

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_

Certiorari to Dillon County

Honorable Thomas A. Russo, Circuit Court Judge

JOHNNY JONES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000849

\_\_\_\_\_

APPENDIX

\_\_\_\_\_

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ATTORNEYS FOR RESPONDENT

**Vol. II of II**  
**RECEIVED**  
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S.C. SUPREME COURT

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1 "We're gonna try to get this. I talked to Kenard on this  
2 date. We're gonna try to get it, but I don't know for  
3 sure," you know?

4 But there is a difference between that and saying --  
5 you know the Solicitor saying, "Hey, will your guy take  
6 eight years," and not conveying it to your client. That's a  
7 -- that's a actual offer is, you know, "Can your guy take  
8 eight years?"

9 It might not be written, it might not look very  
10 official, but that is an offer from the State. And Mr.  
11 Redmond indicated that had he come back and said, "Yes, I'll  
12 take eight years," that he would have recommended the eight.

13 So I -- I -- I guess what I'm saying is we don't know  
14 exactly the nature of the five-year agreement, if there was  
15 a five-year agreement. I don't know what exactly it was  
16 because outside of a, you know, two-line thing and a -- and  
17 a note, we don't really have any records of it and she  
18 doesn't have any independent recollection of it. She's  
19 assuming that that was what it meant. I don't think that  
20 that's reliable enough to be -- to --

21 THE COURT: But you're willing to use Mr. Redmond's  
22 testimony as being reliable, and his own testimony was he  
23 didn't recall if he actually ever made the offer.

24 He recalls talking about an eight-year thing. He  
25 doesn't recall whether he ever actually made it, I mean,

1 that was his testimony.

2 MR. SHAFFER: And -- and Your Honor, I -- I think that  
3 his testimony that -- the difference is, is that he -- he's  
4 -- he's firm that he conveyed that he would allow them to  
5 plea to eight years at some point.

6 THE COURT: He -- He's -- he confirmed that today.

7 MR. SHAFFER: Yes, Your Honor.

8 THE COURT: He didn't say that that was -- he recalls  
9 there being some discussion. He can't recall whether it was  
10 in an offer or whether it was just talking.

11 As a matter of fact, he said, based on his -- and I --  
12 and I'm just trying to get -- I'm just trying to put the  
13 testimony in -- in the light in which it was presented. And  
14 I -- I know you're arguing for your side and the State  
15 argues for their side. I'm -- I'm just in the middle. I'm  
16 neutral.

17 MR. SHAFFER: Yes, Your Honor.

18 THE COURT: But -- but the testimony needs to speak as  
19 it was spoken. And -- and his testimony was that he doesn't  
20 recall whether there was an offer -- actual offer made  
21 either; but he does recall the number eight, and that eight  
22 years was something that stuck out in his mind.

23 But he doesn't recall whether he actually made that  
24 offer to her in writing or whether he spoke it or whether it  
25 was actually made. But he -- he believes there was some

1 discussion about it.

2 MR. SHAFFER: Yes, sir.

3 THE COURT: And that's his testimony, and -- and it is  
4 what it is.

5 Her testimony is basically the same, but as it relates  
6 to five years. And whether or not she conveyed it to Mr.  
7 Jones, she said that this -- "These are notes of my  
8 conversation of that meeting with him that day." So how are  
9 they different?

10 MR. SHAFFER: The time frame ---

11 THE COURT: Other than one is in your favor and one  
12 doesn't fall in your favor?

13 MR. SHAFFER: Your Honor, I think the -- the time  
14 frame's different. I also think that even if there was ---

15 THE COURT: Mr. Redmond didn't recall a time frame.

16 MR. SHAFFER: And Your Honor, I -- I may be mistaken,  
17 but it is my recollection that what he said was that it  
18 would -- would have been relatively close to the trial. It  
19 would have been early on. I would have been relatively  
20 close to the trial. It wasn't the day of trial, but it was  
21 relatively close.

22 THE COURT: I believe his testimony was, "I don't know  
23 when it was, but usually, in these type of matters, as they  
24 get closer to trial, that's when discussions and talks of  
25 plea offers comes up."

1           And that's when he said, "But in this case, that never  
2 occurred because we pulled a jury and went straight to  
3 trial. There were no negotiations."

4           So I don't think he recalls either. He was talking  
5 about what usually occurs.

6           MR. SHAFFER: And Your Honor, I think earlier on the  
7 -- with the five-year offer, though, I don't think it's a  
8 safe assumption to say just because she had written down a  
9 date and put a comment saying that she conveyed it to the  
10 client and the client rejected it --

11           THE COURT: Well, she just said that those were her --  
12 that -- my -- my recollection of her testimony was those  
13 were her notes of the conversation she had with her client  
14 on that date.

15           MR. SHAFFER: Yes, Your Honor.

16           THE COURT: So I'm assuming if -- if you and I have a  
17 meeting and I write something down, I'm assuming that we  
18 talked about that at our meeting or I wouldn't have written  
19 it down.

20           MR. SHAFFER: Yes, Your Honor. I -- I'm -- I'm not  
21 saying that that's not an assumption that can be made. I'm  
22 just saying that it -- given the -- the fact that she also  
23 made a statement that no offer was conveyed as well, that --  
24 that Mr. Redmond is probably more credible about what  
25 occurred that day than she is.

1           You know, he also -- Ms. McMillan, like every defense  
2 attorney I imagine, also has a ego and doesn't -- you know,  
3 most defense attorneys don't want to look like they -- they  
4 messed something up for their client as well.

5           Mr. Redmond has no reason to -- to do that. In fact,  
6 the State's position -- and he's still a representative of  
7 the State -- is contrary to the testimony that was given by  
8 Mr. Redmond. I -- I think that he certainly wouldn't have  
9 said that unless he was sure of it, and ---

10          THE COURT: No. He specifically said he wasn't sure.

11          MR. SHAFFER: And Your Honor, I think he wasn't sure  
12 of the wording. I think that was the context of what he  
13 said he wasn't sure of. But he knew -- he said he knew at  
14 some time that was sent from him to her, conveyed from her -  
15 - him to her.

16          THE COURT: All right.

17          MR. SHAFFER: And Your Honor, I have no further  
18 questions. I would like to put something on the record ---

19          THE COURT: Yes, sir.

20          MR. SHAFFER: --- as well, though. We had -- I -- I  
21 had actually subpoenaed co-counsel. Or not co-counsel.  
22 Mr. Burns's -- the co-defendent's counsel, Artie Burns's?

23          THE COURT: Mr. Watson?

24          MR. SHAFFER: Yes, Your Honor. And that --  
25 unfortunately, I -- I have not been able to reach him. I

1 have tried to call him prior to subpoenaing him, was not  
2 able to reach him. He is actually ill and had gotten the  
3 subpoena basically quashed or -- I -- I had got a call from  
4 Judge Seals saying, you know, he's excused because he was  
5 ill. I think he's going through chemotherapy.

6 But Your Honor, he did send a letter and at some point  
7 I would like to leave the -- the record open just so I  
8 include it. Basically it just said, "I don't recall any  
9 offer being made in this case."

10 MR. THOMAS: I have a copy of it ---

11 MR. SCHAFFER: You have a copy of the letter?

12 MR. THOMAS: Yeah.

13 MR. SHAFFER: I mean, just to cover my bases. I don't  
14 want anyone to say I didn't -- I didn't ...

15 (To Mr. Thomas) Do you object to it?

16 MR. THOMAS: No objection to that being entered.

17 THE COURT: All right. Now, should we -- we can make  
18 a copy of that so you can maintain yours.

19 MR. THOMAS: I -- he emailed me a copy, so ---

20 THE COURT: Okay. So you have no problem with us ---

21 MR. SHAFFER: No, you can use that one.

22 THE COURT: We can use that one. Okay. Well, we'll  
23 make that a Court's exhibit as well. And Mr. Shaffer, this  
24 is a letter from ---

25 MR. SHAFFER: David ---

1 THE COURT: --- Mr. Watson?

2 MR. SHAFFER: Yes, Your Honor.

3 THE COURT: Okay.

4 (Marked Court's Exhibit No. 2, letter.)

