

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge  
\_\_\_\_\_

**RECEIVED**

NOV 19 2014

S.C. Supreme Court

DAVID STEWART,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001138

\_\_\_\_\_  
APPENDIX  
\_\_\_\_\_

WANDA H. CARTER  
Deputy Chief Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589

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P. O. Box 11549  
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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF SPARTANBURG	)	
The State,	)	TRANSCRIPT OF RECORD
	)	2009-GS-42-5962
-vs-	)	2009-GS-42-6024
	)	
Dave Douglas and David	)	
Anthony Stewart,	)	
	)	February 9, 2011
Defendants.	)	Spartanburg, South Carolina

B E F O R E:

HONORABLE J. MARK HAYES II, JUDGE

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

TRAVIS A. MOORE, ESQ.  
Attorney for the State

ANDREW J. JOHNSTON, ESQ.  
Attorney for defendant Douglas

ALBERT V. SMITH, ESQ.  
Attorney for defendant Stewart

Margaret A. Woods  
Circuit Court Reporter

**ORIGINAL**

1 MR. MOORE: Dave Douglas and David Anthony Stewart.

2 (Whereupon, the defendants came forward.)

3 MR. MOORE: Your Honor, standing before ya is Mr. Dave  
4 Douglas, he's here on Indictment 2009-GS-42-5962 which is a  
5 true billed indictment for trafficking in cocaine over 400  
6 grams. He's being allowed to plead to the lesser included  
7 offense of trafficking cocaine twenty-eight to a hundred grams  
8 first offense, he's represented by Mr. Andy Johnson; and also  
9 before Your Honor is Mr. David Anthony Stewart. He's here on  
10 Indictment 2009-GS-42-6024 which is a true billed indictment  
11 for trafficking cocaine over 400 hundred grams. He too is  
12 being allowed to plead to the lesser included offense of  
13 twenty-eight to a hundred grams, he's represented by  
14 Mr. Albert Smith, there are no further recommendations or  
15 negotiations by the State.

16 THE COURT: You are Mr. Stewart?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: You're Mr. Stewart?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: And you are Mr. Douglas?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Alright, gentlemen, if you would, please  
23 raise your right hand, the clerk of court needs to swear you  
24 in.

25 (Whereupon, the defendants were sworn.)

1 THE COURT: Alright, Mr. Douglas, you intend to enter a  
2 plea today to trafficking cocaine 28 grams to 100 grams?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: And, Mr. Stewart, you intend to enter a plea  
5 to trafficking in cocaine 28 grams to 100 grams?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Alright, gentlemen, if ever during this  
8 process if either of you wish to speak to your lawyer, you  
9 just let me know and I'll allow you to do so in private. How  
10 old are you, Mr. Douglas?

11 THE DEFENDANT: Twenty-nine.

12 THE COURT: Mr. Stewart?

13 THE DEFENDANT: Thirty-five.

14 THE COURT: How far did you go in school, Mr. Douglas?

15 THE DEFENDANT: I finished high school, yeah, didn't, I  
16 didn't go to college.

17 THE COURT: Mr. Stewart?

18 THE DEFENDANT: GED.

19 THE COURT: How far did you go in school before you  
20 dropped out?

21 THE DEFENDANT: Actually, I was -- when I came to this  
22 country, I di -- was too old to go back to high school.

23 THE COURT: Are you married, single, divorced or widowed,  
24 Mr. Douglas?

25 THE DEFENDANT: Yes, sir, I'm married.

1 THE COURT: Mr. Stewart?

2 THE DEFENDANT: Single.

3 THE COURT: Do you have any children, Mr. Douglas?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: How many?

6 THE DEFENDANT: I got three livin' with me and one is  
7 not.

8 THE COURT: How old are the children?

9 THE DEFENDANT: The oldest one is 7 and 7, 6, 3 and 2.

10 THE COURT: Mr. Stewart?

11 THE DEFENDANT: No, sir.

12 THE COURT: Do you have a job outside the home,  
13 Mr. Douglas?

14 THE DEFENDANT: Right now not really. I I would s -- buy  
15 and sell cars.

16 THE COURT: Mr. Stewart?

17 THE DEFENDANT: Work with my dad.

18 THE COURT: What type of work?

19 THE DEFENDANT: Contract plumber.

20 THE COURT: Ever serve in the military, Mr. Douglas?

21 THE DEFENDANT: No, sir.

22 THE COURT: Mr. Stewart?

23 THE DEFENDANT: No, sir.

24 THE COURT: When you got arrested on these charges, how  
25 long a time did you spend in jail before you made bond,

1 Mr. Douglas?

2 THE DEFENDANT: It was about two, two days.

3 THE COURT: Mr. Stewart?

4 THE DEFENDANT: Yeah, about that time.

5 THE COURT: Within the last twenty-four hours, have you  
6 consumed any type of substance that is adversely or negatively  
7 affecting your ability to understand what we're doing today,  
8 Mr. Douglas?

9 THE DEFENDANT: No, sir.

10 THE COURT: Mr. Stewart?

11 THE DEFENDANT: No, sir.

12 THE COURT: Alright. Have you ever been treated for any  
13 type of drug or alcohol abuse, Mr. Douglas?

14 THE DEFENDANT: No, sir.

15 THE COURT: Mr. Stewart?

16 THE DEFENDANT: No, sir.

17 THE COURT: Are ya satisfied with the work that your  
18 lawyer has done, Mr. Douglas?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Mr. Stewart?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Beyond that which has been stated in this  
23 courtroom, has anybody come to you and threatened you in any  
24 way or have they made you any promises in order to get you to  
25 make the decision to enter the plea today, Mr. Douglas?

1 THE DEFENDANT: No, sir.

2 THE COURT: Mr. Stewart?

3 THE DEFENDANT: No, sir.

4 THE COURT: The de -- I I can properly conclude that the  
5 decision to enter the plea today is a free and voluntary  
6 decision on your part, Mr. Douglas?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Mr. Stewart?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: I need for you to understand that under the  
11 law you are presumed innocent of these charge that's presently  
12 against you and you do have a right to have a jury trial on  
13 the charge. At any jury trial that would take place, it would  
14 be the State that has the burden of proof and the State would  
15 have to convince all twelve members of a jury that you are in  
16 fact guilty beyond a reasonable doubt. Now in order to enter  
17 a plea however, you have to give up your right to that jury  
18 trial but if you wish to have a jury trial, that is fine, we  
19 will simply schedule one for you. Do you understand that you  
20 have a right to that jury trial, Mr. Douglas?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Mr. Stewart?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: And do you wish to give up your right to that  
25 jury trial and proceed with entering the plea, Mr. Douglas?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Mr. Stewart?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: I need for you to understand that there are  
5 other very important constitutional rights that you are  
6 entitled to but that you have to give up in order to enter a  
7 plea: You have to give up your right to confront and  
8 cross-examine the State's witnesses, you also have to give up  
9 your right to present evidence which you or your lawyer might  
10 feel would establish some tyla defense to these charges and  
11 you have to give up your right of subpoena and you also have  
12 to give up your right to remain silent. Now do you understand  
13 all those rights, Mr. Douglas?

14 THE DEFENDANT: Yes, sr.

15 THE COURT: Mr. Stewart?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: And do you wish to give up all those rights  
18 and go forward with the plea, Mr. Douglas?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Mr. Stewart?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Alright, gentlemen, if you would this  
23 gentleman over here (indicating) is the solicitor, he is going  
24 to give me the facts behind the the case. I need for ya'll to  
25 please listen to him and after he is finished I'll have some

1 more questions for you.

2 DEFENDANT STEWART: Okay.

3 MR. MOORE: Thank Your Honor. This incident occurred on  
4 June the 16th 2009. Deputy Carraway with the Spartanburg  
5 County Sheriff's office was on patrol in the vicinity of mile  
6 marker 73 on I-85 here in Spartanburg County when he witnessed  
7 the vehicle that the defendant was a passenger and driver of  
8 commit a traffic violation following too closely to some other  
9 vehicles and then changin' lanes. He attempted to move up  
10 through traffic to initiate a traffic stop. By the time he  
11 got in position, they had already gotten off the interstate,  
12 he then got off the interstate as well, went to Best Western  
13 Hotel where he'd seen the vehicle parked in the parking lot,  
14 the two defendants already checked in. He deployed his canine  
15 unit which is assigned to him around the vehicle in the  
16 parking lot and it positively alerted to a presence of  
17 narcotics in the vehicle, made contact with the defendants in  
18 their hotel room, brought 'em down, brought one of 'em  
19 downstairs, Mr. Douglas I believe, and explained to him that  
20 his canine alerted to the presence of narcotics and requested  
21 consent to search the vehicle, at that time he was given  
22 consent to search the vehicle. A search of the vehicle found  
23 in the trunk compartment a box of washing detergent, one of  
24 the large cardboard boxes of washing detergent, inside that  
25 box it was obvious that it had been opened and reglued to the

1 officer, he opened it up, dug through the washing detergent  
2 and found what later tested to be a little bit over 1 kilogram  
3 of powder cocaine, Your Honor.

4 THE COURT: Were you able to hear the solicitor when he  
5 told me the facts that are behind the case, Mr. Douglas?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Mr. Stewart?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Do you believe that as he stated the facts to  
10 me that he is substantially correct, Mr. Douglas?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Mr. Stewart?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: I need for you to understand that on the  
15 charge that is presently against you that I am required to  
16 impose a sentence of between 7 to 25 years and also impose a  
17 fine of \$50,000. Do you understand that, Mr. Douglas?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Mr. Stewart?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Do you also understand that the charge that's  
22 presently against you is classified as both a violent and also  
23 a serious offense under the law, Mr. Douglas?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Mr. Stewart?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: And have you been able to talk to your lawyer  
3 as to the consequences and ramifications of this -- of these  
4 offenses being classified as both a violent and also serious  
5 offense, Mr. Douglas?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Mr. Stewart?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Understanding the possible sentence I could  
10 impose as well as the ramifications of the offense being  
11 classified as both a violent and serious offense, you still  
12 wish to enter the plea, Mr. Douglas?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Mr. Stewart?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Mr. Douglas, are you in fact guilty of  
17 trafficking cocaine 28 grams to 100 grams?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Mr. Stewart, are you in fact guilty of  
20 trafficking in cocaine 28 grams to 100 grams?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Have you been able to hear all of my  
23 questions, Mr. Douglas?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Mr. Stewart?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Have all of your answers been truthful and  
3 honest, Mr. Douglas?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Mr. Stewart?

6 THE DEFENDANT: Yes.

7 THE COURT: Discovery's been shared with both of the  
8 defendants?

9 MR. MOORE: Yes, sir, it has, Your Honor.

10 THE COURT: Does Mr. Douglas have a prior record?

11 MR. MOORE: No, sir, Your Honor.

12 THE COURT: Does Mr. Stewart have a prior record?

13 MR. MOORE: No, sir, Your Honor.

14 THE COURT: Anything further from the State on  
15 Mr. Douglas or Mr. Stewart?

16 MR. MOORE: No, sir.

17 THE COURT: Yes, sir, Mr. Johnston.

18 MR. JOHNSTON: May it please the Court, Your Honor. As  
19 you've heard Dave has three children, he lives with those  
20 children's mother, they live together as a family, he has one  
21 for whom he pays for in child support also. He was born in  
22 Jamaica. He came to the United States at about age 20. He is  
23 in fact a citizen of the United States. He became a citizen  
24 about two and a half to three years ago so as I understand his  
25 situation there will be no immigration consequences for him as

1 a result of this plea.

2 Mr. Smith and I have done our best to thoroughly  
3 investigate the circumstances of the stop in this case and of  
4 the search in this case and I believe that I can say along  
5 with Mr. Smith that we have concluded that those issues were  
6 not worth pursuing in light of the offer that the State  
7 extended to us and we have explained that thoroughly to our  
8 clients about what we found out as a result and what the  
9 potential risks and potential benefits of pursuing that  
10 strategy would have been.

