

VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

RECEIVED

NOV 19 2013

S.C. Supreme Court

ERNEST BATTLE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001776

APPENDIX

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Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

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ALAN WILSON
Attorney General

ASHLEIGH R WILSON
Assistant Attorney General

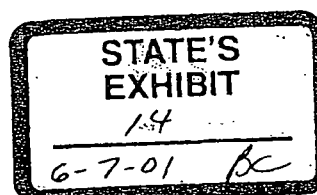
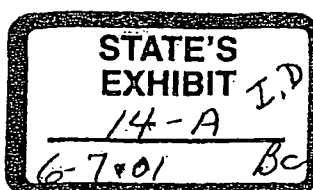
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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499

7-21-99

Dear Shawn,

I hope and Pray that you are hanging in there. This is a very Fucked-up position to be in. I'm not going into details about what happened. The main concern is where do we go from here. Well I will tell you. Although this thing happened it doesn't make me love you or care for you any less.

[REDACTED]

[REDACTED]

The only person can save us is you. My Attorney name is Joseph Condon. You may have already spoken with him. I told him that you was willing to give a statement to the fact that me and Eddie had nothing to do with what happened at your apartment that night and that you and I never had any physical contact with each other or attempted in any way to conspire to sell or deliver any drugs to anyone. That me and Eddie was just happen to be walking through the cut going to your mother's house. Many people use this cut day & night 24-7. During this time of the incident as me & Eddie walked through your front gate, because that's where the cut leads, so we were thrown to the ground.

Continue
on
page

(4)

Shawn you know everything the boy in the
 Charge papers is a lie. They are saying
 that you met me & Eddie on the corner of
 St. John & Redden Rd where we discussed
 making this drug deal and I was supposed
 to have gave you this stuff. Then you took
 this Cocaine back to your Apartment and
 when you saw those detectives you threw the
 cocaine to the ground and ran upstairs.
 You know as well as I do, Shawn, this
 never happened we never met or
 discussed any drug transaction period.
 They don't know shit and is trying to put
 something together. Shawn Listen to me,
 trust me. I know how these mother fuckers is
 They try to make you turn on each other.
 I & nor Eddie would ever turn on you. You are
 our Family. Shawn do what I ask you to
 and what you promised to do so that I
 can help all of us out this messed up situation.
 They also seized my car although they did
 not find anything in it or on me or on Eddie
 and is giving my sister & mom the run around.
 My Lawyer is supposed to handle that and he is
 also working on getting my bond down and the
 bond's man is on standby. I know him for a long
 time. Me & him are good friends. Once I get
 out, I can get you & Eddie out. Then we can go
 from there. Me and my Attorney already done discussed
 your situation. Once I get you out & back you will sign up the

③

And your statement will ~~cost~~ me a ~~lot~~ of
 trouble. Do not listen to Police because
 the only thing they are going to do is lie
 to you and try to have you turn on
 me & Eddie. As I said earlier you
 are our family and we must stick
 together. & be strong. I promise
 you everything will be alright as
 long as you listen to me and do
 as I say O.K. we are all in this
 together. I don't know if Jim Smiley
 is working on your case or Eddie's case
 I was told by his Secretary that his
 office was handling one of you it's C.
 That's a good thing because my lawyer
 Mr. Condon & J. Smiley & the bonds Mr.
 Waddy all work together. O.K. their
 office is across the street. if you
 haven't spoken to my Attorney Mr. Condon
 yet call him collect and give him
 the statement his number is 554-100
 His cousin is the Attorney General for
 South Carolina. Charlie Condon - ~~rep~~ Sen
 they own half of Charleston. much love.
 Do as I say and everything will be alright.
 we will be put back together - sooner than you think.
 I am going to call for Reinforcement.

(4)

to anybody, do as I say and let me handle this O.K.

Shawn if the Question comes up about where you got this stuff from, Tell Them you got it from this Guy you met in The Club Big Boy a Few days ago and he wanted to spend the night with you & him & him, so you told him that won't do. That's when he offered you the stuff to make up the difference and you told him what was you suppose to do with that and he said Sell, and that you could have made about 3 or thousand off it. Since you had started using cocaine about 3 months ago and your bills were over due you decided to take it with the intentions of giving it to someone else to sell for you but after a Few days after had it your Friend from Mt Pleasant called you asking about if you could get him some stuff. You already had some stuff hid outside your Apartment but you did not want him your Friend from Mt Pleasant to know this because he may have took it from you. So that's why you kept stalling him to make him think it's coming from someone or some where else but you. Eric & Eddie didn't have anything to do with what happened that night.

Write this State ment down also and give to Mr. Condon O.K. Along with must put it in parentheses.

STATE'S
EXHIBIT

14-B

6-8-01

BC

STATE'S
EXHIBIT

14

6-7-01

BC

503

7-21-99

Dear Shaw,

I hope and pray that you are hanging in there. This is a very fucked-up position to be in. I'm not going into details about what happened. The main concern is where do we go from here. Well I will tell you. Although this thing happened it does not make me love you or care for you any less.

[REDACTED]

[REDACTED]

The only person can save us is my attorney; name is Joseph Condon. You may have already spoken with him. I told him that you was willing to give a statement to the fact that me and Eddie had nothing to do with what happened at your apartment that night. That you and I never had any physical contact with each other or attempted in any way to conspire to sell or deliver any drugs to anyone. That me and Eddie was just happen to be walking through the cut going to your mother's house. Many people use this cut day & night 24-7. During this time of the incident as me & Eddie walked through your front gate, because that's where the cut leads, so we were thrown to the ground.

Continue
on
Page

(4)

Show you had everything the go in the
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 cocaine to the ground and ran upstairs.
 You know as well as I do, Shawn, this
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 discussed any drug transaction period.
 They don't have shit and is trying to put
 something together. Shawn Listen to me,
 Trust me. I know how these motivations is
 They try to make you turn on each other.
 I & nor Eddie would ever turn on you. You are
 our Family. Shawn do what I ask you to
 and what you promised to do so that I
 can help all of us out this messed up situation.
 They also sieged my car although they did
 not find anything in it or on me or on Eddie.
 and is giving my sister & mom the run around.
 My lawyer is suppose to handle that and he is
 also working on getting my bond down and the
 bond's man is on standby. I know him for a long
 time. Me & him are good friends. Once I get
 out, I can get you & Eddie out. Then we can go
 from there. Me and my Attorney already done discussed
 your situation. Once I get you out and you will sign up for

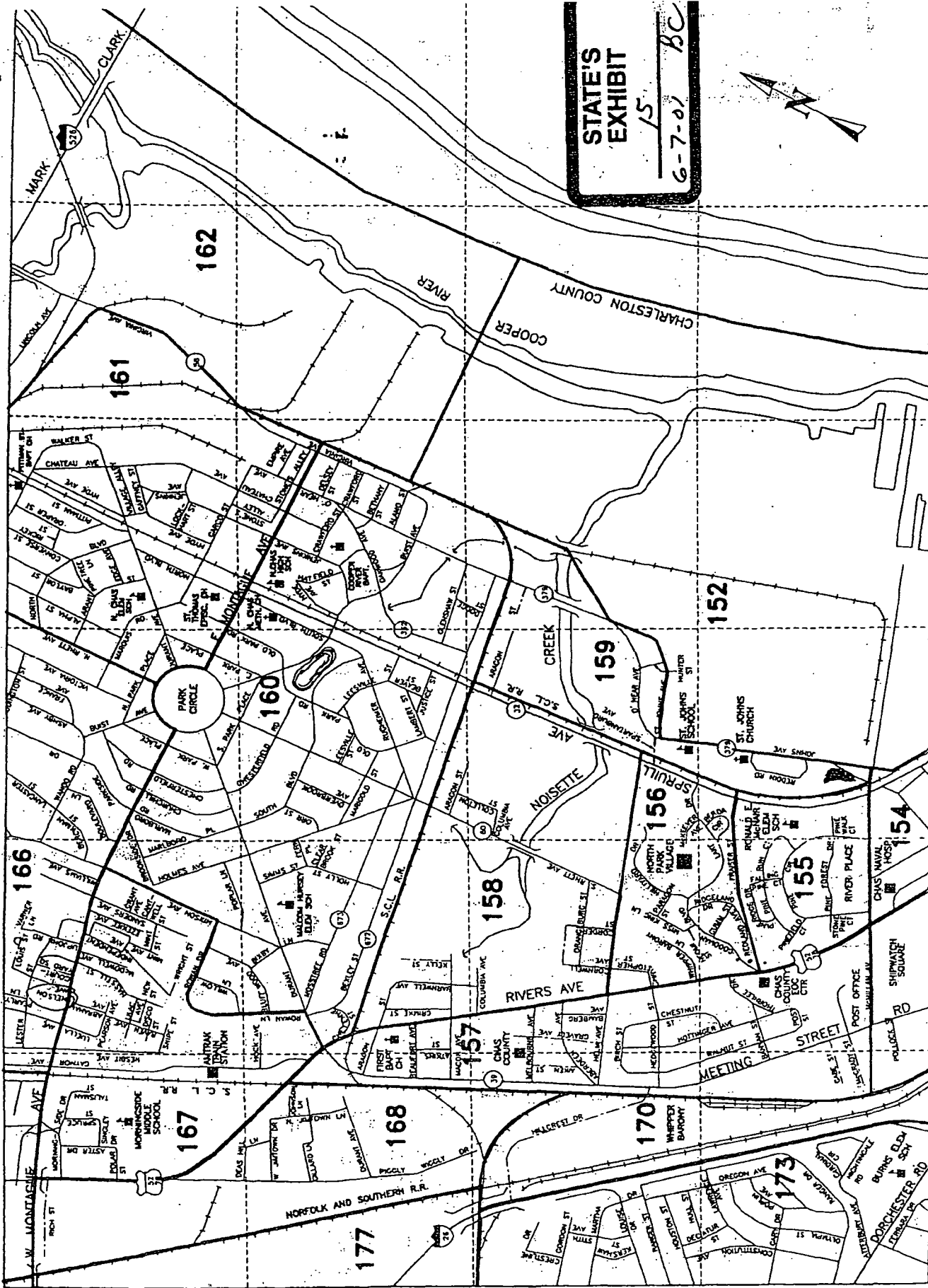
And your statement will be a lie
 false. do not listen to Police because
 the only thing they are going to do is lie
 to you and try to have you turn on
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 His cousin is the Attorney General for
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 they own half of Charleston. much love.
 Do as I say and everything will be alright.
 we will be put and be able to put our
 life back together. sooner than you think.
 I am going to call for Reinforcements.
 I don't know what I mean. D.L.

to anybody, do as I say and let me handle this O.K.

7 Show if the Question comes up about where you got this stuff from, Tell Them you got it from this guy, ~~you met~~ in The Club Big Boy a Few days ago and he wanted to spend the night with you but he only has about \$50 after he had bought you & your friends. So you told him that want to do this you he offered you the stuff to make up the difference and you told him what was you supposed to do with that and he said Sell it and that you could have made about 3 or 4 thousand off it. Since you had started using cocaine about 3 months ago and your bills were over due you decided to take it with the intentions of giving it to someone else to sell for you but after a Few days after had it your friend from Mt Pleasant called you asking about if you could get him some stuff. You already had some stuff hid outside your apartment but you did not want him your friend from Mt Pleasant to know this because he may have took it from you. So that's why you kept stalling him to make him think it was coming from someone or somewhere else as you. Ernie & Eddie didn't have anything to do with what ~~happened that night~~.

Write this State ment down also
and give to Mr. Condon O.K. Along with
what I got in parentheses here

A B C D E F



STATE'S EXHIBIT
15
6-7-01 BC



A B C D E F

1 507 2 3 4

SEE MAP #49

SEE MAP #51

CONTROL NO.

B111717

508

PRINT ALL INFORMATION EXCEPT WHERE SIGNATURE IS REQUIRED

L99-10645

Milly

FORM C (RULE 6)**CERTIFICATE OF PROOF OF CHAIN OF PHYSICAL
CUSTODY OR CONTROL
(Subsequent Change of Custody)**This is to certify that I Charles W Hardin am employed by
(Name)North Charleston Police Dept. as Property Officer and that on
(Name of Agency or Department) (Capacity of Employment)July 20, 1999, I received Evidence Dropbox / Person
(Date) (Specify Whether by Mail or in Person)from Glen Campbell of North Charleston Police Dept.
(Name of Person) (Law Enforcement Agency)

the following substance(s) or container(s) which were originally seized by

Glen Campbell

(Name of Person Making Original Seizure)

(Describe substance or container with sufficient particularity to distinguish it.)

Best Kit No. B111717On JUL 28 1999, I made delivery of the above described
(Date)substance(s) or container(s) to Evidence Dropbox of
(Name)SLED in substantially the same condition
(Law Enforcement Agency)

as when I received it.

Charles W Hardin
(Signature)

Place:

Date:

Sworn before me on this 28 day of July, 1999Notary Public for South Carolina
My Commission expires: 7-7-01**STATE'S
EXHIBIT**166-7-01 AC

SC0100800

EVIDENCE TAG #

CITY COURT DATE

PAGE # 1 OF

(ONLY PROPERTY THAT CAN NOT BE PHOTOGRAPHED AND RETURNED TO OWNER SHALL BE TURNED IN

PROPERTY RECEIPT
OWNER//DEFENDANT SIGNATURE/DATE:

ITEM #	DATE	RELEASED BY	RECEIVED BY	PURPOSE
		NAME	NAME	
		ORGANIZATION	ORGANIZATION	
		SIGN	SIGN	
		NAME	NAME	
		ORGANIZATION	ORGANIZATION	
		SIGN	SIGN	
		NAME	NAME	
		ORGANIZATION	ORGANIZATION	
		SIGN	SIGN	
		NAME	NAME	
		ORGANIZATION	ORGANIZATION	
		SIGN	SIGN	

STATE'S
EXHIBIT
I.D.
17 only
6-7-01 BC

STATE'S
EXHIBIT
17 ^{I.D.} only
6-7-01 BC

ORIGINAL TO PROPERTY ROOM

North Charleston Police Department
 Property Room
 4900 LaCross Road
 North Charleston, South Carolina 29418
 (803) 554-5700 (Ext. 169)

510

Safe Keeping Property:

I hereby acknowledge that the property listed on the front of this Chain of Custody Sheet and marked as such has been placed in the North Charleston Police Department Property Room for the purpose of SafeKeeping.

I fully understand that the listed property will only be held for a period of only 60 (sixty) days from the date received. I understand that it is my responsibility to claim or make arrangements to have the property claimed. I understand if unclaimed by the owner that it will be disposed of without further notification. I understand that it will be construed as my consent to destroy or otherwise dispose of the property. No cause of action shall lie against the police department for the destruction of the property.

Note: You can in your absence designate someone else to claim the property for you by completing the information listed below: This paper must be notarized for the designation to be valid.

Unclaimed Evidence

Property collected for the purpose of evidence regarding this case will be held for a period of 30 days following the court disposition. I understand that it is my responsibility to claim or make arrangements to have the property claimed. I understand if unclaimed by the owner that it will be disposed of without further notification. I understand that it will be construed as my consent to destroy or otherwise dispose of the property. No cause of action shall lie against the police department for the destruction of the property.

Note: You can in your absence designate someone else to claim the property for you by completing the information listed below: This paper must be notarized for the designation to be valid.

I am unable to pick up the property on or before the time is expired. I hereby authorize the following person(s) to pick up the legally allowed property as listed on reverse side for me. I also understand that any person picking up property for me must present a picture I.D. as proof of identity.

(Please Print)

(1) _____

(2) _____

 Signature of Owner

 Date

Sworn to and Subscribed before me
 this _____ day of _____ 19 ____.

 Notary Public

511

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

IN THE COURT OF GENERAL SESSIONS
 FOR THE NINTH JUDICIAL CIRCUIT

Case No.:

Warrant No.: F-980726-728

STATE OF SOUTH CAROLINA)
)

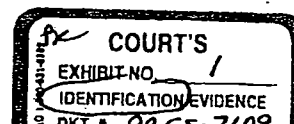
-versus-

DEFENDANT'S REQUESTED
 VOIR DIRE QUESTIONS

ERNEST BATTLE,
 Defendant.)
 _____)

The above-referenced Defendant through the Charleston County Public Defender's Office and its attorney requests the following questions of the jury panel.:

1. Are you a former law enforcement employee?
2. Are any members of your immediate families employed by law enforcement agencies?
3. Have you or any of your relatives or close personal friends been the victim of a crime in the last five years?
4. Do you have any particular opinions or feelings about the crime of Possession With Intent to Distribute Crack Cocaine which would make it difficult for you to serve on a jury where the Defendant is charged with this crime?
5. Do you or any member of your immediate family have problems with alcohol or other substance abuse?
6. Have you had a personal or family experience involving narcotics which might make it difficult for you to sit on the case and fairly judge the testimony?
7. Do you live in an area where you consider drug use a problem? Do you feel that this may affect your judgment in this case where drug possession is alleged?
8. Do you feel that just because someone is in an area known to be a high narcotics area, he must be guilty of using or selling drugs?
9. Do you have any personal, religious or moral beliefs that drugs are sinful or wrong?
10. Do you belong to or contribute to any civic group such as Mothers Against Drunk Driving (M.A.D.D.), People Against Rape (P.A.R.), Citizens Advocating Decency and Return to Ethics



(C.A.D.R.E.) or Parents Empowered to Save Teens (P.E.S.T.), or Citizens Against Violent Crime (CAVE)?

11. Would you tend to believe the testimony of a police officer in preference to other witnesses' simply because of the witnesses' employment as a police officer?
12. Are there any persons on the jury panel who have seen any press coverage relating to this incident on television or in the newspaper?
13. Do you believe the defendant sits before you as an innocent man, and he remains wholly innocent unless and until proven otherwise by the State?
14. Is there anyone who believes that the defendant must prove his innocence?
15. Have you ever served on a jury before? If so, did this prior jury service in any way affect the way you would view or judge this particular case? If so, please stand.
16. Are you aware of any reason whatsoever why you could not be fair and impartial to the defendant or the state?

Respectfully submitted,

Bill McGuire / LTS
WILLIAM S. MCGUIRE
Attorney for Defendant

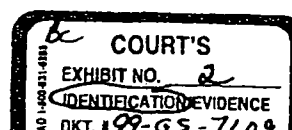
Charleston, South Carolina

Dated: June 7, 2001.

513

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	INDICTMENT NO. 1999-GS-10-7109;
		7110 & 7111
STATE OF SOUTH CAROLINA	)	WARRANT #'S: G980726-980728
PLAINTIFF,	)	
	)	
-versus-	)	VOIR DIRE
	)	
EARNEST BATTLE	)	
DEFENDANT.	)	

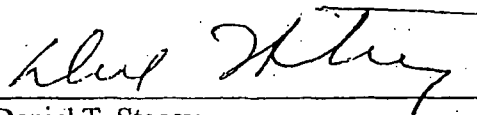
1. Have you or any member of your family, ever had any criminal charges handled by the Charleston County Solicitor's Office?
2. Have you, or any member of your family, ever been represented by any members of the Public Defenders Office?
3. Would any member of the jury panel have any problem following the law as the Judge cites it to you even if you believe that it is inappropriate or unfair?
4. Does any member of the jury panel have any personal, political or religious beliefs that would prevent them from being a fair and impartial juror?
5. Do you or any member of your family live in the area of Reddin Rd.?
6. Have you or any member of your family been exposed to any media coverage what-so-ever in regard to this case?
7. Do you know of any reason why you cannot render this defendant a fair and impartial verdict?



CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

September 18th, 2002



Daniel T. Stacey
Chief Attorney

South Carolina Office of Appellate Defense
1122 Lady Street, Suite 940
Columbia, S. C. 29201
(803) 734-1330

ATTORNEY FOR APPELLANT.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Thomas L. Hughston, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EARNEST BATTLE,

APPELLANT

FINAL *ANDERS* BRIEF OF APPELLANT

DANIEL T. STACEY
Chief Attorney

South Carolina Office
of Appellate Defense
1122 Lady Street, Suite 940
Columbia, S. C. 29201
(803) 734-1330

ATTORNEY FOR APPELLANT

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TABLE OF AUTHORITIES**Cases**

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Rules

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred when it admitted a letter purporting to be from appellant to the witness, LaShawn Floyd, because it was not properly authenticated?

STATEMENT OF THE CASE

Appellant was indicted for trafficking in cocaine, conspiracy, and distribution within half-mile of a school, all in Charleston County. He was tried June 4-8, 2001 at Charleston before the Honorable Thomas L. Hughston, Jr., judge and a jury. The conspiracy charge was judicially dismissed. Appellant was found guilty on the other two charges and sentenced to twenty-five years for trafficking and ten years concurrent on the proximity charge. This appeal follows.

ARGUMENT

The court erred when it admitted a letter purporting to be from appellant to the witness, LaShawn Floyd, because it was not properly authenticated.

The state's key witness was LaShawn Floyd, a co-defendant. She testified that she was involved in arranging a sale of drugs from Earnest Battle to Matt Wallace in which she would apparently act as go-between. ROA p. 245, line 3 – p. 247, line 14. Matt arrived in a cab which was driving actually by an undercover police officer. ROA p. 249, line 25 – p. 250, line 7. She counted the money for the purchase and at this time Matt left. He then returned somewhat later. ROA p. 250, line 21 – p. 251, line 17. She also saw appellant's car pulling up. He was signaling to her. ROA p. 251, line 18 – p. 252, line 2. She told Earnest everything would be alright with Matt. ROA p. 253, lines 3–21. No one else saw any transaction. ROA p. 253, lines 20–21. She went back in the house and testified that the dope was found on the ground contrary to police testimony that they saw her throw it down. ROA p. 255, lines 18–24. She stated to the police that she got the drugs from "E" whom she claimed was Earnest Battle. ROA p. 257, lines 1–15.

To bolster its case, the state tendered a letter which Floyd claimed she had received while she was in jail. However, she stated, "I don't really know [appellant's] handwriting." ROA p. 269, lines 3–6. Appellant objected to the foundation under Rule 901, and the court allowed it under Rule 901 (b) (4). ROA 271, lines 10–18. Floyd then published the letter to the jury. ROA p. 273, line 18 – p. 277, line 20. It was only signed "Your cousin."¹

Rule 901 provides in pertinent part:

(a) General Provision. The requirement of authentication or

¹ James Nelson, also known as "Eddie" was another co-defendant. ROA p. 215, lines 4–5. He claimed that he went to the scene but that appellant had the drugs. ROA p. 220, lines 10–18. And he was a cousin of Floyd. ROA p. 214, lines 17–22.

identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

- (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule

* * *

- (4) *Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

Floyd only testified as follows:

LASHAWN FLOYD: Because as it speaks about what happened and it says "me and" -- I didn't wrote the letter. So it -- I didn't wrote the letter. And he didn't wrote the letter because his name was in there. It was mentioned. So, you know, it said "me and. . ."

THE COURT: So you believe that letter is from Mr. Battle. Is that right?

THE WITNESS: Yes, sir.

ROA p. 270, lines 18-25. This was insufficient to comply with the rule. In *State v. Hightower*, 221 S.C. 91, 69 S.E.2d 363, at 370 (1952), it is held:

Like any other material fact, the genuineness of a letter may be established by circumstantial evidence of its tenor, subject-matter, and the parties between whom it purports to have passed make it fairly fit into an approved course of conduct, and manifest the probability that the subject-matter of its contents was known only to the apparent writer and the person to whom it was written, -- these circumstances justify its admission.

Here, there was another cousin, "Eddie," (James Nelson) who was equally capable of writing the letter.

Moreover, the solicitor made much use of the letter in closing argument. The error was prejudicial:

The first part of the letter was he wrote: The only person who can save you -- "the only person can save us is you." A 19-year-old girl, no record, no prior record, never been in trouble with the law, had no police record, he knew that she wouldn't get in any trouble or a little bit of trouble. So he wanted her to take the fall for his drug dealing enterprise.

"I told him that you were willing" -- "him," that's Mr. Battle's attorney. "I told him that you are willing to give a statement to the facts that me and Eddie had nothing to do with what happened at your apartment that night." If he didn't have nothing to do with it, why would he need her to say that?

ROA p. 389, line 15 -- p. 390, line 2. In fact, the solicitor read the entire letter to the jury.

ROA p. 390, line 3 -- p. 393, line 4. He then characterized it:

Sounds like an innocent man, doesn't it? Isn't that an innocent man who tries to get a 19-year-old girl to lie for him and writes her a letter here and tells her what to say and promises all kind of things. I think that shows guilt as much as anything else.

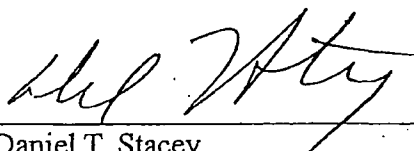
ROA p. 393, lines 5-9.

Thus, the erroneously admitted letter was highly prejudicial to the appellant.

CONCLUSION

Appellant should receive a new trial.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "d. t. Stacey", written over a horizontal line.

Daniel T. Stacey
Chief Attorney

ATTORNEY FOR APPELLANT

This 3rd day of October, 2002.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Thomas L. Hughston, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EARNEST BATTLE,

APPELLANT

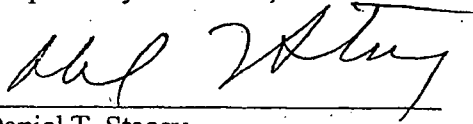
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Earnest Battle states:

1. He is Chief Attorney for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Thomas L. Hughston, Jr., which was held on June 15, 2001, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Earnest Battle.

Respectfully submitted,



Daniel T. Stacey
Chief Attorney

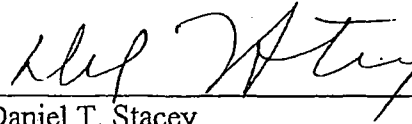
ATTORNEY FOR APPELLANT

This 3rd day of October, 2002.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

October 3rd, 2002



Daniel T. Stacey
Chief Attorney

S. C. Office of Appellate Defense
1122 Lady Street, Suite 940
Columbia, SC 29201
(803) 734-1330
Attorney for Appellant

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Thomas L. Hughston, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

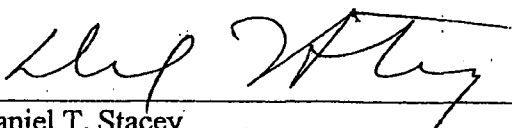
V.

EARNEST BATTLE,

APPELLANT

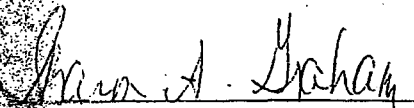
CERTIFICATE OF SERVICE

Designated attorney hereby certifies that a true copy of the Final *Anders* Brief of Appellant in the above referenced case has been served upon Charles H. Richardson, Esquire this 3rd day of October, 2002.


Daniel T. Stacey
Chief Attorney

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of October, 2002.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: April 8, 2012.

RECEIVED

FEB 10 2004

ATTORNEY GENERALS
OFFICE

The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERKV. CLAIRE ALLEN
DEPUTY CLERKPOST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

February 9, 2004

REMITTITUR

The Honorable Julie J. Armstrong
100 Broad Street, Suite 106
Charleston, SC 29401-2258Re: The State v. Battle, Earnest
1999-GS-10-07109
1999-GS-10-07110
1999-GS-10-07111

Dear Ms. Armstrong:

The above referenced matter is hereby remitted to the trial court. A copy of the judgment of this Court is attached.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kenneth A. Richstad".

Kenneth A. Richstad
Clerk of Court

KAR/rj

cc: Chief Attorney Daniel T. Stacey
Earnest Battle #165247
Assistant Deputy Attorney General Charles H. Richardson
Ralph E. Hoisington

RECEIVED**The Supreme Court of South Carolina** FEB - 6 2004**ATTORNEY GENERALS
OFFICE**

The State,

Respondent,

v.

