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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

William A. McKinnon, Circuit Court Judge

Case No. 2013-GS-46-02041
Appellate Case No. 2021-000226

State of South Carolina,

Respondent,

v.

Duane A. Harrison

Appellant.

RECORD ON APPEAL

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Notice of Motion and Motion to Vacate
Defendant's Sentence and Conviction for
Lack of Subject Matter Jurisdiction.1

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STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF GENERAL SESSIONS
SIXTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA)

Case No.: Amended Indictment No.
2013-GS-46-02040

vs.)

NOTICE OF MOTION AND MOTION
TO VACATE DEFENDANT'S SENTENCE
AND CONVICTION FOR LACK OF
SUBJECT MATTER JURISDICTION

DUANE ARNESS HARRISON,)

Defendant/Movant.)

TO: The Honorable Kevin Brackett, Esquire, Solicitor and The Honorable Matthew Shelton, Esquire, Assistant Solicitor, Sixteenth Judicial Circuit:

YOU WILL PLEASE TAKE NOTICE that Defendant Duane Arness Harrison, also referred as the "Movant" in this matter, by and through the undersigned attorney, will move before the presiding Judge of the above-captioned court, not earlier than ten days (10) after service of this Notice and Motion, unless a different period is fixed by an order of the Court, for an order vacating the Judgment of conviction and sentence that were entered by the Honorable Judge Lee S. Alford in this matter on September 02, 2014.

The grounds for this Motion are as follows:

1. By Amended Indictment dated May 29, 2014, Defendant was indicted for Trafficking in Cocaine, in violation of *S.C. Code 44-53-370(e)(2)(a)*. The CDR Code for the indicted offense is 0281 [hereinafter referred to as the "Indictment"]. See, *Defendant's Exhibit No. 4*.

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2. The indictment basically follows the language contained in *S.C. Code 44-53-370(e)(2)(a)*, to wit:

“Between the dates of September 30, 2012 through October 30, 2012, the Defendant...did knowingly sell, manufacture, cultivate, deliver, purchase, or bring into this State, or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive possessive of four hundred (400) grams or more of cocaine . . . all in violation of 44-53-370, Code of Laws of South Carolina, (1976, as amended). *See, Id.*”

3. On September 02, 2014, Defendant entered a “no contest plea” to the Indictment under a negotiated plea where the amount of the drugs in the Indictment was reduced to twenty-eight (28) to one hundred (100) grams. *See, Defendant Exhibit No. 3, Transcript of Record, p. 5, Lines 22-25* [Transcript of Record is hereinafter cited as the “Sentencing Transcript”].
4. A fair reading of the Sentencing Transcript establishes that the State was relying upon a theory that Defendant conspired to traffic cocaine because the evidence never showed that the Defendant was ever in possession of the package that was intercepted by law enforcement and delivered to the co-defendant after replacing the cocaine with the “fake drugs”.
5. Moreover, Judge Alford, the trial judge, expressly stated several times during the sentencing hearing that the Defendant was pleading to conspiracy to trafficking cocaine.¹

¹Judge Alford said: “Mr. Harrison, you are charged today with conspiring to traffic in cocaine in an amount between twenty-eight grams and one hundred grams, first offense. . .” *Sentencing Transcript, p. 7, Lines 17-19*. In stating how he would have ruled on a pending motion, Judge Alford also said the following: “. . .First of all, they [the emails] are relevant as to the relationship with regard to any conspiracy between these individuals. . .” *Sentencing Transcript, p. 20, Lines 3-5*. Then, in accepting the Defendant’s plea, Judge Alford said, in part: “. . .Now, Mr. Harrison in your case, you had plead [sic] no contest to the charge of conspiracy and trafficking in cocaine in the amount of twenty-eight grams or less than one hundred grams first offense. . .” *Sentencing Transcript p. 29, Lines 15-18*.

6. Judge Alford's Sentencing Sheet states that the Defendant was committed for "Drugs/Conspiracy to Traffick in Cocaine 28 g or more, but less than 100 grams, 1st offense" in violation of S.C. Code § 44-53-0370(e)(2)(b)¹² [hereinafter referred to as the ["the Conviction"]]. The CDR Code listed on the Sentencing Sheet is 0281. Additionally, the Sentencing Sheet also states that the Defendant was convicted of a "Lesser Included Offense".
7. The CDR code sheet for the charge on the Indictment and the charge for the Conviction are hereby attached as Defendant Exhibits 1 and 2. Said sheets were downloaded from the South Carolina Judicial Branch's website.
8. The jurisdiction of a court over the subject matter of a proceeding is fundamental. *Anderson v. Anderson*, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989). "Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court." *Id.*
9. It is well-settled that issues related to subject matter jurisdiction may be raised at any time, including for the first time on appeal and even after collateral matters have already been adjudicated. *Carter v. State*, 329 S.C. 355, 495 S.E.2d 773 (1998); *State v. Funderburk*, 259 S.C. 256, 191 S.E.2d 520 (1972); *see also, Brown v. State*, 343 S.C. 342, 540 S.E.2d 846 (2001)[In this case, our State Supreme Court entertained an appeal of a defendant who had been convicted on drugs charges and later raised the issue of lack of subject matter jurisdiction even after the first PCR had been denied and the case

¹²The Sentencing Sheet is part of the Clerk's File. Counsel does not have a presentable copy to tender with this Motion. However, Defendant craves reference to the Sentencing Sheet and incorporates the same within this Motion as if fully set out.

had been previously denied by the state supreme court. The Court heard the case and vacated the conviction and sentence for lack of subject matter jurisdiction].

10. "[T]he acts of a court with respect to a matter as to which it has no jurisdiction are void." *Funderburk*, 259 S.C. at 261, 191 S.E.2d at 522.
11. The circuit court does not have subject matter jurisdiction to hear a guilty plea unless:
(a) there has been an indictment which sufficiently states the offense; (b) there has been a waiver of indictment; or (c) the charge is a lesser included charge of the crime charged in the indictment. *Carter v. State*, *supra*.
12. In this case, the Court did not have subject matter jurisdiction to accept Defendant Harrison's plea because there was no sufficient indictment to reflect the reduced amount of the drugs charged, nor was there a waiver or indictment, nor was the conviction a lesser included charge of the crime charged in the Amendment Indictment [see, *State v. Gosnell*, *supra*]. Therefore, Harrison's conviction and sentence are void as a matter of law, and such sentenced and conviction must be vacated.
13. Moreover, conspiracy is not a lesser-included offense of the substantive statutory offense of trafficking in cocaine. Hence, for this independent reason, the court did not have subject matter jurisdiction to accept Defendant Harrison's plea because there was no sufficient indictment to reflect the reduced amount of the drugs charged, nor was there a waiver or indictment, nor was the conviction a lesser included charge of the crime charged in the Amendment Indictment. Therefore, Harrison's conviction and sentence are void as a matter of law, and such sentenced and conviction must be vacated.³

³Counsel is aware of the case of *Gordon v. State*, 2004-MO-044 (2004). This is a non-binding, Memorandum Opinion, in which Justice Waller dissented. As a non-binding MO opinion, this case is not controlling in the case subjudice.

14. Movant did not consult with opposing counsel because such consultation would have served no useful purpose.

Plaintiff will rely upon the all documents in the file, the Joint Appendix on file in the South Carolina Supreme court in the associated PCR case, and Defendant's Memorandum, if any, and any other materials allowed under the applicable rules.

WHEREFORE, for the reasons outlined in this Motion and based upon the arguments to be presented at the hearing of this Motion, Defendant seeks the following relief:

- a. For an order vacating his conviction and sentence in this matter.
- b. For such further relief the Court deems just and proper.

Dated: November 03, 2020

/s/ Glenn Walters, Sr.
GLENN WALTERS, Sr.
1910 Russell Street (29115)
Post Office Box 1346
Orangeburg, SC 29116
Ph: 803 531-8844
Fax: 803 531-3628
SC Bar No.: 1346

Attorney for Defendant

EXHIBITS:

- 1-CDR Code Sheet 0281
- 2-CDR Code Sheet 2359
- 3-Sentencing Transcript
- 4-Copy of the Amended Indictment

Moreover, Counsel will show the court that the law as argued by Justice Waller in this case is actually the controlling, dispositive law in this case, to wit: that conspiracy is not a lesser-included offense to the statutory offense of trafficking.

EXHIBIT 1-CDR Code Sheet 0281

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CDR Codes

CDR Code:

0281

Offense Description:

Drugs / Trafficking in cocaine, 400 g or more

Offense Statute(s):

44-53-0370(e)(2)(e)

Penalty Statute(s):

44-53-0370(c)(2)(e) 16-01-0010(D)

Offense Type:

Felony

Offense Class:

Exempt

Status:

Active

Effective Date:

Expiration Date:

Rescind/Retire Date:

Last Updated:

Handwritten scribbles and lines, possibly representing a signature or initials.

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Defendant
EXHIBIT "1"

EXHIBIT 2-CDR Code Sheet 2359

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CDR Codes

CDR Code:

2359

Offense Description:

Drugs / Trafficking in cocaine, 28 g or more, but less than 100 g - 1st offense

Offense Statute(s):

44-53-0370(e)(2)(b)1

Penalty Statute(s):

44-53-0370(e)(2)(b)1

Offense Type:

Felony

Offense Class:

B

Status:

Active

Effective Date:

Expiration Date:

Rescind/Retire Date:

Last Updated:

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Defendant EXHIBIT "2"

EXHIBIT 3-Sentencing Transcript

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E-X-A-M-I-N-A-T-I-O-N

WITNESS

BY:

PAGE NO.

No witnesses were called.

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I-N-D-E-X - CON'T

E-X-H-I-B-I-T-S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
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No Exhibits were received into the record.

Court Reporter's Certificate Page P.31

1 (COURT IN SESSION AND ON THE RECORD AT 10:55 A.M..)

