

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from York County

Alison Renee Lee, Circuit Court Judge

---

**RECEIVED**

SEP 14 2015

**S.C. Supreme Court**

BRIAN EDISON GAINES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. #2015-000103

---

APPENDIX

---

KATHRINE H. HUDGINS  
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

JOHN W. MCINTOSH  
Chief Deputy Attorney General

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Senior Assistant Deputy Attorney General

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Assistant Attorney General  
P. O. Box 11549  
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA	)	GENERAL SESSIONS
	)	
County of York	)	2013-GS-46-2979
	)	
	)	
State of South Carolina,	)	
	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
Brian Edison Gaines.	)	
	)	
	)	
	)	

October 8th, 2013  
York, South Carolina

BEFORE:

THE HONORABLE J. DERHAM COLE, JUDGE.

APPEARANCES:

MARINA HAMILTON, ASSISTANT SOLICITOR  
Attorney for the State

MELISSA INZERILLO, ASSISTANT PUBLIC DEFENDER  
Attorney for the Defendant

AMINAH R. HARDY, RPR, CVR-CM  
Official Court Reporter

EXHIBITS

No.

Description

Page

(No exhibits were marked.)

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MS. HAMILTON: May it please the Court, Your Honor.

THE COURT: Yes, ma'am.

MS. HAMILTON: This is Brian Edison Gaines. He is originally charged with trafficking in crack cocaine third offense between 10 to 28 grams. He is pleading guilty today represented by his attorney, Melissa Inzerillo, to the lesser-included offense of trafficking crack cocaine second, 10 to 28 grams. The state has negotiated with the defense a sentence of 20 years in the case.

THE COURT: All right. You're Brian Edison Gaines?

THE DEFENDANT: Yes, sir.

THE COURT: And Ms. Inzerillo has been representing you in this case?

THE DEFENDANT: Yes, sir.

THE COURT: You're charged in indictment 2013-2979 with trafficking in crack cocaine. The state alleges on or about February the 9th of 2013, you did have in your actual or constructive possession a quantity of crack cocaine being at least 10 grams but less than 28 grams. If you were convicted of second offense trafficking in crack cocaine, you could receive a sentence of up to 30 years in jail and a fine of \$50,000. Do we agree on that?

MS. HAMILTON: Yes, Your Honor.

THE COURT: Okay. You can receive up to 30 years in

1 jail and a fine of \$50,000. It requires a mandatory  
2 minimum sentence of not less than five years in jail. And  
3 you and your lawyer apparently have been negotiating an  
4 agreement and a resolution and sentence with the  
5 prosecutor, and I've been told by the prosecutor just now  
6 that you have agreed to a negotiated sentence of 20 years.

7 THE DEFENDANT: Yes, sir.

8 THE COURT: So you understand what you're charged  
9 with?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: You understand what you're pleading  
12 guilty to?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: And you understand what the sentence will  
15 be should I agree to go along with the negotiated  
16 agreement?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Do you still want to go forward and plead  
19 guilty?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: You had plenty of time to talk to your  
22 lawyer about that decision?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Do you understand what the state would  
25 have to prove in court before you could be convicted of

1 trafficking in crack cocaine?

2 THE DEFENDANT: No, sir.

3 THE COURT: Well, they would have to prove to the  
4 satisfaction of a jury beyond a reasonable doubt that you  
5 had in your possession under the facts of this case as I  
6 understand them to be, since I had the pretrial hearing.

7 THE DEFENDANT: Yes, sir.

8 THE COURT: They'd have to prove you possessed, had  
9 in your possession knowingly a quantity of crack cocaine,  
10 has to be at least 10 grams, less than 28 grams.

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Have you discussed that with your lawyer?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: And did you tell her everything you know  
15 about the facts that relate to this case, your arrest, and  
16 the charges brought against you?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: And did you and she discuss whether or  
19 not you have some defense to the charge, whether it be  
20 based upon the law or based upon the facts?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Do you understand that when you plead  
23 guilty to a criminal charge, you give up your right to  
24 assert any defense that you might have?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: You waive your right to assert a defense.

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Which just means there's no chance you'll  
4 be found not guilty when you plead guilty.

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Is that what you want to do?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Has she explained to you about your right  
9 to remain silent?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Do you understand that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Has she explained to you about your right  
14 to confront and to examine witnesses in court?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Do you understand it?

17 THE DEFENDANT: No, sir.

18 THE COURT: You don't? Well, your right to confront  
19 and to examine witnesses means that anybody that the state  
20 would present that would be providing testimony or other  
21 evidence against you that is trying to prove your court,  
22 they have to come to court. They got to take the witness  
23 stand. They got to testify in your presence under oath so  
24 you can see who they are. You can hear what they have to  
25 say. Your lawyer can cross-examine that witness on that

1 testimony. You heard the testimony of Officer Osborne,  
2 didn't you, yesterday?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: And you heard the prosecutor asking him  
5 questions?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: You heard your lawyer asking him  
8 questions?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: That's called confrontation of the  
11 witness. You get to see the witness in court; you get to  
12 hear what they have to say; your lawyers gets to examine  
13 them on their testimony in order to test their reliability  
14 and the credibility of the information they're providing.  
15 And, of course, when you plead guilty, no additional  
16 witnesses will be called to testify because it's  
17 unnecessary since you're admitting your guilt.

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Do you understand when you plead guilty  
20 you'll be giving up the right to confront the witnesses  
21 and examine them in court?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Is that what you want to do?

24 THE DEFENDANT: I tried to get a witness, but they  
25 said they couldn't get in touch with them.

1 THE COURT: I'm talking about the state's witnesses.  
2 You have a right to confront and examine the state's  
3 witnesses.

4 THE DEFENDANT: I don't want to do that.

5 THE COURT: You don't? So you want to give that  
6 right up?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: You also have a right to have a jury  
9 trial. You have 12 jurors decide if you're guilty or not.  
10 You and your lawyer have already participated in that  
11 selection. Those 12 are waiting in a jury room now  
12 waiting for us to call them back if you wish to go forward  
13 with the jury trial. In order for you to be found guilty  
14 by that jury, all 12 would have to be convinced of your  
15 guilt beyond a reasonable doubt, and the burden is on the  
16 state to convince them of that fact. The burden is not  
17 upon you to prove anything. And still you do not have to  
18 testify or answer questions or give up your right to  
19 remain silent even if you have a jury trial. You would  
20 also be permitted to call any witness you want to, present  
21 any evidence that you want to. But the jury ultimately  
22 would make a decision as to whether or not on February the  
23 9th of 2013 you possessed more than 10 grams of crack  
24 cocaine.

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Do you understand your right to have a  
2 jury trial?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Do you wish to give that up in order to  
5 plead guilty?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: I know there's been an agreement between  
8 you and your lawyer and the solicitor. That agreement  
9 provides for -- as I understand it that this charge would  
10 be -- will be treated as a second trafficking violation.