11 I would ask the Court to consider a few points in  
12 mitigation regarding Dave: He has no criminal as the Court  
13 has heard, he's here before Your Honor today accepting  
14 responsibility, he was cooperative with the police officers as  
15 you heard, his, uh, the entire premise for the search I think  
16 would have been based at least in part on his consent to  
17 search the vehicle wherein the drugs were found. Your Honor,  
18 this is a large quantity of drugs obviously but I would ask  
19 the Court to consider that Dave is not at the top end of this  
20 particular drug transaction, he is at the bottom end of this  
21 particular drug transaction. They didn't find any guns in the  
22 car on either of these gentlemen, no money, there's no  
23 evidence to indicate that they were engaged in selling these  
24 drugs or anything like that. I think the evidence would lead  
25 a reasonable person to include that they are what's called in

1 drug trade "mules" which essentially someone or someone who is  
2 entrusted with carrying the drugs from point A to point B  
3 because of the inherent dangers of traveling with the drugs.  
4 The big end people don't want to get caught with the drugs so  
5 we end up with people like these gentlemen here. On the other  
6 hand, they did know it was wrong, Your Honor, and they accept  
7 responsibility for what they did. There is one point I would  
8 ask the Court to consider: This is an overall plea with no  
9 negotiations or recommendations, there is one minor point that  
10 I think the solicitor and I have agreed on: They found a very  
11 small quantity of marijuana in the car, my client has been  
12 found guilty at a bench trial for that marijuana, sentenced to  
13 30 days or a fine, I believe that they are gonna recommend  
14 that this sentence run concurrently with that 30-day sentence.  
15 At the appropriate time Dave would like to address you.

16 THE COURT: Mr. Douglas, do you agree with what your  
17 lawyer just stated to me?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Mr. Douglas, is there anything you would like  
20 to say or would like for me to know or consider?

21 THE DEFENDANT: Well, sir, really, I'm accepting the  
22 responsibility for what I did but I was in the position where  
23 I wasn't workin', I got kids and I I really need mo -- I had  
24 no way of payin' bills and I was just tryin' a one time thing  
25 to try to get some money 'cuz I really didn't have it and I

1 was pretty much that's how I really got myself into it. I  
2 didn't know the danger of it. I didn't know -- I never had a  
3 criminal record, I've been workin' the whole time, I've been  
4 laid off and that's pretty much how I got in this situation.  
5 I just try to do to get money for my kids and I I I really got  
6 caught up in a situation that I never should have been in and  
7 I really apologize and I'm sorry for that, very sorry 'cuz I  
8 got four kids, I have no way to pay the bills and I got laid  
9 off in those times and I couldn't, I couldn't afford and I  
10 apologize.

11 MR. JOHNSTON: Thank you, Your Honor.

12 THE COURT: Thank you, sir. Yes, sir, Mr. Smith.

13 MR. SMITH: Please the Court, Your Honor. I represent  
14 Mr. Stewart and of course I can tell you that over the past  
15 months I have basically represented his entire family. I've  
16 been on the phone the last two or three days with the mother  
17 who is very religious. She is disappointed in what's happened  
18 here and he is too and the reason we were taking so long to  
19 come around is because I saw the family connection and  
20 Mr. Stewart he was crying with his mom, his dad and telling  
21 them how sorry he was that he's put them in this position. He  
22 doesn't have a criminal record, he knows that, he's accepting  
23 responsibility and, Your Honor, we believe that he's not a  
24 danger to society if the Court were to consider the lower end  
25 of a -- of the range. The other thing I tell the Court is

1 that if you were to consider the low end of the range he will  
2 not not probably be a citizen of the United -- a resident of  
3 the United States. He's a resident from Jamaica and probably  
4 would be deported under the current laws of this country once  
5 that sentence is finished, that's not something he's looking  
6 forward to because the lifestyle in Jamaica is not one  
7 that -- it's more of a scavaging-type lifestyle than it is a  
8 working lifestyle. He doesn't wanna go back there so his  
9 sentence will not end no matter what the Court does, his  
10 sentence will continue. He's going back to a country that's  
11 poor, offers very little opportunities for him to make a  
12 living, he will be separated from his family who is now in the  
13 United States of America. His mom is a worker, his dad is a  
14 plumbing contractor, he told you he worked for him, he's got  
15 some good in him and he has no record at all, nothing,  
16 he's -- there's nothing to show that he's ever violated any  
17 law and the range is now 7 to 25. The legislature, Your  
18 Honor, in its wisdom said if the charge was presented to you  
19 at the range of of what we're talking about, twenty-eight to a  
20 hundred grams, that this court can consider under the  
21 circumstances as low as 7 or as much as 25. We think, Your  
22 Honor, that this is the kind of case that the legislature had  
23 in mind when they set that bottom range at 7: someone who's  
24 never been involved in drugs, someone who's never been  
25 arrested. He has no family other than his mom and his dad,

1 his sisters and brothers but he has no children and but he has  
2 no children and we think that he fits in that range and we  
3 would also think that his co-defendant fits in that range.  
4 They just got caught up in somethin' that's bigger than what  
5 they are not realizin' the consequences. Certainly he knew it  
6 was wrong but not realizing the consequences of his action.  
7 He knows now.

8 THE COURT: Mr. Stewart, were you able to hear what your  
9 lawyer just said?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Do you agree with what he stated?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Is there anything that you would like to say  
14 or would like for me to know or consider?

15 THE DEFENDANT: I'm I'm not very good with words, it's  
16 the only thing I can say I'm I'm deeply and truly sorry of  
17 that choice that I made, uh, there's just so much stuff goin'  
18 on in my head right now. I'm sorry.

19 THE COURT: It's Alright. Thank you, sir.

20 (Pause.)

21 THE COURT: I'll find there's a substantial factual basis  
22 for the plea, I'll find that each defendants' decision to  
23 enter the plea has been made freely, voluntarily, knowingly  
24 and intellect -- and intelligently by them, I'll find that  
25 each has received the services from a very competent and able

1 legal counsel, services that they've indicated they're  
2 satisfied with and have relied on in reaching the decisions  
3 that they've made, therefore I will accept the pleas. On both  
4 of the sentences for both of the gentlemen, it'll be a like  
5 sentence for each, the sentence of the Court is that the  
6 defendant will be confined to the State Department of  
7 Corrections for a period of 7 years and the payment of a  
8 \$50,000 fine, they'll each get credit for the time that  
9 they've served. Good luck to you both.

10 MR. JOHNSTON: Thank you, Your Honor.

11 MR. SMITH: Thank you, Your Honor.

12 MR. MOORE: Thank Your Honor.

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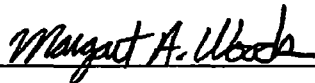
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2  
3 CERTIFICATE OF REPORTER

4 I, Margaret A. Woods, Court Reporter in and for the State  
5 of South Carolina at Large, hereby certify that I reported the  
6 preceding case on February 9, 2011 at the time and place  
7 heretofore set forth; and that the foregoing pages numbered  
8 from 2 through 17, inclusive, constitute a true and accurate  
9 transcription of my stenographic notes of the said proceeding.

10 I further certify that I am neither attorney nor counsel  
11 for, nor related to or employed by any of the parties  
12 connected to the action, nor am I financially interested in  
13 the action.

14 February 16, 2012

15 

16 Margaret A. Woods, Court Reporter  
17 in and for the State of South Carolina at Large.  
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FORM 5

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

DAVID ANTHONY STEWART 344762 )

Full name and prison number (if any) of Applicant. )

v.  
COUNTY AND MUNICIPALITY OF SPARTANBURG.  
State of South Carolina, )

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7TH CIR

2011-CP-42-5359

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 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 to 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. KIRKLAND CORRECTIONAL INSTITUTION
2. Name and location of Court which imposed sentence SPARTANBURG COUNTY
3. Name(s) of co-defendant(s) (if any) \_\_\_\_\_
4. ~~The indictment number or numbers (if known) upon which and the offenses for which~~  
sentence was imposed:

- (a) 2009 - GS - 42 - 6024 TRAFFICKING COCAINE 28 GRAMS BUT LESS THAN 100
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

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

- (a) 2/9-11 SEVEN (7) YEARS
- (b) \_\_\_\_\_

M. MORGAN CLEVERLEY  
2011 FEB 15 AM 10:50  
COURT CLERK  
COUNTY

(c) \_\_\_\_\_

6. Check whether a finding of guilty was made:

(a) after a plea of guilty  \_\_\_\_\_

(b) after a plea of not guilty \_\_\_\_\_

(c) after a plea of nolo contendere \_\_\_\_\_

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

no

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

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

i. n/a

ii. n/a

iii. n/a

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

i. n/a

ii. n/a

iii. n/a

(c) the date of each such result:

i. n/a

ii. n/a

iii. n/a

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

i. n/a

ii. n/a

iii. \_\_\_\_\_

11th DISTRICT COURT  
OF SAN JOSE COUNTY  
2011 DEC -5 AM 10:50  
M. HOPE BLACKLEY

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

(a) \_\_\_\_\_

(b) \_\_\_\_\_

(c) \_\_\_\_\_

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

- (a) MU ARREST AND SEIZURE VIOLATES FEDERAL AND STATE LAW
- (b) THE COURT OF GENERAL SESSION DO NOT HAVE JURISDICTION
- (c) I AM BEING CONFINED FOR AN OFFENSE THAT I WAS NOT INDICTED FOR IN VIOLATION OF SC CONST ART 1 § 11 & US CA 5TH AND 14TH

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

- (a) THE OFFICER MAKING THE ARREST DID NOT HAVE A WARRANT OR PROBABLE CAUSE
- (b) THE PROVISION OF ART 5 § 4 THAT PROVIDES FOR DISPOSITION WAS NOT COMPLIED
- (c) THE SENTENCING SHEET WOULD REFLECT CONFINEMENT MATERIALLY DIFFERENT AND NOT A LESSER INCLUDED OFFENSE

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

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

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

(a) the specific nature thereof:

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

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

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

(c) the disposition thereof:

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

FILED  
 CLERK OF COURT  
 SHERBORN COUNTY  
 2011 DEC -5 AM 10:50  
 M. HOPE BLACKLEY

iv. n/a

(d) the date of each such disposition:

i. n/a

ii. n/a

iii. n/a

iv. n/a

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

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:

i. n/a

ii. n/a

iii. n/a

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

i. n/a

ii. n/a

iii. n/a

CLERK OF COURT  
STATE OF MISSISSIPPI  
2011 DEC -5 AM 10:50  
M. HOPE BLACKLEY

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

(a) PRIOR TO THIS TIME I WAS WITHOUT THE MATERIAL EVIDENCE

(b) WAS WITHOUT MATERIAL EVIDENCE

(c) WAS WITHOUT MATERIAL EVIDENCE TO SUPPORT

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

- (a) your arraignment and plea? ✓
- (b) your trial, if any? \_\_\_\_\_
- (c) your sentencing? ✓
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? \_\_\_\_\_

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

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

i. ALBERT V SMITH 180 MAGNOLIA ST. SPARTANBURG SC 29304

ii. \_\_\_\_\_

iii. \_\_\_\_\_

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

i. BENCH TRIAL AND SENTENCING

ii. \_\_\_\_\_

iii. \_\_\_\_\_

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

CONVICTION AND SENTENCE VACATED AND DAMAGES IN SUM OF \$100,000

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

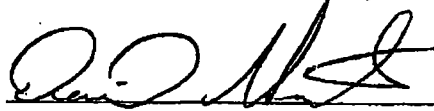
NO

2011 DEC -5 AM 10:50  
 CLERK OF COURT  
 H. HOPE BLACKLEY  
 COUNTY

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

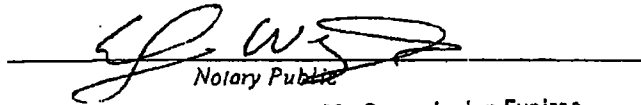
I, \_\_\_\_\_, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (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.



Applicant

SWORN or affirmed to and subscribed before me this  
15<sup>th</sup> day of December, 2011.

  
Notary Public

My Commission Expires

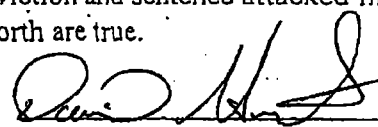
My Commission Expires: October 8, 2014

2011 DEC -5 AM 10:50  
M. HOPE BLACKLEY  
CLERK OF SUPERIOR COURT  
COUNTY


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.

  
\_\_\_\_\_

SWORN to and subscribed before me this 15<sup>th</sup>  
day of December, 2011.

  
\_\_\_\_\_  
Notary Public (L.S.)