2 THE COURT: Thank you. Please be seated.

3 SOLICITOR SHELTON: Your Honor, I believe Ms. Moody
4 and Mr. Rutherford are still speaking with their clients.

5 THE COURT: Okay.

6 SOLICITOR SHELTON: While we can give them another
7 minute or two.

8 THE COURT: All right. We can do that.

9 (PAUSE.)

10 SOLICITOR SHELTON: Judge, may we approach?

11 THE COURT: Yes, sir.

12 (BENCH CONFERENCE OFF THE RECORD AT 11:00 A.M..)

13 THE COURT: It'll take a few minutes to sign their
14 clients up.

15 (COURT AT EASE AT 11:02 A.M..)

16 (COURT BACK IN SESSION AT 12:14 P.M..)

17 (BENCH CONFERENCE OFF THE RECORD AT 12:27 P.M..)

18 MADAM CLERK: Can I get each of you to raise your
19 right hand?

20 (WHEREUPON, JACQUESE TRAVEON
21 UNDERWOOD AND DUANE ARNESS HARRISON, BEING FIRST CALLED AND
22 DULY SWORN, TESTIFIED AS FOLLOWS:)

23 MADAM CLERK: Thank you.

24 SOLICITOR SHELTON: May it please the Court, Your
25 Honor.

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THE COURT: Solicitor.

SOLICITOR SHELTON: Your Honor, standing before you is Duane Arness Harrison repressed by Todd Rutherford of the Richland County Bar. And Jacquese Traveon Underwood represented by Leah Moody of the York County Bar.

Both men as you know were scheduled to resume their jury trial this morning. We had one outstanding pretrial issue that was to be ruled on by Your Honor this morning but in the interim we've been able to negotiate a plea agreement whereby both men are entering No Contest Pleas for a negotiated twelve and a half years.

Their charges as indicted carry the mandatory minimum of twenty-five up to thirty years. This represents exactly half of what they would be exposed to as a mandatory minimum sentence if they were to continue at trial and so their pleading to a lower weight.

Harrison's pleading to trafficking cocaine. I believe it's ten to one hundred grams, first offense. And Underwood is pleading to the same, trafficking cocaine ten to one hundred grams but this one is a second offense based on a prior conviction.

THE COURT: Twenty-eight to one hundred grams. You said --

SOLICITOR SHELTON: Yes, sir. I'm sorry. Twenty-eight to a hundred yes, sir.

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THE COURT: Sir, you're Duane Arness Harrison; is that correct?

MR. HARRISON: Yes, sir.

THE COURT: Mr. Harrison, how old are you?

MR. HARRISON: Forty.

THE COURT: How far did you go in school?

MR. HARRISON: I graduated from high school and a year of college.

THE COURT: What do you do for a job or occupation?

MR. HARRISON: I have my own business BBR Investment. And I also work at ABK Racing.

THE COURT: Are you married, sir?

MR. HARRISON: No, sir.

THE COURT: Do you have children?

MR. HARRISON: Yes, sir.

THE COURT: What are their ages?

MR. HARRISON: A nine month old and a six year old.

THE COURT: Did you serve any time in jail on this charge when you were arrested or anytime since you were arrested?

MR. HARRISON: I think one day.

THE COURT: Sir, you are Jacques Trave on Underwood; is that correct?

MR. UNDERWOOD: Yes, sir.

THE COURT: How old are you, Mr. Underwood?

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MR. UNDERWOOD: Twenty-nine.

THE COURT: How far did you go in school?

MR. UNDERWOOD: Twelfth grade.

THE COURT: What do you do for a job or occupation?

MR. UNDERWOOD: Stewart Plumbing.

THE COURT: Are you married, sir?

MR. UNDERWOOD: No, sir.

THE COURT: Do you have children?

MR. UNDERWOOD: Yes, sir.

THE COURT: What are their ages?

MR. UNDERWOOD: Ten and - Both of 'em are ten.

THE COURT: Did you serve any time in jail on this charge when you were arrested?

MR. UNDERWOOD: Yes, sir.

THE COURT: How much time?

MR. UNDERWOOD: I think a day and a half, two days.

THE COURT: Mr. Harrison, you are charged today with conspiring to traffic in cocaine in an amount between twenty-eight grams and one hundred grams, first offense, which carries as classified as a felony; carries a maximum sentence of twenty-five years and fifty thousand dollar fine and carries a minimum sentence of seven years, the minimum sentence cannot be suspended and no probation granted.

This offense is also classified as a serious offense.

1 The importance of that classification is should you get
2 three serious offenses on your record or a combination of
3 three serious and most serious offenses on your record,
4 upon receiving a third such offense you could get a
5 sentence of life without parole, so called the three
6 strikes rule. This offense is classified as one of those
7 three strikes.

8 Do you understand that?

9 MR. HARRISON: Yes, sir.

10 THE COURT: It's also classified as a violent offense
11 which could affect your ability to participate in certain
12 programs down at the South Carolina Department of
13 Corrections. It is a no parole offense which means you
14 would be expected to serve the sentence you actually
15 receive. You would have to serve at least eighty-five
16 percent of your sentence before you would be eligible for
17 parole. Do you understand that?

18 MR. HARRISON: Yes, sir.

19 THE COURT: Understanding the charge and the maximum
20 minimum sentences you could receive on this charge, my
21 understanding is you wish to enter a plea of No Contest to
22 this charge. Is that correct, sir?

23 MR. HARRISON: Yes, sir.

24 THE COURT: Mr. Underwood, you are charged today with
25 conspiracy to trafficking in cocaine in an amount of

1 twenty-eight grams to one hundred grams, second offense,
 2 which carries a minimum sentence of seven years. A minimum
 3 sentence cannot be suspended nor probation granted. It
 4 carries a maximum sentence of thirty years and a Fifty
 5 Thousand Dollar fine.

6 It's also classified as a felony. It is classified as
 7 a serious offense. As I explained if you get three serious
 8 offenses on your record or a combination of three serious
 9 and most serious offenses on your record upon receiving a
 10 third such offense you could get a sentence of life without
 11 parole, so called three strikes rule. This would classify
 12 as one of those three strikes in your case. Do you
 13 understand that?

14 MR. UNDERWOOD: Yes, sir.

15 THE COURT: It's also classified as a violent offense
 16 and it's classified as a no parole offense. Again you'd be
 17 expected to serve the sentence you actually receive but you
 18 would not be eligible for parole until you've served
 19 eighty-five percent of your sentence. Do you understand
 20 that?

21 MR. UNDERWOOD: Yes, sir.

22 THE COURT: Understanding all of that, my
 23 understanding is that you wish to enter a plea of NO
 24 Contest to this charge. Is that correct, sir?

25 MR. UNDERWOOD: Yes, sir.

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1 for a plea of twelve point five years.

2 Is that your understanding of the agreement you have
3 with the Solicitor's office in order to enter your plea
4 today?

5 MR. HARRISON: Yes, sir.

6 THE COURT: Did anybody promise you anything other
7 than that in order to get you to enter your plea?

8 MR. HARRISON: No, sir.

9 THE COURT: Mr. Underwood, the State has agreed to
10 reduce the amount of cocaine involved in this trafficking
11 case and is recommending or has agreed to a sentence of
12 twelve point five years in your case. Is that your
13 understanding of the agreement you have with the
14 solicitor's office in order to enter your plea today?

15 MR. UNDERWOOD: Yes, sir.

16 THE COURT: Did anybody promise you anything other
17 than that in order to get you to enter your plea today?

18 MR. UNDERWOOD: No, sir.

19 THE COURT: Are you satisfied with the manner in which
20 your attorney has advised and represented you in this case,
21 Mr. Harrison?

22 MR. HARRISON: Yes, sir.

23 THE COURT: Mr. Underwood?

24 MR. UNDERWOOD: Yes, sir.

25 THE COURT: Are you today under the influence of any

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1 mind altering substance such as alcohol, drugs, or
2 prescription medications which interfere with your judgment
3 or ability to understand what you're doing in court today,
4 Mr. Harrison?

5 MR. HARRISON: No, sir.

6 THE COURT: Mr. Underwood?

7 MR. UNDERWOOD: No, sir.

8 THE COURT: Do you have any mental, emotional or
9 nervous condition that interferes with your judgment or
10 ability to understand what you're doing in court today, Mr.
11 Harrison?

12 MR. HARRISON: No, sir.

13 THE COURT: Mr. Underwood?

14 MR. UNDERWOOD: No, sir.

15 THE COURT: Are you entering your plea today of your
16 own free will, Mr. Harrison?

17 MR. HARRISON: Yes, sir.

18 THE COURT: Mr. Underwood?

19 MR. UNDERWOOD: Yes, sir.

20 THE COURT: Please give me the facts.

21 SOLICITOR SHELTON: Thank you, Your Honor. May it
22 please the Court.

23 On October 30th, 2012 an officer from the Drug
24 Enforcement Agency Task Force named Frank Finch was called
25 to the UPS facility on Mount Gallant Road in Rock Hill,

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1 York County, South Carolina in reference to a suspicious
2 package. Agent Finch brought with him a K9 who is trained,
3 along with Agent Finch and package drug detection packages.
4 The K9 conducted a package lineup on five packages as you
5 heard about in pretrial, alerted on the package. There
6 were also indicators on the package suggesting that there
7 was some sort of illegal contraband inside.

8 A search warrant was obtained and executed at the UPS
9 facility where what was gauged or estimated as one kilogram
10 of cocaine was inside of a package. The package was
11 addressed to a residence at [REDACTED] in Rock
12 Hill, South Carolina addressed to a woman named Sharika
13 White who law enforcement were able to confirm that she was
14 in fact a resident at that house.

15 Before I loose my chain of thought, Judge, as you have
16 heard us mention Ms. White was interviewed by the Drug Unit
17 and during their interview they did not suspect she was
18 involved in this activity. It became clear to them that
19 she had been notified by Mr. Underwood the day before and
20 morning of as she characterized it him checking to see if
21 she was home. She would testify consistent with that. I
22 have no reason - had no reason to doubt anything she said
23 to the police or in subsequent interviews, and she was at
24 fact at home with her children at school.