Ernest Battle,

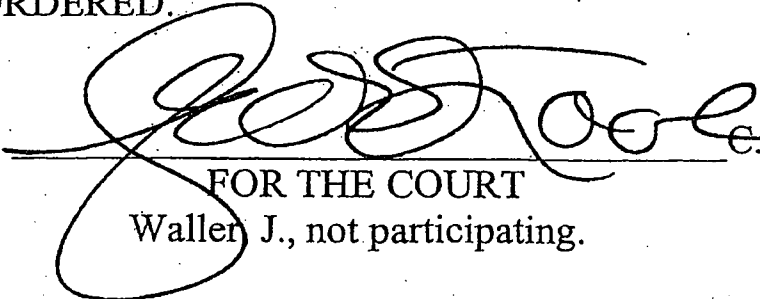
Petitioner.

ORDER

Petitioner seeks a writ of certiorari to review the decision of the Court of Appeals in State v. Battle, Op. No. 2003-UP-348 (S.C. Ct. App. filed May 20, 2003). He has also filed a motion for judgment on the pleadings on the ground that the State did not file a return to his petition.

We deny the motion for judgment on the pleadings as the State is not required to file a return. State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991). Furthermore, we deny the petition for a writ of certiorari.

IT IS SO ORDERED.



FOR THE COURT
Waller J., not participating.

Columbia, South Carolina

February 5, 2004

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Earnest Battle,

Appellant.

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Unpublished Opinion No. 2003-UP-348
Submitted March 26, 2003 – Filed May 20, 2003

APPEAL DISMISSED

Chief Attorney Daniel T. Stacey, of Columbia, for
Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Charles H.
Richardson, all of Columbia; and Solicitor Ralph E.
Hoisington, of N. Charleston, for Respondent.

STATE OF SOUTH CAROLINA)

County of CHARLESTON)ERNEST BATTLE/165247)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

04-CP-10-3794
IN THE COURT OF COMMON PLEASBY _____
JULIE J. SAMPSON
CLERK OF COURT

2004 SEP 10 AM 9:08

FILED

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention LIEBER CORRECTIONAL INSTITUTION , RIDGE VILLE,
S.C. 29472
2. Name and location of Court which imposed sentence CHARLESTON COUNTY COURT
OF GENERAL SESSIONS, LOCATED IN CHARLESTON, S.C.
3. Name(s) of co-defendant(s) (if any) JAMES NELSON AND LASHAWN SHANTELE
FLOYD.
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) INDICTMENT No. 1999-GS-10-7169 TRAFFICKING IN COCAINE

- (b) INDICTMENT No. 1999-GS-10-7110 PWED COCAINE IN PROX. SCHOOL
- (c) INDICTMENT No. 1999-GS-10-7111 CONSPIRACY TO VIOLATE NAR. ACT.

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

- (a) JUNE 8, 2001 SENTENCE TO 25 YEARS ON TRAFFICKING CHARGE
- (b) JUNE 8, 2001 SENTENCE TO 10 YEARS CONCURRENT ON PROXIMITY CHARGE
- (c) JUNE 8, 2001 DIRECTED VERDICT OF NOT GUILTY OF CONSPIRACY CHARGE

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty _____
- (b) after a plea of not guilty x _____
- (c) after a plea of nolo contendere _____

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

YES

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

- (a) the name of each Court to which you appealed:
- i. SOUTH CAROLINA COURT OF APPEALS
- ii. THE SOUTH CAROLINA STATE SUPREME COURT
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. APPEAL DISMISSED
- ii. CERTIORARI DENIED
- iii. _____
- (c) the date of each such result:
- i. MAY 20, 2003
- ii. FEBRUARY 5, 2004
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Unpublished Opinion No. 2003-UP-348
- ii. State v. Battle, Op. No. 2003-UP-348 (S.C. Ct. App. May 20, 03)
- iii. _____

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

- (a) N/A

- (b) N/A
- (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) DUE PROCESS FOURTH AND FOURTEENTH AMENDMENT TO U.S. CONSTITUTION
- (b) FIFTH AMENDMENT DOUBLE JEOPARDY VIOLATION TO U.S. CONST.
- (c) INSUFFICIENT EVIDENCE AND INEFFECTIVE ASSISTANCE OF COUNSEL
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) SEE ATTACHMENT MEMORANDUM OF LAW Pg. 1-5
- (b) SEE ATTACHMENT MEMORANDUM OF LAW Pg. 5-7
- (c) SEE ATTACHMENT MEMORANDUM OF LAW Pg. 7-22
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? N/A
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. N/A
- iii. N/A

iv. N/A

(c) the disposition thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(d) the date of each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

N/A

N/A

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

(a) which grounds have been presented:

i. N/A

ii. N/A

iii. N/A

(b) the proceedings in which each ground was raised:

N/A

i. N/A

ii. N/A

iii. N/A

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) POST CONVICTION RELIEF COLLATERAL CLAIMS
 (b) POST CONVICTION RELIEF COLLATERAL CLAIMS
 (c) POST CONVICTION RELIEF COLLATERAL CLAIMS

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
 (b) your trial, if any? YES
 (c) your sentencing? YES
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No

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

- (a) the name and address of each attorney who represented you:

- i. JOSEPH CONDON JR., 3842-C LEEDS AVENUE N. CHAS. S.C. 29405
WILLIAM S. MCGUIRE, Charleston Co. Public Defenders Office
 ii. LESLI SARJI, Charleston Co. Public Defenders Office
Daniel T. Stacey, S.C. Office Of Appellate Defense
 iii. _____

- (b) the proceedings at which each such attorney represented you:

- i. Mr. Condon- Bond Reduction and Preliminary Hearing
Mr. McMcGuire- Trial
 ii. Ms. Sarji- Trial
Mr. Stacey- Direct Appeal
 iii. _____

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

The applicant's sentence and conviction should be vacated or
voided as a matter of law due to the facts and the memorandum of
law and evidence/exhibits in support thereof.

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

No

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Charleston)

VERIFICATION

I, ERNEST BATTLE / 165247, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Ernest Battle #165247

SWORN to and subscribed before me this 9
 day of Sept, 2004.

[Signature] (L.S.)
 Notary Public

My Commission Expires: 12/05/05

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

I, ERNEST BATTLE / 165247, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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

Ernest Battle #165247
Applicant

SWORN or affirmed to and subscribed before me this

9 day of Sept 2004.

[Signature]
Notary Public

My Commission Expires: 12/05/05

FILED

2004 SEP 10 AM 9:09

JULIA ARMSTRONG
CLERK OF COURT

BY

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ERNEST BATTLE,)

APPLICANT,)

Vs)

STATE OF SOUTH CAROLINA,)

RESPONDENT.)

IN THE COURT OF COMMON PLEAS

MEMORANDUM OF LAW IN SUPPORT

OF

POST CONVICTION RELIEF APPLI-

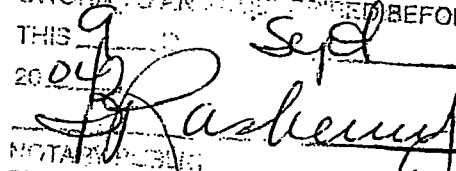
CATION, PURSUANT TO S.C. CODE

ANN. § 17-27-10,-160.

Now comes the applicant, Ernest Battle # 165247, an inmate presently confined at the SOUTH CAROLINA DEPT. OF CORRECTIONS, located in Ridgville, S.C. LIEBER INSTITUTION, respectfully submit in support of his application for POST-CONVICTION RELIEF, a Memorandum of Law in support thereof. Pursuant to S.C.Code Ann. § 17-27-10,-160.

RESPECTFULLY SUBMITTED,


 ERNEST BATTLE /165247

SWORN TO AND SUBSCRIBED BEFORE ME
 THIS 9 Sept 2004

 NOTARY PUBLIC
 STATE OF SOUTH CAROLINA
 MY COMMISSION EXPIRES 12/05/05

EXHIBITS

The applicant pursuant to South Carolina Rules Of Evidence with respect to this Honorable Court Respectfully submit in support of POST CONVICTION APPLICATION :

EXHIBIT (A)- SLED REPORT RULE 6-B CHAIN OF CUSTODY FORM

EXHIBIT (B)- MEMO FROM SLED

EXHIBIT (C)- LETTER FROM APPLICANT TO JUDGE THOMAS L. HUGHSTON

EXHIBIT (D)- *Warrant and affidavit*

EXHIBIT (E)- *EDWARDS NOTICE and Specific Brady Motion*

RESPECTFULLY SUBMITTED,

Ernest Battle #165247
ERNEST BATTLE/165247

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 9 DAY Sept
20 04
[Signature]
NOTARY PUBLIC
STATE OF SOUTH CAROLINA
MY COMMISSION EXPIRES 12/05/05

ALLEGATION

I

Applicant was arrested without probable cause, thus in violation of his 4th and 14th Amendment Rights to the U.S. Constitution and S.C. Const., Article I, § 3.

A informant by the name of Jason Wallace agreed to set up a drug deal. They had the name of a "Lashawn Floyd." ROA.p.66, line 22. There was no witnesses to the alleged transaction between applicant and Floyd. ROA.p.70, line 24-25, -p.71, line 1-2. Applicant was down the street when Detective Vanootegham gave take-down signal to arrest Floyd. ROA.p.71, line 9-19. Floyd was recorded having conversation with informant on three separate occasions prior to her arrest and revealed to C.I. on tape, that she can do about three or four. ROA.p.451, line 23-24. Floyd then subsequently informs C.I. that she can do almost seven. ROA.p.462, line 5-7. Floyd stated in surveillance tape also that she had previously sold three ounces of cocaine and then right after that she sold four more to a different individual, all this took place the night prior to incident of applicant's arrest. ROA.p.451, line 5-24. Floyd stated that she handled that because she already had that. Applicant's name was not mention during any of Floyd's conversations with C.I. as him being her supplier. Floyd gave a statement the night of arrest indicating that her supplier was an individual that she referred to as her uncle that goes by the letter "E", whom she do not know his name, that he is a distant cousin. ROA.p.80-81, line 25 & 1. Floyd testified as follows:

A. Yes and I told them [r]eferring to officers, that I know my uncle, you know, which is "Eddie." I told them his name was Eddie. ROA.p.365, line 2-8.

James Nelson, another co-defendant who was arrested goes by the name (Eddie Nelson), which was unknown to officers at time of arrest. ROA.p.116, line 7-12, p.194, line 24-25, p. 195. line 1-4.

The State testified as follows:

James Nelson and the applicant was sitting on the corner, they saw the police, they say "Oh man the police." "let's walk back through the cut. We don't have any money or drugs on us. Nothing the police can do." Well the police arrested Floyd, Ernest battle, and James Nelson too, because they were the only persons in the area. ROA.p.72, line 5-16. Detective Vanootegham testified on Direct Exam: "No one was near my vehicle, but further down the street, she was not sure. ROA.p.100, line 22-25,-p.101, line 1. Although applicant had committed no crime, nor was there reason to believe that he had committed any crime, Detective Vanootegham testified she saw applicant and Nelson approaching her direction and gave take-down signal. ROA.p.101, line 20-25,-p.102, line 1-2,p.105, line 7-20. The arresting officer was Patrick Wiley Morris. Morris testified as follows:

I was employed as a take-down Unit to apprehend the suspects involved. ROA.p.184, line 20-25,-p.185, line 1-3. Morris further testified that he was advised by Detective vanootegham to place applicant and Nelson under arrest. No Miranda Rights were advised. ROA.p.192, line 11-23.

See Bryson v. Comm., 175 S.E.2d 248 Va. Which held: Arresting officer without probable cause to arrest may not lawfully search defendant's person, unless he has a reason to believe that defendant is armed and dangerous.

Probable cause must exist before the warrantless arrest, and an incident search may not proceed and serve to justify the arrest. Henry v. U.S., 361 U.S. 98, 80 S.Ct. 168 4 L.Ed.2d 134 (1959); U.S. v. Di Ri, 332 U.S. 581, 595, 68 S.Ct. 22, 228, 92 L.Ed. 210 (1948). Thus where an officer, without previous information, observed a man talking to known drug addict over a period of eight hours, but saw nothing passed between them, he had no probable cause to arrest and search the man for narcotics. Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).

~~The test of~~ Constitutional validity is whether at the moment of arrest officer had knowledge of sufficient facts and circumstances to warrant a reasonable man in believing that an offense has been committed. Brinegar v. U.S., 338 U.S. 160 69 S.Ct. 1302, 93 L.Ed. 1879 (1949); Fierst v. Comm., 210 Va. 757, 173 S.E.2d 807 (1970). If the arresting officer had no probable cause to arrest then he could not lawfully search the defendant's person. Rios v. U.S., 364 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960). See Beck v. Ohio, 379 U.S.

89, 85 S.Ct. 223, L.Ed.2d 142 (1964). Police officers arrested Beck without having any reason to believe that he was acting unlawful. It was pointed out in that opinion that:

When the validity of an arrest is challenged, the trial court must be informed of the facts upon which the arresting officers acted in order to determine whether they had probable cause to arrest. If an informant had furnished information to the officers which gave them probable cause to arrest Beck it was the prosecutor's duty to show what the informant said and why the officers thought the informant credible. But the records fails to supply the necessary facts with sufficient specificity. Cf. Draper v. U.S., 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959).

Beck's arrest was held unlawful, thus in violation of his 4th and 14th Amendment Rights to the U.S. Constitution. See also: Wong Sun v. U.S., 371 U.S. 471, 479-480, 83 S.Ct. 409, 413, 9 L.Ed. 441; see Aguliar v. Texas, 378 U.S. 108, 84 S.Ct. 1245, 2 L.Ed.2d 773; Gardenello v. U.S., 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed. 1505; see Nathanson v. U.S., 290 U.S. 41 54 S.Ct. 11, 78 L.Ed. 159. The goodfaith exception is applicable only to searches pursuant to a search warrant. U.S. v. Leon, 468 U.S. 879 (1984).

ALLEGATION II

Former attorney Joseph Condon and trial attorney was ineffective by failing to file a pre-trial motion challenging the validity of the warrant affidavit, pursuant to Franks v. Delaware, 98 S.Ct. 2674 (1978); thus in violation of applicant's 4th, 5th, 6th, and 14th Amendment Rights to the U.S. Constitution, and properly raise and litigate applicant's claims.

Applicant was represented by attorney Condon at preliminary hearing in which he was present. The State was represented by Assistant Prosecutor, Rodney Davis and Alfred Keuchler, North Charleston Police Department, and William S. McGuire and Lesli Sarji at trial.

Attorney Condon and McGuire both had original true copies of the warrant affidavit and SLED REPORT, prior to trial. The applicant put both attorneys on notice prior to trial that the information contained in the warrant affidavit was false and misleading, and requested that it be challenged. Both attorneys ignored applicant's request and failed or refused to motion the Court for an evidentiary hearing permitting the applicant to challenge the validity and truthfulness in the warrant affidavit. Franks v. Delaware, 98 S.Ct. 2674 (1978)

held; Where a defendant makes a substantial preliminary showing that false statement knowingly and intentionally , or with reckless disregard for the truth, was included by the affiant in the search/arrest warrant affidavit, and allegedly false statement is necessary to the finding of probable cause, the 4th and 14th Amendment requires that a hearing be held at the defendant's request. If, after the evidentiary hearing, defendant establishes by a preponderance of the evidence that a false statement knowingly and intentionally, or with reckless disregard for the truth , was included by the affiant in search/arrest warrant affidavit, and, with affidavit's false material set to one side, the remaining content is insufficient to establish probable cause, Search/arrest warrant must be voided and fruits of search/arrest excluded to the extent as if probable cause was lacking on the face of the affidavit. U.S.C.A. 4th and 14th.

See State v. Jones, 500 S.E.2d 449 (S.C. App. 1998); State v. Clifton, 302 S.C. 431, 433, 396 S.E.2d 831, 832 (Ct. App. 1990); see also U.S. v. Halsey, 257 F. Supp. 1005 (S.D.N.Y. 1996). Judge Frankel held; A challenge to a warrant must be permitted, The Warrant Clause itself, which surely takes the affiant's goodfaith at a premise: "[N]o Warrant shall issue but upon probable cause, supported by Oath or Affirmation." [W]hen the Fourth Amendment demand a factual showing sufficient to comprise "Probable Cause," the obvious is that there will be a truthful showing."

On July 16, 1999, the day after applicant's arrest, Pfc. R. Miller of the North Charleston Police Department obtained an arrest warrant from the Magistrate Judge on which he alleged his probable cause was based, although Miller was not the arresting officer nor was Miller present on scene during time of arrest. The affidavit read in part as follows:

The defendant "Ernest Battle" did willfully, unlawfully, and knowingly did have in his possession and under his control approximately (83) grams of a white powder substance which field tested presumptive for cocaine. The defendant agreed to meet with co-defendant "Lashawn Floyd" and upon meeting co-defendant cocaine was turned over to her in which she in turn agreed to sell it to confidential informant. Det. A. Keuchler, J. Vanooteghem, Lt. Cumbee, and G. Gould are witnesses to prove the same. [Emphasis supplied].

There was no audio, video, telephone conversations, nor any witnesses to the alleged meeting or transaction between applicant and co-defendant "Lashawn Floyd." ROA.p.70, line 24-25,-p.71, line 1-2.

The Detectives that officer Miller swore under oath were witnesses, testified that at no time did they ever witness applicant to be in possession of any drugs or in Floyds presence.

Thus the information supplied to the magistrate was false and misleading. The probable cause issue was not challenged during trial. This Court has jurisdiction to review Fourth Amendment claims De Novo.

Had either attorneys motioned the court for an evidentiary hearing pursuant Franks v. Delaware, permitting the applicant to challenge the validity and truthfulness of the warrant affidavit, there is a reasonable likelihood that the case at bar would never have proceeded to trial but instead dismissed because of lack of probable cause because of the false and misleading information contained in the warrant affidavit. The incompetent and ineffectiveness of both attorneys violated applicant's right to the 4th, 6th, and 14th Amendment Rights to the U.S. Constitution.

ALLEGATION III

Trial attorney was ineffective by failing to object to applicant being subjected to Double Jeopardy after acquittal of conspiracy charge where prosecution had opened and closed charging conspiracy, and trial court failed to give curative instructions, thus in violation of applicant's 5th, and 6th Amendment Rights to the U.S. Constitution.

The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Clause provides three separate protections for criminal defendants: against reprosecution for the same offense after an acquittal, against prosecution for the same offense after convicted, and against multiple punishment for the same offense.

Please see Court Charge to the jury; ROA.p.59, line 21-25,-p.60, line 1-2.

The Court: One of the charges is what is called trafficking in cocaine; another one that's charged, conspiracy to violate the narcotics laws of South

carolina; and then the other charge is possession with intent to distribute cocaine within a half mile of a school. Those are the charges that the state made against Mr. Battle.

Applicant was granted a Directed Verdict on the Conspiracy indictment no. 1999-GS-7111. § 44-53-420. Applicant was also indicted for Trafficking in cocaine, indictment no. 1999-GS-7109. § 44-53-370, which incorporates the conspiracy element. The prosecution opened and closed before the jury charging conspiracy. The trial court directed the verdict on the conspiracy because the indictment charge that the applicant attempted to "purchase" cocaine instead of "sell" as was argued by the prosecution throughout the entire trial. Upon the prosecution's request the trial court withheld this information from the jury prior to deliberation, fail to give curative instructions, thus allowing the jury to still infer and assume that applicant could still be found guilty of the conspiracy charge although he had been acquitted. Trial counsel failed to object. See; ROA.p.408, line 25,-p.409, line 1-13. ROA.p.413, line 2-11. Trial court then re-charge the jury on trafficking and told them that if they had any questions as to what the state actually charged, to read the indictments. The trafficking and conspiracy charge arise out of the same single offense.

Our South Carolina Court of Appeals held in State v. Constineira, 341 S.C. at 625-26, 535 2d at 452-53; that there is no distinction between the substantive offense of trafficking in cocaine § 44-53-370(e) and the offense of conspiracy to traffick. It found that the language of 44-53-370(e) under which the defendant was indicted, incorporates conspiracy within the substantive offense. Applicant was also indicted under 44-53-370(e).

Indictments charging a single offense in different counts are multiplicitious. Such indictments may result in multiple sentences for a single offense in violation of constitutional double jeopardy provisions, or otherwise prejudice the defendant. U.S. v. Sandoval, 20 F.3d 134, 139 n.17 (5th. Cir. 1994) (dictum) (indictment charging separate counts for each 1,500 bribe installment multiplicitious); U.S. v. Graham, 60 F.3d 463, 467 (8th. Cir. 1995); U.S. v. Smith, 924 F.2d 889, 894-95 (9th. Cir. 1991). When several factual allegation are each elements of the same offense, the defendant may be charged with only one count of the offense. U.S. v. Powell, 894 F.2d 895, 897-98 (7th. Cir.) (indictment charging conspiracy to distribute cocaine and methamphetamine an two separate counts multiplicitious because each count was

based on same agreement) U.S. v. Brandon, 17 F.3d 409, 422 (1st. Cir.) cert. denied, 115 S.Ct. 80 (1994). Multiplicitious indictment may prejudice jury against defendant by creating impression of more activity than in fact occurred. In a criminal proceeding jeopardy attaches when the defendant faces risk of a determination of guilt. Jeopardy attaches in a jury trial when the jury is empaneled and sworn. Abney v. U.S., 431 U.S. 651, 660-62 (1977). Double Jeopardy Clause protects against even the "risk" of being punished twice for the same offense. See; U.S. v. Elliott, 849 F.2d 886, 890 (4th. Cir. 1998) Although multiple acts of physical delivery of a controlled substances technically distinct, when they occur essential at same time, same place, and involve same participants, must be considered single offense under statute prohibiting participation in any aspect of distribution chain. The "Blockburger Test" determines whether multiple prosecution for single act constitute prosecution for same offense.

Trial counsel's failure to object to prosecution's request clearly put applicant at risk of double jeopardy in violation his 5th, 6th, and 14th Amendment Rights to the U.S. Constitution. Counsel's performance clearly fell below an objective standard of reasonableness, thus constituting ineffective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. at 689.

ALLEGATION IV

Trial counsel was ineffective by failing to file pre-trial motion to suppress cocaine found on co-defendant and not applicant, failure to raise issue of insufficient evidence at end of trial or move for dismissal based on insufficient evidence, violated applicant's 6th and 14th Amendment Right to the U.S. Constitution.

Trial counsel was aware that applicant did not possess any drugs long before applicant proceeded to trial. Applicant was out on bond nearly two (2) years prior to going to trial. There was no excuse or any logical explanation that would justify counsel's failure to file motion to suppress the drugs. Counsel was in possession of the warrant affidavit and the SLED REPORT Rule 6-B Chain of Custody form submitted by seizing officer; Detective Glenn Campbell, in which the report clearly specifically identify the co-defendant and possessor of the drugs in regard to Best Kit No. B111717, as "Lashawn Shantelle Floyd" and Not "Ernest Battle", the Applicant!

See; Hollines v. Estelle, 569 F. Supp. 146 (W.D.Tex.1983); Counsel's failure file motion to suppress in a timely manner, was an abdication of

counsel's duty to advocate client's case. Moran v. Morrison, 478 F. Supp. 145 (C.D.Cal.1979); Kimmelman v. Morrison, 477 U.S. 365; U.S. v. Hammond, 425 F.2d 597

The Due Process Clause of the 14th Amendment to the U.S. Constitution requires the government to prove beyond a reasonable doubt every element of the crime with which a defendant is charged. If the government fails to sustain its burden of proof on any element, the defendant must be acquitted. The State may design statutes which facilitates proof of every element. In determining what facts must be proved beyond a reasonable doubt, the State's Legislature's definition is usually dispositive; McMillian v. Pennsylvania, 477 U.S. 79, 85 (1986).

"[B]efore" a person may be convicted of the offense of trafficking in cocaine, State must prove person knowingly possessed ten or more grams of cocaine; Person's mere presence where drugs are present would be insufficient to convict without more. State v. Scott, 400 S.E.2d 784 (S.C. App.1991). In a prosecution for trafficking in cocaine, S.C. Code Ann. 44-53-370(e), state must prove the "essential element" of the offense charged in the indictment, which is "possession." State must prove that person charged either had actual or constructive possession of the drugs. See; State v. Ellis, 207 S.E.2d 408 (S.C. 1994); Actual possession of narcotics occurs when the drugs are found to be in the actual physical custody of person charged with possession. Under South Carolina law, person has "constructive possession" of drugs if he has knowledge of presence of drugs and dominion and control, or the right to exercise dominion and control over the drugs. S.C. Code 1976, § 44-53-370(a)(1). Even presence of defendant in area containing drugs, absent his dominion and control over them is insufficient to prove his possession of the drugs. Under South Carolina law, proof of dominion and control as required to sustain drug possession conviction may include evidence that accused controlled the premises where drugs were found or he had a special relationship with owner or lesser of premises. S.C. Code 1976, § 44-53-370(a)(1).

Co-defendant "Floyd" testified that she in fact had actual possession of cocaine found, and that she attempted to sell it to confidential informant (Matt Wallace), ROA.p.294, line 3-5. Detective Richard Glenn Campbell testified that he witnessed a black female run up some steps and threw an object over the guard rail., in which he retrieved. and later tested positive for cocaine.

ROA.p.125, line 8-21. See State v. Kimbrell, 294 S.C. 51, 362 S.E.2d 630, 631 (1987)(holding that the possession element requires proof of power and intent to control). Constructive possession may be proved by circumstantial. Ellis 207 S.E.2d at 413. Evidence that accused threw recognizable object, coupled with the finding of such object in the area where it would have landed, will support an inference that accused had possession of object thrown. Applicant lived downtown Charleston with his sister on Radcliff Street. Co-defendant "Floyd" lived alone with her daughter at place of incident. There is no special relationship nor any nexus between applicant, Floyd, and the drugs found in her actual possession while at her resident. ROA.p.247, line 14-18. ROA.p.456, line 17-18. To further corroborate applicant's claim, see applicant's exhibit A-SLED REPORT, also Exhibit B-Memo from SLED which states that the subject name on the drug report submitted to them by the N.Chas. Police Dept. Best Kit No. B111717 was not "Ernest Battle." also see; Rule 6-B Chain of Custody form which was filled out by seizing officer Richard Glenn Campbell and forwarded ot SLED.

The night of the incident Floyd gave a statement indicating that her supplier was someone she referred to as "E" which she says is a distant cousin, but she does not know his name, but she refers to him as her uncle.

ROA.p.356, line 1-4. ROA.p. 357, line 9. Floyd further testified: "No. Eddie was a distant cousin." "I didn't really even know his last name for sure unti after we got arrested." A. "And I told them (referring to officers), that; I know my uncle, you know, which is Eddie. I told them his name was "Eddie." ROA.p. 365, line 6-7. Eddie is another co-defendant that was arrested that also who's actual name is James Nelson.

The State essentially only proved applicant's presence in area where drugs were found on another co-defendant. Under South Carolina law, the mere presence in area containing drugs, absent evidence of his dominion and control over them, is insufficient to prove his possession of the drugs. State v. Tabory, 260 S.C. 355, 196 S.E.2d 111, 113 (1973). Again, even presence coupled with knowledge of drugs is insufficient to sustain a possession conviction; state must also prove dominion and control. Kimbrell, 362 S.E.2d at 631. Even if this was not state law, the Due Process Protections of Jackson v. Virginia, 443 U.S. at 319, 99 S.Ct. at 2789 would require the invalidation of convictions based solely on evidence of mere presence; as was established in applicant's case. See also Goldsmith v. Witkowski, 981 F.2d 697 (4th. Cir.1992) The trial evidence simply did not demonstrate that applicant was

"alone" in the sense that would have allowed jury to infer that he had the right to exercise dominion and control over the premises or the drugs found on co-defendant. Viewing the evidence in light most favorable to the state, there is no rational trier of facts could have found the essential element beyond a reasonable doubt. Jackson, 443 U.S. at 319, 99 S.Ct. at 2789. See Jones v. Commonwealth, 451 S.E.2d 695 (Va.App.1994), Which held; Evidence was insufficient to support conviction for distribution of cocaine where state failed to prove that cocaine that confidential informant turned over to special agent had been obtained from defendant. "No one saw any thing change hands and state failed to prove confidential informant's whereabouts from time he was searched by special agent until he returned to police vehicle with cocaine. Code 1950 §18.2-248. In that case; Detective testified that C.I. and defendant was "Momentarily" out of sight. He could not see whether other persons were in the area. A short time later C.I. returned with cocaine.