My Commission Expires: October 8, 2014 . Commission Expires

RECORDED  
NOTARY COURT  
SPRINGMOUNT COUNTY  
2011 DEC -5 AM 10:50  
M. HOPE BLACKLEY

COURT

DEAR CLERK

PLEASE FIND FOR FILING WITHIN

YOUR OFFICE  
WITH EXHIBIT  
OF LAW .DUE TO LACK OF SPACE IN THE PCR FORM

- (1) APPLICATION FOR POST-CONVICTION RELIEF
- (2) AN ATTACHMENT WITH MEMORANDUM

THANK

DAVID

M. HOFF & BLACKLEY

2011 DEC -5 PM 10:50

CLERK OF COURT  
SPRINGFIELD COUNTY

Court

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS

COUNTY OF ) SEVENTH JUDICIAL CIRCUIT

DAVID STEWART )

APPLICANT )

v )

POST-CONVICTION RELIEF

COUNTY OF SPARTANBURG )

MUNICIPALITY OF SPARTANBURG )

STATE OF SOUTH CAROLINA ET AL )

LAW ANALYSIS

THE APPLICANT WAS DENIED AND DEPRIVED OF THE PRIVILEGES AND IMMUNITIES OF UNITED STATES CONSTITUTION U.S.C.A. 5 AND 14 THE SOUTH CAROLINA CONSTITUTION ARTICLE 4 § 3 AND 4 § 14 THE RULES OF STATE COURT RULE 77(E) AND 77(C) AND RULE 11. THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION SOUTH CAROLINA CONSTITUTION ARTICLE 4 § 11 PROVIDES THAT ALL PERSONS SHALL BE HELD TO ANSWER FOR A CAPITAL OR OTHERWISE INFAMOUS CRIME BY OR ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, OR BE DEPRIVE OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW.

M. HOPKINS  
 2018 DEC 25 11:05:50 AM  
 CLERK OF COURT  
 SPARTANBURG COUNTY

PURSUANT TO SOUTH CAROLINA CONSTITUTION THE CHIEF JUSTICE IS THE ADMINISTRATIVE HEAD OF THE UNIFIED JUDICIAL SYSTEM WITH POWER TO SET THE TERMS OF ANY COURT. S.C. CONST. ART 5 § 4.

PURSUANT TO THIS CONSTITUTION SECTION IT IS ORDERED THAT ALL CRIMINAL CASES IN THE STATE OF SOUTH CAROLINA SHALL BE DISPOSED OF WITHIN A 180 DAYS FROM THE DATE OF THE DEFENDANTS ARREST.

PROVIDED HOWEVER THAT CIRCUIT COURT MAY GRANT CONTINUANCE AND CONTINUE A CRIMINAL CASE BEYOND 180 DAYS BY "WRITTEN ORDER" IF EXCEPTIONAL CIRCUMSTANCES EXIST.

Court

THE RECORD WOULD REFLECT BY THE GENERAL SESSIONS CASE HISTORY THAT APPLICANT WAS ARRESTED ON JUNE 16 - 2009. NO CONTINUANCE IS REFLECTED OR DATE GRAND JURY MET OR GENERAL SESSIONS HELD. THEREFORE THE COURT DID NOT HAVE POWER TO ACT SEE APPLICANT EXHIBIT #1 FOR IDENTIFICATION PURSUANT TO RULE 71(E) THE CHIEF JUSTICE SETS FORTH THE TERMS OF COURT AND NO TERM OF COURT SHALL BE CANCELLED NOR ADDITIONAL TERM SCHEDULE WITHOUT PRIOR APPROVAL OF THE CHIEF JUSTICE WHEN THE LOCAL BAR REQUEST OR SOLICITOR

A GENUINE ISSUE OF MATERIAL FACT EXIST WHETHER OR NOT THIS INDICTMENT WAS FRAUDULENTLY "TRUE-BILL" VIOLATION. U.S.C.A. AND SC CONST ART 2 § 11 SEE APPLICANT EXHIBIT # (A)

THE INDICTMENT IN THIS CASE HAS TWO (2) DIFFERENT DATES TO IT THE SIGNATURE OF THE FOREMAN HAS THE DATE 11 - 24 - 2009 HOWEVER

DIRECTLY BELOW THE CAPTION "COURT OF GENERAL SESSIONS" THE DATE NOV 20 - 2009

THE DATE THE INDICTMENT WAS FILED WITH THE COURT EITHER THIS INDICTMENT WAS BACKDATED OR FORCEFULLY FILED TO THE RULE OF CRIM PROC RULE (3) C WITHIN 90 DAYS OF AN ARREST WARRANT FROM THE CLERK OF COURT, THE SOLICITOR SHALL TAKE ACTION ON THE WARRANT BY PREPARING AN INDICTMENT FOR PRESENTMENT TO THE GRAND JURY WHICH INDICTMENT SHALL BE FILED WITH THE CLERK OF COURT ASSIGNED A CRIMINAL CASE NUMBER, THEN PRESENTED TO THE GRAND JURY NOT THE OTHER WAY AROUND

THE TRUE-BILLING AND ASSIGNMENT OF A CRIMINAL NUMBER DO NOT COME BEFORE THE FILING OF THE INDICTMENT THEREFORE SUCH IS INVALID FOR AN INSUFFICIENT PROCESS AND SERVICE OF PROCESS

RECEIVED  
 CLERK OF COURT  
 COURT OF GENERAL SESSIONS  
 21 DEC - 2009  
 AM 10:50  
 HOPE BLACKLEY

Court

THE APPLICANT WAS UNLAWFULLY SEIZE AND ARRESTED WITHOUT PROBABLE CAUSE CITING STATEY SIMS 405 SE 2d 377 (1991)

EXHIBIT #3 THE WARRANT WOULD REFLECT IN THE AFFIDAVIT SECTION THAT SUFFICIENT FACTUAL INFORMATION WAS NOT FURNISH TO THE MAGISTRAT TO SUPPORT AN INDEPENDANT JUDGEMENT THAT THERE WAS PROBABLE CAUSE TO ISSUE THE WARRANT SEE CRIMINAL LAW KEY 211 (1,3) 212, 217

THE GENERAL RULE IS THAT ONE SHALL NOT BE ARRESTED EXCEPT BY AUTHORITY OF A WARRANT ISSUED BY A PROPER OFFICER UPON INFORMATION UNDER OATH

THE APPLICANTS ARREST WAS ILLEGAL BECAUSE (1) THE OFFICER MAKING THE ARREST ACTED WITHOUT A WARRANT (2) THE ALLEGED OFFENSE WAS NOT COMMITTED IN HIS PRESENT AND (3) HE AND OTHERS INVADSD AN AREA IN WHICH WAS PROTECTED BY THE FOURTH AMENDMENT AND SOUTH CAROLINA CONSTITUTION ARTICLE 4 § 10

THE APPLICANT WAS ON THE I 95 AND FOLLOWED SIMPLY BECAUSE OF OUT OF STATE PLATES AND BEING EXITED THE I 95 AND WENT AND RENTED A HOTEL ROOM. THE ARRESTING OFFICERS AND OTHERS BY FORCE AND AGAINST A SEARCH WARRANT TOOK ME FROM THE ROOM AND ASKED FOR THE KEYS TO THE CAR. TOOK US OUTSIDE AND CONDUCTED A SEARCH WITHOUT A WARRANT OF A PARKED VEHICLE.

I DID NOT GIVE ANY CONSENT TO SEARCH AND THE OFFICER DID NOT HAVE LEGAL AUTHORITY TO DO SO, VIOLATING THE HOLDING IN WONG SUN AND TITLE 18 USCA 4 EVIDENCE SEIZED DURING UNLAWFULL SEARCH CANNOT CONSTITUTE PROOF AGAINST VICTIM OF SEARCH AND EXCLUSIONARY PROHIBITION EXTENDS TO INDIRECT AS WELL A DIRECT PRODUCTS OF SUCH INVRASIONS. THE EVIDENCE SEIZE WAS THE PRODUCT OF THE FRUIT OF THE POISONOUS TREE DOCTRINE CITING 371 US 471 83 SC7 407

1963

(C)

2011 DEC 05 AM 10:50  
SPRINGFIELD COUNTY  
CLERK OF COURTS  
M. HOPKINS  
BLACKKEY

Court

SUBJECT MATTER JURISDICTION

IN CRIMINAL CASES THE TRIAL COURT SUBJECT MATTER JURISDICTION IS LIMITED TO THOSE CRIMES CHARGED IN THE INDICTMENT AND ALL LESSER INCLUDED OFFENSES STATE V WATSON 563 SE 2d CRIMINAL LAW KEY 93

THE RECORD WOULD REFLECT BY THE WARRANT EXHIBIT THAT THE APPLICANT WAS ARRESTED FOR DRUG TRAFFICKING IN COCAINE AND GIVEN NOTICE OF SCODE 44-53-370 (E) (2)

THE INDICTMENT EXHIBITS THAT APPLICANT WAS CHARGED WITH TRAFFICKING IN COCAINE 400 GRAM OR MORE AND GIVES NOTICE OF STATE STATUTE 44-53-370 OF THE 1976 CODE OF LAWS. NO SUBSECTION WAS PROVIDED.

HOWEVER AT REARRESTMENT AND SENTENCING THE APPLICANT WAS SENTENCED AND CONVICTED OF TRAFFICKING IN COCAINE 28 GRAMS OR MORE BUT LESS THAN A 100 AS A LESSER INCLUDED OFFENSE THAN THAT CHARGED IN THE INDICTMENT AND GIVES NOTICE OF 44-53-370 (G)

TRAFFICKING OF COCAINE 28 GRAMS LESS THAN A HUNDRED GRAMS IS NOT A LESSER INCLUDED OFFENSE OF THE CRIME CHARGED IN THE INDICTMENT. THEREFORE THE COURT LACKED SUBJECT MATTER JURISDICTION TO ACCEPT OR ENTERTAIN THE APPLICANT'S GUILTY PLEA. EXHIBIT (2) (3) (4)

2011 DEC 15 11:05:50  
M. HOPPE  
CLERK  
SPRINGFIELD COUNTY  
COURT

IN GENERAL IN A CRIMINAL CASE THE TRIAL COURT REQUIRES SUBJECT MATTER JURISDICTION BY WAY OF A VALID INDICTMENT AND A COURT LACKS SUBJECT MATTER JURISDICTION TO CONVICT FOR AN OFFENSE FOR WHICH HE WAS NOT INDICTED. CITE STATE V JOHNSON SC 1999]333 SC 439 510 SE 2d 423

THE DEFENDANT APPLICANT WAS NOT INDICTED FOR TRAFFICKING IN 28 GRAMS BUT LESS THAN A HUNDRED AND DID NOT SIGN ANY WAIVER OF PRESENTMENT THEREFORE HIS CONVICTION AND CONFINEMENT IS ILLEGAL AMOUNTING TO FALSE ARREST AND FALSE IMPRISONMENT VIOLATION OF 15-78-60(5)

(1)

Court

A LESSER INCLUDED OFFENSE OF TRAFFICKING IS POSSESSION WITH INTENT TO  
DISTRIBUTE SEE MATHEWS V STATE 300 SC 238, 387 SE2d 258 (1990)

THE APPLICANT CONVICTION OFFENDS THE CONSTITUTION OF THE UNITED STATES  
U.S.C.A. 5th AND 14th AND SOUTH CAROLINA CONSTITUTION ARTICLE 1 § 8 AND 1 § 11

WHEREFORE APPLICANT PRAY THAT THE RELIEF REQUESTED BE GRANTED WITHIN  
THE INTEREST OF JUSTICE

Respectfully Submitted

DAVID STEWART

Applicant

M. HOPE BLACKLEY

2011 DEC - 5 AM 10:50

FILED  
CLERK OF COURT  
SOUTH CAROLINA COUNTY

EXHIBIT # 1  
General Sessions

CASE HISTORY FOR CASE M088094

The State of South Carolina VS David Anthony Stewart

FILED DATE: 6/18/2009

CASE TYPE: GS/180 Day Track

STATUS: Pled Guilty

JUDGE: Clerk Of Court C P, G S, And Family Court

ARRESTING AGENCY: Spartanburg County Sheriff

CASE PARTIES:

Defendant Stewart, David Anthony

Officer Carraway, Jason

Spartanburg, SC 29303

Bond Entity Carolina Ball Bonding/Paul J. Hess, Jr./Palm

554 El Paso St, Spartanburg, SC 29303

Defendant Attorney Smith, Albert V

Attorney At Law, P O Box 5866, Spartanburg SC 29304

Solicitor Moore, Travis

Seventh Circuit Solicitors Office, 180 Magnolia St, Spartanburg, SC 29304

Court Reporter Woods, Margaret A

P.O. Box 4305, Greenville, SC 29608

CASE HISTORY FOR CASE M088094

Stewart, David Anthony

Age: 35

DL#: [REDACTED]

Norfolk, VA

M. HOPE BLACKLEY

DOB: [REDACTED]

SSN: [REDACTED]

ISS: [REDACTED]

EXP: [REDACTED]

AM 10:50

2/9/2011

CHARGE

VIOL. DATE

DISPOSITION

DISP DATE

2359 Drugs / Trafficking in cocaine, 28 g or more,  
but less than 100 g - 1st offense

6/16/2009

Pled Guilty

SENTENCING

Sentenced - 7YRS & \$50,000 FINE/ CFTS 2DYS

COST

ORIGINAL

BALANCE DUE

DISBURSED

PAY PRIORITY

Charge: Drugs / Trafficking in cocaine, 28 g or more, but less than 100 g - 1s

	ORIGINAL	BALANCE DUE	DISBURSED	PAY PRIORITY
Fine to State 44%	\$22,000.00	\$22,000.00	\$0.00	999
Fine to General Fund	28,000.00	28,000.00	0.00	999
Victim Services Asm 38.0013% / 5.783	19,000.00	19,000.00	0.00	999
Victim Conviction Surcharge \$100 / \$2	100.00	100.00	0.00	999
Law Enforcement Funding Surcharge \$	25.00	25.00	0.00	999
PCC Surcharge	150.00	150.00	0.00	999
SC Criminal Justice Adacerny Training	5.00	5.00	0.00	999
State Assessment	34,750.00	34,750.00	0.00	999

Print Date: 04/19/2011

Print Time: 10:28:00AM

Requested By: TLCAMP

CaseHistory.rpt

WITNESSES

SPTG CO SHERIFF'S OFFICE

*T. H. Villotson*

1. SENTENCE MADE

2. REPORT ENDED

3. CARD PULLED

4. INDEXED

ARREST WARRANT NUMBER

5. CHECKED WARRANTS

6. CHECKED SIGNATURE

M088094 7. ASSESSMENT AND FINE CARD MADE

8. TRAFFIC VIOLATION COPY

ACTION OF GRAND JURY

*John Bell*

*Blindy*

Foreperson of Grand Jury

Date: 11/24/09

VERDICT

Foreperson of Petit Jury

Date:

EXHIBIT 2

DOCKET NO.

09-GS-42-6024

The State of South Carolina

County of Spartanburg 3:47

Trey Gowdy, Solicitor

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY

2009 DEC 10 PM 12:37

MARC KITCHENS

COURT OF GENERAL SESSIONS

NOV 30 2009

TERM

THE STATE

VS.

DAVID ANTHONY STEWART

Indictment for

TRAFFICKING IN COCAINE

SC Code: 44-53-370



35

M-088094

STATE OF SOUTH CAROLINA

County/  Municipality of

Spartanburg

THE STATE

against

David Anthony Stewart

Address:

Phone: \_\_\_\_\_ SSN: \_\_\_\_\_  
Sex: M Race: B Height: 5 9 Weight: 175  
DL State: VA DL #: \_\_\_\_\_  
DOB: \_\_\_\_\_ Agency ORI #: SC0420000  
Prosecuting Agency: Spartanburg County Sheriff  
Prosecuting Officer: Jason Carraway - 0655  
Offense: Drugs / Trafficking in cocaine, 400 g or more

Offense Code: 0281  
Code/Ordinance Sec: 44-53-0370(e)(2)

This warrant is CERTIFIED FOR SERVICE in the  
 County/  Municipality of \_\_\_\_\_  
The accused is to be arrested and brought before me to be dealt with according to the law.

(I.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant on David Stewart 6/16/09  
Swad  
Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions  
180 Magnolia Street  
P O Box 3483  
Spartanburg, SC 29304

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA  
 County/  Municipality of

Spartanburg

Personally appeared before me the affiant Jason Carraway who being duly sworn deposes and says that defendant David Anthony Stewart did within this county and state on or about: 06/16/2009 violate the criminal laws of the

State of South Carolina (or ordinance of  County/  Municipality of Spartanburg) in the following particulars:

2011 DEC -5 PM 3:48

DESCRIPTION OF OFFENSE Drugs / Trafficking in cocaine, 400 g or more

M. HOPE BLACKLEY

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

That on June 16, 2009, in the city/county of Spartanburg, the defendant did knowingly traffick and bring into the state over 400 grams of cocaine, a schedule II controlled substance, without authority to do so.

AFFIANTS BELIEF BASED ON POLICE INVESTIGATION

JUN 18 11:47 AM

Signature of Affiant

STATE OF SOUTH CAROLINA  
 County/  Municipality of

Spartanburg

Affiant's Address 8045 Howard Street  
Spartanburg, SC 29303-

Affiant's Telephone \_\_\_\_\_

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 6/16/2009 defendant David Anthony Stewart did violate the criminal laws of the State of South Carolina (or ordinance of  County/  Municipality of Spartanburg) as set forth below:

DESCRIPTION OF OFFENSE: Drugs / Trafficking in cocaine, 400 g or more

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable Sworn to and subscribed before me

on 06/16/2009  
D Smith (L.S.)  
Signature of Issuing Judge  
Dwight Smith  
Judge Code: 7151

Judge's Address Spartanburg County Judicial Center  
Spartanburg, SC 29306-  
Judge's Telephone (864)596-2564

Issuing Court:  Magistrate  Municipal  Circuit

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

AFFIDAVIT

JUN 18 PM 12:03  
MARC KITCHENS  
CLERK OF COURT  
SPARTANBURG COUNTY

MAILED COPY  
CLERK OF COURT  
SPARTANBURG COUNTY  
DATED 06-18-09

36

CITY OF SPARTANBURG VS. David Anthony Stewart

INDICTMENT/CASE#: 2009GS4206024 A/W#: M088094 Date of Offense: 6/16/2009 S.C. Code § : 44-53-0370(e) CDR Code #: 0281

Age: P Sex: M Age: 35 DOB: SS# Address: City, State, Zip: DL#: SID#

SENTENCE SHEET

\*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 / Trafficking in Cocaine, 28 g or more, but less than 100 g - 1st offense (7-25 years and \$50k)

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

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

ATTEST: MOORE, TRAVIS A SC Bar# 78109 Defendant Attorney for Defendant SC Bar# 5162

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of 7 days/months/years or under the Youthful Offender Act not to exceed years and/or to pay a fine of \$ 50,000; 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. 2 days 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 16-25-60 (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: \$ 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:

Table with 3 columns: Description, Amount, Total. Includes items like § 14-1-206 (Assessments 107.5 %), § 14-1-211(A)(1) (Conv. Surcharge), § 14-1-211(A)(2) (DUI Surcharge), § 56-5-2995 (DUI Assessment), § 56-1-286 (DUI Breath Test), Proviso 47.9 (Public Def/Prob), § 14-1-212 (Law Enforce. Funding), § 14-1-213 (Drug Court Surcharge), § 50-21-114 (BUI Breath Test Fee), § 56-5-2942(J) (Vehicle Assessment), Proviso 90.5 (SCCJA Surcharge), § 44-53-450(C) (Conditional Discharge), 3% to County (if paid in installments), TOTAL \$107,150.90

Clerk of Court/ Deputy Clerk: A. Searcy Court Reporter: M. Woods SCCA/217 (06/2010)

Presiding Judge: Judge Code: Sentence Date: 2/9/11

FILED 2009 DEC -5 PM 3:48

State of South Carolina  
County of Spartanburg

In the Court of Common Pleas  
Case # M-088094 37  
7/9/06

David Stewart

Supplement Amendment  
to P.C.R. Hearing Relief

v.  
State of South Carolina  
Respondant

Post conviction relief applications are established to relief based on ineffectiveness of trial counsel, if he can establish that counsel's performance was deficient and that deficiency prejudiced his defence. See Grier v. State (sc. 1989) 299 S.C. 321, 384 S.E. 2nd 722.

My attorney is ineffective for not investigating my case. (1) I am being held in custody unlawfully for the following reason: Insufficient evidence in that. (2) My arrest and search and seizure violates federal and state law. The officer making the arrest did not have warrant or probable cause. (2) Lack of subject matter jurisdiction in that indictment reflected a charge for trafficking. There was no trafficking ticket issue and there was no video recording of the illegal driving. The video taping of the incident site must be taken at later than the activation of the officers blue light and must include after the arrest, and include the person being advised of my maranda rights. There was no probable cause to begin with, the officer violated my 4th Amendment right, and conducted an illegal warrantless search and seizure arrest.

38 Issue: Trial counsel was ineffective for he failed to motion for a video recording of a patrol cars must have video recording, an excused failure to video records defendant conduct in a traffic stop underlying prosecution for driving. Code 1976, 56-5-2953, 2007) Town of Ft. Pleasant v. Roberts 113 SE 2d 278, 393 S.C. 337

156-5-295) S.L.E.D. is responsible for purchasing, maintaining, and applying all necessary video recording equipment for use at the breath test site. The Department of Public Safety is also responsible for maintaining all law enforcement vehicles use for traffic

The police went upon hotel property and made an illegal search of the defendants room, without a search warrant. See: State v. Loflin 76 S.C. 48, 50, 275 S.E. 2d 576 (1981) The hotel landlord doesn't have the authority to consent to the search of a tenants residence. U.S. v. Matlock 415 U.S. 16, 494 sct. 988, 39 Fed 242 (1972)

### Search Warrant

Issue (2) Trial counsel is ineffective for failing to move to suppress evidence obtained in the parking lot of the hotel shower in violation of fourth amendment. Sikes v. State s.c. 448 SE 2d 566 (1994) (NO Warrant) Prejudice; a judgement of opinion held in disregard of facts that contradict it, as two black men in a car with Fla. tags / racial profiling by the police of Spartanburg S.C. What the Constitution forbids is unreasonable searches and seizures. See: State v. Rodriguez: 323 S.C. 484 492 476 SE 2d 161 166 (app 1996) Elkins v United States; 364 U.S. 206, 80 sct 1437, 46 Fed 2d 1669 (1960)

39  
other patrol cars traffic stop audio records of the recording that the  
court would have a first hand look at this situation. Under a police officer  
who makes an investigation stop may conduct a limited pat down frisk of a  
suspect's outer clothing. See: 392 U.S. at 27, 30. In this case, the suspect was  
called out by police and asked to come to him to take away his privacy.  
The suspect allowed him to a search for weapons and court stated  
it may not be used to search for evidence of criminal activity. U.S. v.  
Lace 462 U.S. 196, 706-07, 1983. 4th amendment protects against government  
intrusions into legitimate expectation of privacy. They have an element  
if fruit of the poisonous tree and exclusion of evidence. It would not  
have come to light, but for the illegal action of police, and the evidence  
had been obtained by the exploitation of that illegality. See: State v.  
Green 330 S.C. 551, 559, 499 Ed. 2d 441, 817, 821, ct 1997, citing Wong Sun  
U.S. 371 U.S. 471, 9 L. Ed. 2d 441, 835, ct 407, 1963. Also see: State v.  
Robinson 306 S.C. 399, 417 SE 2d 411 (1991) holding consent to search  
invalid where officer stopped vehicle without reasonable suspicion of  
criminal activity and where no attenuating circumstances removed the  
taint of the illegal stop from the consent to search. The key in this  
case established a break in the causal connection between the  
illegality and the evidence thereby obtained. The court must consider  
the following factor when determining whether a consent to search  
is limited by a preceding fourth amendment violation. (1) The temporal  
proximity between the police's illegality and the consent to search. (2)  
The presence of intervening circumstances and the purpose and  
lagrancy of the misconduct. It after reviewing the consent in light of  
these factors, the court finds that there is a causal link between the  
fourth amendment violation and the consent to search. The court must  
exclude the evidence constituting the 21538/35 fruits of an illegal see;  
Brown v. Illinois 422 U.S. 590, 45 L. Ed. 2d 416, 95 ct 2254 (1991) U.S. v.  
Telender-Garcia 28 F.3d 1046, 1053 (10th cir 1994) State v. Robinson 306 S.C.  
199, 412 SE 2d 411 (1991) The state bears the burden to articulate  
sufficient fact to support a finding of reasonable suspicion see; State v.  
Worton 349 S.C. 430, 512 SE 2d 1668 (ct app 2002). Therefore, a stop  
based solely on the defendant's refusal to answer an officer's  
question and err the defendant exercise of his right to ignore the officer  
without more is insufficient to support a reasonable suspicion. U.S. v.  
Arvier 534 U.S. 216, 217, 1225. ct 144, 153, 451 L. Ed. 140 (2002)