5 MR. SHAFFER: And I -- I just wanted to at least cover  
6 my bases so it can't be said that I didn't, you know --]

7 THE COURT: Yeah.

8 MR. SHAFFER: -- try to find out the other side of it.

9 THE COURT: Sure. Okay. All right. Well ---

10 MR. SHAFFER: And that's all, Your Honor.

11 THE COURT: I'm -- I'm going to read these matters and  
12 -- and look at the cases you've submitted. And I'll get you  
13 an answer.

14 MR. SHAFFER: Thank you, Your Honor.

15 MR. THOMAS: Thank you, Your Honor.

16

17 -- END OF TRANSCRIPT OF RECORD --

18

19

20

21

22

23

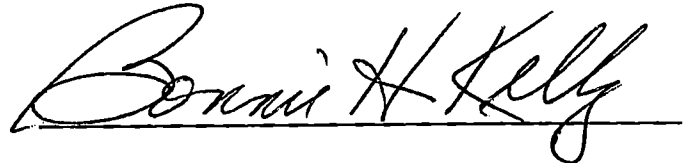
24

25

**CERTIFICATE**

1  
2 I, the undersigned Bonnie H. Kelly, Official Court  
3 Reporter for the Fifth Judicial Circuit of the State of  
4 South Carolina, do hereby certify that the foregoing is a  
5 true, accurate, and complete transcript of record of all the  
6 proceedings had and evidence introduced in the hearing of  
7 the captioned cause, relative to appeal, in the Fourth  
8 Circuit Court for Darlington County, South Carolina, on the  
9 21st day of July, 2014.

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

12  
13   
14

15 Bonnie H. Kelly, CVR

16 Official Court Reporter

17  
18 Columbia, South Carolina

19 August 25, 2018  
20  
21  
22  
23  
24

RECEIPT FOR EXHIBITS

CASE NO. 2011-CP-17-00153 JUDGE RUSSO  
 PLAINTIFF: Johnny Jones PLTF'S ATTY. Tristan Shaffer  
 DEFENDANT: State of SC DEF'D ATTY. Joshua L. Thomas  
 DATE TRIAL STARTED: 7-21-14 DATE TRIAL ENDED: 7-21-14

Received of Bonnie Kelly, Court Reporter for the above case, these exhibits:

		This space for Clerk of Court's use
C-1.	Two Pages - Not Document from Mr. McWilliam's file	FILED GWEN T. HYATT 2014 JUL 23 AM 10:28 CLERK OF COURT DILLON COUNTY
2.		
C-2	3-PS letter David Watson dated 7-16-14	
3.		
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This 21 day of July 2014 Page 1 of 1

DARLINGTON COUNTY CLERK OF COURT  
 By: Jennifer Sanders

THE CLERK OF COURT WILL RETAIN THE WHITE COPY OF THIS RECEIPT IN CIVIL CASES.  
 THE CLERK OF COURT WILL RETAIN THE PINK COPY OF THIS RECEIPT IN CRIMINAL CASES.

DW Appt. 7/26/06  
LEM Appt. 3/6/06  
7/19/06

Warrant K - 046047  
Indictment 06 CS 16441  
44-53-370

Johnny Jones

3/13/72

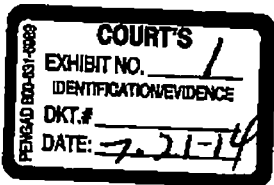
Trafficking Cocaine 44-53-370  
2/28/06

142g. (5oz) [28.4gr = 1oz]

David Lane DCSD

Note  
No SLED Report  
7/26/06

Offer 7/5/06 5 years  
plead to trafficking 1st



29.52  
83.28  
07.88  
138.68 gr.

In Vehicle - driver didn't  
know his name -  
Video of stop

Burns allowed search -  
space tire - 2 clear plastic bags

Prison Mary - Wip date 7/22/97 8.7 yr. prison  
3/19/92 3 yr 4 mo. prison

Trafficking Cocaine: 100-199+gr

25 years mandatory  
and 50,000\$

DL Suspend  
V10/cab  
NO Suspend  
NO probation  
NO parole  
NO Suspend

10/13/06  
Reg. W. ...  
King of ...  
Mami

(305) 491-1710  
Julie ...  
on ...

Walter Taylor 323 S.C. 162, 473 5528 817 (Ct App 1996)

Clements: 1. knowingly  
2. (a) Selling OR  
mfg or cultivating or

Miss De

: Complex cases - same day warrant issued for arrest <sup>511</sup>  
was same date to have gone to Court

David Shapiro (305) 547-0326

Case F 03/4769

Life : F/A pass. career criminal - ~~790-~~ 235

Violent career if jury "guilty", if Judge sentences - life  
or, 15 yrs mandatory  
if cooperates - will assist

~~Violent  
of career~~

**J. DAVID WATSON**  
ATTORNEY AT LAW  
200 WEST HAMPTON STREET  
P. O. DRAWER 969  
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July 16, 2014

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thewatsonlawfirm@gmail.com

VIA FACSIMILE 1-843-916-9311

Mr. Tristan M. Shaffer, Esquire  
Axelrod & Associates, P.A.  
Attorneys and Counselors at Law  
4701 Oleander Drive  
Myrtle Beach, SC 29577

RE: Johnny Jones -vs- State of South Carolina  
Case No. 2012-CP-16-0070

Dear Mr. Shaffer:

Please allow this letter to confirm our conversation of this morning in which you represent Johnny Jones in post-conviction relief.

There is a question as to whether or not a plea offer was made to Mr. Jones by Kenard Redmond to me and Lois McMillan.


I have no recollection of that occurring. Whether or not it did, I cannot tell you.

I trust this satisfies your inquiry.

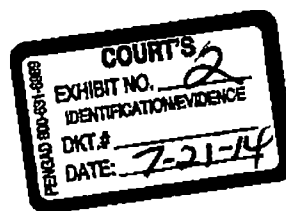
I am by copy of this letter informing Judge Seals of my correspondence with you.

With kindest personal regards, I remain

Yours truly,

  
J. David Watson  
Attorney at Law

mb  
pc: Honorable William Seals, Jr.



J. DAVID WATSON  
ATTORNEY AT LAW  
200 WEST HAMPTON STREET  
P. O. DRAWER 969  
DILLON, SOUTH CAROLINA 29536

OFFICE (843) 774-5678  
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July 16, 2014

E-MAIL  
thewatsonlawfirm@gmail.com

VIA FACSIMILE 1-843-423-0535

Honorable William Seals, Jr.  
Fourth Judicial Circuit Judge at Large  
208 West Dozier Street  
Marion, SC 29571

RE: Johnny Jones -vs- State of South Carolina  
Case No. 2012-CP-16-0070

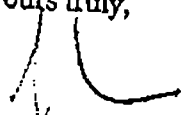
Dear Judge Seals:

I appreciate your time in the conference this morning. Attached is a copy of my letter to Mr. Shaffer indicating that I have no independent recollection of a plea offer being made.

I am by copy of this letter informing him of my correspondence with you.

With kindest personal regards, I remain

Yours truly,



J. David Watson  
Attorney at Law

mb

Attachment

pc: Tristan M. Shaffer, Esquire

THE

WATSON

LAW FIRM

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Attorney at Law

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Dillon, SC 29536

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FAX TRANSMITTAL SHEET

TO: Tristan Shaffer, Esq.

FAX: 1-843-916-9311

COMPANY: Axelrod & Associates, P.A.