The Court held: the evidence failed to show that C.I. was under police surveillance at all times. The chain of circumstantial evidence was flawed because the jury was required to speculate as to a critical event. [N]o witness saw informant at the front of the restaurant. This incident occurred on a public street where other persons were gathered. [N]o one saw anything change hands, and the Commonwealth failed to provide sufficient evidence of informant's whereabouts from time he was searched by Special Agent until he returned with cocaine. Because of the fatal gap in the chain of circumstantial evidence," *id.*, at 301, 183 S.E.2d at 737, the Commonwealth failed to exclude other reasonable hypotheses concerning how informant came to be in possession of the drugs.

Applicant's case at bar is essentially identical. There was [N]o witnesses. [N]o one saw anything change hands. ROA.p.70, line 25, -p.71, line 1-2. Floyd was "never" searched prior to disappearing from officer's sight for approximately five minutes or more, then return with cocaine. ROA.p.100-102, line 1-7. Det. J. Vanootegham testified there was no one near her vehicle, but further down the street, she was not sure. ROA.p.100, line 22-25, -p.101, line 1. Although counsel objected to admission to the drugs pursuant to S.C.R.E. Rule 6-Chain of Custody numerous times through the trial. ROA.p.143, line 23-24, ROA.p.161, line 4-6. ROA.p.178, line 20-24. ROA.p.179, line 18-25. ROA.p. 340, line 11-20. Although the sufficiency

of the evidence and chain of custody are inextricably linked, counsel's failure to raise issue of insufficient evidence at end of trial or move for dismissal based on insufficient evidence, constitute ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 689. also see; Holsclaw v. Smith, 822 F.2d 104 (11th. Cir.1987); Buggs v. U.S., 153 F.3d 739 (7th. Cir.1998).

ALLEGATION V

Trial counsel was ineffective by failing to call known exculpatory witness and state's failure to preserve potentially exculpatory evidence violated applicant's Right to Due process guaranteed by the U.S. Constitution.

Applicant's former attorney Joseph Condon advised applicant that he had spoken with co-defendant "lashawn Floyd's attorney Mr Jim Smiley and was informed by him that Floyd told him that applicant had nothing to do with the incident that happened. she was pressured to cooperate by threats by officers and Former prosecutor(Rodney Davis) to implicate applicant or her child would be placed in D.S.S. custody. Attorney Condon passed this information to trial attorney upon his receipt of the case. Applicant discussed this with trial attorney and requested that attorney Condon and Smiley be subpoenaed. Trial attorney advised applicant that he had subpoenaed both attorneys, but when asked by the court, trial attorney stated "we are not going to call any witnesses." Attorney Smiley was in fact present in the courtroom during applicant's trial and in fact spoke to trial attorney. trial attorney's failure to call or subpoena exculpatory witness constitute ineffective assistance of counsel and violate applicant 's right to present witnesses of his behalf in which denies applicant the right to a fair trial and violates Due Process.

Applicant requested and received a preliminary hearing. He was represented Joseph Condon, Esq. The state was represented by Rodney Davis and Alfred Keuchler N. Chas. Police Dept. The hearing was held by Magistrate Judge James B. Gosnell. Applicant was present along with attorney. There was no stenographer or court reporter present. The hearing was conducted on audio cassette tape. Judge Gosnell advised that either party could sign the tape out to transcribe a copy for their records, but must return it so other party can do the same. Rodney Davis signed tape out but failed to return it. The

prosecution had the tape in their possession for approximately 4 months and never returned it. Applicant requested a copy pursuant to S.C.R.Crim.P. Rule 5 Disclosure and discovery and was informed by Assistant prosecutor Rodney Davis that someone in their office had mistakenly erased the entire tape and he did not have a chance to transcribe a copy. This is in violation of S.C.R..Crim.P. and Rule 5 and Brady v. Maryland, 373 U.S. 83, 87 (1963).

Exculpatory evidence is evidence or other statements which tends to justify, excuse, or clear the defendant of alleged fault or guilt. Declaration against defendant's interest which indicate that defendant is not responsible for crime charged. As defferentiated from that which although favorable, is merely collateral or impeaching purposes of rule constraining states from disposing of potentially exculpatory evidence. A defendant has a right to review or reproduce or review and produce stenographically or electronically recorded materials. See; § 14-7-1700. Prosecutor's failure to preserve potentially exculpatory evidence as violating criminal defendant's due process rights under Federal Constitution-Supreme Court cases, 102 L.Ed 2d 1041. Where discovery rights are not accorded; prejudice must be presumed and unless party who has failed to submit to discovery can show a lack of prejudice, reversal is required. Downey v. Dixon, 294 S.C. 42, 362 S.E.2d 317 (App.1987).

Had trial counsel called or subpoenaed exculpatory witnesses and the state preserved potentially exculpatory evidence, there is a reasonle likely hood that the outcome would have been in favor of applicant.

ALLEGATION VI

Trial counsel was ineffective by failing to request a charge on constructive possession and objecting to the improper an incomplete mere presence charge.

Co-defendant was caught with drugs in her actual possession. Co-defendant was proprietor and lesser of resident where drugs were found. There was no special relationship or nexus between co-defendant, the drugs found on her, or applicant. Applicant was not in actual or constructive possession of any drugs. Had counsel requested a specific charge on constructive possession, state would have had to prove beyond a reasonable doubt applicant's dominion and control. State v. Ellis, 207 S.E.2d 408 (1974). State v. Kimbrell, 362 S.E.2d at 631. State v. tabory, 260 S.C. 355, 196 S.E.2d 111, 113 (1973).

Applicant requested a "mere presence charge." The court charged the jury as follows:

Mere presence at the scene is not sufficient to establish guilt as an aider or abetter. All persons who are present aiding, abetting, encouraging, or inciting another to commit a criminal act are equally guilty with the one who does the act.

However, if you find all the evidence that Mr. was merely present at the or near the scene of the crime, you are instructed that such presence at or near the scene would not support a finding of guilt. Mere presence can only create a suspicion, and you cannot find Mr. Battle guilty because of suspicion.

Mere presence at or near the scene of a crime does not in and of itself permit an inference to be drawn by you that he has knowledge of any criminal plan which might have been formed, nor does mere presence support an inference of intent to engage in or to aid criminal conduct. Suspicion circumstances, like mere presence, are not sufficient for a finding of guilt against Mr. Battle. So, of course, mere presence, as I said, is not enough to convict someone of a crime.

[W]hen a jury is charged with mere presence, the trial court must give specific, proper charge. (1). Court must charge the jury that the defendant's presence at the location or scene where drugs are found, absent his dominion and control, is insufficient as a matter of law to find defendant guilty beyond a reasonable doubt. (2). The charge must also inform the jury that the state must prove beyond a reasonable doubt that defendant had dominion and control over the drugs or the right to exercise dominion and control over the drugs. Failure to give a proper mere presence charge will result in the reversal of a conviction. See; State v. Brownlee, 318 S.C. 34, 37, 455 S.E.2d 704 (Ct.App.1995); State v. Lee, 298 S.C. 362, 365 380 S.E.2d 834, 836 (1989); see State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991).

ARGUMENT VII.

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Counsel was ineffective by failing to hire handwriting expert, which The admission of the letter was highly prejudicial to petitioner, which allowed the State to attack his character when it was not offered as evidence, made improper comments, plead to jury's passion, interject his personal opinion as to guilt, placed prestige of government behind witnesses by vouching for their credibility, counsel also conceded applicant's guilt.

The State's key witness was Lashawn Floyd. She testified that she was involved in arranging a sale of drugs to informant Jason Wallace. ROA.p.245, line 3-p.247, line 14. To bolster its case, the state tendered a letter which Floyd claimed she receive while in jail. However, she stated "I don't really know [petitioner's] handwriting." ROA.p.269, lines 3-6. Petitioner objected to the foundation under Rule 901, the court allowed it under 901 (b)(4). ROA.p.271, lines 10-18. The state then published the letter to the jury. ROA.p.273, lines 18-p.277, line 20. It was signed only "Your cousin."

Rule 901 Provides in pertinent part:

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements with the rule.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

Floyd only testified as follows:

Lashawn Floyd: Because as it speaks about what happened and it

says "me and"--I didn't wrote the letter. So it--I didn't wrote the letter. And he didn't wrote the letter because his name was in there. It mentioned. So, you know, it said "me and...."

The Court: So you believe that letter is from Mr. Battle. Is that right?

The Witness: Yes, sir.

ROA.p.270, lines 18-25. This was insufficient to comply with the rule. In State v. Hightower, 221 S.C. 91, 69 S.E.2d 363, at 370 (1952), it held: A conversation or writing can be authenticated by evidence that the other party was replying to information supplied by or questions asked by the witness. Hightower Supra: see: Leesville Mfg. Co. v. Morgan Wood & Iron Works, 75 S.C. 342. 55 S.E. 768 (1902). In fact, a letter received in due course of mail in response to letter or conversation by receiver is presumed to be letter of person or corporation whose name is on it.

Rule 901 (b)(4). Distinctive Characteristic and the Like, recognizes three (3) types of characteristics evidence when authenticating a letter. (1) evidence authenticated by Unique Markings, (2) evidence authenticated by the Reply Doctrine and (3) evidence authenticated by a Chain Of Custody.

The court allowed the letter into evidence under the Reply Doctrine (2). This was error and insufficient to comply with the rule 901 (b)(4). There was also another cousin, "Eddie," (James Nelson) who was equally capable of writing the letter.

Moreover, the solicitor made much use of the letter in closing argument. The error was prejudicial:

The first part of the letter was he wrote: The only person

who can save you--"the only person can save us is you." A 19-year-old girl, no record, no prior record, never been in trouble with the law, had no police record, he knew that she wouldn't get in any trouble or a little bit of trouble. So he wanted her to take the fall for his drug dealing enterprise.

"I told him that you were willing"--"him," that's Mr. Battle's attorney. "I told him that you are willing to give a statement to the facts that me and Eddie had nothing to do with what happened at your apartment that night." If he didn't have nothing to do with it, why would he need her to say that?

ROA.p.389, line 15-p.390, line 2. In fact the solicitor read the entire letter to the jury. ROA.p.390, line 3-p.393, line 4. He then characterized it:

Sounds like an innocent man, doesn't it? Isn't that an innocent man who tries to get a 19-year-old girl to lie for him and writes her a letter here and tells her what to say and promises all kind of things. I think that shows guilt as much as anything else. ROA.p. 393, lines 5-9.

Solicitor further made a plea to the passion of the jury. Roa.p.380, lines 15-19.

Poison that's what this is, this stuff causes more crime in the country than anything else. It does more to destroy families. More violent crime in this country is caused by this stuff right here in this pouch that Mr. Battle is putting on our streets.

ROA.p.394, lines 21-25,-p.395, lines 1-2.

We've got to do something about this, especially in this quantity. That's what makes this case so important. It's a 1999 case. It was old. I inherited it when I came to work. I had to do something with it. It's too much drugs involved. I couldn't plead

it. I couldn't let it go, because we really in society have to be concerned about people that sell this much drugs.

ROA.p.395, lines 4-8. Petitioner objects.

ROA.p.67, line 3. Solicitor bolstering and vouching for witnesses credibility. "She wasn't selling drugs" ROA.p.380, lines 3-4. This little girl is not any kind of sophisticated drug dealer. ROA.p.386, lines 19-22. We know Lashawn didn't have the drugs. She didn't have the drugs. ROA.p.388, lines 23-24. just--she had no reason to lie. She's told the truth about that. Roa.p.387, lines 8-25, -388, lines 1-3. Here's a man that works as a stevedore. He loads and unloads ships for a living. Does that sound like a drug dealer to you? He doesn't even have a car. I don't think he was making any money out of it, but he went along. That's James's testimony, and you listened to him, and he told the truth.

Attorney may not suggest in closing argument that evidence which was not presented at trial provides additional grounds for finding defendant guilty. Where improper closing argument is made by prosecution, trial judge has obligation to intervene to assure protection of defendant's right to fair trial. U.S. v. Garza, 608 F.2d 659 (1979). U.S. v. Monahan, 741 F.2d 1434, 1441 (D.C. Cir.1984) Cert. denied, 470 U.S. 1085, 105 S.Ct. 1847, 85 L.Ed.2d 146 (1985); U.S. v. Hawkins, 595 F.2d 751, 754 (D.C. Cir.1978)(Prosecutors are not "at liberty to substitute emotion for evidence by equating, directly or by innuendo, a verdict of guilty to a blow against the drug problem." Cert. denied, 441 U.S. 910, 99 S.Ct. 2005, 60 L.Ed.2d 380 (1979). See; State v. Liberte, 521 S.E.2d 744 (S.C. App. 1999). State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996).

Character evidence is so highly prejudicial that it is usually excluded under hard fast rules. State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959); McCormick Evidence § 116 p.442 (2d ed. 1972); See also; State v. Ross, 272 S.C. 56, 249 S.E.2d 159 See; U.S. v. Diloroto, 888 F.2d 996, 999-1000 (3d Cir. 1989)(reversal required when prosecutor vouched for credibility of witnesses and credibility significant issue at trial); See also; U.S. v. Eyester, 948 F.2d 1196, 1207 (11th Cir. 1991).

First prosecutor comments to jury that" because both codefendant took the stand, they did not have anything to hide. This planted the seed in the jury's mind that, since applicant did not take stand, was because he had something to hide.. "I told them to tell you all what they were convicted of. I didn't want him to hide it" ROA.p.375, line 14-18.

Trial counsel objected to the admission of the letter throughout the entire trial, but at closing trial-counsel conceded applicant's guilt to the jury. ROA.p.402, line 18-22, -p.403, line 1-8.

And he writes a letter. What would do? You know she won't give up Eddie, the real uncle. He wrote that letter in an inarticulate and desperate attempt to provide Shawn with a viable statement that she can write so she could save Eddie who you know she's got to keep an eye on.

The only option was for Ernie to try to save his life. So he writes a letter. And it wasn't the smartest thing to do. To be honest with you, it looks bad, and I am afraid that the letter will actually prevent you from seeing the truth. Don't lose sight of what the truth is and where to find it and where to get it from. Yeah, Ernie tried to save his life by writing that letter. How many of us wouldn't do the same thing?

This performance by counsel clearly fell below an objective standard of reasonableness, thus depriving applicant of the right to effective assistance of counsel. Strickland v. Washington. See U.S. v. Swanson, 943 F.2d 1070 (9th Cir. 1991) (trial counsel abandoned petitioner's only defense which was inherently prejudicial where counsel conceded only factual issue in dispute in closing argument, and deprived petitioner of effective assistance of counsel and due process no showing of prejudice was necessary) Deluca v. Lord, 77 F.3d 578 (3rd Cir. 1996)

ARGUMENT VIII~~XXXX~~

The trial judge erroneously instructed the jury on reasonable doubt charge and concomitantly, charge on circumstantial evidence constituted burden-shifting easing the prosecution's burden of proof was highly prejudicial to petitioner., counsel's failure to object constituted ineffective assistance of counsel.

ROA.p.415, lines 5-10. The court charged the jury on reasonable doubt as follows:

A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. If after considering all the evidence in this case you hesitate to convict Mr. Battle on the basis of the evidence, then he is entitled to a verdict of not guilty.

ROA.p.428, lines 9-14. jury returned with a question pertaining to reasonable doubt. the following colloquy ensued between the court and the Foreman:

The Foreman: There was a portion about a reasonable person. Could there be another scenario possible: Would a reasonable person consider that something else happened instead of what's claimed by the prosecution?

The Court: Okay. I'm not sure if what you're asking about was what I discussed or mentioned when I was talking about two types of evidence, the two ways that we classify evidence.

ROA.p.419, lines 9-14. It further charged the jury on Circumstantial evidence.

and they must point conclusively, that is to a "moral certainty" to the guilt of the accused to the exclusion of every other reasonable hypotheses or explanation. In other words, the circumstances must be absolutely inconsistent with any other reasonable hypotheses or explanation than the guilt of the accused. [Emphasis supplied].

The Record On Appeal indicates no objection at trial, but counsel preserved for the record any issues for Appellate review. ROA.p.443, lines 17-21.

The U.S. Supreme Court held in: Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d (1990). That the Court disapproves of the "moral certainty" standard as applied to evidentiary proof beyond a reasonable doubt. See also; U.S. v. Drake, 673 F.2d 15 (1st Cir. 1982). Challenge to burden-shifting instructions on reasonable doubt has long been recognized by the Court. When a court defines reasonable doubt in a way that impermissibly eases the prosecution's burden of proof, "the defendant must be acquitted." Cage supra; (Per: Curiam) (Instruction equating reasonable doubt standard with "grave uncertainty" or "actual substantial doubt" and requiring only "moral certainty" impermissibly raised the degree of doubt required for acquittal) See; Sullivan v. Louisiana, 113 S.Ct. 2078, 2081 (1993).

The Supreme Court disagreed with the State Supreme Court finding that instruction was harmless beyond a reasonable doubt, and held that the jury instruction had the effect of directing a verdict for the prosecution, depriving the defendant of his right to a trial by a jury. The Court held that this was a "structural error," which under Arizona v. Fulminante, 449 U.S. 279, 286 (1991) was not subject to harmless error review.

Prosecution opened and closed on conspiracy charge. ROA.p.73, lines 17-24. ROA.p.378, lines 18-25. ROA.p.379, lines 1-2. Petitioner was granted a directed verdict on conspiracy charge. ROA.p.409. The judge agreed not to inform the jury that petitioner was granted a directed verdict on the conspiracy

charge. ROA.p.413, lines 6-10. Judge then re-charged the jury on trafficking which include conspiracy and failed to give curative instructions. ROA.p.419, lines 17-22. Judge instructed the jury if they had any questions as to what was charged, they should take the indictments with them and read them during their deliberation. ROA.p.424, line 9-18. This was error because although petitioner was acquitted of conspiracy, jury still could have inferred his guilt on the conspiracy element.

AFFIDAVIT OF SERVICE

04-3794

I, Ernest Battle/165247, against penalty of perjury, disposes and says that on this _____ day of September did forward to the Clerk Of Court/Julie J. Armstrong via U.S. Mail postage prepaid One (1) Original of Memorandum of Law in support of Post Conviction Relief Application pursuant to S.C. Code Ann. 17-27-10,-160. for filing.

Respectfully submitted,

Ernest Battle #165247
Ernest Battle/165247

FILED

2004 SEP 10 AM 9:09

JULIE J. ARMSTRONG
CLERK OF COURT

BY _____

SWORN TO _____ BEFORE ME
THIS 9 Sept
20 04
[Signature]
NOTARY PUBLIC
STATE OF SOUTH CAROLINA
MY COMMISSION EXPIRES 12/05/05

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ERNEST BATTLE.)

APPLICANT,)

v.)

STATE OF SOUTH CAROLINA,)

RESPONDENT.)

MOTION FOR APPOINTMENT OF COUNSEL

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2004 SEP 10 AM 9:09

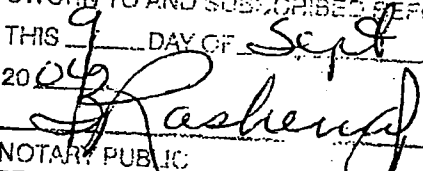
FILED

THE Applicant, Ernest Battle/165247, an Inmate Currently confined at the Lieber Correctional Institution , (S.C. Dept Of Corrections), hereby respectfully motion this Honorable Court for Appointment of Counsel to represent him in the upcoming POST CONVICTION RELIEF ACTION inwhich he has forwarded for filing in Charleston County. Pursuant to S.C.code Ann. § 17-27-10-160.

RESPECTFULLY SUBMITTED,



ERNEST BATTLE/165247

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 9 DAY OF Sept
2004

NOTARY PUBLIC
STATE OF SOUTH CAROLINA
MY COMMISSION EXPIRES 12/05/05

04-3794

AFFIDAVIT IN SUPPORT OF MOTION FOR APPOINTMENT OF COUNSEL

I, Ernest Battle/165247, an Inmate confined at the Lieber Correctional Institution, (S.C. Dept Of Corrections), disposes and says that I am of indigent status and cannot afford counsel nor payment for counsel in the proceeding and there for with respect file this affidavit in support thereof.

Respectfully,

Ernest Battle
Ernest Battle/165247

BY

2004 SEP 10 AM 9:09
JULIE L ARMSTRONG
CLERK OF COURT

FILED

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 9 DAY OF Sept
2004
[Signature]
NOTARY PUBLIC
STATE OF SOUTH CAROLINA
MY COMMISSION EXPIRES 12/05/05

AFFIDAVIT OF SERVICE

04-3794

I, Ernest Battle/165247, an Inmate confined at the Lieber Corrections Institution, against penalty of perjury desposes and says that on this 7th day of September, 2004, forwarded for filing with the Clerk of Court/Charleston County, Julie J. Armstrong, one (1) original of Motion For Appointment of Counsel. Via postage prepaid U.S. Mail.

Respectfully

Ernest Battle #165247

Ernest Battle/165247

FILED

2004 SEP 10 AM 9:09

JULIE J. ARMSTRONG
CLERK OF COURT

BY _____

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 9 DAY OF Sept

2004

[Signature]
NOTARY PUBLIC
STATE OF SOUTH CAROLINA

MY COMMISSION EXPIRES 12/05/05

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

Exhibit (A)

MARK SANFORD
Governor



ROBERT M. STEWART
Chief

March 15, 2004

Mr. Ernest Battle, # 165247
Lieber Correctional Institution
P. O. Box 205
Ridgeville, SC 29472

Dear Mr. Battle:

Please find enclosed a copy of the form you requested concerning Best Kit No. B111717.

Sincerely,

Major Mark A. Keel, Esq.
Chief of Staff
South Carolina Law Enforcement Division

MAK/dwh1stqtr.04C

Attachment: Form B (Rule 6)



CONTROL NO. B111717

PRINT ALL INFORMATION EXCEPT WHERE SIGNATURE IS REQUIRED

FORM B (RULE 6)CERTIFICATE OF PROOF OF CHAIN OF PHYSICAL
CUSTODY OR CONTROL
(Initial Custody)L99-10648
MillyThis is to certify that I Glen Campbell am employed by
(Name)North Charleston Police Department and that on
(Name of Agency or Department)7-16, 99, I seized from LASHAWN SHANTELL FLOYD
(Date) (Name)pursuant to Lawful Arrest
(State Whether Subject to a Warrant, Lawful Arrest or Otherwise)at or near 1855 Reddin Road North Charleston SC
(Place Where Seized)

the following substance(s) or container(s):

(Describe substance or container with sufficient particularity to distinguish it.)

ONE ZIPLOCK SANDWICH BAG CONTAINING A WHITE POWDER
SUBSTANCE WHICH FIELD TESTED POSITIVE FOR COCAINE AT
TIME OF ARRESTOn 7-16, 99, I made delivery of the above described
(Date)substance(s) or container(s) to NCPD EVIDENCE DROP BOX of
(Name)NCPD in substantially the same condition
(Law Enforcement Agency)

as when I received it.

NCPD PROPERTYPlace: _____
Date: JUL 20 1999Sworn before me on this 20 day of July, 1999Charles H. Hadd
Notary Public for South Carolina

(Signature)

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

Exhibit (B)

JIM HODGES
Governor



ROBERT M. STEWART
Chief

December 19, 2002

JUL 22 2003

S.C. SUPREME COURT

Mr. Ernest Battle (#165247)
Leiber Correctional Institution
P. O. Box 205
Ridgeville, SC 29472

Dear Mr. Battle:

I am responding to your request concerning BEST Kit No. B 111717. The enclosed memo should be self-explanatory.

Sincerely,

Major Mark A. Keel, Esq.
Chief of Staff
South Carolina Law Enforcement Division

MAK/dwh2ndqtr.(02/03)SCDC

Attachments: Memo from Lt. Todd Hughey



SOUTH CAROLINA LAW ENFORCEMENT DIVISION



JAMES H. HODGES
Governor

ROBERT M. STEWART
Chief

MEMO

To: Lt. Andy Jordan

From: Lt. C. Todd Hughey 

Date: December 12, 2002

Re: Request by Inmate Ernest Battle (165247)

I have completed a review of the case file associated with evidence submitted for Drug Analysis in BEST Kit No. B111717 (L9910648) on July 28, 1999 by the North Charleston Police Department. A Forensic Service Laboratory report was issued by this department for this case, but the subject named on the report was not "Ernest Battle".



THOMAS L. HUGHSTON, JR.
CIRCUIT JUDGE, RETIRED



2144-MELBOURNE AVENUE, SUITE 220
NORTH CHARLESTON, SC 29405
PHONE: (843)740-5875
FAX: (843)740-5883
thughstonj@scjd.state.sc.us

Exhibit (c)

July 16, 2001

Mr. Earnest Battle, Jr.
No. 165247
Kirkland R & E Center
4344 Broad River Rd.
Columbia, SC 29210

I received your letter of July 1, and I am placing it in the Clerk's file of your case.

Very truly yours,

T. L. Hughston, Jr.
Thomas L. Hughston, Jr.

TLH:rrh

2001 JUL 17 AM 8:10
JULIE J. ARMSTRONG
CLERK OF COURT
BY *OK*

FILE

REC - 6/14/01
B.T.L.H.J.

To: Your Honorable Judge Houston

Dear Judge Houston,

I am writing to you in regards to my previous trial in which you presided over. I respectfully bring to your attention that I was not, nor am I satisfied with my counsel, Att. William McGure's representation. I render Att. William McGure ineffective in his representation. I believe according to the rules of ineffective assistance of counsel. 1. That the petitioner or defendant must first show how his or her attorney was ineffective in their representation. 2. How his or her attorney's ineffectiveness deprived the petitioner or defendant of a fair trial. 3. How his or her attorney's ineffectiveness may have of did cause the jury's verdict to have been different then in favor of the petitioner or defendant. The defendant Ernest Battle will first bring to the court's attention that during closing arguments, defendant attorney William McGure told the jury that defendant Ernest Battle, his client, wrote the letter that was introduced into evidence by the state which was objected to by defense counsel. There was no evidence that the defendant wrote the letter. The jury had no evidence that the defendant wrote the letter. The letter did not contain defendant's signature. The letter was testified to on direct examination by the state by Ms. Lashawn Floyd, witness for the state. She woke up one night the letter was under her door she testified she didn't know where it came from at the time in which defense counsel, Att. William McGure told the jury that defendant Mr. Ernest Battle wrote the letter, when there was no evidence ~~that~~ linked the defendant Mr. Battle to the letter, at that instance Att. William McGure was and became ineffective and to further corroborate the defendant's claim. After the jury have reached a verdict of guilty on the charges of trafficking and possession with intent to distribute in school zone. The jury was dismissed and told by your honor that they could freely discuss the case at that point. One of the jurors, Ms. Lana, I don't know her last name, however she is a black female approximately age 21-25, went and sat behind my mother and fiancée, Ms. Felicia Smalls. I was informed by my fiancée later that next evening via telephone that she, Felicia Smalls spoke to the juror Ms. Lana and asked her what made them reach the guilty verdict and she stated #1 we the jury did not believe that Mr. Battle wrote the letter however when Att. McGure stated in the closing argument to the jury that Mr. Battle did write the letter that was one of the reasons why we convicted him on was his attorney's statement that Mr. Battle wrote the letter and second the defendant Mr. Battle did not take the stand. Your honor this is a clear disregard of the instructions that you gave the jury. That by the defendant not taking the stand, In no way is he Mr. Battle to be presumed guilty. The burden of proof is on the state to prove the defendant Mr. Ernest Battle guilty beyond a reasonable doubt upon the evidence presented and the testimonies given. But by the defendant not testifying in his behalf is not reason to assume guilt. For these reasons the defendant Mr. Ernest Battle request that the jury verdict be set aside and Ms. Lana be contacted to corroborate the defendant's claim and declared a mistrial and his bond be reinstated.

