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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Chester County

Brian M. Gibbons, Circuit Court Judge

ANDREW J. MACK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000645

APPENDIX

WANDA H. CARTER
Deputy Chief Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
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ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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1 STATE OF SOUTH CAROLINA
2 COURT OF GENERAL SESSIONS
3 COUNTY OF CHESTER
4 2012-GS-12-0445, 0447
5

6 State of South Carolina

7 vs.

8 Andrew Jammie Mack
9

10

11 Chester, South Carolina

12 December 10, 2012

13 Before the Honorable Brooks P. Goldsmith
14

15 APPEARANCES

16 For the State: Julie Hall

17 For the Defendant: Everett Stubbs
18

19 Reported by: Michael C. Watkins

20 Official Court Reporter
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22
23
24
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1 Plea hearing:

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2 Sentence:

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3 Certificate:

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NO EXHIBITS

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1 MS. HALL: Before you is Andrew Jammie Mack, he is
2 charged and pleading guilty on the following true billed
3 indictments, 2012-G-12-445, which is trafficking in cocaine
4 base 28 to 100 grams, he is pleading guilty to the lesser
5 included offense of -- actually this is his third offense is
6 what he is indicted for, he is pleading guilty to the same
7 weight but to a second offense.

8 THE COURT: Second?

9 MS. HALL: Yes. He is also pleading guilty on
10 2012-GS-12-447 which is possession of a firearm during the
11 commission of a violent crime. He is represented by
12 Mr. Stubbs. The State has negotiated with the defense for a
13 sentence of seven years on the trafficking charge. And upon
14 completion of his guilty plea the State will be dismissing
15 2012-GS -- 2010-GS-12-668 which is possession of cocaine
16 base, and 2010-GS12-223 which is possession of a controlled
17 substance.

18 THE COURT: And Mr. Stubbs, have you explained to
19 Mr. Mack the charges contained in the indictments, his
20 possible punishment and have you explained to him his
21 constitutional rights?

22 MR. STUBBS: Yes, sir. I fully explained, I believe,
23 everything that he needs to know considering this and I
24 would like to hand up a plea affidavit if the Court will
25 accept it.

1 THE COURT: All right, sir. Do you agree with his
2 decision to plead guilty to these two charges?

3 MR. STUBBS: Yes, sir, Your Honor.

4 THE COURT: Based on your investigation of the facts
5 and circumstances of these cases, do you believe it likely
6 the State could convince a jury of his guilt beyond a
7 reasonable doubt?

8 MR. STUBBS: I do, Your Honor.

9 THE COURT: Mr. Mack, how old are you, sir?

10 THE DEFENDANT: Twenty-five.

11 THE COURT: Are you married?

12 THE DEFENDANT: No, sir.

13 THE COURT: You need to speak up, this gentleman over
14 here is trying to record your voice. What kind of work have
15 you normally done?

16 THE DEFENDANT: I've done a lot of work from warehouse
17 to construction and landscaping, all of that.

18 THE COURT: Have you ever been in criminal court
19 before?

20 THE DEFENDANT: You mean like a trial?

21 THE COURT: I guess you would have. You're pleading
22 guilty to -- they tell me you're pleading guilty to a
23 trafficking second.

24 THE DEFENDANT: Yes, sir.

25 THE COURT: The last time that you were in criminal

1 court would have been approximately how long ago?

2 THE DEFENDANT: For this charge?

3 MR. STUBBS: For any charge.

4 THE DEFENDANT: Like 2009, 2008.

5 THE COURT: And what happened to you as a result of you
6 being in court in 2008?

7 THE DEFENDANT: This is the one they're throwing out
8 now, dismissing now.

9 THE COURT: Have you ever been treated for the abuse of
10 alcohol, abuse of drugs or ever treated for any mental
11 illness?

12 THE DEFENDANT: No, sir.

13 THE COURT: In the past 24 hours have you taken any
14 medication, any drugs or have you consumed any alcohol?

15 THE DEFENDANT: No, sir.

16 THE COURT: Mr. Mack, are you aware today of any
17 physical, nervous or emotional problem you might have that
18 would interfere with your ability to understand what is
19 going on here?

20 THE DEFENDANT: Am I aware? Yes, sir.

21 THE COURT: Do you have any problems understanding what
22 is going on here?

23 THE DEFENDANT: No, sir.

24 THE COURT: The solicitor and your attorney both tell
25 me they believe you wish to plead guilty to those two

1 charges, one possession -- possession of a firearm by a
2 person convicted of a violent crime; is that correct?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: And trafficking in cocaine second offense;
5 is that right?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: The solicitor is going to give me some
8 facts about these cases, I ask you to please listen to what
9 she says.

10 THE DEFENDANT: Yes, sir.

11 MS. HALL: Your Honor, this incident occurred on
12 June 15th of this year over at the Mill Street Apartments
13 which are located in the City of Chester. Officers from the
14 police department received a tip that Mr. Mack has been
15 coming in by way -- somebody who is familiar with that Mill
16 Street area that he was going to be coming in with some
17 crack cocaine. And they went over to the Mill Street
18 Apartment area, made contact with Mr. Mack there, he was
19 driving a rental car and he had had a couple of warning
20 tickets indicating that he had been to the state of Georgia
21 within the past 24 hours and he had put a lot of miles on
22 that rental car within the past 24 hours. The officers when
23 they got there went up to Mr. Mack, they said they smelled
24 marijuana coming from the car, Mr. Mack also gave consent to
25 search the car. When they opened the trunk of the car they

1 found a gun in the back of the car and they also found some
2 white powdery substance in the back of the car. When they
3 found that they searched the rest of the car but they had
4 reason to believe there probably were drugs in the car at
5 that point because they field tested the powdery substance
6 in the back of the car and it tested positive for cocaine.
7 When they did they opened a shoe box that was behind the
8 driver seat and it was a purchase that had been made either
9 in Georgia or right on the line at the outlet mall, there
10 were shoes in the box and inside the shoes was a quantity of
11 cocaine base. That substance was sent to SLED, it came back
12 37.5 grams. Mr. Mack has a 2007 conviction out of Richland
13 County for simple possession of crack cocaine, then he had
14 another conviction out of Fairfield County in 2011 for
15 simple possession with intent to distribute cocaine base
16 first offense. The rest of his prior record, I think he had
17 a receiving stolen goods and that was in 2009 and he was
18 placed on probation on that charge, he was also on probation
19 at the time the offense was committed. I tell you this
20 because the State has reduced the charge so that he is
21 facing a lesser prison charge of 25 to 30 years because he
22 has never been to the department of corrections before and
23 we feel this is an adequate resolution of the case and the
24 police officers do concur.

25 THE COURT: Mr. Mack, you've heard the solicitor's

1 statement of the facts concerning these charges, do you
2 agree with what she told me?

3 THE DEFENDANT: Yes, sir. But one of those charges I
4 didn't have and I don't know how that popped up on my
5 record. I had a possession of a controlled substance in
6 2007, I pled to that no contest, I remember getting a fine
7 for it in 2007 but I don't know why it is still popping up.
8 That's what they charged me with and I went to court and
9 they found out what it was, I don't know why it is still
10 popping up on my record like that. I tried to get it
11 resolved.

12 MR. STUBBS: Your Honor, obviously Mr. Mack has told me
13 about his concern on that one charge but as it is that is
14 what it is on his record and I have no reason other than Mr.
15 Mack's recollection of those events to believe otherwise. I
16 have fully explained to him that this ultimately has been
17 dropped down to the second offense where the enhancement
18 would be a big deal so that's kind of already been taken
19 care of. With the sentencing being at the level it is it
20 would be seven to 25 or seven to 30 whether it's a first
21 offense or second offense so ultimately the mandatory
22 minimum is what has been negotiated here so it's not
23 really --

24 MS. HALL: And I would concur in that as well and also
25 point out that he's not eligible for probation or a

1 suspended sentence since it was a possession out of
2 Fairfield County so that would take him out of that.

3 THE DEFENDANT: I ain't got no possession with an
4 intent.

5 MS. HALL: Your Honor, I'm not relying on his rap sheet
6 to do this, these are printouts that I have from the state
7 department of justice website, I have confirmed that those
8 are actual convictions.

9 THE COURT: Let me make sure I understand where we are.
10 Mr. Stubbs, is Mr. Mack saying that he didn't have the
11 charge in Fairfield County and he didn't have the charge in
12 Richland County either?

13 MR. STUBBS: From what he tells me he was convicted or
14 pled guilty or no contest to both charges, but what he is
15 saying is that one was originally a manufacturing
16 distribution, et cetera, of cocaine base that he pled down
17 to possession of less than 1 gram.

18 MS. HALL: And I think that's correct, I'm sorry, I was
19 reading it backwards.

20 THE COURT: I think the solicitor misspoke when she
21 said it was possession with intent to distribute.

22 MS. HALL: I don't know what happened with that, but
23 anyway.

24 THE COURT: But for the purposes of this plea do you
25 agree that the possession in Fairfield County is sufficient

1 to make this a second, do you agree with that?

