



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332
Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734-1330
Facsimile (803) 734-1397

Robert M Dudek Chief Appellate Defender
Wanda H Carter Deputy Chief Appellate Defender

October 7, 2011

RECEIVED

OCT - 7 2011

SC Supreme Court

Honorable Daniel E Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re Christopher Lovett Burke v State of South Carolina

Dear Mr Shearouse

I argued this case yesterday in the Supreme Court and I would like to obtain a copy of the oral argument Please bill our office accordingly

Sincerely,

Robert M Pachak
Appellate Defender

RMP/kam



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October 7, 2011

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OCT - 7 2011

SC Supreme Court

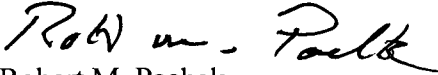
Honorable Daniel E Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re Christopher Lovett Burke v State of South Carolina

Dear Mr Shearouse

Yesterday during oral argument in the above captioned case I told the Court how difficult it was to win a case on direct appeal on the issue of a continuance I did state that I was fortunate to win a case on a continuance issue This case was not on direct appeal as I stated, but it was in post-conviction relief See, Morris v State, 371 S C 278, 639 S E 2d 53 (2006) I just wanted to stand corrected on this issue

Sincerely,


Robert M Pachak
Appellate Defender

RMP/kam



ALAN WILSON
ATTORNEY GENERAL

October 4 2011

The Honorable Daniel E Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201
Via hand delivery

RECEIVED

OCT - 4 2011

SC Supreme Court

Re State v Christopher Lovett Burke

Dear Mr Shearouse

Oral argument is scheduled in the referenced case for Thursday, October 6, 2011
Pursuant to Rule 208(b)(7), SCACR, I would refer to the following cases as additional authority

Butler v State, 286 S C 441, 334 S E 2d 813 (1985) (burden of proof to prove allegations in pcr application rests on applicant)

Davis v State, 326 S C 283, 486 S E 2d 747 (1997) (applicant must prove prejudice to establish ineffective assistance of counsel)

O'On, L L C v Town of Mt Pleasant, 338 S C 406, 526 S E 2d 716 (2000)
(issues and arguments must be both presented and ruled upon in the lower court before review by appellate court)

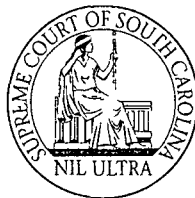
Skeen v State, 325 S C 210, 214, 481 S E 2d 129, 132 (1997) (applicant must prove prejudice to establish ineffective assistance of counsel)

With kind regards, I am

Very truly yours,

Suzanne H White
Assistant Attorney General

cc Robert M Pachak Esquire
via facsimile 4-1397



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

September 26, 2011

Appellate Defender Robert M. Pachak
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Assistant Deputy Attorney General Salley W. Elliott
Assistant Attorney General Suzanne H. White
Office of the Attorney General
P O Box 11549
Columbia, SC 29211

Re Burke, Christopher Lovett v The State

Dear Counsel

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows

Petitioner	10 minutes
Respondent	10 minutes
Petitioner in Reply	5 minutes

This case is scheduled for hearing on Thursday, October 6, 2011 at 10:00 a.m.

Very truly yours,

Daniel E Shearouse, Clerk

By Debbie M Hopkins

Administrative Assistant

DES/dmh



 ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332
Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734-1330
Facsimile (803) 734-1397

Robert M Dudek Chief Appellate Defender
Wanda H Carter Deputy Chief Appellate Defender

August 11, 2011

RECEIVED

AUG 11 2011

Honorable Daniel E Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

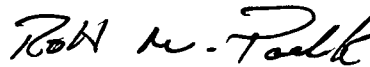
SC Supreme Court

Re Burke, Christopher Lovett v The State
Preliminary List

Dear Mr Shearouse

Concerning the October preliminary list, I have a reconstruction hearing scheduled for October 3-4, 2011 in Lexington County I have a doctor's appointment on October 19, 2011 So I guess October 5, 6, and 18 would be open for me

Sincerely,



Robert M Pachak
Appellate Defender

RMP/fkb



The South Carolina Supreme Court

DANIEL E SHEAROUSE
CLERK OF COURT
BRENDA F SHEALY
DEPUTY CLERK

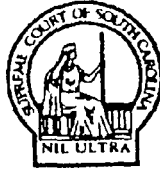
PO BOX 11330
COLUMBIA S C 29211
PHONE NO 734 1080

To Appellate Defender Robert M Pachak
From Daniel E Shearouse
Date August 10 2011
RE October Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules this is to advise that the following case(s) will probably be reached for hearing at the October 2011 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s)

Court will meet the days of October 4 5 6 18 and 19. Please notify this office in writing prior to August 17 2011 as to any scheduling conflicts for the October term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict please advise as to the specific nature of the conflict.

