

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Greenville County

D. Garrison Hill, Circuit Court Judge

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S.C. Supreme Court

KENNETH HENRY SHERMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001364

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APPENDIX

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BENJAMIN JOHN TRIPP  
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON  
Attorney General

KAREN RATIGAN  
Senior Assistant Deputy Attorney General  
P. O. Box 11549  
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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1 STATE OF SOUTH CAROLINA ) COURT OF GENERAL SESSIONS  
 2 COUNTY OF GREENVILLE ) 2011-GS-23-5696  
 3 )  
 4 State of South Carolina ) TRANSCRIPT OF RECORD  
 5 )  
 6 -vs- )  
 7 Kenneth Henry Sherman )

8 February 13, 2012  
 9 Greenville, South Carolina

10 B E F O R E:

11 THE HONORABLE EDWARD W. MILLER, Judge.

12 A P P E A R A N C E S

13 Joyce Monts, Esquire  
 14 Attorney for the State

15 Jake Erwin, Esquire  
 16 Attorney for the Defendant

17 CAROLINE HISKELL  
 18 Thirteenth Circuit Court Reporter  
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I N D E X

(No exhibits or witnesses presented.)

State versus Sherman

1 THE COURT: State versus Sherman.

2 MS. MONTS: Your Honor, if it please the  
3 Court, the State has a motion to amend the two  
4 indictments. The defendant's name is listed two separate  
5 way on different pieces of paper and it just deals with  
6 his first name. The indictments are under Henry Kenneth  
7 Sherman and the State would like to amend that to include  
8 an AKA of Kenneth Henry Sherman.

9 ATTORNEY: Your Honor, I don't have any  
10 objection to that being amended. I do have an objection  
11 to it being read to the jury like that. I just don't want  
12 it to seem like there is some attempt on my client's part  
13 to -- it's obviously a clerical error. It's not an  
14 attempt by my client to ---

15 THE COURT: Is he known as that? What does  
16 he go by? What's his name?

17 MS. MONTS: Your Honor, he has convictions  
18 under both names so and we've got him in the jail under  
19 one name and in our system, the Clerk's Office system  
20 under another name.

21 THE COURT: This is a 10 percent tea pot. He  
22 doesn't want me to post an AKA to the jury because he's  
23 afraid it will reflect badly on his character.

24 What's your name?

25 DEFENDANT SHERMAN: Henry Kenneth Sherman,

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1 Your Honor.

2 THE COURT: The defense request for  
3 additional voir dire is Kenneth H. Sherman. It's Henry  
4 Kenneth?

5 DEFENDANT SHERMAN: Yes, Your Honor.

6 THE COURT: I will announce it as Henry  
7 Kenneth.

8 MS. MONTS: Your Honor, for recordkeeping  
9 purposes, can we have it changed on the indictment?

10 THE COURT: Yeah, you can do it.

11 How do I know you?

12 DEFENDANT SHERMAN: You used to be my  
13 attorney, Your Honor.

14 THE COURT: That's what I thought. When was  
15 that and what for, Mr. Sherman?

16 DEFENDANT SHERMAN: 1990 assault and battery.

17 THE COURT: You object to me being the judge  
18 in the case?

19 DEFENDANT SHERMAN: No, Your Honor.

20 THE COURT: State object?

21 MS. MONTS: No, Your Honor.

22 THE COURT: I recognize his face. I don't  
23 remember the case.

24 What y'all want to do.

25 ATTORNEY: Your Honor, I've got some pretrial

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1 stuff. I don't know if you want to take care of that now.

2 THE COURT: We're waiting on the jury. We  
3 don't have a jury right now. We have 25 left in the pool.  
4 It's 5 and 5 and then an alternate. We'll be cutting it  
5 close. We better wait until we get some more. Let's do  
6 some pretrial stuff then.

7 ATTORNEY: First thing, I would like to have  
8 the drugs suppressed because there was a Fourth Amendment  
9 violation in the investigation that led to their discovery  
10 and before we get into that, I'd like Officer Godfrey to  
11 be sequestered from the courtroom while I do that.

12 THE COURT: Alright. We'll get all the  
13 potential witnesses sequestered while we do this legal  
14 stuff.

15 (Witnesses sequestered from the courtroom.)

16 ATTORNEY: Your Honor, on Wednesday of this  
17 week, I gave Officer Godfrey a call attempting to  
18 investigate some of the issues with this stop. He told me  
19 -- after I introduced myself and told him what I wanted to  
20 talk about, he told me that he would be willing to talk to  
21 me but he wanted to call the solicitor and figure out if  
22 she was okay with him speaking to me.

23 He did that. He called me back a few minutes  
24 later and told me that the solicitor said that he was not  
25 allowed to talk to me.

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1                   I asked the solicitor about this, Ms. Monts,  
2 the next day and she said that that was not true, that she  
3 did not tell him that. I guess what I'm getting at is  
4 there is a potential Sixth Amendment issue affective  
5 assistance of counsel. I don't think I can effectively  
6 represent my client without being able to investigate this  
7 stuff. A conscious effort to keep me away from him,  
8 that's a ---

9                   THE COURT: No. He doesn't have to talk to  
10 you. He's not required to talk to you. If what you say  
11 is true, that would be impeachable stuff, although you're  
12 the one that's talking about him dancing on the line,  
13 you're becoming a witness. You can ask him if that's what  
14 he said. You can't call Ms. Montz to the stand.

15                  ATTORNEY: I understand.

16                  THE COURT: That's dangerous territory. He's  
17 not required to talk to you and he could say no. What  
18 relief are you asking?

19                  ATTORNEY: It sort of depends on his answer,  
20 Your Honor. I guess if it's an effort on the part of the  
21 Solicitor's Office to prevent me from talking to him and I  
22 would say that's obstruction of justice and ask for  
23 dismissal of the charges. I don't think that's the case  
24 and if it's not I would say, short of, I guess, Your  
25 Honor, I'm not asking for -- I'm just trying to get a

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1 clear record going forward.

2 THE COURT: Ms. Montz, did you tell him not  
3 to talk to him?

4 MS. MONTS: No, Your Honor.

5 ATTORNEY: Good enough, Your Honor.

6 THE COURT: Anything else?

7 ATTORNEY: Just going forward with the Fourth  
8 Amendment discretionary, Your Honor.

9 THE COURT: Search and seizure. Was it a  
10 warrantless search?

11 ATTORNEY: Yes, Your Honor.

12 THE COURT: The burden shifts to the State.  
13 You want to get your people back in here, Joyce?

14 MS. MONTS: Yes, sir.

15 THE COURT: Okay. Got a motion to suppress.

16 MS. MONTS: Your Honor, the State calls  
17 Officer Godfrey.

18 THE COURT: Come on around and be sworn.

19 THE CLERK: Place your left hand on the Bible  
20 and raise your right hand.

21 JAMES TRAVIS GODFREY, having been duly sworn  
22 testified as follows:

23 Thank you. You may be seated. State your  
24 full name for the record.

25 THE WITNESS: James Travis Godfrey.

## State versus Sherman

## 1 DIRECT EXAMINATION

2 BY MS. MONTS:

3 Q. Deputy Godfrey, were you on duty on March 23,  
4 2011?

5 A. Yes, ma'am, I was.

6 Q. And what was your assignment approximately 7:18  
7 that evening?8 A. We were running traffic, speeding, down on  
9 Anderson Road.10 Q. Describe what your job is and what the other  
11 officers's jobs are?12 A. We had two officers running radar in two  
13 different locations and we were parked in a parking lot.  
14 We clocked the speeding vehicles. We caught the speeding  
15 vehicle and caught up to him and stopped the vehicle.

16 Q. What do you do once you stop that vehicle?

17 A. Once we stop the vehicle for speeding that  
18 particular evening, we would write them a ticket for  
19 speeding.20 Q. At approximately 7:19 that evening, did you  
21 happen to get a call out regarding a green Dodge Stratas?

22 A. Yes, ma'am.

23 Q. Please describe what you observed? What  
24 direction was it coming from?

25 A. It was coming from the city going toward White

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1 Horse Road area on Anderson Road. I had an officer that  
2 called out there was a green Dodge going 45 in a 30.

3 Q. Were you alone or was there someone else with  
4 you?

5 A. I was alone in my vehicle. There were several  
6 other officers in the parking lot where we were stationed  
7 at.

8 Q. And what did you do once that vehicle came up?  
9 Did you stop the vehicle?

10 A. Yes, ma'am. Once I saw the vehicle pass by me, I  
11 got out into the roadway and activated my blue lights and  
12 pulled it over.

13 Q. Did the car pull over immediately?

14 A. Yes, ma'am.

15 Q. How many occupants were in the vehicle?

16 A. There were three.

17 Q. Was the defendant in that car?

18 A. Yes, ma'am.

19 Q. Where was he located?

20 A. Directly behind the driver in the back seat.

21 Q. Did you approach the car?

22 A. Yes, ma'am, I did.

23 Q. What did you do when you approached the car?

24 A. I asked for the driver's information as well as  
25 the other two occupants of the vehicle. When you pull

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1 over a car, we ask for license, proof of insurance,  
2 registration and advised them the reason for the stop.

3 Q. Did the defendant give you his identification?

4 A. I believe he didn't have it at the time. He told  
5 me his name, date of birth, and gave me some information.

6 Q. And did you run -- what's your procedure when you  
7 get this information from the people in the vehicle?

8 A. Usually when I stop the car I get all of their  
9 information and then I'll check for a warrant and the  
10 driver I always check for his driving record, check the  
11 tag on the vehicle, make sure everything is legit.

12 Q. What information did you obtain about the  
13 information?

14 A. I was checking him for warrants as well as the  
15 other two and I was advised he had an active warrant out  
16 of the city.

17 Q. Do you recall what that was for?

18 A. Yes, ma'am, assault and battery.

19 Q. Did you continue with your car stop?

20 A. Yes, ma'am.

21 Q. What did you do? Did you go back to your  
22 vehicle?

23 A. Yes, ma'am. After retrieving their information  
24 is when I went back to my vehicle and that's where I  
25 checked for warrants on my computer in my vehicle and

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1 learned that he did have an active warrant out of  
2 Greenville City for assault and battery.

3 Q. Did you call for back up?

4 A. Yes, ma'am, I immediately called for back up.

5 Q. Now, did someone arrive and how long did it take?

6 A. Deputy Brashears arrived and like I said there  
7 were many units in the area doing traffic. He got there  
8 maybe within two or three minutes. It wasn't long at all.

9 Q. Did you continue with the traffic ticket or  
10 warrant? What did you do?

11 A. Yes, ma'am. At that time while I was waiting on  
12 the unit, I went ahead and wrote a warning out to the  
13 driver.

14 Q. At that time, had you confirmed whether the  
15 assault and battery warrant was in hand?

16 A. No, ma'am, not at that time. It had to be  
17 located.

18 Q. Describe the procedure. How does it have to be  
19 located?

20 A. Once we make the call out on the radio and check  
21 for somebody who has warrants, we can check ourselves on  
22 the computer which is what I did. Once that's done and we  
23 see that somebody does have a warrant, we'll call either  
24 by phone or radio call the front desk at the Sheriff's  
25 Office and advise them that we're out with a subject that

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1 has an active warrant and they will go back to the warrant  
2 office and pull out the warrant and advise us either on  
3 the radio or telephone when they have located that  
4 warrant.

5 Q. Is it your normal standard procedure to wait  
6 until that warrant is in hand before you arrest the  
7 person?

8 A. Yes, ma'am.

9 Q. And what did you tell the defendant?

10 A. After I realized that he did have a warrant, like  
11 I said, I called for a back up unit and I called into the  
12 front desk and let them know. As they were looking for  
13 it, I continued to write a warning ticket out for  
14 speeding. I walked back to the vehicle, Deputy Brashears  
15 was with me at that time, and I advised him I was giving  
16 him a warning ticket for speeding and I also talked to the  
17 defendant who was in the back seat. I advised him that we  
18 had an active warrant showing his arrest for the  
19 Greenville City Police for assault and battery and we're  
20 still trying to locate it at that time.