Issue(3) The police of Spartanburg saw two black male with tags made a racial suspicion not on a traffic violation, no ticket were given to the black males, but following them to a hotel, and violating the black males to make a illegal search of his room and his car. The police failed to establish an arrest warrant may be issued only information under oath setting fourth probable cause. The police conducted a warrantless search see: United v. Capp 412 U.S. 136 (1973) The police failed to produce the video tapes of the motion to discovery on the traffic violation law, State v. McKnight 352 S.C. 635, 56 S.E. 2d 168, 179 (2003) State v. Sprouse 375 S.C. 478, 56 S.E. 2d 71 (1996) S.C. code ann. § 17-13-140. State v. Tench 353 S.C. 531, 56 S.E. 2d 314 (2003). State v. Bellamy 336 S.C. 140, 519 S.E. 2d 349 (1999)

Issue(4) The police "knocked and announced" in these case however in this instance the knock and announcement requirement might be unreasonable under fourth amendment see: Wilson v. Arkansas 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed. 2d 976 (1995) S.C. Code § 7-13-160

Trial counsel was ineffective for he failed to make a motion for the audio tape of the patrol car. Must have video recording of unexcuse failure to have audio recording of the tape and conduct in a traffic stop underlying a prosecution for driving. Code (1976-56-5-2953 200) own of Mt. Pleasant v. Roberts. 113 S.E. 278, 393 S.C. 332.

Trial counsel was ineffective for he failed to obtain all the recording in each of the patrol car. see; Tp. page 45. line 1-25. Each one of the patrol cars have a discovery of a recording of the traffic stop also see; Tp 18 line 13-18 clean show a Brady violation by not turning over each one of the police officers mobile audio video tapes. So if the camera sometimes work and sometimes does not, and sometimes the audio and sometimes it work and sometimes it does not.

Conclusion

We hold that an involuntary incriminating statement may be used for the purpose, including impeachment. Recognizing the structures of due process, we hold Steward's conviction for trafficking should be reversed and the case remanded a new trial.

1378 U.S. 368 (1964)

SWORN to and subscribed before me this  
29<sup>th</sup> day of January, 2013.  
*[Signature]* (L.S.)  
Notary Public for South Carolina

My Commission Expires: 4-27-2016

*[Signature]*

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

DAVID STEWART  
APPLICANT,

v.

STATE OF SOUTH CAROLINA,  
RESPONDENT

IN THE COURT OF COMMON PLEAS

CASE # m.088094

CERTIFICATE OF SERVICE BY MAIL

1. I AM THE ABOVE NAMED DAVID STEWART IN THE ABOVE CAPTIONED ACTION.
2. REGULAR COMMUNICATION BY MAIL EXISTS THROUGHOUT THE STATE OF SOUTH CAROLINA AND THAT THIS IS A PROPER CIRCUMSTANCE OF SERVICE BY MAIL.
- ~~3. I HAVE THIS DAY SERVED A COPY OF THE~~

IN THE ABOVE-CAPTIONED MATTER ON THE FOLLOWING PERSON(S) BY DEPOSITING IN THE UNITED STATES MAIL, POSTAGE PREPAID:

<u>DAVID STEWART</u>
<u>344762 TRAIL</u>
<u>P.O. Box 252</u>
<u>Turbeville SC 29162</u>

<u>LARA Pattiss HARRILL</u>
<u>1539 Healthcare Drive</u>
<u>Rock Hill SC 29732</u>

DATED THIS 1 DAY OF 29, 2013.

SWORN to and subscribed before me this 29th day of January, 2013.  
[Signature] (L.S.)  
Notary Public for South Carolina

RESPECTFULLY SUBMITTED,  
[Signature]

My Commission Expires: 4-27-2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE SEVENTH CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	2011-CP-42-5359
David Anthony Stewart, #344762,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN AND MOTION
	)	TO DISMISS
State of South Carolina,	)	
	)	
Respondent.	)	
_____		

In response to the post-conviction relief application filed on December 5, 2011, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the November 2009 term of General Sessions for trafficking in cocaine +400g (09-GS-42-6024). The Applicant was represented by Albert V. Smith, Esquire. On February 9, 2011, the Applicant pled guilty to the lesser included offense of trafficking in cocaine 28g-100g. The Honorable J. Mark Hayes II sentenced the Applicant to confinement, for a period of seven (7) years and ordered Applicant to pay a fine of \$50,000. The Applicant did not appeal his guilty plea or sentence.

Attached herewith and incorporated herein are the Spartanburg Clerk of Court records, the South Carolina Department of Corrections' records, and the guilty plea transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

## II.

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

1. Insufficient evidence; in that,
  - a. "My arrest and seizure violates Federal and State law,"
  - b. "The officer making the arrest did not have a warrant or probable cause,"
2. Lack of Subject Matter Jurisdiction; in that,
  - a. Indictment reflected charge for trafficking in cocaine +400g, but Applicant was convicted and sentenced for trafficking in cocaine 10-28g,
  - b. Defects in indictment.

## III.

Respondent interprets Applicant's initial allegations as claims that there was insufficient evidence for his conviction. Respondent moves to dismiss this allegation as improper for post-conviction relief. S.C. Code Ann. § 17-27-20(a) states:

(a) Any person who has been convicted of, or sentenced for, a crime and who claims:

- (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 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; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. ***Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.***

(emphasis added). It is clear under the statute that post-conviction relief is not the proper avenue to attack the sufficiency of evidence. Accordingly, the Respondent therefore moves for summary dismissal of this allegation pursuant to S.C. Code Ann. § 17-27-70(c) (2003).

However, if the Applicant is alleging that Counsel was ineffective for failing to attack the arrest and search as unconstitutional or invalid, Respondent would note that the Applicant pled guilty to the charge. 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 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).

Furthermore, a guilty plea generally constitutes a waiver of non-jurisdictional defects and claims of violations of constitutional rights. See Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975) (a plea of guilty constitutes a waiver of non-jurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea); Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981). Therefore the plea waives any non-jurisdictional

defects and defenses, including challenges to the sufficiency of the evidence. "Where a defendant voluntarily, intelligently, and understandingly enters a plea of guilt, this makes it unnecessary for the State to offer evidence to prove the offense charged in the warrant or indictment." State v. Allen, 261 S.C. 448, 200 S.E.2d 684, 686 (1973). This is because the guilty plea "admits all matter of fact averments of the accusation." Id. The defendant admits all circumstances described in the indictment, leaving only sufficiency of the indictment for review and waiving all other defenses. State v. Thomason, 341 S.C. 524, 534 S.E.2d 708, 709 (2000). Additionally, PCR is not a proper avenue to challenge the sufficiency of evidence. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974); S.C. Code Ann. § 17-27-20(a)(6).

Accordingly, the Respondent submits that these allegations must be summarily dismissed, as the record fully supports the knowing and voluntary nature of the Applicant's plea. In addition, S.C. Code Ann. §17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent requests that this Court summarily dismiss the Applicant's initial allegations in the current application for post conviction relief for failure to state a cognizable claim under the Uniform Post Conviction Procedure Act.

#### IV.

The Applicant has claimed that the trial court lacked subject matter jurisdiction due to the fact that he was convicted and sentenced for trafficking in cocaine 10-28g, but was indicted for trafficking in cocaine +400g.

In post-conviction relief, an Applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that

his trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90 (2003). A claim of this nature is subject to the procedural bars in the Uniform Post-Conviction Procedure Act – notably the statute of limitations and successiveness. See S.C. Code §§ 17-27-45, -90 (2003).

An Applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by Gentry, 363 S.C. 93, 610 S.E.2d 494. However, “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” Gentry, 363 S.C. at 101, 610 S.E.2d at 499; See also S.C. Const. Art. V, § 7. Thus, Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Applicant’s conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction.

It is clear from the face of the indictment that it was presented to the Spartanburg County Grand Jury and “True Billed” on November 29, 2009. The Respondent submits that an indictment will support a guilty plea for another offense provided the offense is a lesser included offense of the offense charged in the indictment. State v. Cross, 323 S.C. 41, 448 S.E. 2d 569 (Ct. App. 1994); State v. Fennell, 263 S.C. 216, 209 S.E.2d 433 (1974). Trafficking in cocaine 28g-100g is a lesser included offense of trafficking in cocaine over 400 grams. Thus, it was not necessary to neither reindict the Applicant nor have him waive presentment for his plea to trafficking in cocaine 28g-100g. Therefore, the Respondent submits that this allegation is without merit and should be summarily dismissed.

#### V.

The Respondent denies each allegation that is not expressly admitted, qualified or

explained.

VI.

WHEREFORE, having made its Return, the Respondent asks that this application be summarily dismissed.

Respectfully submitted,

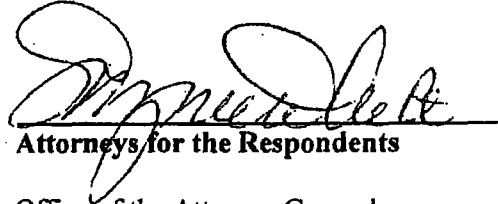
ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE  
Assistant Attorney General

By:



Attorneys for the Respondents

Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
Telephone: (803) 734-3737

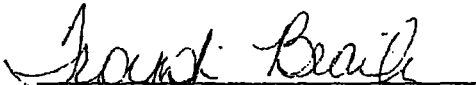
Sept 25, 2012

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
	)	2011-CP-42-5359
	)	
DAVID ANTHONY STEWART, # 344762	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____		

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

**Lara Pettiss Harrill, Esquire**  
**1539 Health Care Drive**  
**Rock Hill, SC 29732**

DATED this 25<sup>th</sup> day of September, 2012

  
 Troyeshi Brailey, Legal Assistant  
 For Respondent

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )  
 )  
 David Anthony Stewart, #344762, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 SEVENTH JUDICIAL CIRCUIT

2011-CP-42-5359

CONDITIONAL ORDER OF DISMISSAL

CLERK OF COURT  
 SPARTANBURG COUNTY  
 2012 SEP 28 PM 2:42  
 M. HOPE BLAUMLEY

This matter comes before this Court by way of an application for post-conviction relief filed December 5, 2011. Respondent made its Return and Motion to Dismiss on or about September 28, 2012.

**I. PROCEDURAL HISTORY**

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the November 2009 term of General Sessions for trafficking in cocaine +400g (09-GS-42-6024). The Applicant was represented by Albert V. Smith, Esquire. On February 9, 2011, the Applicant pled guilty to the lesser included offense of trafficking in cocaine 28g-100g. The Honorable J. Mark Hayes II sentenced the Applicant to confinement, for a period of seven (7) years and ordered Applicant to pay a fine of \$50,000. The Applicant did not appeal his guilty plea or sentence.

**Applicant's Current PCR Application**

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

1. Insufficient evidence; in that,
  - a. "My arrest and seizure violates Federal and State law,"
  - b. "The officer making the arrest did not have a warrant or probable

- cause,"
- 2. Lack of Subject Matter Jurisdiction; in that,
  - a. Indictment reflected charge for trafficking in cocaine +400g, but Applicant was convicted and sentenced for trafficking in cocaine 10-28g,
  - b. Defects in indictment.

Before this Court are the records of the Spartanburg County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, Applicant's PCR application and Respondent's Return and Motion to Dismiss.

**II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**Failure to State a Claim**

This Court finds that this application should be summarily dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 et seq. (1976). S.C. Code Ann. § 17-27-20(a) states:

(a) Any person who has been convicted of or sentenced for, a crime and who claims:

- (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 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; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. **Provided, however, that this section shall not be construed**

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 M. HOPE DEACOLEY  
 CLERK OF COURT  
 SPARTANBURG COUNTY

**to permit collateral attack on the ground that the evidence was insufficient to support a conviction.**

(emphasis added). It is clear under the statute that post-conviction relief is not the proper avenue to attack the sufficiency of evidence.

