

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

RECEIVED  
JAN 30 2017  
S.C. SUPREME COURT

Appeal from Florence County

Honorable Jocelyn J. Newman, Circuit Court Judge

KEVIN BACKUS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001609

APPENDIX

ROBERT M. PACHAK  
Appellate Defender

ALAN WILSON  
Attorney General

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

LINDSEY MCCALLISTER  
Assistant Attorney General  
1000 Rembert Dennis Bldg.  
Room 519  
Columbia, SC 29201

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

**INDEX**

INDEX..... i

GUILTY PLEA TRANSCRIPT DATED JUNE 13, 2013 ..... 1

APPLICATION FOR POST-CONVICTION RELIEF  
FILED SEPTEMBER 26, 2013 ..... 14

RETURN FILED MAY 8, 2014..... 21

POST-CONVICTION RELIEF HEARING DATED JUNE 1, 2016..... 26

ORDER OF DISMISSAL FILED JULY 22, 2016..... 49

INDICTMENTS..... 55

STATE OF SOUTH CAROLINA) }  
COUNTY OF FLORENCE ) GENERAL SESSIONS COURT

STATE OF SOUTH CAROLINA)  
STATE, )

TRANSCRIPT OF RECORD  
12-GS-21-01102  
13-GS-21-00081

v. )  
KEVIN BACKUS, )  
DEFENDANT. )

June 13, 2013  
Florence, South Carolina

**BEFORE :**

THE HONORABLE WILLIAM H. SEALS, JR., JUDGE

**APPEARANCES :**

EMILY CRAYTON, ESQ.  
Assistant Solicitor

MARSHAL S. WEAVER, ESQ.  
Attorney for Defendant

FRANCES BAKIS-RAY, RPR  
Circuit Court Reporter

**INDEX**

	Page
Rights to defendants	3
Qualifying of defendant	6
Facts by Ms. Crayton	9
Remarks in mitigation by Mr. Weaver	10
Sentence of the Court	13

(There were no exhibits submitted.)

1 THE COURT: Everyone who is here and  
2 you're signed up to plead guilty or thinking about  
3 pleading guilty, I want to go over certain rights  
4 that you have. And I want you to understand those  
5 rights, the first of which is that you do not have  
6 to plead guilty and nobody can make you plead  
7 guilty. If you would rather have a jury trial  
8 instead, all you have to do is ask me and I'll make  
9 sure you get one. Furthermore, I want you to  
10 understand that if you have a trial, the State of  
11 South Carolina has the burden of proof, not you.  
12 Furthermore, if you have a jury trial you'll have a  
13 jury made up of twelve people, and it would have to  
14 take all twelve members of the jury to agree  
15 unanimously to convict you before the Court can  
16 sentence you.

17 Furthermore, if you had a trial you have a  
18 lawyer. Your lawyer would have the right to  
19 cross-examine and confront each and every one of the  
20 of the State's witnesses. Furthermore, at your  
21 trial you could come over here, you could take this  
22 witness seat right here, be sworn in, and you can  
23 testify if you like. However, you do not have to  
24 testify because you have the constitutional right to  
25 remain silent. And if you chose to exercise that

1 right, I want you to understand that I will tell the  
2 jury they cannot use that against you in any way. I  
3 would tell the jury that the fact that you did not  
4 testify is to have absolutely no prejudice against  
5 you. I would even tell the jury they cannot talk  
6 about that fact in the jury room. Furthermore, if  
7 you had a trial or if you plead guilty in front of  
8 me and you're not happy with something that takes  
9 place, you can appeal it, but you got to do so  
10 within ten days.

11           These are your rights. I want you to  
12 understand these rights. If you come before me, you  
13 have any questions about these rights, do not  
14 hesitate to ask me or ask your lawyer; we'll make  
15 sure they are cleared up.

16           (Taking of pleas commenced.)

17           MS. CRAYTON: May it please the Court,  
18 Your Honor. Standing in front of you is Kevin  
19 Backus, indictment number 2013-GS-21-00081 and  
20 2012-GS-21-01102. Mr. Backus was originally charged  
21 with possession with intent to distribute crack in  
22 the proximity of school, trafficking crack, and  
23 possession with intent to distribute marijuana, but  
24 due to recommendation of drug team and many  
25 negotiations between me and Mr. Weaver, we've agreed

1 to a manufacturing distribution of crack second  
2 offense, Your Honor, which carries up to 30 years.  
3 And after he picked up these charges, Your Honor, he  
4 was in the courtroom and had an incident with an  
5 officer and he was also charged with A and B second  
6 offense and threatening the life of a public  
7 official as a result of that, Your Honor, and those  
8 are the other two charges that he is pleading to.  
9 The A and B second carries up to three years, and  
10 the threatening of life carries up to five years.  
11 The State is asking for -- this is a negotiated  
12 sentence for 11 years, Your Honor.

13 THE COURT: Mr. -- go ahead.

14 (Attorneys confer.)

15 MS. CRAYTON: And Your Honor, just for the  
16 record, we've had many negotiations about, as I  
17 said, the charge. And the reason we selected this  
18 charge is because it was a nonviolent, although it  
19 is serious, it is paroleable and that was  
20 negotiations between Mr. Backus, Mr. Weaver, and  
21 myself.

22 THE COURT: Mr. Backus, you are pleading  
23 guilty to manufacturing, distribution cocaine base  
24 second offense which carries up to 30 years in jail;  
25 is that right?

1 THE DEFENDANT: Yes, sir. Yes, sir.

2 THE COURT: And you're also pleading  
3 guilty to threatening the life of a public official  
4 which carries up to five years in jail; is that  
5 right?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: And you are pleading guilty to  
8 assault and battery second degree which carries up  
9 to 30 years in jail; is that right?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Also, do you understand that  
12 this is a negotiated plea and if I accept the  
13 negotiations you will receive 11 years today?

14 THE DEFENDANT: Yes, sir.

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

16 THE DEFENDANT: Yes, sir.

17 THE COURT: All right. Were you in the  
18 courtroom when I went over your rights to a jury  
19 trial this morning?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Did you understand those  
22 rights?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Do you have any questions  
25 about your rights to a trial?

1 THE DEFENDANT: No, sir.

2 THE COURT: Do you want to give up your  
3 right to a jury trial and plead guilty today?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Are you satisfied with your  
6 lawyer?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Has he answered all of your  
9 questions?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Has he done everything you've  
12 asked him to do?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Has anybody promised you  
15 anything other than these negotiations to induce you  
16 into pleading guilty?

17 THE DEFENDANT: No, sir.

18 THE COURT: Has anybody threatened you or  
19 coerced you in any manner to make you plead guilty?

20 THE DEFENDANT: No, sir.

21 THE COURT: Are you under the influence of  
22 any drugs or alcohol at this time?

23 THE DEFENDANT: No, sir.

24 THE COURT: Are you guilty?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Have you understood all of my  
2 questions?