FROM: J. David Watson

DATE: 07/16/14

NUMBER OF PAGES (including this sheet): 3

RE: Johnny Jones -vs- State of SC

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STATE OF SOUTH CAROLINA )  
COUNTY OF DILLON )

IN THE COURT OF COMMON PLEAS  
FOR THE FOURTH JUDICIAL CIRCUIT

Johnny Jones, #318253, )  
Applicant, )

Case No. 2011-CP-17-153

v.

State of South Carolina, )  
Respondent. )

A CERTIFIED  
TRUE COPY

ORDER OF DISMISSAL

*S. T. Hyatt*  
CLERK OF COURT  
DILLON COUNTY

FILED  
CLERK OF COURT  
DILLON COUNTY

2014 DEC 17 AM 10:42

FILED  
GWENTHYATT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 6, 2011. Respondent made a timely Return on or about October 19, 2011. The Court convened an evidentiary hearing into the matter on July 21, 2014, at the Darlington County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Also testifying were Applicant's trial counsel, Lois E. McMillan, Esquire, and Deputy Solicitor Kenard E. Redmond, Esquire. The Court had before it a copy of the trial transcript, the records of the Dillon County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief and amendments, the return, and the exhibits introduced at the hearing. The Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dillon County Clerk of Court. In May 2006, the Dillon County

Grand Jury indicted Applicant for trafficking cocaine, 100-200 grams (2006-GS-17-441). Lois E. McMillan, Esquire ("trial counsel"), represented Applicant. On October 17, 2006, Applicant proceeded to trial before the Honorable John L. Breeden Jr. and a jury. On October 20, 2006, the jury found Applicant guilty as indicted. Judge Breeden sentenced Applicant to twenty-five (25) years imprisonment.

Applicant filed a timely notice of appeal, and Robert M. Pachak, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on December 18, 2008. State v. Jones, Op. No. 2008-UP-715 (S.C. Ct. App. filed December 18, 2008). The remittitur was returned to the circuit court on January 5, 2009.

## **II. ALLEGATIONS**

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

1. "Ineffective assistance of counsel"
2. "Ineffective appellate counsel"

On or about July 15, 2013, Applicant filed an amendment to the application alleging the following grounds for relief:

1. "Ineffective assistance of appellate counsel for failure to argue that the drugs should have been suppressed based on the termination of the stop."
2. "Ineffective assistance of trial counsel for failure to argue that "suspicious" behavior and presence alone are insufficient to prove constructive possession."
3. "[I]neffective assistance of appellate counsel for failure to adequately argued that that "suspicious" behavior and presence alone are insufficient to prove constructive possession."
4. "Ineffective assistance of trial counsel for failure to object to the solicitor's closing arguments concerning the war on drugs."
5. "Ineffective assistance of counsel for failure to object to the "strong evidence" language in the constructive possession charge."

At the evidentiary hearing, Applicant proceeded on the allegations contained in his amendment, as well as an allegation of ineffective assistance of counsel for failing to convey a plea offer.

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

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

#### **A. Summary of Testimony**

Deputy Solicitor Redmond ("the solicitor") testified he recalled having informal discussions with trial counsel about plea offers. He testified he recalled possibly making an eight (8) year offer, but could not remember specifics details of the offer. He testified he normally makes formal offers in writing, but was not aware of any written offers in this case. The solicitor specifically recalled trial counsel informing him Applicant desired a trial and was not interested in a plea.

Trial counsel testified she was a part-time public defender when appointed to Applicant's case. She recalled her trial strategy was to challenge the traffic stop based on the recent Pichardo<sup>1</sup> case. She also recalled challenging the admission of the drug evidence because of discrepancies in the physical evidence. Trial counsel testified she discussed these strategies with Applicant prior to trial. She testified she did not promise Applicant the case would be dismissed

---

<sup>1</sup> State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005).

based on the stop, and told him he was "rolling the dice" by going to trial. Trial counsel recalled objecting to the solicitor's closing argument about law enforcement's role in maintaining law and order. She also recalled arguing mere presence in the car was not sufficient to convict Applicant.

Trial counsel testified her file indicates she met with the solicitor on July 15, 2006, and discussed the possibility of a plea. She recalled the solicitor discussed a potential five (5) year sentence, but did not make an official offer. She testified she did not think this was an official offer at that time. However, she testified she discussed the possibility of a five (5) year offer with Applicant on July 26, 2006. At that time, Applicant signed her notes indicating he did not want to accept a five (5) year offer. A copy of this page of trial counsel's notes was entered into evidence at the evidentiary hearing.

Applicant testified he spoke to his attorney about a plea, but she never addressed the issue. He testified he first heard about the eight (8) year plea offer when he arrived at the department of corrections. Applicant maintained he learned of the eight (8) year offer from paperwork in his possession, and not from information provided by his current attorney. He testified he would have accepted an eight (8) year offer, and thinks twenty-five (25) years is an excessive sentence.

#### **B. Ineffective Assistance of Trial 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, 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 trial cannot be relied upon as having produced a just result." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (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)). Courts presume 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).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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.

**1. Failure to argue suspicious behavior and presence alone are insufficient to prove constructive possession.**

The Court finds Applicant failed to meet his burden of proving counsel ineffective for failing to further argue against Applicant's constructive possession of the drugs. Trial counsel and counsel for Applicant's co-defendant presented a lengthy suppression motion in an effort to invalidate the traffic stop. In that argument, the parties argued there was no reasonable suspicion

to prolong the traffic stop. Trial counsel also argued the State had not proven constructive possession merely because Applicant was a passenger in the car. (Trial Tr. p. 126, line 25-p.128, line 10). She raised this same argument in her directed verdict motion. (Trial Tr. p. 307, lines 8-16; p. 309, lines 3-10). Trial counsel also re-raised the argument in her post-trial motions. (Trial Tr. p. 397, line 22 – p. 399, line 16). In light of these thorough arguments regarding constructive possession, the Court finds Applicant has not demonstrated trial counsel was ineffective in failing to further argue this issue.

**2. Failure to object to the solicitor's closing arguments.**

The Court finds Applicant failed to meet his burden of proof to show trial counsel ineffective for failing to object to the solicitor's closing arguments concerning the "war on drugs." The Court notes trial counsel objected to the solicitor's argument defending the actions of law enforcement. (Trial Tr. p. 322, lines 8-14). Her objection was apparently overruled by the trial judge, as he allowed the solicitor to continue his arguments. The Court finds trial counsel was not deficient in failing to further object later in the solicitor's closing because the trial court had already allowed such references.

The Court further finds Applicant has not demonstrated he was prejudiced by the lack of a second objection. Even improper closing arguments may be harmless if, viewed in the context of the entire record, they did not so infect the trial with unfairness as to offend due process. State v. Libarte, 336 S.C. 648, 655-56, 521 S.E.2d 744, 748 (Ct. App. 1999) (citing State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981)). Here, the solicitor's comments did not rise to such a level. Initially, the Court notes Applicant's reliance on Libarte is misplaced. Although Libarte stands for the proposition that comments

about "the war on drugs" are improper, the Court of Appeals reversed Libarte's conviction based on an "improper argument [that] invited the jury to disregard the reasonable doubt standard[.]" Id. at 656, 521 S.E.2d at 748. In Applicant's case, the solicitor did not directly argue Applicant was attempting to use the reasonable doubt standard to protect himself from conviction. Instead, he referenced the "war on drugs" briefly at the conclusion of his closing argument. Viewed in light of the entire record, the Court finds this argument did not so infect the trial with unfairness as to require reversal. Furthermore, the record contains substantial circumstantial evidence of Applicant's guilt. See Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (no prejudice where there is overwhelming evidence of guilt); Brown v. State, 383 S.C. 506, 518, 680 S.E.2d 909, 916 (2009) (same); Franklin v. Catoe, 346 S.C. 563, 574, 552 S.E.2d 718, 724 (2001) (same). Accordingly, Applicant has not demonstrated he was prejudiced by lack of a further objection by trial counsel.