21 Q. Was the defendant asked out of the vehicle?

22 A. No, he was not.

23 Q. Did you explain to him when you would arrest him  
24 and when you were not arrest him?

25 A. I told him that he would not be arrested if we

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1 did not locate it. I would say 90 percent of the time we  
2 do find the warrant, but there is always a small  
3 percentage of the time that we do not locate it and if we  
4 can't locate it and that's the only charge we've got, we  
5 can not arrest him.

6 Q. What took place next?

7 A. The defendant, I believe he stated, that he had  
8 just recently gotten out of jail and he believed that the  
9 warrant was taken care of. So I told him I would go back  
10 to my car and confirm it. The way they do the warrant now  
11 sometimes if you are served with a warrant within a few  
12 days it's not taken out of the system. So sometimes when  
13 we go and serve a warrant on somebody, we'll check to see  
14 if they have been recently in jail and sometimes it will  
15 still show active on the screen. I check my computer to  
16 see if he had gotten out of jail or if he had been in jail  
17 for that charge. I was double checking.

18 Q. What did you find?

19 A. Well, before I could go and check it out I was  
20 sitting in my vehicle getting information on my computer,  
21 Deputy Brashears stood by at the vehicle and before I  
22 could confirm either way or warrant was in hand, the  
23 subject opens the door of his vehicle and took off running  
24 across Anderson Road to the left.

25 Q. Was there traffic?

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1 A. Yes, ma'am, there was.

2 Q. Describe what the vehicles in the road did?

3 A. Initially when he topped out and ran to the left  
4 across two lanes of traffic -- Anderson Road right there  
5 is a four-lane road -- one vehicle slammed on the brakes  
6 and slid and almost hit him as soon as he crossed the  
7 road. Deputy Brashears and I were chasing after the  
8 subject at that time on foot.

9 Q. Did additional backup arrive?

10 A. Yes, ma'am. As we were chasing him I advised  
11 that we were chasing the subject on foot. Like I said  
12 there were other units close by. Another unit came to the  
13 scene and as he was coming to the scene I could see his  
14 vehicle approach ours, the other officer, and I asked him  
15 to stand by the vehicle the subject got out of while we  
16 were dealing with the suspect.

17 Q. Did the defendant come back again across  
18 Anderson?

19 A. Yes. Like I said he initially crossed to his  
20 left across two lanes of traffic, got to that side and  
21 there was no where for him to run to so he run all the way  
22 back across Anderson Road which at that time he crossed  
23 four more lanes. Another car had to slam on the brakes  
24 and almost hit him as well. Yes, he did cross back over  
25 the road.

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1 Q. Did you and Brashears stay close to him and how  
2 close were you?

3 A. He was in sight of me until he went to the  
4 backyard -- when he crossed back over the second time  
5 across four lanes and he went on to Judson Road which is a  
6 street right there where I stopped his vehicle. He ran  
7 down Judson Road and he took an immediate left. The only  
8 time I did not see him the whole time is when he ran into  
9 a backyard of a house and I lost sight him for seconds as  
10 I made that turn into the backyard as well.

11 Q. Was Deputy Brashears behind you?

12 A. No, he was in front of me. He was in between me  
13 and the subject.

14 Q. Are you radioing or trying to get any information  
15 as you're chasing the defendant?

16 A. I advised initially that we were running and  
17 chasing him that we were chasing on foot. I didn't say  
18 anything else that I can remember.

19 Q. Did you eventually get a call back regarding the  
20 warrant?

21 A. Yes, ma'am, I did. They advised us that the  
22 warrant was located.

23 Q. Was that prior to you actually getting to the  
24 defendant?

25 A. Correct.

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1 Q. Describe how you eventually got to the defendant?

2 A. Deputy Brashears as he was making that turn going  
3 to the backyard of the house that he was going into,  
4 Deputy Brashears initially tazed him. The defendant  
5 slowed down some. I don't know if he ran out of one of  
6 the mazer leads. They shoot two leads out but he kept  
7 running and when I made that corner to the backyard of the  
8 house, the defendant was in the back corner of the yard  
9 attempting to climb the fence and that's why I tazed him,  
10 shot him in the back. He was told multiple times to stop  
11 running?

12 Q. Describe what the defendant did when the tazer  
13 hit him?

14 A. When my tazer hit him, he pretty much stopped,  
15 seized up and fell to the ground. He gave up at that  
16 point.

17 Q. What did you and Officer Brashears do?

18 A. I stood by with a tazer in my hand in case he  
19 tried to fight or something I was going to taze him again.  
20 He did not. Deputy Brashears maintained eyes on him.  
21 Deputy Brashears handcuffed him.

22 Q. Describe how you got the defendant up and did you  
23 search him?

24 A. Yes, ma'am. Before we even got him up we started  
25 searching him to make sure he didn't have any weapons or

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1 anything as far as searching his person on the ground. We  
2 retrieved some items out of his pocket and helped him to  
3 his feet. We don't want to leave subjects or defendants  
4 on the ground face down too long for positional asphyxia.

5 Q. What did you find on the defendant?

6 A. Like I said we checked him for weapons, search of  
7 his person. Inside of the pocket of his pants we located  
8 multiple things of illegal narcotics. We pulled out like  
9 a brown pill bottle that had a plastic bags filled with  
10 brown powder. We also pulled out some scales, multiple  
11 empty small bags used to package drugs. We also pulled  
12 out a small black plastic bag with black tar heroine. We  
13 also pulled out -- make sure I'm telling you exactly right  
14 -- small jewelry box which had some crack cocaine in  
15 there.

16 Q. Where was Deputy Brashears when you were pulling  
17 these items off of the defendant's person?

18 A. He was there with me.

19 Q. Was he also looking for something?

20 A. Yes. After I started pulling the items out of  
21 his pants pocket, Deputy Brashears was looking for the  
22 tazer cartridge where he had tased the subject or the  
23 defendant because anytime we tase anyone we have to place  
24 that tazer cartridge inside property and evidence so he  
25 was trying to locate his cartridge after he saw I had the

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1 subject in custody.

2 Q. Was the defendant taken back to a police car?

3 A. Yes, ma'am, he was.

4 Q. Was he charged with the assault and battery  
5 warrant that the dispatcher told you was in hand?

6 A. Yes, ma'am.

7 MS. MONTS: Thank you. No further questions.

8 THE COURT: Cross.

9 CROSS-EXAMINATION

10 BY MR. ERWIN:

11 Q. Officer Godfrey, you pulled this car over for  
12 speeding, correct?

13 A. Yes, sir, correct.

14 Q. And the result of the speeding pullover there was  
15 a warning written eventually, correct?

16 A. Yes, there was a warning written to the driver.

17 Q. No an actual ticket.

18 A. Correct.

19 Q. When you pulled this car over, you came up to  
20 make contact with the occupants of the vehicle, you asked  
21 for the driver's ID, correct?

22 A. Yes.

23 Q. You also asked for both the passenger's IDs,  
24 correct?

25 A. Correct.

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1 Q. When you get IDs like that from the occupants of  
2 the car, what information can you glean from that?

3 A. Well, like I was telling her earlier, we always  
4 check to see if they have warrants and I check the  
5 driver's driving license to make sure his license is  
6 valid.

7 Q. So if you find out that say the passenger in the  
8 car does not have a valid driver's license, what does that  
9 tell you as far as criminal activity?

10 A. The passenger does not have a driver's license?

11 Q. Right. Does that tell you the car is stolen?

12 A. I'm not sure.

13 Q. Does that tell you there is some sort of drug  
14 violation going on?

15 A. I'm not sure.

16 Q. What if the passenger has an active warrant, does  
17 that tell you the car is stolen?

18 A. No, sir.

19 Q. Does that tell you there is some sort of drug  
20 activity going on.

21 A. No, sir.

22 Q. Now, at this passenger stop when you took the IDs  
23 or the information from the passenger, did you call that  
24 into the dispatch or did you call that into your computer  
25 or something like that?

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1           A. Yes, sir. I checked -- sometimes our computers  
2 are running real slow, sometimes we can call into the  
3 dispatch to run a license or we can call into the front  
4 desk to check a warrant, but generally I try to do it  
5 myself.

6           Q. Now, remind me, which one did you do in this  
7 case?

8           A. I checked it on the computer.

9           Q. While you were checking it on the computer, did  
10 you expect the passenger's to stay there?

11          A. While I was checking their information?

12          Q. Yes.

13          A. I assumed they would.

14          Q. At any point before you got the information back  
15 from the computer, before you did that, did you ask  
16 anybody to step out of the car?

17          A. Before I checked anybody's information?

18          Q. Before you got an answer on that check did you  
19 ask anybody to step out of the car in the first part of  
20 the traffic stop?

21          A. I'm not sure. I don't recall.

22          Q. When you make a traffic stop for speeding, do you  
23 generally check IDs of everybody in the car?

24          A. Yes, sir.

25          Q. Front seat and back seat?

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1 A. Yes, sir, that's routine.

2 MR. ERWIN: I don't have any further  
3 questions, Your Honor.

4 THE COURT: Any redirect?

5 MS. MONTS: No, Your Honor.

6 THE COURT: Is that all you got?

7 MS. MONTS: On this issue, yes, Your Honor.

8 THE COURT: Do you have any evidence?

9 MR. ERWIN: No, Your Honor.

10 THE COURT: Alright.

11 MR. ERWIN: Your Honor, this is a seizure  
12 under Terry versus Ohio. It's short of arrest but even if  
13 the detention is brief, it still counts as a seizure.  
14 South Carolina -- well, again, under Terry v. Ohio, the  
15 scope and duration and seizure has to be strictly tied to  
16 an justified by the circumstances which rendered its  
17 proper. The circumstances that rendered this initiation  
18 proper was a speeding violation. It was dealt with by  
19 writing a warning and not a ticket.

20 Your Honor, Knight v. State, a South Carolina  
21 case takes that Terry thing a little bit further.

22 THE COURT: What's your cite?

23 MR. ERWIN: I actually have a copy of these  
24 cases. 325 SC 2e 535. Would you like a copy I'm going to  
25 cite?

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1 THE COURT: Yeah.

2 MR. ERWIN: I believe I was on Knight v.  
3 State. It takes the idea of Terry a little bit further.  
4 The officer may briefly detain the occupants of the vehicle  
5 if he has a reasonable suspicion if occupants are involved  
6 in criminal activity. That leads to 1994 South Carolina  
7 case, Sikes v. State. It's a particular application of  
8 this idea. In that case, the Court ruled that the  
9 evidence in this case should have been suppressed because  
10 the officer's reasonable suspicion that a car was stolen  
11 did not give the officer a right to question the  
12 passenger's of the vehicle.

13 In Sikes that case relies on a case from Utah  
14 which I think is relevant here because the facts are  
15 almost the exactly the facts of this case. There's a  
16 traffic stop, there's a passenger who is asked for ID  
17 without reasonable suspicion of ongoing criminal activity.  
18 The passenger, in fact, does not have ID. He gives his  
19 name and birth date as the defendant did in this case.  
20 Passenger has an active warrant, passenger is arrested on  
21 that active warrant, drugs are discovered on her person as  
22 a result of this seizure.

23 And in that case the Court said, and this is  
24 a direct quote, "The leap from asking for the passenger's  
25 name and date of birth to running a warrants check on her

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1 severed the chain of rational inference from specific and  
2 articulable facts and generated into an intent to support  
3 an as yet uncoined and unparticularized suspicion or  
4 hunch." That last bit is straight from Terry.

5 I think that's what happened here, Your  
6 Honor. It started out as a traffic stop. The officer did  
7 not have any sort of reasonable suspicion that there was  
8 ongoing criminal activity or that criminal activity was  
9 about to happen. It turned this taking IDs from the  
10 passenger and the back seat that doesn't have anything to  
11 do with the traffic stop. You know, is the car stolen?  
12 Is there a licensed driver driving the car? It doesn't  
13 have anything to do with that. It's a fishing expedition  
14 for outstanding warrants which they did find in this car  
15 which led to the discovery of drugs.