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Do you have other convictions that would  
13 make it more than two?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: All right. So they've agreed to reduce  
16 the charge from that of a third or subsequent to that of a  
17 second, and they've agreed to a negotiated sentence of 20  
18 years in jail. Is that what you understood the agreement  
19 to be?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Did anybody agree anything to do other  
22 for you that what I just stated?

23 THE DEFENDANT: No, sir.

24 THE COURT: Did Ms. Inzerillo explain to you that  
25 trafficking second offense is classified as a violent

1 offense under the law?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Did she also explain to you it's  
4 classified as a serious offense under the law?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Did she explain to you it's classified as  
7 a no-parole offense under the law?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: And you have two prior convictions for  
10 what? Two or more?

11 THE DEFENDANT: Possession with intent and  
12 distribution, sir.

13 THE COURT: What else?

14 THE DEFENDANT: That's it.

15 THE COURT: What's his record?

16 MS. HAMILTON: Well, he has -- just drug offenses,  
17 Your Honor, or everything?

18 THE COURT: Well, I'm primarily concerned about those  
19 that are or will be classified as serious offenses.

20 MS. HAMILTON: He has from 2005 a possession with  
21 intent to distribute crack cocaine within proximity of a  
22 school and possession -- or actually distribution in  
23 addition to that crack cocaine second offense. I believe  
24 both of those are serious offenses. And he has a 2003  
25 possession with intent to distribute crack cocaine within

1 proximity of a school.

2 THE COURT: Okay. So you do have two prior  
3 convictions for serious offenses.

4 THE DEFENDANT: Yes, sir.

5 THE COURT: This is a third. The state could, and I  
6 think they probably noticed you that they're going to seek  
7 a life sentence.

8 THE DEFENDANT: Yes, sir.

9 THE COURT: If you plead guilty, they're not going to  
10 seek that life sentence, but the result will be the  
11 20-year sentence.

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Do you understand that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Other than that, have you been promised  
16 anything?

17 THE DEFENDANT: No, sir.

18 THE COURT: You been threatened or coerced or  
19 pressured by anybody in any way?

20 THE DEFENDANT: No, sir.

21 THE COURT: Are you pleading guilty freely and  
22 voluntarily?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Are you guilty of trafficking just as it  
25 is described in the indictment?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: You're 29 years old?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: How far did you go in school?

5 THE DEFENDANT: Not far.

6 THE COURT: How far?

7 THE DEFENDANT: Ninth grade.

8 THE COURT: Are you able to read and write?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And you understand fully what you're  
11 doing here today?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Have you understood all my questions?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And all the answers you've provided me  
16 have been truthful and accurate responses to those  
17 questions?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Do you need to discussion your decision  
20 with your lawyer any further?

21 THE DEFENDANT: No, sir.

22 THE COURT: Do you have any questions you need to ask  
23 me about your decision?

24 THE DEFENDANT: No, sir.

25 THE COURT: Are you married?

1 THE DEFENDANT: No, sir.

2 THE COURT: Do you have children?

3 THE DEFENDANT: No, sir.

4 THE COURT: Do you work?

5 THE DEFENDANT: No, sir.

6 THE COURT: Why not?

7 THE DEFENDANT: No education.

8 THE COURT: Why didn't you go back and get your  
9 education?

10 THE DEFENDANT: You know, this is the time for me to  
11 do it, I guess.

12 THE COURT: What's your last address?

13 THE DEFENDANT: [REDACTED], South  
14 Carolina.

15 THE COURT: Okay. We're going to -- ordinarily I'd  
16 ask the solicitor to tell me about the facts of the case  
17 but I already know what the facts are because we've  
18 already had a pretrial hearing and Officer Osborne already  
19 testified. Do you recall his testimony?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: And is what he stated so far as your  
22 possessing the crack cocaine, is that truthful and  
23 accurate?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: I understand that you do not -- you do

1 dispute the fact that you were grossly intoxicated, but  
2 you don't dispute the fact that you possessed the crack  
3 cocaine; is that correct?

4 THE DEFENDANT: Exactly, yes, sir.

5 THE COURT: All right. You still want me to accept  
6 the plea?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: You not under the influence of anything  
9 today, are you?

10 THE DEFENDANT: No, sir.

11 THE COURT: You ever been treated for substance abuse  
12 or addiction?

13 THE DEFENDANT: What's that?

14 THE COURT: Have you ever been treated for drug  
15 addiction?

16 THE DEFENDANT: No, sir, but I use drugs.

17 THE COURT: You do? Do you use them to the extent  
18 you can't function or understand what you're doing?

19 THE DEFENDANT: Sometimes, yes, sir.

20 THE COURT: What about today?

21 THE DEFENDANT: I've been incarcerated. I ain't been  
22 using no drugs.

23 THE COURT: Right. So you know what you're doing  
24 today?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Ever been treated for any type of mental  
2 illness or emotional disturbance?

3 THE DEFENDANT: No, sir.

4 THE COURT: How long you been in jail?

5 THE DEFENDANT: 30 days.

6 THE COURT: 30 days? And how it is that you are in  
7 jail?

8 THE DEFENDANT: Drugs again.

9 THE COURT: Separate from this charge?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: What's that charge?

12 THE DEFENDANT: Heroin.

13 THE COURT: Possession?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: What's happening in that case?

16 MS. HAMILTON: Charges just came in 30 days ago.

17 THE COURT: Is this intended to wrap up all his  
18 charges or not?

19 MS. HAMILTON: I do not have that case. I'm just  
20 disposing of --

21 MS. COLTON: Judge, the case was actually placed in  
22 my name, and at this point I haven't had the chance to  
23 review or even speak to the officers. It's very, very  
24 recent. I think we'll handle that separately. But given  
25 the sentence he's getting today, obviously I'm going take

1 that into consideration, but we've made no promises or  
2 recommendation as to those charges.

3 THE COURT: You understand you got that charge  
4 pending that you just told me about, but that has nothing  
5 to do with what we're doing here today.

6 THE DEFENDANT: Yes, sir.

7 THE COURT: They could choose to dismiss it, or they  
8 could choose to prosecute. You could come back; you could  
9 receive an additional sentence on top of this.

10 THE DEFENDANT: Yes, sir.

11 THE COURT: You understand that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: You still want to go forward and plead  
14 guilty?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: All right. I'll accept the plea and hear  
17 from you and Ms. Inzerillo.

18 MS. INZERILLO: Your Honor, we would ask the Court to  
19 accept the negotiation in the case. I spoke to Mr. Gaines  
20 extensively about this case, including all the offers and  
21 all of this decisions involved in proceeding with trial  
22 here today. He's been very active in the defense of this  
23 case. And the Court hit the nail on the head in that his  
24 main objection in this case was to the determination that  
25 he was grossly intoxicated. But other than that, he's

1 been very open and honest with me about the crack that was  
2 in his hand.