**3. Failure to object to "strong evidence" language in constructive possession charge.**

The Court finds Applicant has not demonstrated trial counsel was ineffective for failing to object to the trial judge's charge that "[a]ctual knowledge of the presence of the cocaine based drugs is strong evidence of the defendant's intent to control its disposition or use." (Trial Tr. p. 359, lines 18-21). Such language was appropriate prior to the Supreme Court's decision in State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013). There, the Supreme Court overruled its holding in Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994), which specifically approved of the use of the charge. Thus, the law in effect at the time of Applicant's trial allowed use of the "strong evidence" charge. Accordingly, trial counsel was not deficient for failing to make an objection to a proper jury charge. See Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456

(1994) (citations omitted), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) (attorney not required to be clairvoyant or prophetic in anticipating changes in law). Furthermore, Applicant has not shown he was prejudiced by the charge based on the overwhelming evidence of his guilt. Cheeks, 401 S.C. at 329, 737 S.E.2d at 484.

#### **4. Failure to convey plea offer.**

The Court finds Applicant failed to meet his burden of proof to show trial counsel failed to convey any plea offer to him. Regarding this allegation, the Court finds the testimony of trial counsel and the solicitor credible. Correspondingly, the Court finds Applicant's testimony not credible.

To be successful on an allegation of an un-conveyed plea offer, Applicant must prove: (1) trial counsel's failure to communicate the State's initial plea offer constituted deficient performance, and (2) Applicant was prejudiced by the deficient performance, or there was a reasonable probability that but for this deficient performance, he would have accepted he original plea offer. Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009). Generally, failure to convey a plea offer constitutes deficient performance, although the existence of prejudice needs to be evaluated on a case-by-case basis. Id. at 613, 675 S.E.2d at 422. To show prejudice from a failure to convey a plea offer, Applicant must:

demonstrate a reasonable probability [he] would have accepted the earlier plea offer had they been afforded effective assistance of counsel. [He] must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Missouri v. Frye, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1399, 1409 (2012).

Here, the Court finds Applicant failed to demonstrate trial counsel was deficient in failing to convey the solicitor's offer. Trial counsel discussed a five (5) year plea offer with Applicant, who rejected it. Trial counsel wisely had Applicant indicate his rejection in writing. The Court finds this evidence credible and gives it great weight. Accordingly, the Court finds trial counsel relayed the five (5) year plea offer to Applicant, and Applicant made the decision to decline the offer.

Applicant alleged he learned of an eight (8) year offer upon his review of documents after his conviction. However, his testimony in this regard was suspect and not credible. Although the solicitor testified there may have been discussion of an eight (8) year offer, he maintained there was no formal, written offer for eight (8) years. Assuming, *arguendo*, such an offer existed and trial counsel failed to relay it to Applicant, he has not shown he was prejudiced. Because the record indicates Applicant rejected a five (5) year offer, the Court finds he has not demonstrated he would have accepted an eight (8) year offer. Frye, 132 S.Ct. at 1409. Furthermore, the testimony of the solicitor and trial counsel indicates Applicant always intended to stand trial on this charge. Accordingly, the Court finds Applicant has not demonstrated a reasonable probability he would have entered into any plea agreement the State offered. Davie, 381 S.C. at 608, 675 S.E.2d at 420. Therefore, he has not shown he was prejudiced by trial counsel's performance regarding plea negotiations.

**C. Ineffective Assistance of Appellate Counsel.**

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397

S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

An applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537, 397 S.E.2d at 526; Strickland, 466 U.S. at 687. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Furthermore, the applicant must prove prejudice by showing "there is a reasonable probability he would have prevailed on appeal." Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (citations omitted).

**1. Failure to argue drugs should have been suppressed based on the termination of the stop.**

The Court finds Applicant failed to meet his burden of showing ineffective assistance of appellate counsel for failing to challenge the trial judge's admission of the drug evidence over Applicant's Fourth Amendment objection. Initially, the Court notes Applicant failed to present any testimony from appellate counsel on this issue. As such, the Court cannot speculate as to why certain issues were not briefed. Cf. Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, without a witness's testimony, "any finding of prejudice is merely speculative").

Regardless, Applicant has not demonstrated he would have been successful had appellate counsel challenged the admission of this evidence. An officer may continue questioning a vehicle's driver and passenger outside the scope of an initial traffic stop when either 1) the officer has a reasonable articulable suspicion of other illegal activity or 2) the stop has become a consensual encounter. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. Here, ample evidence supports the trial judge's ruling there was reasonable suspicion to extend the stop. There was an automobile lease indicating the car was to remain in Florida, and Applicant and the co-defendant gave conflicting and inconsistent answers to general questions about their destination and purposes. State v. Jones, 364 S.C. 51, 53-54, 610 S.E.2d 846, 847 (Ct. App. 2005) (reasonable suspicion where driver and passenger gave incomplete and inconsistent answers). The record also supports the trial judge's finding the co-defendant gave a voluntary consent to search the vehicle. State v. Provet, 405 S.C. 101, 114, 747 S.E.2d 453, 460 (2013) (consent voluntary when given after officer had returned driver's license and registration and issued citation, and there was no show of force constraining driver). The Court also notes Applicant's co-defendant unsuccessfully challenged the traffic stop on these same grounds in his direct appeal. State v. Burns, Op. No. 2009-UP-262 (S.C. Ct. App. filed June 1, 2009). This Court has no reason to believe the Court of Appeals would have come to a different conclusion in Applicant's case had the same issue been argued. Accordingly, Applicant has not shown he would have been successful if this issue had been raised. Anderson, 354 S.C. at 434, 581 S.E.2d at 835.

**2. Failure to adequately argue "suspicious" behavior and presence alone are insufficient to prove constructive possession.**

The Court finds Applicant failed to carry his burden of proving appellate counsel ineffective for failing to further argue against constructive possession. Initially, the Court notes

this ground for relief is procedurally barred as an attempt to re-litigate an issue already decided by the Court of Appeals. See Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (“It is uniformly held that an application for post-conviction relief is not a substitute for an appeal.”). The issue in Applicant’s direct appeal was “[w]hether the trial counsel erred in refusing to grant a directed verdict ...when the State failed to present any substantial evidence [Applicant] was in constructive possession of the cocaine[.]” (Brief of App. p. 3). In making this argument, appellate counsel averred Applicant’s presence in the car was not sufficient to establish constructive possession. He also argued “[s]uspicion and conjecture should not be use [sic] to convict [Applicant].” (Brief of App. p. 9). Because this issue was directly raised on direct appeal, Applicant cannot now raise it in a collateral attack. Regardless, the Court notes the record contains sufficient evidence to support the trial judge’s denial of Applicant’s directed verdict motion based on the constructive possession issue. Accordingly, Applicant has not shown he would have been successful if this issue had been further argued or presented differently on direct appeal. Anderson, 354 S.C. at 434, 581 S.E.2d at 835.

#### **C. All Other Allegations**

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

#### **IV. CONCLUSION**

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application.

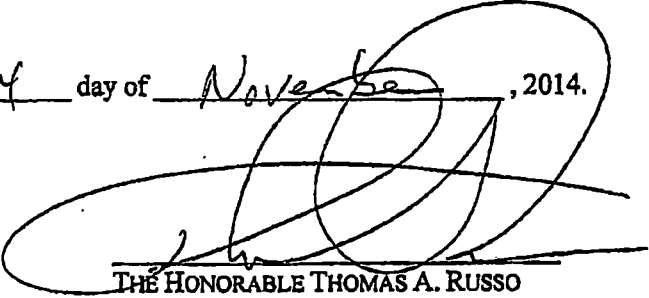
Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED THAT:**

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 24 day of November, 2014.