25 Her front door was unlocked. Mr. Underwood had some

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-15-

1 time after that morning after he contacted her this morning
2 actually bought her breakfast at Bojangles, had gone into
3 her house through the unlocked doors. She indicated she
4 did not give him permission to be there and didn't give
5 either one of these men permission to send anything to her
6 house.

7 The package was opened and inside was the kilogram of
8 cocaine. It was taken to the Drug Unit at the Rock Hill
9 Police Department. The kilogram of cocaine was extracted
10 and put in - and submitted as evidence. A imitation of
11 kilogram was put in the box sealed up for what's known as a
12 controlled delivery. An agent out of Lexington County
13 dressed in full UPS uniform went into a white paneled van
14 and went undercover to affect control of the delivery.

15 Officer Harrelson from the Drug Unit was already in
16 the neighborhood before the package was delivered. He
17 observed Mr. Harrison riding up and down the street in a
18 Yukon in what would have been characterized or described as
19 counter surveillance. Things that Commander Brown is
20 trained on has trained all of his agents to look out for.

21 Mr. Harrison was watching the house, was watching
22 traffic in and out of the neighborhood, was watching for
23 the delivery van. In fact he tailed the delivery van out
24 of the neighborhood - in and out of the neighborhood. Only
25 when he doubled back after the controlled delivery had been

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1 affected he slowed by the house and then Mr. Underwood came
2 outside and retrieved the package. He then put it in the
3 trunk of a vehicle that was parked in the garage of the
4 residence, backed the car out and went back inside.

5 Officers from the drug Unit moved in to effect an arrest.
6 Harrison fled from the police in reverse as fast as he
7 could go and then did a one eighty turn and continued to
8 flee through the neighborhood with Commander Brown and
9 other agents chasing him.

10 Harrison got out on foot continued running and threw a
11 couple of cell phones into the woods that were recovered.
12 Underwood was outside of the house when Harrison came by.
13 Harrison was blowing the horn at him. Harrison ran back in
14 the house, locked himself in the house, tried to go out the
15 back door where he was met my Agent Lubin and he then
16 secured himself inside the residence, eventually opening up
17 the residence for officers. They had a anticipatory search
18 warrant for the residence.

19 The package was in the trunk of the car. There was a
20 cell phone in the front seat of the car that Underwood
21 admitted was his. Inside that cell phone was a message to
22 a store contact indicating his new number. That's relevant
23 because that's the number that Harrison had stored in his
24 phone as a contact of Jacq, the exact number that Underwood
25 said was his new number. And between Harrison's phone and

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-17-

1 that number who we know to be Jacq, Jacques Underwood,
2 there were a series of text messages throughout the month
3 of October dealing with what appears to be packaged
4 delivery. That certainly would have been a question for
5 the jury to determine. Also Your Honor was still to rule
6 on the admissibility of those text messages. But
7 regardless on the 17th of October Jacq sent Harrison the
8 address, the [REDACTED] address, through a text
9 message from his new number to Harrison's phone, one of the
10 phones he threw in the woods. And then no more than two
11 weeks later this package arrives.

12 The drugs were tested by our certified chemist Ms.
13 Mitcham. It tested positive as cocaine and it weighed nine
14 hundred and sixty-five grams so it's just shy of a kilogram
15 by what appeared to be a kilo to law enforcement on the
16 front end.

17 Those are the substantive facts, Your Honor.
18 Obviously all those things together exhibited a conspiracy
19 between these two men to traffic the drugs and that's the
20 case the State would argue to the jury and were confident
21 that we would have proven those facts beyond a reasonable
22 doubt to a jury.

23 Mr. Harrison has a prior conviction out of Richland
24 County. In 1995 he was convicted of kidnaping and received
25 an eighteen year sentence. And he also subsequently a

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1 couple of years ago got a possession of marijuana
2 conviction in 2009 in York County.

3 Jacquese Underwood in 2007 received a five year
4 sentence for trafficking in cocaine ten grams to twenty-
5 eight grams. Possession of a stolen pistol and possession
6 of a weapon during the commission of a violent crime.

7 I think Mr. Underwood also has a prior possession of
8 marijuana conviction according to his NCIC. We've made
9 copies of their substantive prior convictions already a
10 part of the court's record when we were dealing with Rule
11 609 issues in pretrial. Also the text message we were
12 referring to earlier in the month have also been made Court
13 Exhibits for Your Honor's consideration on that motion that
14 was outstanding.

15 THE COURT: I find the decision of the defendant Duane
16 Arness Harrison and the defendant Jacquese Traveon
17 Underwood to plead guilty to their - Excuse me - Plead no
18 contest to their respective charges be made freely
19 voluntarily and intelligently. They've had the
20 representation of each of them of a competent attorney with
21 whom each has said he is satisfied. I find the facts
22 presented to the court by the Solicitor's office fully
23 support the plea's in this case and I will accept the pleas
24 as freely and voluntarily made.

25 Mr. Harrison, Mr. Underwood, if you disagree with the

-19-

1 proceeding in which you are currently involved you have ten
2 days from today's date within which to file a Notice of
3 Intent to Appeal. Do you understand your right to appeal
4 today's proceeding, Mr. Harrison?

5 MR. HARRISON: Yes, sir.

6 THE COURT: And, Mr. Underwood?

7 MR. UNDERWOOD: Yes, sir.

8 THE COURT: Counsel, before I hear from you, let me
9 just state on in so far as the motion is outstanding, there
10 is a question of the admissibility of certain text
11 messages, I believe phone messages, text messages from
12 respective cell phones in this case. And the question of
13 whether they were admissible not of the day of the - I
14 believe of the occurrence - but previous phone messages or
15 text between the two defendant's in this case and the Court
16 took that question under advisement.

17 The Court however indicated to the counsel how I had
18 planned to rule in this case and I will tell you for
19 purposes of the record, and I think you can make those
20 exhibits in this case, I find that they would be
21 admissible. Those phone messages would be admissible in
22 the case and I want to give some of the reasons for that
23 and go ahead and put that on the record in the event the
24 question comes up later at Appellate Court level.

25 It comes in for - And I researched this since we had

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1 the motion and I took them under advisement - and there are
2 two reasons, primary reasons that the evidence comes in in
3 a case. First of all they are relevant as to the
4 relationship with regard to any conspiracy between these
5 two individuals so it's relevant. The approbative value to
6 the State is very high; it is somewhat prejudicial to the
7 defendant but the approbative value is somewhat high so by
8 using that balancing test they would come in.

9 Secondly, the Court finds a conspiracy and actually
10 there's more than one but there are several different ways
11 that you can conspire under the trafficking statute and be
12 guilty. One of them is of course this possession of over a
13 certain amount of drugs, either actual or constructive.
14 They don't have to be in your hands. Knowingly actual
15 constructive possession. And certainly in this case Mr.
16 Underwood I think, and I think the evidence shows, he
17 believed he was in possession of about a kilo and in this
18 case it turned out to be nine hundred and sixty-five grams
19 which certainly exceeds the four hundred grams that's
20 required for this maximum trafficking.

21 So he believed he was in possession of it. He picked
22 it up, put it in the car so he was in possession of it,
23 actual possession of it. Even sitting in the car that's
24 constructive possession. So for that reason he could have
25 been proven to be guilty of trafficking on that basis

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1 alone.

2 But also in the statute it provides as follows that
3 anyone who manufactures, cultivates, delivers, purchases,
4 or brings into this state, or provides financial assistance
5 or otherwise aid, abet, attempt, or conspire to sell,
6 manufacture, cultivate, deliver, purchase, or bring into
7 this state, or was knowingly in actual constructive
8 possession as I previously stated.

9 Conspiring in any of those, bringing it into the
10 state, to handle it in this state, do something with it in
11 this state, all of those are guilty of trafficking. And so
12 the state has to prove that there is a connection between
13 these two defendants which would amount to a conspiracy,
14 conspired together to do any of these things. They would
15 have to prove that. But, it's pretty broad this
16 conspiracy, their ability to prove it.

17 Now, I say it is relevant in the case because these
18 two defendant's can simply take the position that they
19 really don't even know each other that well and certainly
20 were not working together with regard to these drugs simply
21 delivered to them on the day in question. They can
22 certainly say we don't know each other so the state has to
23 prove a connection between them and their relationship and
24 how they were involved.

25 That's one reason this evidence comes in, to show

1 through these previous text messages - and it's all within
2 thirty days so their timing - but all of these is showing
3 their connection between them, and similar type activity
4 shows the relationship between them, and they would be able
5 to bring that in to prove their case.

6 It also comes in the State is entitled to present the
7 res gestae of the case according to the cases. That means
8 a full res gestae, what was going on with the parties. So
9 it comes in for that reason, to be able to prove their case
10 that it was a conspiracy going on as part of the res gestae
11 of the case.

12 Finally under - It comes in under Rule 404(b) evidence
13 of other crimes, wrongs or acts is not admissible and reads
14 as I'm reading it to you. Not admissible to prove
15 character of a person in order to show action and
16 conformity there. It may however be admissible to show
17 motive, identity - Again these tend to show identity of the
18 parties - involved the existence of a common scheme of
19 plan. The text messages indicate the same type of conduct
20 and communication between these two defendants as were
21 going on the day the arrest was made and the drugs were
22 delivered.

23 The existence of a common scheme of plan as I said the
24 absence of mistake or action or intent of the parties. And
25 so it comes in under Subsection B and also 404(b). Not to

-23-

1 show the character of the defendants but to show common
2 scheme or plan, identity of the parties involved which the
3 State has to prove the absence of mistake or absence - or
4 the intent of the parties in this case.