Burke, Christopher Lovett v. The State



The South Carolina Supreme Court

DANIEL E SHEAROUSE
CLERK OF COURT
BRENDA F SHEALY
DEPUTY CLERK

PO BOX 11330
COLUMBIA S C 29211
PHONE NO 734 1080

To Attorney General Alan Wilson
Chief Deputy Attorney General John W McIntosh
Assistant Deputy Attorney General Salley W Elliott
Assistant Attorney General Suzanne H White

From Daniel E Shearouse

Date August 10 2011

RE October Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules this is to advise that the following case(s) will probably be reached for hearing at the October 2011 term of the South Carolina Supreme Court Our records indicate that you are counsel of record in one or more of these case(s)

Court will meet the days of October 4 5 6 18 and 19 Please notify this office in writing prior to August 17 2011 as to any scheduling conflicts for the October term and any changes or additions of counsel that should be made to the record for the purpose of argument If you do have a scheduling conflict please advise as to the specific nature of the conflict

Burke, Christopher Lovett v The State



ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION 803 734 3737
PCR FACSIMILE 803 734 4113

July 25, 2011

Via Hand Delivery

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 1130
Columbia, SC 29211

RECEIVED

JUL 25 2011

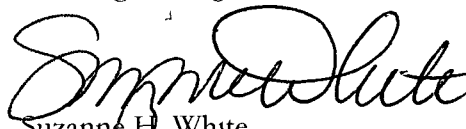
SC Supreme Court

**RE Christopher L. Burke v. State of South Carolina
2008-CP-42-2844**

Dear Mr. Shearouse,

Enclosed please find the original and thirteen (13) copies of the Brief of Respondent in the above-referenced matter for filing in your office. By copy of this letter we are serving opposing counsel Robert M. Pachak, with two copies of this brief today.

With highest regards,


Suzanne H. White
Assistant Attorney General

SHW/aam
Enclosures

cc Robert M. Pachak, Esquire (w/enclosure)

The Supreme Court of South Carolina

Christopher Lovett Burke, Petitioner,

v

State of South Carolina, Respondent

The Honorable J Mark Hayes, II
Spartanburg County
Trial Court Case No 2008-CP-42-02844

ORDER

July 25, 2011

For good cause shown, the request for an extension until ~~June 24, 2011~~ to serve and file the Brief of Respondent in this matter is granted Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what measures are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY *Drenda J Shealy*

Chief Deputy Clerk

Columbia, South Carolina

June 28, 2011

cc Appellate Defender Robert M Pachak
Assistant Attorney General Suzanne H White



ALAN WILSON
ATTORNEY GENERAL

June 24, 2011

RECEIVED

JUN 24 2011

SC Supreme Court

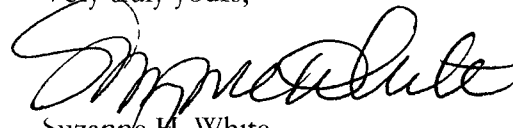
The Honorable Daniel L. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia South Carolina 29211

RE Christopher L. Burke v. State of South Carolina
2008-CP-42-2844

Dear Mr. Shearouse

The Brief of Respondent in the above appeal is due to be served and filed today. However, this is to respectfully request a 30-day extension to serve and file this Return. This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a heavy workload and is for good cause.

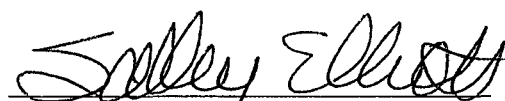
Very truly yours,

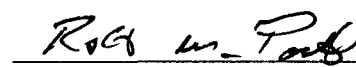

Suzanne M. White
Assistant Attorney General

SHW/aam

In compliance with

In Re Extensions in Criminal and Post-Conviction Relief Cases, (S C Sup Ct order dated March 18, 2009) (Davis Adv Sh No 13 at 1)


SALLY W. ELLIOTT
Assistant Deputy Attorney General


Robert M. Pachak
Attorney for Petitioner

The Supreme Court of South Carolina

Christopher Lovett Burke, Petitioner,

v

State of South Carolina, Respondent

The Honorable J Mark Hayes, II
Spartanburg County
Trial Court Case No 2008-CP-42-02844

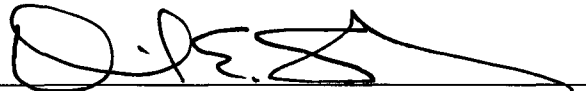
ORDER

For good cause shown, the request for an extension until June 24, 2011 to serve and file the Brief of Respondent is granted Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

May 26, 2011

cc Appellate Defender Robert M Pachak
Assistant Attorney General Suzanne H White



ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION 803 734 3737
PCR FACSIMILE 803 734 4113

May 25, 2011

The Honorable Daniel E. Shearouse
Clerk Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

(2)

RECEIVED

MAY 25 2011

SC Supreme Court


**RE Christopher L. Burke v. State of South Carolina
2008-CP-42-2844**

Dear Mr. Shearouse:

The Brief of the Respondent in the above appeal is due to be served and filed on today's date. However, this is to respectfully request a 30-day extension in which to serve and file this brief.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a heavy workload and made for good cause.

