

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009- CP-01-00105

Marshall Miller,

State of South Carolina,

**TRUE COPY**

PLAINTIFF(S)

BY *[Signature]*  
 ABBEVILLE COUNTY CLERK OF COURT

DEFENDANT(S)

Submitted by:

Attorney for :  Plaintiff  Defendant  
 or  
 Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court: The Plaintiff's Motion for Reconsideration is denied without the necessity of oral argument. No formal order to follow.

**ORDER INFORMATION**

This order  ends  does not end the case.  
 Additional Information for the Clerk :

FILED  
 STATE OF SOUTH CAROLINA  
 COUNTY OF ABBEVILLE  
 RECEIVED  
 CLERK OF COURT  
 MAY 20 9:37 AM  
 2013

**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

**RECEIVED**

MAY 20 2013

**SC Court of Appeals**

*[Signature]*  
 Circuit Court Judge - R. LAWTON McINTOSH

2155 Judge Code Date



**TRUE COPY**  
*Emily M. Mahan*  
ABBEVILLE COUNTY CLERK OF COURT

STATE OF SOUTH CAROLINA )  
COUNTY OF ABBEVILLE )  
Marshall Miller, #249557, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE 8TH JUDICIAL CIRCUIT  
Case No.: 2009-CP-01-00105

**ORDER OF DISMISSAL**

**RECEIVED**  
MAY 20 2013  
FILED  
STATE OF SOUTH CAROLINA  
COUNTY OF ABBEVILLE  
**Appeals**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 20, 2009. The Respondent made its Return on or about April 19, 2010. An evidentiary hearing into the matter was convened on November 30, 2012, at the Laurens County Courthouse. The Applicant was present at the hearing and was represented by John D. Compton, III, Esquire. Ashley A. McMahan, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Also testifying was Kim R. Varner, Esquire and Robert M. Dudek, Esquire. This Court also had before it a copy of the records of the Statewide Grand Jury Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, and the trial transcript.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Statewide Grand Jury Clerk of

Court. The Applicant was indicted On September 10, 2002 for Conspiracy to Traffick Methamphetamine (2002-GS-47-0032). A superseding indictment was returned on March 11, 2003. Kim R. Varner, Esquire, represented him. On March 25-27, 2002, the Applicant underwent trial by jury pursuant to which he was found guilty as charged. He was sentenced by the Honorable Edward B. Cottingham to confinement for a period of fifteen (15) years.

The Applicant proceeded to trial on January 20-30, 2004 and was convicted as indicted. The Applicant's sealed sentence was opened on August 24, 2004 at which time the Honorable Wyatt T. Saunders, Jr., sentenced him to confinement for a period of twenty-five (25) years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence on October 19, 2007. State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (2007). The Court of Appeals denied the Applicant's Petition for Rehearing on January 17, 2008. The Applicant subsequently filed a Petition for Writ of Certiorari to the South Carolina Supreme Court on April 21, 2008. The Supreme Court denied the petition on November 7, 2008, and the Remittitur was issued on November 10, 2008.

### **Motion for Discovery**

Applicant filed a Discovery Motion on or about March 12, 2012. The Respondent made its reply on April 18, 2012. A Protective Order was filed with the Statewide Grand Jury Clerk of Court on October 26, 2012, granting Mr. Compton

access to the underlying investigative file. The contents of the investigative file were mailed to Applicant's attorney on November 13, 2012. Applicant and his attorney was also allowed access to the transcripts of the testimony presented to the Statewide Grand Jury at the PCR hearing. At the hearing Applicant indicated that he also wanted access to trial & appellate counsel's files. Both trial and appellate counsel were present in the courtroom with their files and the Court allowed the Applicant time to access and review these files. Therefore, the Applicant's Motion for Discovery is now moot as Applicant was given access to all material related to his conviction and sentence and the motion is dismissed.

### **ALLEGATIONS**

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

1. Ineffective Assistance of Trial Counsel;
2. Ineffective Assistance of Appellate Counsel; and
3. "Denial of 5th, 6th, and 14th Amendment rights."

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

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This 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).

### Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18,

386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant's particular allegations regarding ineffective assistance of counsel are set forth in the attachments to his application. They are:

1. Was counsel ineffective for conceding Applicant's guilt during the trial?
2. Was counsel ineffective for failing to object to the highly prejudicial "opinion testimony" of a State's witness who had not been qualified as an expert by the trial court? (re: Agent Sonnefeld.)
3. Was counsel ineffective for failing to object to the highly prejudicial "opinion testimony" of a State's witness who had not been qualified as an expert by the trial court? (re: McCallister.)
4. Was counsel ineffective for failing to object to the erroneous reasonable doubt instruction?
5. Was counsel ineffective for failing to make a motion *in limine* challenging the admissibility of the alleged evidence retrieved from the State of Georgia, due to improper chain of custody of the alleged evidence, as well as the unreliability of the evidence?
6. Was counsel ineffective for failing to object to the trial court's instructions to the jury that impermissibly commented on the facts of the case and thus in doing so prematurely directed a verdict for the state?
7. Was counsel ineffective for failing to object to deficiencies in the indictment prior to trial as mandated by SC Code §17-19-90?
8. Was counsel ineffective for failing to motion the court for a bill of particulars based on the vagueness of the indictment?