16 Basically this stop is a pretext for an  
17 investigation that does not match up with the reason for  
18 the original stop. With all that in mind, Your Honor, I  
19 would ask you to suppress the evidence that was discovered  
20 as a result of this.

21 THE COURT: Ms. Montz, anything you want to  
22 tell me?

23 MS. MONTZ: The reason that the officer  
24 originally stopped the car was for a speeding violation.  
25 The officer had not yet returned the speeding warning

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1 ticket prior to finding out there was a possible  
2 outstanding assault and battery warrant active on the  
3 defendant. The defendant gets out and runs. This is all  
4 within a short time frame.

5 THE COURT: That's not in evidence. I don't  
6 know how long it was, long or short. It wasn't testified  
7 to, I don't believe.

8 MS. MONTS: Your Honor, it's the State's  
9 position that since it was prior to the warning ticket  
10 being returned to the driver that the officer found out  
11 there was an outstanding arrest warrant for the defendant  
12 and the defendant takes off running prior to having that  
13 confirmed, the detention was valid. If there hadn't been  
14 and the defendant got out and ran, officers still would  
15 have had the right to get out and chase him as flight is  
16 evidence of guilt, they would have been able to chase him  
17 and determine if he had a weapon, if he had contraband,  
18 based on his own actions.

19 THE COURT: Evidence of guilt of what?  
20 Speeding?

21 MS. MONTS: I can pull some cases on that but  
22 officers would have the opportunity to investigate whether  
23 the defendant who gets out and runs at a car stop may be  
24 armed or might have contraband on him, that they would  
25 have the ability to continue an investigation of those

## State versus Sherman

1 actions.

2 THE COURT: Okay. What I think she was  
3 saying is the linchpin of this argument is whether or not  
4 he was seized.

5 MR. ERWIN: And I will give you the time line  
6 again as I understand the officer testified to it, and if  
7 I'm wrong Ms. Montz can correct me, but from what I  
8 understand happened is they were pulled over. He asked  
9 for IDs of everybody in the car and that's when the Fourth  
10 Amendment violation took place.

11 THE COURT: What's wrong with that?

12 MR. ERWIN: There's no reasonable suspicion  
13 to investigate the passenger's in the car. He didn't  
14 testify to anything about what the passenger's were doing  
15 to justify him investigating them other than they were in  
16 a car that was speeding. That's the driver's violation.  
17 He could have asked the driver for the ID and that's fine.  
18 That's relevant.

19 THE COURT: Your client did not refuse.

20 MR. ERWIN: He did not, Your Honor. But the  
21 ID was taken and a search into an active warrant was made,  
22 he wrote the ticket and then they asked them to stay and  
23 wait. They were going to investigate into this warrant  
24 and find out what happened. The ticket was written after  
25 the Fourth Amendment violation took place.

## State versus Sherman

1 THE COURT: Where is the Fourth Amendment  
2 violation.

3 MR. ERWIN: The seizure on the part of the  
4 officer.

5 THE COURT: Whom did he seize?

6 MR. ERWIN: Could he reasonable be expected  
7 to not comply with that?

8 THE COURT: He could have said, no, I'm not  
9 giving it to you, but he didn't give him anything.

10 MR. ERWIN: He gave him his name and his  
11 birth date.

12 THE COURT: Well, how is that a Fourth  
13 Amendment violation?

14 MR. ERWIN: He could have said, no, but in  
15 that situation he could not have reasonably thought that  
16 it was okay for him to say no.

17 THE COURT: Well, you're fighting hard for  
18 Mr. Sherman, but I don't find any violation here.

19 Anything else we can do?

20 MR. ERWIN: I believe we got a Jackson v.  
21 Denno issue on a statement that might be introduced by the  
22 State at some point. I guess we might as well go ahead  
23 with that.

24 THE COURT: How's the jury going, Mary?

25 THE CLERK: I'm checking now.

## State versus Sherman

1 (Brief discussion off the record.)

2 THE COURT: What's the weight on these drugs?

3 MS. MONTS: The heroine is 15 something.

4 THE COURT: 15 grams.

5 MS. MONTS: Yes, Your Honor.

6 THE COURT: What does it carry?

7 MS. MONTS: A mandatory 25.

8 THE COURT: Is it first offense?

9 MS. MONTS: Third, Your Honor. The heroine

10 was 16.01 grams, 2.25 grams for the crack cocaine.

11 THE COURT: Ms. Montz, any objection to the

12 defendant's proposed voir dire?

13 MS. MONTS: I haven't see anything.

14 THE COURT: I can tell you I won't ask No. 4.

15 The others I cover mostly in my charge.

16 MS. MONTS: No objection, Your Honor.

17 THE COURT: Let me see the lawyers here for a

18 second.

19 (Whereupon, there was a bench conference.)

20 (Whereupon, defendant and counsel confer.)

21 So what we'll do is we'll break for lunch.

22 We can't get this done and still be fair to them. So

23 we'll break for lunch and y'all come back at about 2:00

24 and we'll do the Jackson v. Denno.

25 (Whereupon, there was a lunch break.)

## State versus Sherman

1 THE BAILIFF: All rise, the Honorable Edward  
2 Miller presiding.

3 THE COURT: Thank you. You can be seated.

4 THE CLERK: Please come around, sir. Your  
5 Honor, in the case of 2011-GS-23-5695, the State versus  
6 Henry Kenneth Sherman, also known as Kenneth Henry  
7 Sherman, indicted for possession of cocaine base with  
8 intent to distribute and Your Honor he is pleading to  
9 intent to distribute second offense.

10 In the case of 2011-GS-23-5696, Mr. Sherman  
11 is indicted for trafficking in heroine. He is pleading to  
12 the same more than four grams.

13 Mr. Sherman, would you please raise your  
14 right hand.

15 KENNETH HENRY SHERMAN, having been duly  
16 sworn, testified as follows:

17 Thank you.

18 THE COURT: In the last 24 hours have you had  
19 any drugs, alcohol or medication?

20 DEFENDANT SHERMAN: No, Your Honor.

21 THE COURT: Have you ever been treated for  
22 substance abuse?

23 DEFENDANT SHERMAN: Yes, Your Honor.

24 THE COURT: What was it for and when?

25 DEFENDANT SHERMAN: 2006, Voc Rehab over at

## State versus Sherman

1 Greenville Tech.

2 THE COURT: Are you sober today?

3 DEFENDANT SHERMAN: Yes, Your Honor.

4 THE COURT: You ever been treated for mental  
5 illness or anything like that?

6 DEFENDANT SHERMAN: No, Your Honor.

7 THE COURT: You're up here on these two  
8 indictments and that first one is 2011-5695 alleges you  
9 did in Greenville County, March 23rd, 2011 possession with  
10 intent to distribute a quantity of crack, second offense,  
11 it carries five to thirty years. Do you understand that?

12 DEFENDANT SHERMAN: Yes, You Honor.

13 THE COURT: You're also here on 2011-5696  
14 alleges you did in Greenville County, March 23 of 2011,  
15 knowingly sell, manufacture, bring in South Carolina,  
16 provide a financial or other assistance to do any of those  
17 things or you were in active or constructive possession of  
18 more than 14 grams of heroine, pleading to trafficking in  
19 heroine more than four grams, and what does that carry?

20 MS. MONTS: Your Honor, seven to twenty-five  
21 and a \$50,000 fine.

22 THE COURT: Seven to twenty-five years and a  
23 \$50,000 and I'll tell you that's a Violent Offense which  
24 means no parole and a Serious Offense. The other one is a  
25 Serious Offense to and if you get three or more

## State versus Sherman

1 convictions for Serious Offenses, you are eligible for  
2 life in prison without parole. Do you understand all  
3 that?

4 DEFENDANT SHERMAN: Yes, Your Honor.

5 THE COURT: Understanding all of that, the  
6 nature of the charges against you and the maximum possible  
7 punishment, how do you want to plead?

8 DEFENDANT SHERMAN: Guilty, Your Honor.

9 THE COURT: Has anybody forced you in any way  
10 to do that?

11 DEFENDANT SHERMAN: No, Your Honor.

12 THE COURT: Are you doing it freely and  
13 voluntarily?

14 DEFENDANT SHERMAN: Yes, Your Honor.

15 THE COURT: You understand that you have an  
16 absolute right to a trial by jury where you'd be presumed  
17 innocent unless and until the State could prove you guilty  
18 beyond any reasonable doubt of each and every element of  
19 each offense that you're charged with. You'd have a right  
20 to confront and cross-examine the witnesses and the  
21 evidence. You'd have a right to compel in court all  
22 relevant and competent in your own defense or you can  
23 remain silent. Your silence can not be held against you  
24 and you can never be compelled to incriminate yourself.  
25 Do you understand all those rights?



## State versus Sherman

1 actually for heroine.

2 THE COURT: Who makes those? We need to shut  
3 that production down.

4 MS. MONTS: Your Honor, he had a pill bottle  
5 and he had a white chunk of crack cocaine that was 2.25  
6 grams. He had two baggies of brown powder that was  
7 heroine of 13.76 grams. He also had another amount of  
8 heroine in seven other baggies in a pouch. That heroine  
9 was .17 grams. He also had black tar heroine and that  
10 weighed out to be 2.08 grams.

11 THE COURT: Explain that. What is that?

12 MS. MONTS: I can ask Deputy Woodall.

13 Deputy, do you know anything about that?

14 DEPUTY WOODALL: Yes. It's just a different  
15 form of heroine. It looks just like black tar and it's  
16 during the process of manufacturing heroine. It's just  
17 how they use the opium and it's just a different form of  
18 processing.

19 THE COURT: Thank you.

20 MS. MONTS: Defendant was arrested at that  
21 time. He did go down to Southern Command. He did speak  
22 with Deputy Woodall down there at that time after being  
23 Mirandized. He did admit that he was in possession of  
24 these items. He did state that he used to deal for  
25 another individual, Mr. Brown, and they had a fallen out

## State versus Sherman

1 and he stole these items from the other person by digging  
2 them out of the backyard of that individual.

3           Defendant does have a prior record. He has  
4 at least two prior drug convictions and Your Honor, he has  
5 been in jail since this incident as well as on family  
6 child support and I believe some other charges.

7           Your Honor, the State's position on  
8 sentencing is that we had offered 15 years. We've been  
9 through motions last week in front of Judge Verdin as well  
10 as today and we do request that the sentence be hire that  
11 we originally offered.

12           THE COURT: Okay. How many days credit?

13           MR. ERWIN: March 23rd.

14           THE COURT: What y'all want to tell me?

15           MR. ERWIN: Your Honor, Mr. Sherman is going  
16 to be 39 in just over a week. He's a graduate of  
17 Greenville High School. He's lived here his whole life.  
18 He's got two children, 18 and 4 years old. Your Honor,  
19 Mr. Sherman is not Scarface. I understand he's got a  
20 record and that the time he was caught with a large  
21 quantity of drugs and the mans to distribute those drugs,  
22 but you heard what the solicitor said about his  
23 explanation for that and I do believe that. He had simply  
24 stolen all this stuff as a unit from somebody else.

25           He was not going to set up his own shop or

## State versus Sherman

1 become a drug kingpin in Greenville. He just had  
2 something that he really should not have had. Your Honor,  
3 he's not ---

4 THE COURT: I'm aware of that. I represented  
5 him back in 90's.

6 MR. ERWIN: Understanding that I'll just  
7 leave it to you. You know him better than I do and I  
8 think we ---

9 THE COURT: You probably know him as well as  
10 I do.

11 MR. ERWIN: I just ask you not to hold it  
12 against him that he's come this far in the proceedings.  
13 He's got a Constitutional right to have these evidentiary  
14 hearings and these issues heard out and I just ask you not  
15 to hold this against him. And we are asking you to  
16 consider the minimum sentence which is seven years.