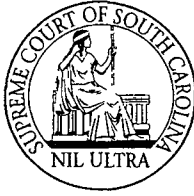
Yours very truly,



Suzanne H. White
Assistant Attorney General

SHW/aam

cc Robert M. Pachak, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

May 25, 2011

Christopher Lovett Burke #272240
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

Re Burke, Christopher Lovett v The State

Dear Mr. Burke

This responds to your letter of May 23, 2011

A timely Petitioner's Brief has been filed in this matter. We are currently awaiting the Respondent's Brief. No date has yet been set for oral argument.

Very truly yours,

Daniel E. Shearouse
DES

CLERK

DES/jj

cc Appellate Defender Robert M. Pachak
Assistant Attorney General Suzanne H. White

Christopher L Burke, #272240
Perry C I / Q4B-116
430 Oaklawn Road
Pelzer, SC 29669

May 23, 2011

Supreme Court of South Carolina
Hon Daniel E Shearouse, Clerk
Post Office Box 11330
Columbia, SC 29211

Re Christopher L BURKE v STATE of South Carolina

Dear Hon Shearouse,

I am trying to find out if a Petition for Writ of Certiorari was timely filed on my behalf and what is the date of oral argument in my case

Sir, your Honorable Court issued an order to the above effect on March 2, 2011 and I am trying to follow up on it Please respond accordingly

Thanking you in advance

Sincerely,

Christopher Burke
Christopher L Burke

cc file

RECEIVED

MAY 25 2011
SC SUPREME COURT

The Supreme Court of South Carolina

Christopher Lovett Burke, Petitioner,

v

State of South Carolina, Respondent

The Honorable J Mark Hayes, II
Spartanburg County
Trial Court Case No 2008-CP-42-02844

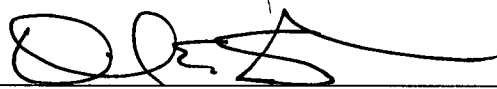
ORDER

The request for an extension until May 25, 2011 to serve and file the Brief of Respondent is granted Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

April 26, 2011

cc Appellate Defender Robert M Pachak
Assistant Attorney General Suzanne H White



ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION 803 734 3737
PCR I AC SIMI I 803 734 4113

April 25, 2011

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

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APR 25 2011

S.C. Supreme Court

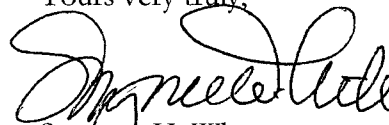
**RE Christopher L. Burke v. State of South Carolina
2008-CP-42-2844**

Dear Mr. Shearouse:

The Brief of Respondent in the above appeal is due to be served and filed on today's date. However, this is to respectfully request a 30-day extension in which to serve and file this brief.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a heavy workload.

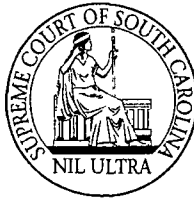
Yours very truly,



Suzanne H. White
Assistant Attorney General

SHW/aam

cc Robert M. Pachak, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

March 2, 2011

Appellate Defender Robert M. Pachak
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re Burke, Christopher Lovett v The State

Dear Counsel

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) **bound** copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before April 1, 2011. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Very truly yours,

Daniel E. Shearouse
65

CLERK

DES/JJ

cc Assistant Attorney General Suzanne H. White

The Supreme Court of South Carolina


Christopher Lovett Burke, Petitioner,


v

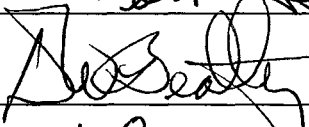
State of South Carolina, Respondent

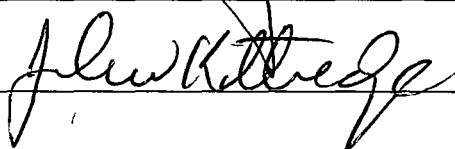
ORDER

This matter is before the Court on a petition for a writ of certiorari. The petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 227(1), SCACR. This matter will be set for oral argument, accordingly, the parties will be advised as to the date and time.









Kaye L. Heam J

Columbia, South Carolina

March 2, 2011

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J Mark Hayes, II, Circuit Court Judge

RECEIVED

DEC - 1 2009

SC SUPREME COURT

CHRISTOPHER LOVETT BURKE,

PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

ROBERT M PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S C 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether calling petitioner's case the day before trial resulted in ineffective assistance of counsel?

STATEMENT

Petitioner was convicted of trafficking in crack cocaine after a jury trial held before the Honorable John C Few in Spartanburg County on November 2, 2005. A twenty-five (25) year sentence was imposed. Timothy M Ray, Esquire was trial counsel.

Petitioner appealed his conviction and the South Carolina Court of Appeals affirmed it on December 14, 2007. State v Burke, Op No 2007-UP-550.

Petitioner filed an application for post-conviction relief on April 17, 2008. An evidentiary hearing was held on May 29, 2009, before the Honorable J Mark Hayes, II. Petitioner was present and was represented by Caroline M W Horlbeck, Esquire. Respondent was represented by Ashley A McMahan, Assistant Attorney General. Petitioner and trial counsel testified at the hearing.

On July 7, 2009, Judge Hayes issued an order denying and dismissing petitioner's application for post-conviction relief.

