

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

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Appeal from Aiken County

S.C. Supreme Court

James R. Barber, III, Circuit Court Judge

KENNETH JONES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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Attorney General

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
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ATTORNEYS FOR RESPONDENT

INDEX

INDEX .....i

TRIAL TRANSCRIPT ..... 1

APPLICATION FOR POST-CONVICTION RELIEF ..... 15

RETURN .....23

POST-CONVICTION RELIEF HEARING TRANSCRIPT .....29

ORDER OF DISMISSAL .....48

CLERK OF COURT RECORDS .....55

State of South Carolina	)	Court of General Sessions 2009-GS-02-2230
County of Aiken	)	

State of South Carolina	)	Transcript of Record
Plaintiff	)	
vs.	)	
Kenneth Jones	)	
Defendant	)	

November 18, 2009  
Aiken, South Carolina

**B E F O R E:**

The Honorable Doyet A. Early, III, Judge.

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

Elizabeth B. Young, Assistant Solicitor  
Attorney for the Plaintiff

De Grant Gibbons, Esq.  
Attorney for the Defendant

Lisa H. Davenport, RPR  
Official Court Reporter

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I N D E X   O F   W I T N E S S E S

Kenneth Jones,

Questions by the Court.....	6
Statement by Mrs. Young.....	3,10
Statement by Mr. Gibbons.....	3,11

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
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(none offered)

1           KENNETH JONES, after being duly sworn, testified  
2 as follows:

3           THE COURT: Mr. Gibbons, you represent Kenneth Joseph  
4 Jones, Kenny Jones, Kenneth Jones, age 32, indictment  
5 09-GS-02-2230, an indictment for distribution of crack  
6 cocaine within proximity of a school?

7           MR. GIBBONS: I do, Your Honor.

8           MRS. YOUNG: It's not been presented to the grand  
9 jury, Your Honor.

10          MR. GIBBONS: I believe he signed a waiver.

11          THE COURT: He has. All right. Before I get too far  
12 into it, Mrs. Young, please tell me what his record may  
13 be.

14          MRS. YOUNG: Your Honor, his record is as follows.  
15 In 1999 he was convicted of burglary third and a later  
16 date in 1999 he was convicted of a separate incident of  
17 burglary third. In 2005 --

18          THE COURT: Hold on. Two burglary thirds in '99?

19          MRS. YOUNG: Yes, sir. In 2005, 2006 he has several  
20 small offenses such as trespassing, entering premises  
21 after warning, simple assault and battery. 2007 he has a  
22 PWID within proximity of a school and that was crack  
23 cocaine. That was a conviction.

24          THE COURT: What did he get on '07? This happened --  
25 Was that mine?

1 MRS. YOUNG: Yes, sir. On that one he got 10 years  
2 suspended to 18 months and then he had another entering  
3 premises after warning in 2008.

4 THE COURT: Was that mine in '07?

5 MR. GIBBONS: I've got it here, Judge. It is you.

6 THE COURT: I tried to give him a break. How much  
7 drugs was it?

8 MRS. YOUNG: Your Honor, he is waiving the results.  
9 Also, it was a 40-dollar rock purchase and it did field  
10 test positive for crack cocaine.

11 THE COURT: So, it was 10 years suspended to 18  
12 months and probation?

13 MRS. YOUNG: I think it was just a straight-up 18  
14 months. That's how I read it on the NCIC report.

15 THE COURT: Let me see the sentence sheet. I just  
16 want to see how I did it. All right.

17 Mr. Gibbons, you have advised him of the charges, I  
18 assume, which is possession with intent to distribute  
19 within --

20 MR. GIBBONS: I have, Your Honor.

21 THE COURT: -- proximity of a school? Did he get a  
22 serious on that one?

23 MRS. YOUNG: Yes, sir, I believe.

24 MR. GIBBONS: I have informed him of that, Your  
25 Honor. It is two out of three. He understands that.

1 THE COURT: All right. Let's start over. You have  
2 informed him of the charges contained in the indictment?

3 MR. GIBBONS: I have.

4 THE COURT: Possible punishment which 10 to 15 years  
5 and or a fine of \$10,000?

6 MR. GIBBONS: I have, Your Honor. I explained to him  
7 that it is a strike. It is non-violent, but it is  
8 serious.

9 THE COURT: And that by being serious it is a strike  
10 and, obviously, he's already got one strike from April of  
11 '07. So, this is two strikes. Three makes him eligible  
12 for life in prison without the possibility of parole.

13 MR. GIBBONS: We've discussed that, Your Honor.

14 THE COURT: Have you advised him of the right to  
15 trial by jury?

16 MR. GIBBONS: I have.

17 THE COURT: Have you advised him of his right to have  
18 the matter presented to the grand jury?

19 MR. GIBBONS: I have, Your Honor, and he wishes to  
20 waive that.

21 THE COURT: He wishes to waive that? And he wishes  
22 to plead guilty?

23 MR. GIBBONS: That's correct, Your Honor.

24 THE COURT: Do you agree with that decision?

25 MR. GIBBONS: I do.

1 THE COURT: All right. Mr. Jones, I see you again.  
2 You're charged with distribution of crack cocaine within  
3 proximity of a school. Do you understand those charges?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Understand that the possible sentence is  
6 a minimum of 10 years and a maximum of 15 years?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Do you understand that you have the right  
9 to have this matter sent to the grand jury before we  
10 proceed here today?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Your lawyer says you wish to give up or  
13 waive that right and you signed the sentence sheet  
14 indicating that; is that correct?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: You further understand that it is -- the  
17 offense is classified as a serious offense?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: And, obviously, I explained that to you  
20 back in 2007 because you had a serious then.

21 THE DEFENDANT: Yes, sir.

22 THE COURT: This would be your second strike as I  
23 understand your past record?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: If you -- Once you're released from

1 incarceration if you do this again and plead guilty or  
2 convicted or some other crime that's classified as serious  
3 or most serious, then you'll be subjecting yourself to the  
4 possibility of life in prison without the possibility of  
5 parole. Do you understand that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. Understanding the charges,  
8 the possible punishment, your right to trial by jury --  
9 Strike that. Understanding the charges, the possible  
10 punishment, your right to have the matter sent to the  
11 grand jury, the fact that it is serious, how do you wish  
12 to plead, not guilty or guilty?