3 THE DEFENDANT: Yes, sir.

4 MS. CRAYTON: Thank you, Your Honor. On  
5 the original charge on May 10th of 2012, Corporal  
6 Wynn (ph) with the city police noticed that the  
7 defendant was in his vehicle. Several individuals  
8 were outside and a nearby area. There was some just  
9 suspicious activities going on, Your Honor. The  
10 defendant then got in his vehicle and left that  
11 location. The police followed him without pursuing  
12 him but did follow him, and after some time the  
13 officer tried to make a stop at — a stop on the  
14 defendant for a traffic violation, but the defendant  
15 accelerated his vehicle, then finally did stop. He  
16 exited his vehicle against the commands of the  
17 officer and went into a residence. Eventually the  
18 defendant was found in that residence. He was tazed  
19 and handcuffed. He was found in a bathroom. I  
20 think he was trying to flush some drugs down the  
21 toilet, Your Honor. He was found with 17-grams of  
22 crack in his possession as well as a quantity of  
23 marijuana.

24 His — I'll just go over his NCIC before I  
25 move on to the second incident. In 2003 he's had a

1 possession of crack and a possession of controlled  
2 substance and manufacturing distribution of crack  
3 second offense where he got, I think, about six  
4 years; 2009, a CDV. And 2011 he had assault and  
5 battery third and a possession of crack second, Your  
6 Honor, and a DUS. The second incident occurred here  
7 in the courtroom on the eleventh floor on  
8 September 11th, 2012. The defendant was being  
9 disruptive and would not follow the officer's  
10 commands. He was removed from the courtroom and  
11 swung actually at the officer and hit his, I think  
12 his side, his shoulder, his leg and his arm. I  
13 actually was one of the few solicitors not present  
14 for that incident, but he was tazed. And then after  
15 that he did threaten the officer and his wife and  
16 threatened to kill him so that was the result of the  
17 two extra charges, Your Honor.

18 THE COURT: All right. Mr. Weaver.

19 MR. WEAVER: Yes, Your Honor. May it  
20 please the Court, I'm here today representing Mr.  
21 Kevin Backus. The State went over the facts of the  
22 case. I would just like to offer mitigation in the  
23 hopes that the Court will accept the negotiated  
24 plea. Mr. Backus is 28 years old. He has one child  
25 and was born and raised here in Florence County.

1 The reason Mr. Backus had such an extensive record  
2 is because he has a very serious drug problem. I  
3 spoke with Mr. Backus about his drug usage; and at  
4 that time of his arrest, Mr. Baccus stated to me  
5 that he had actually been using crack, marijuana,  
6 and alcohol as his drugs of choice at that  
7 particular time. In addition to that, Your Honor, I  
8 also had him evaluated for criminal responsibility,  
9 and he was diagnosed at that time with antisocial  
10 personality disorder, alcohol dependency, and  
11 cocaine dependency so this isn't just a — this  
12 isn't just something that he's fabricated. He  
13 really does have a drug problem. And even though he  
14 had enough cocaine on him at the time of his arrest  
15 to be charged with trafficking, that was all for  
16 personal use is what he's told me. The cocaine and  
17 the marijuana was for his personal use and that was  
18 how out of control his drug usage had gotten at that  
19 particular time.

20 When we sat in the back — and we've been  
21 going through this case for a while. We actually  
22 appeared before Your Honor before on a motion to be  
23 relieved as counsel, of counsel that my client  
24 filed. And we've been going back and forth on this  
25 case for a while. And then finally my client came

1 to me with a resolution and said to me, I'm tired, I  
2 think this may be the best thing for me. He  
3 recognized that he has a drug problem. I think that  
4 being in a correctional facility may give him some  
5 resolution, if he so seeks it there. Of course, you  
6 know, you can do anything in jail that you -- in  
7 prison that you can do out here, but if you seek  
8 that resolution there you can find it. I think that  
9 he is going to try to find it, and I just really ask  
10 this Court to accept the 11 year negotiated  
11 sentence. I believe that it is fair and ask that  
12 you accept it, Your Honor.

13 THE COURT: Does he get credit for any  
14 time?

15 MS. CRAYTON: Yes, Your Honor, he does.

16 THE COURT: How much?

17 MS. CRAYTON: He's been in there since  
18 May 10th of 2012. He's never been -- that would be  
19 on the -- I mean, I guess it doesn't matter how  
20 much, but yeah, May 10th, 2012, correct.

21 MR. WEAVER: You talking about probation?

22 MS. CRAYTON: Credit. No, from --

23 MR. WEAVER: Oh, yes. Yes, that's right.  
24 And also, Your Honor, there's an issue of probation.  
25 My client was on probation at the time of his

1 arrest, and we would ask that the Court terminate  
2 probation. He was on three years suspended 29 days  
3 and one year probation, Your Honor.

4 THE COURT: What was he on probation for?

5 MR. WEAVER: For possession of less than  
6 one gram of methamphetamine or cocaine base second  
7 offense.

8 THE COURT:

9 MR. WEAVER: Yes, Your Honor.

10 THE COURT: All right. I will accept the  
11 negotiated sentence and find that he is doing so  
12 freely, intelligently, with the advice of very  
13 competent counsel. The sentence of the Court on the  
14 drug charge is 11 years. I'll run it concurrent.  
15 He will serve credit from May 10, 2012 up to this  
16 date. In reference to the threatening life of  
17 public official, 5 years and run concurrent and also  
18 receive credit. And in regard to the A and B, the  
19 sentence of the Court is 3 years. That will be  
20 concurrent. He'll receive any appropriate credit as  
21 well. Anything else?

22 MS. CRAYTON: No, Your Honor.

23 MR. WEAVER: No, Your Honor. Thank you.

24

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

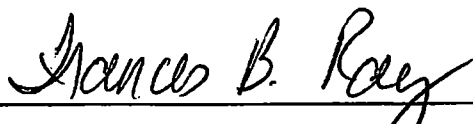
**C E R T I F I C A T E   O F   R E P O R T E R**

STATE OF SOUTH CAROLINA)  
COUNTY OF FLORENCE        )

I, FRANCES BAKIS-RAY, Registered Professional Reporter (RPR), court reporter for the State of South Carolina, Twelfth Judicial Circuit, do hereby certify that the foregoing proceeding is a stenographic report and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

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

Witness my hand at Florence, South Carolina, this 30th day of December, 2013.