5 I go on and cite some cases here. In *State versus*
6 *Wallace* 384 SC 428 683 S.E. 2d 275, the Court found that
7 when determining whether the evidence is admissible as a
8 common scheme or plan the trial court must analyze the
9 similarities and dissimilarities between the crime charged
10 and the bad act evidence to determine whether there is a
11 close degree of similarity. And I found it was all
12 similar, the difference being that the day of the arrest in
13 this case, the day of the occurrence, with the drugs and et
14 cetera, or the delivery of fake drugs as it were. But
15 delivery is except for the fact that there is no text
16 messages that they had been able to retrieve, no pointing
17 out that there are a couple of cell phones that they were
18 not able to get into for whatever reason, but not
19 considering that for or against it, but just to - that was
20 the only dissimilarity. All of the other messages on there
21 are the similar type behavior which is described by the
22 police when they made the arrest on this day or what went
23 on that day they are very similar messages parallel to
24 those that went on in this case. And so it's very similar
25 evidence that was going on.

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1 When the similarities outweigh the dissimilarities,
2 and they do in this case, the bad evidence is admissible
3 under Rule 404(b). And that's cited in *State versus*
4 *Classy, C-l-a-s-b-y*, 385 SC 148, 682 S.E. 2d 892. And the
5 prior bad act evidence is admissible where the evidence is
6 of a such close similarity to the charge of the offense
7 that previous act enhances the approbative value of the
8 evidence so as to outweigh the prejudicial effect. That's
9 exactly the case in here.

10 When it's taken together it enhances the approbative
11 value of the State's evidence to prove the conspiracy in
12 this case. The degree of remoteness between the other
13 crimes and the one charge is one factor to be considered in
14 determining the connection between them. All these phone
15 messages happened within thirty days so it's very close in
16 time.

17 As the similarities become closer the more likely the
18 evidence would be admissible. The acid test of
19 admissibility is the logical relevancy of the other crime.
20 And that they are very relevant. Logically they are very
21 relevant to each other and point to the same type of
22 conduct which the evidence is a conspiracy.

23 When the prior bad acts are very similar in nature
24 these acts are admissible as a common scheme or plan,
25 *State versus Martucci, -a-r-t-u-c-c-I*, found at 387 SC 232

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1 669 S.E. 2d 598.

2 Generally in *State versus Edwards* 373 S.C. 230, 644
3 S.E. 2d 66 the court found such evidence is admissible when
4 the intent to establish a common scheme or plan embracing
5 the commission of two or more crimes so related to each
6 other that proof of one tends to establish the other.
7 That's exactly the case the court finds in this case as far
8 as the State's evidence is concerned.

9 The foundation for admissibility transcends mere
10 similarity for the admission of such evidence of it's
11 common scheme or plan exception requires a connection
12 between the extraneous crime and the crime charged so that
13 proof of the former tends to prove the later. Succinctly
14 stated the prior bad act evidence must be relevant to prove
15 the alleged crime. The Court finds that it is in this case
16 and this is *State versus Tuffour*, T-u-f-f-o-u-r, 364 S.C.
17 497, 1613 S.E. 2d 814.

18 Finally a close degree of similarity or connection
19 between the prior bad act and the crime for which the
20 defendant's are on trial is required to support
21 admissibility under the common scheme or plan exception.
22 The Court so finds that it is in this case. And that's
23 *State versus Chesborough* 346, SC 526, 552 S.E. 2d 300.

24 Finally the trial judge must clearly perceive the
25 connection between the other crimes and the crime charged.

1 Further other crimes which are not a subject of conviction
2 must be proven by clear and convincing evidence. The Court
3 finds that would be clear and convincing evidence in this
4 case in their close connection and logically related
5 between the same and the same type of conduct which would
6 evidence a conspiracy.

7 So for all of those reasons the Court finds Number
8 One, the primary reason is it's evidence of a conspiracy
9 between these two same individuals through the same type of
10 conduct which is trafficking number one and that's pretty
11 broad.

12 And Number Two: It comes under 404(b) Lyle type
13 evidence in this case. The court finds that it meets all
14 the requirements to be admitted and it would be admitted.

15 All right, I put all of that on the record.

16 Now, counsel, I'll go to Mr. Rutherford first I guess
17 as to Mr. Harrison. Anything you wish to say on his
18 behalf?

19 MR. RUTHERFORD: Your Honor, just briefly. As he told
20 you he's told you his background and we respectfully ask
21 that you accept the negotiated sentence. Our understanding
22 is what the court sees as well, that it is for a twelve and
23 half year sentence which is twelve years and six months
24 just for anybody that's listening and trying to figure out
25 what twelve and a half is, which also I believe a hundred

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1 and fifty months all together. That is our understanding
2 of the negotiation and we would ask that Your Honor accept
3 that.

4 My client did one year of college. There is no
5 indication that he cannot read and write, in fact, he can
6 read and write where at the plea sheet that he was given,
7 those are his initials, not mine. He did indicate that he
8 understood everything and has understood everything up
9 until this point. And again, Your Honor, we'd ask that you
10 accept the negotiated sentence.

11 THE COURT: Thank you.

12 Mr. Harrison, you're pleading no contest. You do not
13 have to say anything. Do you want to say anything?

14 MR. HARRISON: No, sir.

15 THE COURT: Now counsel as to Mr. Underwood.

16 Ms. Moody.

17 MS. MOODY: Thank you, Your Honor, may it please the
18 court.

19 I would reiterate what Mr. Rutherford has said in
20 terms of the negotiated plea here that it is twelve and a
21 half years. I can't break down all the numbers but my
22 client did give me that information and did go over the
23 plea affidavit with me and did initial and those are his
24 initials on the sheet.

25 Your Honor, based on your ruling as far as the cell

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1 phone messages, I explained to my client, he understood
2 that was something that we were waiting on and I felt like
3 it would weigh heavily in a trial in this situation and
4 what the State could prove. Not what exactly happened for
5 him but what the State could prove and what consequences of
6 any kind of conviction would have on him in terms of his
7 sentence and what the Court would have to sentence him to
8 and what his sentencing exposure would be. And with that
9 being said, Your Honor, we ask that you accept this
10 negotiated plea.

11 THE COURT: Mr. Harrison, you're pleading no contest.

12 Excuse me. Mr. Underwood, you're pleading no contest.

13 You do not have to say anything. Do you want to say
14 anything?

15 MR. UNDERWOOD: No, sir.

16 THE COURT: I know these sentences are tough on
17 families and tough on the defendant's; I understand that.
18 I believe there is substantial evidence so based on
19 pretrial information that came in and the evidence I
20 believe there is substantial evidence in this case. The
21 ultimate decision would be up to the jury but I think there
22 is substantial evidence to take this case to the jury and
23 it would be their decision.

24 Of course each defendant were convicted of more than
25 four hundred grams if they are convicted of a jury of that

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1 the Court would have had to impose a minimum of twenty-five
2 years no parole. Possibly thirty years up to thirty years
3 no parole. And in this case what you're pleading to is
4 twelve point five years which mean you - on the twenty-five
5 year sentence if you were to get to have to serve twenty-
6 one point twenty-five years before you would be eligible
7 for parole that's a long time.

8 On the twelve and a half year sentence you would have
9 to serve ten point six-two five years before you would be
10 eligible for parole. That's a big difference. Twice the
11 time you would have to serve. You would be a lot older
12 when you got out so I concur and understand why you're
13 pleading in this case.

14 Again I accept the pleas as freely voluntarily made.

15 Now, Mr. Harrison, in your case you have plead no
16 contest to the charge of conspiracy and trafficking cocaine
17 in the amount of twenty-eight grams or less than one
18 hundred grams first offense the sentence of the court is
19 you be committed to the State Department of Corrections for
20 a determinate term of twelve point five years. You're
21 given credit for one day of jail time.

22 Mr. Underwood, you have plead no contest to a charge
23 of trafficking cocaine in the amount between twenty-eight
24 grams and one hundred grams second offense, the sentence of
25 the court is you be committed to the State Department of

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1 Corrections for a determinat term of twelve point five
2 years. And you're given credit for two days jail time.

3 MS. MOODY: Your Honor, if I may ask. And I meant to
4 ask this on behalf of my client, to ask if he could do a
5 delayed report. He came here today thinking that it was
6 just a trial.

7 THE COURT: I'm not gonna do that. With this kind of
8 sentencing I just don't do that. Thank you.

9 MS. MOODY: Thank you, Your Honor.

10 - END OF TRANSCRIPT OF RECORD -
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CERTIFICATE OF REPORTER

State of South Carolina)
)
County of York)

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for York County, South Carolina, on the 2nd days of September, 2014.

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

Wanda Nelson
Wanda Nelson, CVR
Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: July 6 / 2015

1 THE COURT: All right. Mr. Harrison, Mr. Underwood,
2 you understand that entering these pleas you give up your
3 right to remain silent. You understand that, Mr. Harrison?

4 MR. HARRISON: Yes, sir.

5 THE COURT: Mr. Underwood?

6 MR. UNDERWOOD: Yes, sir.

7 THE COURT: And if you give - plead guilty - Excuse
8 me.

9 By entering your plea of No Contest you also give up
10 your right to a trial by jury.

11 Mr. Harrison, you understand that?

12 MR. HARRISON: Yes, sir.

13 THE COURT: Mr. Underwood.

14 MR. UNDERWOOD: Yes, sir.

15 THE COURT: And if you give up your right to a trial
16 by jury you also give up your right to assert any legal
17 defenses you might have in a jury trial.

18 Mr. Harrison?

19 THE COURT: And, Mr. Underwood?

20 MR. UNDERWOOD: Yes, sir.

21 THE COURT: I know you're attorney's have gone over
22 that right with you, I'm gonna do so as well. If you
23 request a trial by a jury - Of course we were already in
24 trial posture in this case - the state would give you a
25 trial, at trial you would have the right to confront and

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1 cross examine all witnesses' against you. You would have
2 the right to present any witnesses' and or evidence in your
3 own defense. You would have the right to testify in your
4 own defense if you wished to do so, but no one could make
5 you testify in your own trial. If you decide to go to
6 trial and not testify the judge would tell the jury they
7 could not hold your failure to testify against you. In
8 fact the jury couldn't even consider your failure to
9 testify in their deliberations on your guilt or innocence.