Sincerely,

Mr. Ernest Battle

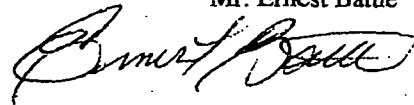


Exhibit #1

STATE OF SOUTH CAROLINA

AFFIDAVIT

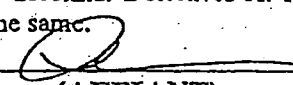
COUNTY OF CHARLESTON
CITY OF NORTH CHARLESTONOCA# 9902558209716
INV. A. KUECHLERPersonally appeared before me, a magistrate of this County, one R. MILLER
who, first being duly sworn, deposes and says that (name of the defendant)

ERNEST BATTLE

did within this County and State on the 15th day of July, 1999, violate the criminal laws of the State of South Carolina in the following particulars:DESCRIPTION OF OFFENSE
TRAFFICKING IN COCAINE
VIOLATION OF SECTION 44-53-370

The affiant states there is probable cause to believe that the defendant named above did commit the crime(s) set forth, and that such probable cause is based on the following facts:

That on or about 07-15-99, while at 1855-B Reddin Rd., located in the City, County and State aforesaid, one Ernest Battle, did commit the offense of **TRAFFICKING IN COCAINE** in violation of section 44-53-370 of the South Carolina Code of Laws of 1976, as amended. In that the defendant did willfully, unlawfully, and knowingly, have in his possession and under his control approximately (83) grams of a white powder like substance, which field tested presumptive for Cocaine. Facts to establish the aforesaid are that the NCPD Narcotics Unit conducted a controlled purchase of cocaine utilizing a confidential informant. The defendant drove to the corner of St. Johns Ave. and Reddin Rd. where he agreed to meet the co-defendant, Lashawn Shantelle Floyd, to deliver to her a approximately 4 ounces of a white powder like substance that she in turn agreed to sell to the confidential informant. Upon the defendant meeting with the co-defendant, the substance was turned over to the co-defendant. All this done against the form of the Statute and against the peace and dignity of the State of South Carolina. Detectives A. Kuechler, Lt. Cumbee, G. Gould, and Det. VanOoteghem are witnesses to prove the same.

Sworn to and Subscribed before me
this _____ day of JUL 16 1999
19____.
(AFFIANT)

Signature of JudgeAddress: 4900 Lacross Rd.
North Charleston, SC 29419
Phone: (803) 554-5700NOT A TRUE COPY
JUL 16 1999 (SEAL)
CLERK OF COURT

STATE OF SOUTH CAROLINA)
☒ County/ ☐ Municipality of)
CHARLESTON)

Personally appeared before me the affiant PEC R. MILLER
being duly sworn deposes and says that defendant EARNEST BATTLE
did within this county and state on 7-15-99 violate the criminal laws of
State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of CHARLESTON
in the following particulars:

TRAFFICKING CRACK COCAINE
44-53-375

I further state that there is probable cause to believe that the defendant named above did
the crime set forth and that probable cause is based on the following facts:

SEE ATTACHED AFFIDAVIT

Sworn to and subscribed before me)
on JULY 16, 1999)
Signature of Affiant)
Affiant's Address 4900 LACROSS ROAD
NORTH CHARLESTON, SC 29405
Affiant's Telephone 554-5700

STATE OF SOUTH CAROLINA)
☒ County/ ☐ Municipality of)
CHARLESTON)

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:
It appearing from the above affidavit that there are reasonable grounds to believe
on 7-15-99 defendant EARNEST BATTLE
did violate the criminal laws of the State of South Carolina (or ordinance of
☒ County/ ☐ Municipality of CHARLESTON as set forth below:

TRAFFICKING CRACK COCAINE
44-53-375

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her
me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to
defendant at the time of its execution, or as soon thereafter as is practicable.

Judge's Address 3841 LEEDS AVE.
CHARLESTON, SC 29405
(LS.))
Judge's Telephone 529-7482
Issuing Court ☒ Magistrate ☐ Municipal ☐ C

Signature of Issuing Judge 611
Judge Code: 611

ARREST WARRANT
F- 980726
STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
CHARLESTON

THE STATE
against
EARNEST BATTLE

Address: CHARLESTON, SC 29403

Phone: 554-5700
Sex: M Race: B Height: 5'11" Weight: 165

DOB: 07-15-1972 Agency/ORI #: NCRD
Prosecuting Agency: KEUGHLER
Prosecuting Officer: KEUGHLER

Offense: TRAFFICKING CRACK
COCAINE Offense Code: 44-53-375
Code/Ordinance Sec: 44-53-375

This warrant is CERTIFIED FOR SERVICE in the
☒ County/ ☐ Municipality of

The accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge
(LS.)

RETURN
A copy of this arrest warrant was delivered to
defendant EARNEST BATTLE
on 07-15-99

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:
SHERIFF'S OFFICE
JIM RUSSELL BUILDING
201 EMBELBOURNE STREET, ROOM 201
SOUTH CHARLESTON, S.C. 29405

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON)
STATE OF SOUTH CAROLINA)
- v -)
Earnest Battle)
Defendant.)
BY)
JULIE J. ARMSTRONG)
CLERK OF COURT)
Charge: F-980726 Trafficking Crack
F-980727 Trafficking CS within Proximity of
F-980728 School
Consp. Violate S.C. Narc Laws
REQUEST PURSUANT TO SC RULES
OF CRIMINAL PROCEDURE- RULE 5 & 6
EDWARDS NOTICE

The Defendant respectfully requests that the Solicitor produce or otherwise make available to the Defense all documents, tangible objects, reports of examinations and tests, witness statements, physical evidence and any other information subject to disclosure pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure.

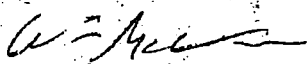
The Defendant further requests the Solicitor to produce all evidence favorable to the Defendant, subject to disclosure pursuant to Brady v. Maryland, 373 U.S. 83 (1963) and its progeny.

This request is a continuing request for all such discoverable information as it becomes known to the Solicitor or any Prosecution Agents.

The Defendant hereby asserts his Fifth Amendment right to remain silent and does not wish to be questioned in the absence of counsel, pursuant to McNeil v. Wisconsin, 111 S.Ct.220(1991), and Edwards v. Arizona, 451 U.S. 477 (1981).

Furthermore, pursuant to Rule 6 of the South Carolina Rules of Criminal Procedure, Defendant objects to the introduction of a chemist's or analyst's report without such person being personally present at trial. Defendant also requests the appearance in Court of persons within the chain of custody of all physical evidence.

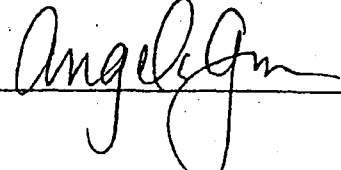
Respectfully Submitted,


William S. McGuire
Attorney for Defendant

Charleston, South Carolina
Dated: 10-27, 1999

CERTIFICATE OF SERVICE

I hereby certify that this Specific Brady Motion was served on the Solicitor for the Ninth Judicial Circuit on 10.27, 1999.



FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
 COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
 STATE OF SOUTH CAROLINA)
 JULIE J. ARMSTRONG)
 CLERK OF COURT)
 BY)

2001 MAY 30 PM 4:06
 W-16
 Informant No.: Traff. Crack (F-980726-728)

-vs.-

SPECIFIC BRADY MOTION

ERNEST BATTLE,
 Defendant.

The Defendant, Ernest Battle through his attorney, William S. McGuire, moves to have all Rule 5, Brady and Kyles material turned over to the defense. Specifically, all written material relating to all negotiations between the prosecutor's office and the co-defendants and their lawyers.

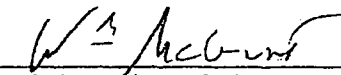
The defense requests the number, duration, and subject matter of each and every communication between the prosecutor's office and the co-defendants or their lawyers; whether verbal or written.

The defense requests all statements made by the informant and each of the co-defendants as well as any agreement under which those statements were given. The defense requests the contents of any deal, no matter how vague. The defense requests the identity and last known address of the confidential informant. The informant is not only a material witness, but would likely be a source of impeachment evidence regarding a co-defendant.

The defense requests all impeachment evidence regarding any potential witness including, but not limited to, prior inconsistent statements, convictions and acts of dishonesty that are not the subject of conviction.

The defense requests the substance of any and all statements made to the co-defendant that would be potentially admissible under Davis v. Alaska.

I SO MOVE:



William S. McGuire
Counsel for Ernest Battle

Charleston, South Carolina

Dated: 8-31, 2001

Honorable: Julie J. Armstrong
 Clerk of Court, C.P. & C.S.
 Charleston County
 100 Broad Street, Suite 106
 Charleston, S.C. 29401-2258

Mr. Ernest Battle # 165247
 Lieber Correctional Inst.
 P.O. Box 203
 Ridgely, S.C. 29472

September 7, 2004

Dear Ms. Armstrong:

Enclosed for Shag is one (1) original Application for Post Conviction Relief, one (1) Memorandum of Law in support of PCR Application, and Exhibits A, B, C, D, and E. Also for Shag, please find one (1) Motion For Appointment of Counsel with affidavit in support and affidavit of service. I respectfully request that all documents be filed with the Court of Common Pleas, and that you return to me a checked stamp/copy of each document forwarded to Shag.

Thanking you,

Sincerely,

Ernest Battle # 165247

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

04-CP-10-3794

Ernest Battle, # 165247,

Applicant,

v.

State of South Carolina,

Respondent.

RETURN

The Respondent, making its Return to the application for Post-Conviction Relief (PCR) filed September 10, 2004, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the November 1999 term of the Charleston County Grand Jury for trafficking cocaine (1999-GS-10-7109), Possession With Intent to Distribute Cocaine Within Proximity of a School (1999-GS-10-7110), and Conspiracy to Violate South Carolina Narcotics Laws (1999-GS-10-7111) He was represented by William S. McGuire, Esquire and Lesli Sarji, Esquire. On June 4-8, 2001, the Applicant proceeded to trial after which he was found guilty of trafficking cocaine and possession with intent to distribute cocaine within proximity of a school. He was sentenced by the Honorable Thomas L. Hughston to concurrent sentences totaling twenty-five years.

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.

Battle, Op. No.2003-UP-348 (S.C. Court of Appeals filed May 20, 2003). The South Carolina Supreme Court denied the Applicant's petition for Writ of Certiorari by Order dated February 5, 2004.

Attached herewith and incorporated herein by reference are the records of the Charleston County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the Applicant's appellate records. Any of the above not so attached will be forwarded upon receipt.

II.

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

1. Applicant was arrested without probable cause, thus in violation of his 4th and 14th Amendment Rights to the U.S. Constitution and S.C. Const., Article I, § 3.
2. Former attorney Joseph Condon and trial attorney was ineffective by failing to file a pre-trial motion challenging the validity of the warrant affidavit, pursuant to Franks v. Delaware, 98 S.Ct. 2674 (1978); thus in violation of applicant's 4th, 5th, and 14th Amendment Rights to the U.S. Constitution and properly raise and litigate applicant's claims.
3. Trial attorney was ineffective by failing to object to applicant being subjected to Double Jeopardy after acquittal of conspiracy charge where prosecution had opened and closed charging conspiracy, and trial court failed to give curative instructions, thus in violation of applicant's 5th, and 6th Amendment Rights to the U.S. Constitution.
4. Trial counsel was ineffective by failing to file pre-trial motion to suppress cocaine found on co-defendant and not applicant, failure to raise issue of insufficient evidence at end of trial or move for dismissal based on insufficient evidence, violated

applicant's 6th and 14th Amendment Right to the U.S. Constitution.

5. Trial counsel was ineffective by failing to call known exculpatory witness and state's failure to preserve potentially exculpatory evidence violated the applicant's Right to Due Process guaranteed by the U.S. Constitution.
6. Trial counsel was ineffective by failing to request a charge on constructive possession and objecting to the improper an[d] incomplete mere presence charge.
7. Counsel was ineffective by failing to hire a handwriting expert, which the admission of the letter was highly prejudicial to petitioner, which allowed the state to attack his character when it was not offered as evidence, made improper comments, plead to jury's passion, interject his personal opinion as to guilt, placed prestige of government behind witnesses by vouching for their credibility, counsel also conceded the applicant's guilt.
8. The trial judge erroneously instructed the jury on reasonable doubt charge and concomitantly, charge on circumstantial evidence constituted burden-shifting easing the prosecution's burden of proof was highly prejudicial to petitioner, counsel's failure to object constituted ineffective assistance of counsel.

III.

The Respondent interprets each of the Applicant's allegations to be claims that he received ineffective assistance of counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of

competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Butler, Id. 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, Id.

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, Id. 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.

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

IV.

The State therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the State moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

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

VI.

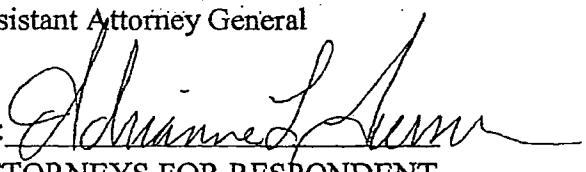
WHEREFORE, having made its Return, the State requests that a hearing be held.

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

ADRIANNE L. TURNER
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

May 25, 2005.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

)
) IN THE COURT OF COMMON PLEAS

2004-CP-10-3794

Ernest Battle,

Applicant,

VS

State of South Carolina,

Respondent.

)
)
)
)
) AFFIDAVIT OF SERVICE BY MAIL

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

Rad S. Deaton, Esquire
Deaton Law Firm, LLC
2170 Ashley Phosphate Rd., Ste. 402
North Charleston, SC 29406

DATED this 1st day of June, 2005.

Brooke L. Gambill, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OF COMMON PLEAS
DOCKET NO. 2004-CP-10-3974

POST CONVICTION RELIEF HEARING

ERNEST BATTLE,

Applicant,

VS.

May 30, 2006
Charleston, South Carolina

STATE OF SOUTH CAROLINA

Respondent,

BEFORE:

THE HONORABLE WILLIAM P. KEESLEY, Judge.

APPEARANCES:

RAD S. DEATON, ESQ.
ATTORNEY FOR APPLICANT

COLLEEN E. DIXON, ESQ.
ASST. ATTORNEY GENERAL
ATTORNEY FOR RESPONDENT

HEATHER GAYLE BURNS, RDR
OFFICIAL COURT REPORTER
9TH JUDICIAL CIRCUIT

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CLOSING ARGUMENTS

By Mr. Deaton
By Ms. Dixon

Page 154, 177
Page 172

1 THE COURT: All right.

2 Ernest Battle is the first case?

3 MS. DIXON: That's

4 correct, your Honor.

5 THE COURT: You ready to
6 proceed?

7 MR. DEATON: Yes, your
8 Honor.

9 THE COURT: State ready?

10 MS. DIXON: State is
11 ready, your Honor.

12 THE COURT: All right.
13 You need to make any opening
14 statements or you just want to
15 call your first witness?

16 MR. DEATON: Your Honor,
17 I'd like to frame the issues if I
18 could just to let you know what
19 Mr. Battle's issues are that the
20 Court has to rule on and then
21 we'll start out with testimony.

22 Mr. Battle has claimed
23 that there was a lack of probable
24 cause for his arrest, that trial
25 counsel was ineffective for

1 failing to file a motion pursuant
2 Franks versus Delaware
3 challenging the warrant
4 affidavit, counsel was
5 ineffective for failure to object
6 or request a curative instruction
7 after a directed verdict on the
8 conspiracy to violate the
9 narcotics laws indictment,
10 counsel was ineffective for
11 failure to file a pretrial motion
12 to suppress cocaine, counsel was
13 ineffective for failing to raise
14 the issue of insufficiency of
15 evidence presented or move for a
16 dismissal on that ground, counsel
17 was ineffective for failing to
18 call Matt Wallace as a witness,
19 counsel was ineffective for
20 failing to move for dismissal
21 based on the State's losing the
22 preliminary hearing tape, counsel
23 was ineffective for failure to
24 request a constructive possession
25 charge, counsel was ineffective

1 for failure to request a more
2 specific mere presence charge,
3 and counsel was ineffective for
4 admitting that a handwritten
5 letter at issue in the case was
6 written by the applicant in his
7 closing, counsel was ineffective
8 for failure to request a mistrial
9 upon the solicitor's improper
10 closing argument to the jury, and
11 failure to object to the
12 reasonable doubt and
13 circumstantial evidence charges
14 given by Judge Hughston.

15 Your Honor, if I may,
16 I've given a brief, your Honor,
17 on the last issue which is the
18 circumstantial evidence
19 reasonable doubt charge, given a
20 brief to the State and I'd to
21 present one to the Court if I
22 may.

23 THE COURT: Sure. You
24 ready?

25 MR. DEATON: Yes, your

1 Honor.

2 THE COURT: Call your
3 first witness.

4 MR. DEATON: Applicant
5 would call Ernest Battle.

6 THE COURT: Come around
7 and be sworn, please.

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ERNEST BATTLE, having
been called as a witness, is duly
sworn and testifies as follows:

DIRECT EXAMINATION BY
MR. DEATON:

Q Mr. Battle, how old are
you, sir?

A I'm forty-six.

Q Forty-six. You recall
your trial and being represented by
Mr. William Mc Guire and Miss Leslie
Sarji?

A Yes, I do.

Q Did Mr. Mc Guire handle

Battle -- Direct

1 your case mostly or did Miss Sarji
2 have any, any involvement in the
3 preparation of your case?

4 A Well, Mr. Mc Guire, he
5 handled the case himself.

6 Q And Miss Sarji sat
7 second chair?

8 A Yeah. She sat second
9 chair. Correct.

10 Q You recall the
11 preliminary hearing?

12 A Yes.

13 Q Who were you represented
14 by then?

15 A Attorney Joseph Condon.

16 Q Okay. And what exactly
17 happened at that preliminary hearing?

18 A Okay. I was present
19 during the hearing along with my
20 attorney and Officer Quenton from
21 North Charleston, he was present
22 representing himself, and Assistant
23 Prosecutor Rodney Davis was present
24 also for the State when the
25 proceeding occurred.

Battle -- Direct

1 The fact that the first
2 Officer Quenton who testified, he
3 said I was standing there, I had
4 possession of the drugs, and that was
5 the reason they based the probable
6 cause on.

7 Q Was that based on the
8 warrant affidavit?

9 A Right. Correct.

10 Q And the warrant
11 affidavit you're talking about was
12 for trafficking cocaine?

13 A Yes, sir.

14 Q That indicated that --
15 and if you need to look at this to
16 refresh your recollection -- that
17 indicated that you possessed cocaine?

18 A Of course. If I could
19 finish.

20 Q Go ahead.

21 A Thank you. And it was
22 established at the preliminary
23 hearing that I did not have any
24 possession of the drug whatsoever and
25 then he attempted to base his

Battle -- Direct

1 probable cause on the fact that I had
2 marked monies, which I didn't have
3 any marked monies either, and that he
4 said the drugs or the marked monies
5 was found in my car, which it wasn't.
6 In fact it was another codefendant
7 who actually had the actual proceeds
8 of the sale.

9 Q And that was John
10 Claude?

11 A Correct.

12 Q And have you since
13 attempted to obtain a copy of the
14 preliminary hearing tape in this
15 matter?

16 A Yes, sir, I did.

17 Q And you were unable to
18 do so?

19 A Yes, sir.

20 Q That was because the
21 tape was lost?

22 A Well, according to my
23 attorney at the time, Mr. Condon, he
24 said because I believe he requested a
25 copy of the tape pursuant to the

Battle -- Direct

1 rules and he was advised by Mr. Davis
2 that someone in his office had
3 mistakenly erased the whole tape.

4 Q And that's Rodney Davis?

5 A That's correct.

6 Q He was the one who was
7 the prosecutor at the time of the
8 preliminary hearing?

9 A Right. He never got a
10 chance to transcribe a copy of the
11 tape.

12 Q Okay. Did your case get
13 bound over to the grand jury?

14 A Yes, sir. It did.

15 Q Okay. Did Judge -- do
16 you recall or you recall Judge
17 Gosnell -- was Judge Gosnell the
18 judge at the preliminary hearing?

19 A Yes, sir. He was.

20 Q Do you recall him
21 wavering on his decision to bind you
22 over?

23 A Yes, sir. He based his
24 decision on probable cause because
25 that -- should one of the witnesses

Battle - - Direct

1 decide to testify for the State at a
2 later time - -

3 MS. DIXON: Objection,
4 your Honor.

5 THE COURT: Yes.

6 MS. DIXON: It's hearsay.
7 He's testifying as to what the
8 judge may or may not have said.

9 MR. DEATON: I agree, your
10 Honor.

11 THE COURT: All right.
12 Sustained.

13 Q Well, at the time of the
14 preliminary hearing or before the
15 preliminary hearing did you ask
16 Mr. Condon or any of your attorneys
17 to make a motion, Franks versus
18 Delaware, regarding the sufficiency
19 of the warrant affidavit?

20 A Yes, sir, I did.

21 Q And why did you do that?

22 A Because I know that the
23 contents of the warrant affidavit
24 were false and misleading.

25 Q Okay. And that

Battle -- Direct

1 mentioned that you have in your
2 possession approximately eighty-three
3 grams of white powder-like substance?

4 A Right. Which never
5 occurred. Right.

6 Q And those facts you
7 allege are false and misleading?

8 A The fact that it's
9 contained in the warrant affidavit
10 are false and misleading.

11 Q And you asked your
12 attorney --

13 A I asked my attorney, I
14 requested a copy of the preliminary
15 hearing showing that I specifically
16 did not have it, I requested that he
17 in fact challenge the validity and
18 insufficiency of the warrant
19 affidavit on my behalf.

20 Q And he didn't do that?

21 A And he didn't do it.

22 Q You recall during your
23 trial that Mr. McGuire objected to a
24 letter allegedly written by you? The
25 State was indicating that the letter

Battle -- Direct

1 was written by you. Do you recall
2 that?

3 A Yes, sir, I do.

4 Q And Mr. Mc Guire
5 objected to that letter?

6 A Yes, he did. During the
7 entire trial.

8 Q And that letter was
9 produced by LaShawn Floyd?

10 A Correct.

11 Q Who was the codefendant?

12 A Yes, sir.

13 Q And do you recall
14 whether or not Ms. Floyd was
15 identified?

16 A Yes -- no, she was not.
17 Nor was there any attempt to identify
18 me as the one who wrote the letter.

19 Q Did you write the
20 letter?

21 A No, I did not.

22 Q Were you surprised that
23 Mr. Mc Guire told the jury you wrote
24 the letter?

25 A Very surprised. Yes,

Battle -- Direct

1 sir.

2 Q Did that catch you
3 off-guard?

4 A Of course it did. Yes,
5 sir.

6 Q When did Mr. Mc Guire
7 tell the jury after you wrote the
8 letter after objecting during the
9 whole trial?

10 A That was during the
11 closing, in his closing argument. I
12 believe he stated about three or four
13 times he apologized for me writing
14 the letter. He said it was maybe a
15 desperate attempt on my behalf but
16 really something to the effect
17 whereas I think it was, it was stupid
18 on my behalf or it was something dumb
19 on my behalf or something to that
20 nature.

21 But approximately three
22 or four times he reiterated to the
23 jury that I in fact wrote the letter
24 where he objected to it throughout
25 the entire trial and never once did I

Battle -- Direct

1 admit writing the letter.

2 Q Okay. And that letter,
3 basically it was a letter from
4 somebody to LaShawn getting --

5 A I'm sorry.

6 Q It was a letter to
7 LaShawn?

8 A Yes, sir.

9 Q He was saying, if you
10 know, that it would have come from
11 you. Correct?

12 A Right. Yes, sir.

13 Q So Mr. Mc Guire
14 basically admitted that you were
15 trying to get LaShawn to change her
16 testimony?

17 A Right. By him
18 apologizing to the jury for me,
19 stating that I wrote the letter when
20 he in fact objected throughout the
21 entire trial. I feel it was highly
22 prejudicial to me.

23 Q Okay. You claim in this
24 case that Mr. Mc Guire was
25 ineffective for failing to object to

Battle -- Direct

1 the insufficiency of the evidence or
2 failing to file a motion for a
3 dismissal based on the lack of
4 evidence to convict. Is that because
5 you were not found with any drugs on
6 your possession?

7 A Right.

8 Q Or explain to me what
9 that allegation is in regard.

10 A Yes, sir. Okay. The
11 fact that I never was in possession
12 of any drugs nor there was any nexus
13 between me and the alleged
14 codefendant LaShawn Floyd and as well
15 the --

16 Q Is that because
17 Miss Floyd was found with the drugs
18 that night?

19 A I'm sorry. Say again.

20 Q On the night of July
21 fifteenth, 1999, the night of the
22 alleged incident --

23 A Uh-huh.

24 Q -- Miss Floyd was found
25 with the drugs?

Battle - - Direct

1 A Yes. She was found with
2 the drugs in her possession.

3 Q In her possession?

4 A Right. While in the
5 process of attempting to sell to an
6 informant.

7 Q And you were in the
8 yard?

9 A No. I was not in the
10 yard. I was around the corner.

11 Q Around the corner. All
12 right.

13 A Yeah.

14 Q And as far as there
15 being insufficient evidence, you want
16 to expound on that some more?

17 A Okay. Mr. Mc Guire, he
18 never once filed a pretrial motion to
19 have the evidence suppressed being as
20 he knew because he had a S. L. E. D.
21 warrant testimony from various
22 different officers that in fact these
23 drugs was actually seized from
24 Miss Floyd.

25 Q And you said the

Battle -- Direct

1 S. L. E. D. report -- hold on one
2 second. Your Honor, may I approach
3 the witness?

4 THE COURT: Sure.

5 Q Thank you.

6 You recognize that
7 document?

8 A Right.

9 Q Is that the -- is that
10 the S. L. E. D. report you're
11 referring to?

12 A Well, this is the form
13 rule six chain of custody form.
14 Right.

15 Q Okay.

16 A And one of the documents
17 that I received from S. L. E. D.

18 Q And what does that
19 document indicate?

20 A Okay. This document is
21 in regarding to the control of B one
22 one seven one seven and then the
23 content of the documents is a form B
24 to prove chain of custody, says that
25 he is employed by the North

Battle -- Direct

1 Charleston Police Department and on
2 seven sixteen 1999 I seized from
3 LaShawn Shantelle Floyd pursuant to
4 lawful arrest at or near 1855 Reddin
5 Road, North Charleston, and the
6 description that was seized, the
7 substance was one Ziplock sandwich
8 bag containing a white powder which
9 field tested positive for cocaine at
10 the time of arrest.

11 Q So this document is
12 saying basically that LaShawn Floyd
13 had the drugs?

14 A Yes, sir.

15 Q And you, you wanted Mr.
16 Mc Guire to move for, to suppress the
17 evidence based on that document or
18 based on the S. L. E. D. reports?

19 A Based on -- correct.
20 Yes, sir.

21 Q Did you request that Mr.
22 Mc Guire subpoena and call to testify
23 Matthew Wallace?

24 A Yes, sir, I did.

25 Q Did you know Matthew

Battle -- Direct

1 Wallace in 1999?

2 A No. No, sir. I didn't.

3 Q Had you ever met Matthew
4 Wallace before?

5 A No, sir.

6 Q Do you know if Mr.
7 Wallace was subpoenaed to testify in
8 your trial in 2001?

9 A In 2001?

10 Q When you went to trial.

11 A Okay. How I came to
12 come in contact with Matthew Wallace?

13 Q Well, I didn't ask
14 you -- what I was trying to get at.
15 Was did you know Matt Wallace at the
16 time of your trial?