3 Mr. Gaines served one day in conjunction with this  
4 case, as he indicated. He's currently incarcerated on  
5 unrelated charges. We'd ask the Court to give him credit  
6 for any time served as the Court does deem appropriate.

7 THE COURT: All right. Anything you want to add to  
8 what your lawyer's told me.

9 THE DEFENDANT: No, sir.

10 THE COURT: All right. On indictment 2013-2979,  
11 sentence of the Court is you, Brian Edison Gaines, be  
12 confined to the South Carolina Department of Corrections  
13 for a period of 20 years. Give him credit for any time  
14 he's entitled to pursuant to 24-13-40. Good luck to you.

15 (Whereupon, the proceedings were concluded.)  
16  
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STATE OF SOUTH CAROLINA )  
  )  
COUNTY OF YORK              )

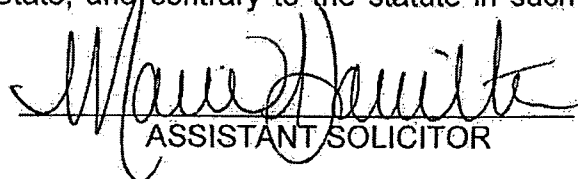
## INDICTMENT

At a Court of General Sessions, convened on August 22, 2013, the Grand Jurors of York County present upon their oath:

**TRAFFICKING IN CRACK COCAINE**

On or about February 9, 2013, the Defendant, Brian Edison Gaines, did knowingly sell, manufacture, deliver, purchase, or bring into this State, or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive possession of ten (10) grams but less than twenty (20) grams of crack cocaine, as defined and otherwise limited in Section 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2). Said incident occurred in York County, South Carolina, all in violation of Section 44-53-375, Code of Laws of South Carolina, (1976, as amended).

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

  
ASSISTANT SOLICITOR

DOCKET NO. 2013-GS-46-02979

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

**WITNESSES**

CPD/Wilson

**The State of South Carolina  
County of York**

Defendant

**COURT OF GENERAL SESSIONS**

**August 22, Term 2013**

I hereby appear in my own proper person and plead guilty to the within indictment or to

jwg

**ARREST WARRANT NUMBER**

J-212016

Trafficking 2nd 10-28g

X Brian Gaines

Defendant

**THE STATE**

vs.

Witness: Regina Rutledge - CL Spec.  
C.C.C. PLS. AND G.S.

**ACTION OF GRAND JURY**

**BRIAN EDISON GAINES**

**TRUE BILL**

*Dammy Earins*

Foreperson of Grand Jury

Date: 8/22/13

**VERDICT**

**Indictment for**

**TRAFFICKING IN CRACK COCAINE**

SC Code: 44-53-375(C)(1)

CDR Code: 0452

Foreperson of Petit Jury

Date:

INDICTMENT/CASE#: 2013GS4602979
A/W#: J212016
Date of Offense: 2/9/2013
S.C. Code § : 44-53-0375(C)(1)(c)
CDR Code #: 0452

STATE OF SOUTH CAROLINA
COUNTY OF YORK
VS.
Brian Edison Gaines
AKA: Jail
Race: BLACK Sex: M Age: 29
DOB: [REDACTED] SS#: [REDACTED]
Address: [REDACTED]
DL#: [REDACTED] SID#: [REDACTED]

SENTENCE SHEET
ORIGINAL

\*CDL Yes [ ] No [ ] CMV Yes [ ] No [ ] Hazmat Yes [ ] No [ ]
in disposition of the said indictment comes now the Defendant who was [ ] CONVICTED OF or [X] PLEADS
TO: Drugs / Trafficking in ice, crank or crack - 10 g or more, but less than 28 g - 2nd or more offense

in violation of § 44-53-0375(C)(1)(c) of the S.C. Code of Laws, bearing CDR Code # 0451
[ ] NON-VIOLENT [X] VIOLENT [X] SERIOUS [ ] MOST SERIOUS [ ] Mandatory GPS(CSC [ ] §17-25-45
w/minor 1st or Lewd Act)

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

ATTEST: [Signature] 80383 SC Bar# [Signature] Brian Gaines Defendant [Signature] Attorney for Defendant [Signature] SC Bar#

WHEREFORE, the Defendant is committed to the [X] State Department of Corrections, [ ] County Detention Center,
for a determinate term of 20 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:
[X] 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.
[ ] The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

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

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

PTUP \_\_\_ 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: David Hamilton
Court Reporter: Aminah Hardy
SCCA/217 (03/2011)

Presiding Judge: [Signature]
Judge Code: 2053
Sentence Date: 10-08-2013

2014 CP4601517

STATE OF SOUTH CAROLINA )

COUNTY OF YORK )

CERTIFIED TRUE COPY

IN THE COURT OF COMMON PLEAS

Brian Gaines, #293395

2014 MAY -8) AM 8:44

Full name and prison number (if any) of Applicant

DAVID HAMILTON  
CLERK OF COURT  
YORK COUNTY, SC

2014 MAY -7 PM 4:03  
DAVID HAMILTON  
C.C.P. & G.S.  
YORK COUNTY, S.C.  
FED-RECEIVED

APPLICATION FOR

v.

State of South Carolina )

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 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 Lee Correctional Institution, Ric B 189  
990 Wisacky Highway, Bishopville, South Carolina 29010
2. Name and location of Court which imposed sentence York County  
Court of General Sessions Pleas, York, South Carolina
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) 2013 - GS - 4602979/ Trafficking (Cocaine)
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) September 13, 2013 - Trafficking/ 20yrs.
  - (b) \_\_\_\_\_

- (c) \_\_\_\_\_
- 6. Check whether a finding of guilty was made:
  - (a) after a plea of guilty Yes
  - (b) after a plea of not guilty N/A
  - (c) after a plea of nolo contendere N/A

7. Did you appeal from the judgment of conviction or the imposition of sentence?  
No

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

- (a) the name of each Court to which you appealed:
  - i. N/A
  - ii. N/A
  - iii. N/A
- (b) the result in each such Court to which you appealed:
  - i. N/A
  - ii. N/A
  - iii. N/A
- (c) the date of each such result:
  - i. N/A
  - ii. N/A
  - iii. N/A
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
  - i. N/A
  - ii. N/A
  - iii. N/A

9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) Counsel rendered ineffective assistance. By not advising
  - (b) his client of the right to appeal the sentence given
  - (c) by the Honorable Judge.