10 You would be presumed innocent throughout your trial,
11 the State would have to prove you guilty beyond a
12 reasonable doubt to a jury of twelve people, all twelve
13 people would have to unanimously agree that you were guilty
14 in order for you to be convicted. And even if you were
15 convicted you would still have the right to appeal that
16 conviction.

17 Do you understand your rights with regard to a trial
18 by a jury, Mr. Harrison?

19 MR. HARRISON: Yes, sir.

20 THE COURT: Mr. Underwood?

21 MR. UNDERWOOD: Yes, sir.

22 THE COURT: Now the State had --

23 Mr. Harrison, the State has recommended in your case
24 they've agreed to reduce this down to a first offense and
25 reduce the amount to twenty-eight to one hundred grams and

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EXHIBIT 4-Copy of the Amended Indictment

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EUHARRISON

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

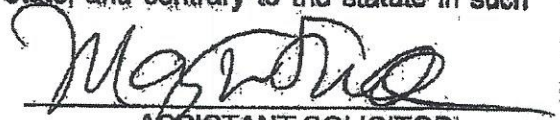
INDICTMENT
CERTIFIED TRUE COPY
2015 APR 30 AM 9:03

At a Court of General Sessions, convened on May 29, 2014, the Grand Jurors of York County present upon their oath: YORK COUNTY, SC

TRAFFICKING IN COCAINE

Between the dates of September 30, 2012 through October 30, 2012, the Defendant, Duane Arness Harrison, did knowingly sell, manufacture, cultivate, deliver, purchase, or bring into this State, or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive possession of four hundred (400) grams or more of cocaine or any mixtures containing cocaine, as provided in 44-53-210(b)(4). Said incident occurred in York County, South Carolina, all in violation of Section 44-53-370, 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

STATE OF SOUTH CAROLINA)
 COUNTY OF York)
 STATE VS.)
 Duane Arness Harrison)

IN THE COURT OF GENERAL SESSIONS

AKA:)
 Race: BLACK Sex: M Age: 40)
 DOB: 12-22-1973 SS#: 248-55-6062)
 Address: 1620 Sandpiper Dr.)
 City, State, Zip: Rock Hill SC 29732)
 DL#: 004126241 SID#:)

INDICTMENT/CASE#: 2013GS4602041
 A/W#: N230853
 Date of Offense: 10/30/2012
 S.C. Code §: 44-53-0370(e)(2)(e)
 CDR Code #: 0281

CERTIFIED TRUE COPY
 2013 NOV 11 11:13 AM
 DAVID HAMILTON
 CLERK OF COURT
 YORK COUNTY, SC

ORIGINAL

*CDL Yes No CMV Yes No Hazmat Yes No
 In disposition of the said indictment comes now the Defendant who was CONVICTED OF or **PLEADS**
 TO: Drugs / Conspiracy to traffick in cocaine, 28 g or more, but less than 100 grams, 1st offense **NO CONTACT**

in violation of § 44-53-0370(e)(2)(b)1 of the S.C. Code of Laws, bearing CDR Code # 2359
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

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

ATTEST: Matthew W. Shelton 74785 David Hamilton 12097
 SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
 for a determinate term of 12.5 days/months/years or under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 1 day
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP
 Total: \$ _____ plus 20% fee: \$ _____
 Payment Terms: _____
 Set by SCDPPPS _____

Recipient: _____

*Fine:		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100 -
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25 -
§ 14-1-213 (Drug Court Surcharge)	\$150	\$ 150 -
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(I) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5 -
3% to County (if paid in installments)		\$
TOTAL		\$ 280 -

_____ days/hours Public Service Employment
 Obtain GED
 Attend Voc. Rehab. or Job Corp. _____
 May serve W/E beginning _____
 Substance Abuse Counseling
 Random Drug/Alcohol testing
 Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund
 Other: _____

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Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk David Hamilton
 Court Reporter: Wanda Nelson
 SCCA/217 (03/2011)

Presiding Judge Leo [Signature]
 Judge Code: 2113
 Sentence Date: 9-2-14

STATE OF SOUTH CAROLINA) IN THE GENERAL SESSIONS COURT
COUNTY OF YORK) CASE NO. 13-GS-46-02041

State of South Carolina,) ORIGINAL
Plaintiff,)
vs.) HEARING BEFORE
Duane A. Harrison,) THE HONORABLE WILLIAM MCKINNON
Defendant.)

Date of Hearing: February 16, 2021
Presiding Judge: The Honorable William McKinnon
Attorney for Plaintiff: Kevin Brackett, Esquire
Matthew Shelton, Esquire
Attorney for Defendant: Glenn Walters, Esquire
Location of Hearing: Various Locations via
Virtual Courtroom
Times: 9:48 a.m. - 10:19 a.m.
Court Reporter: Vickie J. Stewart, CVR

LEGAL EAGLE

Post Office Box 5682

Greenville, South Carolina 29606

(864) 467-1373

depos@legaleagleinc.com

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1 BY THE COURT:

2 Next up, we are switching hats for a moment and becoming
3 a general sessions court. This is State versus Duane
4 Harrison. And I see Mr. Walters -- I see you're online.
5 What about -- I don't see your client; is he --
6 Mr. Walters, I think you're muted; I can't hear you.

7 By Mr. Walters:

8 May it please the Court?

9 BY THE COURT:

10 Yes, sir.

11 By Mr. Walters:

12 Your Honor, we obtained a waiver with regards to Duane
13 Harrison. It was previously scheduled, and we went to
14 the South Carolina Department of Corrections, where he
15 signed to waive. And of course, we couldn't visit him,
16 and we went through counsel for the South Carolina
17 Department of Corrections.

18 BY THE COURT:

19 Okay. So you've got a waiver -- a written waiver from
20 your client stating that he waives presence?

21 By Mr. Walters:

22 Yes, sir, Your Honor.

23 BY THE COURT:

24 All right. And I see Mr. Shelton is online from the
25 solicitor's office, and I believe solicitor Brackett is

1 present as well. So Mr. Walters, whenever you're ready.

2 By Mr. Walters:

3 May it please the Court, Your Honor, I'm not sure if you
4 got the memorandum that we sent to your office in
5 regards to support of the Defendant Harrison's motion to
6 vacate the conviction and the sentence. That was sent
7 to you this morning. Did you receive that?

8 BY THE COURT:

9 I did.

10 By Mr. Walters:

11 Okay. May it please the Court, Your Honor, the facts in
12 this particular case are undisputed. Under the
13 circumstances, he was indicted in May of 2013 for
14 trafficking cocaine, over 400 grams. There was later an
15 amendment to the indictment, on May 29th of 2014. And
16 of course, he was indicted under 44-53-370, and that
17 would be (e)(2)(a), and that's Exhibit 4 to the motion
18 to vacate. He then pled on September 2nd of 2014 to --
19 no contest to trafficking 28 grams to 100 grams before
20 Judge Alford. And that essentially is how the
21 indictment worked, and the plea itself.

22 As far as the procedural history, one, there was a
23 PCR application that was done in September of 2016, and
24 it was dismissed by Judge Verdin; two, Harrison appealed
25 Judge Verdin's order, and it was dismissed April of

1 2018; and of course, three, the writ of habeas corpus
2 was denied probably around August of 2018, and there was
3 no certificate of appealability that was issued. And
4 that's been the procedural history. Then he filed a pro
5 se notice of appeal for dismissal of the writ of habeas
6 corpus, and that was in November of 2019, and that was
7 an unpublished opinion.

8 Now, each one of these particular issues that were
9 raised in that process never addressed the issue that is
10 before the court today. The issue before the court
11 today is with regard to subject matter jurisdiction.
12 And that's our motion to vacate the sentence and
13 judgment.

14 I think the facts that are important in this case
15 are, number one, as we stated, there was an amended
16 indictment that occurred in May of 2014; there was a
17 plea of no contest on September 2nd of 2014. In the
18 actual transcript that was obtained, it stated that they
19 believed he conspired in order to distribute drugs, but
20 they never showed possession. Judge Alford went on to
21 state that, "This is conspiracy to trafficking."

22 There's a sentencing sheet with regards to 44-53 ---

23 BY THE COURT:

24 Mr. Walters, let me just stop you here for a second.

25 The trafficking statute encompasses both the --

1 conspiracy within the trafficking charge, does it not?

2 By Mr. Walters:

3 Yes, sir, that is correct.

4 BY THE COURT:

5 Okay.

6 By Mr. Walters:

7 All right. And Judge Alford in this particular case
8 went on to state it's conspiracy -- in the sentencing
9 sheet in this particular case, it went on to state that
10 this was a lesser included offense that he pled to, 28
11 grams to 100 grams. And that CDR Code was 0281. And
12 Judge Alford even went on to find that there was more
13 than one conspiracy with regards to this case. I
14 believe they came to a conclusion that he was a lookout,
15 and, of course, there was no substantive drug
16 possession. And I think those facts are undisputed.

17 Our particular case addresses the issue of subject
18 matter jurisdiction, which can be raised at any time.
19 And of course, we believe that the case that controls
20 here is the 2000 case of State versus Gentry. At one
21 time, there was a lot of confusion. When I served as a
22 public defender, many of the solicitors, we would argue
23 over and over again about indictments and the courts'
24 jurisdiction. And in the jurisprudential history of
25 South Carolina, it was unclear as it went back and

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1 forth.

2 But Gentry in 2005 laid down the foundation for the
3 analysis. And what Gentry essentially did was, it
4 divided it into two issues. Gentry stated that there's
5 one issue with regards to subject matter jurisdiction,
6 and there's another issue with regard to the sufficiency
7 or the deficiency of an indictment. So Gentry addressed
8 three issues, and they issued three principles with
9 Gentry. One, under 17-19-90, a defendant must raise
10 issues with regard to the sufficiency or deficiency of
11 an indictment before a jury is sworn. All right. And
12 we're not addressing that issue; that is not part of our
13 argument.

14 But Gentry went on to address two other issues.
15 One, they created an exception that a defendant may
16 raise for the first time on appeal with regards to the
17 issue of the court's issue to try a certain class of
18 case, which the Defendant in this particular case was
19 convicted of, and this is the subject matter
20 jurisdiction.