17 A No. I did not.

18 Q But you know he was
19 subpoenaed to testify at your trial?

20 A Right, because I
21 requested it.

22 Q But he never testified?

23 A No, sir. He didn't.

24 Q Okay. Did you want him
25 to testify?

Battle -- Direct

1 A Yes, I did.

2 Q Okay. Were you
3 surprised that Mr. Mc Guire didn't
4 call any witnesses on your behalf?

5 A Yes, I was.

6 Q When did you first meet
7 Matt Wallace?

8 A I believe it was about
9 maybe six, six or seven months ago,
10 something in the area. Between six
11 and seven months ago I believe it was
12 because I'm currently housed at
13 Lieber Correctional Institution, and
14 for some reason or another he was
15 transferred from up the state, Evans
16 Correctional Institution I believe it
17 was, or one of the institutions up
18 state.

19 And we had an
20 opportunity because I was asking some
21 guys and some guys was discussing my
22 case and his name happened to come up
23 and they said oh, well, he came in
24 today. As a matter of fact he's on
25 the other side of there. Would you

Battle -- Direct

1 like to meet him? And I said okay.

2 Sure. So that's how I came to meet
3 him and stuff like that.

4 Q So you met Matthew
5 Wallace -- you didn't seek him out
6 and he didn't seek you out. You just
7 kind of met?

8 A Right.

9 Q Did you ask him or
10 threaten him to testify in this
11 proceeding or did he offer to do so?

12 A No. I never threatened
13 him on anything. I asked him so
14 far -- he offered to do it for me. I
15 asked him if wanted to do, that's
16 what he wanted to do? He said sure,
17 that's what he wanted to do. I said
18 that's fine with me.

19 Q Mr. Battle -- may I
20 approach, your Honor?

21 THE COURT: Certainly.

22 Q Do you recognize that
23 document?

24 A Yes, sir, I do.

25 Q What is that document?

Battle - - Direct

1 A This is a memo from
2 S. L. E. D. from Major Hughey.

3 Q To you?

4 A To me. Yes, sir.

5 Q You received that?

6 A Yes, sir, I did.

7 Q What does that indicate?

8 A It's to Lieutenant Andy
9 Jordan from Lieutenant Todd Hughey,
10 date was December twelfth, 2002,
11 request by inmate Ernest Battle, one
12 six five two four seven. I have
13 completed a review of the case file
14 associated with evidence submitted
15 for drug analysis in best kit number
16 B111717. In parenthesis L9910648. on
17 July 28, 1999 by the North Charleston
18 Police department.

19 A forensic evidence
20 laboratory report was issued by this
21 department for this case, but the
22 subject named on the report was not
23 Ernest Battle.

24 Q Thank you, Mr. Battle.

25 MR. DEATON: Your Honor,

Battle - - Direct

1 we'd like to admit applicant's
2 exhibit number one, or number one
3 and two, your Honor, without
4 objection.

5 MS. DIXON: No objection,
6 your Honor.

7 THE COURT: All right.

8 (Whereupon, the
9 S. L. E. D. report dated May 27,
10 1997, was received and marked as
11 Petitioner's Exhibit No. 1 in
12 evidence.)

13 (Whereupon, the letter
14 dated December 12, 2002, was
15 received and marked as
16 Petitioner's Exhibit No. 2 in
17 evidence.)

18 Q Mr. Battle, who was
19 your - - were you engaged or married
20 at the time of the incident in 1999?

21 A Yes, I was. I was
22 engaged.

23 Q You were engaged to who?

24 A Miss Felicia Smalls.

25 Q Okay. During the trial

Battle -- Direct

1 was Miss Smalls present?

2 A Yes, she was.

3 Q She was sitting in the
4 courtroom the whole time?

5 A Yes, she was.

6 Q Okay. Tell me -- don't
7 tell me what she said, but did she
8 approach you at some point or contact
9 you after the trial?

10 A Yes. I didn't. She
11 did.

12 Q And at that -- did you
13 do anything in response to her
14 comments?

15 A Yes. What I did, I had
16 dictated a letter and had it signed
17 and asked her to please present it to
18 Judge Hughston on my behalf.

19 MR. DEATON: May I
20 approach the witness, your Honor?

21 THE COURT: Yes.

22 MR. DEATON: Thank you.

23 Q You recognize that as a
24 copy of the letter that you sent to
25 Judge Hughston?

Battle -- Direct

1 A Yes, sir, it is.

2 MR. DEATON: Your Honor,
3 I'd like to introduce as
4 evidence, put the letter in
5 evidence as petitioner's exhibit
6 three, your Honor, without
7 objection, I believe.

8 THE COURT: Yes, sir.

9 (Whereupon, the letter
10 from Mr. Battle to Judge Hughston
11 was received and marked as
12 Petitioner's Exhibit No. 3 in
13 evidence.)

14 Q Mr. Battle, you
15 initially had a claim that Mr. Mc
16 Guire was ineffective in failure to
17 hire a handwriting expert. You're
18 dropping that claim at this point?

19 A Yes, sir, I am.

20 Q Okay. And you recall at
21 trial, you recall the solicitor
22 making an argument regarding drugs
23 and society?

24 A Yes, sir, I do.

25 Q Do you recall Mr. Mc

Battle -- Direct

1 Guire objecting to that argument?

2 A Yes, sir, I do.

3 Q Was that the last thing
4 that was said to the jury by
5 Mr. Bosnak, the solicitor? Do you
6 recall?

7 A I believe that was the
8 last thing because I believe Mr. Mc
9 Guire asked the Court to admonish
10 Mr. Bosnak because that was against
11 the rules --

12 Q Okay.

13 A -- and the Court did so.

14 Q Okay. But, but Mr. Mc
15 Guire didn't make a motion to the
16 Court for a mistrial?

17 A No, he did not.

18 Q Okay. Do you recall
19 whether Mr. Mc Guire presented any
20 jury instructions to Judge Hughston?

21 A Yes, sir, I do.

22 Q Requested jury
23 instructions? Do you recall him
24 submitting a mere presence
25 instruction?

Battle -- Direct

1 A Yes, sir, I do.

2 Q Do you recall whether
3 that precise mere presence
4 instruction submitted by Mr. Mc Guire
5 was given by Judge Hughston?

6 A The mere presence charge
7 was given by Judge Hughston.

8 Q But was it the one that
9 Mr. Mc Guire asked for?

10 A I don't believe so.

11 Q Okay.

12 A Because it was not a
13 specific mere presence charge.

14 Q Okay. And you have a
15 claim that Mr. Mc Guire failed to
16 request a constructive possession
17 charge. What does, what does that
18 claim entail?

19 A The fact that I did not
20 have actual nor constructive
21 possession of the drugs and if the
22 State of was seeking to obtain a
23 conviction then they would have to
24 have find me, that I had dominion and
25 control over the drugs to order or to

Battle -- Direct

1 establish the chain of conviction for
2 constructive possession, which the
3 record will instruct that I did not
4 because in fact LaShawn had actual
5 possession and constructive control
6 over the drugs and the residence,
7 because the residence, this occurred
8 at her place.

9 MR. DEATON: No further
10 questions at this time, your
11 Honor.

12 THE COURT: Cross-
13 examination.

14 MS. DIXON: Thank you,
15 your Honor.

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21 CROSS-EXAMINATION BY MS.

22 DIXON:

23 Q Mr. Battle, I just have
24 a few questions for you. Just to get
25 the facts of your case straight,

Battle -- Cross

1 there were two codefendants in this
2 case. Is that right?

3 A Correct.

4 Q In addition to yourself?

5 A Correct.

6 Q Their names were LaShawn
7 and Eddied. Is that right?

8 A Well, Eddie, Eddie is
9 Mr. Jay Nelson. That is, is his real
10 name, but he goes by Eddied.

11 Q Okay. So the facts of
12 your case were you and Eddie were at
13 LaShawn's house when she was arrested
14 for drugs. Is that right?

15 A Well, we was in the
16 area. We were not actually at her
17 house.

18 Q You were beside her
19 house?

20 A We were walking past the
21 cab that was parked in the driveway
22 and Detective Van Houton at the time,
23 I believe she said something, she
24 testify something to the effect that
25 she saw two individuals approaching

Battle -- Cross

1 her direction and she suspected that
2 they may have something to do with a
3 drug deal so therefore she gave the
4 take down signal to arrest everybody
5 there. She felt I was involved and
6 alleged that as a fact.

7 Q And were you aware that
8 LaShawn gave a statement to the
9 police implicating you in the drug
10 deal?

11 A I'm aware that LaShawn
12 gave a statement but she did not give
13 a statement implicating me. She said
14 that somebody that goes by the letter
15 "E" was supposed to have been her
16 supplier, but she --

17 Q And she testified --

18 A But she. I'm sorry. Go
19 ahead. Can I finish?

20 Q Go ahead.

21 A Okay. But she never
22 once said that Ernest Battle gave her
23 any drugs.

24 Q And she testified at
25 your trial. Is that right?

Battle -- Cross

1 A She did.

2 Q And she testified that
3 you were the man that she knew as
4 "E". Is that right?

5 A Well, according to the
6 transcript she said that "E" who she
7 refers to as her uncle, which is
8 Eddie.

9 Q The testimony in
10 transcript reflects --

11 A Right.

12 Q -- that LaShawn --

13 A Right.

14 Q -- testified that you
15 were the man she knew as "E". Is
16 that correct?

17 A No, sir. No, ma'am.

18 Q Okay, Mr. Battle.

19 LaShawn testified at your trial that
20 you had met with her and given her
21 the drugs. Is that right?

22 A That's what she
23 testified to. Correct.

24 Q And she testified that
25 she had called you and set up the

Battle -- Cross

1 time and place to meet you, for you
2 to deliver the drugs to her. Is that
3 right?

4 A That's what she
5 testified to.

6 Q You talked some with
7 Mr. Deaton earlier about the letter
8 that was introduced at your trial.

9 A Right.

10 Q And you testified that
11 you did not write this letter. Is
12 that correct?

13 A Correct.

14 MS. DIXON: Court's
15 indulgence, your Honor.

16 THE COURT: Yes, ma'am.

17 MS. DIXON: May I
18 approach, your Honor?

19 THE COURT: Yes, ma'am.

20 MS. DIXON: For the Court
21 I'm referring to page four
22 ninety-five of volume two. Have
23 you seen a copy of this letter,
24 Mr. Battle?

25 A Yes.

Battle -- Cross

1 Q And you're already
2 testified that there were three
3 people involved in this case. Is
4 that right?

5 A LaShawn and Eddie.

6 Q You, LaShawn, and Eddie.
7 Is that right?

8 A Right. But it was two
9 but they alleged that it was three.

10 Q Okay. I'm going to read
11 parts of this letter and point them
12 out to you as I read them and I want
13 you to make sure that I'm reading
14 them correctly. Okay?

15 A Right.

16 Q About how -- about a
17 third of the way down on this first
18 page, page four ninety-five of the
19 transcript --

20 A Uh-huh.

21 Q -- there is a sentence
22 that says: "LaShawn, this is a very
23 serious situation. You know me and
24 Eddie is facing life." Is that what
25 it says?

Battle -- Cross

1 A That's what it says.

2 uh-huh.

3 Q Further down on that
4 page, about two-thirds of the way
5 down, the sentence that starts with
6 "that", it says "that me and Eddie
7 was just happened to be walking
8 through the cut." Is that what it
9 says?

10 A Right.

11 Q Right?

12 A That's what it says.

13 Uh-huh. Yes.

14 Q Okay. I'm going to flip
15 over to page four ninety-six of the
16 transcript, about halfway down.

17 A Uh-huh.

18 Q About halfway down it
19 says "I nor Eddie would ever turn on
20 you." Is that what it says?

21 A That's what it says.

22 Q Further down on the page
23 it says "I can get you and Eddie
24 out." Is that what it says?

25 A That's what it says.

Battle -- Cross

1 Q Flipping over to page
2 four ninety-seven of the, of the
3 record on appeal there's a sentence
4 that says: "The only thing they're
5 going to do is lie to you and try to
6 have you turn on me and Eddie." Is
7 that what that says?

8 A Uh-huh. That's what it
9 says.

10 Q I'm going to flip to
11 page four ninety-eight of the
12 transcript. You look at the very
13 bottom of that page. Does that say:
14 "Love, your cuz." Is that how that
15 letter seems to be signed?

16 A It says: "Love, your
17 cuz." Right.

18 Q What is your
19 relationship to LaShawn?

20 A Nothing. We have no
21 relationship at all.

22 Q Did she testify at trial
23 that she was your cousin?

24 A She said something about
25 a distant cousin, but we are not

Battle -- Cross

1 related.

2 Q Thank you, Mr. Battle.

3 A She had also testified
4 that Eddie was her distant cousin as
5 well.

6 MS. DIXON: I don't have
7 any further questions, your
8 Honor. Thank you.

9 THE COURT: Redirect?

10 MR. DEATON: Thank you,
11 your Honor. Briefly.

12

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16

17 REDIRECT EXAMINATION BY

18 MR. DEATON:

19 Q Mr. Battle, I ask you
20 again, did anybody at trial identify
21 you as being the person that wrote
22 this letter?

23 A No, sir.

24 Q Did you write the
25 letter?

Battle -- Redirect

1 A No. I did not.

2 MR. DEATON: No further
3 questions.

4 THE COURT: Re-cross.

5 MS. DIXON: None, your
6 Honor.

7 THE COURT: Thank you,
8 sir. You may step down.

9 Call your next witness.

10 MR. DEATON: Your Honor,
11 I'd like to call Lana Nelson.

12 THE COURT: Come around,
13 please.

14

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18 LANA A. NELSON, having
19 been called as a witness, is duly
20 sworn and testifies as follows:

21 DIRECT EXAMINATION BY

22 MR. DEATON:

23 Q Miss Nelson, I want to
24 thank you for being here today. I
25 understand your frustration with me,

Nelson - - Direct

1 but I had to subpoena you for this
2 trial, ma'am, and I apologize for
3 that.

4 Miss Nelson, where do
5 you live? Do you live in Charleston
6 County?

7 A Yes, sir.

8 Q Were you a - - have you
9 ever served on a jury before?

10 A Yes, sir. Six years
11 ago.

12 Q Okay. You recall
13 whether or not it was a jury in a
14 case involving Mr. Ernest Battle?

15 A I don't remember his
16 case. I don't even remember him,
17 like I told you on the phone. I
18 don't remember nothing about the
19 case.

20 Q Okay. But you do
21 remember that it was Ernest Battle
22 and that you were hearing that case?

23 A Yeah.

24 Q Okay. I told you I'd
25 ask you one question and I'd let you

Nelson -- Direct

1 go, and that's the only question I'm
2 going to ask you.

3 Did you ever comment to
4 anyone after the case was
5 concluded -- I don't want to hear
6 anything involving what happened in
7 the jury room -- but did you ever
8 comment to anyone after the case was
9 concluded that the jury found
10 Mr. Battle because he did not testify
11 and his attorney admitted that Mr.
12 Battle had written, had written a
13 letter to his codefendant?

14 A No, sir.

15 MR. DEATON: No further
16 questions, your Honor.

17 THE COURT: Cross.

18 MS. DIXON: Nothing from
19 the State, your Honor.

20 THE COURT: Thank you,
21 ma'am. You may step down.

22 Is the witness released
23 from her subpoena?

24 MR. DEATON: Yes, your
25 Honor.

Robinson -- Direct

1 son?

2 A He's about, about thirty
3 now. Going on thirty-one.

4 Q Any grandchildren?

5 A Step-grandchildren.

6 Q How old are they?

7 A From eighteen to ten.

8 Q One of them is ten. Did
9 you ever have to take care of any of
10 them, babysit?

11 A Yeah. Take care of all
12 of them.

13 Q Okay. Where do you
14 live? What, what part of Charleston
15 County?

16 A You mean which
17 neighborhood?

18 Q Yes, sir.

19 A Winnsgate neighborhood.

20 Q And that's -- is that in
21 North Charleston?

22 A No, it's not.

23 Q Did you ever shop at the
24 Piggly-Wiggly down off, right off of
25 Remount Road and it's closed down

Robinson - - Direct

1 now, obviously?

2 A On Rivers Avenue. Yes.

3 Q On Rivers Avenue. You

4 shopped at that one before?

5 A Yeah.

6 Q Did you ever recall

7 meeting anyone by the name of Felicia

8 Smalls?

9 A Her name sound familiar,
10 but I can't place the lady.

11 Q Okay. Do you recall
12 running into anyone asking about the
13 case at the Piggly-Wiggly?

14 A I think, I think a lady
15 did come, you know, come up to me and
16 I think she mentioned something to
17 me.

18 You know my daughter was
19 here and that was it.

20 Q Okay. Did you ever
21 comment to anyone, that lady in
22 particular, that Mr. Battle was found
23 guilty because he didn't testify and
24 because his attorney admitted he
25 wrote a letter to his co-defendant?

Robinson -- Direct

1 A No. Not in that aspect.

2 No.

3 Q Okay. Do you recall
4 commenting anything to that lady
5 about the trial?

6 A I think she might have
7 asked me a question and I probably
8 said yes and that was it. I can't be
9 specific in that.

10 Q Okay. Did you ever
11 comment any member of Mr. Battle's
12 family, regardless of whether it was
13 Felicia Smalls, that you didn't want
14 to fight with the other jurors and it
15 was close to five o'clock and you
16 just wanted to go home so you could
17 make sure you could take care of your
18 kids?

19 A No.

20 Q Your three kids?

21 A No. No. I never had no
22 conversation like that.

23 Q Okay. Did you ever tell
24 Miss Smalls that you changed your
25 verdict from not guilty to guilty?

1 A No.

2 MR. DEATON: No further
3 questions, your Honor.

4 THE COURT: Cross.

5 MS. DIXON: Nothing from
6 the State for Mr. Robinson, your
7 Honor.

8 THE COURT: Thank you,
9 sir. You may step down.

10 Is he released from his
11 subpoena?

12 MR. DEATON: Yes, your
13 Honor.

14 THE COURT: You're free to
15 go. Thank you.

16 MR. DEATON: Call Felicia
17 Smalls, your Honor.

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FELICIA BLAKE SMALLS,

Smalls -- Direct

1 having been called as a witness,
2 is duly sworn and testifies as
3 follows:

4 DIRECT EXAMINATION BY
5 MR. DEATON:

6 Q Miss Smalls, how old are
7 you?

8 A Forty-nine.

9 Q I'm sorry to ask that
10 question. Mr. Mr. Battle was your
11 fiancee. Is that right?

12 A Yes, sir.

13 Q How long had you known
14 Mr. Battle?

15 A Thirty years.

16 Q Thirty years. Had you
17 all been together that long as a
18 couple or --

19 A Off and on.

20 Q Off and on. Okay. Do
21 you recall being at Mr. Battle's
22 trial back in 1999?

23 A Yes, sir.

24 Q You went to the trial.
25 Was it down on Melbourne Avenue in

Smalls -- Direct

1 North Charleston?

2 A Yes. Yes, sir.

3 Q You recall Mr. Mc Guire
4 representing Mr. Battle?

5 A Yes, sir.

6 Q Following the case did
7 you have a chance to speak with
8 anyone?

9 A Yes, sir.

10 Q Did you approach someone
11 or did they approach you?

12 A I approached two people.

13 Q Two people. Who was the
14 first person you approached?

15 A The young lady that was
16 one of the jurors right after the
17 trial, outside.

18 Q Was it the young lady
19 that just testified in the courtroom?

20 A Yes, sir.

21 Q That's Miss Nelson?

22 A Right, sir.

23 Q Okay. The young lady
24 that just testified?

25 A Yes, sir.

Smalls -- Direct

1 Q And you asked her any
2 questions?

3 A Yes.

4 Q What did you ask her?

5 A I asked her if it was
6 okay if I spoke to her in regards to
7 the trial and she said it was okay,
8 and asked her why, why did she vote
9 guilty for Mr. Battle.

10 Q And what was her
11 response?

12 A That she -- he did not
13 take the stand to prove his innocence
14 and his attorney admitted that he
15 wrote that letter so he must be
16 guilty.

17 Q Did you communicate that
18 with Mr. Battle?

19 A Yes, sir.

20 Q Did you call him or did
21 he call you or --

22 A I believe I went to
23 visit with him.

24 Q At the jail?

25 A Yes, sir.

Smalls -- Direct

1 Q Was he still at
2 Charleston County at that point?

3 A I believe he went up --
4 he might have been at the Charleston
5 County jail.

6 Q Okay. Do you know
7 whether that was before or after his
8 sentencing?

9 A After his, after his, he
10 was convicted.

11 Q After he was convicted
12 but, but before his sentence. Is
13 that right?

14 A I believe. Yes.

15 MR. DEATON: May I
16 approach, your Honor?

17 THE COURT: Yes.

18 Q Miss Smalls, you
19 recognize this document?

20 A Right. Yes, sir.

21 Q And that's plaintiff's
22 exhibit three?

23 A Yes.

24 Q Do you recognize in your
25 writing at the top, have you ever

Smalls -- Direct

1 seen that writing before?

2 A Yes.

3 Q What does that, what
4 does that read? What does that say?

5 A It says the date that it
6 was received and by whom.

7 Q Okay. And it was
8 received by?

9 A T. L. H. J.

10 Q And what date?

11 A Six fourteen '01.

12 Q Do you recall the dates
13 of Mr. Battle's trial?

14 A No, sir.

15 Q Do you recall the date
16 of his sentence?

17 A No, sir.

18 Q Okay. Do you recall
19 taking this to anyone?

20 A Yes. To the, the
21 judge's office.

22 Q Okay. And that was
23 Judge Hughston?

24 A Hughston. Yes, sir.

25 Q Thomas Hughston?

Smalls - - Direct

1 A Yes, sir.

2 Q Okay. Do you live in
3 North Charleston?

4 A Downtown.

5 Q Okay. You live
6 downtown?

7 A Yes, sir.

8 Q Did you live in North
9 Charleston at the time?

10 A Yes, sir.

11 Q Where'd you live?

12 A On Leesville Street.

13 Q Okay. Do you shop at
14 the Piggly-Wiggly on Rivers Avenue?

15 A Yes, sir.

16 Q When you went into
17 Piggly-Wiggly did you ever see
18 anybody involved in Mr. Battle's
19 case?

20 A Yes, sir.

21 Q Okay. Who was that?

22 A A gentleman that was one
23 of the jurors.

24 Q Okay. Was that the
25 gentleman that was - - just testified?

Smalls - - Direct

1 A Yes, sir.

2 Q Did you speak with him
3 about Mr. Battle's case?

4 A Yes, sir.

5 Q What did he say to you,
6 or what did you say to him? Excuse
7 me. What did you to say him first?

8 A I introduced myself and
9 I asked him did he recall being a
10 juror at Mr. Battle's trial, and he
11 stated that he was.

12 Q How long ago or how long
13 after the trial did you see him?

14 A I want to say within two
15 weeks after the trial.

16 Q Okay. And he said he
17 remembered being a juror in that
18 case?

19 A Yes, sir, but that he
20 could not speak about it because the
21 judge told him that he could not
22 discuss the trial.

23 Q Okay. Did you ask him
24 anything further?

25 A Yes, sir.

Smalls -- Direct

1 Q And what did he say or
2 what did you ask?

3 A I informed him that the
4 trial was over and that it was okay
5 for him to speak about it.

6 Q Okay. And what did he
7 say about that or did you ask him
8 another question?

9 A Yes, sir.

10 Q Okay. What did you ask
11 him?

12 A Why did he convict
13 Mr. Battle. He say that he was
14 guilty.

15 Q Okay. And what did
16 he -- what was his response?

17 A He said that initially
18 he was just tired. He wanted to go
19 home and he was just tired of
20 fighting and that the judge, I mean
21 Mr. Battle's attorney stated that he
22 wrote the letter so he must have
23 written the letter.

24 Q Okay. Did you
25 communicate that to Mr. Battle?

Smalls -- Direct

1 A Yes, sir.

2 Q Are you and Mr. Battle
3 still together?

4 A No, sir.

5 Q Okay. How long has it
6 been since you and Mr. Battle, you
7 know, communicated with each other or
8 spoke?

9 A Christmas card.
10 Christmas.

11 Q But you don't speak on a
12 regular basis now?

13 A No, sir.

14 Q And that's been since
15 how long? Since he went to prison
16 or --

17 A Well, I want to say
18 about two years after he'd been
19 incarcerated. About five years.

20 MR. DEATON: Okay. Beg
21 the Court's indulgence, your
22 Honor.

23 THE COURT: Yes, sir.

24 MR. DEATON: No further
25 questions, your Honor, at this

Smalls -- Direct

1 time.

2 THE COURT: Cross.

3 MS. DIXON: Thank you,
4 your Honor.

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11 CROSS-EXAMINATION BY MS.

12 DIXON:

13 Q Good morning,

14 Miss Smalls.

15 A Good morning.

16 Q You testified that you'd
17 been with Mr. Battle some thirty
18 years?

19 A Yes, ma'am.

20 Q And that you all had an
21 on-again, off-again relationship for
22 all thirty years?

23 A Yes, ma'am.

24 Q At the time of his trial
25 you were engaged to be married. Is

Smalls -- Cross

1 that right?

2 A Yes, ma'am. Talking
3 about it.

4 Q So it would be fair for
5 me to say that you have a personal
6 interest in Mr. Battle, in whether or
7 not he remains in prison?

8 A Yes, ma'am.

9 MS. DIXON: Thank you,
10 Miss Smalls. I have no further
11 questions, your Honor.

12 THE COURT: Redirect.

13 MR. DEATON: Yes. Thank
14 you, your Honor.

15

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21 REDIRECT EXAMINATION BY

22 MR. DEATON:

23 Q Miss Smalls, at this
24 point in time do you have a personal
25 interest in Mr. Battle at all other

Condon - - Cross

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CROSS-EXAMINATION BY MS.

5

DIXON:

6

Q Good morning,

7

Mr. Condon.

8

A Good morning.

9

Q How long at the time

10 that you represented Mr. Battle at

11 the preliminary hearing had you been

12 practicing law?

13

A Would have been about

14 eleven years.

15

Q And how much of that was

16 criminal law?

17

A About half.

18

Q Had you had the

19 opportunity to represent clients

20 before at preliminary hearings?

21

A Sure.

22

Q And had you ever found

23 cause to challenge a warrant

24 affidavit?

25

A On the Franks case?

Condon - - Cross

1 Q Correct.

2 A No.

3 Q Did you review this
4 warrant affidavit?

5 A Yeah, but it's been a
6 while since I looked at it.

7 Q And at the time of other
8 preliminary hearings if you had seen
9 reason to challenge it, would you
10 have done so?

11 A Sure. Yeah.

12 MS. DIXON: Thank you,

13 Mr. Condon.

14 No further questions,
15 your Honor.

16 THE COURT: Redirect.

17

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21 REDIRECT EXAMINATION BY

22 MR. DEATON:

23 Q Mr. Condon, you

24 acknowledge in this affidavit that it
25 says Mr. Battle did wilfully,

Condon -- Redirect

1 unlawfully, and knowingly have in his
2 possession and under his control
3 approximately eighty-three grams of a
4 white-powder like substance?

5 A Right.

6 Q And at the preliminary
7 hearing or prior to the preliminary
8 hearing you discovered that in fact
9 was not true?

10 A Well, nothing was found
11 on him.

12 MR. DEATON: Okay. No
13 further questions.

14 THE COURT: Recross.

15 MS. DIXON: Nothing from
16 the State, your Honor.

17 THE COURT: Thank you,
18 sir. You may step down.

19 Is this witness excused?

20 MR. DEATON: Yes, your
21 Honor. I apologize.

22 THE COURT: You're free to
23 go, Mr. Condon. Thank you.

24 Any further witnesses?

25 MR. DEATON: Yes, your

Wallace -- Direct

1 Honor. Call Jason Matthew
2 Wallace.

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JASON MATTHEW WALLACE,
having been called as a witness,
is duly sworn and testifies as
follows:

DIRECT EXAMINATION BY
MR. DEATON:

Q Good morning, Mr.
Wallace. How old are you?

A Thirty-three.