13 THE DEFENDANT: Guilty.

14 THE COURT: Mr. Jones, do you understand that when  
15 you plead guilty you will give up certain rights? One is  
16 your right to remain silent. You'll have to admit your  
17 involvement to me.

18 THE DEFENDANT: Yes, sir.

19 THE COURT: The other is your right to a trial by  
20 jury. Obviously, if you requested a trial by jury the  
21 state would give you one at which time you would have the  
22 right to confront and cross examine everyone who testified  
23 against you.

24 THE DEFENDANT: Yes, sir.

25 THE COURT: You would have the right to present your

1 own case by calling your own witnesses, introducing  
2 relevant exhibits, and testifying in your own defense if  
3 you chose to do so. If you chose to exercise your  
4 constitutional right to remain silent, then I would inform  
5 the jury they could not use the fact that you didn't  
6 testify against you in any manner whatsoever, and I would  
7 instruct them that they could not even consider the fact  
8 that you did not testify when they deliberated your guilt  
9 or innocence. You would be presumed to be innocent  
10 throughout the trial, and the State of South Carolina  
11 would have the burden of proving you guilty beyond a  
12 reasonable doubt to a jury of 12 people, and in order for  
13 that jury to convict you all 12 people have to unanimously  
14 agree that you were, in fact, guilty, and even if  
15 convicted you would still have the right to an appeal.

16 Do you understand your rights the trial by jury?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Understanding those rights, do you still  
19 wish to plead guilty?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Has anybody promised you anything, held  
22 out any hope of reward, or threatened you in any manner in  
23 order to make you plead guilty?

24 THE DEFENDANT: No, sir.

25 THE COURT: Are you satisfied with the representation

1 provided by you by Mr. Grant -- Mr. Gibbons?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: In your opinion has he had enough time to  
4 spend with you so that he could learn all of the facts in  
5 your case, research the law, and investigate and then talk  
6 to witnesses?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Is there anything else you want him to do  
9 for you today before we move forward other than speak up  
10 on your behalf?

11 THE DEFENDANT: No, sir.

12 THE COURT: And I ask you once again, sir, are you  
13 totally and completely satisfied with his representation?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Are you today, sir, under the influence  
16 of any alcoholic beverages, drugs, or prescription  
17 medication?

18 THE DEFENDANT: No, sir.

19 THE COURT: Sir, are you today aware of any mental,  
20 nervous, or emotional conditions which would keep you from  
21 understanding what we're doing here today?

22 THE DEFENDANT: No, sir.

23 THE COURT: Sir, are you pleading guilty of your own  
24 free will and accord?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Nobody has made you do this?

2 THE DEFENDANT: No, sir.

3 THE COURT: All right. I find his decision to plead  
4 guilty to be freely, voluntarily, and intelligently made.  
5 He's had the representation of a very competent lawyer  
6 Mr. Gibbons with whom he says he's satisfied, and I will  
7 accept the plea. If you disagree with these proceedings  
8 here today you have 10 days from today's date to file a  
9 notice of intent to appeal. Do you understand your rights  
10 to an appeal?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Mrs. Beth Ann Young?

13 MRS. YOUNG: Thank you, Your Honor. May it please  
14 the court. This sale took place on August 19, 2009,  
15 Narcotics officers with the Aiken Department of Public  
16 Safety developed a confidential informant that could  
17 purchase from Mr. Kenneth Jones also known as KJ from a  
18 location at 436 Ridge Avenue which is within the city  
19 limits of Aiken and Aiken County. The residence is also  
20 .4 miles from Pinecrest Elementary School.

21 The CI was equipped with surveillance equipment and  
22 kept under visual surveillance up until the CI reached the  
23 location. The transaction was being monitored. The CI  
24 met with an individual and began speaking with him and if  
25 you listen to the audio you can clearly tell it's a drug

1 transaction, and during the course of the transaction the  
2 CI tries to get the purchase down to \$20 and the way I  
3 hear it the Defendant refers to himself in the third  
4 person and says something to the effect of KJ doesn't do  
5 that kind of thing confirming that it was Mr. Jones, the  
6 person the CI knew to be KJ.

7 The CI returned and met back with the officers and  
8 turned over the contraband and it did field test positive  
9 for cocaine, and as I stated before it's .4 miles from  
10 Pinecrest Elementary School. They did do a search warrant  
11 several days later at this residence. Mr. Jones was  
12 located there at that point in time along with many other  
13 people. It's my understanding, Your Honor, there is an  
14 elderly man that rents that residence and he doesn't  
15 really have control of what goes on there, but there is a  
16 substantial amount of drug sellers and people who do  
17 drugs. There were six people arrested just for having  
18 drugs at the search warrant, but that's not what he's  
19 pleading guilty to, but he was still at the residence  
20 which I think is relevant.

21 THE COURT: All right. Do you have a commercial  
22 driver's license?

23 THE DEFENDANT: No, sir.

24 THE COURT: What is a CMV? Anybody know?

25 MR. GIBBONS: One is for trucks and one is for buses,

1 I think, Judge.

2 THE COURT: Do you have a commercial motor vehicle  
3 license?

4 THE DEFENDANT: No, sir.

5 THE COURT: Do you have a hazardous material driver's  
6 license?

7 THE DEFENDANT: No, sir.

8 THE COURT: Mr. Gibbons?

9 MR. GIBBONS: Your Honor, my client is 32 years of  
10 age. He is from here in Aiken, and he and I have talked  
11 about this case quite a bit. It developed into a plea  
12 late yesterday afternoon, and we've got him here over in  
13 court. He has been in jail for 84 days on this charge.  
14 His bond was set at 25,000. He tells me that he admits  
15 what he's done is wrong. He's not the typical dealer that  
16 we come across so much that has the money and the  
17 connections and the cars and the people working for him.  
18 He is just trying to take care of a habit that he's  
19 developed and kind of hand to mouth as far as his selling  
20 goes is what he tells me.