2 MR. STUBBS: Yes, sir.

3 THE COURT: Do you agree with that also, Mr. Mack?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: So let me ask you this, Mr. Mack, you've
6 heard this discussion back and forth from the solicitor with
7 you and your attorney and the Court, are you guilty then of
8 trafficking in cocaine second offense?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Okay. And are you guilty of possession of
11 a firearm during the commission of a violent crime?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Has your attorney explained to you your
14 right to have a trial by jury on these charges if you wanted
15 one?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Have you ever had a jury trial?

18 THE DEFENDANT: No, sir.

19 THE COURT: Bear with me just a moment. If you were to
20 have a jury trial, and I need to tell you if even as you're
21 standing there now you're entitled to have a jury trial, but
22 if you were to have a jury trial among other things the
23 Court would instruct the jury that you are presumed innocent
24 and the burden would be upon the State to prove your guilt
25 to the jury beyond a reasonable doubt. You would have the

1 right to cross examine any witnesses that the State might
2 call to testify against you, you could testify yourself or
3 not, and if you decided not to testify the Court would
4 instruct the jury they could not hold that against you
5 because you would have a constitutional right not to
6 testify. You could have your witnesses testify for you. If
7 you would have made any incriminating statements,
8 confessions, things such as that you would actually have the
9 right to challenge the State's right to use that evidence
10 against you, but, of course, you would have the right to
11 challenge the State's right to use any evidence against you.
12 Do you understand you do have all of these rights?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Do you understand by pleading guilty to
15 these charges you would be giving up or waiving those rights
16 as to these charges?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Is that what you wish to do?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Have you had enough time to discuss these
21 charges with your attorney?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Has he answered all of your questions?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Are you satisfied with his services as your

1 attorney?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Now Mr. Mack, has anyone threatened you or
4 coerced you in any way to make you or cause you to plead
5 guilty to these charges?

6 THE DEFENDANT: No, sir, not really.

7 THE COURT: Are you pleading guilty to the charges
8 freely and voluntarily?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Are you pleading guilty to these charges
11 because you are guilty of these charges?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: All right. The Court finds there is a
14 substantial factual basis for both pleas and the decision to
15 enter these pleas has been made freely and voluntarily with
16 the advice of an attorney with whom the defendant states he
17 is satisfied and the Court accepts the pleas. Mr. Stubbs?

18 MR. STUBBS: Thank you, Your Honor. Basically I have
19 just a couple of things that I would like to address the
20 Court about on behalf of my client. One, this was a case
21 that went back and forth whether or not the feds were going
22 to pick it up or whether or not the state was going to
23 prosecute so it has really only been about a month and a
24 half or two months that we have known for sure that this was
25 not going to end up being a federal case, so that being

1 said, there wasn't a whole lot of extensive work on it in
2 that three or four month period. So Mr. Mack at this time
3 where he doesn't feel threatened or pressured or anything,
4 he does feel like this was kind of rushed. He had hired two
5 private attorneys at different times to try to obtain a bond
6 for him, and, of course, I made the motion last month for a
7 change in bond and so he felt like this has all come to a
8 head very fast. And with the holidays approaching his
9 mother is here actually to speak on his behalf, and so our
10 main request would be that you just hold sentencing -- even
11 though we are agreeing to it and everything we would like
12 you to hold it until the January term of court so that his
13 family and his children can actually make it to see him here
14 in Chester over the holidays, that would be the one request.
15 I don't believe that the solicitor has agreed to anything
16 like that but that's a request from the defense, Your Honor.
17 I believe also, if you would like to hear from his mother at
18 the appropriate time.

19 THE COURT: I would be glad to hear from his mother.

20 SPEAKER: Dianna Suber (phonetically).

21 THE COURT: Yes, ma'am, I will be glad to hear from
22 you.

23 SPEAKER: I just want him to stay a little while longer
24 be with his kids for Christmas during the holidays and delay
25 sentencing until the first of the year. He needs some

1 medical attention, too, his neck is very swollen, I don't
2 know if it's glands or not but he is swollen. Can you see
3 it? He is sick. He has put in a request to see the doctor
4 but I don't know if anybody has seen him or not. His neck
5 is three times the size it should be, I don't know what's
6 going on with him but he needs some medical attention, I'm
7 looking at him from back yonder. I didn't come here to say
8 that but I see it. That's all I wanted to say.

9 THE COURT: Thank you, ma'am. Now Mr. Mack, anything
10 you want to say?

11 THE DEFENDANT: Yeah. I just wanted to know if it's a
12 parolable sentence or not since it ain't a possession with
13 intent to distribute like she was saying, she was wrong on
14 that, I don't know on that if I would get parole. I wish it
15 could have been none violent.

16 THE COURT: Let me ask you this, have you talked to
17 your attorney about this?

18 THE DEFENDANT: Yes, sir.

19 MR. STUBBS: Your Honor, I explained to him that
20 because of the sentence being over 20 years it's
21 automatically a violent -- or the possible sentence. But
22 also I told him that statutorily this is a none parolable
23 sentence that he would be getting.

24 THE COURT: Does that answer your question?

25 THE DEFENDANT: Yes, sir.

1 MR. STUBBS: And that, of course, is another reason
2 that I'm making the request that I am, not motion, I guess
3 request, that you hold sentencing until next term of court
4 is just because the travel that would be required for his
5 family to go see him for Christmas in Columbia when he would
6 be still conveniently here in Chester for them if we could
7 just wait until the next term of court. And I have the
8 feeling that the solicitor is going to have something to say
9 in regards to that.

10 THE COURT: Probably. Let me hear what the solicitor
11 has to say.

12 MS. HALL: This is the thing with it, I have spoken to
13 the people at the jail about this. He is unable -- what he
14 did when he filled out his visitation form there were names
15 omitted from it, my understanding these were his children
16 that were omitted from it, what they're telling me is that
17 even if he stays here they can't come see him. So I have a
18 hard time believing that it is appropriate for the State to
19 shoulder the burden of housing him -- I mean the county to
20 shoulder the burden of housing him until January 28th when
21 we have court again which is about six weeks from now. I'm
22 sorry that that is his situation, I feel like if he were at
23 SCDC probably at this point in time he would probably have a
24 better chance of seeing them there, but again I don't
25 believe this is the county's problem. He committed the

1 crime, we would have gone to trial on a third had he not
2 pled guilty at the time. I feel like he's getting a huge
3 benefit. I took him out of the 25 year realm per the
4 negotiations, it's like you give him an inch and he wants a
5 mile. I am sorry but I'm very opposed to having the county
6 to shoulder the expenses to conveniently keep Mr. Mack here
7 for another six weeks.

8 SPEAKER: We're ready to go, don't worry about it.

9 THE COURT: All right. Mr. Mack, the Court accepts the
10 negotiations in this case. On the trafficking charge I
11 sentence you to seven years, they will be concurrent, you
12 will get credit for time served. On the weapons charge I
13 sentence you to five years, it will be concurrent, you will
14 get credit for time served. Good luck to you.

15 (End of the hearing.)

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1 I, the undersigned, Michael C. Watkins, Official Court
2 Reporter for the Sixth Judicial Circuit of the State of South
3 Carolina, do hereby certify that the foregoing is a true,
4 accurate and complete transcript of the proceedings had and
5 evidence introduced in the trial of the captioned case,
6 relative to appeal, in the Court of General Sessions for
7 Chester County, South Carolina, on the 10th day of December,
8 2012.

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

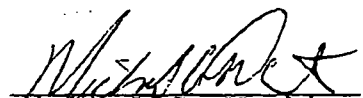
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September 24, 2013

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Michael C. Watkins
Court Reporter

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FORM 5

2013 CP1200285

le 900

STATE OF SOUTH CAROLINA)

County of CHESTER)ANDREW JAMMIE MACIE)

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

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

FILED

2013 JUN 25 P 3 45

CLERK OF COURT
CHESTER S.C.INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention RIDGELAND CORR. INST., P.O. Box 2039,
5 CORRECTIONAL RD., RIDGELAND, SC 29934
2. Name and location of Court which imposed sentence _____
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: _____
 - (a) 2012GS12445 / 44-53-0375 (C)(1)(b)
 - (b) 2012GS12447 / 16-23-0490

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 12/10/2012 - 7 years
- (b) 12/10/2012 - 5 years
- (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. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) SEE ATTACHED APPENDAGE
- (b) _____

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2010 JUN 25 P 3 45
CLERK OF COURT
CHESTER CO. S.C.

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) SEE ATTACHED APPENDAGE
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) SEE ATTACHED APPENDAGE
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

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2017 JUN 25 P 3 46

CLERK OF COURT
CHESTER CO. S.C.

(c) the disposition thereof:

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

(d) the date of each such disposition:

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

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2013 JUN 25 P 3 30
CLERK OF COURT
CHESTER CO. S.

(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. _____
- ii. _____
- iii. _____

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

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

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

(a) _____
 (b) _____
 (c) _____

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

(a) your arraignment and plea? ✓ YES
 (b) your trial, if any? NO
 (c) your sentencing? ✓ YES
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NO
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
NO

FILED

2013 JUN 25 7 34

CHESTER CO. S.C.

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. EVERETT STUBBS, ESQ.
P.O. Box 1727, CHESTER, SC 29706
 ii. _____
 iii. _____
 (b) the proceedings at which each such attorney represented you:
 i. ARRAIGNMENT / PLEA / SENTENCING
 ii. _____
 iii. _____

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

SEE ATTACHED APPENDAGE

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

NO

FILED
2013 JUN 25 P 3 44
CLERK OF COURT
CHESTER CO S.C.