FRANCES BAKIS-RAY, RPR

FORM 5  
**FILED**

STATE OF SOUTH CAROLINA

COUNTY OF Florence

2013 SEP 26 PM 3:58

IN THE COURT OF COMMON PLEAS

Kevin Beckus #296578

CONNIE REEL-SHEARIN  
CCCP & GS  
FLORENCE COUNTY, SC

2013 CP 21 2535

Full name and prison number (if any) of Applicant

v.

State of South Carolina

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.

CERTIFIED A TRUE COPY  
CONNIE REEL-SHEARIN  
CLERK OF COURT CCP & GS  
FLORENCE COUNTY, S.C.

1. Place of detention Hershaw - C. I.
2. Name and location of Court which imposed sentence City/County Complex  
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) 2012-GS-21-01102
- (b) 2013-GS-21-00081
- (c) \_\_\_\_\_

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

- (a) 6/13/13 11 years - Non-violent
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty
- (b) after a plea of not guilty \_\_\_\_\_
- (c) after a plea of nolo contendere \_\_\_\_\_

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

No

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

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

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

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

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

(c) the date of each such result:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

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

- i. \_\_\_\_\_

- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

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

- (a) Did not have A Appeal Issue
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

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

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

- (a) Counsel's Failure to investigate and present
- (b) substantial mitigating evidence during sentencing
- (c) \_\_\_\_\_

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

- (a) any petition in a State Court under South Carolina Law? \_\_\_\_\_
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? \_\_\_\_\_
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? Yes
- (d) any other petitions, motions or applications in this or any other Court? \_\_\_\_\_

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. Writ of Mandamus motion
  - ii. \_\_\_\_\_

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

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

i. General Sessions  
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? \_\_\_\_\_
- (c) your sentencing? \_\_\_\_\_
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? \_\_\_\_\_
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? \_\_\_\_\_

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

- (a) the name and address of each attorney who represented you:
  - i. Marshall Weaver - PO Box 3888, Florence, S.C. 29502
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
  - i. N/A

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

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

"Reconsideration"  
 \_\_\_\_\_  
 \_\_\_\_\_

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

NO  
 \_\_\_\_\_  
 \_\_\_\_\_

STATE OF SOUTH CAROLINA )  
 )  
 County of \_\_\_\_\_ )

VERIFICATION

2013 SEP 26 PM 3:56  
 CONNIE REEL-SHEPHERD  
 CLERK OF COURT C.P. & C.S.  
 FLORENCE COUNTY, S.C.

FILED

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 be vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

*Kevin [Signature]*

SWORN to and subscribed before me this 24  
 day of September, 2013.

*Cathie A. Amos* (L.S.)  
 Notary Public

My Commission Expires: December 23, 2018

CERTIFIED A TRUE COPY  
*Connie Reel-Shepherd*  
 CLERK OF COURT C.P. & C.S.  
 FLORENCE COUNTY, S.C.

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

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

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

*Kerwin Barkus*  
Applicant

SWORN or affirmed to and subscribed before me this  
24 day of September, 2013.

*Cathie A. Amos*  
Notary Public

My Commission Expires: December 22 2014

**FILED**  
2013 SEP 26 PM 3:56  
CONNIE REEL-SHEARIN  
CLERK OF COURT  
FLORENCE COUNTY, SC

CERTIFIED A TRUE COPY  
*Connie Reel-Shearin*  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA )  
 COUNTY OF FLORENCE )  
 Kevin Backus, #296578, )  
 Applicant, )  
 v. )  
 State of South Carolina, )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE TWELFTH JUDICIAL CIRCUIT

Case No. 2013-CP-21-2535

**RETURN**

2014 MAY -8 PM 12:46  
 CONNIE REEL-SHERIFF  
 CCP & CS  
 FLORENCE COUNTY, SC  
**FILED**

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed September 26, 2013, would respectfully show this Court:

**I.**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. In September 2012, the Florence County Grand Jury indicted Applicant for trafficking in cocaine base, possession with intent to distribute marijuana, and possession with intent to distribute cocaine base within proximity of a school (2012-GS-21-1102). In January 2013, the Grand Jury indicted applicant for second degree assault and battery and threatening the life of a public official (2012-GS-21-81). Marshall S. Weaver, Esquire, represented Applicant. On April 32, 2013, Applicant entered a negotiated sentence to distribution of cocaine base, second degree assault and battery, and threatening the life of a public official. The Honorable William H. Seals, Jr., sentenced Applicant to concurrent terms of eleven (11) years for distribution of cocaine base, three (3) years for second degree assault and battery, and five (5) years for threatening the life of a public official. Applicant did not appeal his guilty plea or sentence.

**II.**

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

1. "Ineffective Assistance of Counsel"
  - a. "Counsel's failure to investigate and present substantial mitigating evidence during sentencing"

Any claims not specifically enumerated in the application or amendments thereto will be opposed by Respondent at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRPC.

Attached to this return and incorporated herein are the records of the Florence County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this return upon receipt of any relevant materials.

**III.**

Respondent submits Applicant's allegation of ineffective assistance of counsel is without merit. 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, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the plea proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the Applicant must prove plea counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea 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. With respect to guilty plea counsel, the Applicant must show 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, 59 (1985).

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

**IV.**

Respondent denies each and every allegation not hereinbefore expressly admitted, qualified, or explained.

**V.**

WHEREFORE, having made its return, Respondent requests an evidentiary hearing be held.

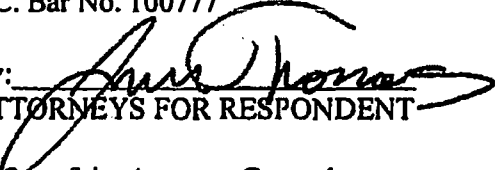
Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

KAREN C. RATIGAN  
Senior Assistant Deputy Attorney General

JOSHUA L. THOMAS  
Assistant Attorney General  
S.C. Bar No. 100777

By:   
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
Telephone: (803) 734-3737

May 6, 2014

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF FLORENCE )  
 )  
 )  
 )  
 KEVIN BACKUS, #296578 )  
 )  
 ) Applicant, )  
 )  
 vs )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 ) Respondent. )

IN THE COURT OF COMMON PLEAS

2013-CP-21-2535

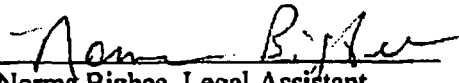
AFFIDAVIT OF SERVICE BY SAIT

FILED  
 2014 MAY -8 PM 12:46  
 CONNIE REEL-SHERMAN  
 CLERK  
 CCJP & CS  
 FLORENCE COUNTY, SC

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:

**Jonathan D. Waller, Esquire**  
**1720 Main St., Suite 104**  
**Columbia, SC 29201**

DATED this 6<sup>th</sup> day of May, 2014.