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

- (a) Ineffective Assistance of Counsel
- (b) Prosecutorial Misconduct
- (c) Constitutional Violations

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

- (a) Failur to investigate, Prepare for trial, and Request Continuance
- (b) Unethical Practices, SCAP- Rule 413
- (c) Under Prov. of SC Const. and U.S. Const. Applicant was denied his 5th, 6th, and 14th Amend. Rights

12. Prior to this application have you filed with respect to this conviction: NO

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

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

- (a) the specific nature thereof:
  - i. N/A
  - ii. N/A
  - iii. N/A
  - iv. N/A
- (b) the name and location of the Court in which each was filed:
  - i. N/A
  - ii. N/A
  - iii. N/A
  - iv. N/A
- (c) the disposition thereof:
  - i. N/A
  - ii. N/A
  - iii. N/A

- iv. N/A
- (d) the date of each such disposition:
  - i. N/A
  - ii. N/A
  - iii. N/A
  - iv. N/A

- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
  - i. N/A
  - ii. N/A
  - iii. N/A
  - iv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? **NO**

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

- (a) which grounds have been presented:
  - i. N/A
  - ii. N/A
  - iii. N/A
- (b) the proceedings in which each ground was raised:
  - i. N/A
  - ii. N/A
  - iii. N/A

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) Attorney was ineffective in failing to request for an
- (b) Direct Appeal.
- (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. Melisa Inzerillo, 1675-3(C)
  - ii. York, SC 29745
  - iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
  - i. Plea and Sentencing
  - ii. N/A
  - iii. N/A

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

Vacate the sentence and Remand for a New Trial.

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

No

STATE OF SOUTH CAROLINA )  
 )  
County of York )

VERIFICATION

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

Brian Gaines, #293395  
Lee Corr. Inst. Ric B 189  
990 Wisacky Highway  
Bishopville, SC 29010

SWORN to and subscribed before me this 5  
day of May, 2014.

*Brian Gaines*

*Debra Seaton* (L.S.)  
Notary Public

My Commission Expires: 11-4-2015

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

I, Brian James, 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.

Brian James  
Applicant

SWORN or affirmed to and subscribed before me this  
5 day of May, 2014.

[Signature]  
Notary Public

My Commission Expires: 11-4-2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
	)	
Brian Gaines, #293395,	)	2014-CP-46-1517
	)	
Applicant,	)	
	)	
v.	)	<b>RETURN</b>
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed May 7, 2014, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. The Applicant was indicted at the August 2013 term of the York County Grand Jury for Trafficking in Crack Cocaine (2013-GS-46-2979). Melissa Inzerillo, Esquire, represented him. On October 8, 2013, the Applicant pled guilty to Trafficking in Crack Cocaine, 2<sup>nd</sup> offense as a lesser included offense before the Honorable Derham Cole and was sentenced to twenty (20) years' incarceration. Applicant did not appeal his convictions or sentences.

Attached herewith and incorporated herein are the records of the York County Clerk of Court regarding the subject conviction(s) and the guilty plea transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. "Ineffective Assistance of Counsel"
  - a. "Failure to investigate, Prepare for trial and Request Continuance"
2. "Prosecutorial Misconduct"
  - a. "Unethical Practices, SCAP- Rule 413"
3. "Constitutional Violations"
  - a. "Under Prov. Of S.C. Const. and U.S. Const. Applicant was denied his 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amend. Rights"

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at evidentiary hearing. All amendments should be made well in advance of hearing and should be filed as required by Rule 11, SCRCP(a).

### III.

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

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

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

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

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

#### IV.

The Applicant further alleges prosecutorial misconduct. These allegations are direct appeal issues that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975). A post-conviction relief application cannot assert any issues that could

have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Pursuant to Rule 56, SCRCP, this Court should grant summary judgment for the Respondent on these allegations.

## V.

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

## VI.

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

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

KAREN C. RATIGAN  
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON  
Assistant Attorney General

By:   
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

*August 20*, 2014.

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

2014-CP-46-1517

BRIAN GAINES, #2933695

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

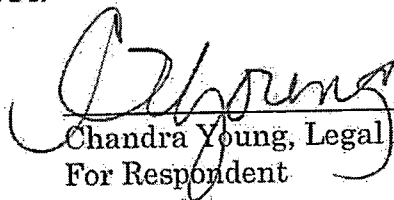
STATE OF SOUTH CAROLINA,

Respondent.

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

W. Michael Hemlepp, Jr., Esquire  
3027 S. Paraham Rd.  
York, SC 29745

DATED this 20<sup>th</sup> day of August, 2014.

  
Chandra Young, Legal Assistant  
For Respondent

1 STATE OF SOUTH CAROLINA

2 -----x

3 BRIAN E. GAINES,

4 Applicant,

5 Case No.

6 -against-

2014-CP-46-1517

7 STATE OF SOUTH CAROLINA,

8 Respondent.

9 -----x

10 November 20, 2014

11 York, S.C.

12

13 B E F O R E:

14 HONORABLE ALISON RENEE LEE, Judge.

15

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

17 J. RUTLEDGE JOHNSON, Esquire

18 Attorney for the State

19

20 W. MICHAEL HEMLEPP, Esquire

21 Attorney for the Respondent

22

23

24 Aileen Butler

25 Official Court Reporter

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I N D E X

WITNESS

DIRECT

CROSS

REDIRECT

RECROSS

Brian E. Gaines

Mr. Hemlepp

Mr. Johnson

Melissa Inzerillo

Mr. Johnson

Mr. Hemlepp

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10, 15

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVD.</u>
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(NO EXHIBITS ENTERED)

1 MR. JOHNSON: May it please the Court, Your Honor,  
2 this is case of Brian Gaines versus the State of South  
3 Carolina, case number 2014-CP-46-1517.

4 Mr. Gaines was indicted at the August 2013 term of  
5 the York County Grand Jury for trafficking crack  
6 cocaine. On October 8, 2013 he plead guilty to  
7 trafficking crack cocaine, 2nd offense, the lesser  
8 included, before the Honorable Durham Cole. Pursuant  
9 to a negotiated sentence he received 20 years for  
10 trafficking crack cocaine, 2nd offense, as he was  
11 charged originally with a third offense.

12 There was no appeal filed, however, there was  
13 timely PCR application filed May 7, 2014. The State  
14 filed its return August 20, 2014 and he is represented  
15 here today by Mr. Michael Hemlepp.

16 THE COURT: Yes, sir, Mr. Hemlepp.

17 MR. HEMLEPP: May it please the Court.

18 The applicant would call -- I would call the  
19 applicant to stand, Brian Gaines.

20 THE COURT: Mr. Gaines, would you step forward  
21 please to be sworn.

22 BRIAN EDISON GAINES, called as a witness, having  
23 been duly sworn by the clerk, was examined and testified  
24 as follows:

25 THE COURT: If you would please step forward and

Brian Gaines - Direct by Mr. Hemlepp  
1 state you full name for the record.