This petition follows.

ARGUMENT

The calling of petitioner's case the day before trial resulted in ineffective assistance of counsel

Trial counsel testified at the evidentiary hearing that there were 62 cases on the docket on the first week in November of 2005. Petitioner's case was third from the end. Under the old system he always hoped they would go in order so he could properly prepare for trial but that was not always how it happened. In the case he was only given notice at 3:30 – 4:00 PM in the afternoon that the case would be tried the next morning. Trial counsel had prepared for three other cases that were ahead of petitioner's case on the docket. (App p 213, line 3 – p 215, line 11) As a result, trial counsel was not well prepared for petitioner's trial. (App p 216, line 4 – p 218, line 11)

The PCR judge noted that this was a circumstantial evidence case involving drugs that were allegedly thrown down during a chase. The judge also noted that it had concern if the petitioner was prejudiced in the trial to the extent that it lacked confidence in the result. (App p 241 – p 242) Nevertheless, he denied relief.

In Nance v. Ozmint, 367 S. Ct. 547, 551-552, 626 S. F. 2d 878, 880 (2006) this Court noted a different legal analysis than is traditionally found in typical ineffective assistance of counsel cases under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) the Court wrote

The Supreme Court also recognized in both Strickland and Cronic that in certain circumstances "prejudice is presumed" because prejudice "is so likely that case-by-case inquiry is not worth the cost." Strickland, 466 U.S. at 692, 104 S. Ct. 2052 (citing Cronic, 466 U.S. at 658, 104 S. Ct. 2039). In Cronic, the Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." Cronic, 466 U.S. at 659, 104 S. Ct. 2039. Second, per-se prejudice occurs if

there has been a constructive denial of counsel. This happens when a lawyer “entirely fails to subject the prosecution’s case to meaningful adversarial testing,” thus making “the adversary process itself presumptively unreliable.” *Id.* Third, the Court identified certain instances “when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *Id.* (citing *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). A finding of per-se prejudice under any of these prongs is “an extremely high showing for a criminal defendant to make.” *Brown v. French*, 147 F.3d 307, 313 (4th Cir. 1998).


Also, in *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550 (1975) the United States Supreme Court found that the government can deny the effective assistance of counsel by things like denying closing argument.

Here, it was the government in the form of the solicitor’s office that had the vast abusive power to call a case for trial at the last minute without any appropriate notice. It smacks of a strong appearance of impropriety. Petitioner should not have to show prejudice to show ineffective assistance of counsel.

CONCLUSION

Petitioner's writ should be granted

Respectfully submitted,

Handwritten signature of Robert M. Pachak in cursive script, written over a horizontal line.

Robert M Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of December, 2009

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

J Mark Hayes, II, Circuit Court Judge

CHRISTOPHER LOVETT BURKE,

PETITIONER,

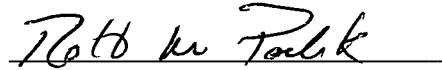
V

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Michelle J Parsons, Esquire this 1st day of December, 2009


Robert M Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day
of December, 2009


(L S)
Notary Public for South Carolina

My Commission Expires August 15, 2010

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J Mark Hayes II, Circuit Court Judge

Case No 2008-CP-42-2844

RECEIVED

FEB 16 2010

SC SUPREME COURT

ORIGINAL

Christopher Lovett Burke,

Petitioner,

v

State of South Carolina,

Respondent

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

HENRY DARGAN MCMASTER
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

SUZANNE H WHITE
Assistant Attorney General

P O Box 11549
Columbia, S C 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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The PCR Court properly held that Petitioner did not receive ineffective assistance of counsel simply as a result of the Trial Court calling Petitioner's case the day prior to the start of Petitioner's trial	3
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QUESTION PRESENTED

Did the PCR Court properly held that Petitioner did not receive ineffective assistance of counsel simply as a result of the Trial Court calling Petitioner's case the day prior to the start of Petitioner's trial?

STATEMENT OF THE CASE

Petitioner is currently incarcerated in the South Carolina Department of Corrections pursuant to orders of the Spartanburg County Clerk of Court. Petitioner was indicted at the July 2005 term of the Spartanburg County Grand Jury for trafficking in cocaine (05-GS-42-3166). On November 2, 2005, Petitioner proceeded to trial after which he was found guilty as indicted. The Honorable John C. Few sentenced Petitioner to confinement for a period of twenty-five (25) years.

Petitioner appealed his conviction and the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Burke, Op. No. 2007-UP-550 (S.C. Ct. App. filed December 14, 2007). The Remittitur was sent on January 8, 2008.

Petitioner subsequently filed an application for post-conviction relief on April 17, 2008. An evidentiary hearing into the matter was convened on May 29, 2009, before the Honorable J. Mark Hayes II. Petitioner was present and represented by Caroline M. W. Horlbeck, Esquire, at this hearing. Ashley A. McMahan, Esquire, of the South Carolina Attorney General's Office, represented the State. Both Petitioner and Trial Counsel testified at the hearing. On July 7, 2009, Judge Hayes issued a written order denying and dismissing Petitioner's application for post-conviction relief.