  
 THE HONORABLE THOMAS A. RUSSO  
 Presiding Judge

Lexington, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF DILLON  
IN THE COURT OF COMMON PLEAS

RECEIVED  
APR 11 2017  
S.C. SUPREME COURT  
Applicant,

JOHNNY JONES, 318253,

v.

STATE OF SOUTH CAROLINA,


Respondent.

CERTIFICATE OF SERVICE

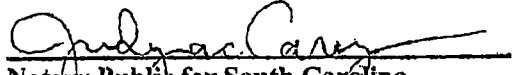
The undersigned hereby certifies that a true copy of the Order of Dismissal has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Tristan M. Shaffer, Esquire  
Axelrod & Associates, PA  
4701 Oleander Drive  
Myrtle Beach SC 29577

This 26th day of January, 2015.

  
JOSHUA L. THOMAS  
ATTORNEY FOR RESPONDENT

SWORN to before me this 26th day of January, 2015.

  
Notary Public for South Carolina.  
My Commission Expires: May 14, 2024

STATE OF SOUTH CAROLINA )  
COUNTY OF DILLON )

Johnny Jones, #318253 )

Applicant, )

v. )

State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE FOURTH JUDICIAL CIRCUIT

2011-CP-17-0153

S.C. SUPREME COURT

RECEIVED  
APR 11 2017

ORDER GRANTING AN APPEAL  
PURSUANT TO AUSTIN V. STATE<sup>1</sup>

This matter comes before the Court by way of an application for post-conviction relief filed May 6, 2011. Respondent made its Return on October 19, 2011, requesting an evidentiary hearing. An evidentiary hearing on the matter was convened on July 21, 2014, at the Darlington County Courthouse. Applicant was present at the hearing and represented by Tristan M. Gaffer, Esquire. Joshua I. Thomas, Esquire, of the South Carolina Office of the Attorney General represented the Respondent.

FILED  
2017 FEB 13 AM 10:48  
CLERK OF COURT  
DILLON COUNTY

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dillon County Clerk of Court. In May 2006, the Dillon County Grand Jury indicted Applicant for trafficking cocaine, 100-200 grams (2006-GS-17-441). Lois E. McMillan, Esquire ("trial counsel"), represented Applicant. On October 17, 2006, Applicant proceeded to trial before the Honorable John L. Breeden Jr. and a jury. On October 20, 2006, the jury found Applicant guilty as indicted. Judge Breeden sentenced Applicant to twenty-five (25) years imprisonment.

Applicant filed a timely notice of appeal, and Robert M. Pachak, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed

<sup>1</sup> Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Applicant's conviction on December 18, 2008. State v. Jones, Op. No. 2008-UP-715 (S.C. Ct. App. filed December 18, 2008). The remittitur was returned to the circuit court on January 5, 2009.

### ALLEGATIONS

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

1. "Ineffective assistance of counsel"
2. "Ineffective appellate counsel"

On or about July 15, 2013, Applicant filed an amendment to the application alleging the following grounds for relief:

1. "Ineffective assistance of appellate counsel for failure to argue that the drugs should have been suppressed based on the termination of the stop."
2. "Ineffective assistance of trial counsel for failure to argue that "suspicious" behavior and presence alone are insufficient to prove constructive possession."
3. "[I]neffective assistance of appellate counsel for failure to adequately argued that that "suspicious" behavior and presence alone are insufficient to prove constructive possession."
4. "Ineffective assistance of trial counsel for failure to object to the solicitor's closing arguments concerning the war on drugs."
5. "Ineffective assistance of counsel for failure to object to the "strong evidence" language in the constructive possession charge."

At the evidentiary hearing, Applicant proceeded on the allegations contained in his amendment, as well as an allegation of ineffective assistance of counsel for failing to convey a plea offer.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his prior application. Applicant's PCR Counsel never placed the

signed Order of Dismissal in Applicant's file; therefore, Applicant was never notified of a final resolution of his case and missed the deadline to file an appeal of his PCR application.

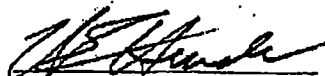
After review of the facts and circumstances surrounding the waiver of Applicant's right to appeal the denial of his post-conviction relief application, this Court finds that Applicant is entitled to appeal the denial of his post-conviction relief application (2011-CP-17-0153) pursuant to Austin v. State. This Court finds that Applicant did not voluntarily waive his right to appeal the post-conviction relief court's denial and dismissal of his prior post-conviction relief action.

Based upon the foregoing, this Court finds that the granting of an appeal of Applicant's post-conviction relief action (2011-CP-17-0153) pursuant to Austin v. State is warranted.

**IT IS THEREFORE ORDERED:**

1. That Applicant be granted an appeal of case 2011-CP-17-0153 pursuant to Austin v. State; and
2. That Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 20<sup>th</sup> day of December, 2016.

  
ROGER E. HENDERSON  
Chief Administrative Judge  
Fourth Judicial Circuit

Chesterfield, South Carolina.

STATE OF SOUTH CAROLINA  
COUNTY OF DILLON  
IN THE COURT OF COMMON PLEAS

JOHNNY JONES, #318253,

Applicant,

v.

STATE OF SOUTH CAROLINA,

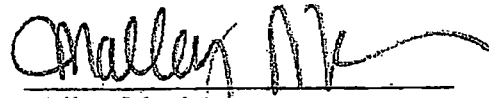
Respondent.

CERTIFICATE OF SERVICE

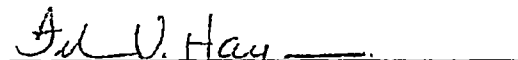
The undersigned hereby certifies that a true copy of the **Order Granting an Appeal Pursant** to **Austin v. State** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Tristan Shaffer, Esquire  
225 Columbia Avenue  
Columbia, SC 29036

This 9<sup>th</sup> day of March, 2017.

  
Mallory Morris  
Legal Assistant for Respondent

SWORN to before me this 9<sup>th</sup> day of March, 2017.

  
Notary Public for South Carolina.  
My Commission Expires: 04-21-2018

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM DILLON COUNTY  
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Case No. 2011-CP-17-0153

RECEIVED

APR 11 2017

S.C. SUPREME COURT

Johnny Jones # 318253,

Petitioner,

v.

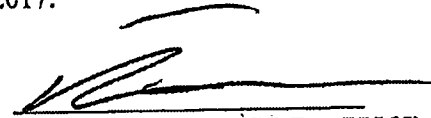
The State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner appeals the order of the Hon. Thomas Russo dismissing his post-conviction relief action filed on December 17, 2014. This order was mailed to Counsel's office on January 26, 2015, but Counsel was unaware of it. In an order dated February 11, 2017, Petitioner was granted a belated appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.3d 395 (1991). The *Austin* order was mailed to Counsel and received on March 13, 2017.

April 7, 2017

  
Tristan M. Shaffer (SC Bar 77565)  
225 Columbia Ave.  
Chapin, South Carolina 29036  
(803) 941-7514  
tristan@shafferlawsc.com  
Attorney for Petitioner

Other Counsel of Record:  
Johnny E. James, Jr.  
South Carolina Attorney General's Office  
P.O. Box 11549  
Columbia, South Carolina 29211  
Attorney for Respondent

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

RECEIVED  
APR 11 2017  
S.C. SUPREME COURT

APPEAL FROM DILLON COUNTY  
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Case No. 2011-CP-17-0153

Johnny Jones # 318253,

Petitioner,

v.


The State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that on the date below I served the Notice of Appeal on The State of South Carolina by mailing a copy to the Attorney General's Office at P.O. Box 11549, SC 29211.