STATE OF SOUTH CAROLINA)
County of JASPER)

VERIFICATION

I, ANDREW JAMMIE MACK, # 353612, 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.

Andrew J Mack

SWORN to and subscribed before me this 22 day of May, 2013.

Virginia Robinson (L.S.)
Notary Public

My Commission Expires: May 20, 2021

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

I, ANDREW JAMMIE MALIK, #353612, 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.

Andrew J Malik
Applicant

SWORN or affirmed to and subscribed before me this
22 day of May, 2013.

Virginia Robinson
Notary Public

My Commission Expires: May 26, 2021

FILED

2013 JUN 25 P 3 46

CLERK OF COURT
CHESTER CO. ST.

STATE OF SOUTH CAROLINA
COUNTY OF CHESTER

Andrew Jammie Mack #353612
Applicant,

VS.

The State of South Carolina
Respondent.

IN THE COURT OF COMMONS PLEAS
Case No.: 2012GS12445/SC Code:
44-53-0375(c)(2)(b)
2012GS12447/16-23-0490

AMENDMENTS TO
POST CONVICTION
RELIEF APPLICATIONS

FILED
2013 JUN 25 PM 3:58
CLERK OF COURT
CHESTER CO. S.C.

The applicant hereby amends answers to number 9 and number 10
his Application for Post-Conviction Relief to state the following:

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

(A) The applicant was denied effective assistance of counsel in
violation of the Sixth Amendment to The United States Constitution and Article
I, Section 14 of The South Carolina Constitution.

10. State concisely and in the same order the facts which support each of
the grounds set out in (9):

(a) The applicant was provided with deficient representation by his
attorney, in that the conduct of his attorney was objectively unreasonable
under the circumstances. Strickland v. Washington, 466 U.S. 668 (1984). The
outcome of the applicant's proceeding was prejudiced, and it is reasonable
probable that the outcome would have been different had counsel's performance
not been deficient. Strickland, 466 U.S. at 694. Defense counsel was
ineffective based on one or more of the following:

1. My defense attorney failed to conscientiously discharge his
professional responsibilities while he was handling my case.

2. My defense attorney failed to effectively challenge the arrest and
seizure of applicant.

3. My defense attorney failed to act as my diligent, conscientious
advocate.

4. My defense attorney failed to give me his complete loyalty.

5. My defense attorney did not have my best interest in mind while he
was supposed to be investigating and preparing my case.

6. My defense attorney failed to serve my cause in good faith.

7. My defense attorney neglected the necessary investigations and the
preparation of my case.

8. My defense attorney did not do the necessary factual investigations
on my behalf.

9. My defense attorney did not do the necessary legal research.

10. My defense attorney did not conscientiously gather any information to protect my rights.

11. My defense attorney did not try to have my case settled in a matter that would have been to my best advantage.

12. My defense attorney did not advise me of all my rights or take any of the actions that were necessary to protect preserve them; knowing that I was not versed in the law.

13. My defense attorney, knowing I was illiterate in the law, never properly ascertained whether or not I actually understood or comprehended all of the issues that were involved in my case.

14. My defense attorney never properly consulted with me or kept me informed with what was going on as far as my case was concerned.

15. My defense attorney never explained to me or discussed with me any of the elements of the crime charged.

16. My defense attorney never made any attempt to ascertain whether or not I actually knew what the elements for the crime charged were or whether or not I understood exactly what the term "criminal" element" actually meant.

17. My defense attorney never explained to me or discussed with me how the elements of the crime charge and the evidence that the prosecution planned to introduce into evidence against me related to one another and did not discuss how the sentencing would be done especially as it related to the elements of the crime in State V. Boyd.

18. My defense attorney never informed me of any of the defenses that were available to me.

19. My defense attorney never intended to offer any defense to court on my behalf.

20. My defense attorney never explained to me or discussed with me any kind of defense strategy.

21. My defense attorney never explained to me or discussed with me any of the tactical choices that they either made or were planning to make.

22. My defense attorney dictated to me exactly how my case was going to be handled and offered no alternative options.

23. My defense attorney failed to properly acquaint me with the law and the facts surrounding my case and as a direct result of this intentional negligence, there was a very serious error in their assessment of both the law and the facts.

24. Because of my defense attorney's gross neglect and his many legal errors no defense at all was put in issue for me during the Court proceedings.

25. My defense attorney did not subject the prosecution's case to any adversarial testing.

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CLERK OF COURT
JAMES H. COUSINS, C.

26. My defense attorney failed to oppose the prosecution's case with any adversarial litigation.

27. My defense attorney failed to function as the government's adversary in any sense of the word.

28. My defense attorney failed to pursue any of the legal recourse that were available to him.

29. The attorney that represented me on this charge in Court failed to function as the counsel that the Constitution's Sixth Amendment Guarantees.

30. My defense attorney failed to call alibi witnesses on my behalf which would have proven my innocence.

31. My defense attorney failed to appeal my case after I was convicted when I wanted to appeal.

I therefore contend my counsel's representation was not within the range and scope of competence demanded by Strickland and its progeny.

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires that the defendant show first, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Sosebee v. Leeke, S.C. 362, F. 2nd 221 (1987), citing Strickland v. Washington 46 S.E.2D. 813 (1984), See also Butler v. State 286 S.C. 441, 334 S.E. 2d 813 (1985), also, Hill v. Lockhart 474 U.S. 88 (1985).

Date: 5-22-13

Respectfully Submitted

S/ Andrew J. Mack
 Andrew J. Mack #353612
 RCI/SB-8
 P.O. Box 2039
 Ridgeland, S.C. 29936

FILED

2013 JUN 25 P 3 52

CLERK OF COURT
 CHESTER CO. S.C.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

COUNTY OF CHESTER)

2013-CP-12-285

Andrew Jammie Mack, #353612,)

Applicant,)

v.)

RETURN

State of South Carolina,)

Respondent.)

The Respondent, making its Return to the application for post conviction relief (PCR) filed June 25 2013, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chester County Clerk of Court. The Applicant was indicted at the September 2012 term of the Chester County Grand Jury for trafficking in cocaine base 28 to 100 grams (2012-GS-12-445) and possession or display of firearm or knife during commission of a violent crime (2012-GS-12-447). Applicant was represented by Everett Stubbs, Esquire. On December 19, 2012, Applicant pled guilty as indicted. Applicant was sentenced by the Honorable Brooks P. Goldsmith for a period of seven (7) years for trafficking and five (5) years for weapon possession, to be served concurrently. The Applicant did not appeal his conviction or sentence.

Attached herewith and incorporated herein are the records of the Chester County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina

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

II.

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

1. Ineffective assistance of counsel.

Applicant has failed to set forth with specificity the grounds upon which the application is based and facts in support thereof. S.C. Code §17-27-50. Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRPC.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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

professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

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

IV.

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

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held solely on the allegation of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN RATIGAN
Senior Assistant Deputy Attorney General

MARY S. WILLIAMS
Assistant Attorney General

By: Mary Williams
ATTORNEYS FOR RESPONDENT

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

Nov. 12, 2013

STATE OF SOUTH CAROLINA
COUNTY OF CHESTER

)
)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

Andrew Jammie Mack,

)
)

2013-CP-12-0285

Applicant,

)
)

v.

)
)

CERTIFICATE OF SERVICE BY MAIL

State of South Carolina,

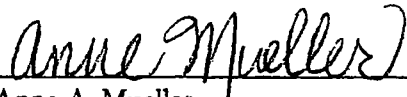
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Respondent.

)
)

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 Respondent's Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Nathan J. Sheldon, Esquire
Shaw Law Firm
P.O. Box 36250
Rock Hill, South Carolina 29732



Anne A. Mueller
Legal Assistant for the Respondent

DATED this 12th day of November, 2013.

1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 COUNTY OF CHESTER
4 2013-CP-12-00285

5

6 Andrew J. Mack

7 vs.

8 State of South Carolina

9

10

11 Lancaster, South Carolina

12 February 3, 2014

13 Before the Honorable Brian M. Gibbons

14

15 APPEARANCES

16 For the State: Mary Williams

17 For the Applicant: Nathan Sheldon

18

19 Reported by: Michael C. Watkins

20 Official Court Reporter

21

22

23

24

25

1	Andrew Mack:	6
2	Everett Stubbs:	17
3	Certificate:	31

4

5

EXHIBITS

6

7

Petitioner's 1:	Letter	12
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1 THE COURT: This is Andrew Mack, 2013-CP-12-0285. Mr.
2 Mack had two charges, trafficking in cocaine 28 to 100 grams
3 and possession of a weapon during the commission of a
4 violent crime. He received a total sentence of seven years,
5 which is the minimum sentence for that charge. This was
6 initially indicted as a third offense, he pled to a second
7 offense and that's going to be part of some of the issues
8 that we're facing here today. But he was represented by
9 Mr. Stubs at the plea and Mr. Sheldon is representing him
10 today, I'll let him take over from there.