Q You're thirty-three.
You're currently in Lieber
Correctional Institution?

A Yes, sir.

Q You're currently serving
two life sentences. Is that correct?

A Yes, sir.

Q For murder?

Wallace -- Direct

1 A Yes, sir.

2 Q Is that one in Florida
3 and one here?

4 A Yes, sir.

5 Q And you're originally
6 from Florida?

7 A No.

8 Q From Charleston and you
9 went to Florida and some point and
10 was transferred back here?

11 A Yes, sir.

12 Q Do you know a man named
13 Ernest Battle?

14 A Yes, sir.

15 Q Okay. You've recently
16 met Mr. Battle. How long has it been
17 since you met Mr. Battle?

18 A About a year.

19 Q About a year ago?

20 A Yeah.

21 Q Were you at Lieber
22 Correctional -- how long have you
23 been at Lieber?

24 A About a year.

25 Q About a year?

Wallace -- Direct

1 A A little over a year.

2 Q So you met Mr. Battle
3 when you came to Lieber?

4 A Yes.

5 Q From what institution?

6 A I was at -- in Florida.
7 Came from Florida to Lieber.

8 Q Okay. You came from
9 Florida to Lieber?

10 A Okay.

11 Q And do you live in the
12 building as Mr. Battle?

13 A Yes, sir. We stay at
14 two different wings, though.

15 Q Did you ever seek out
16 Mr. Battle or did he seek you out or
17 did you just kind of see each other?

18 A It was mutual.

19 Q Okay. Do you recall
20 working for the state as a
21 confidential informant?

22 A Yes, sir.

23 Q Was that back in 1999?

24 A Yes, sir.

25 Q Was that prior to any of

Wallace -- Direct

1 with LaShawn Floyd?

2 A No, sir. I mean I don't
3 know any of these people.

4 Q They came to you with
5 that name?

6 A Yeah.

7 Q Did they specify the
8 amount?

9 A It was four ounces.

10 Q Four ounces?

11 A Yeah.

12 Q Did you give LaShawn a
13 call, a telephone call?

14 A Yeah.

15 Q Were you wired?

16 A I had a pager on that
17 was supposed to be a wire.

18 Q Why didn't you have a
19 wire?

20 A I wouldn't wear a wire.

21 Q Was that because you
22 were nervous or you just didn't want
23 to wear a wire?

24 A I didn't feel like the
25 police, they put it on because I

Wallace -- Direct

1 didn't know that I could get drugs.

2 Q Well, was LaShawn

3 someone you knew as a drug dealer or

4 someone you knew that could get you

5 drugs?

6 A I didn't, I didn't know,

7 I don't know LaShawn.

8 Q Did they tell you that

9 that's what she was?

10 A Yes.

11 Q She could get them

12 drugs?

13 A Right.

14 Q Do you recall the

15 incident when you worked as a

16 confidential informant where Miss

17 Floyd was supposed to sell you drugs?

18 A Yes, sir.

19 Q How did that night come

20 about? What, what was the first

21 thing that you did?

22 A First thing I did was

23 call the number that I'd been given

24 to contact LaShawn.

25 Q Okay. And you'd been

Wallace -- Direct

1 got there I saw her.

2 Q Okay. Well, what was
3 she doing? You all were negotiating
4 a price or you were you all talking
5 about a deal or what?

6 A Yeah. She wanted, she
7 wanted to count the money. She got
8 in the cab. She wanted to count the
9 money for the coke.

10 Q Okay. So she counted
11 the money. Was the money short?

12 A No.

13 Q It wasn't or you don't
14 recall? You don't recall?

15 A I don't recall.

16 Q Okay. But she got in
17 the cab to count the money?

18 A Yes, sir.

19 Q Okay. Did she go back
20 up to your residence at any point?

21 A Yes, sir.

22 Q She did?

23 A Yes, sir.

24 Q Why was she going back
25 up there for? Did you know?

Wallace -- Direct

1 A Yeah..

2 Q What did she tell you?

3 A She told me a number of
4 things that night but she said that
5 she, she was --

6 MS. DIXON: Objection,
7 your Honor. Hearsay.

8 THE COURT: Any exception?

9 MR. DEATON: Your Honor,
10 obviously it's a post conviction
11 relief. My client has the burden
12 of proving that he was prejudiced
13 by the outcome or by
14 Mr. Mc Guire's failure to call
15 Mr. Wallace to trial. I believe
16 he should have been, should be
17 able to testify to what he would,
18 he would have testified to at
19 trial. Ms. Van Houton and Miss
20 Floyd testified at trial.

21 Rather than try the
22 whole case again, which I don't
23 believe is required by the
24 P. C. R. rules or any evidentiary
25 rules, I believe he should be

Wallace -- Direct

1 able to testify to that. I'm not
2 offering it for the truth of the
3 matter.

4 THE COURT: Yes, ma'am.

5 MS. DIXON: If he's not
6 offering it for the truth, your
7 Honor, we withdraw our objection.

8 THE COURT: Go ahead,
9 please. You recall what she
10 said?

11 A Would you repeat the
12 question?

13 Q Okay. You were supposed
14 to get drugs from her. What did she
15 tell you she was going to do? She
16 told you she was going to go get
17 drugs?

18 A She said she had the
19 drugs, you know. She was waiting on
20 somebody named E, a friend of hers
21 she was waiting on.

22 THE COURT: She said she
23 was waiting on what?

24 THE DEFENDANT: A man
25 named E.

Wallace -- Direct

1 THE COURT: Okay.

2 Q Okay. She didn't
3 identify E as anybody else. She just
4 said a man named E?

5 A Right.

6 Q Okay. Did you ever see
7 any other men that night?

8 A I saw several men
9 walking through the yard.

10 Q Okay. Did you ever see
11 LaShawn with the drugs?

12 A No, sir.

13 Q Okay. Did you ever see
14 anybody else with the drugs?

15 A No.

16 Q When the take-down was
17 given, who gave the take-down signal.

18 A Jennifer.

19 Q You just called her
20 Jennifer?

21 A Jennifer.

22 Q Jennifer gave the
23 take-down signal. Where were you
24 when she gave the take-down signal?

25 A In back seat of the cab?

Wallace -- Direct

1 Q Okay. Were was LaShawn?

2 A In the back seat with

3 me.

4 Q Okay. And they took

5 down -- they took down LaShawn

6 because she had the cocaine on her?

7 A She ran. She ran. When

8 Jennifer gave the take-down signal,

9 LaShawn ran to her, ran forwards her

10 apartment --

11 Q Okay.

12 A -- with the cocaine in

13 her hand.

14 Q She had the cocaine in

15 her hand?

16 A Yes.

17 Q Okay. Did you see

18 anybody else anywhere in the area?

19 A No.

20 Q In the area -- was

21 anybody with her?

22 A With LaShawn?

23 Q Yes.

24 A No.

25 Q Anybody else in the, in

Wallace -- Direct

1 the, I guess in the vicinity of that
2 neighborhood?

3 A Well, it was a guy that
4 had walked through prior, you know,
5 after all that transferred. They,
6 they put two men in handcuffs in the
7 yard.

8 Q Okay. Did you see those
9 men?

10 A I saw them. I saw them
11 in handcuffs.

12 Q In handcuffs?

13 A Yes.

14 Q Okay. Did you say
15 anything -- you were in the car with
16 Van Houton. Did you say anything to
17 her at that point?

18 A Other than the fact
19 that, that she knew that the
20 individuals that were being detained
21 didn't have anything to do with that,
22 with that incident at the time.

23 Q She told you that?

24 A Yeah. Shawn did.

25 Q Shawn told you that?

Wallace -- Direct

1 A Right.

2 Q Okay. But what did Van
3 Houton say? You just told Van Houton
4 that she said those two guys there
5 didn't have anything to do with it.

6 A Well --

7 Q Is that right?

8 A Yeah. Van Houton wanted
9 to see, when the officers put them in
10 handcuffs because she said she had a
11 strong suspicion that, that those
12 guys, the guys that walked through
13 the yard, was walking through the
14 yard might have had something to do
15 with it.

16 Q Okay. Did she say
17 anything about them being in the
18 wrong place at the wrong time?

19 A Yes, sir.

20 Q How many people did
21 Shawn call that night to get cocaine?
22 Do you know if she called any more
23 than one person? You said a guy
24 named E was supposed to come.

25 A Right.

Wallace -- Direct

1 Q Did you call -- do you
2 recall, did she call anybody other
3 than one guy?

4 A I don't remember. I
5 don't remember.

6 Q You don't remember?

7 A No. I can't remember.

8 Q Okay. Are you familiar
9 with that area, that Reddin Road
10 area?

11 A Yes.

12 Q And you know, you know
13 you're -- I believe -- did you tell
14 the police that you were familiar
15 with people in the drug business and
16 that you could help them that way?

17 A Yes, I did. They
18 already knew that, I believe.

19 Q Okay. You're familiar
20 with the drug business in that area?

21 A Right.

22 Q Do you know a guy named
23 E?

24 A Yeah.

25 Q Do you know his first

Wallace -- Direct

- 1 name?
- 2 A No.
- 3 Q But he was a drug
- 4 dealer?
- 5 A Yeah.
- 6 Q In that area?
- 7 A Right.
- 8 Q It wasn't Ernest Battle?
- 9 A No.
- 10 Q It was a different guy?
- 11 A Yes, sir.
- 12 Q What'd he look like?
- 13 A You know, this is six
- 14 years ago we're talking about. A.
- 15 Q Oh, I understand.
- 16 A I can't -- I can't --
- 17 Q Just testify to what you
- 18 remember, that's all.
- 19 A I never saw him. I
- 20 never saw him.
- 21 Q You never saw him. You
- 22 just knew him?
- 23 A Right. I know I never
- 24 saw any other individuals that night
- 25 besides Floyd. That was the only

Wallace -- Direct

1 one.

2 Q Oh, I understand. I
3 understand. But you know another guy
4 named E that is not Ernest Battle?

5 A I know several guys
6 named E. Yeah.

7 Q Okay. Do you recall
8 Detective Van Houton or anybody else
9 involved in that take-down looking
10 for a certain type of vehicle?

11 A A blue Cadillac.

12 Q A blue Cadillac.

13 A Yeah.

14 Q But not a black

15 Cadillac. Correct?

16 A No. A blue.

17 MR. DEATON: Okay. No
18 further questions at this time,
19 your Honor.

20 THE COURT: Cross.

21 MS. DIXON: Thank you,
22 your Honor.

23

24

25

CROSS-EXAMINATION BY MS.

Wallace -- Cross

1 DIXON:

2 Q Mr. Wallace, you're
3 currently in prison. Is that right?

4 A Yes.

5 Q And you're serving two
6 life sentences?

7 A Yes.

8 Q Both for murder?

9 A Yes, ma'am.

10 Q One of those murders was
11 committed in Florida?

12 A Yes.

13 Q One murder was committed
14 in South Carolina. Is that right?

15 A Yes, ma'am.

16 Q You've been in prison
17 before?

18 A Yes, ma'am.

19 Q What have you been in
20 prison before?

21 A For armed robbery and
22 strong armed robbery and stole a car,
23 take a hostage.

24 Q And you actually were
25 working for the police as a

Wallace -- Cross

1 confidential informant because they
2 suspected you in another crime. Is
3 that right?

4 A Yes, ma'am.

5 Q I believe you testified
6 on direct that you knew several men
7 named E. Is that right?

8 A Yes.

9 Q None of those men were
10 Ernest Battle?

11 A No.

12 Q Is it possible that
13 there was another man named E in that
14 neighborhood?

15 A Yes, ma'am.

16 Q It's a high crime area.
17 Is that right?

18 A Yes, ma'am.

19 Q A high crime area where
20 there were a lot of drug dealers. Is
21 that right?

22 A High crime area.

23 Q And you testified I
24 believe also that Shawn told you that
25 she was calling a man named E to get

Wallace -- Cross

1 drugs. Is that right?

2 A That's correct.

3 MS. DIXON: Thank you. No
4 further questions, your Honor.

5 THE COURT: Any redirect?
6
7
8
9

10

11 REDIRECT EXAMINATION BY

12 MR. DEATON:

13 Q Mr. Wallace, are you
14 here today because Ernest Battle gave
15 you a deal or, or cut you a break or
16 I mean you have anything to gain by
17 testifying here today?

18 A No. Other than freeing
19 my conscience, no.

20 Q Okay. What do you mean
21 by freeing your conscience?

22 A I know that six years
23 ago somebody way -- over six years
24 ago somebody was accused of
25 committing a criminal that they

Wallace -- Redirect

1 didn't commit and I had something to
2 do with that particular case, you
3 know.

4 Q Okay. You got nothing
5 to gain here. You're serving two
6 life sentences. You pled guilty to
7 avoid the death penalty. Is that
8 correct?

9 A Right.

10 Q So you're never getting
11 out?

12 A No.

13 Q You know that. No
14 matter what you do?

15 A No.

16 Q Okay. You can testify
17 for everybody in the world, you can
18 even testify for the State, but the
19 State has used you as a confidential
20 informant. Correct?

21 A Right.

22 MR. DEATON: Okay. No
23 further questions.

24 THE COURT: Any recross?

25 MS. DIXON: Nothing, your

1 Honor.

2 THE COURT: Thank you,
3 sir. You may step gown.

4 MR. DEATON: Briefly, your
5 Honor, I'd like to call Ernest
6 Battle again for one question.

7 THE COURT: Mr. Battle, I
8 remind you, sir, you're still
9 under oath.

10

11

12

13

14

15

CONTINUED REDIRECT

16

EXAMINATION BY MR. DEATON:

17

Q

Mr. Battle, you recall
18 the testimony in your trial regarding
19 a blue Cadillac?

20

A

Yes, sir. All the
21 officers that testified, I believe
22 they stated that the suspect were
23 supposed to have been, from the
24 information that they received, was
25 supposed to have drove a blue late

Battle - - Redirect Cond.

1 model Cadillac.

2 Q Okay. Mr. Battle, what
3 color - - you own a Cadillac?

4 A Yes.

5 Q Did you own a Cadillac?

6 A Yes, I owned a Cadillac.

7 Yes, I do.

8 Q What color was it?

9 A My Cadillac is black.

10 MR. DEATON: May I
11 approach the witness, your Honor?

12 THE COURT: Yes, sir.

13 Q You recall, you
14 recognize that document?

15 A Yes, sir, I do.

16 Q What is that document?

17 A This is a pamphlet from
18 the warrant affidavit with a
19 description of --

20 Q For what warrant? Which
21 warrant was it for?

22 A The description is
23 conspiracy to violate narcotic laws.

24 Q Okay. And in that
25 affidavit in which it's sworn to,

Battle -- Redirect Cond.

1 does it indicate that there was a
2 black Cadillac involved?

3 A No, sir. It does not.

4 Q In the warrant affidavit
5 it indicates it's a black Cadillac
6 but at this trial everybody says it
7 was dark blue.

8 A That the suspect, the
9 suspected vehicle that the suspect
10 was possibly driving was a blue
11 Cadillac? Yes, sir.

12 That's what everybody
13 testified to at trial.

14 Q So it changed -- their
15 testimony changed from --

16 A Right.

17 Q -- from the black
18 Cadillac to the blue?

19 A Right. And at one point
20 the two detectives that had
21 surveillance, I believe it was on the
22 Cosgrove Bridge, when they did I
23 believe testify, they testified that
24 when they came in contact with the
25 blue Cadillac that they put the, the

Battle -- Redirect Cond.

1 other officers on notice that they in
2 fact had spotted a blue late model
3 Cadillac.

4 Q Didn't they testify that
5 they lost sight --

6 A Right. That's right.
7 They followed this Cadillac up until
8 they got on Cosgrove, until they got
9 to Spruill Avenue and they got caught
10 by a light, when in fact they lost
11 sight of the car.

12 Q Well, there's no
13 question your car was somewhere in
14 that area that night. Right? You
15 were there?

16 A Right. Right.

17 Q But, but your Cadillac
18 wasn't the Cadillac involved in this?

19 A Right. My Cadillac was
20 black and they were following a blue
21 Cadillac.

22 MR. DEATON: Okay. No
23 further questions.

24 THE COURT: Cross.

25 MR. DEATON: Nothing from

1 the State, your Honor.

2 THE COURT: Thank you,
3 sir. You may step down.

4 MR. DEATON: Your Honor, I
5 believe we have one more witness.
6 I'm trying to get him over here.
7 He's a Public Defender.

8 THE COURT: All right.
9 We're at ease.

10 MR. DEATON: If you could
11 give me one more minute.

12 (Whereupon, a brief
13 recess was called.)

14 MR. DEATON: He's here,
15 your Honor. Would you like to
16 start back up?

17 THE COURT: Yes, sir.

18

19

20

21

22

23

24

25

Davis - - Direct

1 having been called as a witness,
2 is duly sworn and testifies as
3 follows:

4 DIRECT EXAMINATION BY
5 MR. DEATON:

6 Q Mr. Davis, where are you
7 employed?

8 A Currently with the
9 Charleston County Public Defender's
10 Office.

11 Q In 1999 were you in the
12 Prosecutor's Office, you recall?

13 A In January, '99 I
14 started with the Charleston County
15 Solicitor's Office.

16 Q Okay. So you since
17 were -- back then you were with the
18 Solicitor's Office.

19 A Right.

20 Q I got you. You're to
21 the good side now, right?

22 Okay. Mr. Davis, do you
23 recall presiding or having a case
24 involving Mr. Ernest Battle?

25 A I don't. I don't recall

Davis -- Direct

1 handling a case with a defendant of
2 that name.

3 MR. DEATON: Mr. Davis --
4 may I approach the witness, your
5 Honor?

6 THE COURT: Yes, sir.

7 Q If I showed you that
8 document, you recognize the signature
9 on that document?

10 A That is my signature.

11 Q Okay. So you
12 wouldn't -- you were involved. You
13 Just don't recall that case.
14 Correct?

15 A Yeah. That's correct.

16 Q How many cases over the
17 years in the Solicitor's Office did
18 you present to the grand jury or at
19 least sent to the grand jury? Over a
20 hundred? Over a thousand?

21 A Certain -- certainly
22 every year -- I worked in the
23 Charleston County Solicitor's Office
24 for two years and primarily handled
25 drug cases, so generally speaking if

Davis - - Direct

1 there was a client with a drug charge
2 there was generally more than one, so
3 I don't know how many over the two
4 years.

5 Q Okay. Were you with - -
6 did you ever have occasion to do any
7 preliminary hearings?

8 A Yes. From time to time.
9 Most if not all the assistant
10 solicitors handled preliminary
11 hearings.

12 Q Okay. So they didn't
13 have a Larry Todd back then?

14 A No. No.

15 Q You don't recall
16 anything about Mr. Battle's case or
17 doing a preliminary hearing for Mr.
18 Battle?

19 A I don't. What I can
20 tell you is obviously this, this
21 hearing was scheduled, originally
22 scheduled some time ago, and you sent
23 a subpoena to me. I called you on
24 the phone and discussed it briefly,
25 what it was about, because I didn't

Davis -- Direct

1 recognize the name.

2 Q Right.

3 A What I can recall about
4 the case is because of the
5 discussions that you and I have had
6 in preparation for this thing,
7 recalling a single preliminary
8 hearing seven years ago.

9 Q I understand. Often
10 times did you, in your representation
11 of defendants at the Public Defender
12 did you also check out preliminary
13 hearing tapes?

14 A Yes. Correct.

15 Q Why did you do that?

16 A Well, we'll, we'll check
17 out the tape of the actual hearing.
18 I'll have my paralegal transcribe the
19 tape as best they can. I think
20 there's one microphone for the entire
21 courtroom. But that way we have a
22 written transcript of the preliminary
23 hearing, because Judge Gosnell I
24 don't believe ever has done more than
25 recorded it on a cassette tape.

Davis -- Direct

1 Q Right. So why, why did
2 you actually tape -- what was the
3 purpose of you doing all that? Why
4 did you want the tape?

5 A To later, if the
6 testimony of the officer or the
7 witness presenting the case testified
8 and if we had that information it
9 would be sworn testimony.

10 Q So if that tape was lost
11 or misplaced by the prosecutor, you
12 know, you would want to find that
13 tape. Right?

14 A Certainly.

15 Q Okay.

16 A Certainly.

17 Q Okay. But you don't
18 recall anything about this case or
19 anything about Mr. Battle's tape.
20 Could you have lost a tape in the
21 past. Do you know?

22 A I don't know for what
23 purpose in the Solicitor's Office --
24 I guess, I guess it's in -- I don't
25 have a recollection ever of

Davis -- Direct

1 requesting a preliminary hearing tape
2 while at the Solicitor's Office. I
3 guess there could have been a reason
4 to do that. I don't have a
5 recollection ever of requesting that.

6 MR. DEATON: Okay. No
7 further questions at this time,
8 your Honor.

9 THE COURT: Cross.

10 MS. DIXON: Nothing from
11 the State, your Honor.

12 THE COURT: Thank you,
13 sir. You may step down.

14 THE WITNESS: Thank you,
15 Judge.

16 THE COURT: Any further
17 witnesses?

18 MR. DEATON: One second,
19 your Honor.

20 Your Honor, I don't
21 believe I'm going to call any
22 more witnesses. I believe
23 Mr. Mc Guire is going to testify
24 for the State and they're having
25 a problem with the phone.

1 MS. DIXON: Your Honor,
2 can I approach real quick, your
3 Honor?

4 THE COURT: Yes, ma'am.

5 (Whereupon, there was an
6 off-the-record bench conference.)

7 THE COURT: All right.
8 We're at ease.

9 (Whereupon, a brief
10 recess was called.)

11 MS. DIXON: Your Honor, if
12 you are ready.

13 THE COURT: Yes, ma'am.
14 Any time.

15 (Whereupon, a telephone
16 conference call with William
17 Mc Guire is set up in the
18 courtroom.)

19 MR. MC GUIRE: This is
20 Bill Mc Guire on the other end.

21 THE COURT: Thank you.

22 MR. MC GUIRE: Okay.

23 MS. DIXON: Hi, Mr. Mc
24 Guire. This is Colleen Dixon
25 from the Attorney General's

1 Office. How are you?

2 MR. MC GUIRE: I'm good.

3 MS. DIXON: We are here
4 for the case of Ernest Battle
5 versus the State. We've been
6 taking testimony this morning, so
7 if you'll just answer a few
8 questions for us, we'll get this
9 over as soon as possible.

10 MR. MC GUIRE: Sure.

11 Sure.

12 THE COURT: Hold on a
13 second. Is he under oath?

14 MS. DIXON: He has not
15 been sworn yet, your Honor.

16 THE COURT: Is there any
17 objection to doing this by
18 telephone?

19 MR. DEATON: No, your
20 Honor. We've tried to get this
21 case tried three or four times.
22 Mr. Mc Guire since moved to
23 Atlanta. He's working as a
24 Deputy Advocate Attorney. Rather
25 than get this case continued

1 again, I think we've agreed to do
2 it by telephone.

3 THE COURT: Place him
4 under oath, Mr. Clerk?

5 CLERK OF COURT: Yes, your
6 Honor.

7
8
9

10

11

12 WILLIAM SHAWN MC GUIRE,
13 having been called as a witness,
14 is duly sworn over the telephone
15 and testifies as follows:

16 DIRECT EXAMINATION BY

17 MS. DIXON:

18 Q Mr. Mc Guire, how long
19 have you been practicing law?

20 A Well, I graduated in
21 U. S. C. '95 and I clerked for two
22 different judges for a year each, and
23 then I started practicing criminal
24 law in the Public Defender's Office,
25 so I guess I started practicing the

Mc Guire -- Direct

1 summer of '97.

2 Q And how much of your
3 practice has been involved in
4 criminal law?

5 A Almost totally been
6 criminal law.

7 Q Do you remember
8 representing Mr. Battle?

9 A I do.

10 Q And how did you come to
11 represent him?

12 A I was with the
13 Charleston County Public Defender's
14 Office and I was assigned the case.

15 Q At the point that you
16 were assigned to represent Mr. Battle
17 had you ever represented a defendant
18 in a drug case before?

19 A I'm sure I did.

20 Q Do you recall meeting
21 Mr. Battle? When your first meeting
22 was?

23 A Do I recall when my
24 first meeting was?

25 Q Right.

Mc Guire - - Direct

1 A No. I don't recall when
2 the first meeting was, but I remember
3 meeting Mr. Battle on several
4 occasions at my office and I believe
5 one time we actually at the crime
6 scene at issue.

7 Q Okay. How long did
8 those meetings last?

9 A They varied. I would
10 say sometimes a half an hour,
11 sometimes over an hour as best I can,
12 I can testify.

13 Q Do you recall what the
14 topic of discussion was when you met
15 with Mr. Battle? Can you tell the
16 Court a little about what you talked
17 about?

18 A Well, basically the
19 defendant and his case.

20 Q And do you remember the
21 facts of this case?

22 A Sure.

23 Q Did Mr. Battle cooperate
24 with you during the course of your
25 representation?

*See letter dated November 19, 2013
next page.*

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Mc Guire -- Direct

1 Mr. Jim Cabinass to get some
2 background on him and just did a
3 little bit of background research on,
4 on him.

5 Q Did you file any Brady
6 or Rule Five motions prior to trial?

7 A Did I file any Rule Five
8 motions?

9 Q Yes, sir.

10 A Sure, I did.

11 Q And did you receive
12 discovery from the Solicitor's
13 Office?

14 A I did. I know that, I
15 know that some of the discovery was
16 very late including an audiotape
17 that, that we were able to request.

18 Q Was there any other
19 discovery that you received late that
20 was used at the trial?

21 A You know, I think the
22 letter was a crucial piece of
23 evidence. I remember the letter and
24 I don't remember when I got the
25 letter. I indicated I did not



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November 19, 2013

RECEIVED

NOV 19 2013

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

S.C. Supreme Court

Re: Ernest Battle v. State of South Carolina
Appellate Case No. 2013-001776

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix in the above-referenced case is being served and filed today. It has been discovered that page numbers 107 and 108 are missing from the PCR hearing, dated May 30, 2006. We have searched all of Mr. Battle's files and cannot find the missing pages.

Thank you for your assistance in this matter.

Sincerely,

Robert M. Pachak
Appellate Defender

RMP/pcm

cc: Ashleigh R. Wilson, Esquire

Mc Guire -- Direct

1 remember when I got the letter, but
2 as soon as I got it I made a motion
3 to exclude it as well, but I don't
4 remember when I got the letter.

5 Q Did you make any motions
6 to exclude the letter at the trial?

7 A I did, based on the lack
8 of authentication.

9 Q And what was the result
10 of that motion?

11 A That motion was denied.

12 Q Do you remember what the
13 substance of that letter was?

14 A Yeah, I do. I'm sure
15 you have a copy there, but it was
16 generally a letter, one-page letter
17 directed to the third co-defendant,
18 the female. I think it was, the bulk
19 of it was, you know, hang in there,
20 don't say anything, don't open your
21 mouth, sort of reinforcement.

22 Q Mr. Battle has made some
23 allegations that you were ineffective
24 in that you admitted during your
25 closing argument that he had written

Mc Guire -- Direct

1 the letter. Do you remember that?

2 A I did.

3 Q And can you tell the
4 Court why you made that decision.

5 A You know, I did, I
6 did -- well, basically, I mean the
7 letter was particularly damaging
8 because the co-defendants were going
9 to testify against Mr. Battle.

10 I mean I suspect it was
11 the most damaging piece of evidence
12 against Mr. Battle and the only
13 reason I could, that I could see
14 making a decision where we had to
15 admit to the letter would be to have
16 been involved or to deny that we were
17 in the car, and that would have lost
18 credibility with the jury.

19 Q And I know you do not
20 have a copy of that letter in front
21 of you. Just that I think that the
22 letter was written to the third
23 co-defendant. I believe you her name
24 was Shawn.