April 7, 2017

  
Tristan M. Shaffer (SC Bar 77565)  
225 Columbia Ave.  
Chapin, South Carolina 29036  
(803) 941-7514  
tristan@shafferlawsc.com  
Attorney for Petitioner

Other Counsel of Record:  
Johnny E. James, Jr.  
South Carolina Attorney General's Office  
P.O. Box 11549  
Columbia, South Carolina 29211  
Attorney for Respondent

WITNESSES

David Lane

Dcsd

ARREST WARRANT #:

K046047

Arrested on February 28, 2006

ACTION OF GRAND JURY

**TRUE BILL**

Foreman:

*Petie Jury 5/18/06*  
Grand Jury

VERDICT

Foreman:

Petie Jury

Date:

DOCKET #: 06GS17-0441

THE STATE OF SOUTH CAROLINA

County of Dillon

COURT OF GENERAL SESSIONS

Term: May, 2006

THE STATE

VS.

Johnny Jones

INDICTMENT FOR

0280

TRAFFICKING 100 GRAMS OR MORE COCAINE

BUT LESS THAN 200 GRAMS (44-53-370)

ACCEPTED  
TRUE COPY

*Queen T. Heath*

CLERK OF COURT  
DILLON COUNTY

STATE OF SOUTH CAROLINA )  
 County of Dillon )

INDICTMENT #06GS17-0441

At a Court of General Sessions, convened on May 22, 2006  
 the Grand Jurors of Dillon County present upon their oath:

COUNT: TRAFFICKING 100 GRAMS OR MORE COCAINE  
 BUT LESS THAN 200 GRAMS (44-53-370)

That Johnny Jones in the County of Dillon on or about February 28, 2006,  
 unlawfully and knowingly transport, and/or deliver and was knowingly in  
 possession of more than 100 grams but less than 200 grams of cocaine, this  
 constituting the crime of Trafficking Cocaine under provisions of Sec.  
 44-53-370, et. seq., Code of Laws of South Carolina (1987), as amended.

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

SOLICITOR: \_\_\_\_\_

*John H. Hodge*

A CERTIFIED  
 TRUE COPY  
*John H. Hodge*  
 CLERK OF COURT  
 DILLON COUNTY

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Dillon  
STATE VS.  
Johnny Jones  
AKA:  
Race: B Sex: M Age: 34  
DOB: 11/12 SS#: \_\_\_\_\_  
Address: \_\_\_\_\_  
City, State, Zip \_\_\_\_\_  
DL# \_\_\_\_\_ SID# \_\_\_\_\_

INDICTMENT/CASE#: 06 -GS- 17 441  
A/W#: K 046047  
Date of Offense: 2/28/2006  
S.C. Code §: 44-53-370  
CDR Code #: 0121810  
 CASE RESTORED  
SENTENCE  
 PLEA  TRIAL

In disposition of the said indictment comes now the Defendant who was  CONVICTED OF or  PLEADS TO: Trafficking Cocaine More than 100gr/less 200gr in violation of § 44-53-370 of the S.C. Code of Laws, bearing CDR Code # 0121810  
 NON-VIOLENT  VIOLENT  SERIOUS  MOST SERIOUS  17-25-45

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

ATTEST: Mary J. Phelan Solicitor Johnny Jones Defendant Luis E. McMillan Attorney for Defendant

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center, for a determinate term of 25 days/months/years or  under the Youthful Offender Act not to exceed \_\_\_\_\_ years and/or to pay a fine of \$5000.00, provided that upon the service of \_\_\_\_\_ days/months/years and/or payment of \$ \_\_\_\_\_; plus costs and assessments as applicable\*; the balance is suspended with probation for \_\_\_\_\_ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or  CONSECUTIVE to sentence on: \_\_\_\_\_  
 The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. SINCE FEB. 28, 2006  
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

RESTITUTION:  Heard,  Waived,  Ordered PTUP \_\_\_\_\_ days/hours Public Service Employment  
Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_  
Payment Terms: Obtain GED  
 set by SCDPPPS 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: \_\_\_\_\_  
Recipient: \_\_\_\_\_  
\*Fine: \$2,000.00  
§14-1-206 (Assessments 107.5%) \$3,750.00  
§14-1-211(A)(1) (Conv. Surcharge) \$100 \$100.00  
§14-1-211(A)(2) (DUI Surcharge) \$100 \$100.00  
§56-5-2995 (DUI Assessment) \$12 \$  
§ 35.13 (Public Def/Prob) \$500 \$  
§73.3, 1B TP (Law Enforce. Funding) \$25 \$25.00  
§33.7, 1B TP (Drug Court Surcharge) \$100 \$100.00  
§50-21-114(BU) Breath Test Fee) \$50 \$  
§56-5-2942(J) (Vehicle Assessment) \$40/ea \$  
3% to County (if paid in installments) \$319.25  
TOTAL \$107,094.25  
 Appointed PD or appointed other counsel, §35.13 TP Requires \$500 be paid to Clerk during probation.

Sam T. Agard  
Clerk of Court/ Deputy Clerk  
Court Reporter: JANELA CARTEE

PRESIDING JUDGE [Signature]  
Judge Code: 01101016  
Sentence Date: October 20, 2006

SCCA/217 (2/2006) White - Clerk Canary - Corrections Pink - Probation Goffenrod - Defendant  
Sam T. Agard  
CLERK OF COURT  
DILLON COUNTY

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

---

Appeal from Dillon County

John L. Breeden, Jr., Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JOHNNY JONES,

APPELLANT

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INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Whether the trial court erred in refusing to grant a directed verdict to the charge of trafficking in cocaine when the State failed to present any substantial evidence beyond a reasonable doubt that appellant, as a passenger in the vehicle, was in constructive possession of the cocaine?

STATEMENT OF THE CASE

Appellant and a co-defendant were convicted of trafficking in cocaine 100 grams or more but less than 200 grams after a jury trial held before the Honorable John L. Breeden, Jr. in Dillon County from October 17-20, 2006. Appellant was sentenced to twenty-five (25) years and was fined \$50,000.00.

This appeal follows.

ARGUMENT

The trial court erred in refusing to grant a directed verdict to the charge of trafficking in cocaine because the State failed to present any substantial evidence beyond a reasonable doubt that appellant, as a passenger in the vehicle, was in constructive possession of the cocaine.

Sgt. David Lane with the Dillon Police Department testified that he belonged to the I.C.E. team which stands for Interstate Criminal Enforcement. They work on I-95 and make traffic stops for routine violations and then make an attempt to find criminal activity such as drug trafficking and money laundering. (Tr. p. 165, line 18 – p. 166, line 17) On February 28, 2006, at 9:18 a.m. he stopped a blue Dodge Charger for weaving from lane to lane. (Tr. p. 169, lines 9-14; tr. p. 170, line 23 – p. 171, line 10; tr. p. 183, lines 4-11) Sgt. Lane went to the passenger side window and asked the driver, co-defendant Burns, for his drivers license and registration. Appellant Jones, was on the passenger side. Burns hands were shaking and he submitted a car rental agreement out of Florida from Enterprise Rental. (Tr. p. 183, line 22 – p. 184, line 23) The rental agreement was under the name of Mike Williams but Burns was listed as an additional driver. Burns was asked to go to the rear of the vehicle and Sgt. Lane patted him down for weapons. He then questioned Burns about who rented the vehicle as it was only allowed in the State of Florida. Lane had Burns' license and put it over the name at the top of the lease and Burns pushed it down so he could see whose name was on the agreement. That caused Lane concern because he knew then that Burns did not know who rented the vehicle. But Burns then said that appellant's uncle rented the vehicle but he could not tell him who the uncle was. (Tr. p. 188, line 14 – p. 190, line 25)