  
 Norma Bigbee, Legal Assistant

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF FLORENCE	)	2013-CP-21-2535
	)	
	)	
	)	
Kevin Backus	)	)
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
State Of South Carolina	)	)
<u>DEFENDANT</u>	)	June 1, 2016
		Florence, South Carolina

B E F O R E:

THE HONORABLE JOCELYN J. NEWMAN, JUDGE.

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

JONATHAN D. WALLER, ESQ.  
Attorney for the Applicant

CROOM HUNTER, ASSISTANT ATTORNEY GENERAL  
Attorney for the State

KESHIA REED  
Official Court Reporter

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

I N D E X

WITNESS                      DIRECT      CROSS      REDIRECT      RECROSS

Kevin Backus

    Mr. Waller                      4

    Mr. Hunter                                      16

Certificate of Reporter 23

1 THE COURT: Yes, sir.

2 MR. HUNTER: May it please the Court.

3 THE COURT: Yes, sir.

4 MR. HUNTER: This is Kevin Backus SCDC number  
5 296578 vs. The State of South Carolina, the case number  
6 2013-CP-21-2535. Mr. Backus is presently confined with  
7 SCDC for the pursuant to the Florence County Clerk of  
8 Court's orders. He was indicted at the September 2012  
9 term of the Florence County grand jury for trafficking in  
10 cocaine base, possession with intent to distribute  
11 marijuana and possession with intent to distribute cocaine  
12 base within the proximity of a school. That indictment  
13 number was 2012-GS-21-1102.

14 In January of 2013, Mr. Backus was indicted for  
15 second degree assault and battery and threatening the life  
16 of a public official, that indictment number is  
17 2012-GS-21-81. He was represented by Mr. Marshall Weaver  
18 on April 23rd 2013. Mr. Backus entered a negotiated plea  
19 to distribution of cocaine base, second degree assault and  
20 battery and threatening the life of a public official.  
21 Judge Seals sentenced him to concurrent terms of 11 years  
22 for distribution of cocaine base, three years for second  
23 degree assault and battery and five years for threatening  
24 the life of a public official. He did not appeal. He  
25 file this application for post-conviction relief on

1 September 26th of 2013. Mr. Waller was appointed to  
2 represent him. He is present today. The State is ready  
3 to proceed.

4 THE COURT: All right, Mr. Waller.

5 MR. WALLER: Thank you, Your Honor. I like to  
6 call Kevin Backus.

7 THE COURT: Mr. Backus, would you raise your  
8 right hand to be sworn.

9 THE CLERK: Do you swear to tell the truth, the  
10 whole truth, and nothing but the truth so help you God?

11 MR. BACKUS: Yes, ma'am.

12 THE CLERK: Thank you. Please have a seat.

13 WHEREUPON,

14 Kevin Backus,

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

16 DIRECT EXAMINATION

17 BY MR. WALLER:

18 Q Good afternoon, Mr. Backus, how are you today?

19 A I'm all right.

20 Q Mr. Backus, I want to take you back to when you were  
21 originally arrested on the drug charge. We'll talk about  
22 the other two charges here in a minute. I want to take  
23 you back on the drug charge. What were you originally  
24 arrested for?

25 A Trafficking and proximity to school zone and they say

1 distribution at the same time.

2 Q Okay. Was there a marijuana charge also?

3 A Yeah.

4 Q When you were arrested on the trafficking, how did  
5 you get an attorney?

6 A Well, when I got arrested on the trafficking, I  
7 didn't have an attorney. I was on probation for a drug  
8 charge and I didn't have an attorney or anything yet.

9 Q Okay. How did Mr. Weaver come to be your attorney?

10 A Well, at first they try to -- first I had my  
11 Solicitor was Jupertinger and they was about to appoint me  
12 a public defender, but I'm trying to remember. My memory  
13 kind of messed up.

14 Q All right. Let me ask you this way, when you got  
15 arrested on the threatening the life of a public official  
16 on the assault and battery charge, did Mr. Weaver  
17 represent you yet at that time?

18 A Yeah.

19 Q So that was January of 2013. Do you know about how  
20 far prior to that Mr. Weaver was appointed to represent  
21 you?

22 A It was probably like March or something like that  
23 March or February. It wasn't that far apart from there.

24 Q Okay. And Mr. Weaver was appointed to represent you  
25 or you hired him?

1 A Well, he was appointed because I was going through a  
2 lot of paperwork with my public defender and all that and  
3 the Solicitor. And they appointed me to him.

4 Q Okay. When you first met with Mr. Weaver, do you  
5 remember meeting with him?

6 A Yeah.

7 Q Okay. What did y'all talk about?

8 A The first time I met Mr. Weaver, I was in Effingham  
9 and he came to see someone else. And I ask him about my  
10 case and he seen my emotion and he was like it look good.  
11 I was like okay. I was like I really want to plea. I  
12 really want to take what I got going on and I want to just  
13 go because I know I got a lot of drug charges and stuff  
14 like that.

15 Q Okay. What did he tell you when you told him that?

16 A He was like look like you gone beat this case. I was  
17 like, sir, I really just go and take three years. So I  
18 want have to go through it something like try to get me a  
19 good plea. He was like, no, you can beat this case.

20 Q When you say you gone take three years, how are you  
21 going to be able to do that?

22 A I was hoping he would try to get me a plea.

23 Q Okay. So there wasn't an offer for three years or  
24 anything like that already on the table?

25 A No, sir.

1 Q So you're saying that you wanted to plead guilty and  
2 Mr. Weaver did not want you to plead guilty; is that  
3 right?

4 A Yes, sir.

5 Q Okay. What did y'all talk about after that?

6 A He was telling me about how I could beat the case  
7 because I ask him and he was like on Terry Act  
8 exclusivenary (sic) rule, traffic stop and he was just  
9 showing me everything like the SLED officer had lied on  
10 the report. It was a lot of stuff on it.

11 Q Do you know if he ever filed any motions to suppress  
12 any of the evidence?

13 A I did.

14 Q You did?

15 A Yeah.

16 Q After he was appointed to represent you?

17 A Uh-huh.

18 Q Do you know if he ever filed anything?

19 A I don't think he did. He didn't file it.

20 Q Did y'all discuss that you can't file something while  
21 represented by an attorney?

22 A No.

23 Q Okay. Did your motion ever get heard?

24 A No, sir.

25 Q Okay. Did he ever to the best of your knowledge file

1 any of those motions?

2 A No, sir.

3 Q Did you ever go in front of a judge to try to get the  
4 evidence suppressed?

5 A They wouldn't even see it. I did everything while I  
6 was in the county jail. I had wrote the motion myself and  
7 got copies and everything, but they never seen it.

8 Q Okay. When y'all talked about when you were stopped  
9 and you mentioned a couple different things, what did  
10 y'all talk about why he said that you could beat the case?