21 Your Honor, he understands that he's in a bad  
22 situation. He and I talked about what could happen if the  
23 state wanted to go forward on the distribution second. He  
24 would be looking at substantial more exposure as well as  
25 an 85 percent sentence. After discussing that we

1 discussed the strike issue. He assures me this is his  
2 last go-round and he understands if it's not what the  
3 consequences could be.

4 He wants to get a hold of the addiction situation and  
5 pay his debt to society and get back out. We would ask  
6 the court -- he has asked me to ask the court for time  
7 served or a probationary sentence, but we would just ask  
8 the the court to consider his situation and give him a  
9 fair sentence that will address his issues.

10 THE COURT: Well, anything you want to tell me, sir?

11 THE DEFENDANT: Just --

12 THE COURT: Just what?

13 THE DEFENDANT: I mean, really, it wasn't for sale  
14 really. It just happened -- the situation came up that  
15 the money was there. I just took --

16 THE COURT: Mr. Jones, you were before me in April of  
17 '07. I gave you a very, very, very light sentence for  
18 selling crack cocaine within proximity. Eighteen months.  
19 I don't know how much time you served because you were  
20 back out and doing it again in August of '09. I don't  
21 know how to get your attention.

22 Sentence of the Court is that you be committed to the  
23 Department of Corrections for 12 years. Good luck to you.  
24 I'll give you credit for your time served.

25 (End of Transcript of Record.)

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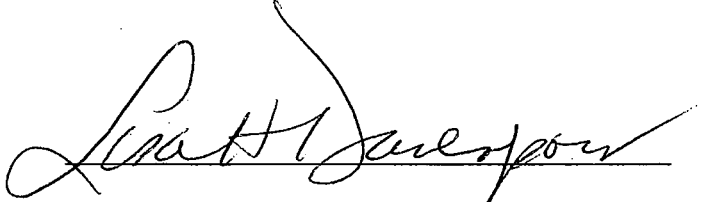
CERTIFICATE OF REPORTER

State of South Carolina        )  
  )  
County of Aiken                    )

I, Lisa H. Davenport, Official Court Reporter for the  
Second Judicial Circuit of the State of South Carolina, do  
hereby certify that the foregoing is a true, accurate and  
complete Transcript of Record of the proceedings had and  
evidence introduced in the trial of the captioned case,  
relative to appeal, in the Court of General Sessions for  
Aiken County, South Carolina, on the 18th day of November,  
2009.

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

January 1, 2012



Lisa H. Davenport, Court Reporter

I091842

2009-03-02 00464  
2009-03-02 2230

FORM 5

Filed: 3-23-10  
Clerk of Court  
Deputy Clerk  
Trial Judge  
Trial Jury  
Court Reporter  
Sec. PCR Petitioner  
General Sessions  
Appointed Asst.

STATE OF SOUTH CAROLINA )

COUNTY OF )

Kenneth Jones #262531 )  
Full name and prison number (if any) of Applicant. )

v. )

State of South Carolina )

IN THE COURT OF )

APPLICATION FOR )

POST-CONVICTION RELIEF )

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention \_\_\_\_\_
2. Name and location of Court which imposed sentence Aiken County Courthouse
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: 2009-08-02-2230.
  - (a) Distribution Crack within 1/2 mile of school
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) November 18, 2009.
  - (b) 12 year 65% nonviolent.

- (c) \_\_\_\_\_
- 6. Check whether a finding of guilty was made:
  - (a) after a plea of guilty
  - (b) after a plea of not guilty \_\_\_\_\_
  - (c) after a plea of nolo contendere \_\_\_\_\_
- 7. Did you appeal from the judgment of conviction or the imposition of sentence?  
NO
- 8. If you answered "yes" to (7), list:
  - (a) the name of each Court to which you appealed: 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: NA
    - i. \_\_\_\_\_
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
- 9. If you answered "no" to (7), state your reasons for not so appealing: Counsel Fail to file
  - (a) AN APPEAL OR PETITIONER'S BELIEF.
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
- 10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: Petitioner asserts that his plea was unknowingly and involuntarily made for the reasons listed below.

10. Petitioner asserts that his plea was unknowingly and involuntarily made for the reasons listed below.

A.) Counsel failed to properly investigate video of alleged transaction, which impeded petitioner's decision to plea guilty or not guilty.

(1) Counsel failed to make a motion to disclose Brady material pursuant to Rule 5 of S. C. R. Crim. P.

B) Counsel fail to properly file an appeal on behalf of the petitioner according to ~~SCRPC~~ SCRPC.

C) Trial judge failed to establish a factual basis to accept petitioner's plea of guilty, where the prosecutor did not give competent and accurate measurements of the distance from the alleged distribution to the school.

- (a) CONSEL WAS INEFFECTIVE IN FAILED TO PROPERLY INVESTIGATE AND
- (b) OF ATTORNEY PROSECUTION WHICH IMPEDED PETITIONER'S DECISION TO PLEA OR
- (c) not guilty.
- (c) See Attachment on Back.

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

- (a) Petitioner AVERs That the state violated his Due Process
- (b) Petitioner AVERs that the state violated his 6th Amendment
- (c) Petitioner AVERs That the government violated his his due

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: N/A
  - i. N/A
  - ii. N/A
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (b) the name and location of the Court in which each was filed: N/A
  - i. \_\_\_\_\_
  - 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? no!
- (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: BE Grant Gibbons
  - i. 410 Bernwell Avenue N.W.
  - ii. P.O. Box 2247
  - iii. Aiken, S.C. 29802

- (b) the proceedings at which each such attorney represented you:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

19. State clearly the relief you seek in filing this application: Vacate sentence at least  
Reverse and Remand A new trial.

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

STATE OF SOUTH CAROLINA )

County of )

VERIFICATION )

I, \_\_\_\_\_, 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.

Kenneth Jones

SWORN to and subscribed before me this 2<sup>nd</sup>  
day of March, 2010.

Alaine Belin Cook (L.S.)  
Notary Public

My Commission Expires: 10-01-2018

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

I, \_\_\_\_\_, 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.

Kenneth James  
Applicant

SWORN or affirmed to and subscribed before me this  
2<sup>nd</sup> day of March, 2010.