11 THE COURT: Mr. Sheldon?

12 MR SHELTON: Thank you, Your Honor. May it please the
13 Court? Just prior to getting started, Your Honor, I would
14 just like to draw your attention to the actual indictment
15 itself. I don't think it's -- I'm on the trafficking, not
16 the gun charge -- I don't think it's accurate to say that it
17 was necessarily indicted as a third offense. I think C2 is
18 simply for trafficking 28 to 100, and then there would be a
19 Subsection C. So essentially it would be C2C had it been
20 indicted on an actual third offense, I don't think it's
21 indicted on any offense because that would be a separate
22 subsection. So with that as the background I guess we would
23 like to go ahead and get started.

24 THE COURT: All right. Let me make sure I follow you

~~25 here. I'm looking at the indictment. What did you want me~~

1 to notice about the indictment?

2 MR SHELTON: If you see 44-53-375C2, I think that's the
3 trafficking 28 to 100 statute. I think it would be C2C if
4 it was a third offense, C2B if it were a second, C2A if it
5 were a first, I think that they left that blank. So I don't
6 think that it -- it's just indicted 28 to 100, I don't think
7 they actually included any of that actual subsection. I
8 didn't have an opportunity to research the CDR code but I
9 believe the CDR code may be for the first offense.

10 THE COURT: We'll check on that real quick.

11 MS. WILLIAMS: Your Honor, the CDR code listed it as a
12 first.

13 THE COURT: 392, it's a trafficking first offense, a
14 minimum seven up to 25.

15 MS. WILLIAMS: Yes, sir.

16 THE COURT: That's what the indictment says.

17 MS. WILLIAMS: Maybe I misspoke. When the plea
18 happened this was considered to be a third offense and he
19 pled to a second.

20 THE COURT: I'm sorry?

21 MR SHELTON: According to the plea transcript the
22 solicitor believed that this was a third offense for Mr.
23 Mack and he pled guilty to a second offense.

24 THE COURT: But he was sentenced as a first offense.

25 MR SHELTON: As a second offense.

1 MS. WILLIAMS: And the CDR code on the sentencing sheet
2 is correct.

3 MR SHELTON: And the warrant --

4 THE COURT: But he was charged with a third -- or the
5 solicitor believed it was a third which is a minimum of 25.

6 MR SHELTON: Your Honor, and that's just kind of I
7 guess why we're here.

8 THE COURT: Hold on a second. But regardless of
9 whether it was a third, second or it looks to be looking at
10 the CDR code, first -- well, first says seven years to 25
11 years, class D, and then second --

12 MS. WILLIAMS: Is seven to 30.

13 THE COURT: Is seven to 30 as well, so either first or
14 second is a minimum of seven. So what are we doing?

15 MR SHELTON: Well, Your Honor, even if it were I think
16 a first would actually affect his parole eligibility as to a
17 second. I think it would be a 65 percent instead of an
18 85 percent sentence, Your Honor.

19 MS. WILLIAMS: It's over 20 so I think it's --

20 THE COURT: Violent and serious, no suspended sentence,
21 no probation, no parole for first. Second says violent,
22 serious, no suspended sentence, no probation, no parole.
23 And the only -- it's all -- no PTI, it's all the same. And,
24 of course, third is the big one, 25 years mandatory, so --
25 anyway.

TESTIMONY OF ANDREW MACK

1 MR SHELTON: I'm just going to put him up and we'll --

2 THE COURT: Okay.

3 MR SHELTON: I just want that to kind of be clarified.

4 THE COURT: Your client understands that the remedy
5 that the Court could impose is not a new sentence, it would
6 be a trial where if this actually was a third offense he's
7 looking at a mandatory minimum of 25 years.

8 MR SHELTON: I explained that to him, Your Honor.

9 THE COURT: Okay. Do you want to talk to him some
10 more?

11 MR SHELTON: Just briefly.

12 (A bench conference was held.)

13 THE COURT: All right. Mr. Sheldon, are you ready to
14 proceed?

15 MR SHELTON: In just a second, Your Honor.

16 (Break in proceedings.)

17 MR SHELTON: Your Honor, we will call Mr. Mack to the
18 stand.

19 The witness, ANDREW MACK, was first duly sworn
20 and testified as follows:

21 DIRECT EXAMINATION

22 BY MR SHELTON:

23 Q. Mr. Mack, please state your name for the record.

24 A. Andrew Jamal Mack.

25 Q. And when you're talking to me today make sure you speak

TESTIMONY OF ANDREW MACK

1 up loud enough so the court reporter can take down what you
2 say. Okay?

3 A. Yes, sir.

4 Q. And Mr. Mack, are you currently incarcerated in SCDC?

5 A. Yes, sir.

6 Q. And you're serving time on a concurrent sentence of
7 possession of a firearm during the commission of a violent
8 crime and a trafficking second offense?

9 A. Yes, sir.

10 Q. And trafficking, when I say trafficking, trafficking
11 crack. And that was under the 28 to 100 statute; is that
12 correct?

13 A. Yes, sir.

14 Q. And you received seven years and five years concurrent
15 on that?

16 A. Yes, sir.

17 Q. Mr. Mack, describe for the Court the circumstances
18 surrounding your guilty plea. Were you represented by
19 Everett Stubbs in this case?

20 A. Yes, sir.

21 Q. And how long after you were charged did Mr. Stubbs take
22 over the case for you?

23 A. Well, I had been in the county for like four months.

24 ~~They was trying to see if the feds was going to take over~~

~~25 the case and whatnot, then he stepped in about the fifth~~

TESTIMONY OF ANDREW MACK

1 month period.

2 Q. And how long after he became your lawyer did you end up
3 pleading guilty to the trafficking charge?

4 A. It was a month, a month and a half.

5 Q. And did you feel that you were given enough time to
6 discuss your case with Mr. Stubbs?

7 A. No, sir. Even he said himself that he hadn't had
8 enough time to even discuss the case at all.

9 Q. Did he seem familiar with your case when he met with
10 you?

11 A. No, sir. He didn't really -- like he stated one time
12 back when I talked to him that he really -- that he had to
13 get the chief public defender to try to help him along with
14 the case.

15 Q. What were some of the concerns that you had with his
16 representation?

17 A. Well, basically I was trying to get him to realize the
18 facts about the case, you know, knowing that were they able
19 to enhance it to a third due to the information that they
20 had, but it seemed like they had some incorrect information.

21 Q. When you say incorrect information, a lot of this is
22 referenced in the transcript itself. Was there a Richland
23 County charge that they maybe misrepresented at the plea
24 hearing?

25 A. Yes, sir.

TESTIMONY OF ANDREW MACK

1 Q. And essentially just to kind of speed this along,
2 essentially they said you were convicted of a possession of
3 crack charge; is that correct?

4 A. Yes, sir.

5 Q. But it's your position, I believe everybody's position
6 at this point, that that was actually possession of a pill
7 charge; is that right?

8 A. Yes, sir.

9 Q. And there was also a Fairfield County charge that
10 originally began with a PWID charge but got reduced to a
11 possession charge; is that right?

12 A. Yes, sir.

13 Q. But that was a possession of crack charge, wasn't it?

14 A. That one was.

15 Q. So at this point we have a conviction from Richland
16 County for possession of pills and a conviction from
17 Fairfield County for possession of crack; is that right?

18 A. Yes, sir.

19 Q. But prior to the plea and at the plea it was
20 represented that those were both possession of crack
21 charges, was it not?

22 A. Yes, sir. And that's when I had wrote -- well, I told
23 them at that time that I did not have that charge and he
24 said all he had was my word and the paperwork saying

~~25 something different, he didn't really try to research to get~~

TESTIMONY OF ANDREW MACK

1 it resolved at any time.

2 Q. How would this case have turned out differently had
3 there been a possession of pill charge as opposed to a
4 possession of crack charge in your opinion?

5 A. Well, from my point of view their main focus was the
6 two prior possessions of crack, that's all they were stating
7 about and I told them that I didn't have it. I'm thinking
8 that -- well, from my point of view if I only had just the
9 one possession they wouldn't have tried to use the other one
10 to enhance it all the way to a third and try to make me
11 either go to trial or plead within a month or two to try to
12 go on and get me out of the court system.

13 Q. So essentially to sum it up, you're saying that had
14 they known that was a possession of pill charge they
15 wouldn't have enhanced this to a third offense to begin
16 with; is that right?

17 A. Yes, sir.

18 Q. Well, let me ask you then, but you ended up pleading
19 then to a trafficking second charge; is that right?

20 A. Yes, sir.

21 Q. So how would the outcome have not -- so if you didn't
22 plead to a third, how would you have gotten away from the
23 trafficking second?

24 A. Well, from my point a plea is really not as indicted,
25 it would have been -- my plea would have been probably back

TESTIMONY OF ANDREW MACK

1 to a first offense which would have left me with a different
2 sentence, even though they said that the minimum is seven it
3 still would have been a violent but it would have been a
4 violent 65 due to after 2010 after a lot of the laws had
5 changed.

6 Q. Well, let me ask you this: Did you inform Mr. Stubbs
7 that that was a possession of pill charge?

8 A. Yes, sir, several times.

9 Q. Did he ever present any evidence that it was indeed a
10 possession of pill instead of a possession of crack charge?

