at the hearing and represented by R. Scott Dover, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, Richard H. Warder, Esquire. The Court had before it the transcript of the guilty plea hearing, the records of the Pickens County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the Respondent's return.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Pickens County Clerk of Court. The Applicant waived presentment to the Pickens County Grand Jury on charges of resisting arrest with assault

9/14

(2009-GS-39-1438), two (2) counts of distribution of cocaine base within 1/2 mile of a park (2009-GS-39-1439, -1448), and two (2) counts of distribution of cocaine base (crack cocaine) (2009-GS-39-1440, -1446). Richard H. Warder, Esquire represented the Applicant.

On September 23, 2009, the Applicant pled guilty. The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of ten (10) years for resisting arrest with assault, fifteen (15) years for each count of distribution of cocaine base within 1/2 mile of a park, and fifteen (15) years for each count of distribution of cocaine base, third offense. The Applicant did not appeal.

ALLEGATIONS

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

- 1. Ineffective assistance of counsel:
 - a. Failed to appear at preliminary hearing.
 - b. Failed to request "a Frank's hearing on the arrest warrant."
- 2. Involuntary guilty plea:
 - a. Did not "knowing and voluntary waive his right to a grand jury presentment of the indictments.
- 3. "Charges should have been dismissed at preliminary hearings."
- 4. Did not waive right to an appeal.

On August 1, 2011, the Applicant filed a "Propose Amendment to Post Conviction Application" in which he alleged:

- 1. Ineffective assistance of counsel:
 - a. Failed to file "motion regarding the 15 on everything, except 10 on the resisting arrest case discrepancy between the oral pronouncement of the sentences and the written order."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and hear the testimony and arguments presented at the PCR hearing. This Court has further had the

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HIT

opportunity to observe the witnesses who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel/Involuntary Guilty Plea

The Applicant alleges his guilty plea was involuntary and that 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).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel’s representation was below the standard of reasonableness and that, but for counsel’s unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000).

The Applicant stated he and plea counsel had one meeting at the jail and one meeting at the courthouse before the guilty plea hearing. The Applicant stated plea counsel did not appear at a scheduled preliminary hearing. On the day of the plea, the Applicant stated plea counsel told him there was a plea deal for a fifteen (15) year sentence that would be suspended to seven (7) years. The Applicant admitted the plea judge later advised him that the minimum sentence he could receive on the distribution charge was fifteen (15) years. The Applicant stated plea counsel told him the distribution charge had been reduced to a second offense. The Applicant testified he did not object at the plea hearing when the State announced the fifteen (15) year recommendation because he thought things were proceeding according to plan. The Applicant admitted he told the plea judge he was satisfied with counsel and had reviewed the evidence because he wanted the plea deal. Though the Applicant said he believed he was pleading guilty to a second offense, he could not explain why he did not object at the plea hearing when the State noted it was a third offense.

Plea counsel testified he actually represented the Applicant on three (3) sets of charges – two of which were accrued while the Applicant was released on bond. Plea counsel testified the Applicant originally faced a maximum sentence of thirty (30) years but that it was increased to one hundred ninety-one (191) years because of the additional charges. Plea counsel testified he explained the State's evidence on the charges and possible sentences he was facing. Plea counsel testified the Applicant had filed a pro se request for a preliminary hearing but that he had not filed a letter of representation because he was not contracted to handle that set of charges. Plea counsel stated, however, that the judge agreed to reschedule the preliminary hearing. Plea counsel stated that, regardless, there were no viable issues for a preliminary hearing. Plea counsel stated there was a plea offer for a ten (10) year sentence on the first set of charges, but it

was withdrawn when the Applicant was re-arrested. Plea counsel stated the fifteen (15) year recommendation was for a third offense on the distribution charge and no suspended sentences. Plea counsel stated he never told the Applicant he would receive a seven (7) year sentence.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds the Applicant's testimony is not credible, while also finding plea counsel's testimony is credible. This Court further finds plea counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

The Applicant admitted to the plea judge both that he was guilty and that the facts recited by the solicitor were true. (Plea transcript, p.8; p.11). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced in any way. (Plea transcript, pp.5-9).