Olivia Belin Cook  
Notary Public

My Commission Expires: 10-01-2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	
	)	
	)	2010-CP-02-0464
	)	
Kenneth Jones, #262531,	)	
	)	
Applicant,	)	
	)	
v.	)	<b>RETURN</b>
	)	(Appointment of Counsel Requested)
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed March 3, 2010, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. The Applicant was indicted at the December 2009 term of the Aiken County Grand Jury for Distribution of Cocaine Base Within Proximity of a School (2009-GS-02-2230). He was represented by DeGrant Gibbons, Esquire. On November 18, 2009, the Applicant pled guilty to before the Honorable Doyet A. Early, III. He was sentenced to twelve (12) years imprisonment. The Applicant did not appeal his guilty plea or sentence.

Attached herewith and incorporated herein are the records of the Aiken County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina

Department of Corrections, and the guilty plea transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

- 1. Involuntary plea.
  - a. "Counsel failed to properly investigate video of alleged transaction, which impeded petitioner's decision to plea guilty or not guilty
    - i. "Counsel failed to make a motion to disclose Brady material pursuant to Rule 5 of SCCrimP."
  - b. "Counsel fail to properly file an appeal on behalf of the petitioner according to SCRCF."
  - c. "Trial judge failed to establish a factual basis to [accept] petitioner's plea of guilty where the prosecutor did not give competent and accurate measurements of the distance from the alleged distribution to the school."

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCF.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be

relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

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

## IV.

Respondent submits that the Applicant's allegation that his guilty plea was involuntary is without merit. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant 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 defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4<sup>th</sup> Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4<sup>th</sup> Cir. 1976).

Respondent submits that 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 which is not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing on this allegation. Sharper v. State, 305 S.E.2d 247.

## V.

The Respondent submits that the allegation of trial court error should be summarily dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. §

17-27-10 to -160 (2003). An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.... S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by the Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. The allegation presented by Applicant raises direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised these issues at trial or on appeal. His failure to do so has waived these allegations as grounds for relief. Therefore, the Court should summarily dismiss this application for post-conviction relief.

## VI.

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

## VII.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

Respectfully submitted,

HENRY DARGAN McMASTER  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

MARY S. WILLIAMS  
Assistant Attorney General

By:   
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Telephone: (803) 734-3737

Oct. 20, 2010.

1 STATE OF SOUTH CAROLINA

2 COUNTY OF AIKEN

CIRCUIT COURT  
2010-CP-02-00464

3

4 KENNETH JOSEPH JONES,  
5 Applicant,

6 -vs-

TRANSCRIPT OF RECORD

7 STATE OF SOUTH CAROLINA,  
8 Respondent.

8

9

Post Conviction Relief Hearing

10

Heard on Monday, July 11, 2011

11

Aiken, South Carolina

12

13 BEFORE:

14

THE HONORABLE JAMES R. BARBER III

15

16

APPEARANCES:

17

Counsel on Behalf of the Applicant:  
18 Dorothy Holley Hogg, Esq.

19

Counsel on Behalf of the Respondent, State of SC:  
20 Robert Corney, Esq.

21

22

23

Cheri L. Young, RPR  
Circuit Court Reporter

24

P O Box 1154  
Aiken, SC 29802-1154

25

EXAMINATION INDEX

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

KENNETH JOSEPH JONES

DIRECT BY MS. HOGG . . . . . 4

CROSS BY MR. CORNEY . . . . . 11

DE GRANT GIBBONS

DIRECT BY MR. CORNEY . . . . . 15

EXHIBIT INDEX

(NO EXHIBITS IDENTIFIED/INTRODUCED.)

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
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- 24
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KENNETH JOSEPH JONES - DIRECT

1 ON MONDAY, JULY 11, 2011 AT 10:15 A.M.:

2 MR. CORNEY: Kenneth Jones.

3 THE COURT: Ms. Hogg, who are you with?

4 MS. HOGG: Fulcher Hagler Law Firm in Augusta,  
5 Georgia.

6 THE COURT: All right. Mr. Corney?

7 MR. CORNEY: Yes, sir, Your Honor.

8 This is Kenneth Jones, case number 2010-CP-02-0464.  
9 Mr. Jones waived presentment to distribution of crack  
10 cocaine within proximity of a school.

11 On November 18th, 2009, he pled guilty before Judge  
12 Early as indicted. He was sentenced to 12 years and got  
13 credit for time served.

14 And, as you just heard, Ms. Hogg is here on behalf of  
15 Andrew Haltiwanger.

16 THE COURT: All right. Ms. Hogg?

17 MS. HOGG: Yes, Your Honor, I would like to call  
18 Mr. Jones.

19 THE COURT: All right. Mr. Jones, if you'll come up,  
20 please.

21 KENNETH JOSEPH JONES, having been duly sworn, was  
22 examined and testified as follows:

23 THE CLERK: Please have a seat in the box and state  
24 your full name.

25 THE APPLICANT: Kenneth Jones, Kenneth Joseph Jones.

KENNETH JOSEPH JONES - DIRECT

DIRECT EXAMINATION

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BY MS. HOGG:

Q. Mr. Jones, did you enter a guilty plea voluntarily?

A. Yes, ma'am.

Q. But in your PCR application, you have alleged that the voluntariness of your plea, that's why you're bringing your PCR application today; is that correct?

A. Yes, ma'am.

Q. Can you explain to the Judge why your plea was involuntary?

A. It's because of, like, I was not -- as far as using my lawyer, I asked him over and over about, supposed to have been an alleged audio, you know what I'm saying, but he telling me, the lawyer, he said we can't get it unless we go to trial.

I need this audio in order to make a clear decision but without the audio I'm in a rock and a hard place. Basically I'm between a rock and a hard place. You're going to go with the plea or go to trial blind. Really.

So I'm like, only thing I'm going off of what he saying. I think you should take the plea, you know what I'm saying, et cetera. And I take the plea.

Then when I get my paper, transcripts and paperwork, I'm telling him over and over that I need you to investigate different things about the situation. They

KENNETH JOSEPH JONES - DIRECT

1 saying that the place, and different -- but he never, he  
2 didn't do nothing.