11 A. No, sir. I even asked him for a motion to reconsider
12 and he wrote me back saying that I have two prior
13 possessions of crack cocaine and he will not be giving me a
14 motion to reconsider.

15 Q. Did you -- did Mr. Stubbs discuss with you what your
16 potential options were in terms of an appeal?

17 A. No, sir.

18 Q. Did you ask him to file a motion to reconsider?

19 A. Yes, sir.

20 Q. And did he file a motion to reconsider?

21 A. No, sir.

22 Q. Did he refuse to honor your request to file a motion to
23 reconsider?

24 A. Yes, sir.

~~25 Q. I'm going to hand up -- I'm going to hand you a letter~~

TESTIMONY OF ANDREW MACK

1 here. Do you recognize this letter?

2 A. Yes, sir.

3 Q. What is that?

4 A. It's a letter from Mr. Stubbs himself.

5 Q. Did you receive that in the mail while you were in
6 SCDC?

7 A. Yes, sir.

8 Q. Had that letter been -- other than the underlines that
9 you put on that letter, has it been altered or amended in
10 any way?

11 A. No, sir, coming straight from him.

12 Q. Is that an accurate reflection of the letter you
13 received from Mr. Stubbs?

14 A. Yes, sir.

15 MR SHELTON: Your Honor, we would move to put that into
16 evidence as Petitioner's Exhibit 1.

17 MS. WILLIAMS: It's without objection.

18 THE COURT: Without objection introduced as
19 Petitioner's 1.

20 (The letter was received as Petitioner's 1.)

21 Q. Go ahead and read that letter for the Court, would you,
22 please?

23 A. It says, "Dear Mr. Mack," it says, "I am writing you in
24 reference to your letter to me about your sentence. The
25 minimum sentence on the trafficking of cocaine at your level

TESTIMONY OF ANDREW MACK

1 and a third offense is 25 years. You say this should be
2 your second offense, you are incorrect in stating that. You
3 have two prior possessions of crack cocaine, those two prior
4 enhanced this to your third offense. I got you the minimum
5 sentence for a second offense. You say that you were
6 charged under the wrong offense. Well, you technically pled
7 guilty to a second offense and even were guaranteed the
8 minimum sentence under that offense level. I will not be
9 making any motions to reconsider your sentence. You say I
10 hardly ever spoke with you. I am attaching a prior letter
11 that I wrote to you as proof that I did actually speak with
12 you regarding your charges multiple times. I have even used
13 part of that letter to reference this letter. I am sorry
14 that you ended up with a minimum" --

15 Q. I'm going to stop you there. So you had asked him to
16 file a motion to reconsider; is that correct?

17 A. Yes, sir.

18 Q. At any point in time after you pled guilty or prior to
19 pleading guilty, did Mr. Stubbs explain your right to appeal
20 to you?

21 A. No, sir.

22 Q. Had you known that you had the right to appeal would
23 you have asked him to do so?

24 A. Yes, sir.

~~25 Q. Do you think that the outcome would have been different~~

TESTIMONY OF ANDREW MACK

1 had you been allowed to appeal this case?

2 A. Yes, sir.

3 Q. Did you treat -- at the time that you were sentenced
4 did you know that you could ask Mr. Stubbs to file a motion
5 to reconsider?

6 A. No, sir. I really didn't know anything about the
7 process at that time.

8 Q. Had you ever been to SCDC before?

9 A. No, sir.

10 Q. Had you ever had the need to appeal a sentence before?

11 A. No, sir.

12 Q. Did Mr. Stubbs go over with you what a motion to
13 reconsider was at the time?

14 A. No, sir.

15 MR SHELTON: Thank you, Your Honor. I don't have
16 anymore questions.

17 THE COURT: Ms. Williams?

18 CROSS EXAMINATION

19 BY MS. WILLIAMS:

20 Q. Mr. Mack, you said you did not have an adequate
21 opportunity to talk to Mr. Stubbs.

22 A. No, sir. I mean, I've talked to him but we really
23 didn't discuss the case formally like you were supposed to.

24 Q. Okay. I'm looking at pages 11 and 12 of the trial
25 transcript. Do you recall telling the Judge that you had

TESTIMONY OF ANDREW MACK

1 enough time to meet with Mr. Stubbs?

2 A. Did I have enough time to meet with him?

3 Q. Do you recall telling the Judge that you had had enough
4 time?

5 A. Yes, ma'am. But, you know, at that time he was just
6 telling me to go along with everything that the Judge say
7 just so we can get the plea over with.

8 Q. So he was just whispering in your ear the whole time
9 giving you all of the answers? How does that work?

10 A. No, ma'am. Before we went up he told me to just say
11 yes to all of the questions, and basically that's what he
12 told me to do.

13 Q. And you would do that because you wanted this sentence
14 and you wanted this plea to go forward?

15 A. No, ma'am.

16 Q. So you just did whatever he told you to do, that wasn't
17 what you wanted to do.

18 A. No, ma'am.

19 Q. You wanted to go to trial?

20 A. No, ma'am, not on a third offense.

21 Q. Okay. And this wasn't your first time in criminal
22 court, right?

23 A. No, ma'am.

24 Q. You had had some -- you had a stolen goods charge,
~~25 forgery charge in the past?~~

TESTIMONY OF ANDREW MACK

1 A. I mean, yes, ma'am.

2 Q. And you have no -- there's no question that Fairfield
3 County is a possession of crack cocaine, right?

4 A. Yes, ma'am.

5 Q. And you're telling me that Richland County is actually
6 possession of a pill charge?

7 A. Yes, ma'am.

8 Q. And your attorney explained to you that even if you
9 only have one offense, this was a second offense and that
10 was the correct charge. Do you remember the Judge going
11 over that with you during this plea?

12 A. Going over what exactly?

13 Q. I'll bring you a copy of the transcript.

14 MS. WILLIAMS: Your Honor, may I approach the witness?

15 THE COURT: Yes.

16 Q. And I'm directing you to page eight of the transcript.
17 The Court --

18 THE COURT: Sir, you can grab that and look at it, we
19 are on page eight. I see where Judge Goldsmith asked him on
20 page nine, "Let me make sure I understand where we are.
21 Mr. Stubbs, is Mr. Mack saying that he didn't have the
22 charge in Fairfield and he didn't have the charge in
23 Richland either?" Is that where you're talking about?

24 MS. WILLIAMS: And also Mr. Stubbs talks about on page
25 eight that Mr. Mack has told him about his concern on that

TESTIMONY OF ANDREW MACK

1 one charge and he has no reason to recollect otherwise. He
2 says, "I have fully explained to him that this ultimately
3 has been dropped down to a second and that basically that
4 this as a second offense is the correct offense even if he
5 disputes the Richland charge.

6 Q. And that was explained to you by your attorney?

7 A. I mean, yes, ma'am. But even though, like he say, I
8 wouldn't have been in there for a third offense trafficking,
9 though, even though it is my second offense my plea wouldn't
10 have been for no second offense.

11 MS. WILLIAMS: All right. I don't have any further
12 questions, Your Honor.

13 THE COURT: All right. Anything else?

14 MR SHELTON: No, sir, Your Honor.

15 THE COURT: All right. Thank you, sir, you can step
16 down.

17 MR SHELTON: That is the defense petitioner's case,
18 Your Honor.

19 THE COURT: Anything from the State?

20 MS., WILLIAMS: Yes, Your Honor. The State would call
21 Mr. Stubbs.

22 The witness, EVERETT STUBBS, was first duly
23 sworn and testified as follows:

24 DIRECT EXAMINATION

~~25 BY MS. WILLIAMS:~~

TESTIMONY OF EVERETT STUBBS

1 Q. Mr. Stubbs, tell me a little bit about your experience
2 and how you came to represent Mr. Mack in this matter.

3 A. I was working as assistant public defender in Chester
4 County for the Sixth Circuit and came to know Mr. Mack. I
5 took the case that was assigned to me a couple of months
6 after I believe Mr. Mack was first arrested. I think he
7 obtained prior counsel, maybe even two, I know of one,
8 possibly two, prior to my involvement in the case but I
9 believe those were simply on bond matters only. So I took
10 over the case, and I can't remember the date, but as
11 Mr. Mack already testified to it was a couple of months
12 after the initial arrest.

13 Q. You do something called a plea affidavit that was
14 mentioned in this transcript. Tell me about that.

15 A. Plea affidavit -- and I believe I used what most people
16 considered Judge Kinard's plea affidavit, I don't have one
17 here in court with me today, but I actually went through a
18 plea affidavit that goes through all the rights of Mr. Mack
19 in regards to jury trials, his constitutional rights, and it
20 also addresses the appeals issue and the fact that he has
21 ten days to appeal the sentence if he does not agree with
22 the sentence by any means. Mr. Mack -- I handed it up to
23 the Court as part of evidence during that plea that we did
24 with Mr. Mack, and Mr. Mack -- we went through the entire
25 thing, he signed and the Judge, of course, accepted it as

TESTIMONY OF EVERETT STUBBS

1 part of the record for the plea.

2 Q. Did he at any point ask you to file that appeal for him
3 within that ten days?

4 A. No ma'am.

5 Q. Did you see any reason, any issues that presented
6 themselves in this plea that would you thought merited an
7 appeal?