17 MS. MONTS: Your Honor, at the appropriate  
18 time I need to put in his record.

19 THE COURT: Go ahead.

20 MS. MONTS: 1990 possession with intent to  
21 distribute crack cocaine, assault and battery with intent  
22 to kill, 92, possession of marijuana, unlawfully carrying  
23 a weapon, receiving stolen goods, grand larceny, failed to  
24 stop for blue light, criminal domestic violence, failed to  
25 comply, 1993, assault and battery of a high and aggravated

## State versus Sherman

1 nature, 1994 failed to comply, 2002 possession of  
2 marijuana, possession of cocaine second offense,  
3 possession of a stolen pistol, malicious injury to  
4 personal property, 04 interference with law enforcement  
5 officers, resisting arrest, possession of drug  
6 paraphernalia, petty larceny, 06 possession of drug  
7 paraphernalia, possession of crack cocaine second offense,  
8 resisting arrest, petty larceny, failed to appear for the  
9 resisting arrest and '07 fail to appears and failing to  
10 stop for blue light and possession of stolen goods.

11 THE COURT: All that about right?

12 DEFENDANT SHERMAN: Yes, sir.

13 THE COURT: What did I represent you on?

14 DEFENDANT SHERMAN: 1990.

15 THE COURT: Anything you want to tell me?

16 DEFENDANT SHERMAN: No.

17 THE COURT: Who was the judge?

18 DEFENDANT SHERMAN: Epps.

19 THE COURT: I had you on the possession with  
20 intent. What happened with the ABIK, that must have  
21 gotten thrown out. This just doesn't give me in pleasure  
22 but it's all got to stop. I'm going to give you 16 on  
23 each of them and run them concurrent. Good luck and make  
24 the best of it.

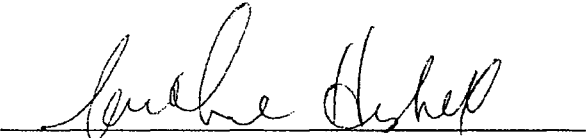
25 ---END OF TRANSCRIPT RECORD---

State versus Sherman

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I, the undersigned Caroline Hiskell, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas, Greenville, South Carolina on the 13, February, 2012.

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



Caroline Hiskell

FORM 5

STATE OF SOUTH CAROLINA )  
 )  
 County of GREENVILLE )  
 )  
KENNETH H. SHERMAN, # 183789 )  
 Full name and prison number (if any) of Applicant )  
 )  
 v. )  
 )  
 State of South Carolina )  
 )  
 )  
 )

IN THE COURT OF COMMON PLEAS

2013-CP-23-00242

APPLICATION FOR  
POST-CONVICTION RELIEF

**INSTRUCTIONS - READ CAREFULLY**

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

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

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

1. Place of detention MCCORMICK CORRECTIONAL INST. 386 REDEMPTION WAY, McCormick, S.C. 29899
2. Name and location of Court which imposed sentence Greenville Court of General Sessions
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) 2011-GS-23-5695) PWID Cocaine base
  - (b) 2011-GS-23-5696) Trafficking Heroine

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

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

(a) ~~2/13/2012 - Trafficking Heroin term 16~~

(b) 2/13/2012 PWID Cocaine base term 16

(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?

I asked counsel to appeal but he didn't, so I tried

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

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

i. S.C. Court of Appeals

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

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

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

i. Dismissed

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

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

(c) the date of each such result:

i. 11/30/2012

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

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

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

i. None

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

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

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

(a) Counsel didn't honor my request for an appeal

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

- (c) \_\_\_\_\_
- 10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
  - (a) My plea of guilty was not knowingly and intelligently
  - (b) made in violation of the Due Process Clause( \_\_\_\_\_
  - (c) Ineffective assistance of counsel (see attachments \_\_\_\_\_
- 11. State concisely and in the same order the facts which support each of the grounds set out in (10):
  - (a) See attached sheets \_\_\_\_\_
  - (b) See attached sheets \_\_\_\_\_
  - (c) Failed to object or file any motion about the sentence \_\_\_\_\_
- 12. Prior to this application have you filed with respect to this conviction:
  - (a) any petition in a State Court under South Carolina Law? No \_\_\_\_\_
  - (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No \_\_\_\_\_
  - (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no \_\_\_\_\_
  - (d) any other petitions, motions or applications in this or any other Court? no \_\_\_\_\_
- 13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
  - (a) the specific nature thereof:
    - i. N/A \_\_\_\_\_
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
    - iv. \_\_\_\_\_
  - (b) the name and location of the Court in which each was filed:
    - i. N/A \_\_\_\_\_
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
    - iv. \_\_\_\_\_

(c) the disposition thereof:

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

(d) the date of each such disposition:

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

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

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

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

No \_\_\_\_\_

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

(a) which grounds have been presented:

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

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

- i. N/A \_\_\_\_\_
- 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) N/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? N/A
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NO
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?  
No

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

- (a) the name and address of each attorney who represented you:
  - i. Jake Erwin, Esquire
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
  - i. Plea of guilty
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

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

Vacate conviction and sentence  
specific sentence performance

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

No

STATE OF SOUTH CAROLINA )  
County of McCormick )

VERIFICATION

I, Kenneth Sherman, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Kenneth Sherman

SWORN to and subscribed before me this 02  
day of Jan 2013.  
[Signature] (L.S.)  
Notary Public

My Commission Expires: 12.16.2019

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

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

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Kenneth Sherman  
Applicant

SWORN or affirmed to and subscribed before me this  
02 day of Jan, 2013.

JCA Rankler  
Notary Public

My Commission Expires: 12-16-2019

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Kenneth Henry Sherman, )  
 a/k/a Henry Kenneth Sherman, )  
 S.C.D.C. No. 183789, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2013-CP-23-0242

**RETURN**

In response to the post-conviction relief application filed January 15, 2013, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the January 2012 term of General Sessions for possession with intent to distribute (PWID) cocaine base (2011-GS-23-5695) and trafficking heroin (2011-GS-23-5696). Jake Erwin, Esquire represented the Applicant.

On February 13, 2012, the Applicant pled guilty to PWID cocaine base, second offense and trafficking heroin (4 or more grams). The Honorable Edward W. Miller sentenced the Applicant to concurrent sentences of sixteen years on each charge.

A notice of appeal was filed at the South Carolina Court of Appeals. In an order filed October 30, 2012, the Court of Appeals dismissed the appeal based on the Applicant's failure to serve the notice of appeal upon opposing counsel. The remittitur was issued December 13, 2012.

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the guilty plea transcript, and the appellate records.

## II.

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

1. Ineffective assistance of counsel:
  - a. "Failed to object or file any motion about the sentence."
2. Involuntary guilty plea.

## III.

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

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386

S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

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

#### IV.

The Applicant's assertion that his guilty plea was involuntary is without merit. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). An Applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by

showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the Applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). An Applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985); Bennett v. State, 371 S.C. 198, 204, 638 S.E.2d 673, 675 (2006).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a criminal defendant must be advised of the constitutional rights he is waiving. Id. at 243, 89 S. Ct. at 1712. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. Moreover, a criminal defendant entering a guilty plea "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citation omitted). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000).

When determining issues relating to guilty pleas, the court will consider the entire record,

including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000).

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

V.

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

VI.

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

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Senior Assistant Deputy Attorney General

KAREN C. RATIGAN  
Assistant Deputy Attorney General  
P.O. Box 11549  
Columbia, S.C. 29211

By:

*Megan E. Harrison*  
Attorneys for Respondent

June 21, 2013

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 )  
 )  
 KENNETH HENRY SHERMAN, 183789 )  
 a/k/a Henry Kenneth Sherman )  
 )  
 Applicant, )  
 )  
 vs )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 Respondent. )

---

IN THE COURT OF COMMON PLEAS

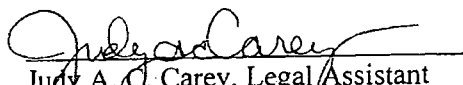
2013-CP-23-0242

AFFIDAVIT OF SERVICE BY MAIL

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

**Kenneth Henry Sherman, 183789  
 McCormick Correctional Institution  
 386 Redemption Way  
 McCormick SC 29899**

DATED this 21st day of June, 2013.

  
 Judy A. Carey, Legal Assistant  
 For Respondent

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

COURT OF COMMON PLEAS  
2013-CP-23-00242

KENNETH HENRY SHERMAN,  
APPLICANT,

vs.

TRANSCRIPT OF RECORD

STATE OF SOUTH CAROLINA,  
RESPONDENT.

**ORIGINAL**

April 23, 2014  
Greenville, South Carolina

B E F O R E:

THE HONORABLE D. GARRISON HILL, JUDGE.

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

BRIAN P. JOHNSON, ESQ.  
Attorney for the Applicant

KAREN C. RATIGAN, ESQ.  
Attorney for the Respondent

HOLLIE M. JENKINS  
Circuit Court Reporter

I N D E X

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

Page No.

(AW) KENNETH HENRY SHERMAN:  
 Direct Examination by Mr. Johnson.....5  
 Cross-Examination by Ms. Ratigan.....20

(RW) JOHN KENNETH ERWIN, JR.:  
 Direct Examination by Ms. Ratigan.....27  
 Cross-Examination by Mr. Johnson.....34

(AW) KENNETH HENRY SHERMAN:  
 Direct Examination by Mr. Johnson.....37

E X H I B I T S

(There were no exhibits introduced.)

P R O C E E D I N G S

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THE COURT: Yes, ma'am.

MS. RATIGAN: Thank you, Your Honor.

May it please the Court.

This is the case of Kenneth Henry Sherman v. the State of South Carolina. The docket number is 2013-CP-23-0242. Mr. Sherman was indicted for possession with intent to distribute cocaine base and trafficking heroin. He was represented on these charges by Mr. Erwin.

On February 13th of 2012, he pled guilty to PWID cocaine base second offense and trafficking heroin four or more grams. Judge Miller sentenced him to concurrent sentences of 16 years on each charge. He did file a notice of appeal. The Court of Appeals dismissed the appeal based upon his failure to serve notice on opposing counsel. That was dismissed in October of 2012.

And the State is ready to proceed.

THE COURT: Yes, sir, Mr. Johnson.

MR. JOHNSON: Thank you, Your Honor.

I do believe I can narrow the issues for the Court today. Mr. Sherman is here today and intends to make four primary points, Judge. His first, in the application, he alleges ineffective assistance of counsel, that his guilty plea was not voluntarily, knowingly, and intelligently made, and was made in violation of due process.

1           Judge, this was another case that was set for trial.  
2           They had done a suppression hearing sometime after lunch.  
3           After the suppression hearing had been done, my client  
4           pled guilty.

5           Your Honor, during the suppression issues, counsel  
6           for Mr. Sherman at the time, Mr. Erwin, alluded to the  
7           fact that he might not be totally prepared due to a lack  
8           of investigation. Furthermore, he failed to call  
9           Mr. Sherman during the suppression hearing when he could  
10          have added testimony that may have assisted in that  
11          hearing.

12          Your Honor, with regards to the appeal, he had to  
13          file it himself, Your Honor. The -- Mr. Sherman states in  
14          his application that he asked counsel to do it, and  
15          counsel did not.

16          And then, finally, Judge, he believes that his guilty  
17          plea was not knowingly and intelligently -- and if you  
18          read the transcript, Judge -- and my client will go  
19          through this -- there were several bench conferences, some  
20          of which my client was involved. And he believes at those  
21          times, he was coerced to plead guilty.

22                 THE COURT: Okay.

23                 MR. JOHNSON: Your Honor, at this time, we call  
24                 Kenneth Sherman.

25                 THE COURT: All right.

1 THE CLERK: Mr. Sherman, can you raise your right  
2 hand, please?

3 WHEREUPON,

4 KENNETH HENRY SHERMAN,

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

6 THE CLERK: Thank you.

7 Please state your full name for the record.

8 THE WITNESS: Kenneth Henry Sherman, ma'am.

9 THE CLERK: Okay. Thank you.

10 DIRECT EXAMINATION

11 BY MR. JOHNSON:

12 Q Now, Kenneth, I know you don't have a microphone, so  
13 I'm going to ask you to speak loud.

14 A Yes, sir.

15 Q Okay. Louder than what you just said, Yes, sir.

16 A All right.

17 Q Do you know why we're here today?

18 A Yes, sir, I do.

19 Q Okay. Why are we here?

20 A For my PCR hearing.

21 Q What does PCR mean?

22 A Post-conviction relief.

23 Q Okay. And what type of relief are you seeking?

24 A To vacate my sentence or either a new trial, sir.

25 Q Okay. Now, with regards to your sentence, was this

1 from a guilty plea, or from a trial?