11 A He was like it was Terry stop. They said it was a  
12 traffic stop, but they didn't have a charge saying why  
13 they stop me for a traffic stop, the car was in a girl  
14 name. They didn't have a call saying, oh, he's riding  
15 with a threat to society or nothing like that.

16 Q Okay. So they didn't say you were speeding ---

17 A None of that.

18 Q --- or went through a stop sign. They just pulled  
19 you over?

20 A Yeah, they was like, you know what I'm saying, they  
21 said in the report a tire ran off the road. But if you  
22 look in the DMV book, you know what I'm saying, if you  
23 mess around and mess up on a turn or a tire on the road  
24 just straighten up and keep moving, you know what I'm  
25 saying, but they said stop me for a traffic stop. But

1 when I pull over, he pulled a rear gun out on me. He  
2 didn't pull a taser or anything. He pulled a real gun out  
3 on a traffic stop.

4 Q Okay. Did you ever get a traffic ticket?

5 A I ain't got no traffic ticket. I just got -- not  
6 from failure to stop for a blue light nothing like that, I  
7 didn't get no traffic ticket for that.

8 Q Okay. Was there a video from the traffic stop?

9 A They ain't had no video.

10 Q Okay. Was it -- what kind of car was it?

11 A It was a regular police car. They ain't had no video  
12 or nothing.

13 Q Well, did it have lights on the top of it?

14 A Yes, sir.

15 Q Did it have the markings all down the side?

16 A Everything.

17 Q Okay. So it was a regular just patrol vehicle?

18 A Yes, sir.

19 Q And there was no video from it?

20 A No, sir.

21 Q Were you arrested right there?

22 A Yes, sir.

23 Q Were you put in that same vehicle?

24 A Yes, sir.

25 Q Do you know if you saw a camera or anything?

1 A It look like I seen the camera like all the police  
2 cars suppose to have camera hooked up to it and  
3 everything. It look like I seen the camera in there.

4 Q Did you notice the officer when y'all started to  
5 leave turn around or reach up?

6 A No, sir.

7 Q Was there any drug analysis done by SLED or Florence  
8 County or any law enforcement agencies?

9 A With the drugs I got?

10 Q Yes.

11 A It was in my motion, yes, sir.

12 Q Okay. Did you and Mr. Weaver talk about that?

13 A Yeah, we talked about that.

14 Q Okay. What did he tell you?

15 A He was telling me what I was facing. He just kept  
16 saying I was going to beat the case, that's all he kept  
17 saying. And while he was doing his research, I was in the  
18 county jail doing my research on my own case too at the  
19 same time. Like I said, we straight up everybody, he was  
20 doing real good until like he just stop coming. I was  
21 like in about three months all that was going on, I was  
22 getting my people to come go see him and writing him. And  
23 then when he finally do came to the county jail, he been  
24 like you looking at ten years. But the last time you talk  
25 to me you said I would beat the case and I was trying to

1 ask for another plea. I was like, man, this ain't right.  
2 I said something to him in Effingham and I was like it  
3 ain't right and I say you fight. I say I'm gone have to  
4 find another lawyer. So I got my daddy them to try to  
5 find me another lawyer.

6 Q Okay. Well, let me ask you this, you testified that  
7 you wanted to plea at the beginning?

8 A Uh-huh.

9 Q And that he told you not to because you were going to  
10 beat the case?

11 A Uh-huh.

12 Q What changed and why did you ultimately wind up  
13 pleading guilty?

14 A Because I felt like they was throwing me up the bus.  
15 I went in front of the judge to try to find a lawyer. I  
16 had my daddy and them up here and they had some money to  
17 pay for another lawyer and the judge told me that I  
18 couldn't fire him. And I told the judge that I feel like  
19 he's working with the State now. And I said he did good  
20 because I been trying to have another lawyer if I thought  
21 he wasn't going to try and help me beat the case.

22 Q Okay. Did you ever hire another lawyer?

23 A No, sir, because they said I couldn't. I went to  
24 court like April the 29th, if I ain't mistaken.

25 Q Did you -- Mr. Weaver was appointed to you. Did you

1 ever try to pay another lawyer?

2 A No, he was talking to me real good. I wasn't trying  
3 to pay right then.

4 Q Okay. How did you end up getting arrested for the  
5 threatening the public official and assault and battery?

6 A Well, I was in the courtroom and like I said, I don't  
7 really want to make to much excuses of what I did because  
8 like I said at the end of the day, I got charge for it and  
9 I took it. But the girl that was in the audience and it  
10 was Carl Scott. He was standing up here and I had my  
11 motion with me and we was still here or whatever, you know  
12 what I'm saying. I had a public defender then. And I was  
13 trying to tell her in the audience to get this motion to  
14 go talk to my lawyer is John Etheridge I use all the  
15 time. So I think Carl Scott saw me and he say why you  
16 talking to the -- that after they had a recess and  
17 everything. He was like why you talking to the people in  
18 the audience. I was like if I'm wrong, sir, I'm wrong.  
19 But I ain't saw her in a long time, I was trying to get  
20 her to do this paperwork will you please get her this  
21 motion.

22 Q Okay. Let me stop you right there because I don't  
23 want to go into too much detail. But you were -- you  
24 mentioned Johnny Etheridge. Were you represented by  
25 Johnny Etheridge also?

1 A No, see he call and talk to my people and he was gone  
2 represent me.

3 Q Okay. But you never hired him?

4 A No, sir.

5 Q Okay. Did Mr. Weaver represent you also on the  
6 threatening public official and on assault and battery  
7 second degree?

8 A Yes, sir.

9 Q Okay. He was appointed to those also?

10 A By the State.

11 Q Okay. He represented you before you got those  
12 charges, so the State appointed him also to represent you  
13 on those?

14 A Yes, sir.

15 Q Mr. Backus, when you were represented by Mr. Weaver,  
16 did you ever talk to any of the Solicitor's office?

17 A Really me and Jepertinger had a dispute and they gave  
18 me another solicitor.

19 Q Okay. Were you represented by Mr. Weaver at that  
20 time?

21 A No, sir.

22 Q Okay. That was very early in your case?

23 A Yes, sir, like I say, I came to court on a probation  
24 violation before I got represented -- before I got a  
25 public defender and he came and try to talk to me about

1 pleading guilty and all that stuff.

2 Q Okay. Mr. Backus, I think I've asked you all he  
3 questions that I have for you. Is there anything that you  
4 think the judge needs to be aware of Mr. Weaver's  
5 representation of you?