25 A That's correct.

Mc Guire - - Direct

1 Q And do you remember
2 whether or not the letter referenced
3 the other co-defendant, Eddie?

4 A Yeah. I don't -- I
5 think it did. I think it did. I
6 mean I honestly can't remember, but I
7 know it was an issue with getting it
8 front of the jurors the fact that
9 Eddie was facing life at the time or
10 that Mr. Battle was, based on a prior
11 record. But I don't remember, to be
12 honest with you.

13 Q Do you remember
14 submitting any proposed jury charges
15 to Judge Hughston at the end of the
16 case?

17 A I don't remember what we
18 requested in the way of charges.

19 Q Do you remember anything
20 specific about the jury charges that
21 caused you concern?

22 A No.

23 Q And I don't know if you
24 remember or not, Mr. Mc Guire, you
25 did not call any witnesses in this

Mc Guire -- Direct

1 case. Is that unusual in a criminal
2 defense case?

3 A I know in my file
4 there's a transport order, but I
5 really haven't -- I haven't, I
6 haven't gone through it, who it was
7 for. If I remember the case
8 correctly there was an informant at
9 the pay telephone and I believe it
10 was with either Shawn or one of the
11 police officers I believe that
12 located Shawn, who was the one
13 involved in the conversation.

14 And I believe that was
15 given at the eleventh hour, and I do
16 believe that I had that person
17 transported to the courthouse.

18 Q Do you recall whether or
19 not it was a strategic decision on
20 your part not to present evidence?

21 A Well, I mean obviously,
22 if I had him in the courtroom, I
23 could call him.

24 Q And what are the
benefits of not presenting any

Mc Guire -- Direct

1 evidence?

2 A I'm sorry.

3 Q What would be the
4 benefit of you not calling witnesses
5 or presenting any evidence?

6 A Well, it would be -- it
7 could be, you know, sort of, you
8 know, if you don't present any
9 evidence, you'll have a pretty short
10 argument, and the judge will instruct
11 the jury that the defendant does not
12 have to testify.

13 Q What would be the --

14 A I mean I decided not to
15 call Mr. Battle due to his prior
16 record.

17 MS. DIXON: I don't have
18 any further questions really, Mr.
19 Mc Guire. Mr. Deaton has some
20 questions. If you could answer
21 those.

22 THE WITNESS: Sure.

23 MS. DIXON: Thank you,
24 sir.

Mc Guire -- Cross

1 DEATON:

2 Q Good morning, Mr. Mc
3 Guire.

4 A Good morning.

5 Q I'm going to ask you a
6 few questions about Mr. Battle's
7 case. You were with the Public
8 Defender's Office back in 1999?

9 A I was.

10 Q Did you have any
11 concerns about the case or, or any
12 strong points about the case?

13 A Did I have any concerns
14 or, or strong points?

15 Q Yes.

16 A I guess my concern would
17 be that Mr. Battle was at the scene
18 of the crime and based on his prior
19 record and based on the amount of
20 drugs. I don't remember just what
21 the sentence was, but I know it would
22 be quite substantial if he was
23 involved.

24 Q Trafficking third?

25 A Sure.

Mc Guire -- Cross

1 Q And that was a mandatory
2 minimum of twenty-five years?

3 A It would.

4 Q Okay. But a strong
5 point about Mr. Battle's case was
6 that nobody found him in possession
7 of any drugs. Right?

8 A I remember that. If I
9 recall correctly Jennifer Van Houton,
10 who was posing as a taxi driver, goes
11 by in a car and Mr. Battle and Eddie
12 had pulled up alongside. I had a lot
13 of information in my file, I mean
14 have some information of that which
15 is at this time back at the Public
16 Defender's Office but, yeah.

17 I think basically they
18 show up and then they run up and he
19 sees everybody running around. I
20 think they were found on the ground
21 and nobody obviously found it on Mr.
22 Battle.

23 Q And that night Shawn
24 Floyd gave a statement. Right?

25 A I'm sorry.

Mc Guire -- Cross

1 Q LaShawn Floyd, the
2 co-defendant, give a statement that
3 night?

4 A I think she did.

5 Q And she stated that a
6 guy named E was coming. She didn't
7 identify Ernest Battle. Right?

8 A Exactly. Exactly. In
9 fact, I think we seized on that at
10 trial in the case because the person
11 that I've been referring to as Eddie
12 is -- I think I brought up testimony
13 that he actually was a relative of
14 the female and I think they referred
15 to each other as cousins.

16 I think I tried to call
17 them up and obviously I called Eddie
18 before the trial to see what his
19 story would be.

20 Q And the fact that he
21 testified at trial and that everybody
22 calls him E. Correct? Right?

23 A Of course. Sure.

24 Q Okay. At the arrest
25 scene the only thing they had was

Mc Guire -- Cross

1 LaShawn Floyd with, with drugs in her
2 hand and they knew that a guy named E
3 was supposed to bring them to her.

4 Is that right?

5 A Correct.

6 Q Did you ever think about
7 making a motion to dismiss the case
8 for lack of probable cause against
9 Ernest Battle?

10 A No, I didn't.

11 Q Did you ever challenge
12 the arrest warrant in the case?

13 A I'm sorry.

14 Q Did you ever challenge
15 the arrest warrant in the case or was
16 the case already bound over by the
17 time that you got it?

18 A You know, I don't, I
19 don't, I don't recall when I got the
20 case. I don't know if I inherited
21 that case from the other lawyer that
22 was in front of me initially.

23 From my understanding
24 Mr. Battle was actually out on bond
25 for a long period of time and he may

Mc Guire -- Cross

1 have even had another lawyer at the
2 beginning part of this case. I think
3 I got it later.

4 Q Do you recall whether or
5 not that may have been Joe Condon?

6 A I knew that Joe Condon
7 was referenced in that letter that
8 came in at the beginning of the
9 trial.

10 Q Did you look at the
11 indictments prior to Judge Hughston
12 getting ready to charge the jury?
13 Did you ever look at the indictments
14 prior to trial?

15 A I'm sure I would have.

16 Q Do you ever recall Judge
17 Hughston dismissing one of the
18 indictments or directing a verdict as
19 to one of the indictments?

20 A I think he did dismiss
21 one. I think it was a conspiracy
22 charge. You know, like I said, one
23 of the problems, I don't know. I
24 mean you've obviously got the
25 transcripts there.

Mc Guire -- Cross

1 Q Yeah. It was a
2 conspiracy charge, conspiracy to
3 violate the narcotics laws bill and
4 I'll reference the Court and
5 Miss Dixon on page four oh nine of
6 the transcript -- I know you don't
7 have it there, but I'll read it to
8 you.

9 A Sure.

10 Q Hopefully with no
11 objection. Do you have a copy of the
12 transcript, Bill?

13 A I'm sorry.

14 Q Do you have a copy of
15 the transcript with you?

16 A You know, I don't know.
17 You know, I had it at one time and
18 when I moved to Atlanta I didn't take
19 it with me.

20 Q Hopefully with no
21 objection, your Honor, I'm just going
22 to read.

23 A Sure.

24 Q On page four oh eight
25 and four of nine of the transcript.

Mc Guire -- Cross

1 you'd already made your arguments,
2 both of you, and the judge calls you
3 up to the stand and says: "Now, come
4 here a second." And a bench
5 conference was held on the record.

6 And the judge, Judge
7 Hughston says that: "This is a copy
8 of the conspiracy indictment. I want
9 to discuss something with you. What
10 I'm talking about is the indictment
11 for conspiracy, as I read it, charges
12 the defendant with conspiring with
13 another to purchase cocaine. Do you
14 think there's any proof that he
15 conspired with another person to
16 purchase cocaine?"

17 Mr. Bourdon says: "No,
18 not for purposes of trial."

19 And the Court asked you
20 if you had any motions and obviously
21 you moved for a directed verdict or
22 at least you moved that the
23 indictment not be presented to the
24 jury. Do you recall that?

--

A

Yes. I really, I really

Mc Guire -- Cross

1 don't recall the details of that.

2 Q Well, if that's in the
3 transcript, that's what happened?

4 A Oh, I'm sure that's what
5 happened.

6 Q Okay. Are you familiar
7 with the elements of trafficking in
8 cocaine?

9 A Yeah.

10 Q And would I be correct
11 in stating that some of the elements
12 are that someone knowingly sells,
13 manufacturers, delivers, purchases,
14 or brings into this state or to
15 provide financial assistance or
16 otherwise aids, abets, attempts, or
17 conspires to sell, manufacture,
18 deliver, or purchase, or bring into
19 this state, and then it says a
20 certain amount of cocaine.

21 A Sure.

22 Q So Judge Hughston, am I
23 correct in saying Judge Hughston
24 dismissed the conspiracy indictment

Mc Guire. -- Cross

1 with, or Mr. Battle conspiring with
2 another to purchase cocaine.

3 Correct?

4 A Yes.

5 Q And then so the jury was
6 able to consider whether Mr. Battle
7 conspired to purchase cocaine in
8 their consideration of the
9 trafficking elements. Is that

10 correct?

11 A Yeah. If that's what it
12 says.

13 Q You didn't request a
14 curative instruction, did you?

15 A I think Judge Hughston
16 just gave, just read the definition.

17 Q Okay. Did you ever
18 think about making a motion to sever
19 those indictments?

20 A No.

21 Q Or a motion to elect
22 regarding those indictments because
23 obviously conspiracy to violate the
24 narcotics laws, conspiracy to

... would be encompassed in the

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Mc Guire -- Cross

1 trafficking indictment. Correct?

2 A It could be. I mean I
3 could tell you I didn't, I didn't, I
4 didn't move to elect to sever or, or
5 anything like that.

6 Q Okay. Any reason why
7 you didn't or any other reason?

8 A Conspiracy never merges.
9 I suppose they could proceed under
10 both indictments.

11 Q Okay. Are you familiar
12 with the State versus Castinarro
13 (phonetic).

14 A Not offhand.

15 Q Would you dispute that
16 that case, that's dispute that
17 Castinarro, excuse my
18 mispronunciation, Bill, 341 South
19 Carolina 619, that was a 2000, year
20 2000 case. When was this -- was
21 this -- was this trial in 2001? Is
22 that right?

23 A You know, I don't know
24 exactly when it was tried. I mean I
25 guess it could have been late in 2001

Mc Guire -- Cross

1 although -- maybe it was 2001. I
2 thought it was June, though.

3 Q Well, I believe the
4 incident happened in June of 1999. I
5 believe the trial was in July of
6 2001.

7 A Okay.

8 Q The case of State versus
9 Castinarro, would you dispute that it
10 states that trafficking cocaine and
11 conspiracy to traffic are in and of
12 themselves the same?

13 A Well, I don't have the
14 case in front of me but if that's
15 what you say it does.

16 MR. DEATON: Okay. And I
17 may be paraphrasing there, your
18 Honor.

19 Q Well, as to the
20 proximity indictment. The proximity,
21 possession with intent to distribute,
22 there is no trafficking -- is there a
23 trafficking within proximity?

24 A You know, that's a good
question. I actually raised that

Mc Guire -- Cross

1 issue before. I can't remember if it
2 was this case or not but, yeah, the
3 proximity statute doesn't seem to
4 necessarily include trafficking. I
5 think it goes up to possession with
6 intent to distribute and stops.

7 Q So that would require --
8 that, the conviction on that
9 indictment would require possession.
10 Correct?

11 A Well, it seems to
12 require that.

13 Q Okay.

14 A Or distribution.

15 Q But you didn't argue
16 that even if they found him guilty of
17 conspiracy of selling the crack, they
18 couldn't find him guilty of
19 possessing the drugs to constitute
20 P. W. I. D. or were you proceeding
21 under the assumption that, you know,
22 if he got convicted of one, it didn't
23 matter about the others?

24 A No. I don't think, I
I argued any alternative

Mc Guire -- Cross

1 theories. I think I just went with
2 the, you know, wrong time, wrong
3 place.

4 Q But you requested and
5 obtained a mere presence charge.
6 Right?

7 A You know, I don't know.
8 I don't know if I did or didn't.

9 Q Well, I'm on page three
10 seventy of the record. You
11 requested: "Your Honor, I will
12 respectfully request that the
13 language of my charge be given
14 regarding mere presence. It's right
15 out of the Hubbard's Request to
16 Charge."

17 And the judge read over
18 it and decided to charge it.

19 A Well, like I say, I
20 don't, I don't have a specific
21 recollection of what I did or did not
22 ask for regarding the charge.

23 Q Well, if it was in the
24 record, you wouldn't dispute it.

Oh no. No. I mean

Mc Guire -- Cross

1 certainly seems likely that I would
2 ask for a mere presence charge.

3 Q Are you familiar with
4 the case of State versus Brownley?

5 A Not offhand.

6 Q In a mere presence in a
7 drug case, what are you trying to get
8 at? What is the Court supposed to be
9 trying to get or the court in the
10 charge of mere presence and what are
11 you trying to argue to the jury? I
12 mean in a drug case.

13 A That just because
14 somebody is merely present where
15 drugs are found doesn't mean that
16 they're necessarily guilty. They
17 would have to establish that they
18 have control.

19 Q Okay. So, so you would
20 request or you would want something
21 specifically tailored to drugs so
22 that, you know, the jury would
23 understand that he would still have
24 to be found guilty of possessing or
actually having some dominion or

Mc Guire -- Cross

1 control over the drugs?

2 A Well, I mean, yeah.

3 Those are arguments. That he was
4 merely present. That he happened to
5 be there at the scene. You know, I
6 don't remember if I asked for any
7 instruction on constructive
8 possession or, you know, I don't
9 think I'd want it or he didn't give

10 it.

11 I don't think I asked
12 for it because the drugs weren't
13 found -- if I remember correctly, the
14 drugs were not found on or near Mr.
15 Battle. They were closer to other
16 people. I think they were found
17 laying on a table, the floor or
18 something, or even by the defendants.

19 Q So what you were getting
20 at is you're saying that you would
21 have rather had them consider rather
22 than constructive possession try to
23 make sure the jury could only find
24 him guilty of actual possession? Is
that what you're saying?

Mc Guire -- Cross

1 A Well, no. I mean just
2 regarding the jury, I'd like them to
3 be under the impression that the
4 drugs were not found on you but you
5 were not guilty.

6 Q Okay.

7 A And that you just
8 happened to be there at the wrong
9 time and wrong place, being present.
10 That gets to be not guilty.

11 Q You didn't file a motion
12 to challenge the validity of the
13 warrant affidavit, did you?

14 A No, sir.

15 Q Okay.

16 A I didn't.

17 Q Okay. Do you remember
18 whether or not Mr. Battle requested
19 that?

20 A I don't know. If you're
21 asking me did I consider the
22 suppression of the drugs based on
23 law, if you mean arrest or -- I don't
24 think I did that.

25 Q Any strategic reason for

Mc Guire -- Cross

1 not doing that?

2 A I wouldn't find it very
3 meritorious.

4 Q All right. Did you find
5 it, did you find it odd that the
6 arrest affidavit for trafficking
7 cocaine lists that Ernie possessed
8 cocaine or had it in his possession?

9 A I'm sorry. Could you
10 say that again?

11 Q Did you find it odd or
12 did you find it odd at trial or did
13 you ever review the warrant affidavit
14 where it says that Ernest Battle had
15 in his possession, wilfully and
16 unlawfully and knowingly had it in
17 his possession and under his control
18 eighty-three grams of cocaine?

19 A No. I'm quite certain
20 that I would have reviewed the
21 verdict with the prosecution.

22 Q But nobody -- none of
23 the officers that are listed on the
24 warrant affidavit testified at trial
that he was actually in possession

Mc Guire -- Cross

1 that cocaine. Is that right?

2 A You mean did any officer
3 testify that they actually saw him in
4 physical possession of it?

5 Q Right.

6 A No.

7 Q Did you ever try to
8 listen to the preliminary hearing
9 tape?

10 A I'm sorry.

11 Q Did you ever try to
12 listen to the preliminary hearing
13 tape in this case?

14 A I don't remember if I
15 did or didn't. I think I did.

16 Q You think you listened
17 to it or you think you tried to?

18 A I thought I did, but I
19 wasn't sure if Joe Condon had it
20 or -- you know, I just don't
21 remember.

22 I remember talking with
23 Joe Condon briefly and I don't
24 remember if he had it, a transcript

Mc Guire -- Cross

1 Q Do you recall whether or
2 not Rodney Davis lost that tape?

3 A I'm sorry.

4 Q Do you recall whether or
5 not Rodney Davis lost that
6 preliminary hearing tape?

7 A That may be it. I think
8 he did. I think I tried to get it
9 and the system in place at the time
10 was you had to check it out from the
11 magistrate, sort of like a lending
12 library almost.

13 I think, if I'm not
14 mistaken, I tried to get it from them
15 and I don't remember if I ever
16 listened to it or not.

17 Q Well --

18 A I mean, I'm assuming
19 you've established in the case that
20 it was lost.

21 Q It's been testified to.
22 What, what did Mr -- did Mr. Battle
23 tell you what happened at the
24 preliminary hearing or Mr. Condon?
-- either one?

Mc Guire -- Cross

1 A You know, I can't
2 remember. I just can't remember.

3 Q Okay.

4 A You know, I wish I could
5 remember more about that.

6 Q At trial you didn't
7 offer the chain of custody sheet or,
8 or the S. L. E. D. report or anything
9 that said the drugs belonged to or
10 were taken from LaShawn Floyd. Any
11 strategic reason for not doing that?

12 A None that I can think
13 of.

14 Q Couldn't you have used
15 that at trial to, to at least bolster
16 your argument that they were LaShawn
17 Floyd's drugs or Eddie's drugs or
18 somebody else's drugs other than Mr.
19 Battle's?

20 A I suppose so.

21 Q But the evidence the
22 State was relying on regardless or
23 besides the testimony of LaShawn
24 Floyd was predominantly

Mc Guire -- Cross

1 A I'm sorry.

2 Q Was it predominantly
3 circumstantial?

4 A Well, I mean Miss Floyd
5 obviously.

6 Q Right. Other than that.
7 Other than that testimony.

8 A Well, the evidence at
9 trial, yeah. They did have that tape
10 which we were able to keep
11 suppressed, which would have been
12 part of it.

13 Q Well, that tape wasn't
14 part of your case?

15 A Right. There was direct
16 evidence that came from Miss Floyd.
17 She put it all on Mr. Battle. You
18 know, he was present at the scene and
19 he was driving the car. Yeah. Yeah.
20 It was possibly circumstance.

21 Q You subpoenaed Matt,
22 Matt Wallace, the confidential
23 informant, to testify?

24 A Yeah. Yeah, I did do
-- that I know it.

Mc Guire -- Cross

1 In looking through my
2 file sometime ago when this case was
3 coming up for a P. C. R. hearing, I
4 know I went through my file and I
5 know had a subpoena of transport
6 order for him or I had a transport
7 order for him, and I know he came to
8 the courthouse and we sat and talked
9 and the gist of the conversation was
10 with him, assuming it was positive.

11 Q So you met with him?

12 A Yeah. I'm sure I did.

13 If I remember correctly, if I
14 remember correctly, but I don't
15 remember why it developed like this,
16 but for whatever reason, the State
17 never talked to him, never subpoenaed
18 him for court, never transported him
19 as a potential witness, but he was at
20 the courthouse, and of course that's
21 the old courthouse in North
22 Charleston.

23 And there was a holding
24 cell in the second floor of the

Mc Guire -- Cross

1 was, he was there and I talked with
2 him briefly and I don't know if you
3 remember how the holding cell was in
4 North Charleston, but it was sort of
5 the main holding cell and then there
6 was a small holding cell for the
7 deputies for either if they would
8 transport juveniles or females, that
9 was kept separate for them. And that
10 cell was empty that day and that's
11 where I talked to him was in that
12 small little cell. I think Miss
13 Sarji was with me when I talked to
14 him. I don't know.

15 But I don't recall what
16 we talked about but the result of it
17 was it wouldn't have helped the case.

18 Q Okay. Do you recall
19 what Mr. Wallace looked like?

20 A Do I recall what he
21 looked like?

22 Q Yeah.

23 A Yeah. He was -- at the
24 time he was an African-American

man. You know, kind of a round

Mc Guire -- Cross

1 face. You know what I mean by that?

2 A round face.

3 Q Okay. So he's an

4 African-American gentleman?

5 A That's my recollection.

6 Q Okay. You had just

7 learned Matt Wallace's name?

8 A I'm sorry.

9 Q You had just learned

10 Matt Wallace's name when you went to
11 trial. Right?

12 A I'm sorry. Could you
13 repeat that?

14 Q You had just learned

15 Matt Wallace's name when you went to
16 trial. Right?

17 A Did I just learn his
18 name?

19 Q Yeah.

20 A You know, I don't know
21 when I learned it exactly. I know
22 that -- my recollection is that
23 Mr. Battle gave that name to me.

24 Q Page forty-one of the
25 transcript could you dispute that

Mc Guire -- Cross

1 you informed the Court when you were
2 arguing to keep that tape out, that,
3 that Rodney Davis made
4 representations that the police
5 officers didn't actually see the drug
6 transaction take place and that the
7 audiotape involved conversations of
8 only the confidential informant, Mr.
9 Matt Wallace, who I've recently
10 learned his name?

11 A Okay. I agree with
12 that.

13 Q And he was the State's
14 confidential informant. Right?

15 A I'm sorry.

16 Q And he was the State's
17 confidential informant. Right?

18 A Would you repeat that?

19 Q I'm sorry. He was the
20 State's confidential informant.
21 Right?

22 A Yeah. My understanding
23 was, yeah. He'd been used by law
24 enforcement. At the time he was
25 working closely with them when the

Mc Guire - - Cross

1 phone call was actually made there
2 with him, actually with him. That's
3 my understanding.

4 Q Bill, let's talk about
5 the handwritten letter. Regardless
6 of what your thoughts may have been
7 or what you thought the State was
8 going to show, LaShawn Floyd did not
9 identify that as coming from Ernie,
10 did she?

11 A My feeling is that we
12 had a hearing outside the presence of
13 the jury where I would be able to
14 establish that Mrs. Floyd had not
15 received letters from Mr. Battle, had
16 no occasion to see his signature, and
17 really wasn't familiar with his
18 handwriting, and I believe we
19 established that pretty clearly.

20 And of course our motion
21 was that, was that that letter
22 couldn't be identified as actually
23 coming from Mr. Battle. And my
24 understanding, Judge Hughston denied
25 the motion based on the part of the

Mc Guire -- Cross

1 rules of evidence where somebody can
2 identify or authenticate documents
3 based on the contents or subject
4 matter of it. I was pretty sure I --
5 yeah.

6 I was pretty
7 disappointed. I thought it was a
8 pretty good issue for appeal. It was
9 actually used in an Anders brief on
10 appeal.

11 Q You're correct. The
12 entire trial you objected to the
13 letter. Right?

14 A I'm sorry.

15 Q The entire trial you
16 objected to the letter. Right?

17 A Oh, sure.

18 Q You have attempted to
19 characterize the letter as, as being
20 from someone other than Ernie.
21 Right? I mean trying to keep it out.

22 A Well --

23 Q Not necessarily in front
24 of the jury, but that was your

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Mc Guire -- Cross

1 A Well, no. My theory
2 was, you know, they couldn't prove it
3 or they couldn't properly
4 authenticate it.

5 Q And that letter was bad.
6 Right? I mean if it, if it would
7 have come from Mr. Battle, it's -- it
8 pretty much says more than, you know,
9 hang in there. Right?

10 A Yeah. I mean it's been
11 a long time since I've seen the
12 letter. I would say that it was
13 touched on and it was pretty
14 damaging, and if she can be
15 impeached, but the letter was a
16 terrible, terrible hit.

17 Q I mean it says me and
18 Eddie, it says Joe Condon and his
19 phone number in there, right, and it
20 says do as I say and everything will
21 be okay. I wasn't in the cut.

22 Me and Eddie weren't
23 there that night. I mean it
24 basically even goes so far as to
25 outline a statement that --

Mc Guire -- Cross

1 A That the -- I think it
2 was that she was supposed to say that
3 she met the guy at a club. He was a
4 white guy.

5 Q Right. So I mean if, if
6 the jury would have thought hey, if
7 that's from Ernie Battle, he's done.
8 Right?

9 A Yeah. I pretty much
10 agreed.

11 Q But then you told the
12 jury hey, I'm sorry, he did it. He
13 wrote the letter. Right?

14 A Yeah. Yeah. I mean
15 once the letter was coming in, it
16 just didn't seem plausible that we
17 could say that when the letter came
18 into evidence. That was a terrible
19 torpedo in Mr. Battle's case and but
20 I didn't know what to do about it. I
21 mean I just -- it would have been
22 implausible to deny it, I think. We
23 would have lost any credibility that
24 we may have had.

But I can tell you that,

Mc Guire -- Cross

1 I mean I can tell you that, yeah, it
2 was a damning piece of evidence.

3 Q You recall Mike Bosnak
4 telling the jury that they had to
5 clean up the street and the drugs had
6 done so much in America that they,
7 they had to do something, that
8 there's just too much drugs and they
9 had to do something? Do you recall
10 that document?

11 A No. I didn't.

12 Q But you objected to that
13 argument. Right?

14 A Yeah.

15 Q Normally you would have
16 objected to that argument. Right?

17 A Yeah. I think it's --
18 yeah. Normally I would have. If he
19 said it I sure hope I objected in Mr.
20 Battle's trial. I believe it's wrong
21 to tell the jury that they're part of
22 the community and the drugs, you
23 know, putting the entire drug war
24 back with the people. You know, I

Mc Guire -- Cross

1 Q Because it would be an
2 appeal to the passion and prejudice
3 of the jury. Right?

4 A Yeah. I agree with
5 that.

6 Q And you did object.
7 I'll let you know that.

8 A Glad to hear that.

9 Q Any reason you didn't
10 ask for a mistrial? I mean it was
11 the last thing that was said to the
12 jury by Mr. Bosnak.

13 A No. I can't think of
14 anything else.

15 Q Are you familiar with
16 the case of State versus Libertey
17 (phonetic)?

18 A No. Not offhand.

19 MR. DEATON: Just for the
20 record it's 336 South Carolina
21 648, 521 Southeastern 2nd 744.

22 A No.

23 Q Well, then if you're not
24 familiar with it I won't ask you any
questions about it.

Mc Guire -- Cross

1 What about State versus
2 Manning (phonetic). I'm sure you're
3 familiar with that case. Right?

4 A Reasonable doubt?

5 Q Yeah.

6 A Sure.

7 Q You recall State versus
8 Manning; the language regarding
9 seeking the truth or seeking another
10 reasonable hypothesis or another
11 reasonable explanation?

12 A If I were demanding, if
13 I were demanding that charge,
14 generally I would, you know, settle
15 for a reason to hesitate, hesitate
16 to, you know. I don't still don't
17 read it to take advantage.

18 It would surprise me if
19 we didn't have a search for the
20 truth. That's our language.

21 But, yeah. But I don't
22 know if Joe Condon would be in favor
23 of that and I don't know if that came
24 in and I don't recall even if it did

-- I would object if it would come

Mc Guire -- Cross

1 in.

2 Q Well, do you recall --
3 what about at the reasonable doubt
4 charge or circumstantial evidence
5 charge, equating reasonable doubt and
6 moral certainty? Would you object to
7 that?

8 A Would I object to moral
9 certainty? Yes.

10 Q Correct. Moral
11 certainty?

12 A You know, I don't know.
13 I don't know. I know that normally
14 the prosecutor tries to get the
15 Victor V. Nebraska charge, and I
16 wouldn't object to that. I don't
17 know if that was part of the picture
18 or not.

19 I don't know if I would
20 ask for a -- I don't know if -- I
21 can't recall about the fact of the
22 moral certainty.

23 Q All right. Do you
24 recall the jury coming back with any
-- questions in the case?

Mc Guire -- Cross

1 A Not offhand. No. I

2 don't.

3 Q Did the jury come

4 back -- well, the jury came back with

5 a question. Page four twenty-eight

6 of the transcript. The only question

7 they came back with, and it pretty

8 much says that -- the question was

9 can we please have a copy or a

10 transcript of your instructions to

11 the jury at the end of the trial?