#### Conceding Applicant's Guilt During the Trial

Applicant contends that trial counsel was ineffective for conceding that he was guilty during trial counsel's opening and closing statements. Applicant particularly notes trial counsel's opening statement of "I submit to you that you won't hear that what he was doing was appropriate or good or part of the "synergy" or that even some of his activities were legal. They were illegal and nobody is going to argue that." Tr. p. 253, lines 18-25 – p. 254, line 1. As well as trial counsel's

closing statement of "...I submit to you, but what does this mean, evil Marshall do, this drug lord?" Tr. p. 1689, line 25 – p. 1690 line1; and "Why would this evil, mean drug lord who controlled these people pay for somebody's funeral? He was also giving them dope, fronting it loaning it, and it came out how much money these people owed him." Tr. p. 1690, lines 7-11. Applicant also notes several other statements given by trial counsel during his opening and closing statements. Those challenged statements are listed on page 3 of the attachments to the Applicant's PCR application.

Trial counsel testified at the PCR hearing that the goal of his opening and closing statements was to challenge the State's evidence that there was a drug *conspiracy* – it wasn't disputed that the case dealt with drug users, but rather that there was no evidence of a conspiracy to traffic the drugs. Trial counsel also stated that his opening statement must be read and taken as a whole.

This Court finds that trial counsel was not ineffective and did not admit that the Applicant was guilty in his opening and closing statements. Both statements must be read as a whole. This Court agrees with trial counsel that he was being rhetorical based on the Applicant's damning statement he gave to the police and the amount of witnesses that were drug users and buyers. This Court also finds that trial counsel's goal was to challenge the state's conspiracy evidence. Therefore this allegation is denied.

Failure to Object to "Opinion Testimony" of Agent Sonnefeld & Witness McCallister

Applicant contends in allegations 2 & 3, *supra*, that trial counsel was

ineffective for his failure to object to the testimonies of Agent Sonnefeld and witness McCallister because they offered opinion testimony and were not qualified as experts. Specifically he alleges trial counsel should have objected to Agent Sonnefeld's testimony regarding chemicals in containers and chemical residue left in a coffee grinder, as well as her testimony of "We just identified it as what I thought it was." Tr. p. 306, line 21.

Applicant also alleges trial counsel was ineffective for not objecting to witness McCallister's testimony regarding the anhydrous ammonia tank. (See page 14 of the attachments to the PCR application.)

This Court finds that trial counsel was not ineffective for his failure to object to the testimonies of Agent Sonnefeld and witness McCallister. This Court finds these allegations are also without merit. While Applicant claims that this testimony was prejudicial and an attempt to bolster the State's case, this Court finds that their testimonies were cumulative to the evidence presented in this trial. Therefore these allegations are denied.

#### Failure to Object to Reasonable Doubt Jury Instruction

Applicant alleges that trial counsel should have objected to the reasonable doubt instructions that were given to the jury. His particular grievance is with the part of the instruction that references "moral certainty" and "not an attempt to define for you what is meant by reasonable doubt." See page 19 of the attachments to the PCR application.

This Court finds that trial counsel was not ineffective in his failure to object

to the reasonable doubt instructions. While this charge has been modified since the Applicant's trial, that modification is not enough to warrant a reversal had trial counsel objected. Therefore this allegation is denied.

Failure to Move *in limine* Regarding Evidence Retrieved from Georgia

Applicant further alleges that trial counsel was ineffective for not making a motion *in limine* regarding the items that were seized from Gene Saylor's house in Georgia and turned over to SLED. (The items include a trailer, a duffle bag, a red five-gallon jug, and a plastic container with mason jars in it. Tr. p. 538, line 22 – p. 539, line 13.) Applicant claims that the chain of custody of these items was in question because Mr. Saylor "tampered" with the evidence with he acknowledged that he moved it and when Agent Sonnefeld arrived "without contacting the Georgia authorities" to retrieve the items from Mr. Saylor. (See page 26 of the attachment to the PCR application.)

The record reflects that Agent Sonnefeld went to Georgia accompanied by agents from the Georgia Bureau of Investigation. Tr. p. 303. Mr. Saylor testified that he received the items from the Applicant and then hid them. He took the agents to where he hid them and Agent Sonnefeld transported them back to South Carolina. (See Tr. p. 538, line 22 – p. 544, line 10.) This Court finds this allegation is without merit and that trial counsel was not ineffective for not making a motion *in limine* regarding the chain of custody of these items because the chain of custody is complete. Therefore this allegation is also denied.

Failure to Object to Court's Instructions to the Jury  
That Impermissibly Commented on the Facts of the Case

Applicant alleges that trial counsel was ineffective for not objecting to the trial court's jury instruction regarding the co-defendant's testimony (particularly tr. p. 1793, lines 8-24) because it "impermissibly commented on the facts of the case as well as the evidence." See attachments to the PCR application, page 31. This Court finds that this instruction was proper for this case and that there were no impermissible comments made by the judge on the facts of the case within the charge given. The charges must be considered as a whole. Therefore this allegation is also denied.