6 A Yeah, I would like to say something.

7 Q Sure.

8 A Ma'am, Mr. Weaver was a good lawyer when I first got  
9 him and I just felt like he just started working with the  
10 State. And when I try to fire him, I just felt like I  
11 could have suppose to be able to fire him and got another  
12 lawyer in my case. And like I say, it's a whole lot of  
13 stuff was messed up in my case. I was ready to take  
14 whatever I get, you know what I'm saying, but I was just  
15 trying to get as low as I could or whatever, you know,  
16 when I first got him and he probably can say that if he  
17 can. But when it got too late in the time I was doing, I  
18 just felt like he started working with the people when he  
19 came with the ten year thing and they just threw me all  
20 off with him. And I file paperwork and everything on him  
21 and everything, but I say he's a good lawyer in my eyes,  
22 but I just felt like he was working with the State and I  
23 try to fire him. I just thought that wasn't right.

24 THE COURT: What makes you think he was working  
25 with the State?

1 MR. BACKUS: Because like I say before last time  
2 I saw him before he said the ten years, he been like he  
3 still gone get me off. You gone beat this case, that's  
4 all he kept saying Terry stop, you know what I'm saying,  
5 Terry Act. They follow me three destinations without  
6 having a right to even follow me. They had no reason to  
7 follow me at all. They follow me three different  
8 destinations. One of the officers been like, yeah, we see  
9 a red Camry on this area be on the look. That basically  
10 telling the other officer stop me for no reason. You know  
11 what I'm saying, he telling the officer he did and this  
12 did that. But you just telling him to stop me when you  
13 see me, that what he pointed out. So I went and did my  
14 own research, you know what I mean, while I was in the  
15 county jail. And I seen it, you know what I'm saying, so  
16 I was just trying to pursuit it. And I was just trying to  
17 figure out why he trying to say ten years when you keep  
18 telling me I'm going to beat the case. That's all.

19 THE COURT: All right. Thank you, sir.

20 MR. BACKUS: Yes, ma'am.

21 MR. WALLER: Your Honor, if I could ask one more  
22 follow-up question.

23 THE COURT: Sure.

24 BY MR. WALLER:

25 Q After you filed a motion for Mr. Weaver to be

1 relieved, did y'all's relationship change at all?

2 A Not really in my eyes.

3 MR. WALLER: No further questions. Please  
4 answer any questions Mr. Hunter has.

5 CROSS-EXAMINATION

6 BY MR. HUNTER:

7 Q Afternoon, Mr. Backus.

8 A All right.

9 Q So you wanted to plead guilty the whole time, right?

10 A Yes, sir.

11 Q Now, do you remember at your plea you pled guilty the  
12 judge went over the fact that by pleading guilty you'd be  
13 giving up the right or your ability to challenge the  
14 evidence?

15 A Yes, sir.

16 Q Okay. Do you recall telling the judge that you were  
17 satisfied with Mr. Weaver's work on the case?

18 A Yes, sir.

19 Q Okay. And but now you're saying you're unhappy with  
20 it?

21 A I feel like I ain't had no choice but to be satisfied  
22 with him because they tell me I couldn't fire him. I  
23 ain't had no choice but to be satisfied.

24 Q Okay. So what -- I guess, I'm having a little  
25 trouble here figuring out what exactly -- I know you're

1 unhappy with your sentence, but what exactly are you  
2 unhappy with as far as what Mr. Weaver did that he should  
3 have done differently, how do you think he is -- was  
4 ineffective in his representation of you?

5 A Like I said, he was doing good and then next thing  
6 you know I hadn't seen him in three months. And when he  
7 pop up, he say ten years, that's all you can get. How  
8 when you keep telling me that I'm going to beat the charge  
9 and stuff like that, you know, that's why I feel like  
10 he...

11 Q So he led you to believe that you were going to be  
12 able to beat the charge at a trial, I guess?

13 A He act like he was gone get it done before the trial.

14 Q Okay. But you did plead guilty?

15 A Yes, sir.

16 Q Okay. And you told the judge that you were guilty?

17 A Yes, sir.

18 Q Okay. And you understood that it was a negotiated 11  
19 year plea and that 11 years is what you were going to get?

20 A Yes, sir.

21 Q Okay. Did Mr. Weaver ever force you to take the plea  
22 deal he say you had to do it?

23 A Like I tell you, sir, I been in front of the judge to  
24 try to do this with Mr. Weaver, but they told me I  
25 couldn't fire him at all. So I feel like I was forced to

1 plea. They was about to try and put me in front of the  
2 judge and try to make me plead to 25 to 30. So when they  
3 came with 11, I had to go, that's all.

4 Q So you took the 11 years because you knew that if you  
5 didn't take that if you went to trial, you could get a lot  
6 more?

7 A Yeah.

8 MR. HUNTER: Beg the Court's indulgence.

9 (WHEREUPON, a pause in the proceedings.)

10 MR. HUNTER: That's all I have. Thank you, Mr.  
11 Backus.

12 THE COURT: Any redirect?

13 MR. WALLER: No further questions.

14 THE COURT: All right. Thank you, sir. You can  
15 go back and sit next to your lawyer.

16 (WHEREUPON, the witness leaves the witness  
17 stand.)

18 MR. WALLER: Applicant has no further witnesses,  
19 Your Honor.

20 THE COURT: All right, Mr. Hunter.

21 MR. HUNTER: Judge, at this time I'm going to  
22 move under Rule 41(b) for summary dismissal involuntary  
23 nonsuit. I don't believe that Mr. Backus has really  
24 raised any allegations of -- I don't believe he's shown  
25 any ineffectiveness as is necessary under Strickland. And

1 furthermore I don't believe he's shown any prejudice  
2 resulting from any alleged deficiencies and for that  
3 reason the State would go ahead and move to dismiss before  
4 we put up our case.

5 THE COURT: Mr. Waller.

6 MR. WALLER: Your Honor, Mr. Backus testified  
7 that he and Mr. Weaver discussed at length proceeding to  
8 trial. And they discussed trying to get some of the  
9 evidence suppressed. And I believe Mr. Backus testified  
10 that he actually tried to file a motion for suppression on  
11 his own. Your Honor, I think there is evidence there that  
12 Mr. Weaver did not follow up and did not prepare properly  
13 for the trial that obviously never took place, but I do  
14 think that there is evidence in the record that  
15 preparations were made and that Mr. Backus wanted to  
16 proceed down the trial path by evidence by his submitting  
17 a motion to suppress the evidence on his own. And, Your  
18 Honor, I think that there is enough evidence to at least  
19 overcome the summary judgment motion that the State is  
20 making.

21 THE COURT: Well, I recall his testimony being  
22 that he always wanted to plead guilty, that he was not  
23 interested in a trial. And in fact he just nodded when I  
24 said that, so, I guess, I need you to get me over that  
25 hurdle in discussing, you know, what trial preparation or

1 whether a trial -- obviously, no trial happened, but your  
2 client testified that he never wanted a trial.