Sgt. Lane told Burns the reason for the stop and Burns said he was doing something with his cell phone and it caused him to swerve. (Tr. p. 191, lines 20-23) When asked where they were heading, Burns said to the University of Virginia where his cousin was having an M.R.I. done on his knee. Burns did not seem to know appellant's name but at one point did call him Johnny but gave no last name. (Tr. p. 192, line 10 – p. 193, line 10)

Sgt. Lane left Burns and went over to appellant and asked him where they were going. He said they were going to Virginia to see some girls and then to Atlanta. (Tr. p. 193, line 23 – p. 194, line 6) He then asked appellant who rented the vehicle and he said his uncle rented it but he was not sure what his uncle's name was. Then appellant said that is really wasn't his uncle. Appellant also said Burns first name was Audie when it was really Artie. He also did not know his last name. (Tr. p. 195, lines 4-22)

Sgt. Lane said he was concerned that they might be some sort of criminal activity but he did not know what kind. He went back to his car and began writing a warning citation for failure to maintain the lane. He told Burns it would be a warning and wanted to know if he could ask him a few questions. Burns said yes. He asked if he could search the vehicle and Burns said yes without hesitation. (Tr. p. 196, line 2 – p. 197, line 25) He then asked Burns to open the trunk and he did. A search of the trunk resulted in finding cocaine. (Tr. p. 198, line 3 – p. 200, line 13)

On cross-examination, Sgt. Lane said he did not know when the drugs were put in the car, he did not know who put the drugs in the car, and he did not talk with the person who rented the car. (Tr. p. 216, lines 16-24) He had no way to say that the cocaine belonged to either one of the two defendants on trial. (Tr. p. 221, lines 3-7) He could not say if the

drugs were in the rental car prior to the signing of the rental agreement. (Tr. p. 234, line 24 – p. 235, line 2)

At the conclusion of the State's case defense counsel moved for a directed verdict because the State failed to prove that appellant was in possession of the drugs. This was because the State failed to prove knowledge of the drugs by appellant and constructive possession in that he had dominion and control of the drugs. The trial judge admitted that it was a real close question but ruled that he was going to let it go to the jury and reserve his right to rule on the issue at the close of the case. (Tr. p. 306, line 7 – p. 311, line 16) The trial judge's ruling was in error.

Due process as guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979).

Our Court has held:

[T]he trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. [Emphasis added].

State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), cert. denied, 493 U.S. 895, 110 S.Ct. 246 (1989).

In applying this standard, our Court has held that evidence which is “sufficient to raise a strong suspicion of the guilt of the accused” is not sufficient to constitute “any evidence from which the guilt of the accused may be fairly and logically deduced.” State v. Totherow, 263 S.C. 275, 210 S.E.2d 228, 230 (1974). See, also, State v. Turner, 117 S.C. 470, 109 S.E. 119, 120 (1921). The motion for a directed verdict should be granted, therefore, “where evidence merely raises a suspicion of guilt, or is such to permit the jury to merely conjecture or to speculate as to the accused’s guilt.” State v. Brown, 267 S.C. 311, 227 S.E.2d 674, 677 (1976), citing State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93, cert. denied, 420 U.S. 945 (1974). “If the evidence is consistent with both innocence and guilt it cannot support a conviction.” United States v. Varoz, 740 F.2d 772, 775 (10<sup>th</sup> Cir. 1984); United States v. Ortiz, 445 F.2d 1100, 1103 (10<sup>th</sup> Cir. 1971). Guilt is only to be found when there is a “rationally supportable state of near certitude.” Evans-Smith v. Taylor, 19 F.3d 899, 906 (4<sup>th</sup> Cir. 1994).

The State failed to prove constructive possession, which requires a showing that appellant had dominion and control over the drugs or the premises in which the drugs were found as well as knowledge of the presence of the drugs. State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981) Mere presence in an area where drugs are found is insufficient to prove constructive possession. State v. Kimbrell, 294, S.C. 51, 362 S.E.2d 630 (1987) Sitting at a table covered with narcotics in someone else’s apartment does not prove a defendant had dominion and control over those drugs. Goldsmith v. Witkowski, 981 F.2d 697 (4<sup>th</sup> Cir.) A defendant who lives in his mother’s house where crack cocaine was found did not establish the defendant had dominion and control over the drugs. State v. Heath, 370 S.C. 326, 635 S.E.2d 18 (2006) Likewise, being present as a nervous passenger in a car where drugs are

found does not establish that the passenger had dominion and control over the drugs. State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976).

In this case it was the co-defendant whose name was on the lease as an additional driver, it was the co-defendant who was driving the car, and it was the co-defendant who gave consent to search and it was the co-defendant who opened the trunk of the car. The co-defendant had dominion and control over the drugs. Suspicion and conjunctive should not be use to convict appellant.

CONCLUSION

A directed verdict should be granted in appellant's favor.

Respectfully submitted,

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Robert M. Pachak  
Appellate Defender

ATTORNEY FOR APPELLANT.

This 20th day of June, 2007.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Dillon County

John L. Breeden, Jr., Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

JOHNNY JONES,

APPELLANT  
\_\_\_\_\_

**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**  
\_\_\_\_\_

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Tr. p. 150 – p. 237
- (3) Tr. p. 306 – p. 311

I certify that this designation contains no matter which is irrelevant to this appeal.

June 20th, 2007

\_\_\_\_\_  
Robert M. Pachak  
Appellate Defender

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Division of Appellate Defense  
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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

The State, Respondent,

v.

Johnny Jones, Appellant.

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Appeal From Dillon County  
John L. Breeden, Jr., Circuit Court Judge

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Unpublished Opinion No. 2008-UP-715  
Submitted December 1, 2008 – Filed December 18, 2008

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**AFFRIMED**

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Appellate Defender Robert M. Pachak, of Columbia, for  
Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy  
Attorney General John W. McIntosh, Assistant Deputy  
Attorney General Salley W. Elliott, Senior Assistant  
Attorney General Norman Mark Rapoport, all of Columbia;  
and Solicitor Jay E. Hodge, Jr., of Cheraw, for Respondent.

**PER CURIAM:** Johnny Jones appeals his conviction and sentence for trafficking cocaine, arguing the trial court erred by refusing to direct a verdict of acquittal. Jones claims he was merely present as a passenger in the vehicle in which cocaine was found and did not constructively possess the drugs.

Viewing the evidence in the light most favorable to the State, as we must, we find the State offered sufficient circumstantial evidence to prove Jones had the right to exercise constructive possession over the cocaine in the trunk of the car. See State v. Weston, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006) (holding if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury). Specifically, Jones's conduct after the vehicle was pulled over by the policeman indicated he was likely a knowledgeable participant in a joint criminal act: (1) Jones was a passenger without any luggage in a rental car traveling from Florida to Virginia; (2) when explaining the purpose for this trip, Jones gave the policeman an explanation that was completely at odds with the driver's account; (3) Jones contradicted himself when the policeman inquired about the person who rented the vehicle, first stating it was his uncle who rented the vehicle but admitting he did not know his uncle's name, and finally confessing that it was not his uncle who rented the car. See id; State v. Attardo, 263 S.C. 546, 550, 211 S.E.2d 868, 869 (1975) (explaining knowledge of an illegal substance may be proved by circumstantial evidence of acts, declarations, or conduct of the accused from which the inference may be drawn that the accused knew of the existence of the prohibited substances); State v. Brown, 319 S.C. 400, 404, 461 S.E.2d 828, 830-31 (Ct. App. 1995) (finding appellant's presence in a car at the time a drug sale occurred was evidence of actual knowledge

established by circumstantial or direct evidence); State v. Williams, 346 S.C. 424, 430, 552 S.E.2d 54, 57 (Ct. App. 2001) (same). 551