Petitioner subsequently filed a Petition for Writ of Certiorari. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings Cherry v State, 300 S C 115, 386 S E 2d 624 (1989) In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application Butler v State, 286 S C 441, 334 S E 2d 813 (1985)

ARGUMENT

I The PCR Court properly held that Petitioner did not receive ineffective assistance of counsel simply as a result of the Trial Court calling Petitioner’s case the day prior to the start of Petitioner’s trial

In this case, Counsel represented Petitioner for several months prior to proceeding to trial Once Counsel received notice that Petitioner’s case would be called for trial the following day, Counsel attempted to negotiate with the Solicitor and sought a continuance in chambers Although Counsel was ultimately unsuccessful, he presented the motion and pursued the defense strategy Petitioner failed to present substantive evidence that had Counsel received more notice as to the trial date, the outcome of his trial would have been different

However, Petitioner asserts that he should not have to show prejudice to demonstrate ineffective assistance of counsel in this case where the government abused its power by calling a case for trial at the last minute without appropriate notice In making this assertion, Petitioner relies on Nance v Ozmint, 367 S C 547, 626 S E 2d 878 (2006) (holding that prejudice was presumed when counsel failed to provide an adversarial challenge to the State after reconsideration in light of Florida v Nixon) Respondent submits that there is no evidence in the record to support the PCR court's finding that trial counsel "entirely fail[ed] to subject the prosecutor's case to meaningful adversarial testing " Nance, 367 S C at 551, *citing* United States

v. Chronic, 466 U S 648, 659 (1984) Although courts have found three situations in which prejudice can be presumed, a “finding of per-se prejudice under any of [those] three prongs is ‘an extremely high showing for a criminal defendant to make ’” Id., *citing* Brown v. French, 147 F 3d 307, 313 (4th Cir 1998) In fact, The United States Supreme Court has “held that presumed prejudice as outlined by Chronic is reserved for cases in which counsel fails to meaningfully oppose the prosecution’s case ” Florida v. Nixon, 542 U S 175, 125 S Ct 551, 160 L Ed 2d 565 (2004)(clarifying Chronic and the presumption of prejudice)

This present case is distinguished from the facts in Nance, in that Counsel in Petitioner’s case not only prepared an adversarial case, but researched legal issues, moved to suppress evidence, properly preserved issues for appeal, presented witnesses on Petitioner’s behalf, cross-examined State witnesses, and actively represented Petitioner, as the record reflects Counsel testified that he spoke with Petitioner a couple of times prior to learning the case would be called the next day, in addition to speaking with Petitioner more extensively the day prior to trial and he was able to review discovery with Petitioner (App p 216) Counsel further testified that he believed he had completed the research needed to adequately represent Petitioner at trial and prepared both opening and closing statements (App p 217) Counsel also testified that there was nothing else he could recall that Petitioner wanted him to do in preparation for trial that he was not able to do because of the timing issue (App p 217)

Although Petitioner’s case was called for trial the day before the trial began, this case does not rise to the level need to demonstrate a presumed prejudice as discussed in Nance Nance v. Ozmint, 367 S C 547, 626 S E 2d 878 (2006) It is clear from the record and from the testimony provided at the hearing that Counsel presented an adversarial challenge to the State’s case while representing the Petitioner Respondent submits that Petitioner has not offered

sufficient evidence to prove that Counsel was ineffective or that there is a presumption of prejudice simply because the case was called the day before proceeding to trial

During the post-conviction relief hearing, Petitioner alleged ineffective assistance of counsel in that Counsel failed to call an expert to examine the baggie for fingerprints (App p 229) However, Petitioner provided no evidence or testimony to support his claim that had an expert been secured to testify, the outcome of his trial would have been different In fact, it is clear from the record that Counsel was able to point out during the trial that no evidence of Petitioner's fingerprints were presented as being on the baggy, a fact that helped Petitioner's case (App p 96) Petitioner did not present a fingerprint expert to testify on his behalf at the evidentiary hearing As such, any finding of prejudice as a result of not having an expert testify at trial is purely speculative Dempsey v State, 363 S C 365, 610 S E 2d 812 (2005) See also Bannister v State, 333 S C 298, 303, 509 S E 2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial ") (emphasis in original) The judge properly held in the Order of Dismissal that Petitioner had not met his burden of proof as to this issue and that the Court could not speculate since the record indicated no fingerprints had been found on the bag (App p 243)

Respondent submits that Petitioner failed to show that trial counsel "entirely fail[ed] to subject the prosecutor's case to meaningful adversarial testing " Nance, 367 S C at 551, *citing United States v Cronk*, 466 U S 648, 659 (1984) Accordingly, Respondent submits that trial counsel's performance should be analyzed under the traditional Strickland analysis *See Strickland v Washington*, 466 U S 668 (1984)

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application Butler v State, 286 S C 441, 334 S E 2d 813 (1985) Where 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, 334 S E 2d 813