21 In addition to that, State versus Gentry, the third
22 issue they addressed was, the indictment has to give a
23 defendant notice. And that notice requirement stems
24 from the state constitution under, I believe, article
25 eleven -- article one, section eleven. And it just

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1 simply states that, in order for it to go forward, it
2 requires that notice be given to the defendant.

3 So there are three issues that Gentry addresses.
4 We are only arguing with regards to two of those Gentry
5 issues. We're not addressing the issue with regards to
6 objecting before the trial. We're addressing the issue
7 of the indictment itself giving notice to the Defendant;
8 and, of course, the other issue is with regards to
9 subject matter jurisdiction.

10 Now, in this particular case, if you look at the
11 record, the bottom line of our argument is that the
12 solicitor verbally amended the charge. And by verbally
13 amending the charge, the solicitor divested the court of
14 jurisdiction.

15 BY THE COURT:

16 Mr. Walters, I've read everything. I understand the
17 argument. But I'm -- don't you have to -- to win, you
18 have to show me that the trafficking 28 to 100 is not a
19 lesser included of the indictment, correct?

20 By Mr. Walters:

21 Yes, sir. And that ---

22 BY THE COURT:

23 That is what I'm really struggling with. If you could
24 focus on that point of argument, that would help me.

25 By Mr. Walters:

000052

1 May it please the Court, Your Honor, it was addressed in
2 Gentry with Clair v. State. And Clair v. State simply
3 says the amount of drugs, if it's changed, then, of
4 course, you have a new charge; you have to issue a new
5 indictment. And Clair v. State, as it states in my
6 memorandum over and over again, has been upheld by our
7 courts. He was indicted for 400 grams or more. So ---

8 BY THE COURT:

9 Didn't Clair predate Gentry, though?

10 By Mr. Walters:

11 Excuse me, sir?

12 BY THE COURT:

13 Didn't Clair v. State predate Gentry?

14 By Mr. Walters:

15 You are correct, Your Honor. And after Gentry, our
16 court continued to uphold Clair v. State. It was never
17 overruled, as stated in my memorandum. It's been cited
18 four or five times, and continues to be good case law.
19 Even if it's Shepardized, it still stands. If ---

20 BY THE COURT:

21 But you're -- you need to convince me that, charged with
22 the exact same elements, except for a lesser amount of
23 narcotics, is not a lesser included offense of the
24 greater amount. That's what you have to -- now -- and
25 Clair holds that?

000053

1 By Mr. Walters:

2 Yes, sir, Your Honor. And I'll carefully go through
3 Clair to make sure that I bring my point home. In Clair
4 v. State, essentially what happened was that the
5 defendant was indicted for one amount of drugs. After
6 the jury was sworn, the prosecutor then changed the
7 amount of drugs, and defense counsel agreed. They then
8 proceeded forward with the case itself, and he was
9 convicted. And of course, in Clair v. State, what they
10 stated was that that is a new charge.

11 And I'll quote the language with regards to Clair.
12 In this particular case, our Supreme Court ruled that an
13 indictment which charges a specific sentencing parameter
14 -- and that's what we have here, a sentencing parameter
15 -- which makes it different -- and under Gentry, we've
16 got two lines of cases; you've got the Granger line,
17 then you've got the Clair line. So Gentry cites Clair
18 as good case law. And what it says is that, under the
19 Clair line of cases, if there is a specific sentencing
20 parameter by designating an amount -- and that's what we
21 have here -- within a particular sentencing level, it
22 cannot be amended before trial, because it changes the
23 nature of the offense. An indictment may be amended,
24 provided such an amendment does not change the nature of
25 the offense charged -- and that's under the Lynch case,

1 the Means case -- and they go into the analysis.

2 And of course, this case is not a Granger case; it
3 is a Clair case. For example, an amendment which
4 changes an offense to one with increased punishment
5 deprives the court of subject matter jurisdiction. And
6 that's the Lynch case. An amendment may deprive the
7 circuit court of jurisdiction if it even does not change
8 the penalty.

9 And in this particular case, what they did was,
10 they sat down -- and it's written on the sentencing
11 sheet that this is a lesser included offense. This
12 violates my client's rights with regards to notice as
13 required under the constitution. In this particular
14 case, it's ---

15 BY THE COURT:

16 How? I mean, he understood exactly what he was
17 pleading. I mean, I've read the transcript. I -- what
18 did he not get notice of?

19 By Mr. Walters:

20 A new indictment should have been issued. We're not
21 challenging the sufficiency or the deficiency of the
22 indictment. In this particular case, when the solicitor
23 verbally changed the charge, he divested the court of
24 jurisdiction, and the court was required to tell the
25 solicitor, "You've got to get a new indictment, and in

1 addition to that, you have to present it to him and he
2 has to have a waiver, a written waiver." And in this
3 particular case, they failed to do so.

4 First, he changed the charge based on the amount.
5 And when you change it based on the amount, you violate
6 Clair, okay? Clair requires that you go back and get a
7 new indictment. And ---

8 BY THE COURT:

9 Unless it's a lesser included; doesn't Clair have that
10 carve-out?

11 By Mr. Walters:

12 No. In this particular case, this would not be a lesser
13 included. The Granger case deals with lesser included
14 because Granger deals with 10 grams or more, but it
15 doesn't designate the amount. And what the Granger
16 cases state is that, if it's a lesser amount, you can
17 still proceed forward if it's a lesser offense. What
18 Granger -- and the distinction between Granger and Clair
19 is, what Clair simply states is, if you change that
20 amount, you have to get a new indictment. And the only
21 thing that was presented before this court was a verbal
22 changing of a charge by the solicitor. And it goes
23 further, because the judge ultimately agreed with the
24 solicitor and said, "Oh, it's a lesser included." But
25 Clair says it's not a lesser included. What Clair says

1 is that it's distinctly different because the amount
2 changed. And if the amount changes, you're prohibited
3 from proceeding forward unless you meet the requirements
4 of an indictment and the South Carolina Constitution,
5 which requires that he has to be given notice and, in
6 addition to that, you have to obtain a waiver -- a
7 written waiver. And if you look at the transcript,
8 there is no waiver; there is no new indictment. And
9 under the circumstances, Clair is still good case law,
10 cited four or five times after Gentry. In fact ---

11 BY THE COURT:

12 Mr. Walters, you're telling me, every single case in
13 South Carolina where a quantity of drugs is charged in
14 an indictment and the solicitor allows the defendant to
15 plead to simple possession instead, that is not lesser
16 included unless there's a waiver? All of those pleas
17 are invalid?

18 By Mr. Walters:

19 No, sir. What I'm saying is that, if your case is under
20 a Granger series of cases -- and what Granger simply
21 states is that, if it's 10 grams or more, but it doesn't
22 designate the amount -- the Granger cases simply state
23 that you can be charged with a lesser included offense,
24 and you have no problems, because the elements of the
25 offense have to be proven. And a lesser included

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1 offense would contain the same elements, and a greater
2 offense may ---

3 BY THE COURT:

4 All right. Hold ---

5 By Mr. Walters:

6 --- add ---

7 BY THE COURT:

8 Hold on a second, Mr. Walters. The solicitor has just
9 texted me -- his -- Mr. Shelton from the solicitor's
10 office. His connection has dropped, and he is not
11 online right now. So hold on.

12 (Off the record)

13 BY THE COURT:

14 Mr. Shelton, I'm seeing you as back on my screen. I
15 think you're still muted.

16 By Mr. Shelton:

17 I can hear you. Can you hear me now?

18 BY THE COURT:

19 I can hear you now, yes, sir.

20 By Mr. Shelton:

21 The wonders of modern technology.

22 BY THE COURT:

23 Okay. Mr. Walters, I apologize for interrupting you.

24 Mr. Shelton, how much of that did you lose?

25 By Mr. Shelton:

1 I did not hear a single thing he said, but I have had a
2 chance to review the Defense's motion and -- including
3 what they sent 45 minutes ago, and I think I'm
4 reasonably prepared to respond. But I just -- I guess I
5 would ask for a little bit of latitude if there's new
6 information that ---

7 BY THE COURT:

8 well, let me let Mr. Waters -- you know, he was in the
9 middle of his argument when I stopped him, and then I'll
10 let you respond. And I will give you some latitude.
11 Mr. Walters, go ahead.

12 By Mr. Walters:

13 Thank you, Your Honor. May it please the Court, under
14 Clair v. State, our state supreme court ruled that a
15 drug indictment which charges a specific sentencing
16 parameter -- and that's what we have here -- by
17 designating an amount within a particular sentencing
18 level cannot be amended before trial, because it changes
19 the nature of the offense. What I'm saying is that, in
20 this particular case, the court was divested of subject
21 matter jurisdiction when the solicitor verbally amended
22 the charge. He's allowed to do so under the Granger
23 range of cases if there's no specificity with regards to
24 the sentencing parameter and there's no designation of
25 an amount. And Granger says you have the freedom to do

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1 so.

2 But under Gentry -- Granger cases are applicable in
3 that particular case. What happened was, it said 10
4 grams or more. In this particular case, he's indicted
5 for 400 grams or better, and the amount changes. So
6 under the circumstances, this is a Clair versus State
7 case. And what it essentially says is that you can't
8 verbally create an indictment without violating the
9 state constitution by providing the defendant notice.

10 And under the circumstances, what happened here
11 was, not only did that occur, the court then found that
12 this offense was a lesser included offense. And the
13 analysis in State versus Means and the other cases
14 simply states it can't be a lesser included offense
15 under the circumstances, because the elements are
16 totally different. In Clair v. State ---

17 BY THE COURT:

18 well, that's totally different.