**AFFIRMED. [1]**

**WILLIAMS, PIEPER, and GEATHERS, JJ., concur.**

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

RECORD SUMMARY REPORT DATED 05/25/11

C0404

JONES, JOHNNY - FBI # 534578LA5 SID# SC01685060 SCDC # 318253

OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE

INSTITUTION .: LEE CORR INST

DORM.....: DAR1128T

SECURITY/CUST.: 3 MINIMUM IN

RACE.....: B SEX...: M

CURR INCARC SENT...: 25 YRS 0 MOS 0 DYS

PROJ MAXOUT DATE: 05/24/2027

CENTRAL MONITORING.: NO

PROJ PAROLE DATE: 00/00/0000

SOCIAL SECURITY #...: [REDACTED]

EWC JOB...: FOOD SERVICE AIDE

EDUC PGM...: NO CURR EDUC PROGRAM

CURRENT PROGRAM...: NO CURRENT PROGRAM

EWC LEVEL: 3F5 EEC LEVEL:

AGE...: 39 DATE OF BIRTH...: [REDACTED]/72

ASSIGNMENT...: CAFETERIA

PREVIOUS NUMBERS:

\*\* NO PREVIOUS NUMBERS \*\*

CURRENT OFFENSES	SENTENCE YRS MOS DYS COUNTY	SENTENCE START U/NU CATEGORY
TRAFFICKING IN COCAINE	25 0 0 DILLON	2/28/20 6 U 4

PRIOR COMMITMENTS OVER 90 DAYS:

12/11/96	*ASSAULT ON A POLICE OFFIC	8 YRS 0 MOS 0 DYS
10/ 7/91	VEHICLE THEFT	3 YRS 4 MOS 0 DYS
10/ 7/91	POSSESS TOOLS FOR CRIME	3 YRS 4 MOS 0 DYS
10/ 7/91	RESISTING OFFICER	3 YRS 4 MOS 0 DYS
10/ 7/91	*ASSAULT ON A POLICE OFFIC	3 YRS 4 MOS 0 DYS

DETAINERS (HOLD,WANTED,NOTIFY):

POSSESS PISTOL AFTER CONV	HOLD	PRESIDING JUDGE	CATEG: 3
RESISTING OFFICER	HOLD	PRESIDING JUDGE	CATEG: 3

\*NO DETAINERS\*

ESCAPES:

\*NO ESCAPE HISTORY\*

CRIMINAL CHARGES:

\*NO CRIMINAL CHARGES HISTORY\*

ASSAULTIVE DISCIPLINARIES:

2/19/11 POSSESSION OF A WEAPON DROPPED MAJOR

NON-ASSAULTIVE DISCIPLINARIES:

5/ 2/11 POSSESSION OF CONTRABAND CONVICTED ADMIN  
 4/25/11 REFUSING OR FAILING OBEY CONVICTED ADMIN  
 2/19/11 POSS. DR/ATTEMPT TO POSS CONVICTED MAJOR  
 12/20/ 8 EXHIBITIONISM AND PUBLIC DROPPED MAJOR  
 9/28/ 8 POSSESSION OF CONTRABAND DROPPED CHARG

HISTORY OF MOVEMENTS:

7/ 9/ 8	LEE	INCARCERATED	ADMINISTRATIVE
5/15/ 8	KIRKLAND	INCARCERATED	RETURN FROM COURT
1/24/ 7	FLORIDA	AUTH ABSENCE (AWL)	TO COURT
1/12/ 7	LEE	INCARCERATED	RETURN FROM COURT
1/12/ 7	RICHLAND CO	AUTH ABSENCE (AWL)	TO COURT
12/ 6/ 6	LEE	INCARCERATED	ADMINISTRATIVE
10/24/ 6	KIRKLAND	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
FOOD SERVICE AIDE	04/20/11	0/ 0/ 0		3F5
WASH RACK ATTENDANT	10/14/10	4/19/11	LATERAL TRANSFER	3F5
FOOD SERVICE AIDE	08/08/08	1/ 6/ 9	ASLT/DRUG/MAJOR DISC	3F5
GENERAL WORKER	07/10/08	8/ 7/ 8	INMATE REQUEST	3F5
FOOD SERVICE AIDE	01/18/07	1/24/ 7	COURT	3F5
GENERAL WORKER	12/07/06	1/17/ 7	INMATE REQUEST	3F5

HISTORY OF EARNED EDUCATION CREDITS:

EEC DESCRIPTION	START DATE	END DATE	TERMINATION REASON
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CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 05/25/11  
 OMCOMITA RELEASE DATE SCREEN C040481  
 SCDC# > 318253 LOC: LEE  
 JONES, JOHNNY - SCDC CLASSIFICATION...: VIOLENT  
 OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL REGISTRY...: N  
 SEXUAL PREDATOR...: NOT APP  
 DNA STATUS...: COMPLETED  
 GPS REQUIREMENT...: N  
 PREA DECISION...:

CURRENT SENTENCE: 025-00-000 CONSECUTIVE SENTENCE ...: N  
 025-00-000 CURRENT SENT START DATE: 02/28/2006

PROJECTED COMPLETION DATES  
 MAXOUT DATE .....: 05/24/2027 CURRENT EWC ..: 3 F 5  
 YOA SIX YEAR DATE: / / CURRENT EEC ..: NOT CURRENTLY EARNING EEC  
 INITIAL PAROLE DATE: 00/00/0000 NEXT PAROLE HEARING DATE: 00/00/0000

TOTAL GT DAYS EARNED .....: 000000 LABOR CREW/WORK PROG DATE: 99/99/9999  
 TOTAL EARNED WORK CREDITS ...: 000449 LABOR CREW DISQ REASON:  
 TOTAL EDUCATION CREDITS ....: 000000 CATEGORY 4 OR 5 OFFENSE  
 TOTAL EXTRA EARNED CREDITS ..: 000  
 TOTAL SERVICE TIME EARNED ...: 001887

PFKEYS: 5:HISTORY OF DATE CHANGES

4-© 1 Sess-1 167.7.50.33 SCDC1063 3/11

<b>STATE OF SOUTH CAROLINA</b>	) <b>IN THE COURT OF COMMON PLEAS</b>
	) <b>FOR THE FOURTH JUDICIAL CIRCUIT</b>
<b>COUNTY OF DILLON</b>	)
	) <b>Case No.: 2011-CP-17-0153</b>
	)
<b>JOHNNY JONES # 318253,</b>	) <b>SUPPLEMENTAL GROUNDS FOR POST-</b>
	) <b>CONVICTION RELIEF</b>
<b>Applicant,</b>	)
	)
<b>vs.</b>	)
	)
<b>THE STATE OF SOUTH CAROLINA,</b>	)
	)
<b>Respondent.</b>	)
<hr/>	

In addition to the grounds listed in the application and the pro se filings, Applicant request that the Court consider the following as grounds supporting Post Conviction Relief.

1. Ineffective assistance of appellate counsel for failure to argue that the drugs should have been suppressed based on the termination of the stop.<sup>1</sup>
2. Ineffective assistance of trial counsel for failure to argue that “suspicious” behavior and presence alone are insufficient to prove constructive possession.
3. Alternative to 2, ineffective assistance of appellate counsel for failure to adequately argued that that “suspicious” behavior and presence alone are insufficient to prove constructive possession.
4. Ineffective assistance of trial counsel for failure to object to the solicitor’s closing arguments concerning the war on drugs.<sup>2</sup>
5. Ineffective assistance of counsel for failure to object to the “strong evidence” language in the constructive possession charge.

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<sup>1</sup> See *State v. Pichardo*, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005); see also, *United States v. Digiovanni*, 650 F.3d 498 (2011).

<sup>2</sup> Tr. 331, ll. 4-21. See *State v. Liberte*, 336 S.C. 648, 521 S.E.2d 744.

Based on the above listed allegations as well as those listed in the application and pro se filings, Applicant respectfully request this court grant him a new trial.



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Tristan Michael Shaffer  
Attorney for Applicant

July 15, 2013