2 THE WITNESS: Brian Edison Gaines.

3 DIRECT EXAMINATION

4 BY MR. HEMLEPP:

5 Q Mr. Gaines, where do you currently reside?

6 A In Lee Correctional Institution.

7 Q And how long have you been at Lee?

8 A Thirteen months.

9 Q Thirteen months. You are serving a sentence from York  
10 County, are you not?

11 A Yes, sir.

12 Q Tell the Court what your sentence is?

13 A 20 years, violent.

14 Q And for what charge was that?

15 A Trafficking.

16 Q Were you convicted and sentenced because you had a jury  
17 trial or did you have a plea?

18 A A plea.

19 Q You plead guilty?

20 A Yes.

21 Q When were you arrested on that charge?

22 A I was arrested in February, I believe 9th of 2013, but  
23 I bonded out.

24 Q Okay. Did you bond out that same day or the next day?  
25 How long were you in jail?

1 A It was about two or three days.

2 Q Were you screened or did somebody talk to you about  
3 your right to a lawyer and getting a public defender?

4 A Yes, sir.

5 Q Did you go through that process and get a public  
6 defender?

7 A Yes, sir.

8 Q Who was that public defender?

9 A Melizza Inzerillo.

10 Q Do you see her in the courtroom today?

11 A Yes, sir.

12 Q How long after you were arrested did Miss Inzerillo  
13 begin representing you?

14 A I'd say within four months I had to come in off the  
15 street and come have a meeting with her. It was probably may be  
16 about four months.

17 Q About four months?

18 A Yes.

19 Q Okay. And how long -- how many times did you meet with  
20 her and talk with her before coming to plead guilty?

21 A We talked for probably three or four times.

22 Q Okay. Okay. And did you talk to her about your case?

23 A Yes, sir.

24 Q And did she talk to you about the possible sentences  
25 that you were looking at?

Brian Gaines - Direct by Mr. Hemlepp

7

1 A Yes, sir.

2 Q And did she talk to you about any decisions that you  
3 needed to make like going forward on a trial, or having a plea,  
4 or negotiations with the solicitor's office? Did you discuss  
5 those matters?

6 A Yes, sir.

7 Q When you came before the Court -- excuse me, just a  
8 moment. When you came before the Court do you remember the  
9 judge? Do you remember his name?

10 A Judge Cole.

11 Q Judge Cole. And what was the agreement for you to  
12 plead guilty?

13 A The agreement was to take twenty years, but he was  
14 going to drop it from trafficking third to trafficking second.

15 Q Okay. And, did Miss Inzerillo represent you in that  
16 plea?

17 A Yes, sir.

18 Q Okay. And did you have opportunity to talk to her  
19 before the plea?

20 A Yes, sir.

21 Q In talking to her privately did you talk to her about  
22 whether you would have the right to appeal?

23 A Yes, sir.

24 Q What did she tell you?

25 A She told me yes, but when we got in the courtroom I was

1 kind of distracted at the time. I wasn't in the right state of  
2 mind and I didn't really say nothing about the direct appeal at  
3 the time, but neither did she. You know what I am saying.

4 Q Do you remember whether Judge Cole said anything about  
5 your right to an appeal?

6 A No, sir. I don't remember him saying nothing about it.

7 Q Okay. Did you know at the time whether there was a  
8 time limit on appealing?

9 A Yes, I know there was ten days.

10 Q Okay. Did you subsequently ask Miss Inzerillo to  
11 appeal your case?

12 A I did before I signed the sentencing sheet, but like I  
13 said with so much going on --

14 Q Okay. Okay. After you were sentenced did you have any  
15 occasion to talk to Miss Inzerillo at all?

16 A No, sir.

17 Q When you were sentenced how long did it take them to  
18 get you out of the courtroom?

19 A It was like ---

20 Q Was it mediate?

21 A Yes, sir.

22 Q And then, did you have any conversations with her since  
23 that time?

24 A No.

25 Q How about until today?

Brian Gaines - Direct by Mr. Hemlepp

9

1 A No, sir. No. No, sir.

2 Q Okay. Did you want to appeal your case?

3 A Yes, sir.

4 Q So it's your testimony before the Court that you wanted  
5 to appeal your sentence and you had prior to the sentence talked  
6 to your lawyer about appealing, but she never checked up with  
7 you to ask you whether you affirmatively wanted an appeal or  
8 not?

9 A Yes, sir.

10 Q In this case Judge Lee is going to have to listen to  
11 the testimony and make the decision of the Court based upon all  
12 the record. Having talked about the appeal, is there anything  
13 else about this case that you believe that Judge Lee needs to  
14 know in order for her to make a decision for you?

15 A No, sir.

16 Q Okay. Because this is your opportunity to do that and  
17 I want to make sure that you do that. Okay.

18 Mr. Gaines, thank you so much. Please answer any questions  
19 that the Attorney General's office may have or any questions  
20 that the Court may have, okay?

21 A Okay.

22 THE COURT: Yes, sir.

23 MR. JOHNSTON: Just briefly.

24 CROSS EXAMINATION

25 MR. JOHNSTON:

1 Q Mr. Gaines, you admit that you were charged with a  
2 third offense?

3 A Yes, sir.

4 Q That's because you had two prior PWID crack charges?

5 A Yes, sir.

6 Q There is no dispute about that?

7 A Yes, sir.

8 Q And that you plead down to a second offense?

9 A Exactly.

10 Q Because you didn't want to risk get the 25 to 30  
11 sentence on the third?

12 A Exactly.

13 Q Okay.

14 MR. JOHNSTON: That is all I have Your Honor.

15 MR. HEMLEPP: I have a brief redirect, Your Honor.

16 THE COURT: Yes, sir.

17 MR. HEMLEPP: And it may not be true redirect. I  
18 ask the the Court's indulgence.

19 REDIRECT EXAMINATION

20 BY MR. HEMLEPP:

21 Q Mr. Gaines, you and I had this discussion. If Judge  
22 Lee makes a decision to grant your relief the only relief that  
23 she can grant is to invalidate your plea and you will start all  
24 over again?

25 A Yes, sir.

1 Q We had that discussion?

2 A Yes.

3 Q And you understand you that would mean you would come  
4 back to York County and you would be facing trafficking third  
5 offense which carries a minimum of 25 up to 30. Do you  
6 understand that?

7 A Yes.

8 Q Knowing that, do you still want to go forward today?

9 A Yes, sir.

10 Q You and I had this discussion, did we not?

11 A Yes, sir.

12 Q And it was your decision to continue to go forward  
13 rather than exercise your right -- rather than withdrawing your  
14 application because your sentence now is less than the minimum  
15 of trafficking third. Is that your decision?

16 A Yes, sir.

17 Q Okay. Thank you, Mr. Gaines. Answer any questions  
18 that anybody may have.

19 Thank you, Your Honor.

20 THE COURT: So you are only requesting an appeal  
21 or what relief are you seeking?

22 THE DEFENDANT: I am trying to reopen my case.

23 THE COURT: So you don't want an appeal from the  
24 proceedings.

25 THE DEFENDANT: No, ma'am.

1 THE COURT: I don't have any additional questions.  
2 You may step down.

3 THE COURT: Any additional witnesses?

4 MR. HEMLEPP: No, Your Honor. If I could beg the  
5 Court's indulgence to make sure that the record is  
6 complete. The Court should have the application  
7 together with the sentencing sheet, the Indictments  
8 for trafficking, which was True Billed, August 22,  
9 2013.