2 A It was in the proceedings for the suppression  
3 hearing. I thought I was going to pick -- they dressed me  
4 out. I thought I was getting ready to pick my jury, sir.

5 Q Who was your attorney?

6 A Jake Erwin at the time.

7 Q Was he your only attorney on the cases, or was there  
8 a different attorney?

9 A Well, I had -- I, originally, had Christopher Scalzo,  
10 sir. And Jake showed up at the law enforcement center one  
11 day and told me that he was my new attorney..

12 Q Okay. How long was it -- what type of period of time  
13 was it when you first got charged to when the trial date  
14 was, actually, set?

15 A This was between October and December 2011, sir.

16 Q Okay. And you went to trial when?

17 A February the 13th, 2012.

18 Q Okay. When did you first learn that Jake was your  
19 attorney?

20 A It was at a moments notice.

21 Q Do you know when in comparison to when you went to  
22 trial? Was it --

23 A It was November, December of 2011, sir.

24 Q Okay. And you stated that the trial date -- and you  
25 pled guilty in February of 2012?

1 A Yes, sir.

2 Q So you had known Jake for roughly how long? Two or  
3 three months?

4 A Yes, sir.

5 Q Okay. When did you learn that Chris Scalzo was not  
6 your attorney?

7 A Repeated phone calls from the law enforcement center  
8 to the courthouse. And his secretary notified me that  
9 Chris was away on business. And I just -- I constantly --  
10 I had repeated phone calls. And he -- I never heard any  
11 more from him.

12 So I wrote -- I have documentation where I wrote the  
13 Supreme Court. And they wrote me back on October the 6th,  
14 2011. I have the documentation right here to prove that  
15 he was my lawyer.

16 Q Well, I believe the Court will take notice that Chris  
17 was your first attorney, that Jake replaced you --  
18 replaced him. Excuse me.

19 Now, so you stated in November or December of 2011,  
20 Jake visited you and told you that he was your attorney.  
21 And up until that point, you had Chris Scalzo?

22 A Yes, sir.

23 Q And then you went to -- you had a trial date set in  
24 February; is that right?

25 A February of 2012.

1 Q When did you, initially, learn that you were going to  
2 trial -- that you were on the trial docket? Excuse me.

3 A After a few visits from Jake at the law enforcement  
4 center.

5 Q About what --

6 A This was in December and January -- December of 2011  
7 and January of 2012, sir.

8 Q Now, how many times do you think you met with Jake?

9 A Probably three or four times.

10 Q Okay. Did y'all go over your case?

11 A Not well.

12 Q What do you mean by "not well"?

13 A I mean, he only was letting me know the office -- the  
14 offers that the Solicitor's Office was making me, and the  
15 deal would be off the table.

16 Q Did y'all -- so y'all didn't really discuss the trial  
17 at all in any of these meetings, or did you discuss it  
18 some?

19 A I was pressing for a jury trial. And I just didn't  
20 have the support that I was looking for as far as a jury  
21 trial. When I got here, things changed. They dressed me  
22 out for a jury trial. And the suppression hearing -- and  
23 after the conferences off the record and going back to the  
24 holding cell, he just notified me that they was not going  
25 to give me a jury trial. And if I did move forward with

1 the jury trial, I would be getting a life sentence.

2 Q Okay. Now, on the morning of the trial, y'all had a  
3 suppression hearing; is that correct?

4 A Yes, sir.

5 Q And do you recall what the issue was?

6 A He was trying to suppress the evidence -- get the  
7 evidence suppressed from the traffic stop.

8 Q Okay. What evidence is that?

9 A The drugs, the heroin and the PWDI [sic].

10 Q Can you portray to the Court what basis that you  
11 believe you had to suppress the drugs, just from your  
12 understanding? That's all I'm asking, Kenneth.

13 A Can you repeat the question, sir?

14 Q Do you -- can you portray to the Court what reasons  
15 that you believe you had to have the drugs suppressed?

16 A Because the officer, he went beyond the scope in the  
17 traffic stop.

18 Q Okay. Tell us about the traffic stop. Who -- were  
19 you stopped, or was someone else stopped?

20 A I was a passenger in a four-door Dodge Stratus. And  
21 I was sitting directly behind the driver when we was  
22 pulled over on Anderson Road.

23 Q Okay. And what happened to the driver?

24 A The officer -- Officer Godfrey asked for license,  
25 registration, and proof of insurance. And he asked for

1 identification of the other two occupants in the car.  
2 When I refused my ID, he said he was going to call for  
3 backup if I didn't tell him who I was.

4 So he ran a records check on the driver. He wrote a  
5 warning ticket. And when he asked me my name again and he  
6 called for Deputy Brashier [phonetic] for backup, he  
7 grabbed the driver out of the car. And I pursued to jump  
8 out of the car and run. And that's when I was tased. I  
9 ran across a four-lane highway when I jumped out of the  
10 car and ran.

11 Q What type -- so he wrote a warning ticket for what?  
12 What offense?

13 A He wrote the -- after he asked us -- he asked for  
14 license, registration, and proof of insurance. He asked  
15 us where were we going. The driver notified him that he  
16 was going to Auto Zone. He said he was going to get a  
17 timing belt for his mother's car. And he asked for -- he  
18 asked could he find an insurance car. He found every --  
19 all the documentation in the car. And once he found all  
20 the documentation, he proceeded to focus on me in the  
21 backseat of the car.

22 Q Now, Kenneth, you -- I'm asking you some questions.  
23 I'll ask that you answer my questions. Okay.

24 A Okay.

25 Q All right. So what type of ticket -- was it a

1 warning ticket for speeding, or improper lane change, or  
2 what type of --

3 A He wrote a warning for speeding, sir.

4 Q Okay. So he wrote him a warning ticket for speeding?

5 A Yes, sir.

6 Q And after he wrote that ticket, were you detained any  
7 further?

8 A No. After he wrote the warning, I watched him go  
9 back to the car. He came back to the car and was pressing  
10 me for my identification and asking me for my information.  
11 When I refused, I seen the second car pull up. I got  
12 scared. And I jumped out of the car and took off running.

13 Q So after he wrote the warning ticket, he did not let  
14 you go?

15 A He did not let none of us go.

16 Q Okay. So he didn't let the driver drive off with you  
17 in the car as well?

18 A (Witness shook head.)

19 Q Okay. And do you believe that exceeded the scope of  
20 his stop?

21 A I believe it did.

22 Q Okay. And do you believe that that's one of the  
23 reasons why the drugs should have been suppressed?

24 A Yes, sir.

25 Q Okay. Now, who testified at the suppression hearing?

1 A Just the officer.

2 Q Okay. Do you believe there was anyone else that  
3 could have assisted the Court in making their decision --  
4 well, first of all, let me -- was the suppression of the  
5 drugs denied, or were the drugs suppressed?

6 A No. It was denied.

7 Q And you stated that Officer Godfrey testified?

8 A Yes, sir.

9 Q And did anyone else testify -- or do you believe that  
10 anyone else should have -- could have testified that could  
11 have assisted the Court in deciding that matter?

12 A I wanted -- I should have testified, but I was  
13 advised not to.

14 Q Okay. And what do you believe you would have  
15 portrayed to the Court that would have assisted? Does it  
16 have to do with what you just portrayed a little while  
17 ago, or do you believe there was something else that you  
18 could have added?

19 A The evidence from the dash cam in the cruiser that  
20 day in his car, and the dash cam that was in the  
21 driver's -- the officer's -- Deputy Brashier's car that  
22 pulled up directly behind him in the median on Anderson  
23 Road. There was two dash cams. But I subpoenaed for the  
24 copy of the tapes and I never got them.

25 Q To your knowledge, do you know if either Mr. Scalzo

1 or Mr. Erwin subpoenaed for those tapes?

2 A No, sir.

3 Q Okay. So those weren't available for you?

4 A No, sir.

5 Q And the dash cams would have -- in your -- videotaped  
6 the incident?

7 A It's going to expose the whole story and what  
8 happened at the traffic stop incident, sir.

9 Q It would have had audio and video?

10 A Yes, sir.

11 Q Okay. Would you have preferred to have testified at  
12 the suppression hearing?

13 A Yes, sir.

14 Q Okay. And what would you have said?

15 A I would have told my version of the events that  
16 happened. Because once the driver complied -- once he  
17 discovered that the driver had a record, he snatched the  
18 driver out of the car. And that's when I decided to jump  
19 out of the car. Because he was already -- he was  
20 searching the driver illegally after he wrote a warning  
21 ticket, sir.

22 Q Okay. And you believe -- and you would have  
23 testified that, at that point in time, they should have  
24 let y'all go after writing the warning ticket?

25 A Yes, sir.

1 Q Now, in the -- at the suppression hearing, was there  
2 an issue that your counsel brought up with regards to a  
3 conversation or a potential conversation with the officer,  
4 as you recall?

5 A When he -- when Jake cross-examined Officer Godfréy?

6 Q Yes, sir. Now, did your counsel ever make any  
7 allegations with regards to himself as far as his  
8 preparation, or anything of that nature?

9 A Yes, he did. On Page 6 on State v. Sherman, he  
10 said -- he told the Judge, Judge Miller, he said, I guess  
11 what I'm getting at is there's a potential Sixth Amendment  
12 ineffective assistance of counsel. He said, I don't think  
13 I can effectively represent my client without being able  
14 to investigate this stuff.

15 Q Okay. And that's -- and you're reading from the  
16 transcript right there?

17 A Yes, sir.

18 Q Okay. And --

19 THE COURT: What page are you on?

20 MR. JOHNSON: Page 6, Your Honor.

21 THE WITNESS: Page 6, Your Honor.

22 THE COURT: All right.

23 BY MR. JOHNSON:

24 Q And that's what Mr. Erwin said himself; is that  
25 correct?

1 A Yes, sir.

2 Q Okay. Now, in your application for post-conviction  
3 relief, you stated that you filed your appeal yourself,  
4 and your attorney did not file that for you; is that  
5 correct?

6 A I asked him on my way back to the holding cell. I  
7 didn't recognize the sentence until he came to the holding  
8 cell and explained it to me. I didn't even know I had the  
9 16 years. Because he spoke up for seven. He was -- I  
10 think he was trying to get me seven years. And I  
11 didn't -- I just wasn't clear about it once I -- after he  
12 came to the holding cell.

13 Q Now, you stated, specifically, in your application  
14 that counsel did not honor my request for an appeal; is  
15 that true?

16 A That's correct.

17 Q Okay. Did you end up filing an appeal yourself?

18 A From Kirkland. From Kirkland Correctional  
19 Institution.

20 Q And did you file it properly?

21 A I did to the best of my ability, sir. I thought I  
22 did.

23 Q So they ended up dismissing your request?

24 A Yes, sir.

25 Q And do you believe that if counsel had done it

1 himself that it might have been filed properly?

2 A Yes, sir.

3 Q Okay. And so you were prejudiced by that because you  
4 weren't allowed to proceed with an appeal?

5 A Yes, sir.

6 Q And your issue that you would've appealed would have  
7 had to do with the decision made from the suppression or  
8 otherwise the guilty plea; is that true?

9 A Yes, sir.

10 Q Okay. Now, obviously, as you know, we -- you,  
11 eventually, pled guilty; is that correct?

12 A Yes, sir, I did.

13 Q Do you believe you did that freely, voluntarily, and  
14 intelligently?

15 A No, I don't, sir.

16 Q Can you, please, portray to the Court why you believe  
17 that?

18 A Because as I was sitting down -- they had a brief  
19 discussion off the record on Page 27, sir.

20 Your Honor, Page 27.

21 Judge Miller called me to the stand on the brief  
22 discussion and put his hand over the microphone. He said,  
23 Sir, you don't want to take a jury trial. He said, I'm  
24 going to have to give you a life sentence. You don't want  
25 a life sentence.