Furthermore, a guilty plea generally constitutes a waiver of non-jurisdictional defects and claims of violations of constitutional rights. See Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975) (a plea of guilty constitutes a waiver of non-jurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea); Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981). Therefore the plea waives any non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence. "Where a defendant voluntarily, intelligently, and understandingly enters a plea of guilt, this makes it unnecessary for the State to offer evidence to prove the offense charged in the warrant or indictment." State v. Allen, 261 S.C. 448, 200 S.E.2d 684, 686 (1973). This is because the guilty plea "admits all matter of fact averments of the accusation." Id. The defendant admits all circumstances described in the indictment, leaving only sufficiency of the indictment for review and waiving all other defenses. State v. Thomason, 341 S.C. 524, 534 S.E.2d 708, 709 (2000). Additionally, PCR is not a proper avenue to challenge the sufficiency of evidence. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974); S.C. Code Ann. § 17-27-20(a)(6).

Additionally, this Court finds that the Applicant has failed to state a claim as it relates to his issue with the indictment regarding the lesser-included offense. An indictment will support a guilty plea for another offense provided the offense is a lesser included offense of the offense charged in the indictment. State v. Cross, 323 S.C. 41, 448 S.E. 2d 569 (Ct. App. 1994); State v. Fennell, 263 S.C. 216, 209 S.E.2d 433 (1974). This Court finds that trafficking in cocaine 28g-100g is a lesser included offense of trafficking in cocaine over 400 grams and therefore, the court had the jurisdiction to accept Applicant's plea. Therefore, this Court finds that the application should be summarily dismissed for

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failure to state a claim cognizable in post-conviction relief.

S.C. Code Ann. §17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to state a claim cognizable in post-conviction relief.


**Summary**

Pursuant to S.C. Code Ann. §17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the Spartanburg County Clerk of Court and shall serve opposing counsel at the following address:

Suzanne H. White, Esquire  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

AND IT IS SO ORDERED this 29<sup>th</sup> day of September, 2012.

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2012 SEP 28 PM 2:42  
M. HOPE SHADLEY

  
~~J. Mark Hayes II~~ Roger L. Couch  
~~Administrative Judge~~ - Common Pleas  
Seventh Judicial Circuit

Spartanburg, South Carolina

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STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

IN THE COMMON PLEAS COURT

David Anthony Stewart,  
Applicant,

TRANSCRIPT OF RECORD  
2013-CP-42-5359

-vs-

The State.

September 30, 2013  
Spartanburg, South Carolina

B E F O R E:

HONORABLE J. DERHAM COLE, JUDGE

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

LARA P. HARRILL, ESQUIRE  
JORDAN C. CALLOWAY, ESQUIRE  
Attorneys for the Applicant

SUZANNE H. WHITE, ESQUIRE  
Attorney for the state

Linda D. Moffitt  
Circuit Court Reporter

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ALBERT V. SMITH (SW)	
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No exhibits entered into evidence.

1 MS. WHITE: Thank you, Your Honor.

2 This is the case of David Stewart vs. the State. It's  
3 case No. 2011-CP-42-5359. He's represented today by  
4 Mr. Jordan Calloway.

5 Mr. Stewart was indicted November of 2009 for  
6 trafficking in cocaine over 400 grams. He was represented  
7 by Albert Smith and pled guilty February 9th of 2011 to the  
8 lesser included of trafficking 28 to a hundred grams and  
9 received a sentence of seven years and a \$50,000 fine.

10 He's alleged ineffective assistance of counsel and a  
11 lack of subject matter jurisdiction in that counsel failed  
12 to investigate the illegal arrest and illegal search and  
13 seizure based on problems with the warrant and that counsel  
14 failed to request video tape from the officer's car.

15 And I will note the state had originally filed a  
16 return and motion to dismiss based on the failure to state  
17 a claim. But once Mr. Stewart had responded some we felt  
18 that he had alleged claims of ineffective assistance of  
19 counsel that probably needed to have a hearing, and so  
20 that's why we're having a hearing today.

21 And I will turn it to Mr. Calloway.

22 MR. CALLOWAY: Good morning, Your Honor.

23 At this time I'd like to call David Anthony Stewart to  
24 the stand.

25



David Anthony Stewart  
Direct examination by Mr. Calloway

1 A No, sir. And I just told issue with Mr. Smith, and he  
2 never looked into it.

3 Q Okay. Tell me, Mr. Stewart. How did you come to --  
4 how did Mr. -- how did he become your lawyer?

5 A While we was in the county my codefendant -- I guess  
6 he was talking to some other guys that was in the county  
7 and recommend him -- to recommend my client to Mr. Smith --  
8 that he could get in touch with him, he's a good lawyer,  
9 stuff like that.

10 So based on the time we had to go back in front of the  
11 judge he told me this guy, contact, and see what's going  
12 on.

13 Q And so you believe that there was not -- that the  
14 search was improper.

15 A Yes.

16 Q Did you discuss this with Mr. Smith?

17 A Yes.

18 Q Okay. What did he tell you about the possibility, how  
19 you could challenge that?

20 A He said we would -- we had to hire a dog expert or --  
21 or I forgot the term he used -- someone to look at the  
22 video and determine if the dog was credible and reliable.

23 Q Okay. And did he retain an expert on your behalf?

24 A No, sir.

25 Q Did you discuss with him -- the possibility of

David Anthony Stewart  
Direct examination by Mr. Calloway

1 retaining an expert with him?

2 A We spoke about that. And when it gets to the day of  
3 trial, which ended up turning into a plea, he told me the  
4 guy wasn't going to make it. He was somewhere in Texas or  
5 something like that.

6 Q Now, Mr. Stewart, do you recall also saying in your  
7 application that the court lacked subject matter  
8 jurisdiction for your case?

9 A Correct.

10 Q Tell the -- tell the Court what you meant by that.

11 A One was --

12 Q Let me -- let me ask a more specific question.

13 A Okay.

14 Q Were you indicted on any offense related to this case?

15 A On the paperwork, no, sir.

16 Q Okay. You were never indicted on any offense.

17 A No, sir.

18 Q Okay. What was your understanding of the charge that  
19 had been brought against you?

20 A To make -- to be clear I'm not familiarizing the law  
21 and stuff like that. I just started doing my own research  
22 as I been incarcerated. And as I'm going through the  
23 paperwork it was brought to my attention that when I looked  
24 at the terms lesser included offense and I was wondering  
25 why I got a second violent and not the lesser included,

David Anthony Stewart  
Direct examination by Mr. Calloway

1 which is a P.W.I.D., and I was like that's one other issue  
2 was not fair to me. I never been in trouble before. I  
3 always work. I pay tax.

4 You know, the truth of the matter is my codefendant,  
5 he wasn't going to come to court at that moment. And he  
6 said he was going to take the plea. And I always told  
7 Mr. Albert what if my codefendant took ownership of it. He  
8 said no, they want both of y'all. That was the deal.

9 Q Did you discuss with your attorney the possibility of  
10 going to trial?

11 A He said they was going to roast me.

12 Q Okay. And what -- did you understand what he meant by  
13 that?

14 A I was going to get the full maximum, which would be  
15 25.

16 Q When you -- when -- before the plea hearing were you  
17 comfortable with pleading guilty to this charge?

18 A No, sir.

19 Q Why not?

20 A Because I didn't know I was going to plead to that  
21 charge at that moment. That just came out of nowhere.

22 Q What do you mean by that?

23 A When I came to Spartanburg I was told that we was  
24 going to trial, and I felt pretty much confident that, you  
25 know, something could work out. But when I spoke to him

David Anthony Stewart  
Direct examination by Mr. Calloway

1 the other following day he told me the dog-expert gluy  
2 wasn't going to show up. And that's who we was relying on.  
3 And that he came to me and told me about the seven -- he  
4 say five, but it's seven years.

5 Q You -- you mentioned earlier a video tape. Tell the  
6 Court what this video tape was that you were looking for.

7 A Just to show proof that the officer was on the highway  
8 trying to get in pursuit to pull the vehicle over and, you  
9 know, just a regular traffic violation.

10 He said we was following too closely and was changing  
11 lanes and all of that in traffic first. The video I got  
12 from Mr. Smith only showed the officer pulled up behind the  
13 vehicle and then came out up with the dog and walked around  
14 the car twice.

15 Q And what did Mr. Smith tell you about this video tape,  
16 if anything?

17 A He said he just had to give it to the expert and let  
18 them take a look at it, he would have to hire expert to  
19 look at the video.

20 Q Did he tell that you he ever had or did not have this  
21 video tape or that he'd asked for it or not asked for it?

22 A He had -- he had it, and he gave me a copy.

23 Q Are there any other ways that you feel that Mr. Smith  
24 was ineffective in assisting you as your counsel?

25 A Yes.

David Anthony Stewart  
Direct examination by Mr. Calloway

1 Q Okay. Could you describe those for the Court?

2 A A lot of the -- I'm sorry. I'm kind of nervous.

3 Q That's okay.

4 A Okay. I lived in New York for quite some times. So  
5 he will call me and tell me we got court appearances and  
6 stuff like that. And it's a hell of a -- it's a stretch  
7 coming all the way down here.

8 So when I do come down here he told me they postpone  
9 court. And when I asked him if anything come across your  
10 desk let me know and stuff like that, he would tell me no  
11 news is good news. I said okay.

12 So he led me to believe he had total control over the  
13 situation, but then I started getting calls from him say he  
14 losing -- he lost this trial, he lost this trial. So I  
15 felt like he could have did better.

16 Q Mr. Stewart, if -- if Mr. Smith had done the things  
17 that you requested or the things that you talked about here  
18 this morning do you feel like you would have pled guilty to  
19 the charge that you pled guilty to?

20 A Pardon me?

21 Q If Mr. Smith had done the things that we've discussed  
22 here this morning, the things that you've just spoken  
23 about, do you feel that you would have pled guilty to the  
24 charge you ultimately pled guilty to?

25 A I wouldn't have pled guilty.

David Anthony Stewart  
Cross-examination by Ms. White

1 Q Okay. Why not?

2 A Because he had me believe that he could have did his  
3 job to his best and often -- he just withdraw from me. And  
4 I just -- it's just confused me the whole time.

5 He kept -- he told me I'm still young, it's seven  
6 years, it's not going to be so bad and -- excuse me. He  
7 told me that if I pled and take this seven years I'm still  
8 young and I'll be out. So I asked him. I said if you go  
9 to trial there's nothing you could have did, I couldn't get  
10 parole, probation or anything. He said no.

11 MR. CALLOWAY: Thank you, Your Honor. Nothing  
12 further.

13 MS. WHITE: Just a few brief questions.

14 CROSS-EXAMINATION

15 BY MS. WHITE

16 Q Mr. Stewart, the judge went over a lot of things with  
17 you on the day of your guilty plea.

18 A Yes, ma'am.

19 Q Do you recall most of the day?

20 A No, ma'am.

21 Q What -- some of the things he said to you?

22 A No, ma'am.

23 Q So do you recall that the judge said that if you plead  
24 guilty you're giving up the right to present evidence that  
25 could be a possible defense to these charges?

David Anthony Stewart  
Cross-examination by Ms. White

1 A Yes, ma'am.

2 Q And you said you understood that and wanted to give up  
3 that right.

4 A Yes, ma'am.

5 Q Okay. And when he said that -- he also explained that  
6 this was a plea to, as they said, the lesser included of  
7 trafficking cocaine 28 to a hundred grams. You said you  
8 understood that and that that's what you intended to enter  
9 the plea to.

10 A Yes.

11 Q Okay. But you say today that you after reading some  
12 do not believe that that is a lesser included of the  
13 trafficking over 400?

14 A Correct. Can I add it? He coerced me that I don't  
15 have to get the seven years, if I go in there and not  
16 answering and say what I suppose to say the judge could  
17 change his decision on my sentence, so for my best interest  
18 just agree and go along with whatever the judge is asking.

19 Q Okay. And-but you did have conversation when the  
20 judge asked with you about your family status and you going  
21 to school. You had conversations with him --

22 A Yes, ma'am.

23 Q -- in the Court. Okay. So you just didn't answer yes  
24 or no to everything. And they did tell the court that you  
25 had no prior record.