3 So I'm thinking, okay, I don't have no money to get my  
4 own lawyer. So if I could go to court and say this  
5 against him, what they going to do, give me another lawyer  
6 out of his -- out of the public defenders office. And  
7 they all work together.

8 So I'm like, okay, you know, I might as well take the  
9 plea, you know what I'm saying. That's really why I took  
10 the plea because, off of his word, you know. Okay. This  
11 is a plea and you take it. This is the time to take the  
12 plea, da-da-da-da-da. I think you should take the plea,  
13 if not you're going to trial. You're this, that and the  
14 other.

15 Q. And to make sure I'm clear, you asked to hear the  
16 audiotape?

17 A. Yeah.

18 Q. Your attorney told you you could not hear it --

19 A. Unless I went to trial.

20 Q. And so you had to make the decision to plead?

21 A. Off of just -- okay. What am I going to do, take this  
22 or what, take the plea or what? Because, to be honest  
23 with you, I know what I was out there doing at the time.  
24 See what I'm saying?

25 But it's like, I don't understand why the motion that

KENNETH JOSEPH JONES - DIRECT

1 I received didn't have -- I'm telling him different stuff  
2 that I don't see, that's right about the case.

3 He telling me, well, I don't think you should do this,  
4 I don't think you should do that. I'm like, okay. Well,  
5 that only leave me one option. If he telling me I don't  
6 think we should do that, he, he, he's not going to work  
7 for me anyway. So what else can I do besides take the  
8 plea?

9 Q. How many times did you meet with your attorney?

10 A. Once. He came to see me one time.

11 Q. How close was that in time to when you decided to  
12 plead guilty?

13 A. I can't give you exact, you know what I'm saying. I'd  
14 say probably two weeks, two or three weeks. Two to three  
15 weeks at the most.

16 Q. Okay. Is there anything else you wish to tell the  
17 Court about the voluntariness of your plea?

18 A. I mean, I really -- I was like, well, I wasn't --  
19 wasn't really nothing else I could do, because I felt like  
20 wasn't -- if I called his office either he's -- I would  
21 get an excuse from him. He's doing this. He's busy, he's  
22 doing this.

23 I'm -- okay. Well, I mean, what else could I do? I  
24 can't help myself now.

25 Q. How many times did you try to contact him?

KENNETH JOSEPH JONES - DIRECT

1 A. I called his office several times. I talked to him.  
2 I did talk to him a couple times, you know what I'm  
3 saying.

4 Q. By telephone?

5 A. By telephone, yeah. But mostly I talked to the  
6 paralegal, Ms. Culbertson. I mostly talked to her most of  
7 the time.

8 Q. Did you wish to file an appeal?

9 A. Yes. I contacted his -- I contacted the office. I  
10 got sentenced on the 18th. The 19th is when I contacted  
11 the office. I talked to her on the phone, the paralegal.

12 Q. And what did you tell the paralegal?

13 A. I asked -- tell Mr. Grant Gibbons that I need him to  
14 appeal my case.

15 Q. Were you ever able to speak to Mr. Gibbons?

16 A. No.

17 Q. And do you know if an appeal was ever filed on your  
18 behalf?

19 A. I received a -- when I first wrote to South Carolina  
20 Court of Appeals, they said you don't have -- we don't  
21 have nothing in our court. But then later on, about a  
22 week later, I received a paper saying letter of intent.

23 Q. Do you know if anything further was filed?

24 A. No. After -- after the letter of intent I received a  
25 letter from them again saying that it was -- something,

KENNETH JOSEPH JONES - DIRECT

1 that it was re-admitted to the lower courts, back to Aiken  
2 County Court. That's the only thing -- only  
3 correspondence I got from them. Basically they were  
4 telling me I don't have no case in their court.

5 Q. Do you feel that you had effective assistance of  
6 counsel?

7 A. I mean, by him -- as far as him not -- no. Basically  
8 by him not doing any investigation, and if -- as far as  
9 him letting -- okay. When I get my motion to discovery,  
10 all the evidence that you have against me is supposed to  
11 be in it. We supposed to be able to hear the audio to  
12 make a effective decision. We weren't able to hear it. I  
13 don't understand why.

14 Q. Is there anything else you wish to tell the Court  
15 about your PCR application today?

16 A. Yeah. I mean, as far as just not being able to hear  
17 the evidence which he knew that she supposed to give it to  
18 him. I mean, I did research in the law library. And the  
19 law clearly states that anything she has against me she's  
20 supposed to give it to me.

21 In my motion -- and he let her do it. And she say no,  
22 okay, then there's -- no.

23 Q. Other than the audiotape, is there anything else that  
24 you think you should have access to?

25 A. Well, the audio, the chemical analysis in my case, the

1 chain of custody. I didn't get none of this as far as the  
2 who, who got who -- who did the drug analysis. I didn't  
3 get nothing.

4 I done wrote several different people trying to get  
5 this in the course of my time being in prison. And  
6 everybody keeps saying the same thing. I wrote his office  
7 asking him, and I never did receive anything back from his  
8 office

9 MS. HOGG: Nothing further, Your Honor.

10 THE COURT: When are you eligible for parole?  
11 December?

12 THE APPLICANT: I think -- I think so.

13 THE COURT: Five months from now?

14 THE APPLICANT: No, December of 2012, I think it is.  
15 Sometime in 2012, I think, if I'm not mistaken.

16 THE COURT: It says right here on the sheet from the  
17 Department of Corrections, December 21, 2011.

18 THE APPLICANT: No, she told me it was -- my  
19 caseworker in my institution, she said, I think she said  
20 it changed.