19 By Mr. Walters:

20 The amount of the drugs.

21 BY THE COURT:

22 No, I -- why is that not the Granger situation? I'm ---

23 By Mr. Walters:

24 There is a distinction, because in the Granger
25 situation, it was 10 grams or more. In Clair v. State,

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1 it stated the amount within a range. The jury came back
2 and found below that range. And of course, there was
3 some mixup with the indictment, but the bottom line is,
4 the court said, "Look, if you're going to change the
5 amount, you have to get an indictment and the defendant
6 has to have notice and you have to obtain a waiver."
7 There was no waiver; there was a verbal amendment. The
8 amendment can occur with regards to a new charge; you
9 simply have to get a new indictment. And they failed to
10 do so in this particular case.

11 So under the circumstances, his constitutional
12 rights under the South Carolina Constitution were
13 violated because he didn't receive notice. And in
14 addition to that, they never obtained a waiver; they
15 simply said, "Let's go forward." They operated under
16 the assumption that it was a lesser included offense and
17 that they were under the Granger range of cases and they
18 had a right to simply -- do what? Amend. In this
19 particular case, there could be no amendment, because
20 the solicitor in this particular case verbally attempted
21 a new charge, and the Defendant was not given notice
22 along with a waiver. And that's exactly what Clair was
23 designed to prohibit. And Clair is still good case
24 today. The Granger line of cases are still good.

25 But this case is not a Granger case; it's a Clair

1 v. State case. And the problem here is that the
 2 defendant never provided a written waiver. In fact, the
 3 sentencing statement -- and I'll cite the case where the
 4 court goes into the offense itself and it talks about
 5 what he needs to do -- what it simply states is that
 6 Harrison didn't waive presentment of the amended
 7 charges. There's no colloquy in the transcript itself
 8 that says, "Hey, I'm aware of what I'm doing. I'm
 9 waiving this, and of course I'm aware that I was
 10 indicted for one charge as opposed to the other." What
 11 simply happened here was, everyone assumed it was a
 12 lesser included offense. And that's just not the case,
 13 based on Clair v. State. It is a totally new charge.

14 BY THE COURT:

15 Okay. Thank you, Mr. Walters. Mr. Shelton?

16 By Mr. Shelton:

17 Your Honor, do you have a copy of the true-billed
 18 indictment, as amended, and the sentencing sheet?

19 BY THE COURT:

20 I do have what Mr. Walters submitted. Let me double-
 21 check that it is the amended indictment.

22 By Mr. Shelton:

23 Okay.

24 BY THE COURT:

25 I have the indictment which is dated May 29th term,

1 2014.

2 By Mr. Shelton:

3 I believe that's correct. Yes, that's right. It should
4 have the word "amended" typed at the very top, above the
5 number.

6 BY THE COURT:

7 It does, yes. I've got that, yeah.

8 By Mr. Shelton:

9 And do you have a copy of the sentencing sheet?

10 BY THE COURT:

11 I don't believe I do have the sentencing sheet. I've
12 got ---

13 By Mr. Shelton:

14 Okay. I've provided that to Mr. Walters. I can forward
15 that to your clerk, if it's helpful.

16 BY THE COURT:

17 Yeah. If you don't mind, just forward it directly to
18 -- Mr. Walters, any objection to him just emailing it
19 directly to me?

20 By Mr. Walters:

21 No, sir, Your Honor.

22 BY THE COURT:

23 Mr. Shelton, just do wmckinnonj@sccourts.org.

24 By Mr. Shelton:

25 All right. Just one second, Your Honor. I beg the

1 Court's indulgence here, Judge. I've got to navigate
2 through here and save it real ---

3 BY THE COURT:

4 Okay.

5 By Mr. Shelton:

6 But I've got it at my fingertips. All right. Your
7 Honor, this should be coming through shortly. It's
8 going to include a certified a true copy of the true-
9 billed amended indictment, the sentencing sheet, as well
10 as the plea waiver that the Defendant went over with
11 Mr. Rutherford prior to the plea. So, I think that's --
12 I would ask you to make all that a copy of the -- or a
13 part of the record here. I think that's all very
14 relevant to what we're talking about. But whenever
15 you're ready, Judge, after you've had a chance to look
16 at it, I'll continue whenever you're ready.

17 BY THE COURT:

18 It hasn't come through email yet; I'm looking at my
19 email screen ---

20 By Mr. Shelton:

21 Okay.

22 BY THE COURT:

23 --- to make sure. Our -- the court email is a bit slow
24 sometimes. Let's see here.

25 By Mr. Shelton:

1 It is showing sent on my side, so ---

2 BY THE COURT:

3 Okay.

4 By Mr. Shelton:

5 Judge, I can go ahead and speak to the substantive
6 subject ---

7 BY THE COURT:

8 Well, let's ---

9 By Mr. Shelton:

10 --- matter of ---

11 BY THE COURT:

12 --- just hang on a second. If ---

13 By Mr. Shelton:

14 Okay.

15 BY THE COURT:

16 It should come through.

17 By Mr. Shelton:

18 If I knew how to share a screen, I would do it that way,
19 but I haven't quite figured that out yet.

20 BY THE COURT:

21 Oh, the way webex is set up, only the -- what they call
22 the presenter, the person like the -- which is me, can
23 do that. And so it's a little frustrating. I keep --
24 at least if there's a way to let other people do that, I
25 don't know how.

1 By Mr. Shelton:

2 Okay.

3 BY THE COURT:

4 I just don't know how to. All right, Mr. Shelton, go
5 ahead and make your argument, like you suggested, and
6 then when it -- hopefully it'll ---

7 By Mr. Shelton:

8 Yes, sir.

9 BY THE COURT:

10 --- come within the next few minutes.

11 By Mr. Shelton:

12 Yes, sir, Your Honor. So the -- as you can see in the
13 indictment, it's 2013-GS-46-02041; it was true-billed,
14 alleging trafficking in cocaine, 400 grams or more.
15 That's in reference to Section 44-53-370(e)(2)(a). That
16 charge carries a mandatory 25 years in the Department of
17 Corrections. You'll notice in the language of that
18 indictment, it includes conspiracy language: aid, abet,
19 conspire, things that mimic the language in the statute
20 and that we put in every single one of our trafficking
21 statutes. We have ---

22 BY THE COURT:

23 Okay, Mr. Shelton, I have your email.

24 By Mr. Shelton:

25 okay.

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1 BY THE COURT:

2 All right. I have the sentencing sheet. Okay.

3 By Mr. Shelton:

4 And so you'll see the sentencing sheet reflects -- you
5 know how a sentencing sheet -- at the top right, it
6 reflects what he was indicted for, and that's
7 referencing CDR Code 0281, and the statute that I just
8 stated. He pled guilty to CDR -- or pled no contest to
9 a charge connected to CDR Code 2359, and that's under
10 Section 44-53-370(e)(2)(b)(1). And we allowed him --
11 afforded Mr. Harrison the benefit of pleading guilty to
12 a lower weight, 28 grams but less than 100 grams, which
13 is a lesser included offense.

14 We were primed for trial. We had had two days of
15 pretrial in this case. And one of the key questions in
16 this case in pretrial was the admissibility of a series
17 of text messages between Mr. Harrison and his co-
18 defendant, Mr. Underwood, that established an ongoing
19 scheme or conspiracy to traffic drugs. And Judge Alford
20 had taken that matter under advisement before we struck
21 this deal. He ultimately articulated at the plea, on
22 the record, what he -- how he would have ruled and the
23 reason for doing so. But before we struck this deal,
24 that ruling was still in abeyance. So the parties got
25 together and agreed to give Mr. Harrison the benefit of

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1 the doubt, as it were, with that ruling still
2 outstanding. The jury could have come back and
3 theoretically found him guilty of less than 400 grams,
4 because that's a lesser included. You know how the
5 trafficking law -- it steps down, 400 grams, and so on
6 and so forth, as low as 10 grams or more.

7 We afforded him that benefit during the plea
8 negotiations. That's how we were able to agree to a
9 twelve-and-a-half-year sentence. It carried a mandatory
10 25 years. We couldn't have agreed to a twelve-and-a-
11 half-year sentence without lowering the weight. That is
12 not what happened in the Clair case that the Defense has
13 cited. In the Clair case, the weight was increased by
14 amendment. Therefore, the penalty was substantially
15 increased, as well as all the drug charges were.

16 That's not what happened here. We didn't move to
17 alter the charge to increase the penalty. We lowered
18 the weight to allow Mr. Harrison to have a lower penalty
19 for a plea agreement, and he ---

20 BY THE COURT:

21 Now, let me just stop you for a second.

22 By Mr. Shelton:

23 --- he waived his rights.

24 BY THE COURT:

25 Mr. Walters, is that correct, that the Clair case is

000068

1 referring to a situation where the solicitor's office
2 increased the weight and not decreased?

3 By Mr. Walters:

4 That's correct. I think it was 200 grams or more. And
5 in the findings, with regards to the evidence that was
6 presented, it was 196. Mr. Shelton, you can correct me
7 if I'm wrong.

8 By Mr. Shelton:

9 I think the issue there was that the weight was amended
10 on the indictment. The indictment alleged the lower
11 weight, and then the weight was amended on the
12 indictment.

13 By Mr. Walters:

14 There was a ---

15 By Mr. Shelton:

16 We're dealing with a charging document, not necessarily
17 a jury question.

18 By Mr. Walters:

19 What happened was, the jury came back with a finding
20 less than the amount that he was indicted for. And
21 then, of course, there was some mixup that occurred with
22 the foreman of the jury and the clerk, and after the
23 indictment came out of the back, they then struck
24 through the amount that was on the indictment, and he
25 was convicted for the amount that came in. That's not

000069

1 the case here. What happened was, there is a difference
2 in the amount of the weight, and that's what Clair
3 addresses. It doesn't address whether it increased the
4 penalty or lessened the penalty. What Clair says is
5 that, if you change that weight, you're not under the
6 Granger line of cases anymore; you have to seek an
7 indictment and a defendant has to be given notice. And
8 if you look at the document that's before ---

9 BY THE COURT:

10 Mr. Walters, let me go back to Mr. Shelton. I
11 interrupted him, so let me go ahead and let him continue
12 his argument. But thank you.