This Court finds the Applicant failed to meet his burden of proving plea counsel was ineffective regarding his preliminary hearing. Plea counsel testified he had not been informed of the Applicant's request for a preliminary hearing on some of his charges because he had not been hired to represent the Applicant on that set of charges. Plea counsel testified the preliminary hearing was rescheduled. This Court finds plea counsel's testimony is credible. This Court notes one does not have a constitutional right to a preliminary hearing. See State v. Keenan, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982). Plea counsel testified there was no value in having a preliminary hearing on these charges and the Applicant has failed to articulate what arguments plea counsel could have made at a preliminary hearing that would have affected the outcome of his case.

This Court finds the Applicant failed to meet his burden of proving plea counsel

misadvised him about the plea recommendation. Plea counsel testified the plea offer was for a fifteen (15) year sentence and he relayed this to the Applicant. Plea counsel also testified he never advised the Applicant he would receive a seven (7) year sentence. This Court finds plea counsel's testimony is credible. This Court notes the recommendation was stated on the record at the guilty plea hearing and neither the Applicant nor plea counsel objected. (Plea transcript, p.10). This Court also notes that fifteen (15) years is the minimum sentence one can receive for a third offense of distribution of crack cocaine. This Court finds that, even assuming arguendo that plea counsel misadvised the Applicant about the recommendation, any error was cured by the plea colloquy. See Holden v. State, Op. No. 27012 at *5 (S.C. Sup. Ct. filed July 25, 2011); Burnett v. State, 352 S.C. 589, 593-94, 576 S.E.2d 144, 246 (2003).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by plea counsel's performance.

This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to

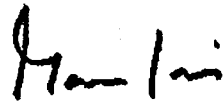
proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that she must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if she wants to secure appropriate appellate review. Her attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 17 day of Aug., 2011.



D. Garrison Hill
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

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WITNESSES

Jonathan Hamby

Easley Police Department

6/3/2009

ARREST WARRANT NUMBER

K360642

ACTION OF GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2009-GS-39-
CLN 1438

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

TERM 2009

THE STATE

vs.

ALEX BRICE GRAHAM

Indictment for

0256

RESISTING ARREST WITH ASSAULT

VIOLATION § 16-09-0320(B)

VAV

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

INDICTMENT FOR
RESISTING ARREST WITH ASSAULT

At a Court of General Sessions, convened on _____ the Grand Jurors of Pickens
County present upon their oath:

That ALEX BRICE GRAHAM did in Pickens County, on or about the 2nd day of June, 2009, knowingly and willfully and unlawfully assault, beat or wound Jonathan Hamby with the Easley Police Department while resisting an arrest by one whom he knew or reasonably should have known was a law enforcement officer. This is in violation of §16-9-320(B) of the South Carolina Code of Laws (1976) as amended.

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


SOLICITOR

62

WITNESSES

Jonathan Hamby

Easley Police Department

6/3/2009

ARREST WARRANT NUMBER

K360641

ACTION OF GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2009-GS-39-^{CLN} 1439

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

TERM 2009

THE STATE

vs.

ALEX BRICE GRAHAM

Indictment for

0108

DISTRIBUTION OF COCAINE BASE WITHIN 1/2 MILE OF A PARK

VIOLATION § 44-53-0445(B)(2)

VK

DL SUSPENDS

Did Clerk receive driver's license?