3 MR. WALLER: Your Honor, he did testify that he  
4 at the very beginning wanted a plea and, Your Honor, I  
5 would say is that Mr. Backus certainly is not an attorney.  
6 When his attorney came to him and I said, I think, we have  
7 defenses to this case, I think that that for the purposes  
8 of this motion -- what he testified to was that it changed  
9 in his mind and they started to talk about suppressing the  
10 evidence to the extent of he actually filed a motion to  
11 attempt to suppress that evidence. If that hearing ever  
12 takes place, obviously they're not going to hear it  
13 because Mr. Backus cannot file a motion on his own. If  
14 Mr. Weaver had filed the motion and that had been heard or  
15 not heard, I think it be a different situation.

16 My understanding is Mr. Backus' testimony is  
17 that he wanted to plead. Mr. Weaver essentially talked  
18 him out of it saying there were some defenses and he  
19 ultimately end up pleading. I think that the preparation  
20 in getting Mr. Backus to believe that defeating the  
21 charges was a possibility and then not doing so I think  
22 was ineffective.

23 THE COURT: If Mr. Backus wanted to plead and  
24 his attorney told him he could beat the charges, but  
25 Mr. Backus ultimately entered a plea, that demonstrates to

1 me that Mr. Backus made his own decision actually. That  
2 it was freely and voluntarily probably intelligently made.  
3 Otherwise, if he were relying strictly on advice of  
4 counsel good, bad or indifferent, he may gone down some  
5 other road and there may have been a trial.

6 I think, I'm going to grant the State's motion  
7 to dismiss. I just don't see how he always wanted to  
8 plead. His attorney advised him of some other potential  
9 options suppression of evidence things like that, but he  
10 waned to plead guilty. He always wanted to plead guilty.  
11 He ultimately pled guilty. I don't see the ineffective  
12 assistance. I mean, it's not incumbent upon his attorney  
13 to convince him not to plead guilty if that's what he  
14 wants to do and under oath admits his guilt before the  
15 Court.

16 Dissatisfaction with the sentence received,  
17 although it was negotiated, so he knew what he was  
18 getting, but that's not grounds for post-conviction  
19 relief. So I don't think based on his own testimony that  
20 their any grounds from which the Court could find that  
21 Mr. Weaver was deficient in his performance or that his  
22 performance fell below the norms in representation. So  
23 I'm going to grant the State's motion to dismiss this  
24 case. Thank you.

25 MR. HUNTER: Thank you.

1

MR. WALLER: Thank you, Your Honor.

2

THE COURT: Mr. Hunter, if you'll get me an

3

order on that too.

4

MR. HUNTER: Yes, Your Honor.

5

END OF REQUESTED TRANSCRIPT

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25



STATE OF SOUTH CAROLINA )  
COUNTY OF FLORENCE )

IN THE COURT OF COMMON PLEAS )  
TWELFTH JUDICIAL CIRCUIT )

Kevin Backus, #296578, )

Civil Action No: 2013-CP-21-2535 )

Applicant, )

**ORDER OF DISMISSAL**

v. )

State of South Carolina, )

Respondent. )

FILED  
2016 JUL 22 PM 3:04  
CONNIE REEL-SHARRIF  
JCCP & GS  
FLORENCE COUNTY, SC

This matter comes before the Court by way of the Applicant's Post-Conviction Relief application filed September 26, 2013. Respondent filed its Return on May 6, 2014. An evidentiary hearing into the matter was convened on June 1, 2016 at the Florence County Courthouse. Jonathan D. Waller, Esquire, represented Applicant. J. Croom Hunter, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Applicant testified on his own behalf. This Court had before it a copy of the records of the Florence County Clerk of Court, records from the South Carolina Department of Corrections, the application, the State's Return, and the guilty plea transcript.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. In September 2012, the Florence County Grand Jury indicted Applicant for trafficking in cocaine base, possession with intent to distribute marijuana, and possession with intent to distribute cocaine base within proximity of a school (collectively 2012-GS-21-1102). In January 2013, the Florence County Grand Jury indicted

*gm*

TRUE COPY  
*Connie Reel-Sharrif*  
JCCP & GS

applicant for second degree assault and battery and threatening the life of a public official (collectively, 2012-GS-21-81). Marshall S. Weaver, Esquire, represented Applicant on the charges. On April 32, 2013, Applicant entered a negotiated sentence to distribution of cocaine base, second degree assault and battery, and threatening the life of a public official. The Honorable William H. Seals, Jr., imposed the negotiated sentence of concurrent terms of eleven (11) years for distribution of cocaine base, three (3) years for second degree assault and battery, and five (5) years for threatening the life of a public official. Applicant did not appeal his guilty plea or sentence.

#### SUMMARY OF TESTIMONY

At the evidentiary hearing, Applicant testified he was unhappy with Attorney Weaver's representation. Additionally, he testified he wanted to plead guilty, but Weaver advised him that he thought Applicant had a good chance to win at trial. Applicant testified Weaver encouraged him to go to trial, but he always wanted to plead guilty.

On cross-examination, Applicant acknowledged he was unhappy with his sentence, but he admitted he liked Weaver. Applicant further acknowledged that he knew he was pleading to a negotiated sentence of eleven years, which is what he wanted to do. When asked what his actual allegation against Weaver was, Applicant responded vaguely that he felt like Weaver was "working with the State," but he could not give any specific allegations of how he felt Weaver's performance was deficient.

At the conclusion of Applicant's case, Respondent moved pursuant to Rule 41(b), SCRCP, for an involuntary dismissal that based upon the facts presented, Applicant had shown no right to relief.



## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

### RULE 41(b)

Rule 41(b), SCRPC, states that, "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief."

#### *Ineffective 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, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the plea proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v.



Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the Applicant must prove plea counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea 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. With respect to guilty plea counsel, the Applicant must show 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, 59 (1985).

This Court finds that Applicant failed to set forth even a *prima facie* case for relief. Applicant's testimony indicated that he never wanted to proceed to trial, and he always wanted to plead guilty. Upon cross-examination by Respondent, Applicant could not articulate any grounds for which he was seeking post-conviction relief other than he felt his attorney was "working with the State." Applicant's own testimony indicated that he received the resolution he was looking for by pleading guilty, despite Counsel's alleged efforts to have Applicant proceed to trial. Where Hill requires an Applicant to show that but for plea counsel's errors, he would have proceeded to trial,



Applicant's testimony indicated the opposite; he wanted to plead guilty, and he pled guilty. Put simply, Applicant's testimony failed to set forth any specific allegations of ineffective assistance of counsel for this Court to make such a finding, and as such, Respondent's motion to dismiss is granted.