David Anthony Stewart  
Cross-examination by Ms. White

1 A Yes, ma'am.

2 Q Right? And talked with you about the fact that this  
3 was going to be considered both a violent and a serious  
4 offense. And, in fact, you agreed with the facts when they  
5 were presented and said you are guilty, is that correct?

6 A Yes, ma'am.

7 Q Okay. So had you gone to trial on the original charge  
8 of trafficking 400 plus you were facing a minimum of 25 to  
9 30, is that right?

10 A No. He said 25. He didn't mention the 30.

11 Q Okay. But you would definitely get 25, is what he  
12 told you, if you were convicted of the trafficking over  
13 400.

14 A Yes, ma'am.

15 Q Okay. And is that why -- one of the reasons you  
16 wanted to plead guilty to this lesser offense, was to be  
17 able to have the option of less time?

18 A Yes, ma'am.

19 Q Okay. And, in fact, the seven years is the minimum  
20 for this charge, is that right? Are you aware of that?

21 A Right, yes.

22 Q Okay. All right. And is your testimony today that  
23 you would have rather gone to trial for the trafficking of  
24 400 instead of pleading guilty to this charge unless, you  
25 know, Mr. Smith had talked with you about some of these

David Anthony Stewart  
Redirect examination by Mr. Calloway

1 defenses you would have -- you wanted that risk?

2 A Well, my codefendant and me -- when I and my  
3 codefendant was speaking about it and he said that he was  
4 going to take the responsibility for it, yes, at that  
5 moment I would have went on to trial.

6 Q Okay. But that's contingent on the fact that you were  
7 hoping he would testify and take responsibility.

8 A Yes, ma'am.

9 Q Okay. All right.

10 MS. WHITE: I think that's all I have, Your Honor.

11 MR. CALLOWAY: Just a couple, Your Honor, briefly.

12 REDIRECT EXAMINATION

13 BY MR. CALLOWAY

14 Q Mr. Stewart, did you tell Mr. Smith that your  
15 codefendant told you he intended to take responsibility for  
16 the drugs?

17 A Yes, sir.

18 Q Okay. What was his response to that?

19 A Well, repeat that question. I'm sorry.

20 Q What was his response to that?

21 A Not repeat the question?

22 Q The question was did you talk with Mr. Smith about  
23 your codefendant agreeing to take responsibility for the  
24 drugs.

25 A Yes.

David Anthony Stewart  
Redirect examination by Mr. Calloway

1 Q Okay. What was his response to that?

2 A He said they wanted both of us, that was the deal.

3 Q You went over on cross-examination some of the  
4 statements that you -- that are made in the plea  
5 transcript. Do you remember that?

6 A No, sir.

7 Q Oh, well, do you remember going over that this morning  
8 on cross-examination?

9 A Yes.

10 Q Okay. And now is it your testimony today that the  
11 reason that you made the statements that you made there is  
12 because -- well, what was the reason that you made the  
13 statements that you made in the plea-transcript hearing?

14 A What was the question?

15 Q Was it your testimony this morning that you were just  
16 going along with what your lawyer told you to do?

17 A Yes, sir.

18 Q Okay.

19 A Could I add something else?

20 Q Yes, sir.

21 A On my way here to Spartanburg I didn't know anything  
22 about a plea until that Wednesday morning -- until that  
23 Tuesday -- Tuesday evening, Tuesday night, because my  
24 codefendant, he wasn't going to show up.

25 And I was told. I was instructed by Mr. Smith that I

Albert V. Smith  
Direct examination by Ms. White

1 had that hearing that Monday morning and he wasn't going to  
2 show. And I talked to him and I talked to him and I talked  
3 to him, and I said you got a family and everything. And  
4 then he just come to reality like, and I didn't mean to get  
5 involved and all of this.

6 And Mr. Smith picked him up, and we came here. He was  
7 still talking about it. And he was like I'm sorry, saying  
8 I didn't mean to get you involved. And Mr. Smith kept  
9 saying the deal was for both of y'all when I spoke to him,  
10 because he came in and me and Mr. Smith was still back in  
11 the office for quite some time.

12 Q All right. Thank you.

13 MR. CALLOWAY: Nothing further.

14 MS. WHITE: Nothing further from the state.

15 THE COURT: You may step down.

16 MR. CALLOWAY: Your Honor, I have no additional  
17 witnesses at this time.

18 MS. WHITE: Your Honor, the state would call Albert  
19 Smith to the stand.

20 ALBERT V. SMITH, having been  
21 first duly sworn, testified as follows:

22 DIRECT EXAMINATION BY MS. WHITE

23 Q Mr. Smith, were you retained in this case to represent  
24 Mr. Stewart?

25 A I was.

Albert V. Smith  
Direct examination by Ms. White

1 Q And do you recall having a conversations with him  
2 about the situation and the facts of the case involving his  
3 codefendant as well?

4 A We did.

5 Q And what was your take on the -- the evidence or the  
6 video that he says he thought should have had additional, I  
7 guess, video of the traffic stop?

8 A We had all the video given to us by the solicitor's  
9 office.

10 We engaged -- and I say we. I'm talking about Andrew  
11 Johnston and Gerald Wilson. They represented Mr. David  
12 Douglas.

13 We engaged the services of Steven Nicely out of Buda,  
14 Texas. We sent all of the videos to Mr. Nicely. And that  
15 was prior to -- after a preliminary hearing and/but before  
16 a motion-to-quash hearing -- hearing on that.

17 And we engaged in conversations with Mr. Buda [sic],  
18 and we were told that the tapes did not show really any  
19 violation of the law. And he couldn't tell much about the  
20 dog. The K-9 dog was supposed to have hit on the car.

21 And we talked about that at length with Mr. Stewart  
22 because he was reluctant. He's telling the truth there.  
23 When he came here the day of the hearing it was either  
24 going to be a trial and/or plea. He was very reluctant to  
25 accept the plea.

Albert V. Smith  
Direct examination by Ms. White

1 He was here long before David Douglas was here. He  
2 says that David Douglas was going to accept responsibility.  
3 David Douglas didn't even show up. We had to talk him into  
4 coming from -- that it was in his best interest to take the  
5 seven years. We had to talk him into coming.

6 And he came in by airplane, and I did go pick him up  
7 and brought him in. But the seven years was the best that  
8 we could do with 400 grams of cocaine.

9 Q And did you talk with him about the fact that this was  
10 a lesser included offense?

11 A We did, and I never heard anything about David Douglas  
12 accepting responsibility for it. Andy Johnston didn't tell  
13 me that and Gerald Wilson didn't tell me that.

14 Q And in regards to taking responsibility for it, they  
15 were both in the car, is that correct?

16 A They were in the car, but I did feel and I do feel  
17 that probably Mr. Douglas was more comfortable than  
18 Mr. Stewart. I think Mr. Stewart was a drag-along.

19 Q Okay.

20 A But obviously he was in the drag-along for the wrong  
21 reasons, I thought.

22 Q And when it came to presenting a defense of possession  
23 of the drugs was there anything that you thought y'all were  
24 going to be able to do to counteract the fact that they  
25 were found in the car with that amount of drugs?

Albert V. Smith  
Direct examination by Ms. White

1 A We did all we could do by hiring Mr. Nicely out of  
2 Texas to review what we had. Hopefully, if he had been  
3 favorable to us we would have used him at the trial.

4 Q Okay. Is it accurate? He said that on the day of  
5 trial he was told that the witness was not going to be able  
6 to make it from Texas.

7 A The witness was not coming because we weren't going to  
8 pay for him to come because of what he was saying.

9 Q Okay. So --

10 A He was not coming.

11 Q He was not -- he was never planned to come because it  
12 was not providing anything to the defense.

13 A After we lost the motion to quash the indictment we  
14 made a decision that we would not invite Mr. Nicely to come  
15 because of the information we got from him would not aid  
16 and assist us in the defense of that case.

17 Q Okay.

18 A Of those two cases.

19 Q And in your conversations with him obviously you said  
20 he was reluctant to enter the plea, but knowing what we  
21 could potentially receive at trial versus what -- what he  
22 was being able to plead to, did you feel like he was  
23 pleading ultimately freely and voluntarily?

24 A Yes. I encouraged him to take the plea, but I never  
25 put any pressure on him to take it. A trial I think would

Albert V. Smith  
Cross-examination by Mr. Calloway

1 have been most detrimental to him based upon what they had.

2 Q Okay. Thank you, Mr. Smith.

3 A And I did tell him that -- you know, the deal might go  
4 to David Douglas, might get David. And he was reluctant to  
5 plead guilty, and David Douglas pled guilty. A deal might  
6 go to David Douglas who was the driver of the car.

7 Q Okay. But ultimately they both pled guilty on that  
8 day.

9 A They both did, sure.

10 Q Thank you.

11 MS. WHITE: That's all I have, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. CALLOWAY

14 Q Good morning, Mr. Smith. A couple of questions for  
15 you.

16 A Yes, sir.

17 Q You mentioned Mr. Nicely, the proposed expert that you  
18 contacted.

19 A That's correct.

20 Q Okay. And his testimony or his opinion was not  
21 favorable to the defense.

22 A It was not going to be very persuasive, what he told  
23 us about the dog.

24 Q Okay. Now, when you say persuasive, do you mean it  
25 was not favorable to you, or you didn't feel he would --

Albert V. Smith  
Cross-examination by Mr. Calloway

1 A It was not strong testimony coming from Mr. Nicely  
2 about the dog, whether or not the dog's proper training --  
3 had proper training and whether or not the dog properly hit  
4 on the car.

5 Q Did you discuss Mr. Stewart's case with any other  
6 potential experts?

7 A No. That was the only one we talked about.

8 Q Were there other potential experts with whom you could  
9 have spoken perhaps to --

10 A I'm sure there were, but Mr. Nicely was the one we  
11 thought was the best in the business for us. And we paid  
12 for him to look at what we sent to him.

13 Q Is it your testimony that Mr. Stewart did not tell you  
14 that Mr. Douglas informed him he intended to take  
15 responsibility for these drugs?

16 A Mr. Stewart was disappointed in that that did not  
17 happen. And certainly he did tell me that, but David  
18 Douglas did not indicate he would do that. He didn't even  
19 come. He wasn't even here.

20 Q Did you do anything additionally to investigate the  
21 veracity of Mr. Stewart's statement that his codefendant  
22 was taking responsibility for the drugs?

23 A We did everything we could do. I went to the scene.  
24 We drove the route that the officers said that he had  
25 driven.

Albert V. Smith  
Cross-examination by Mr. Calloway

1           We motioned to dismiss the indictment because we  
2 thought that it was a targeted stop, and to this day I  
3 still believe that. We had a hearing on that, and we lost  
4 it. And so at that point in time they came with a deal far  
5 less than what he was charged with, and we encouraged him  
6 to take it.

7 Q       And what about specifically relating to Mr. Stewart's  
8 statements about his codefendant? Did you do anything  
9 additionally to investigate the veracity of that statement?

10 A       No. I was in contact with their lawyer, with his  
11 lawyer. He had two of them -- Gerald Wilson and Andy  
12 Johnston. And they never told me that David Douglas was  
13 going to accept responsibility and exonerate Mr. Stewart.

14 Q       Did you -- could you have asked for a continuance to  
15 do some further investigation into the veracity of this  
16 statement?

17 A       I don't think we would have gotten a continuance.  
18 Certainly I could have asked, yes. But I don't know what  
19 else I could have found out. I mean, we had lost the  
20 motion. We'd talked to the expert. We'd looked and  
21 reviewed all the evidence presented to us including video  
22 evidence. And at no time until this day have I heard  
23 Mr. Douglas say he didn't know about the cocaine being in  
24 the car.

25 Q       would you agree though that --

Albert V. Smith  
Cross-examination by Mr. Calloway

1 A Mr. Stewart. I'm sorry.

2 Q No problem. Would you agree though that it would have  
3 been beneficial to Mr. Stewart's case if you could confirm  
4 that his codefendant intended to take responsibility for  
5 the drugs?

6 A Well, he was here and he knew what was going on. And  
7 never did I hear that David Douglas was going to accept  
8 responsibility.

9 Q Mr. Stewart didn't tell you that?

10 A No, sir. And I knew better because we had encouraged  
11 -- Douglas had come to accept the deal. We thought it was  
12 in his best interest to do that.

13 Q Okay. But if he had told you that would you have  
14 done -- do you think you should have done investigation of  
15 that?