1 Q Well, let me slow you down. Are you speaking in  
2 reference to Lines 19 and 20 where it says, Whereupon,  
3 there was a bench conference whereupon Defendant and  
4 counsel conferred?

5 A Each time he --

6 Q I'm asking you a specific question.

7 A Yes, sir.

8 Q Okay. And you stated at that bench conference what  
9 was said?

10 A The same thing. At the bench conference, he called  
11 me up and told me -- he said, I don't -- he don't [sic]  
12 think it's wise for me to take a jury trial and end up  
13 with a life sentence. And I was scared. I didn't know...

14 Q And was this the only time that this happened, or was  
15 there another occasion that -- there was another bench  
16 conference where you --

17 A It was a Defendant and a counsel conference. There  
18 was another time. And whereupon there was a lunch break.  
19 Each time, they was just hammering away at me telling me  
20 not to take a jury trial.

21 Q For the record, you've already stated that Lines 19  
22 and 20 was a bench conference. For the record, can you,  
23 please, state where the other bench conference was?

24 A To deter me from taking --

25 Q No. I'm asking you where in the transcript do you

1 see it?

2 A I see brief discussion at the top. I see --

3 Q So hold on. Slow down, please. You've got to -- for  
4 the record. So brief discussion off the record, you're --  
5 so you're talking about Line 1 on Page 27?

6 A Yes, sir.

7 Q And then you're, also, talking about Lines 19 and 20  
8 on Page 27?

9 A Yes, sir.

10 Q And then you stated something about a lunch break.  
11 Do you see where that is?

12 A At the bottom. At the bottom below Jackson v. Denno.

13 Q Okay. And that's Line 25?

14 A Yes, sir.

15 Q And so those were -- those are the three conferences  
16 where you talked -- that these --

17 A That's where things changed, took a turn. That's  
18 where things took a turn for me at.

19 Q And, once again, portray to the Court what you --  
20 what's portrayed to you during these --

21 A During these breaks -- during these breaks, I'm  
22 advised not to take a jury trial because I might end up  
23 with a life sentence. And that's what -- you know,  
24 because once they dressed me out, I -- the morning I  
25 dressed out in street clothes, I thought I was -- I was

1 advised that I was going to pick my jury.

2 But, at the beginning of the transcript, Judge Miller  
3 said that they didn't have a jury and -- it's at the  
4 beginning of the transcript, sir.

5 Q Okay. Would you, please, preserve that? Would you,  
6 please, portray to the Court what you're referring to  
7 there? Give us page numbers and lines.

8 A Judge Miller quoted and said, We're waiting on the  
9 jury. We don't have a jury right now. He said, We have  
10 25 left in the pool. It's a five and five, and then an  
11 alternate. We'll be cutting it close. We better wait  
12 until we get some more. Let's do some pre-trial stuff.

13 Q Okay. Now, what lines are you on, and what page?

14 A I'm reading from Page 5, Line 2, and 3, 4, and 5,  
15 sir.

16 Q Okay. So was this -- was this something that you  
17 understood?

18 A Not clearly, sir. I had never heard of that. I  
19 never heard you couldn't have a jury trial.

20 Q Well --

21 A I never had a jury trial, so I just...

22 Q Okay. Now, were you dressed out for trial?

23 A Yes, sir, I was.

24 Q Okay. And so it was your intention of going to  
25 trial?

1 A Yes, sir.

2 Q And then later you learned that despite the  
3 conversations that you had that the trial could not,  
4 actually, go forward, even if y'all wanted to?

5 A Right.

6 Q Okay. Mr. Sherman is there anything else that you  
7 would like to portray to the Court as far as Mr. Erwin's  
8 representation that you believe was ineffective?

9 A That's about it, sir.

10 MR. JOHNSON: Your Honor, I have no further questions.  
11 Mr. Sherman, please, answer any questions Ms. Ratigan  
12 has.

13 THE WITNESS: Sir?

14 MR. JOHNSON: Please answer any questions Ms. Ratigan  
15 has.

16 CROSS-EXAMINATION

17 BY MS. RATIGAN:

18 Q So when you would meet with Mr. Erwin, would you talk  
19 about the State's evidence?

20 A Yes, ma'am.

21 Q Okay. And did you talk with him about the fact that  
22 one of the officers stated you admitted possessing those  
23 drugs?

24 A Yes, ma'am.

25 Q And did you talk with him about how that was going to

1 be damaging to your case?

2 A Yes, ma'am.

3 Q Okay. And did you tell Mr. Erwin your version of  
4 what had happened that day?

5 A Yes, ma'am.

6 Q And you discussed with him the fact that you were  
7 going to try and get those drugs suppressed?

8 A Yes, ma'am.

9 Q Okay. And when you, eventually, were -- once the  
10 officers caught up with you, they, actually, found the  
11 drugs on you; is that correct?

12 A Yes, ma'am.

13 Q Okay. And you discussed that with Mr. Erwin?

14 A Yes, ma'am.

15 Q All right. And when you talked with Mr. Erwin about  
16 testifying at the suppression hearing, you said that he  
17 said he didn't want you to testify?

18 A Yes, ma'am.

19 Q And did he tell you why he didn't want you to  
20 testify?

21 A I can't remember, ma'am.

22 Q Okay.

23 A I can't remember.

24 Q And you wanted to testify in order to tell your  
25 version of what had happened?

1 A Yes, ma'am.

2 Q And to, basically, be able to say that the officer  
3 exceeded his scope?

4 A Yes, ma'am.

5 Q But didn't Mr. Erwin make these arguments for you at  
6 the suppression hearing?

7 A Yes, ma'am, he did.

8 Q Okay. You just believe that you would have maybe  
9 been more successful if you had testified?

10 A No, ma'am.

11 Q So then why did you want to testify if Mr. Erwin had  
12 made these arguments on your behalf?

13 A I just wanted to -- I wanted to tell my version of  
14 events and -- as well as the dash cam, ma'am.

15 Q Okay. And sometime after the suppression hearing is  
16 when you say that the Judge started trying to pressure you  
17 to plead guilty?

18 A Yes, ma'am.

19 Q All right. And you had numerous conversations with  
20 Mr. Erwin while this was going on?

21 A Excuse me, ma'am?

22 Q You had several conversations with Mr. Erwin while  
23 this was going on?

24 A When I approached the bench?

25 Q Yes.

1 A No. I approached the bench -- Judge Miller called me  
2 up to the bench.

3 Q Okay. And Mr. Erwin was with you when you went up to  
4 talk to him?

5 A No. It was the Solicitor.

6 Q Okay. Mr. Erwin just hung back here?

7 A At the desk.

8 Q Okay. But after you spoke to the Judge, did you and  
9 Mr. Erwin talk about pleading guilty?

10 A Yeah. We went -- when we went -- when we had a  
11 counsel-inmate conference in the back.

12 Q And what did Mr. Erwin tell you? Did he tell you  
13 that you needed to plead guilty? Did he advise you one  
14 way or the other? Or did he leave it up to you?

15 A He was -- he told me that I didn't -- it's not -- a  
16 jury trial is not a good idea. And that I possibly might  
17 end up with a life sentence. And it would be best if I  
18 pled guilty. He, also, advised me that he would ask the  
19 Judge for seven years.

20 Q Okay. Why did Mr. Erwin tell you a trial would be a  
21 bad idea? Did he give you a reason why he thought it  
22 would not go well?

23 A It wasn't a lot of specifics. But he just -- it was  
24 just, you know, things just took a turn for the worse for  
25 me when -- I mean, this was my -- it really wasn't -- like

1 I said in the evidentiary hearing, it really wasn't Jake's  
2 fault because my lawyer -- I had a lawyer before Jake.  
3 They just dumped this on him. They just put him in a -- I  
4 think they put him in a bad position. And he tried to do  
5 what he could to help me, but it just didn't turn out in  
6 my favor, ma'am.

7 Q Okay.

8 A I don't think Jake's a bad lawyer.

9 Q So would you say that after the suppression hearing  
10 didn't go well that's when the case started to turn?

11 A Yes, ma'am.

12 Q Okay. And you feel as if, basically, everyone was  
13 kind of pressuring you to plead guilty?

14 A Yeah. I mean, I didn't even get -- all I asked was I  
15 wanted my family to be with me. I didn't -- I was -- they  
16 didn't know. Nobody allowed me to get in contact with my  
17 family. I didn't -- I was in here by myself. I didn't  
18 have no help.

19 And just -- I ended up -- I was -- from the pressure  
20 from a life sentence and never being in this situation and  
21 looking at a life sentence, I just didn't want to leave  
22 out of here with a life sentence, ma'am.

23 Q Okay. So when you told the Judge you weren't feeling  
24 pressure or coerced, was that not truthful?

25 A That's what he told me to say when -- after --

1 Q Who -- wait. Hold on. Now, who is "he"?

2 A That's what my lawyer told me to say when I got  
3 back -- when I -- when we came out of the chambers.

4 Q Okay. Did he tell you to lie to the Judge, or did he  
5 just --

6 A No. He did not tell me to lie to the Judge. He did  
7 not do that.

8 Q Okay. And you testified that when Mr. Erwin came to  
9 see you to explain the sentence, that's when you asked him  
10 to file an appeal?

11 A When -- after I got -- after the Judge sentenced me  
12 to 16 years, I said, Excuse me. I said, What did he say?

13 So when I -- when the officer grabbed my arm and  
14 walked me -- I didn't have any handcuffs on.

15 Q Okay.

16 A So I wasn't handcuffed. So he walked me back to the  
17 door. And I said, Can I say something to my lawyer? He  
18 said -- and he called Jake over because Jake was going out  
19 the door because he had an assistant that day.

20 And I said, What did he say? I said, What did he  
21 say?

22 He said, 16. I'm sorry, man. He said, I don't -- he  
23 said, 16.

24 I said, 16.

25 And they closed the door in my face. I didn't know.

1 And I went on to the Department of Corrections.

2 Q When did you ask him to file an appeal? Was it when  
3 he was back there with you? Or when did you ask him to  
4 file the appeal?

5 A I asked him -- I thought -- I mean, I thought he was  
6 going to file the appeal. That's what I was led to  
7 believe.

8 Q Okay. So you never, actually, asked him. You just  
9 assumed --

10 A Yes. I asked him.

11 Q Okay. So that's what I'm asking you is when did you  
12 ask him --

13 A Yes, ma'am.

14 Q Was it back there?

15 A Right. At the door.

16 Q And what did you say?

17 A I didn't get a response. He walked --

18 Q No, no. That's not what I asked you. What did you  
19 say to him?

20 A I asked him will he be filing an appeal on my -- I  
21 asked him, specifically, will he be filing an appeal on my  
22 behalf, ma'am.

23 Q Okay. And he did not answer you?

24 A He just walked off.

25 Q All right. And you testified that you wanted an

1 appeal in order to have the appellate court look at the  
2 issues about the suppression hearing?

3 A Yes, ma'am.

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

5 THE COURT: Redirect?

6 MR. JOHNSON: No redirect, Your Honor.

7 THE COURT: Thank you, Mr. Sherman.

8 THE WITNESS: Thank you, Your Honor.

9 MR. JOHNSON: Your Honor, that's our case.

10 THE COURT: All right.

11 MS. RATIGAN: We call Mr. Erwin, Your Honor.

12 THE CLERK: Mr. Erwin, please, place your left hand  
13 on the Bible and raise your right hand.

14 WHEREUPON,

15 JOHN KENNETH ERWIN, JR.,

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

17 THE CLERK: Thank you.

18 Please be seated.

19 And speak your first -- full name for the record.

20 THE WITNESS: My full name is John Kenneth Erwin, Jr.  
21 I go by Jake.

22 DIRECT EXAMINATION

23 BY MS. RATIGAN:

24 Q Mr. Erwin, do you recall representing Mr. Sherman on  
25 these charges?

1 A I do.

2 Q And were you the first attorney to represent  
3 Mr. Sherman? Do you know?

4 A I was not. Chris Scalzo was appointed to his case  
5 originally.

6 Q And how did you end up representing Mr. Sherman?

7 A In the fall of 2011, Chris got appointed to be the  
8 temporary head public defender of the Tenth Circuit. So  
9 he had to go over to Anderson. And a lot of his cases  
10 were shuffled around. And Mr. Sherman's is one that came  
11 to me.