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases The courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment Strickland, 80 L Ed 2d 674 The Applicant must overcome this presumption in order to receive relief Cherry v State, 300 S C 115, 386 S E 2d 624 (1989)

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel 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, 386 S E 2d at 625, (citing Strickland) Second, Counsel's deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different ” Cherry, 300 S C at 117-18, 386 S E 2d at 625 Here, Applicant has failed to meet either prong of the Strickland test and has failed to show that Counsel was ineffective

Clearly, Petitioner has failed to meet his burden of proof as to this argument

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

HENRY DARGAN MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Attorney General

P O Box 11549
Columbia, S C 29211
(803) 734-3737

By 
ATTORNEYS FOR THE RESPONDENT

February 16, 2010

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J Mark Hayes, II, Circuit Court Judge

Case No 2008 CP-42 2844

CHRISTOPHER LOVETT BURKE,

Petitioner,


v

STATE OF SOUTH CAROLINA,

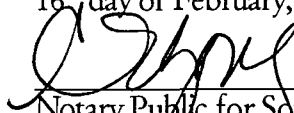
Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Pachak, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211


Anne A. Mueller
Legal Assistant for Respondent

SWORN to before me this
16th day of February, 2010


Notary Public for South Carolina
My Commission Expires 12/28/2014 (L S)



HENRY McMASTER
ATTORNEY GENERAL

February 16, 2010

RECEIVED
FEB 16 2010
SC SUPREME COURT

Via Hand Delivery

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE **Christopher Lovett Burke v State of South Carolina**
2008 CP 42 2844

Dear Mr. Shearouse

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

With highest regards,

Suzanne H. White
Assistant Attorney General

SHW/aam
Enclosures

cc Robert M. Pachak, Esquire (w/enclosure)

The Supreme Court of South Carolina

Christopher Lovett Burke, Petitioner,

v

State of South Carolina, Respondent

The Honorable J Mark Hayes, II
Spartanburg County
Trial Court Case No 2008-CP-42-02844


ORDER

The request for an extension until February 15, 2010 to serve and file the Return to the Petition for Writ of Certiorari is granted Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

January 19, 2010

cc Appellate Defender Robert M Pachak
Assistant Attorney General Suzanne H White



HENRY McMASTER
ATTORNEY GENERAL

January 15, 2010

RECEIVED

JAN 15 2010

SC SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED

JAN 15 2010

SC SUPREME COURT

RE **Christopher Lovett Burke v State of South Carolina**
2008 CP 42-2844

Dear Mr. Shearouse

The Return to the Petition for Writ of Certiorari in the above appeal is due to be served and filed on today's date. However, this is to respectfully request a 30-day extension in which to serve and file this Return.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a heavy workload.

Yours very truly,

Suzanne H. White
Assistant Attorney General

SHW/aam

cc Robert M. Pachak, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDEPENDENT DEFENSE

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

RECEIVED

OCT 5 2009

SC SUPREME COURT

October 5, 2009

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

Dear Mr. Shearouse

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side

Christopher Lovett Burke v. State of South Carolina

10/2/2009

I would appreciate you beginning our time limits from the above dates, and if you need additional information, or have any questions please contact me

Thank you for your assistance in this matter

Sincerely,

Lorie French
Legal Services Coordinator



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

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Telephone (803) 734 1343
Facsimile (803) 734 1397

July 29, 2009

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JUL 29 2009

SC SUPREME COURT

Ms Sharon L. Vizer-Hanks
Circuit Court Reporter
P O Box 52
Honea Path, SC 29654

Dear Ms. Vizer-Hanks

Our office has been requested to perfect the appeal arising out of

Christopher Lovett Burke v State of South Carolina Indictment # 08-CP-42 02844

County Spartanburg Date of Trial May 29, 2009

Presiding Judge J. Mark Hayes, II

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms Sharon L Vizer-Hanks
July 29 2009
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,


Lorlene French
Legal Services Coordinator

xc S C Supreme Court
Attorney General's Office

Law Office of Lawrence W Crane

101 WHITSETT STREET
GREENVILLE SOUTH CAROLINA 29601

LAWRENCE W CRANE ESQ
ELIZABETH P WIYGUL ESQ
CAROLINE M HORLBECK ESQ

TELEPHONE (864) 235 2900
FAX (864) 467 1916
TOLL FREE (800) 852 0899

July 20, 2009

RECEIVED
JUL 22 2009
S C SUPREME COURT

Via Regular Mail

Mr Daniel E Shearouse
Clerk The S C Supreme Court
P.O. Office Box 11330
Columbia, South Carolina 29211

Re CHRISTOPHER L BURKL v State

Dear Mr Shearouse

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Union County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,



Caroline M Horlbeck, Esq

Enclosure

cc Office of the Attorney General
Office of Appellate Defense

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
THE HONORABLE J Mark Hayes, II

CA No 2008-CP-42-2844

CHRISTOPHER L BURKE,

APPELLANT,

vs

STATE OF SOUTH CAROLINA

RESPONDENT

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JUL 22 2009

SC SUPREME COURT

NOTICE OF APPEAL

Appellant CHRISTOPHER L BURKE, appeals from the Order of the Honorable J Mark Hayes, II, Circuit Court Judge, clocked July 7, 2009