13 By Mr. Shelton:

14 Judge, like I haven't had an opportunity to fully
15 review the Clair case. This morning was the first time
16 Mr. Walters mentioned that; he didn't have that in his
17 original motion. So I would just ask Your Honor to go
18 through that. My understanding of what he put in his
19 motion was -- the one that I saw this morning was in
20 reference to the weight being increased through an
21 amendment by the solicitor without sending it to the
22 grand jury. That's my understanding of what the -- kind
23 of the mechanism was, so to speak. We didn't do that
24 here. This is a true-billed indictment for 400 grams or
25 more, trafficking. We allowed him to plead guilty under

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1 a lower weight so that he could receive the substantial
2 benefit of half of his sentence.

3 And Judge, I just want to point out, there's really
4 no ambiguity here. The sentencing sheet is on all fours
5 with that. It mentions lesser included. The plea
6 colloquy talks about a lower sentencing range than what
7 he was exposed to. It had the case proceed to a trial,
8 as it was primed to do. You know, the only thing that
9 is potentially inconsistent -- and it's really not -- is
10 the charge description on the sentencing sheet. It says
11 conspiracy to traffic in cocaine, 28 grams or more but
12 less than 100 grams. A conspiracy is a way that the
13 State can prove trafficking. We can ---

14 BY THE COURT:

15 Right. I understand, yeah. You don't have to -- I
16 understand that.

17 By Mr. Shelton:

18 Right.

19 BY THE COURT:

20 So I just ---

21 By Mr. Shelton:

22 I don't really know how to articulate this any more
23 plainly than this is a lesser included charge. We
24 reduce charges all the time pursuant to a plea
25 agreement. We were not looking to increase the penalty.

000071

1 We -- again, we moved -- we allowed him the benefit of
2 pleading to a lower charge so he could receive half of
3 the sentence he was facing, because he accepted
4 responsibility, waived his rights, and entered his plea
5 of no contest.

6 I would note, Your Honor, that the PCR court had no
7 problem with this, the trial court had no problem with
8 this, and it doesn't appear that SCDC has any trouble
9 interpreting this. They have him classified as serving
10 a twelve-and-a-half-year sentence with an 85 percent no-
11 parole. That's consistent with the trafficking statute
12 under the lower weight. I understand jurisdiction can
13 be raised at any time. This is simply not a
14 jurisdiction question.

15 BY THE COURT:

16 All right. Mr. Walters, I'll give you a minute or so.
17 We have a lot of folks waiting today, so I'll give you
18 the final word, but if you will, keep it very brief.

19 By Mr. Walters:

20 Yes, sir. Your Honor, as it states in the plea waiver
21 form, the conspiracy to traffic cocaine, 28 grams to 100
22 grams, first offense, is a violation of Clair v. State.
23 An indictment should have been obtained. While making
24 that decision, it is admirable that the solicitor says
25 we were helping him. The problem is, his constitutional

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1 rights were violated. They need an indictment. And, of
2 course, they divested the Court of jurisdiction by
3 changing the charge. By changing 28 to 100 grams, the
4 Court no longer had jurisdiction with regards to this
5 matter. And under the circumstances, he did not receive
6 notice, as required under Granger. And in addition to
7 that, there should have been a waiver with regards to
8 the indictment for the new charge. But under the
9 circumstances, the 28 grams to 100 grams is exactly what
10 Clair was designed to prohibit. It's not a lesser
11 included offense. It's not a line of Granger cases. In
12 this particular case, it is a totally new offense which
13 addresses the issue of subject matter jurisdiction. And
14 of course, by the solicitor doing that, he divested this
15 Court of jurisdiction with regards to this matter.

16 BY THE COURT:

17 All right. I'll take this matter under advisement.

18 Thank you, counsel.

19 By Mr. Walters:

20 Thank you, Your Honor.

21 [HEARING CONCLUDED, 10:19 A.M.]
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CERTIFICATION

I, VICKIE J. STEWART, CVR, a Notary Public in and for the state of South Carolina, do hereby certify that the foregoing 28 pages represents a true and accurate transcript of the aforementioned hearing and taken by me before the Honorable William MCKinnon via Virtual Courtroom on February 16, 2021.

That I am not related to nor an employee of any of the parties hereto, nor their counsel, and am not interested, financially or otherwise, in the outcome of this action.

That any exhibits submitted to me for marking during the course of said hearing were duly submitted to the Clerk of Court at the time of the hearing.

In witness whereof, I have set my hand and official seal.

Dated: July 10, 2021

Vickie J. Stewart

Notary Public for South Carolina

My commission expires: 01/15/25

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Mar 05 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

William A. McKinnon, Circuit Court Judge

Case No. 2013-GS-46-02041

State of South Carolina,

Respondent,

v.

Duane A. Harrison

Appellant.

NOTICE OF APPEAL

Duane A. Harrison appeals the order of the Honorable William A. McKinnon, dated February 18, 2021, denying his Motion to Vacate Conviction and Sentence. Appellant received written notice of entry of this order on February 18, 2021. A copy of the Order under appeal is attached.

February 24, 2021

At Orangeburg, SC

/s/ Glenn Walters, Sr.
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Orangeburg, SC 29116
Ph: 803 531-8844
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Other counsel of record:
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York, SC 29745

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Mar 05 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

William A. McKinnon, Circuit Court Judge

Case No. 2013-GS-46-02041

State of South Carolina,

Respondent,

v.

Duane A. Harrison

Appellant.

PROOF OF SERVICE

I, Glenn Walters, Sr., certify that I have served the Notice of Appeal on Respondent State of South Carolina, by depositing a copy of it in the United States Mail, postage prepaid, on February 24, 2021, addressed to its attorneys of record as follows:

Matthew Shelton, Esquire
Assistant Solicitor
Sixteenth Judicial Circuit
1675 York Highway
York, SC 29745

The Honorable Alan Wilson, Esquire
Attorney General for South Carolina
Post Office Box 11549
Columbia, SC 29211

February 24, 2021

/s/ Glenn Walters, Sr.

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Mar 05 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA)
YORK COUNTY)

COURT OF GENERAL SESSIONS
SIXTEENTH JUDICIAL CIRCUIT

State of South Carolina,)

**ORDER DENYING DEFENDANT/MOVANT'S
MOTION TO VACATE CONVICTION AND
SENTENCE**

vs.)

Amended Indictment No.: 2013-GS-46-02041

Duane Arness Harrison)

Defendant/Movant.)
_____)

This matter came before the Court on February 16, 2021 by way of Defendant/Movant's Motion to Vacate Conviction and Sentence. At the hearing, the State was represented by Matthew Shelton and Defendant/Movant was represented by Glenn Walters. Defendant/Movant waived his right to be present at the hearing in a writing that he provided to his attorney.

In May 2013, Defendant/Movant was indicted for trafficking in cocaine 400 grams or more. However, at his plea hearing on September 2, 2014, Defendant/Movant pled no contest to conspiracy to trafficking in cocaine 28 to 100 grams. The State did not seek a new indictment reflecting the reduced drug amount, and Defendant/Movant did not waive presentment to the grand jury on the amended charge. In his motion, Defendant/Movant argues that the State divested the Court of subject matter jurisdiction by failing to seek a new indictment.

The Court finds that the verbally amended indictment did not change the nature of the charged offense and that Defendant/Movant pled to a lesser-included offense of the crime charged. See State v. Myers, 313 S.C. 391, 393, 438 S.E.2d 236, 237 (1993) (finding amendments to indictments permissible "if they do not change the nature of the offense; the charge is a lesser included offense of the crime charged on the indictment; or the defendant waives presentment to

the grand jury and pleads guilty”).

First, an amendment changes the nature of an offense if it increases the penalty or changes an element of the offense. Myers, 313 S.C. 391, 393, 438 S.E.2d 236, 237; Clair v. State, 324 S.C. 144, 478 S.E.2d 54 (1996). In the instant case, the amended indictment decreased the amount of drugs and the possible penalty. Further, the amended indictment only altered the amount of drugs, rather than an element of the offense. *See* S.C. Code Ann. Section 44-53-370. As such, the verbally amended indictment did not change the nature of the charged offense.

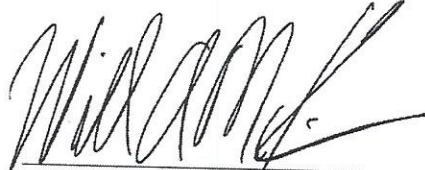
Second, the “test for determining when a crime is a lesser-included offense of the crime charged is whether the greater of the two offenses includes all the elements of the lesser offense.” State v. Suttles, 279 S.C. 87, 88, 302 S.E.2d 338 (1983) (citation omitted). Defendant/Movant was originally charged with trafficking in cocaine 400 grams or more in violation of S.C. Code Ann. Section 44-53-370(e)(2)(e). The verbally amended indictment changed the charge to conspiracy to trafficking in cocaine 28 to 100 grams in violation of S.C. Code Ann. Section 44-53-370(e)(2)(a). The plain language of S.C. Code Ann. Section 44-53-370 shows that it encompasses conspiracy drug charges. As such, the only difference between the lesser and greater charge is the reduced amount of drugs. Therefore, the greater offense includes all of the elements of the lesser offense, and Defendant/Movant was convicted of a lesser-included offense of the crime charged.

Clair v. State, relied upon by the movant, applies only to increases in possible punishment, not decreases, and has no application here.

For the reasons set forth above, Defendant/Movant's Motion to Vacate Conviction and Sentence is DENIED.

IT IS SO ORDERED.

February 18
_____, 2021
York, South Carolina



The Honorable William A. McKinnon 2761

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Nov 19 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

William A. McKinnon, Circuit Court Judge

Case No. 2013-GS-46-02041
Appellate Case No. 2021-000226

State of South Carolina,

Respondent,

v.

Duane A. Harrison

Appellant.

CERTIFICATE OF COUNSEL

I, Glenn Walters, counsel for the Appellant, certify that the foregoing Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

At Orangeburg, SC
Dated: November 19, 2021

/s/ Glenn Walters, Sr., Esquire