10 Beg the Court's indulgence, Your Honor.

11 May we approach, Your Honor?

12 THE COURT: Yes, sir.

13 (WHEREUPON, there was an off the record discussion  
14 held at the bench.)

15 MR. HEMLEPP: Your Honor, does the Court also have  
16 the transcript?

17 THE COURT: Yes, sir.

18 MR. HEMLEPP: I would like to make argument from  
19 the transcript at the appropriate time. If the record  
20 is complete the applicant rests.

21 THE COURT: Is there anything from the State?

22 MR. JOHNSTON: Yes, Your Honor. At this point I  
23 feel obliged to ask for a directed verdict or summary  
24 -- or in the alternative a summary judge.

25 Mr. Gaines has not alleged any ineffective

1 assistant of counsel against Miss Inzerillo and then  
2 he talks about an appeal but then when asked by the  
3 Court if wants an appeal he states no. I don't know  
4 what the relief is in this case. I don't know what he  
5 is asking for. But based on that I don't feel like he  
6 has met any burden that he has. We would ask for a  
7 directed verdict. In the alternative a motion for  
8 summary judgement.

9 THE COURT: I will give you a chance to explain  
10 that because I am confused too.

11 MR. HEMLEPP: Your Honor, the ineffective  
12 assistance my client wishes to bring to the Court's  
13 attention was that knowing that he was interested in  
14 an appeal Miss Inzerillo took no effort to ask him  
15 whether or not he wished to appeal his case. Had she  
16 asked he would have said, yes, I do want you to file  
17 an appeal and she didn't do that.

18 He and I did discuss the relief that is available  
19 to him about him having a belated appeal and of course  
20 the Court heard the testimony. I would ask the Court  
21 to remember that a motion for summary judgement that  
22 the Court consider the facts in the light of the  
23 non-moving party.

24 THE COURT: Any response to that?

25 MR. JOHNSON: No response, Your Honor. I just

1           rely on the testimony given by Mr. Gaines.

2           THE COURT: And my only comment is that, while the  
3 application states ineffective assistance of counsel  
4 for failure to investigate and prepare for trial and  
5 request for a continuance, that is not what he has  
6 raised today. What he raises today talks about that  
7 he wanted an appeal and he wasn't given that  
8 opportunity either because he didn't have the  
9 opportunity to speak to his attorney after the plea or  
10 because he told her before hand and she didn't file  
11 one afterwards. So he is not saying that he wouldn't  
12 have plead, but for her failure to file the appeal or  
13 that he wouldn't -- that there was any discussion  
14 about the appeal issues and what an appeal from a  
15 guilty plea means versus what an appeal from a trial  
16 means. I would almost have to agree with the State  
17 that any relief that I would be able to grant would be  
18 limited to giving him a belated appeal and not  
19 starting all over. So that's currently where I am,  
20 unless there is some additional information that is  
21 needed to be presented about that particular matter,  
22 or some additional argument that I didn't hear.

23           MR. HEMLEPP: May I may I have a moment, Your  
24 Honor?

25           THE COURT: Yes.

Brian Gaines - Redirect by Mr. Hemlepp 15  
MR. HEMLEPP: Your Honor, with the Court's

1  
2 permission I would like to recall Mr. Gaines.

3 THE COURT: I'll allow it just to make sure we are  
4 clear as to what is going on and I know the State  
5 would object.

6 MR. JOHNSTON: We do, Your Honor, but I understand  
7 your ruling.

8 THE COURT: Mr. Gaines, you are still under oath  
9 to tell the truth in this matter.

10 THE DEFENDANT: Okay.

11 REDIRECT EXAMINATION

12 BY MR. HEMLEPP:

13 Q Mr. Gaines, in talking to you about your case and  
14 talking about the choices that you have before you today, do you  
15 remember us discussing what a belated appeal is? Do you  
16 remember us having that discussion?

17 In other words being allowed to appeal even though the  
18 time has run?

19 A Yes, sir. Yes, sir.

20 Q And do you remember the discussion that we had about  
21 what the effect of that would be if the Court were to grant  
22 that; that you would be allowed an appeal that was denied to you  
23 prior to this, but that would be different from overturning your  
24 case?

25 A Exactly.

1 Q The Court -- let's make it clear what you want today,  
2 if we go forward you have testified regarding Miss Inzerillo  
3 failure to file an appeal, you have not testified about her  
4 representing of you other then you were satisfied with that do  
5 you want to go forward on an appeal or do you want the judge to  
6 offer turn the entire case, did you understand her question  
7 before?

8 A Yes, sir.

9 Q Okay. Do you understand what the question is now?

10 A Yes, sir.

11 Q Let me back up how far did you go in school?

12 A Ninth grade. Did you have any schooling after that?

13 A Yes, sir.

14 Q What type of schooling?

15 A GED.

16 Q Okay. Okay. To make sure that you understand my  
17 question. If you don't understand I want you to tell me you  
18 don't understand?

19 A I understand.

20 Q You testified about an appeal. Do you want the Court  
21 to give you the right to an appeal?

22 A Yes, sir.

23 Q Okay. And you are sure? If you have any questions --  
24 well, you can't do that.

25 Thank you Mr. Gaines. Thank you for that.

1 MR. JOHNSON: No follow up from the State, Your  
2 Honor.

3 THE COURT: And, I will ask the question one more  
4 time just to make sure I understand. Mr. Gaines you  
5 understand that what you stated was that you talked to  
6 Miss Inzerillo about having an appeal and that you  
7 talked to her when you signed the sentencing sheet, but  
8 you never discussed it with her after the plea and after  
9 you were actually sentenced; is that correct?

10 THE DEFENDANT: Yes, ma'am.

11 THE COURT: And what I hear you saying today is  
12 that you want your right to an appeal?

13 THE DEFENDANT: Yes, ma'am.

14 THE COURT: And that's the relief that you are  
15 seeking today is that you want an appeal and not to  
16 overturn the plea and start from scratch?

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: Anything further?

19 MR. HEMLEPP: Nothing, Your Honor, thank you.

20 THE COURT: You may step down.

21 Anything from the State?

22 MR. JOHNSON: Yes, Your, renew my motion for  
23 summary judgement. And I do plan to call Miss  
24 Inzerillo as a witness. I was waiting for a ruling by  
25 the Court.

Melissa Inzerillo - Direct by Mr. Johnson 18

1 THE COURT: Well, I mean, the way it stands right  
2 now I would have to deny your request because he at  
3 least set forth a prima facia case and he asked for a  
4 appeal and he didn't get one.