8 A. No, ma'am.

9 Q. Tell me about Mr. Mack's request for a motion to
10 reconsider sentence.

11 A. Well, the motion to reconsider sentence was many months
12 after the actual sentence was handed down, and also I knew
13 that only bad could come of a reconsidering of the sentence.
14 It could not be suspended whether it was a first or a
15 second, and also he got the mandatory minimum. The only
16 reconsideration that could have been given is the sentence
17 could have been larger than what it was, that's the only way
18 it could have gone was up at the time.

19 Q. And in that letter would you agree that you were
20 mistaken, he said he had a pill charge instead of one the
21 crack charges?

22 A. Yes.

23 Q. Had you looked up that Richland County charge online
24 somewhere?

~~25 A. I had. And I pulled from the index, the public search~~

TESTIMONY OF EVERETT STUBBS

1 index I think it's referred to, it's on the SC Courts
2 website and it says that he pled guilty to a possession of
3 crack cocaine.

4 Q. Okay. So that's what you relied on --

5 A. Right.

6 Q. Did he also have some charges that were nolle prossed
7 as a result of this?

8 A. He did. There were two prior arrests from 2010 that
9 were dismissed as part of this plea deal, this negotiated
10 plea deal.

11 Q. Were those drug charges as well?

12 A. I believe one was another possession of pills and might
13 have been a possession of crack cocaine charge.

14 Q. So those could have actually been enhanced as well if
15 they were tried separately.

16 A. Yes, ma'am, very well could have.

17 Q. Okay. Did you talk to him about parole issues at all?

18 A. I believe I did. I don't believe it's part of the
19 actual plea affidavit that we went through, but I
20 specifically remember reading from the -- what we call the
21 red book, it's a book with sentencing issues in it that most
22 public defenders' offices had. I took it to the jail and
23 actually read to him the different levels I guess you could
24 say, the different enhancement levels.

25 MS. WILLIAMS: I think that's all of the questions I

TESTIMONY OF EVERETT STUBBS

1 have for you. Thank you.

2 THE COURT: Mr. Sheldon?

3 MR SHELTON: Thank you, Your Honor. May it please the
4 Court?

5 THE COURT: Yes.

6 CROSS EXAMINATION

7 BY MR SHELTON:

8 Q. Mr. Stubbs, just very briefly, did you have an
9 opportunity to speak with Mr. Mack after the guilty plea?

10 A. I do not believe so.

11 Q. So at what point in time if somebody is getting seven
12 years in prison and they're being taken directly back to the
13 jail, at what point is he supposed to ask you to appeal his
14 sentence?

15 A. Well, Mr. Mack had sent me multiple, multiple, multiple
16 I guess what you would call faxes from the jail, we call
17 them jail grams. Basically what he does is he writes a
18 request, gives it to any of the law enforcement -- or the
19 corrections officers and they send it immediately over to
20 me, that's typically -- and also I tell my clients have
21 their family contact me with anything that you need. I do
22 at that point.

23 Q. Did you -- and you did end up filing an appeal in this
24 case; is that correct?

25 A. ~~That's correct.~~

TESTIMONY OF EVERETT STUBBS

1 Q. Do you remember if you asked him if he wanted an appeal
2 or not?

3 A. No, sir.

4 Q. Would it be your standard practice to ask somebody if
5 they wanted an appeal?

6 A. No, sir. What I do is I let them know that they need
7 to let me know if they want to appeal.

8 Q. And in this case he specifically asked you to file a
9 motion to reconsider; is that correct?

10 A. Yes, sir.

11 Q. Do you think a motion to reconsider, if timely, would
12 be tantamount to asking for an appeal?

13 A. Not necessarily.

14 Q. And in the letter, which is Petitioner's Exhibit 1, I
15 have it -- I believe it's right there -- at any point in
16 time when he wrote that letter did you explain to him that
17 the motion to reconsider was not timely?

18 A. No, sir, I did not.

19 Q. So in other words you just simply say that -- in more
20 or less terms would it be fair to characterize you stating
21 you didn't feel it was meritorious; is that right?

22 A. That's correct.

23 Q. But at no point did you inform him that it wasn't
24 timely, did you?

25 A. No, sir.

TESTIMONY OF EVERETT STUBBS

1 Q. In terms of the Richland County charge, based on your
2 experience in the solicitor's -- in the public defender's
3 office, had you known -- had you done due diligence in
4 knowing that was a possession of a pill charge, would the
5 outcome of this case been different?

6 A. Not in my opinion.

7 Q. Why not?

8 A. Because the minimum -- this was a second offense
9 charge, it truly was according to the testimony and also
10 what I believed could have been a third potentially. But I
11 didn't necessarily worry about that one pill or crack
12 cocaine charge, I was more worried about the sentence
13 because seven years was the mandatory minimum. And so at
14 that point my negotiation tactics were more in regards to
15 the actual sentence itself rather than the enhancement
16 level.

17 Q. At any point did the solicitor indicate to you that the
18 basis for the second or anything else was being driven by
19 the false information of that possession of crack in
20 Richland County?

21 A. No. I pretty much from the get-go had this as a second
22 offense dropped down to a second offense and what the plea
23 offer was going to be. Mr. Mack -- and I'm not sure why,
24 but he was at the time I guess being targeted by law

~~25 enforcement, specifically I know of one officer that was I~~

TESTIMONY OF EVERETT STUBBS

1 believe the head of narcotics of Chester City that was
2 investigating Mr. Mack in particular. But I at that time
3 tried to get with the solicitor and make sure that the
4 second offense, a lower offense, is what we were going to
5 do.

6 Q. You mentioned in the -- you mentioned in the actual
7 transcript of the plea that although he did not feel
8 threatened or coerced, Mr. Mack did, in fact, feel rushed at
9 the plea; is that correct?

10 A. Definitely so.

11 Q. And do you think -- so how do you square away with
12 being rushed with not feeling coerced? What do you mean by
13 being rushed?

14 A. Well, the solicitor still drives the docket and, you
15 know, that's the way it is and so the solicitor sets the
16 cases for trial. The offer was set for the second offense,
17 take the minimum negotiated, minimum sentence or it would be
18 a trial the next term of court and the offer would be
19 pulled, so I think many of my clients have felt rushed in
20 that aspect. You have very few clients that are chomping at
21 the bits to get to trial, and a large number of them
22 actually do not want to go to trial but the solicitor
23 determines when we do those things.

24 MR SHELTON: Okay. Your Honor, beg the Court's
25 indulgence for one moment.

TESTIMONY OF EVERETT STUBBS

1 (Break in proceedings.)

2 Q. Mr. Stubbs, it appears in the transcript on page 12 or
3 13 it says there wasn't a lot of extensive work on the case
4 in the past three or four months because of that holding
5 pattern of whether or not it was going to be federal or not;
6 is that correct?

7 A. Yes, sir.

8 Q. So do you feel like if had there been extensive work on
9 the case that the outcome could have potentially been
10 different?

11 A. No. What it all boils down to is it was a search
12 issue, and me and Mr. Mack actually went through the
13 different case law and the other avenues. It was a search
14 issue basically where I ultimately believed, and I haven't
15 even looked at it, but just from memory I ultimately
16 believed that the solicitor's office would have prevailed on
17 the search issue.

18 Q. Were you given an opportunity to argue that search
19 issue at some point prior to the case being called for trial
20 or was this a situation where that issue would not have been
21 argued until the seven to 25 was off the table?

22 A. I honestly believe that if we were to have argued it
23 then the offer would have been off the table.

24 Q. Had you been given more time to research the search
~~25 issue, would you have -- do you think that would have been~~

TESTIMONY OF EVERETT STUBBS

1 an issue that could have prevailed?

2 A. No.

3 Q. Did you ultimately have enough time to go over this
4 case and go over the prior convictions and everything else
5 given the time frame that you were in and the solicitor's
6 office breathing down your neck to go to trial?

7 A. Well, it wasn't ideal time by any means, but I think
8 that I had enough time.

9 Q. Did you represent Mr. Mack from the outset of these
10 charges? I know there were two attorneys hired to do bond
11 hearings, who was representing him during those periods?

12 A. From my understanding, my recollection -- and I don't
13 think -- my file is over there, but I don't know exactly
14 when we picked that case up. I was told at one point, and
15 Mr. Mack actually wrote me at least once saying that he was
16 seeking private counsel, but I know that I had had the case
17 for the last two, three or four months..

18 Q. When the case was being deliberated by going federal or
19 not, were you representing him at that time?

20 A. I believe so.

21 Q. So you were representing him more than for essentially
22 five or six months, is that fair to say, four to six months?

23 A. Timeframe I don't remember his arrest date and when the
24 actual plea date was, but I tend to agree with you if that's
25 your assumption.

TESTIMONY OF EVERETT STUBBS

1 Q. But in that three to four month span where it was the
2 feds were debating about taking the case, were you actively
3 working on the case at that time?