16 A Well, sure we would have. But the decision to plead  
17 and take responsibility doesn't mean that he was going to  
18 be exonerated.

19 Q No. Of course not.

20 A I don't know that the solicitor would have bought  
21 that.

22 There were things going on -- the pretextual stop, we  
23 attacked that. But the solicitor had this on David Douglas  
24 and David Stewart.

25 They were coming from Atlanta in a rental car, and we

Albert V. Smith  
Cross-examination by Mr. Calloway

1 believed that's why they were stopped. They came in the  
2 rental car. They both were dressed in overalls as if they  
3 were mechanics. And I think one or both of them told the  
4 officers they were mechanics but told different stories  
5 about where they were coming from and where they were  
6 going.

7 Q Did you discuss with Mr. Stewart the circumstances  
8 under which the officers searched their hotel room?

9 A Sure, we did.

10 Q Did he discuss with you whether -- well, what was your  
11 understanding as to why the police officers came into the  
12 room?

13 A I think it was a pretextual stop and they thought  
14 there was drugs in that car. I really do.

15 Q Okay.

16 A For no other reason. It wasn't stop -- it wasn't  
17 changing lanes, improper change, lane changing. Did not  
18 show up on any tape.

19 Q Okay. And so you saw the video tape and there was --  
20 in your opinion, your legal opinion, there was no  
21 justification for the officers to stop them.

22 A Absolutely.

23 Q Could you have challenged that at trial?

24 A We did challenge it before trial, sure.

25 Q But at trial as well could you have --

Albert V. Smith  
Cross-examination by Mr. Calloway

1 A We could have.

2 Q -- tried to exclude the evidence?

3 A We could have.

4 Q Did you discuss that with Mr. Stewart?

5 A No, we didn't discuss that with Mr. Stewart, but I did  
6 discuss -- we was present when we had the hearing to  
7 exclude that evidence -- him and Mr. Douglas both.

8 MR. CALLOWAY: Your Honor, I have no further  
9 questions.

10 MS. WHITE: The state has nothing further, Your Honor.

11 THE COURT: Step down.

12 MS. WHITE: The state has no other witnesses, Your  
13 Honor.

14 THE COURT: Anything further?

15 MR. CALLOWAY: Nothing further at this time, Your  
16 Honor.

17 THE COURT: I'll review the transcript and issue an  
18 order.

19 END OF REQUESTED TRANSCRIPT OF RECORD  
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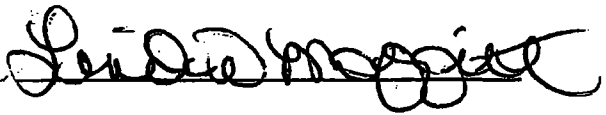
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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for Spartanburg County, South Carolina, on the 30th day of September 2013.

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

June 24, 2014



Linda D. Moffitt  
Circuit Court Reporter

**RECEIVED**

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )  
 )  
 David Anthony Stewart, #344762, )  
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 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 SEVENTH JUDICIAL CIRCUIT  
**S.C. SUPREME COURT**  
 2011-CP-42-5359

**ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 5, 2011. The Respondent made its Return and Motion to Dismiss on or about September 28, 2012. A Conditional Order of Dismissal was served on October 1, 2012. Following Applicant's response to the Conditional Order, Respondent set the matter for hearing. An evidentiary hearing into the matter was convened on September 30, 2013 at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Jordan C. Calloway, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

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At the hearing, the Applicant testified on his own behalf. Albert V. Smith, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, and the plea transcript.

**PROCEDURAL HISTORY**

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg

County Grand Jury indicted the Applicant at the November 2009 term of General Sessions for trafficking in cocaine +400g (09-GS-42-6024). The Applicant was represented by Albert V. Smith, Esquire. On February 9, 2011, the Applicant pled guilty to the lesser included offense of trafficking in cocaine 28g-100g. The Honorable J. Mark Hayes II sentenced the Applicant to confinement, for a period of seven (7) years and ordered Applicant to pay a fine of \$50,000. The Applicant did not appeal his guilty plea or sentence.

### ALLEGATIONS

In his application and response to the Conditional Order of Dismissal, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Insufficient evidence; in that,
  - a. "My arrest and seizure violates Federal and State law,"
  - b. "The officer making the arrest did not have a warrant or probable cause,"
2. Lack of Subject Matter Jurisdiction; in that,
  - a. Indictment reflected charge for trafficking in cocaine +400g, but Applicant was convicted and sentenced for trafficking in cocaine 28-100g,
  - b. Defects in indictment
3. Ineffective assistance of counsel, in that;
  - a. Counsel failed to investigate,
  - b. Counsel failed to move for production of audio and videotape from officer's car,
  - c. Counsel failed to move to suppress the evidence found in the hotel because of Fourth Amendment violations.

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

### Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). 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 v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant testified that he was arrested when the police followed him into a hotel, but

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Applicant testified he never saw a warrant and believed the search was improper. Applicant testified that he was advised on the day of trial that their expert witness, who was hired to attack the qualifications and training of the drug dog, did not appear. Applicant also testified that the videotape evidence from the officer's car only showed the police pulling up behind the car at the hotel and the dog walking around the car, but did not show the entire trip of the Applicant's car. Applicant also testified that he was never indicted for the charge of trafficking in cocaine 10-28 grams and does not believe that it is a lesser-included offense of trafficking in cocaine +400 grams. Applicant testified that he believed the lesser-included offense should have been a possession with intent to distribute. Applicant also testified that the co-defendant had agreed to accept responsibility for all of the drugs. Applicant testified that Counsel advised him he would receive a sentence of twenty-five years if he proceeded to trial. Applicant testified that prior to trial he was out on bond and located in New York, but felt that Counsel was not doing enough for his case. Applicant testified that he would not have pled guilty except for the fact that he, Counsel was not prepared for trial.

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Counsel testified that he was retained to represent the Applicant on the charge of trafficking in cocaine. Counsel testified that he had the entire video of the stop. Counsel also testified that he had retained an expert from Texas to review the training procedures for the drug dog. However, Counsel testified that the expert's testimony would not be favorable to Applicant's defense, so Counsel did not subpoena the expert to testify. Counsel testified that he filed a motion to quash the indictment, but lost that motion. Counsel testified that the Applicant was present for the hearing on the motion to quash and suppress evidence. Counsel testified that Applicant never informed him that the co-defendant was going to accept responsibility. In fact, Counsel testified that he never received any indication from the co-defendant's attorneys that the co-defendant would

accept a plea. The co-defendant barely showed up for his plea. Counsel testified that he knew that the Applicant was reluctant to plead guilty, but chose to plead guilty once the charge was reduced and he faced seven to twenty-five years, rather than a minimum of twenty-five.

This Court finds the testimony of Counsel to be more credible than the testimony of the Applicant. The Applicant's allegation that Counsel did not conduct an adequate pre-trial investigation is without merit. Following testimony and review of the transcript, it is clear that Counsel had reviewed the facts and evidence, as well as the options that Applicant faced. It is also clear that Counsel consulted with the Applicant and discussed various defenses and attacks on the State's evidence. The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen, 329 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on result at trial). The Applicant failed to point to any specific matters Counsel failed to discover or any meritorious defenses that could have been pursued had Counsel been more fully prepared. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequate preparation. Accordingly, this allegation is dismissed.

In Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court held that the two-part standard adopted in Strickland v. Washington, *supra*, for evaluating claims of ineffective assistance of counsel applies, as well, to guilty plea challenges based on ineffective assistance of counsel. To meet the Court's "prejudice" requirement, a criminal defendant must

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show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill at 59. Although the Applicant testified that he would not have pled guilty had Counsel been prepared for trial, this Court does not find that testimony credible. A review of the guilty plea transcript reflects that the Applicant was fully informed of his constitutional rights and chose to waive those rights. The Applicant acknowledged his guilt and informed the court that he was pleased with Counsel's representation. The Applicant has failed to establish that he would have proceeded to trial, but for any alleged deficiencies of Counsel. Therefore, this claim is denied and dismissed.

#### Insufficient Evidence

The Applicant alleged "insufficient evidence," and the State moved to summarily dismiss the claim. A guilty plea generally constitutes a waiver of non-jurisdictional defects and claims of violations of constitutional rights. See Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975) (a plea of guilty constitutes a waiver of non-jurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea); Whetsell v. State, 276 S.C. 295, 297, 347 S.E.2d 891 (1981). Therefore the plea waives any non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence. "Where a defendant voluntarily, intelligently, and understandingly enters a plea of guilt, this makes it unnecessary for the State to offer evidence to prove the offense charged in the warrant or indictment." State v. Allen, 261 S.C. 448, 200 S.E.2d 684, 686 (1973). This is because the guilty plea "admits all matter of fact averments of the accusation." Id. The defendant admits all circumstances described in the indictment, leaving only sufficiency of the indictment for review and waiving all other defenses. State v. Thomason, 341 S.C. 524, 534 S.E.2d 708, 709 (2000). Additionally, PCR is not a proper avenue to challenge the sufficiency of evidence. Simmons v. State, 264 S.C. 417, 215 S.E.2d

883 (1974); S.C. Code Ann. § 17-27-20(a)(6). Therefore, this Court finds that this claim is summarily dismissed based upon S.C. Code Ann. §17-27-70(c) (1985), which authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

**Lack of Subject Matter Jurisdiction**

The Applicant alleged a lack of subject matter jurisdiction based upon the fact that he was indicted for trafficking in cocaine +400 grams, but pled to and was sentenced for trafficking in cocaine 28-100 grams. This Court finds that this allegation lacks merit. The circuit court has subject matter jurisdiction to accept a defendant's guilty plea to an offense if "*the defendant pleads to a lesser included offense of the crime charged in the indictment.*" State v. Timmons, 338 S.C. 287, 289, 525 S.E.2d 906, 907-08 (S.C. Ct. App. 1999) aff'd, 349 S.C. 389, 581 S.E.2d 657 (2002) overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (emphasis added). "Presentment of an indictment or a waiver of presentment is not needed to confer subject matter jurisdiction on the circuit court." State v. Gentry, 363 S.C. 93, 610 S.E.2d 494, 499 (2005). Therefore, this Court finds that any defects in the indictment did not affect the subject matter jurisdiction of the court and the Applicant properly pled guilty to the lesser-included charge. Therefore, this claim is denied and dismissed.

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*Summary*

This Court finds in regards to the allegation of ineffective assistance of counsel, the Applicant's testimony is not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of

reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel’s performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

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

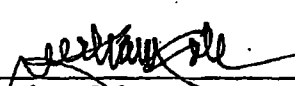
This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a 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.

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**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 20 day of February, 2014.

  
\_\_\_\_\_  
J. Derham Cole  
Presiding Judge

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WITNESSES

SPTG CO SHERIFF'S OFFICE

*T. K. Tillotson*

1. SENTENCE MADE

2. REPORT ENTERED

3. CARD PULLED

4. INDEXED

ARREST WARRANT NUMBER

5. CHECKED WARRANTS

6. CHECKED SIGNATURE

M088094 7. ASSESSMENT FINE CARD MADE

8. TRAFFIC VIOLATION COPY

ACTION OF GRAND JURY

*Alindy*  
Foreperson of Grand Jury  
Date: 11/24/09

VERDICT

Foreperson of Petit Jury  
Date:

DOCKET NO.

09-GS-42-6024

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

NOV 30 2009

TERM

THE STATE  
vs.

DAVID ANTHONY STEWART

Indictment for  
TRAFFICKING IN COCAINE

SC Code: 44-53-370

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SPARTANBURG )

INDICTMENT

At a Court of General Sessions, convened on NOV 24 2009 the  
Grand Jurors of Spartanburg County present upon their oath:

**TRAFFICKING IN COCAINE**

That David Anthony Stewart did in Spartanburg County on or about June 16, 2009, knowingly sell, manufacture, cultivate, deliver, purchase or bring into this State, or did provide financial assistance or did otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase or bring into this State, or did knowingly actually or constructively possess or did knowingly attempt to become in actual or constructive possession of more than (400) four hundred grams of Cocaine, a schedule II controlled substance, in violation of §44-53-370 , *THE CODE OF LAWS OF SOUTH CAROLINA, (1976)*, as amended.

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

  
\_\_\_\_\_  
ASSISTANT SOLICITOR