12 Q And after you assumed representation, did you go meet  
13 with Mr. Sherman?

14 A I did.

15 Q Was he over at the detention center?

16 A He was.

17 Q Did you already have the discovery materials in your  
18 file at that point?

19 A I did.

20 Q And did you review them with Mr. Sherman?

21 A I did.

22 Q Did he tell you his version of what happened that  
23 day?

24 A He did.

25 Q And you discussed that the drugs were, actually,

1 found on his person?

2 A Yes.

3 Q At what point did you decide you were going to move  
4 to suppress?

5 A I mean, pretty much from the beginning. Usually, in  
6 a drug case like that, that's something we're going to do  
7 pre-trial every time, especially in a case like this where  
8 there's a traffic stop. And there were some borderline  
9 issues and I thought some stuff that we might have a  
10 chance at. We were going to make that motion every time.

11 Q Were there plea negotiations prior to this, or was  
12 this case always going to trial? Do you remember?

13 A I don't remember. I imagine that -- I think that the  
14 plea negotiations would have taken place with Chris before  
15 I was on the case. And by the time I got on, it was  
16 already -- it was pretty clear that it was going to be a  
17 trial.

18 Now, I'm sure we talked about, you know, any previous  
19 offers that had been made. I don't remember exactly what  
20 they were, though.

21 Q And you explained to Mr. Sherman that you would make  
22 this motion to suppress before the trial?

23 A Right.

24 Q And what was your general argument in favor of  
25 suppression? Do you recall?

1 A That it was -- I mean, just, in general, that it was  
2 an illegal search and seizure. I remember that,  
3 basically, it turned on the idea that the police officer  
4 asking all of the occupants of the vehicle for ID was  
5 overreaching, outside the scope of the stop, and that kind  
6 of thing. Obviously, it was much more specific then  
7 because I had all the research in front of me. But that's  
8 sort of the general idea.

9 Q Do you believe you were prepared to argue that motion  
10 that day?

11 A I do.

12 Q And did you discuss with Mr. Sherman whether or not  
13 you would call him to testify at the suppression hearing?

14 A Yeah. I mean, it's something that we talked about.  
15 And for the purposes of the suppression hearing,  
16 essentially, I decided that that was not what we were  
17 going to do.

18 Q Any particular reason why?

19 A I just didn't -- we had talked about his story. I  
20 felt like it didn't really add anything. The legal  
21 arguments that I was going to make were going to be  
22 supported by the officer's testimony. And, you know, I  
23 felt like it wasn't going to help and the sort of -- the  
24 things that Mr. Sherman wanted to testify to were the  
25 legal arguments that I was going to make. And I felt like

1 I could do that more effectively.

2 Q Did you ever discuss with him attempting to obtain  
3 the dash cam videos from either of the officers vehicles?

4 A I don't remember whether we had that conversation or  
5 not.

6 Q Do you recall whether or not you had a conversation  
7 ever attempting to get those videos?

8 A I don't remember whether there were specific requests  
9 for them. You know, our -- you know, I don't remember  
10 what was going on with the dash cam videos.

11 I know that our standard Rule 5 and Brady stuff would  
12 have covered that. And I know we did not have the videos.  
13 And, sitting here today, I can't remember why we didn't  
14 have them.

15 Q Once the suppression motion was denied, how did y'all  
16 get from being in trial mode to transitioning over to a  
17 guilty plea? Do you recall?

18 A Yeah. I mean, there were some conversations, I  
19 guess. The bench conference that Mr. Sherman was talking  
20 about, we went up there and -- I mean, he was, basically,  
21 right. Judge Miller, basically, said, you know -- made  
22 sure Mr. Sherman understood that if he went forward and  
23 had the trial that he would probably be convicted. And if  
24 he was that there was a mandatory minimum of 25 years.

25 And, at that point, the Prosecutor was willing to

1 come down. If he was going to plead, he would come down  
2 to something that was seven to 25. And, you know, I think  
3 that -- you know, Judge Miller just wanted Kenneth to be  
4 aware of that, and be sure that he knew that that's what  
5 was going on.

6 We spent a lot of that lunch break in the holding  
7 cell talking about that. And, you know, at some point  
8 during that conversation, Mr. Sherman decided that he  
9 wanted to plead guilty. So that's when we switched over  
10 to a guilty plea.

11 Q Okay. And that bench conference where Judge Miller  
12 called Mr. Sherman up, did you, also, accompany him up to  
13 the bench?

14 A Oh, yeah.

15 Q Okay. And was Judge Miller's demeanor -- was he  
16 being heavy handed? Was he being threatening, or was it  
17 more an informational, this is what you're facing if you  
18 go to trial type of thing?

19 A It was informational. It was, I guess, kind of  
20 friendly even -- I mean, Judge Miller -- it's in the  
21 transcript. You'll see that at the beginning, he realized  
22 that he had represented Kenneth before years and years  
23 back. And I think just having that prior connection with  
24 him, he wanted to be sure that, you know, Kenneth was  
25 fully aware of what he was about to do.

1           And so it was informational. I didn't feel like it  
2 was coercive. I did feel like it was, you know -- I guess  
3 just trying -- attempting to offer some support and advise  
4 him in this situation.

5           Q     Okay. Did you feel you had adequate time with  
6 Mr. Sherman after that bench conference to talk about the  
7 advantages and disadvantages of a plea versus a trial?

8           A     Yeah. I mean, like I said, we had that whole lunch  
9 break. And, you know, that doesn't seem like a lot of  
10 time. But it's a pretty simple issue. I mean, it was  
11 seven to 25 versus a mandatory 25. And, you know, we  
12 talked it out. I felt like we had plenty of time.

13          Q     Okay. And would y'all be pleading straight up at  
14 that point?

15          A     I mean, there was no recommendation from the  
16 Prosecutor.

17          Q     And did you explain to Mr. Sherman that it would be  
18 without recommendation?

19          A     Right.

20          Q     And did Mr. Sherman ever ask you to file an appeal?

21          A     I don't think so. You know, if he had, I would have  
22 done it. Usually, in a trial, I'm always going to file an  
23 appeal. In a guilty plea situation, I'm going to file an  
24 appeal if the client asks me to.

25                 So just by the fact that I didn't in this case let's

1 me know that I -- either he didn't ask me, or I didn't get  
2 the message. I don't know.

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

4 THE COURT: Yes, sir, Mr. Johnson.

5 MR. JOHNSON: Thank you, Your Honor.

6 CROSS-EXAMINATION

7 BY MR. JOHNSON:

8 Q Mr. Erwin, did you hear Mr. Sherman when he recited a  
9 portion of the transcript when he stated that you said  
10 that you don't think -- that you think there's a potential  
11 Sixth Amendment issue of ineffective assistance of  
12 counsel, and I don't think I can effectively represent my  
13 client? Do you remember saying that?

14 A Yeah. I remember saying that.

15 Q Now, you say with regards to the appeal that you  
16 don't recall whether or not he asked you for the appeal?

17 A I don't remember. I mean, but I think that he didn't  
18 because I didn't file one.

19 Q Okay. Now, did you ever become aware -- or do you  
20 recall whether you became aware that he had filed one on  
21 his own behalf?

22 A I don't. I don't remember hearing about that.

23 Q Okay. Now, with regards to the trial itself, that  
24 day, despite having the suppression hearing, would the  
25 case have continued to trial, or would it have not? Was

1       there a jury or --

2       A       There was a jury. I think there were two trial  
3       courtrooms going. And what the Judge was talking about  
4       when he said they only had 25, they were just waiting for  
5       the other pool to free up so we would have enough to pick  
6       a jury from. And so it would have taken some time with  
7       that. But that afternoon we could have gotten started.

8       Q       So Mr. Sherman misunderstood that portion?

9       A       I think so, yeah.

10      Q       Okay. Now, with regard to the suppression hearing,  
11      do you recall whether any testimony was elicited as to how  
12      long the stop took, or how long the stop was, in general?

13      A       I don't recall. I just -- I was flipping through the  
14      transcript just now. And I don't remember seeing anything  
15      about the length of the stop.

16      Q       Okay. Do you believe with regards to legal arguments  
17      that you made that that would have been a pertinent issue?

18      A       It could have been. And that -- you know, in  
19      retrospect, that might have been something I could have  
20      hit harder, but, you know.

21      Q       Well, could Mr. Sherman have been someone who could  
22      have provided testimony on the length of the stop?

23      A       It's possible.

24      Q       Now, you stated you took over from Mr. Scalzo. Do  
25      you remember when you took over?

1 A Yeah. It would have been -- let's see. I started in  
2 the office here in September. Chris left about that time.  
3 It would have been October or November, something like  
4 that when I got that file. I couldn't tell you the exact  
5 date, though.

6 Q Okay. And then you went to trial in February?

7 A Right.

8 Q If the suppression could have been appealed, do you  
9 think that the issue on appeal had any merit?

10 A Honestly, no. I felt like we -- you know, like I  
11 said, there were borderline issues. And I felt like I --  
12 the research was there and they were -- we got pretty good  
13 testimony from the police officers. I argued the best I  
14 could. The Judge just disagreed. And, you know, that's  
15 how it goes. I don't know if an appeal would have been  
16 any different.

17 Q Okay. So -- but did you believe that your argument  
18 had a chance?

19 A Yes.

20 Q Okay. So an appeals judge or someone else may see it  
21 differently than Judge Miller did?

22 A I guess that's possible.

23 MR. JOHNSON: Your Honor, I have no further  
24 questions.

25 MS. RATIGAN: I have no redirect, Your Honor.

1 And the State would rest at this time.

2 THE COURT: How long did the stop last? Do you  
3 remember?

4 THE WITNESS: I do not.

5 THE COURT: Before it --

6 THE WITNESS: I don't remember.

7 THE COURT: Okay. Thank you, sir.

8 Yes, ma'am.

9 MS. RATIGAN: We rest, Your Honor.

10 MR. JOHNSON: Your Honor, we have no further -- well,  
11 just one question, Your Honor. I think I could ask him  
12 from here.

13 Is he still under oath?

14 THE COURT: He's still under oath.

15 DIRECT EXAMINATION

16 BY MR. JOHNSON:

17 Q Mr. Sherman, how long did the stop last, as you  
18 recall?

19 A About 30 minutes, a 30-minute stop.

20 MR. JOHNSON: No further questions, Judge.

21 THE COURT: Okay. I will review the allegations in  
22 light of the testimony I heard here today and let you know  
23 my decision as soon as I can.

24 Thank you.

25 \*\*\*\*\*END OF TRANSCRIPT OF RECORD\*\*\*\*\*

CERTIFICATE OF REPORTER

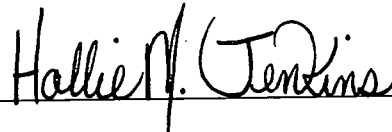
STATE OF SOUTH CAROLINA )

COUNTY OF GREENVILLE )

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 23rd day of April, 2014.

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

September 31, 2014



Hollie M. Jenkins, Court Reporter

My Commission Expires: 09/24/20

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Kenneth Henry Sherman, )  
 a/k/a Henry Kenneth Sherman, )  
 S.C.D.C. No. 183789, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2013-CP-23-0242

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKREEMER  
 2014 MAY 20 11 3 55

**ORDER OF DISMISSAL  
 GRANTING WHITE V. STATE  
 APPEAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 15, 2013. The Respondent made its return on June 21, 2013. An evidentiary hearing into the matter was convened on April 23, 2014 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, John K. "Jake" Erwin, Jr., Esquire. The Court had before it a copy of the guilty plea transcript, the records of the Greenville County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the return.

**PROCEDURAL HISTORY**

The Applicant was indicted by the January 2012 term of the Greenville County Grand Jury for possession with intent to distribute (PWID) cocaine base (2011-GS-23-5695) and

*Fit*

trafficking heroin (2011-GS-23-5696). He was represented by John K. "Jake" Erwin, Jr., Esquire.