Respectfully submitted,

Caroline Horlbeck

Caroline M Horlbeck, Esq
101 Whitsett St
Greenville, SC 29601

Date July 14, 2009

Other Counsel of Record

Ashley A McMahan, Esq
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

FILED
JUL 15 AM 11 09
RC 117CHL/S

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE SUPREME COURT

Christopher L. Burke,)
)
Appellant,)

C A No 2008-CP-42-2844

-vs-

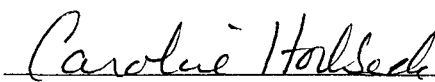
CERTIFICATE OF SERVICE

State of South Carolina,)
)
Respondent)

This is to certify that I am an employee in the law office of Lawrence W. Crane, attorneys for Appellant, and that I have this day caused to be served upon the person(s) named below Appellant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows

Ms. Lorlene French
S C Office of Appellate Defense
P O Box 11433
Columbia, SC 29211

Ashley A. McMahan, Esq.
Office of the Attorney General
P O Box 11549
Columbia, SC 29211


Caroline Hohlbeck

Greenville, South Carolina

July 21, 2009

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JUL 22 2009

SC SUPREME COURT

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE 7TH JUDICIAL CIRCUIT
 COUNTY OF SPARTANBURG) Case No 2008 CP 42 2844

Christopher Lovett Buike, #272240,)
)
 Applicant)
)
 v)
)
 State of South Carolina)
)
 Respondent)

ORDER OF DISMISSAL

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2009 JUL -7 PM 2 58
 MARC KITCHENS

This matter comes before the Court by way of an Application for Post Conviction Relief filed April 17 2008 The Respondent made its Return on or about May 17, 2006 An evidentiary hearing into the matter was convened on May 29, 2009 at the Spartanburg County Courthouse The Applicant was present at the hearing and was represented by Caroline M W Horlbeck, 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 Timothy M Ray, Esquire This Court has before it the records of the Spartanburg County Clerk of Court regarding the subject convictions Applicant's records from the South Carolina Department of Corrections, 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 Clerk of Court for Spartanburg

County The Applicant was indicted at the July 2005 term of the Spartanburg County Grand Jury for trafficking in crack cocaine (2005 GS 42 3166) He was represented by Timothy M Ray, Esquire On November 2 2005, the Applicant proceeded to trial after which he was found guilty as indicted On November 3 2005, the Applicant was sentenced by the Honorable John C Few, to confinement for a period of twenty five (25) years¹

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected The South Carolina Court of Appeals affirmed Applicant's conviction and sentence State v Burke, Op No 2007 UP 550 (S C Ct App filed December 14 2007) The Remittitur was sent on January 8, 2008

ALLEGATIONS

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

- 1 Ineffective assistance of trial counsel
 - a Trial counsel failed to object to solicitor's improper closing argument,
 - b Trial counsel failed to request a directed verdict,
 - c Trial counsel failed to object to the relevance of evidence presented,
 - d Trial counsel failed to require the court to determine the probative value of evidence, and
 - e Trial counsel failed to object to hearsay testimony during the suppression hearing

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CLERK OF COURT
SPARTANBURG COUNTY
2009 JUL -7 PM 2 58
MARC HEDENS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and

¹In addition to the above conviction the Applicant is currently serving sentences for convictions in 2001 for PWID marijuana (99 GS 42 6350) PWID cocaine (99 GS 42 6351) and three counts of PWID crack cocaine (99 GS 42 6352 00 GS 42 4282 01 GS 42 0123) Those convictions were the subject of a prior PCR and are not a part of the current PCR

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), SCRCP). 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. Applicant must overcome this presumption to receive relief. Cherry v. State, 286 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient.

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MARGARET B. HENNING

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)

The Applicant testified that trial counsel informed him he would only be sentenced to about eighteen years for his conviction In addition, the Applicant claimed trial counsel never went over discovery with him and only told him the date of his trial one day before it began The Applicant also testified that although the incident took place at Brad Logan's house, where he did not live, and the solicitor argued that the Applicant was conspiring with others trial counsel did not object Last, the Applicant stated trial counsel did not have time to prepare his case This, he claims, is indicated by trial counsel's failure to put a bag found at the scene, allegedly with fingerprints on it, into evidence Also, the Applicant stated that an officer testified that a confidential informant made the controlled buy from Brad Logan rather than the Applicant, but trial counsel failed to present this information during trial

Trial Counsel testified that he represented the Applicant for a number of months, and he never received any plea negotiations from the solicitor

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JARED KITCHENS

Furthermore trial counsel claimed that at the status conference he approached the solicitor to negotiate, but she had not yet looked at the Applicant's file. Trial counsel stated that the solicitor indicated she would look at the file and get back to him, but she said it may be some time away as the Applicant's case was third from last out of sixty two cases. However, under the system at the time, there was no guarantee that cases would be called in order. Trial counsel testified that he was not given notice that the Applicant's case was to appear until the afternoon before the trial. Even at this point, trial counsel alleged that no plea negotiations had been offered by the solicitor.