Failure to Object to Deficiencies in the Indictment &  
Failure to Move for a Bill of Particulars

The last two issues have been combined in this order. Essentially the Applicant claims that the charges put forth in the indictment were too vague and that trial counsel was ineffective for not making a motion for a definitive statement regarding the charges enumerated within the indictment. What Applicant cites in his attachment on page 35, is actually taken from the order sealing the indictment not from the indictment or the superseding indictment. In determining whether an indictment meets the sufficiency standard, whether the indictment could be more definite or certain is irrelevant. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (S.C. 2005). The indictment and the superseding indictment both satisfy the requirements of SC Code §17-19-20 in that they included the time period and the place as well as charged the crime in the language of the statute.

This Court finds that counsel was not ineffective for failing to object to the indictment or request a bill of particulars since the indictment is sufficient and mirrors the statute under which the Applicant was charged. Therefore these allegations are denied.

### **Ineffective Assistance of Appellate Counsel**

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, Id. at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003).

Applicant's issue regarding Mr. Dudek is found in the attachment to his PCR application. See page 22 of the attachment to the application – Issue F. Applicant alleges that appellate counsel was "...ineffective for failing to raise the issue of jurisdiction concerning the alleged evidence that was introduced at trial due to its unreliability and jurisdiction and chain of custody."

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). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

"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 (1990): Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Mr. Dudek testified at the hearing that he felt the issue the Applicant complains of was a non-issue and that in his opinion, after reading through the record, the best issue was the one he raised on appeal regarding the plea offer. Mr. Dudek also stated that he wasn't going to raise an issue that wouldn't be "in the ball game."

Based upon a review of the record and Mr. Dudek's testimony, this Court finds that appellate counsel was not ineffective for his failure to raise the issue regarding the chain of custody on the evidence from Georgia on appeal. 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 (4th Cir. 1985). Therefore, this allegation is denied.

#### *Summary*

This Court finds in regards to the allegation of ineffective assistance of counsel and ineffective assistance of appellate counsel, the Applicant's testimony is not credible, while also finding trial counsel and appellate counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in their representation, and that trial counsel's conduct does not fall below the objective standard of reasonableness. This Court also finds that appellate counsel was

thoroughly competent in their representation, and that his conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that either trial counsel or appellate failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel or appellate counsel committed either errors or omissions in their representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel or appellate counsel's performance. This Court concludes the Applicant has not met his burden of proving that either counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, the foregoing allegations are denied.

#### **Allegations Regarding Constitutional Amendments**

As to the allegations of "[d]enial of 5th, 6th, and 14th Amendment rights," which were raised in the application but not at the hearing in this matter and were not specifically addressed in this Order, this Court finds that the Applicant failed to present any probative evidence regarding these allegations. Accordingly, this Court finds that the Applicant waived these allegations and failed to meet his burden of proof regarding them. Therefore, they are denied and dismissed with prejudice.

#### **CONCLUSION**

Based on all the foregoing, this Court finds and concludes that the Applicant

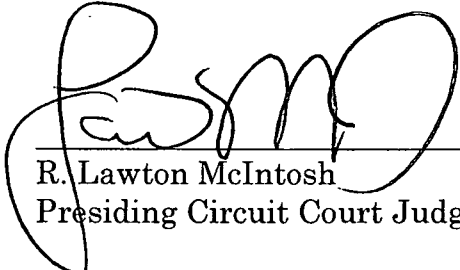
has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions 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. Your 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 must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED!**

  
\_\_\_\_\_  
R. Lawton McIntosh  
Presiding Circuit Court Judge

3-25, 2013  
Anderson, South Carolina

STATE OF SOUTH CAROLINA, )  
 )  
COUNTY OF ABBEVILLE. )

IN THE COURT OF COMMON PLEAS.

Marshall Miller, #249557, )  
 )  
Applicant, )

v. )

State of South Carolina, )  
 )  
 )  
 )

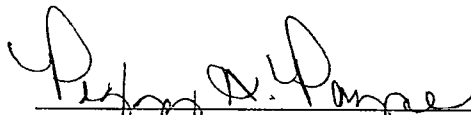
CERTIFICATE OF SERVICE BY MAIL

09-CP-01-105

The undersigned, an employee of the Abbeville County Clerk of Court's Office, does hereby certify that service of a certified copy of the Order Denying PCR and Dismissing with Prejudice filed March 27, 2013, in the above-referenced PCR case was made upon the following persons by placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 27th day of March, 2013, addressed as follows:

Ashley A. McMahan  
Asst. Attorney General  
Post Office Box 11549  
Columbia, SC 29211

John D. Compton, III, Esq.  
Compton Law Firm ✓  
212 Grace Street  
Greenwood, SC 29649



Peggy A. Payne, Common Pleas Clerk