21 THE COURT: (Displaying paper to witness).

22 Projected parole date, 12-21-2011. Max-out date,  
23 9-11-15; is that right?

24 THE APPLICANT: No, you get disciplinary. I had got  
25 disciplinary.

KENNETH JOSEPH JONES - CROSS

1 THE COURT: Oh. So you've gotten yourself in some  
2 trouble?

3 THE APPLICANT: Disciplinary. That's why I'm -- it  
4 changed. That's why everything is changed.

5 THE COURT: Do you understand what happens if you're  
6 successful in this?

7 THE APPLICANT: Yes, sir. I understand.

8 THE COURT: You go back for a new trial.

9 THE APPLICANT: Yes, sir.

10 THE COURT: What charges were pending, distribution  
11 and what else?

12 THE APPLICANT: Distribution and distribution within  
13 half-mile of a school zone.

14 THE COURT: You can get substantially more time.

15 THE APPLICANT: I understand that.

16 THE COURT: You still want to go forward?

17 THE APPLICANT: Yes, sir.

18 THE COURT: All right. Mr. Corney, anything?

19 MR. CORNEY: Just real briefly, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. CORNEY:

22 Q. Mr. Jones, in regard to this audiotape, did  
23 Mr. Gibbons discuss with you the solicitor's ability to  
24 withhold that audiotape until trial?

25 A. He just said he was not able to get it unless we go to

KENNETH JOSEPH JONES - CROSS

1 trial. He didn't say nothing about the Pacifics (sic) on  
2 it, why he couldn't get it. He just never explained none  
3 of that.

4 Q. He told you he wasn't able to get it to listen to it  
5 unless you decided to go to trial; right?

6 A. Yeah, that was just that. No Pacific (sic) why, or  
7 none of the other stuff.

8 Q. You told Judge Early during your plea hearing that you  
9 were totally and completely satisfied with Mr. Gibbons'  
10 representation; right?

11 A. That comes with take -- part of the plea. If I would  
12 have told him anything else, he wouldn't have accepted the  
13 plea; right?

14 Q. You said whatever you had to to get this plea?

15 A. Yeah. I mean, I'm trying to help myself, I mean,  
16 basically.

17 Q. So this plea deal that you would have said anything to  
18 Judge Early for to get before, now you don't want to;  
19 right?

20 A. What you mean? Say that again.

21 Q. You just said a minute ago that you would've said  
22 whatever it took to get the plea.

23 A. I mean, when you plead he asks you these questions.

24 All of this comes along with you -- with the plea. When

25 he asks you these questions, you know what I'm saying, you

KENNETH JOSEPH JONES - CROSS

1 have to either say yes or no or, you know what I'm saying,  
2 and you're just going along with, basically going along  
3 with the flow.

4 If he asks me the questions I have to answer the  
5 questions, okay, yeah, I'm satisfied. If I say no, then  
6 I'm not trying -- I'm not helping myself. I don't feel  
7 like he's going to help me, but guess what, by me taking  
8 the plea I have to try to help myself. And that's in the  
9 course of answering questions.

10 Q. So you said what you had to do to get the plea?

11 A. Making them do something, yeah.

12 Q. So obviously you wanted this plea at the time?

13 A. I mean, what other options do I have? Go to trial  
14 with him when he already -- I feel like he ain't even  
15 doing nothing.

16 Q. You appeared before Judge Early less than two years  
17 before this, right, on another possession with intent to  
18 distribute charge?

19 A. Yes, sir.

20 Q. And Judge Early was pretty lenient on you; right?

21 A. Yeah.

22 Q. I think he gave you 10 years suspended to 18 months;  
23 is that correct? And this second time he brought that up  
24 to your attention; right?

25 A. Yeah.

## KENNETH JOSEPH JONES - CROSS

1 Q. He had just seen you two years before this?

2 A. No. He asked me a question, was he on my case in the  
3 first one. Then he was like -- yeah, well, he did  
4 sentence me on the first one. That's when he said, okay,  
5 I gave you leniency on the first one.

6 Then it went from there.

7 Q. Judge Early remembered that he had just sentenced you  
8 two years before and that was -- it was pretty leniently  
9 on a similar charge?

10 A. Yes.

11 Q. Okay. Do you remember whether or not Mr. Gibbons  
12 filed that notice of intent to appeal?

13 A. It was -- I don't know who -- I got a real -- I  
14 heard -- only name I remember was Ms. Rankin, Mary Rankins  
15 or something like that. I don't know if his name was on  
16 it or what. I don't remember.

17 Q. Mr. Jones, you have a prior criminal record; right?

18 A. Yeah.

19 Q. You've got a burglary third charge. You got two of  
20 those, right, burglary third?

21 A. Yeah.

22 Q. 1999. 2005, 2006 trespassing?

23 A. It was misdemeanor charges; yes, sir.

24 Q. Simple assault and battery from 2006; right?

25 A. Uh-huh.

## DE GRANT GIBBONS - DIRECT

1 Q. And then entering premises after warning in 2008?

2 A. Yeah.

3 Q. Also you got that other possession with intent to  
4 distribute crack cocaine in proximity that we just spoke  
5 about in front of Judge Early; right?

6 A. Yes, sir.

7 MR. CORNEY: That's all we have.

8 THE COURT: Ms. Hogg, anything further?

9 MS. HOGG: Nothing further, Your Honor.

10 THE COURT: All right. You may step down. Thank  
11 you. Any more witnesses, Mrs. Hogg?

12 MS. HOGG: No, Your Honor.

13 THE COURT: Anything from the State?

14 MR. CORNEY: We'd like to call Mr. Grant Gibbons  
15 again, please.

16 THE COURT: Mr. Gibbons, continue under oath.

17 DE GRANT GIBBONS, having been previously sworn, was  
18 examined and testified as follows:

19 DIRECT EXAMINATION

20 BY MR. CORNEY:

21 Q. Mr. Gibbons, do you recall Mr. Jones's case and have  
22 you had a chance to review his file?

23 A. I do and I have.

24 Q. Do you recall meeting with him, the number of times  
25 you met with him?

DE GRANT GIBBONS - DIRECT

1 A. I met with him a couple of times. This was kind of a  
2 case that was moving pretty quickly through the  
3 solicitor's office.

4 Q. And during those meetings, you had the opportunity to  
5 either review the indictments and charges with him, the  
6 potential sentences?

7 A. I did. He had a distribution of crack cocaine and a  
8 proximity charge. Given his priors, that made the  
9 distribution an 85-percent charge with a lot of time on  
10 it, up to 25.