5 MR. JOHNSON: The State calls Miss Inzerillo.

6 MELISSA ANN INZERILLO, called as a witness, having  
7 been duly sworn by The Clerk, was examined and  
8 testified as follows:

9 DIRECT EXAMINATION

10 BY MR. JOHNSON:

11 Q Good morning Miss Inzerillo.

12 A Good morning.

13 Q Do you remember becoming involved in this case?

14 A I do.

15 Q And did you remember the plea?

16 A I do.

17 Q And we'll jump right in to the only issue that is at  
18 stake hear is whether or not he is entitled to a belated review  
19 of direct appeal issues through PCR. Do you remember any  
20 discussions you would have had with Mr. Gaines concerning his  
21 right to an appeal?

22 A I do. We -- I spoke with him when he indicated he  
23 wished to enter a plea after we started the trial. I did  
24 explain to him his right to appeal. He had ten days to indicate  
25 his intention to file an appeal and did have that discussion

Melissa Inzerillo - Direct by Mr. Johnson

19

1 with him. At no point did Mr. Gaines tell me he wished to file  
2 an appeal.

3 Q And what were the circumstances as far as negotiations  
4 with you and the State in this case?

5 A We had begun the trial. I think we had taken some  
6 testimony on a pretrial issue. The State issued an offer of 20  
7 years and there was some reconsideration of that by Mr. Gaines  
8 and Mr. Gaines decided to accept that offer. I think things  
9 were sort of strained at that point because I think Mr. Gaines  
10 didn't think he would lose the pretrial issue that we had  
11 litigated. So things were strained, and I know in my notes  
12 there was some conversation between Mr. Gaines, and I did advise  
13 him of his plea rights at that point because certainly once we  
14 had started the trial since he was entering a plea I made sure  
15 that he understood that would cut off any appeal rights he'd  
16 have as to what had been litigated. That he was essentially  
17 entering a plea. We did discuss mitigation. He had indicated  
18 to me he didn't wish for me to go into any mitigation with it  
19 being a negotiated plea. And I know I did note in my notes that  
20 you can see in the transcript I did put some mitigation on the  
21 record and that was due to some of the responses he had given to  
22 Judge Cole. But other than that it was pretty basic just going  
23 over his rights. Make sure he understood the plea including his  
24 appeal rights.

25 Q Now prior to trial, please tell the Court the

1 consequences of Mr. Gaines going through a trial and be  
2 convicted? Was there anything in place as far as life without  
3 parole notice?

4 A Yes. Mr. Gaines had been served with a life without  
5 parole notice on September 5th of 2013. I had discussed this in  
6 it detail with Mr. Gaines because it was actually the second  
7 attempt by the State to serve him with life without parole. So  
8 he was aware in going forward especially on the trafficking  
9 charge that would result in a life without parole sentence.

10 Q And the State agreed to plead him to a second offense  
11 instead of a third?

12 A Yes, for a negotiated 20.

13 Q Is that a legal sentence?

14 A It is a legal sentence.

15 Q So you saw no reason to object to that sentence?

16 A No.

17 Q Did you see any appealable issues?

18 A No, I didn't see anything that so far in the testimony  
19 for the pretrial issue.

20 Q But after the plea was --

21 A -- Oh, I'm sorry on that issue -- I misunderstood the  
22 question. No, I did not.

23 Q And your testimony is that he never asked you for a  
24 plea?

25 A He never did. He never asked me for an appeal.

Melissa Inzerillo - Direct by Mr. Johnson

21

1 Q An appeal. Excuse me.

2 A The only request made by -- in regards to that -- was I  
3 believe his mom called us some time in March asking if he could  
4 get an appeal and we, through my assistant, explained to her  
5 that the ten days had run so he could not avail himself of an  
6 appeal.

7 Q So you advised him hip of his appellant rights but he  
8 never exercised them to you?

9 A That's correct.

10 MR. JOHNSON: No further questions, Your Honor.

11 THE COURT: Recross.

12 MR. HEMLEPP: Yes, please, Your Honor.

13 CROSS EXAMINATION

14 BY MR. HEMLEPP:

15 Q Miss Inzerillo, Mr. Gaines' testimony is that  
16 immediately after he was sentenced he was taken out of the  
17 courtroom and put in a holding cell. Is that your recollection?

18 A Out of the courtroom into the holding cell?

19 Q Yes.

20 A Yes, that is standard practice.

21 Q Did you have any discussions after that with him?

22 A I did not. Mr. Gaines was pretty upset and angry at  
23 that point. So I did not speak with him.

24 Q Okay. At any time?

25 A No. Generally in my experience when client's request

1 appeals they do let me know after that. They will send a letter  
2 and will I have a person contact me.

3 Q Okay.

4 A And I generally let them know that.

5 Q Okay. But did he understand any means to get in touch  
6 with you?

7 A Generally I tell he has ten days to file. To let me  
8 know if he wants to do that.

9 Q Okay. Okay. But you had no discussions with him?

10 A After the plea?

11 Q After the plea.

12 A That is correct.

13 Q All right. Thank you.

14 MR. HEMLEPP: Nothing further. Thank you.

15 MR. JOHNSON: Just brief redirect.

16 REDIRECT EXAMINATION

17 BY MR. JOHNSON:

18 Q Did you receive any letters or communication about any  
19 type of appeal that he wished to go forward on?

20 A Any appeal?

21 Q Yes.

22 A No, like I said just from his mother.

23 Q And that was after the ten days had run?

24 A Yes, sir.

25 Q But you advised him that he only had ten days to let

1 you know whether to file a notice of appeal?

2 A That's correct.

3 MR. JOHNSON: Okay. Thank you, Your Honor.

4 THE COURT: I'm sorry, just to clear. When did  
5 you advise him about the ten days?

6 MS. INZERILLO: Immediately prior to him entering  
7 his plea.

8 THE COURT: And the pretrial motion related to was  
9 a suppression hearing?

10 MS. INZERILLO: Yes, Your Honor.

11 THE COURT: Any additional questions?

12 MR. JOHNSON: None from the State.

13 MR. HEMLEPP: None from the applicant. Thank you,  
14 Your Honor.

15 THE COURT: You may step down.

16 MS. INZERILLO: Thank you, Your Honor.

17 MR. JOHNSON: The State has no further witness.

18 THE COURT: Any argument at this time.

19 MR. HEMLEPP: Your Honor, I would simply point out  
20 to the Court that in the record of the case in the  
21 transcript, the Court elected not to go over his  
22 appeal rights during the plea. Judge Cole elected not  
23 to do that. I have gone through the transcript to try  
24 and find that.

25 His testimony that immediately after the hearing he

1 was taken out of the courtroom. Miss Inzerillo's  
2 testimony was that he was very upset at that time and  
3 there was no effort made to determine whether he  
4 wanted an appeal and he had no ability to tell her  
5 that he wanted to appeal in the time that was  
6 allotted. I would ask the Court to take all that into  
7 consideration in making its decision.