YES _____ NO

If no, explain _____

Defendant Alex Brice Graham

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

INDICTMENT FOR
DISTRIBUTION OF COCAINE BASE WITHIN 1/2 MILE OF A
PARK

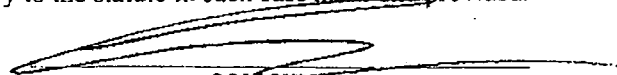
At a Court of General Sessions, convened on

the Grand Jurors of Pickens

County present upon their oath:

That ALEX BRICE GRAHAM did in Pickens County, on or about the 2nd day of June, 2009, distribute a quantity of Cocaine Base (Crack Cocaine), a controlled substance, while being within one-half (1/2) mile proximity of Hagood Park. This is in violation of §44-53-445 of the South Carolina Code of Laws (1976) as amended.

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


SOLICITOR

WITNESSES

Jonathan Hamby

Easley Police Department

6/3/2009

ARREST WARRANT NUMBER

K360639

ACTION OF GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2009-GS-39-1440
CLN

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

TERM 2009

THE STATE

vs.

ALEX BRICE GRAHAM

Indictment for

3039

DISTRIBUTION OF COCAINE BASE (CRACK
COCAINE)

VIOLATION § 44-53-0375(B)(3)

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

INDICTMENT FOR
DISTRIBUTION OF COCAINE BASE (CRACK COCAINE)

At a Court of General Sessions, convened on

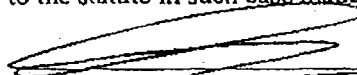
the Grand Jurors of Pickens

County present upon their oath:

That ALEX BRICE GRAHAM did in Pickens County, on or about the 2nd day of June, 2009, distribute, dispense, deliver, or aid, abet, or conspire to distribute, dispense or deliver to an undercover operative a quantity of Cocaine Base (Crack Cocaine), a controlled substance, such distribution not having been authorized by law.

This is in violation of §44-53-375 of the South Carolina Code of Laws (1976) as amended.

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


SOLICITOR

WITNESSES

D Patterson

Easley Police Department

3/5/2009

ARREST WARRANT NUMBER

K360418

ACTION OF GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2009-GS-39-^{CLN} 1446

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

TERM 2009

THE STATE

vs.

ALEX BRICE GRAHAM

Indictment for

3039

DISTRIBUTION OF COCAINE BASE (CRACK
COCAINE)

VIOLATION § 44-53-0375(B)(3)

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

INDICTMENT FOR
DISTRIBUTION OF COCAINE BASE (CRACK COCAINE)

At a Court of General Sessions, convened on

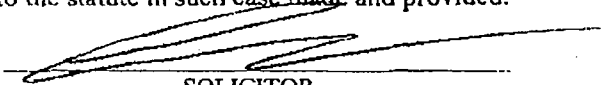
the Grand Jurors of Pickens

County present upon their oath:

That ALEX BRICE GRAHAM did in Pickens County, between March 2, 2009 and March 5, 2009, distribute, dispense, deliver, or aid, abet, or conspire to distribute, dispense or deliver to an undercover operative a quantity of Cocaine Base (Crack Cocaine), a controlled substance, such distribution not having been authorized by law.

This is in violation of §44-53-375 of the South Carolina Code of Laws (1976) as amended.

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


SOLICITOR

WITNESSES

D Patterson

Easley Police Department

3/5/2009

ARREST WARRANT NUMBER

K360420

ACTION OF GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2009-GS-39-^{CLN} 1448
The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

TERM 2009

THE STATE

vs.

ALEX BRICE GRAHAM

Indictment for

0108

DISTRIBUTION OF COCAINE BASE WITHIN 1/2
MILE OF A PARK

VIOLATION § 44-53-0445(B)(2)

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

INDICTMENT FOR
DISTRIBUTION OF COCAINE BASE WITHIN 1/2 MILE OF A
PARK

At a Court of General Sessions, convened on

the Grand Jurors of Pickens

County present upon their oath:

That ALEX BRICE GRAHAM did in Pickens County, on or about the between March 2, 2009 and March 5, 2009, distribute a quantity of Cocaine Base (Crack Cocaine), a controlled substance, while being within one-half (1/2) mile proximity of Hagood Park. This is in violation of §44-53-445 of the South Carolina Code of Laws (1976) as amended.

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


SOLICITOR