11 Q. Okay. Do you recall receiving the discovery file in  
12 this case?

13 A. I do. And the policy the solicitor's office has here,  
14 they'll give me the paperwork discovery. If there's an  
15 audio or a video that has a CI identifiable on it, either  
16 by voice or by picture, their policy is they make a plea  
17 offer to resolve the case. And we can either take it or  
18 we can ask for a trial, but they will not show us the  
19 identifying evidence until we've -- we're set hard on a  
20 trial.

21 And that's what happened in this case. He could have  
22 listened -- and I explained to him. He could have  
23 listened to the audio at any time, but once he did that  
24 the plea offer was off the table.

25 Q. And based on your understanding, that's a pretty

DE GRANT GIBBONS - DIRECT

1 widely-accepted rule, I mean, that's been ruled on before?

2 A. That's what they do in Aiken. They've done it for  
3 years.

4 Q. And Mr. Jones had appeared less than two years before  
5 in front of Judge Early on a possession with intent to  
6 distribute crack charge; right?

7 A. Correct.

8 Q. And you were aware of that?

9 A. I was.

10 Q. Did you feel that that might affect his sentencing  
11 when the sentencing came?

12 A. Well, I thought it might have an effect but I didn't  
13 really have a whole lot of choice at that point because  
14 there was a time limit on the plea offer. And I put that  
15 to Mr. Jones and he understood what was going on.

16 We had the discussion. The biggest thing we had to  
17 worry about was getting rid of that 85-percent charge.

18 Q. And it was ultimately Mr. Jones's decision to plead  
19 guilty on the case?

20 A. That's correct.

21 Q. And did you believe it was in his best interests to do  
22 so?

23 A. I did.

24 Q. As far as this appeal, did you file the notice of  
25 appeal?

DE GRANT GIBBONS - DIRECT

1 A. There was an appeal filed on the guilty plea. It was  
2 sent in. I got notice back from the Court of Appeals that  
3 they had received it and they had opened the case on it.

4 At that point it was kind of out of my hands.

5 MR. CORNEY: I believe that's all I have, Your  
6 Honor.

7 THE COURT: Ms. Hogg, anything?

8 MS. HOGG: Nothing, Your Honor.

9 THE COURT: All right. Mr. Gibbons, you may step  
10 down.

11 THE WITNESS: Thank you.

12 MR. CORNEY: Your Honor, there's one more thing I  
13 wanted to ask him. I'm sorry. Is it okay if I --

14 THE COURT: Sure.

15 MR. CORNEY: I apologize for that. Just real  
16 briefly, Mr. Gibbons. I apologize for that, Your Honor.

17 THE COURT: Any objection, Ms. Hogg?

18 MS. HOGG: I'm sorry Your Honor?

19 THE COURT: He had another question. It slipped his  
20 mind.

21 MS. HOGG: No objection.

22 CROSS-EXAMINATION (CONTINUED)

23 BY MR. CORNEY:

24 Q. Mr. Gibbons, you were appointed on this case?

25 A. I was.

1 MR. CORNEY: That's all I have. I'm sorry about  
2 that.

3 THE COURT: All right. We'll take the matter under  
4 advisement. Thank you.

5 MS. HOGG: Thank you, Your Honor.

6 THE COURT: Yes, ma'am.

7 END OF PROCEEDINGS: 10:30 A.M.

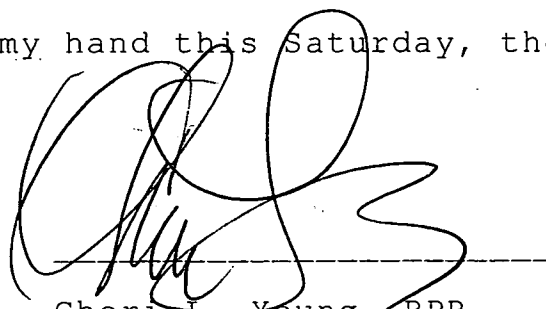
8 \* \* \* \*

9 CERTIFICATE OF REPORTER

10 I, Cheri L. Young, Registered Professional Reporter,  
11 and Official Court Reporter for the State of South  
12 Carolina, do hereby certify that the foregoing transcript  
13 of proceedings heard on Monday, July 11, 2011, in Aiken,  
14 South Carolina, was reported by me using machine shorthand  
15 and realtime computer-aided translation and is a true,  
16 accurate and complete transcript of the proceedings had  
17 and evidence introduced in the hearing of the matter.

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

20 I have hereunto set my hand this Saturday, the 19th  
21 day of November, 2011.

22  
23  
24 

25 Cheri L. Young, RPR  
Official Court Reporter

STATE OF SOUTH CAROLINA )  
 COUNTY OF AIKEN )  
 )  
 )  
 )  
 Kenneth Jones # 262531, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FOR THE SECOND JUDICIAL CIRCUIT

2010-CP-02-0464

**ORDER OF DISMISSAL**

FILED: 31 August 20 11  
 \_\_\_\_\_  
 L. J. Hedard  
 C.C.P. & G.S.  
 \_\_\_\_\_  
 Angel Miles  
 Deputy Clerk

**PROCEDURAL HISTORY**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 3, 2010. The Respondent made its Return on October 20, 2010. An evidentiary hearing into the matter was convened on Monday, July 11, 2011, at the Aiken County Courthouse. The Applicant was present at the hearing and was represented by Dorothy Holley Hogg, Esquire, on behalf of Andrew Holliday, Esquire. The Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Applicant also presented testimony from plea counsel, Grant Gibbons, Esquire. This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Aiken County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. The Applicant was indicted at the December 2009 term of the Aiken County Grand Jury for Distribution of Cocaine Base Within Proximity of a School (2009-GS-02-

2230). He was represented by DeGrant Gibbons, Esquire. On November 18, 2009, the Applicant pled guilty to before the Honorable Doyet A. Early, III. He was sentenced to twelve (12) years imprisonment. The Applicant did not appeal his guilty plea or sentence.