8 MR. JOHNSON: The State's position is that Miss  
9 Inzerillo did advise him of his appellant rights. He  
10 made no effort to let her know that he wanted an  
11 appeal.

12 This is the first time in his testimony that we  
13 found out that he wanted an appeal. He didn't  
14 provide it in its application. But his testimony says  
15 he wants an appeal. I also asked Miss Inzerillo did  
16 she see any appealable issues. She said no. So she  
17 had no right to think he wanted an appeal because it  
18 was a legal sentence and there was no other issues to  
19 appeal.

20 We would ask you you to deny this application on a  
21 belated appeal issue.

22 THE COURT: I will look at the matter and review  
23 the documents I have. Again, he does raise -- he does  
24 raise in his application that the attorney is  
25 ineffective in failing to request a direct appeal.

1                   And so I will look at it again more carefully and  
2                   issue an Order from there.

3                   MR. HEMLEPP: Thank you, Your Honor.

4                   MR. JOHNSON: Thank you.

5                                   \*                   \*                   \*

6   (END OF TRANSCRIPT)

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I, the undersigned Aileen Butler, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings in the captioned case, in the Circuit Court for York County, South Carolina, on the 20th day of January, 2014.

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

April 5, 2015

/s/ Aileen Butler

Certified Court Reporter

STATE OF SOUTH CAROLINA )  
 COUNTY OF YORK )  
 )  
 Brian Gaines, #293395, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 SIXTEENTH JUDICIAL CIRCUIT

Case No. 2014-CP-46-01517

ORDER OF DISMISSAL

DAVID HAMILTON  
 C.C.P. & G.S.  
 YORK COUNTY, SC

FILED-RECEIVED  
 2014 DEC 16 AM 10:38

This matter comes before the Court by way of an application for post-conviction relief filed May 7, 2014. The State made its Return on August 20, 2014 requesting an evidentiary hearing. A hearing was convened November 20, 2014 at the York County Courthouse. Applicant was present at the hearing and was represented by counsel, W. Michael Hemlepp, Jr., Esquire. Respondent was represented by Assistant Attorney General J. Rutledge Johnson. After reviewing all testimony and evidence presented at the hearing, along with a review of all records provided to the Court, this Court finds that there are no constitutional deprivations or other grounds on which to grant relief and denies and dismisses this application with prejudice.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted during the August 2013 term of the York County Grand Jury for trafficking crack cocaine (2013-GS-46-02979). Melissa Inzerillo, Esquire, represented Applicant on this charge. On October 8, 2013, Applicant appeared before the Honorable Derham Cole, where he pled guilty to the lesser included offense of trafficking crack cocaine, second offense. Judge Cole sentenced Applicant to incarceration for twenty years pursuant to a negotiated sentence, with credit for time served. Applicant did not appeal his conviction or sentence.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully based on allegations of ineffective assistance of counsel for failure to investigate, prepare for trial, and request continuance; prosecutorial misconduct because of unethical practices; and constitutional violations under the South Carolina Constitution and the United States Constitution.

*and*  
*2/1*

**SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING**

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented testimony from plea counsel, Melissa Inzerillo. This Court also had before it Applicant's guilty plea transcript, the records from the York County Clerk of Court regarding the subject conviction, and Applicant's records from the South Carolina Department of Corrections.

Applicant testified first on his own behalf. He testified that he completed the ninth grade. He was arrested February 9, 2013 for trafficking crack cocaine and was released on bond two to three days later. Inzerillo was appointed as his public defender, and he talked with her three to four times. They discussed his case, possible sentences, and whether he would like to proceed to trial or take a plea. He testified that he did speak with Inzerillo about his right to appeal.

Applicant testified that during his plea, he was distracted in the courtroom. He did not inform Inzerillo after entry of his plea that he wanted to appeal at that time, and Inzerillo did not bring up the possibility of an appeal either. Applicant testified, and the transcript supports, that Judge Cole did not say anything to Applicant about a right to appeal or advise him on this right when taking Applicant's plea. However, Applicant testified that he knew there was a ten day time limit to appeal the entry of a guilty plea. Before signing the sentencing sheet, Applicant informed Inzerillo that he would want to appeal, but he did not say anything after the sentence. Applicant testified that after he was sentenced, he had no time to speak to Inzerillo, as he was taken immediately out of the courtroom. Applicant clarified that the only relief he seeks is the right to have a belated appeal.

Inzerillo testified a Life Without Parole notice had been served on Applicant on September 5, 2013. Applicant decided to plead guilty after he lost a pretrial suppression hearing and the trial began. Inzerillo explained to Applicant his right to appeal, including the ten day time limit, immediately prior to Applicant entering his plea. At no point did Applicant say he wished to file an appeal, and the only request she ever received was from Applicant's mother in March of the following year asking if Applicant could get an appeal. Inzerillo testified that she did not see any appealable issues in Applicant's case. Applicant was immediately taken to a holding cell after being sentenced. Inzerillo did not talk to him; Applicant was very upset and angry. Inzerillo testified that clients usually request an appeal by sending her a letter or having someone contact her on their behalf. Inzerillo testified she did not receive any letters in this case.

*ad #2*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Applicant submits Inzerillo rendered ineffective assistance of plea counsel. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Claims of ineffective assistance of counsel are evaluated under a two-prong test. See *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." *Id.* at 117, 386 S.E.2d at 625. 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." *Id.* at 117-18, 386 S.E.2d at 625.

The United States Supreme Court discussed under what circumstances counsel has an obligation to consult with a defendant about an appeal in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). The Court stated that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Roe*, 528 U.S. at 477. However, when the defendant has not instructed counsel to file an appeal, the court should look to whether counsel consulted with the defendant about an appeal. "If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Id.* at 478.

There is no dispute that Inzerillo spoke with Applicant before entry of his plea about his right to appeal within ten days. The only dispute is whether Applicant informed Inzerillo that he would like to appeal. Applicant testified that he informed Inzerillo before entry of his guilty plea that he would want to appeal; Inzerillo testified that at no point did Applicant ever tell her that he wanted to appeal. This Court finds the testimony of Inzerillo credible and the testimony of the Applicant not credible. Therefore, because Applicant was fully informed of his right to an

appeal and did not inform Inzerillo that he wanted to appeal, this Court denies this application on the basis that Counsel's performance did not fall below the standard required.

Applicant is only seeking the right to a belated appeal. All other issues raised in his application for post-conviction relief were abandoned at the hearing.

### CONCLUSION

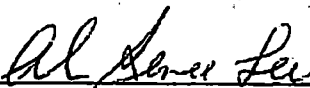
Based on all the foregoing, this Court finds that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

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

### **IT IS THEREFORE ORDERED:**

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

**AND IT IS SO ORDERED.**

  
ALISON RENEE LEE  
Presiding Judge

December 10, 2014  
Columbia, South Carolina

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