4 A. At that time I had discovery and had looked at the case
5 file as well as the actual statutes surrounding it.

6 MR SHELTON: Thank you, Your Honor. I don't have
7 anymore questions.

8 MS. WILLIAMS: Nothing further, Your Honor.

9 THE COURT: Thank you, you can step down.

10 MS. WILLIAMS: That would conclude the State's case.

11 THE COURT: All right. Let's hear argument,
12 Mr. Sheldon.

13 MR SHELTON: Thank you, Your Honor. May it please the
14 Court? Your Honor, there's actually two different arguments
15 here. One is that the trafficking, although technically a
16 true third, had they known that that was not a possession of
17 crack and instead it was a possession of pill charge, while
18 it could have still been a true third the offer would have
19 been different because they were basing it essentially on
20 the possession -- the two possession of cracks instead of
21 just the one. That would be our first position, that the
22 outcome would have been different --

23 THE COURT: But the minimum wouldn't have been
24 different.

~~25 MR SHELTON: Not under the 28 to 100 statute, I agree~~

1 that the minimum would not have been different. However,
2 the --

3 THE COURT: Seven to seven no matter what, whether it's
4 a second seven or a first seven.

5 MR SHELTON: Unless it comes down to the ten to 28
6 level which would be the three to ten and that is violent
7 and parolable.

8 THE COURT: Well, that didn't have anything to do with
9 this plea, this is just a second or a first. The weight of
10 the drugs, I didn't see anything in the transcript about
11 that.

12 MR SHELTON: That's correct. The second issue, Your
13 Honor, would be that the -- I didn't see anything in the
14 transcript about Judge Goldsmith informing Mr. Mack that he
15 had a right -- ten days to the right to appeal in the
16 transcript which would be part of standard colloquy
17 typically in a guilty plea, especially one resulting in no
18 parole time. Your Honor, that said, Mr. Stubbs testified he
19 did not after the plea ask the defendant if he wanted an
20 appeal. The defendant we know has asked for a motion to
21 reconsider, we would basically argue that that is tantamount
22 to asking for an appeal or asking for some sort of
23 reconsideration and therefore counsel was ineffective but
24 not automatically filing some sort of appeal even if it's
25 accompanied with an Anders brief that there are no

1 appealable issues that there should have been an appeal
2 asked for when given seven years no parole and that the
3 defendant wasn't even given the option to appeal. That
4 typically -- that had counsel been effective after the plea
5 was over he would have gone back to the jail with the
6 defendant and essentially asked him if he wanted an appeal
7 or not, Your Honor, and we would argue that he was
8 ineffective in that aspect as well.

9 THE COURT: Got it. Ms. Williams?

10 MS. WILLIAMS: Your Honor, obviously you picked up on
11 all of the issues regarding the sentencing and how that
12 would have no affect on this matter. But there's no
13 evidence that had they known this was crack or pills or
14 whatever in Richland County that there would have been a
15 different sentence or a different plea offer given to him,
16 that's purely speculative at this point. In terms of an
17 appeal, the law does not require the attorney to discuss an
18 appeal with a client following a guilty plea under every
19 circumstance, only if there would be a reason to believe
20 that he would want to appeal, which there has been no
21 evidence of that in this case and no obvious appealable
22 issue in the plea. The motion to reconsider, I don't think
23 that's the same as asking for an appeal especially four
24 months later when has been informed what an appeal is and
~~25 didn't ask for it, and Mr. Stubbs gave very good reasons to~~

1 regarding the motion to reconsider as to his actions there,
2 that's not something that you have a constitutional right to
3 the way that you do possibly on an appeal. So I think that
4 would sum up those points.

5 THE COURT: All right. Based upon the testimony and
6 evidence presented and considering arguments of law by the
7 attorneys I respectfully deny the application for post
8 conviction relief.

9 (End of the hearing.)

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1 I, the undersigned, Michael C. Watkins, Official Court
2 Reporter for the Sixth Judicial Circuit of the State of South
3 Carolina, do hereby certify that the foregoing is a true,
4 accurate and complete transcript of the proceedings had and
5 evidence introduced in the trial of the captioned case
6 relative to appeal, in the Court of Common Pleas for Chester
7 County, South Carolina, on the 3rd day of February, 2014.

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

10

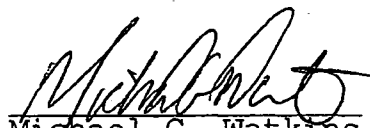
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June 20, 2014

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Michael C. Watkins
Court Reporter

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STATE OF SOUTH CAROLINA)

COUNTY OF CHESTER)

Andrew J. Mack, #353612,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2013-CP-12-0285

ORDER OF DISMISSAL

FILED
2014 FEB 26 11:38
CLERK OF COURT
CHESTER CO. S.C.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed June 25, 2013. An evidentiary hearing was convened on February 3, 2014, at the Lancaster County Courthouse. The Applicant was present at the hearing and was represented by Nathan J. Sheldon, Esquire. The Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying was Everett B. Stubbs, III, Esquire ("Counsel"). This Court had before it the records of the Chester County Clerk of Court, the guilty plea transcript, and the Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chester County Clerk of Court. The Applicant was indicted for trafficking in cocaine base 28 to 100 grams (2012-GS-12-445) and possession or display of firearm or knife during commission of a violent crime (2012-GS-

12-447). Applicant was represented by Everett Stubbs, III, Esquire. On December 19, 2012, Applicant pled guilty. Applicant was sentenced by the Honorable Brooks P. Goldsmith to seven (7) years for trafficking in cocaine base 28-100 grams (second offense) and to a concurrent term of five (5) years for weapon possession. The Applicant did not appeal his conviction or sentence.

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

1. Ineffective assistance of counsel

At the PCR hearing, Applicant addressed the following specific concerns:

- Failure to spend adequate time with him.
- Incorrect information regarding a prior drug charge.
- Failure to file motion to reconsider sentence.
- Failure to file direct appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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, supra). 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). With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Failure to Investigate / Inadequate Preparation

Applicant felt that he did not have adequate time with his attorney prior to his plea. Counsel stated that Applicant had retained an attorney for bond hearings. Counsel was assigned the case in his capacity as a public defender. Counsel and Applicant both testified that there had been some discussion that the case may be assumed by federal prosecutors, but the case ultimately remained at the state level. Counsel informed the court during the plea that there had really only been about 1 ½ - 2 months of preparation after the determination the case would not be federally prosecuted. (Tr. p. 12, line 20 – p. 13, line 4.) Counsel commented that while the time he had to prepare was not ideal, additional time would not have changed the outcome of the proceeding. Counsel testified that he had time to review case law with Applicant with regard to the search, and Counsel believed that the solicitor would prevail on that issue at trial. He had obtained discovery and reviewed statutes. Counsel testified that Applicant received a very advantageous plea offer and was faced with the choice of entering a plea or proceeding to trial on Monday. Counsel further reflected that this was not unusual and often clients felt rushed in this way. Counsel had also reviewed a checklist prior to the plea in which he reviewed essential concepts like the right to appeal. I also note that Applicant informed the plea court that he had enough time to discuss the charges with his attorney, and his attorney had answered all questions. (Tr. p. 11, lines 20-24.)

I find Counsel's testimony to be credible. Under these circumstances, Counsel's performance was within reasonable professional norms. Though he had less time than he would have liked, Counsel had time to review the potential trial evidence and analyze his client's case. Moreover, Applicant has failed to show that had Counsel had additional time for preparation he would have proceeded to trial on trafficking third offense rather than accepting the very advantageous plea offer



to trafficking second offense. See for example Harris v. State, 377 S.C. 66, 75 - 76, 659 S.E.2d 140, 145 (2008) (Applicant failed to carry burden where it was merely speculative that there would have been a different result had counsel spent additional time with his client); Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009) (applicant failed to establish that if counsel were more prepared for trial he would have found a witness or evidence helpful to the case such as would alter counsel's advice to accept the plea bargain and plead guilty).

Prior Record

Applicant further asserted that Counsel failed to ensure that the solicitor and court had accurate information as to his prior offenses. Applicant agreed with the solicitor's statement that he had a prior conviction for possession of cocaine base in Fairfield County. Applicant disagreed with the statement that he had been convicted in Richland County for possession of crack cocaine; Applicant maintained that his conviction in Richland County had involved "pills," presumably illegal prescription drugs. Applicant argued that while it was correct that the present drug offense would therefore properly be characterized as third offense, the solicitor and court may have been willing to enter into an even more beneficial plea arrangement had they known this was only his second offense involving crack cocaine.

Pursuant to plea negotiations, Applicant pled to trafficking cocaine base 28-100 grams (second offense). This carried a sentence range of 7-30 years. This plea reduced Applicant's sentence exposure as a third offense carries a sentence range of 25-30 years. Pursuant to negotiations, the solicitor recommended the minimum seven year sentence, and the plea court followed the solicitor's recommendation.

Even if Applicant's conviction in Richland County is, as he contends, a conviction for



possession of a controlled substance (Schedule I-III), the offense still serves to enhance the charge presently at issue. Therefore, based on Applicant's prior convictions from Fairfield County and Richland County, the charge to which he pled guilty could properly be considered a third offense. The solicitor's reduction of the charge to a second offense greatly reduced Applicant's sentence exposure, and the solicitor's recommendation for the minimum term further reduced Applicant's sentence. Applicant merely speculates that had the parties agreed that his Richland County offense involved a narcotic other than crack there would have been even greater concessions.¹ There is no evidence in the record that the solicitor would have offered any further reduction. Counsel testified that the solicitor had never indicated that the plea offer was in any way based on the misinformation regarding the type of narcotic in the Richland County charge. The solicitor's comments at the plea indicate that the offer was made based on the fact that Applicant had not been incarcerated before and a third offense would have carried 25-30 years. (Tr. p. 7, lines 19-24.) Further, Applicant has made no assertion that but for the purported error he would have gone to trial facing the charge as a third offense. For all these reasons, I find Applicant has failed to carry his burden in this regard.