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

1. Involuntary plea.
  - a. "Counsel failed to properly investigate video of alleged transaction, which impeded petitioner's decision to plea guilty or not guilty
    - i. "Counsel failed to make a motion to disclose Brady material pursuant to Rule 5 of SCCrimP."
  - b. "Counsel fail to properly file an appeal on behalf of the petitioner according to SCRCP."
  - c. "Trial judge failed to establish a factual basis to [accept] petitioner's plea of guilty where the prosecutor did not give competent and accurate measurements of the distance from the alleged distribution to the school."

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington,

466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

#### *Involuntary Guilty Plea*

At the plea hearing, Applicant alleged counsel provided ineffective assistance rendering his guilty plea involuntary. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant 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 defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4<sup>th</sup> Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4<sup>th</sup> Cir. 1976).

Applicant alleges because he was unable to review an audiotape of the controlled drug purchase prior to entering his plea, his plea was involuntary. Applicant testified he had asked counsel to get a copy of the audiotape for Applicant to review, but counsel advised Applicant he could not get the audiotape unless Applicant rejected all plea offers and the case was set on the docket for trial. Counsel stated that although he did review all paper discovery with Applicant, he was unable to review the audiotape with Applicant because it is the Solicitor's policy to withhold audio/video of a controlled buy until the case is scheduled for trial for the protection of the confidential informants. Counsel testified that he discussed this practice with Applicant and advised him that if he wished to review the audiotape he could, but then all plea offers would be revoked. Counsel stated it was Applicant's ultimate decision to enter the plea rather than proceed to trial and review the audiotape.

The State is ordinarily privileged from disclosing the name of a confidential informant. State v. Wright, 322 S.C. 484, 472 S.E.2d 642 (Ct. App.1996). However, the State may be

compelled to reveal an informant's identity where the informant is either an active participant in a criminal transaction or a material witness to the question of the defendant's guilt or innocence. State v. Batson, 261 S.C. 128, 198 S.E.2d 517 (1973). Even if the informant is an active participant in the criminal act and/or a material witness, the court may still sustain an invocation of the nondisclosure privilege if other factors and circumstances warrant doing so. State v. Bultron, 316 S.C. 323, 457 S.E.2d 616 (Ct. App.1995). The trial court must balance the public's interest in perpetuating the flow of vital information to law enforcement officials against the right of the individual to prepare his defense. Id. The burden is on the accused to show facts and circumstances giving rise to the exception to the privilege against disclosure. Batson, supra; State v. Shupper, 263 S.C. 53, 207 S.E.2d 799 (1974).

Applicant has failed to show counsel was not acting within the range of competence demanded of attorneys in criminal cases. The case law is clear that the State did not have to turn over the audiotape for Applicant's review until he was placed on the trial docket. Counsel requested a copy of the tape from the solicitor's office to review with Applicant, but was advised of their policy, which he promptly relayed to Applicant. Applicant made the voluntary decision to enter a guilty plea rather than proceed to trial and gain access to the tape. Therefore, Applicant has failed to prove by the preponderance of the evidence that counsel was ineffective in this regard. Further, Applicant has failed to prove that had he had the opportunity to review the contents of the audiotape, there is a reasonable probability that he would not have pled but instead insisted on going to trial. Finally, this Court finds that Applicant entered his plea knowingly, intelligently and voluntarily, and therefore waived his ability to hear and contest the contents of the tape had he proceeded to trial.

*Failure to File an Appeal*

The Applicant further alleges in his Application that counsel failed to file an appeal as requested. Applicant testified he spoke with counsel's paralegal on November 19, the day after his plea, to ask counsel to file an appeal on his behalf. Counsel testified he did in fact file the appeal as requested by Applicant and received notice from the Court of Appeals that it had been received. Applicant conceded that counsel had filed the notice of appeal filed on his behalf. As Applicant's appointed attorney, counsel was not obligated to represent Applicant for the duration of his appeal, but rather, was only obligated to file the appeal on Applicant's behalf and then turn it over to the Office of Appellate Defense. The Court finds counsel's testimony to be credible that he did in fact file the notice of appeal on Applicant's behalf and therefore properly discharged his duties as plea counsel. Therefore Applicant's allegation that counsel failure to file an appeal is without merit and must be denied.

As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed in its entirety.

### CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the

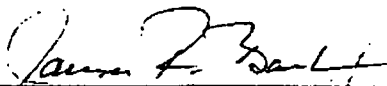
party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 2 day of August, 2011.

  
 \_\_\_\_\_  
 James R. Barber, III  
 Presiding Judge  
 Second Judicial Circuit

Columbia, South Carolina.

WITNESSES

Aiken Department Of Public Safety

Martin Sawyer

Law Enforcement Case #: 10-006646

BAY

ARREST WARRANT NUMBER

1091842

ACTION OF GRAND JURY

FILED *November 18* 2009

*Lin Hodard*  
C.C.P.&G.S.  
*Paulina [Signature]*

Foreperson of Grand Jury  
Date: December 10, 2009

VERDICT

Foreperson of Petit Jury  
Date:

DOCKET NO. 2009GS0202230

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONS

DECEMBER TERM 2009

THE STATE  
vs.

KENNETH JOSEPH JONES

CDR #: 0108

Indictment for

DISTRIBUTION OF COCAINE BASE  
(CRACK COCAINE) WITHIN PROXIMITY  
OF A SCHOOL

§ 44-53-0445(B)(2)

J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA     )  
   )  
 COUNTY OF AIKEN                ) INDICTMENT FOR  
   ) DISTRIBUTION OF COCAINE BASE (CRACK  
   ) COCAINE) WITHIN PROXIMITY OF A SCHOOL  
   )  
   ) § 44-53-0445(B)(2)

At a Court of General Sessions, convened on December 14, 2009, the Grand Jurors of Aiken County present upon their oath:

That KENNETH JOSEPH JONES did in Aiken County, South Carolina on or about August 19, 2009, knowingly or intentionally distribute Cocaine Base (Crack Cocaine), a controlled substance under provisions of Section 44-53-110, et. seq., Code of Laws of South Carolina (1976), as amended, while in, on, or within a one-half mile radius of the grounds of a public elementary school, to wit: Pine Crest School, such distribution not having been authorized by law.

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

  
 \_\_\_\_\_  
 J. STROM THURMOND, SOLICITOR