### CONCLUSION


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

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



**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief is denied and dismissed with prejudice; and
  2. The Applicant must be remanded to the custody of the Respondent.
- AND IT IS SO ORDERED!**

  
 The Honorable Jocelyn New  
 Presiding Circuit Court Judge  
 Twelfth Judicial Circuit

July 18, 2016  
Columbia, South Carolina

2016 JUL 22 PM 3: 04  
 CONNIE REEL-SHEARN  
 ECCP & GS  
 FLORENCE COUNTY, SC

FILED

**WITNESSES**

Carl Scott

Florence County Sheriff

Emily M. Crayton

**ARREST WARRANT NUMBER**

2012A2110100127

2012A2110100128

**ACTION OF GRAND JURY TRUE BILL**

*Emily M. Crayton*  
Foreperson of Grand Jury

Date: 1-3-13

**VERDICT**

on of Petit Jury

Date:

**DOCKET NO. 2013-GS-21-00081**

The State of South Carolina

County of

**FLORENCE**

**COURT OF GENERAL SESSIONS**

JANUARY

TERM

2013

**THE STATE**

vs.

**KEVIN JOHN ANTHONY BACKUS**

Indictment for

**ASSAULT AND BATTERY**

**SECOND DEGREE**

**AND**

**THREATENING THE LIFE OF**

**A PUBLIC OFFICIAL**

FILED  
2013 JAN -3 PM 2:41  
FLORENCE COUNTY, S.C.

2013 JAN -3 PM 2:41  
DONNIE REEL-SHEARIN  
CCOP & GS  
FLORENCE COUNTY, S.C.

**FILED**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF FLORENCE )

INDICTMENT FOR  
ASSAULT AND BATTERY  
SECOND DEGREE  
AND  
THREATENING THE LIFE OF  
A PUBLIC OFFICIAL

At a Court of General Sessions, convened on JANUARY 3, 2013 the Grand Jurors of FLORENCE County present upon their oath:

COUNT ONE- ASSAULT AND BATTERY SECOND DEGREE

That KEVIN JOHN ANTHONY BACKUS did in Florence County, on or about September 11, 2012, knowingly, willfully and unlawfully injure, or offered or attempted to injure with the present ability to do so, another person, to wit: Deputy Carl Scott, by striking him about the body with his fists, such that moderate bodily injury resulted or could have resulted; in violation of Section 16-03-0600(D)(1), S.C. Code of Laws, 1976, as amended.

COUNT TWO- THREATENING THE LIFE OF A PUBLIC OFFICIAL

That KEVIN JOHN ANTHONY BACKUS did in Florence County, on or about September 11, 2012, knowingly and willfully deliver or convey to a teacher, principal, or public official to wit: Carl Scott, a Deputy with the Florence County Sheriff's Office, a letter or paper, writing, print, document, or electronic or verbal communication which contained a threat to take the life of or to inflict bodily harm upon the victim or members of his immediate family, in violation of Section 16-03-1040(A), S. C. 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.



\_\_\_\_\_  
E.L. Clements, III  
TWELFTH CIRCUIT SOLICITOR

**WITNESSES**

Alex Ussery

Florence Police Department

DOCKET NO. 2012-GS-21-01102

The State of South Carolina

County of

FLORENCE

FILED  
2012 SEP 6 AM 11:04  
CORRIE REEL-SHEARIN  
CLERK  
FLORENCE COUNTY, SC

**COURT OF GENERAL SESSIONS**

SEPTEMBER TERM 2012

THE STATE

vs.

KEVIN JOHN ANTHONY BACKUS

John C Jepertinger

**ARREST WARRANT NUMBER**

M379843

M379844

M379842

FILED

2012 SEP -6 AM 11:04

CORRIE REEL-SHEARIN  
CLERK  
FLORENCE COUNTY, SC

ACTION OF GRAND JURY

**TRUE BILL**

Indictment for

**UNLAWFUL DRUGS**

Foreperson of Grand Jury  
Date:

*Corrie Reel-Shearin*  
09-6-12

VERDICT

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF FLORENCE )

INDICTMENT FOR  
 UNLAWFUL DRUGS

At a Court of General Sessions, convened on SEPTEMBER 6, 2012 the Grand Jurors of FLORENCE County present upon their oath:

**COUNT ONE- TRAFFICKING IN COCAINE BASE**

That Kevin John Anthony Backus did in Florence County on or about May 10, 2012, knowingly, sell, deliver, purchase, or bring into this state; or did aid, abet, attempt or conspire to sell, deliver, purchase or bring into this state, or was in actual or constructive possession or attempted to become in actual or constructive possession of a quantity of Cocaine Base in an amount of more than ten grams but less than twenty-eight grams, same being a controlled substance all within the meaning of Section 44-53-110, et seq., S. C. Code of Laws, 1976, as amended, such possession not having been authorized and in violation of Section 44-53-375(C)(1)(C), S. C. Code of Laws, 1976, as amended, for the crime of trafficking.

**COUNT TWO - POSSESSION WITH INTENT TO DISTRIBUTE MARIJUANA**

That Kevin John Anthony Backus did in Florence County on or about May 10, 2012, possess with intent to distribute, dispense or deliver, or did aid, abet, attempt or conspire to distribute, dispense or deliver a quantity of Marijuana, a controlled substance under the provisions of Section 44-53-110, et seq., Code of Laws of South Carolina, 1976, as amended, such distribution not having been authorized by law, and being in violation of Section 44-53-370(B)(2), S. C. Code of Laws, 1976, as amended.

**COUNT THREE- POSSESSION WITH INTENT TO DISTRIBUTE COCAINE BASE  
 PROXIMITY OF A SCHOOL**

That Kevin John Anthony Backus did in Florence County, on or about May 10, 2012, unlawfully possess with intent to distribute a quantity of Cocaine Base, a controlled substance under provisions of Section 44-53-110, et seq., S. C. Code of Laws, 1976, as amended, within a one-half mile radius of the grounds of a public or private school, college, or university, public playground or park, or a public vocational or trade school or technical education center to wit: Carver Alternative School, in violation of Section 44-53-445(A), S. C. Code of Laws, 1976, as amended.

ATTACHED TO AND BECOMING A PART OF THE ORIGINAL INDICTMENT FOR TRAFFICKING IN COCAINE BASE, POSSESSION WITH INTENT TO DISTRIBUTE MARIJUANA AND POSSESSION WITH INTENT TO DISTRIBUTE COCAINE BASE PROXIMITY OF A SCHOOL, WITH THE AFORESAID NAMES(S) OF KEVIN JOHN ANTHONY BACKUS SHOWN THEREON:

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

A handwritten signature in cursive script, reading "E.L. Clements, III". The signature is written in dark ink and is positioned above a horizontal line.

---

**E.L. Clements, III**  
TWELFTH CIRCUIT SOLICITOR