On February 13, 2012, the Applicant pled guilty to PWID cocaine base, second offense and trafficking heroin (4 or more grams). The Honorable Edward W. Miller sentenced the Applicant to concurrent sentences of sixteen years on each charge.

A pro se notice of appeal was filed at the South Carolina Court of Appeals. In an order filed October 30, 2012, the Court of Appeals dismissed the appeal based on the Applicant's failure to serve the notice of appeal upon opposing counsel. The remittitur was issued December 13, 2012.

#### **ALLEGATIONS**

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

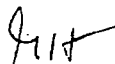
1. Ineffective assistance of counsel:
  - a. "Failed to object or file any motion about the sentence."
2. Involuntary guilty plea.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

#### **Ineffective Assistance of Counsel/Involuntary Guilty Plea**

The Applicant alleges his guilty plea was involuntary and that he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his



allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

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

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

The Applicant stated plea counsel was not his first attorney but started representing him in November or December 2011. The Applicant stated he and plea counsel discussed the evidence (including that the drugs were found on his person) and his version of events. The Applicant stated he wanted a trial. The Applicant stated there was a suppression hearing the morning of trial and plea counsel argued the drugs should be suppressed because the officer exceeded the scope of his duties. The Applicant stated he should have testified at the

suppression hearing but plea counsel advised him not to. The Applicant stated plea counsel admitted his ineffectiveness at the suppression hearing because he said he could not properly investigate the case. The Applicant stated that both the plea judge and plea counsel pressured him to plead guilty during off-the-record discussions.

Plea counsel confirmed he was not the Applicant's first attorney and that he assumed representation in October or November 2011 when that attorney ~~went to~~ <sup>took another position in</sup> Anderson, South Carolina. Plea counsel testified he and the Applicant discussed the discovery materials and the Applicant's version of events. Plea counsel testified they always planned to have a suppression hearing and that he argued there was an illegal search and seizure in this case. Plea counsel testified he discussed with the Applicant whether or not he should testify but stated he concluded the Applicant's testimony would not add anything to his legal arguments. Plea counsel testified the plea judge remembered the Applicant from a prior case and was informational and friendly when he explained he would receive a mandatory minimum sentence of twenty-five years if he was found guilty at trial. Plea counsel testified the plea judge was not being heavy-handed in this discussion. Plea counsel testified the assistant solicitor stated the charge would be reduced if he pled guilty. Plea counsel testified he discussed the advantages and disadvantages of a plea versus a trial with the Applicant over the lunch break and that the Applicant understood there was no sentence recommendation. Plea counsel testified the Applicant decided to plead guilty. JH

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly represent him at the hearing on the motion to suppress. The Applicant argued plea counsel admitted to the plea judge that he was unable to fully investigate the case. The Applicant argued he should have been allowed to testify at the suppression hearing. This Court finds these allegations are without merit. While plea counsel did state he did not think he "can

effectively represent [the Applicant] without being able to investigate this stuff," this Court finds this is neither an example nor an admission of ineffectiveness. (Plea transcript, p.6). Rather, plea counsel was merely expressing his frustration to the judge that a police officer would not talk to him about the case. The plea judge then properly advised the witness was not obligated to speak with him. This Court finds plea counsel vigorously argued a well-researched motion to suppress the evidence in this case and that the Applicant has failed to demonstrate what else plea counsel could have investigated in preparation for the hearing. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Plea counsel also explained that he discussed the suppression motion with the Applicant and whether or not the Applicant would testify. This Court finds plea counsel's testimony is credible. This Court further finds plea counsel's decision not to call the Applicant as a witness at the hearing was a legitimate strategic decision, as the arguments made at the hearing were primarily legal arguments. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel). This Court notes the Applicant admitted plea counsel made proper legal arguments at the suppression hearing in arguing the arresting officer exceeded his scope during the stop and seizure. This Court finds the Applicant's testimony at the suppression hearing would not have changed the outcome of the hearing. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); cf. Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth

Amendment claim was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded.”).

This Court finds the Applicant failed to meet his burden of proving his guilty plea was involuntary. While the Applicant stated the plea judge and plea counsel pressured him into pleading guilty, this Court does not find this testimony is credible. Plea counsel testified the plea judge was being very friendly with the Applicant in advising him of the risks of going to trial. Plea counsel testified he was given time to discuss the options of a guilty plea versus a trial with the Applicant and that the Applicant decided to plead guilty. This Court finds plea counsel’s testimony is both credible and supported by the record. The Applicant admitted to the plea judge both that he was guilty and that the facts set forth in the suppression hearing were true. (Plea transcript, p.31). The Applicant also told the plea judge he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced in any way. (Plea transcript, pp.30-31). This Court finds there is no evidence in the plea transcript to support the Applicant’s assertion that he was pressured into entering a guilty plea; therefore the transcript has refuted this allegation. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007); see also Rayford v. State, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994) (where transcript of guilty plea proceeding refuted applicant’s claim that he did not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant’s claim lawyer misadvised him). This Court finds the Applicant entered a knowing and voluntary guilty plea. See Boykin v. Alabama, 395 U.S. at 243-44, 89 S. Ct. at 1712.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under

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

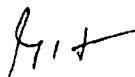
This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d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

#### Appeal

This Court finds the Applicant's allegation that he was denied a direct appeal is meritorious. The Applicant stated he asked plea counsel to file an appeal. Plea counsel testified he did not recall whether the Applicant asked him to file an appeal but noted his general practice would be to file an appeal if requested. Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive their appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State. See Rule 243(i)(1), SCACR; Davis v. State, 288 S.C. 290, 291, n.1, 342 S.E.2d 60, 60, n.1 (1986) ("Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a White v. State review."). The Court finds the Applicant did not knowingly and voluntarily waive his right to a direct appeal. The Court concludes the Applicant is entitled to a review of his conviction.

#### All Other Allegations

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



present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

**CONCLUSION**

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Furthermore, the Applicant's guilty plea was entered knowingly and voluntarily within the mandates of Boykin. Therefore, this PCR application must be denied and dismissed with prejudice. This Court, however, concludes the Applicant is entitled to a review of his direct appeal issues pursuant to White v. State.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice;
2. Within thirty (30) days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate review of the Applicant's convictions. Counsel and the Applicant are directed to Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) and Rule 243(i), SCACR for the appropriate procedure for securing appellate review; and
3. That the Applicant be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 16 day of May, 2014.



\_\_\_\_\_  
D. Garrison Hill  
Presiding Judge  
Thirteenth Judicial Circuit

Greenville, South Carolina

WITNESSES

J. T. Godfrey

Greenville County Sheriffs Office

3/24/2011

DOCKET NO. 2011-GS-23-  
JLK

005695

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

January 2011 TERM 2011

THE STATE

vs.

HENRY KENNETH SHERMAN

a.k.a.

Kenneth Henry Sherman

ARREST WARRANT NUMBER

1432301

ACTION OF GRAND JURY  
KUP BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

3014

Indictment for

POSSESSION OF COCAINE BASE WITH INTENT  
TO DISTRIBUTE

VIOLATION § 44-53-0375

RECEIVED

JUL 28 2011

Clerk of Court  
Greenville County

Foreperson of Petit Jury

Date:

96

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )

INDICTMENT FOR  
 POSSESSION OF COCAINE BASE WITH INTENT TO  
 DISTRIBUTE

At a Court of General Sessions, convened on JAN 10 2012

the Grand Jurors of Greenville

County present upon their oath:

That HENRY KENNETH SHERMAN did in Greenville County, on or about the 23rd day of March 2011, possess with intent to distribute or aid, abet, or conspire to possess with the intent to distribute a quantity of Cocaine Base (Crack Cocaine), a controlled substance, such possession not having been authorized by law. This is in violation of §44-53-375 of the South Carolina Code of Laws (1976) as amended.

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

  
 \_\_\_\_\_  
 SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Greenville
STATE VS.
Henry Kenneth Sherman

AKA:

Race: BLACK Sex: M Age: 38

DOB: SS#

Address:

City, State, Zip: GREENVILLE, SC 29601

DL#: SID#:

\*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was TO: possession with intent to distribute cocaine base, 2nd offense

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS2305695

A/W#: 1432301

Date of Offense: 3/23/2011

S.C. Code § : 44-53-0375

CDR Code #: 3014

SENTENCE SHEET

CONVICTED OF or PLEADS

in violation of § 44-53-0375 of the S.C. Code of Laws, bearing CDR Code # 3015

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (defendant's initials)

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Joyce K. Motts, SC Bar# 65331; Defendant; Attorney for Defendant; SC Bar# 79991

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,

for a determinate term of 16 days/months/years or under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable\*; the balance is suspended with probation for

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

CONCURRENT or CONSECUTIVE to sentence on:

The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 327 DAYS

The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP

Total: \$ plus 20% fee: \$ days/hours Public Service Employment

Payment Terms: Obtain GED

Set by SCDPPPS Attend Voc. Rehab. or Job Corp.

Recipient: May serve W/E beginning

\*Fine: Substance Abuse Counseling

§ 14-1-206 (Assessments 107.5 %) \$

§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$

§ 56-5-2995 (DUI Assessment) \$12 \$

§ 56-1-286 (DUI Breath Test) \$25 \$

Proviso 47.9 (Public Def/Prob) \$500 \$

§ 14-1-212 (Law Enforce. Funding) \$25 \$ 25

§ 14-1-213 (Drug Court Surcharge) \$150 \$

§ 50-21-114(BUI Breath Test Fee) \$50 \$

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$

Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5

3% to County (if paid in installments) \$

TOTAL \$

Random Drug/Alcohol testing

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning

\$ paid to Public Defender Fund

Other:

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

Presiding Judge

Judge Code: 2130

Sentence Date: 2-13-12

Clerk of Court/ Deputy Clerk Paul S. Wickman

Court Reporter: C. Hinkel

WITNESSES

J. T. Godfrey

Greenville County Sheriffs Office

3/24/2011

DOCKET NO. 2011-GS-23-005696

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

January TERM 2011

THE STATE

VS.

HENRY KENNETH SHERMAN

a.k.a.

Kenneth Henry Sherman

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Foreperson of Grand Jury

VERDICT

0287

Indictment for

TRAFFICKING HEROIN

VIOLATION § 44-53-0370

RECEIVED

JUL 28 2011

Clerk of Court  
Greenville County

Foreperson of Petit Jury

Date:



COUNTY OF Greenville
STATE VS. Henry Kenneth Sherman
AKA:
Race: BLACK Sex: M Age: 38
DOB: SS#:
Address:
City, State, Zip: GREENVILLE, SC 29601
DL#: SID#:

INDICTMENT/CASE#: 2011GS2305696
A/W#: 1432300
Date of Offense: 3/23/2011
S.C. Code §: 44-53-0370(E)(3)
CDR Code #: 0287

SENTENCE SHEET

\*CDL Yes No CMV Yes No Hazmat Yes No
In disposition of the said indictment comes now the Defendant who was
TO: Trafficking in Heroin more than 4 grams

CONVICTED OF or PLEADS

in violation of § 44-53-0370(E) of the S.C. Code of Laws, bearing CDR Code # 2361
NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC) §17-25-45
w/minor 1st or Lewd Act

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

ATTEST: Joyce K. Monts, 65331 SC Bar#, Henry Kenneth Sherman Defendant, Attorney for Defendant, 79949 SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
for a determinate term of 10 days/months/years or under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable\*; the balance is suspended with probation for

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

CONCURRENT or CONSECUTIVE to sentence on:
The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. 327 DKS
The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

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

SPECIAL CONDITIONS:

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

Recipient:

Table with 3 columns: Description, Amount, Total. Rows include various assessment fees like § 14-1-206, § 14-1-211(A)(1), § 14-1-211(A)(2), § 56-5-2995, § 56-1-286, Proviso 47.9, § 14-1-212, § 14-1-213, § 50-21-114, § 56-5-2942(J), Proviso 90.5, 3% to County, and TOTAL.

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

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

Clerk of Court/ Deputy Clerk Paul A. Wickerman
Court Reporter: C. Hittell

Presiding Judge [Signature]
Judge Code: 2130
Sentence Date: 2-13-12