Failure to File Motion to Reconsider

Applicant further argues that Counsel was ineffective in failing to file a motion to reconsider sentence after Applicant requested that he do so. Counsel noted that the request to file a motion to reconsider was made well beyond the time in which to file such motions. State v. Campbell, 376 S.C. 212, 215, 656 S.E. 2d 37, 373 (2008) (noting "long-standing rule of law that a trial judge is without jurisdiction to consider a criminal matter once the term of court during which judgment was entered

¹ Additionally, Applicant's assertion that a recommendation of 7 years in a plea to first offense trafficking in cocaine base 28-100 grams would have made him eligible for parole sooner is incorrect. A first offense carries 7-25 years. Therefore, both first and second offenses would require service of 85% of the sentence prior to eligibility for parole. S.C. Code

expires" has "two exceptions: a timely post-trial motion and a motion for new trial based on after-discovered evidence."); Rule 29(a), SCRCrimP ("Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of sentence.") Counsel also noted that Applicant received the minimum sentence for the offense and that the sentence could not be suspended. Counsel also had no additional evidence to present the court as a basis for such a motion.

Under these circumstances, I find Counsel's failure to file a motion to reconsider sentence was well within reasonable professional norms. Attorneys "are expected and required to have lawful and reasonable bases for motions presented to the trial judge." State v. Rayfield, 369 S.C. 106, 114, 631 S.E.2d 244, 248 (2006). In the present case, Applicant's request that the motion be filed was well out of time, based on no additional information to present to the court, and was made following the court's pronouncement of the lowest possible sentence Applicant could receive. Further, Applicant has shown no evidence of prejudice in that he has presented no additional evidence which he could have presented had the motion been filed and has made no showing that the outcome would have been different had the untimely motion been filed. For all these reasons, this claim is denied and dismissed with prejudice.

Failure to File Notice of Appeal

As set forth in Turner v. State, 380 S.C. 223, 224-225, 670 S.E.2d 373, 374 (2008):

Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Roe v. Flores-Ortega, 528

U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); Weathers v. State,
319 S.C. 59, 459 S.E.2d 838 (1995).

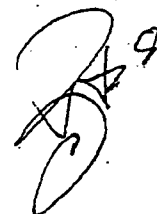
Counsel testified that he reviewed a plea checklist with Applicant prior to his plea, and the checklist included informing Applicant that he had a right to appeal within ten days of his plea. Counsel did not advise Applicant of this again after the plea. Counsel testified that he received no communication from Applicant requesting an appeal. Counsel also testified that Applicant would have been able to make this request as prisoners were able to send what Counsel termed "jail-o-grams" – messages transmitted from the prison to the public defender's office. Counsel added that he had also advised clients that family members could contact him.

Based on the foregoing, I find that Applicant has failed to demonstrate that Counsel was ineffective in this regard. I find Counsel's testimony to be credible. Counsel did inform Applicant of his right to an appeal. Applicant did not notify Counsel of his desire to appeal and Counsel had no reason to believe that an appeal was desired or potentially meritorious. Therefore, Applicant has failed to carry his burden in this regard.

CONCLUSION

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

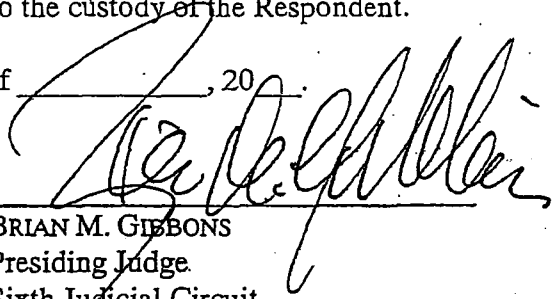
This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. His attention is also directed to Rule 243, SCACR, for appropriate procedures after notice has been timely filed.



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 _____ day of _____, 20____.


BRIAN M. GIBBONS
Presiding Judge
Sixth Judicial Circuit

_____, South Carolina.

RL

STATE OF SOUTH CAROLINA) IN THE COURT OF (Select one.)
 COUNTY OF Chester) ☐ GENERAL SESSIONS ☐ FAMILY COURT
 State of South Carolina, Andrew) 6th JUDICIAL CIRCUIT
 Plaintiff, Jamone) CASE NO.: 2012 HS12445 2012 HS12447
Mack) APPOINTMENT OF COUNSEL
 -vs-) (Select one.)
State of South Carolina) ☒ ORDER
☒ Defendant ☐ Juvenile.) ☐ AMENDED ORDER

Offense(s): ① Drugs/trafficking in ice, crack or crack - 289 or more but less
100g - 2nd offense; ② weapons/pos. weapon during violent crime, if not also sentenced
life without parole or death

It appears that the above named person is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- ☐ the public defender now represents another person involved herein and that a conflict would arise if that office represents the above-named individual.
- ☐ the public defender has indicated a possible conflict of interest or other good cause warranting the appointment of counsel based on:
- ☐ the public defender or court-appointed counsel has indicated that the named individual has now retained private counsel and is no longer entitled to appointed counsel.
- ☐ court-appointed counsel has claimed an exemption or has demonstrated good cause pursuant to Rule 608 warranting the appointment of new counsel based on:
- ☐ court-appointed counsel has obtained substitute counsel named below pursuant to Rule 608(h)(2); only the member who originally received the appointment and who sought substitute counsel shall receive credit for the appointment.

Therefore, it is ordered that Nathan Sheldon Esquire hereby is appointed as
 (Select only one.) ☒ counsel ☐ lead counsel (if capital PCR case) 1169 Eldon Rd.
Rock Hill, S.C. 29732
Phone - 803-329-

for the above-named person. Counsel previously appointed is/are hereby relieved as counsel.

☐ (If Death Penalty PCR Case) It is further ordered that _____
 Esquire, is hereby appointed as second counsel in this capital case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED THIS 25th DAY OF July, 2013

Shirley A. Carpenter
☐ Circuit Judge ☒ Clerk of Court

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

WITNESSES

Brad Bowers (CPD)

T. LEVISTER

DOCKET NO. 2012-GS-12-447

The State of South Carolina

County of Chester

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 2012

ARREST WARRANT NUMBER/DOA

K289490 (DOA-6-15-12)

THE STATE

VS.

Andrew Jimar Mack

ACTION OF GRAND JURY
TRUE BILL

Foreperson of Grand Jury
Date:

VERDICT

Foreperson of Petit Jury
Date:

Indictment for

Possession or Display of Firearm or
Knife During Commission of a Violent
Crime

SC Code: § 16-23-490

CDR Code: 0549

Class: Felony, F

True and correct copy of original paper
On file in this office.

Clerk of Court
Chester County, SC
Date 6/27/2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTER)

INDICTMENT

At a Court of General Sessions, convened on September 11, 2012, the Grand Jurors of Chester County present upon their oath:

**POSSESSION OR DISPLAY OF FIREARM OR KNIFE DURING COMMISSION OF A
VIOLENT CRIME**

That Andrew Jimar Mack did in Chester County on or about June 15, 2012, possess or visibly display a firearm or knife, to wit: handgun during his/her commission of a violent crime, to wit: trafficking in cocaine base, in violation of §16-23-490, *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.



Douglas A. Barfield, Jr., SOLICITOR

WITNESSES

Brad Bowers (CPD)

T. LEVISTE

DOCKET NO. 2012-GS-12-445

The State of South Carolina

County of Chester

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 2012

ARREST WARRANT NUMBER/DOA

K289487 (DOA-6-15-12)

THE STATE
vs.

Andrew Jimar Mack

ACTION OF GRAND JURY
TRUEBILL

Donald W. Es
Foreperson of Grand Jury
Date:

VERDICT

Foreperson of Petit Jury
Date:

Indictment for

Trafficking in Cocaine Base
28 to 100 Grams

SC Code: § 44-53-375 (C)(2)
CDR Code: 0392
Class: Felony, B

True and correct copy of original paper
On file in this office.

Sue K. Carpenter

Clerk of Court
Chester County, SC
Date 6/27/2013

STATE OF SOUTH CAROLINA)
COUNTY OF CHESTER)

INDICTMENT

At a Court of General Sessions, convened on September 11, 2012, the Grand Jurors of Chester County present upon their oath:

TRAFFICKING IN COCAINE BASE 28 TO 100 GRAMS

That Andrew Jimar Mack did in Chester County on or about June 15, 2012, knowingly sell, manufacture, deliver, purchase, or bring into this state or provide financial assistance or otherwise aid, abet, attempt, or conspire to do the same or actually or constructively possess or knowingly attempt to actually or constructively possess 28 grams or more but less than 100 grams of cocaine base, a controlled substance, in violation of § 44-53-375 (C)(2), *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.



Douglas A. Barfield, Jr., SOLICITOR