After trial counsel received notice of the date of the trial, he claims he immediately called the solicitor's office. Nonetheless, he testified that his attempts to negotiate were unsuccessful. In addition, he testified that he talked to the judge in his chambers before trial, but the judge would not agree to a continuance. Trial counsel claimed that he did do as much preparation on the Applicant's case as possible. But, due to such short notice of the Applicant's trial date, he was unable to view certain pieces of evidence. In particular, no one had determined the results of the fingerprint test done on the bag found at the scene. In addition, trial counsel claimed he probably needed more time to handle the state's witness.

The testimony and record establishes that this was a quickly called case due to the docketing system used at the time. The calling of the case seems to have caught the State and the defense by surprise from a timing and trial preparation standpoint. From an evidentiary position the record at trial and the testimony

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MARC HITCHENS

presented during the hearing establishes that the drug charge against the Applicant was driven by circumstantial evidence since this as a so called "throw down" case. The State's case did rely upon the criminal activity of a non party in arguing criminal responsibility of the applicant. He was caught running from a house where drugs were being sold. Additionally, the State argued that the drugs that were thrown down by the Applicant were part of a larger criminal activity which involved not just the thrown down drugs, which led to the charges of the Applicant, but also criminal activity being conducted by the third party pertaining to the drugs in the house. No one asserted that the house belonged to the applicant.

This Court finds that when the record of the trial is viewed as a whole and testimony presented during the hearing is considered, this court does have some concern if the Applicant was prejudiced in the trial to the extent that this Court lacks confidence in the result. However, in a PCR application, the Applicant must prove ineffective assistance of counsel before the issue of prejudice resulting from the ineffectiveness is measured. This Court cannot find that the Applicant has met his burden of proof by establishing ineffectiveness of his trial attorney as alleged in his application. His attorney did not control the calling of the case to trial. Once he was placed on notice he raised his concern to the trial judge in chambers and on the record. The judge attempted to lessen the burden of suddenly calling the case by requiring the State to produce a witness with which the trial attorney spoke and decided not to use at trial. Although the State made a significant argument to link the Applicant to criminal activity for which he was not on trial, the applicant's

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MARE KITCHENS

attorney raised the same type of argument in his closing. Thus, failure to object to an argument made by the solicitor in her closing assuming it was improper, was in response to a prior argument made by the Applicant's attorney.

Last, the failure to obtain a fingerprint analysis was cited as an error by the trial attorney, but the record below indicated that no fingerprints could be found on the bag. Nevertheless, for this court to go beyond speculating as to the existence of fingerprints, the better approach would have been to have the fingerprint analysis performed as presented as part of the PCR case.

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, the Applicant's testimony is not credible, while also finding trial 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.

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

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court

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SPRINGFIELD COUNTY
2009 JUL - 17 PM 2 58
MARC KITCHENS

concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier *supra*. Therefore, this allegation is denied.

Other Allegations

As to the allegations of Failure to Request a Directed Verdict, Failure to Require the Court to Determine the Probative Value of the Evidence, and Failure to Object to the Relevance of the Evidence, 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 such allegations. Accordingly, this Court finds that the Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, 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 the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCA. 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),

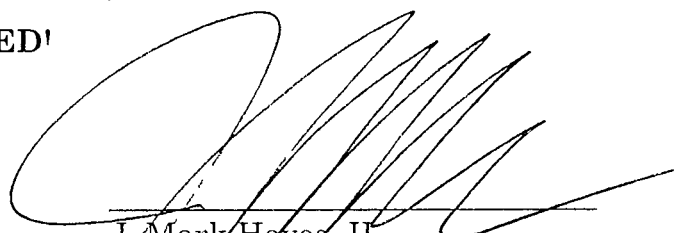
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PARANBURG COUNTY
2009 JUL - 7 PM 2:58
MARC K. CHENS

SCRCR, 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'



J. Mark Hayes II
Presiding Circuit Court Judge

7/7, 2009
Spartanburg, South Carolina

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 SPARTANBURG COUNTY
 2009 JUL -7 PM 2 59
 MARC KITCHENS

Lawrence W Crane

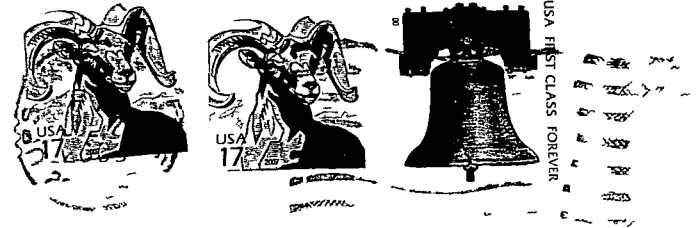
Attorney At Law

101 WHITSETT STREET
GREENVILLE SOUTH CAROLINA 29601

*Christopher
L. Burke*

Via Regular Mail

Mr. DeLoach
Post Office Box 1120
Columbia South Carolina 29211



POSTAGE WILL BE PAID BY ADDRESSEE