12 Judge Hughston, you

13 know, asked if they could narrow it

14 down as to any particular portion.

15 The foreman says there was a portion,

16 and I quote from page four

17 twenty-eight, line eight through

18 eleven.

19 "There was a portion

20 about a reasonable person. Could

21 there be another scenario possibly?

22 Would a reasonable person consider

23 that something else happened instead

24 of what's being claimed by the

-- out of 2"

Mc Guire -- Cross

1 At that point nobody
2 requested anything, any charges. No
3 objections were made.

4 Judge Hughston charges
5 the jury again that "and in
6 evaluating circumstantial" -- just on
7 circumstantial evidence -- "in
8 evaluation of circumstantial
9 evidence, you must search for or
10 consider any other reasonable
11 hypothesis or explanation than that
12 which the State advances in the claim
13 made by the State. You have to
14 assume in any other reasonable
15 hypothesis or explanation other than
16 the guilt of the accused in
17 considering circumstantial,
18 circumstantial evidence.

19 "In consideration" --
20 skipping on down to page four thirty,
21 "in consideration of that it's your
22 duty to examine any other reasonable
23 hypothesis or explanation than the
24 guilt of the accused and if there is
-- another reasonable explanation for

Mc Guire -- Cross

1 the circumstance then you cannot rely
2 on that circumstance and find the
3 defendant guilty."

4 You didn't object to
5 that. Correct?

6 A No. It sounds, sounds
7 pretty good.

8 Q Are you aware that in
9 the Manning, State versus Manning,
10 the Court held that a jury charge on
11 circumstantial evidence urging the
12 jury to seek some reasonable
13 explanation of the circumstances
14 other than the guilt when considering
15 circumstantial evidence.

16 And I quote from the
17 South Carolina Supreme Court: "Turn
18 the State's burden of proof on its
19 head by requiring the jury to find a
20 reasonable explanation of the
21 evidence inconsistent with the
22 defendant's guilt before it could
23 find him not guilty."

24 Are you aware of that?

A I agree with that

Mc Guire -- Cross

1 statement of the law. Yeah.

2 Q Okay.

3 A I mean, I mean I think
4 there's a difference between the
5 circumstantial evidence charge where
6 a judge instructs the jury that if
7 the State is relying on
8 circumstantial evidence that the jury
9 have to find that it's to the
10 exclusion of every other mutual
11 hypothesis, mutual hypothesis, but
12 they should allow the -- but they had
13 pretty good arrangements for the
14 defendant, and I agree with you
15 should have a charge where there's a
16 reasonable doubt charge, they have to
17 find or seek some kind of reason for
18 it to vote not guilty but --

19 Q But you wouldn't argue
20 with the actual law?

21 A No. I'm sure the case
22 said what you say it says, but I
23 would imagine that we were pretty
24 confident when got the circumstantial
charge or repeated it to the

Mc Guire -- Cross

1 jury.

2 MR. DEATON: Hold on one
3 second, Bill.

4 (Whereupon, Mr. Deaton
5 and his client have a private,
6 off-the-record conversation.)

7 MR. DEATON: I have no
8 further questions at this time,
9 your Honor.

10 THE COURT: All right.
11 Redirect.

12 MS. DIXON: I don't have
13 anything further, your Honor.

14 THE COURT: All right.
15 Thank you, Mr. Mc Guire.

16 MR. MC GUIRE: Thank you,
17 your Honor. Glad to help.

18 MR. DEATON: Thanks, Bill.

19 MS. DIXON: State has no
20 further witnesses, your Honor.

21 THE COURT: Thank you.
22 All right. Anything further from
23 the applicant?

24 MR. DEATON: One second,

1 (Whereupon, Mr. Deaton
2 and his client have a private,
3 off-the-record conversation.)

4 (Whereupon, Mr. Deaton
5 and Ms. Dixon have a private,
6 off-the-record conversation.)

7 MR. DEATON: Your Honor,
8 the State has agreed rather than
9 have me call Mr. Wallace back out
10 here and waste the Court's time,
11 the State has agreed that he will
12 testify that he's never met
13 Mr. Mc Guire.

14 We'll leave the -- I'll
15 just leave the credibility of
16 that statement to you.

17 THE COURT: So it's
18 stipulated that if Mr. Wallace
19 were called, he would reply, he
20 would testify that he has never
21 met Mr. Mc Guire?

22 MR. DEATON: Yes, your
23 Honor.

24 MS. DIXON: That's
25 correct, your Honor.

1 THE COURT: Thank you.

2 MR. DEATON: I'd like to
3 make a couple arguments, your
4 Honor, simply in closing.

5 THE COURT: Hold on just a
6 second.

7 MR. DEATON: Yes, sir.

8 THE COURT: All right.
9 Well, let's take a five-minute
10 break and then I'll hear your
11 arguments.

12 MR. DEATON: Thank you,
13 your Honor.

14 MS. DIXON: Thank you,
15 your Honor.

16 THE COURT: We're at ease.

17 (Whereupon, a brief
18 recess was called.)

19 THE COURT: All right.
20 I'll be happy to hear any
21 arguments you wish to make.

22 MR. DEATON: Thank you,
23 your Honor. I'll try to be
24 brief.

25 As your Honor is aware.

1 we submitted a brief in support
2 of the reasonable doubt
3 circumstantial evidence charge.
4 That issue simply -- we'll rely
5 on that brief obviously, but also
6 point out to the Court that that
7 charge was specifically denounced
8 in Manning and several other
9 cases, and Judge Hughston not
10 only equated moral certainty with
11 reasonable doubt in his initial
12 charge, but in response to the
13 direct question from the juror,
14 your Honor, he instructed the
15 jury against Manning and against
16 the other cases in search for any
17 other reasonable hypothesis or
18 explanation than that which the
19 State advances.

20 Manning held that to
21 turn the State's burden of proof
22 on its head by requiring the jury
23 to find the reasonable
24 explanation of the evidence
 inconsistent with the defendant's

1 guilt before they found him not
2 guilty.

3 Your Honor, obviously
4 in, in State versus Cherry the
5 moral certainty language, your
6 Honor, in the search for a
7 reasonable hypothesis language
8 serves to confuse the jury by
9 leading it to believe that the
10 State must, and this is what the
11 Supreme Court said, that the
12 State, as in Manning -- Judge
13 Hughston's original charge
14 referenced one of the forbidden
15 terms which is moral certainty.

16 Couple that with, you
17 know, his instruction that they
18 seek some reasonable explanation
19 other than the accused's guilt.
20 Multiple deficiencies in this
21 charge, unconstitutional shift of
22 the burden of proof.

23 Obviously, your Honor,
24 the standard to evaluate this
25 kind of claim is whether or not

1 there is a reasonable likelihood
2 the jury applied the improper
3 instructions in an
4 unconstitutional way. I believe
5 that's the Todd versus State case
6 which talks about that, your
7 Honor.

8 It's obvious I
9 believe -- the solicitor or the
10 Attorney General may disagree,
11 but based on the questions
12 presented by the -- to the Court
13 by the jury, they were struggling
14 with whether or not they were
15 required to search for some other
16 reasonable hypothesis other than
17 that presented by the prosecutor.

18 It simply -- the Court's
19 response simply just clouded the
20 issue of whether or not they were
21 supposed to look for something
22 other than, you know, did the --
23 basically asking the Court I
24 believe did the defense put up
 nothing that would, you know,

1 be more likely than the, the
2 guilt of the accused. And I
3 believe that that
4 unconstitutionally shifted the
5 burden, your Honor. Certainly in
6 light of the circumstantial
7 evidence portion.

8 Obviously, you know, the
9 State's case was based largely on
10 the letter and the testimony of
11 LaShawn Floyd but I believe there
12 were some circumstantial issues
13 in this case that the State used.

14 And that's all that I
15 have on that argument. If you'd
16 like me to proceed with other --
17 several other arguments, I will,
18 or if you want a response to that
19 argument from the prosecutor, I'd
20 be happy to --

21 THE COURT: Was that issue
22 addressed on appeal?

23 MR. DEATON: No, your
24 Honor. That issue was not
presented to and it's a failure

1 to object.

2 The only issue that was
3 briefed on appeal, your Honor,
4 was the issue involving the
5 admission of the handwritten
6 letter and whether or not it was
7 properly authenticated. An
8 Anders brief was done and the
9 Court dismissed the appeal
10 pursuant to Anders.

11 THE COURT: Go ahead and
12 make your whole argument.

13 MR. DEATON: Thank you,
14 your Honor. My client's argument
15 with regard to Frank versus
16 Delaware is simply the warrant in
17 question, trafficking cocaine,
18 takes an affidavit by Robin
19 Miller of the North Charleston
20 Police Department, which
21 basically says the applicant in
22 his possession -- had in his
23 possession and under his control
24 a substance that field-tested
-- positive for cocaine. Miller

1 listed several detectives as
2 witnesses of that.

3 None of the detectives
4 testified at trial that he had
5 any possession, actual
6 possession. That is my client's
7 argument is that, you know, in
8 order to establish probable cause
9 to obtain an arrest warrant,
10 Mr. Miller placed in there that
11 these people would testify to
12 that. That's his argument on
13 that issue, your Honor.

14 As to the appeal to the
15 passion and prejudice of the
16 jury, the argument -- and if I
17 would reference page three eighty
18 and page three ninety-three, page
19 three ninety-four, reference that
20 to the Court, Mr. Bosnak
21 characterizes cocaine as poison.

22 He says: "That's what
23 this is. This stuff causes more
24 crime in this country than

It does more than

1 destroy families. More violent
2 crime in this country is caused
3 by this stuff right here in this
4 pouch that Mr. Battle is putting
5 on our streets."

6 Then later he states:
7 "But, ladies and gentlemen, we
8 have to do something about this.
9 I said in my opening that this
10 wasn't a kid selling a little
11 gram of drugs, something like my
12 fingertip, to make a little extra
13 money. That's not what this is
14 about. I feel sorry for those
15 people, and I know that's
16 breaking the law. I wish we had
17 a way to deal with that other
18 than that.

19 "But the real devil in
20 all this is people like Ernest
21 Battle. He's the real devil.
22 We've got to do something about
23 this, especially in the quantify.
24 That's what makes this case so
 important so important. It's

1 too much drugs involved. I
2 couldn't believe it. I couldn't
3 let it go because we really in
4 society have to be concerned
5 about people that sell this much
6 drugs."

7 And Mr. Mc Guire did
8 object, your Honor, but the
9 damage was done. I believe he
10 should have requested a mistrial
11 at that point. There's a case
12 right on point, your Honor, State
13 versus Liberte, which is 336
14 South Carolina 648, 521
15 Southeastern 2nd 744, your Honor,
16 which basically says in the
17 response, the Court was dealing
18 with an argument made by the
19 prosecutor in that case that:
20 "Ask yourselves is being used as
21 a sword to attack law and order,
22 to attack law enforcement, to
23 attack people who are trying to
24 keep drugs off our streets."

In the Court's view

1 that type of argument was
2 calculated to, clearly calculated
3 to appeal to the passions and
4 prejudice by playing on the
5 jury's fear of the impact of
6 drugs on society.

7 That's what Mr. Bosnak
8 was saying, the same thing. You
9 know, the Court in Libertey found
10 that -- it invited the jury to
11 convict the defendant even if the
12 evidence did not prove their
13 guilt beyond a reasonable doubt
14 in order to keep the streets safe
15 from the scourge of drugs.

16 That's what Mr. Bosnak
17 was doing. You know, he said
18 this is poison. He said we've
19 got to do something about this.
20 He said, you know, this is
21 getting too prevalent in society.

22 The Libertey Court said:
23 "The prosecutor may not urge
24 jurors to convict a criminal
 defendant in order to protect

1 community values, to preserve
2 civil order, or deter others from
3 law-breaking. The evil lurking
4 in such prosecutorial appeals is
5 that the defendant will be
6 convicted for reasons wholly
7 irrelevant to his own guilt or
8 innocence.

9 "Jurors may be persuaded
10 by such appeals to believe that
11 by convicting their defendant
12 that they will assist in the
13 solution of some pressing social
14 problem."

15 That's what Mr. Bosnak
16 was after. That's why the judge
17 admonished him. You know,
18 amelioration of society is far
19 too heavy a burden for an
20 individual criminal defendant to
21 bear. And that's what the State
22 basically said.

23 And it says even in that
24 case, there is no doubt that the
indictment against the defendant

1 was very strong and that there
2 was no tangible evidence
3 supporting their defense.
4 However, they found that the --
5 because of the prosecutor's
6 arguments to the jury in urging
7 the jurors to disregard the most
8 fundamental aspect of the
9 criminal justice system,
10 basically disregarding reasonable
11 doubt and considering the impact
12 on society, they found that that
13 charge or that argument so
14 affected the trial on fairness so
15 as to assure an unjust result.

16 And we would argue
17 similarly that Mr. Mc Guire
18 should have moved for a mistrial
19 at that point, point to, you
20 know, basically reflect the
21 arguments made in the Liberteys
22 case.

23 Your Honor, with respect
24 to probable cause, Mr. Battle is
-- simply arguing that probable

1 cause didn't exist to arrest him
2 that night, arrest him that
3 night, that he was simply there,
4 he was simply mere present --
5 merely present and Miss Floyd was
6 found in possession of the drugs.
7 She even gave a statement that
8 night that it was not Ernest
9 Battle but it was a man named E.
10 She didn't identify him as Ernest
11 Battle.

12 You know, obviously
13 under that scenario, your Honor,
14 probable cause is, is good faith
15 to believe that a person is
16 guilty of a crime. I believe
17 somebody testified -- I'm not
18 sure who it was -- it might have
19 been Joe Condon or my client --
20 that Van Houton, or it might have
21 been Jason Wallace, your Honor,
22 that Jennifer Van Houton
23 indicated that she suspected
24 those guys of being involved. I
25 don't know that that rises to the

1 level of good faith belief, but
2 that, that's my client's
3 position, your Honor, regarding
4 probable cause.

5 The mere presence
6 instruction, your Honor, what
7 he's simply arguing is that State
8 versus Brownley requires or at
9 least suggests that the purpose
10 of a mere presence charge in a
11 drug case is to inform the jury
12 that any inference which is
13 permissibly drawn from the
14 presence of the defendant at the
15 location where the drugs are
16 found as a matter of law is
17 insufficient by itself to convict
18 the defendant on the, of the
19 possession or the possession with
20 intent to distribute drugs.

21 It is possible for the
22 jury to infer knowledge of the
23 drugs and the intent to exercise
24 dominion and control, but the law
involved does not condemn this

1 inference but, however, the law
2 will not allow that inference
3 without more proof of possession
4 beyond a reasonable doubt.

5 My client's argument is
6 simply that Judge Hughston's
7 charge is rather vague. It's,
8 it's encompassing any crime. If
9 you find from all of what he said
10 on page four forty-two of the
11 transcript, was that if you found
12 from all the evidence that Mr.
13 Battle was present or merely
14 present at or near the scene of
15 the crime, you're instructed that
16 such mere presence or -- at or
17 near the scene of a crime would
18 not support a finding of guilt
19 and mere presence can only create
20 suspicion and et cetera.

21 He does not specifically
22 tailor that charge to drugs.
23 That's my client's position on
24 that, as -- is that Mr. Mc Guire
should have asked for a more

1 specific charge regarding that.

2 With respect to the
3 conspiracy issue and any double
4 jeopardy issues my client makes,
5 I believe it's more so of a
6 failure to request the curative
7 instruction. As Mr. Mc Guire
8 testified to, the conspiracy
9 indictment, conspiracy to violate
10 narcotics was for conspiracy to
11 possess -- to purchase cocaine.
12 Judge Hughston found that there
13 was no evidence of that.
14 Conspiracy to purchase cocaine,
15 however, is also an element of
16 trafficking and therefore the
17 jury was able to consider whether
18 or not it found that I or, you
19 know, nobody is going to be able
20 to know.

21 But they were able to
22 consider it an offense or the
23 elements of an offense that were,
24 was, that they were given no
25 right to consider. Mr. Battle

1 was given a directed verdict on
2 that, on that issue.

3 Finally, with respect to
4 the handwritten letter,
5 Mr. Battle was never identified
6 as the person who wrote the
7 letter at trial. He was --
8 denies that he wrote the letter.
9 Obviously, your Honor, it was as
10 Mr. Mc Guire said, a torpedo.
11 A -- the worst piece of evidence
12 in the case.

13 It basically, you know,
14 once the jury believes it's from
15 Mr. Battle, I believe it results
16 in a conviction. Mr. Mc Guire
17 believed that, too.
18 Unfortunately he told the jury
19 yeah, it was from him.

20 I believe that weighing
21 of imposing his own credibility
22 for the jury versus using
23 Mr. Battle's credibility before
24 the jury was something that, you

1 decision in that regard. I think
2 obviously once he admitted that
3 Mr. Battle wrote that letter, the
4 jury had no choice but to say
5 well, if he's trying to change
6 statements, if he's saying he was
7 there, you know, and if he's
8 saying please say that we weren't
9 there because, you know, our
10 lawyer is going to take care of
11 it, I believe that's certainly
12 prejudicial, your Honor.

13 I believe reasonable
14 probability exists that but for
15 Mr. Mc Guire's errors, you know,
16 a result of the proceeding would
17 have been different.

18 Finally with respect to
19 Mr. Wallace, obviously Mr. Mc
20 Guire never met with Mr. Wallace.
21 I don't think that's going to be
22 contested. Mr. Wallace's
23 testimony would have been
24 beneficial at least to, to

1 possess drugs to impeach the
2 State's credibility because the
3 State, that's the State's
4 witness. You want to, you want
5 to know why the State wasn't
6 calling their own witness.

7 But we'll rest on that,
8 your Honor, those arguments as
9 well as the brief submitted, in
10 addition to the brief submitted
11 in support of my client's
12 application that he submitted on
13 his own.

14 THE COURT: All right.

15 MS. DIXON: Just briefly,
16 your Honor. I'll try to address
17 most of the arguments that's been
18 raised by the applicant.

19 First, as regards to Mr.
20 Wallace, I don't believe that
21 it's been shown that having been
22 called at the trial, there would
23 have been any extra conviction to
24 his testimony. The testimony

1 that he never saw Mr. Battle in
2 possession of the drugs is
3 obviously corroborated at the
4 trial.

5 There's no testimony
6 that Mr. Battle had given the
7 drugs to the confidential
8 informant, that he'd given the
9 drugs to Shawn who then gave the
10 drugs to the confidential
11 informant. And I believe that
12 was the basis of the State's
13 case.

14 As regards to the
15 letter, I believe it was pointed
16 out on the cross-examination of
17 the applicant himself, the letter
18 references me and Eddie at least
19 five times if not more, and was
20 written to the other co-defendant
21 Shawn.

22 I believe that Mr. Mc
23 Guire has testified that he
24 believed that he would lose all

 with the jury if he

1 did not admit and somehow try to
2 mitigate that his client wrote
3 that letter, and I believe that
4 that is a valid, valid trial
5 strategy.

6 As far as the closing
7 argument by the solicitor, I
8 believe that under State V.
9 Hamilton, to be entitled for a
10 new trial for improper closing
11 arguments, the test is whether
12 the solicitor's comments so
13 infected the trial with
14 unfairness as to make the
15 resulting conviction a denial of
16 due process.

17 I don't believe that
18 even had Mr. Mc Guire made a
19 motion for a mistrial that it
20 would have been granted at that
21 point, and therefore no prejudice
22 can be shown for his failure to
23 do so.

24 And as relating to the
25 circumstantial evidence charge

1 as your Honor is aware, the jury
2 charge must be read as a whole.
3 Under Todd V. State as Mr. Deaton
4 pointed out, the standard is
5 whether there is a reasonable
6 likelihood that the jury applied
7 the charge in an unconstitutional
8 manner. I don't believe that
9 that's been shown today.

10 Further, under State V.
11 Neece (phonetic), which is a
12 Supreme Court case, a state
13 Supreme Court case, there was a
14 similar charge requested that the
15 jury seek a reasonable
16 explanation other than the guilt
17 of the accused.

18 The Court found that
19 although the charge was
20 incorrect, there was a failure to
21 demonstrate prejudicial error
22 because the trial judge
23 extensively charged that the
24 State had the burden of proof to
25 prove the defendant guilty beyond

1 a reasonable doubt, and there was
2 also a proper definition of
3 reasonable doubt.

4 In reviewing the
5 transcript briefly, your Honor,
6 first Judge Hughston did give a
7 proper definition of reasonable
8 doubt as the kind of doubt which
9 would cause a reasonable person
10 to hesitate to act, and I noted
11 at least eight times and there
12 were probably more because it was
13 a cursory inspection, that he
14 told the jury that the State had
15 the burden to prove the defendant
16 guilty beyond a reasonable doubt.

17 So I believe that this
18 case falls exactly in line with
19 State V. Neece. As the Supreme
20 Court said, there has been no
21 prejudicial showing because of
22 the reiteration of the State's
23 burden and the correct definition
24 of the burden of proof.

1 a more detailed argument, the
2 State would be happy to submit a
3 brief, your Honor.

4 THE COURT: Thank you.

5 Any response?

6 MR. DEATON: Your Honor,
7 just briefly in response. Miss
8 Dixon indicated in regard to
9 State versus Neece, she is right
10 that the Court held that the
11 trial judge's circumstantial
12 evidence charge was erroneous
13 because it instructed jurors to
14 seek a reasonable explanation
15 other than the guilt of the
16 accused.

17 The Court held that such
18 error was harmless because the
19 trial judge in Neece instructed
20 the jurors twenty-six other times
21 that the State had the burden of
22 proof beyond a reasonable doubt
23 and because, and this is the key
24 thing that she's leaving out in
"and because the charge did

1 not contain the other troubling
2 language identified in Manning
3 and subsequent cases, but for
4 this rule degrades certain or a
5 doubt for which he can give a
6 reason. In this case he did
7 include moral certainty. He did
8 include one of the troubling
9 languages. So I think it's
10 distinguishable from Neece in
11 that regard.

12 I think obviously, you
13 know, Judge Hughston, and I think
14 it, it certainly gives a little
15 more weight to it that it was in
16 direct response to a jury
17 question, your Honor. As far as
18 prejudice goes, I believe it's
19 clear that the jury was focusing
20 on that portion of the jury's --
21 of the judge's charge in making
22 its decision.

23 Nothing further, your
24 Honor.

1 I could just briefly -- I
2 neglected to address the moral
3 certainty issue. I believe under
4 Todd V. State there was also a
5 question regarding the moral
6 certainty issue. The Court found
7 that the phrase didn't
8 automatically render a reasonable
9 doubt charge, wasn't unusually
10 defective.

11 And finally Victor V.
12 Nebraska, which is the United
13 States Supreme Court case that
14 noted that while the trial judge
15 mentioned moral certainty, which
16 is the part of the charge that
17 the Manning Court disfavored, the
18 moral certainty language could
19 not be sequestered from its
20 surroundings. I believe that the
21 jury charge as read as a whole,
22 they correctly stated the laws
23 and were not confusing or likely
24 to cause the jury to misapply the
25 law as stated.

1 Thank you, your Honor.

2 THE COURT: I'll review
3 the record and notify you of my
4 decision in writing. Thank you
5 very much.

6 MS. DIXON: Thank you,
7 your Honor.

8 (Whereupon, the matter
9 was concluded.)

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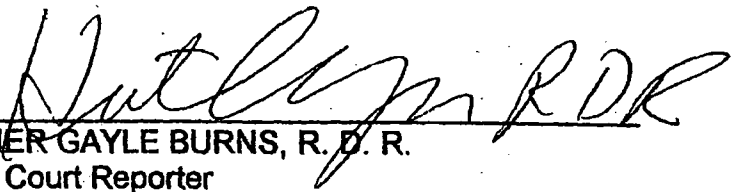
CERTIFICATION

I, the undersigned HEATHER GAYLE BURNS, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the proceedings in the captioned case, relative to appeal, heard in the Court of Common Pleas for Charleston County, South Carolina on the 30th day of May, 2006.

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

DATED: _____

September 3, 2006


HEATHER GAYLE BURNS, R. D. R.
Official Court Reporter

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

NINTH JUDICIAL CIRCUIT

ERNEST BATTLE, #165247,)

CASE NO: 2004-CP-10-3794

Plaintiff(s),)

-vs-)

STATE OF SOUTH CAROLINA,)

Defendant(s).)

ORDER

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2006 JUL 10 AM 9:31

FILED

A. Introduction

The applicant seeks post-conviction relief (PCR) alleging that his conviction and sentences for Trafficking Cocaine and Possession with Intent to Distribute Cocaine within Proximity of a School were the result of ineffective assistance of counsel and violations of due process. The petition is granted based on issues related to jury instructions on reasonable doubt and circumstantial evidence as set forth in number 13 below. A new trial is ordered.

B. Standard of Review

Claims of ineffective assistance of counsel are evaluated under a two-pronged test. The applicant must prove that counsel's performance "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984) and that the applicant was prejudiced by his counsel's deficient performance to such a degree "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Johnson v. State*, 325 S.C.

182, 480 S.E.2d 733 (1997). Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1995); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992); *Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000).

C. Discussion

The following claims were raised and pursued:

(1) The applicant was arrested without probable cause

The applicant first asserts that his arrest was without probable cause, thus in violation of the 4th and 14th Amendments of the United States Constitution and Article I, § 3 of the South Carolina Constitution. Police arranged through a confidential informant to purchase cocaine for \$4700. ROA p. 93. The transaction and telephone calls were monitored. It was understood that the drugs were to be delivered by an "uncle" of one of the co-defendants (Floyd) who would arrive in a particular type of vehicle. The totality of the evidence on this issue allows the reasonable conclusion that the following things were observed and within the knowledge of the arresting officer. A vehicle fitting that general description was observed and parked down the street. The officer at the scene saw a black man (the co-defendant was African-American) walk down the road and into the area of the co-defendant's driveway, turn around, and walk back. ROA p. 101. The officer observed the co-defendant walk to the other side of a building and return, telling the informant she had the cocaine and that if he would get the money they would proceed to her residence and make the drug

transaction. ROA pp. 101-102. The officer testified that she observed the applicant walk toward her vehicle from the same corner of the building where the co-defendant had been just before the co-defendant stated that she had the drugs. ROA p. 106. The officer also testified that when the take-down signal was given and the applicant was arrested, both the applicant and the co-defendant were "right there at [her] vehicle." ROA p. 106.

The applicant argues that he was merely present and no one at that time, including co-defendant LaShawn Floyd, the State's chief trial witness, identified the applicant as a person delivering cocaine. The applicant argues that the officers basically arrested all persons in the area on the night of the incident, regardless of probable cause, and began to build their case afterward. The court finds that the applicant has failed to prove that a challenge to probable cause would have been likely to change the outcome of his trial.

- (2) Counsel were ineffective for failing to file a pretrial motion challenging the validity of the warrant affidavit pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978)

The applicant next asserts that trial counsel William McGuire, Esquire, and Leslie Sarji, Esquire, as well as preliminary hearing counsel Joseph Condon, Esquire, were ineffective in failing to file a pretrial motion challenging the validity of the warrant affidavit for Trafficking in Cocaine in the instant case.

The veracity of a warrant affidavit may be challenged after the warrant is issued and executed. *State v. Missouri*, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). A two-part test was established in *Franks v. Delaware*, 438 U.S. 154,

155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). First, to mandate an evidentiary hearing, there must be "allegations of deliberate falsehood or of reckless disregard for the truth [as to statements included in the warrant affidavit], and those allegations must be accompanied by an offer of proof." *Id.* at 171, 98 S.Ct. 2674. At the hearing, the defendant has the burden of proving the allegations of perjury or reckless disregard for the truth by a preponderance of the evidence. *Id.* at 155-56, 98 S.Ct. 2674; see *State v. Jones*, 342 S.C. 121, 126-27, 536 S.E.2d 675, 678 (2000) (holding a defendant is entitled to challenge misstatements in a warrant affidavit if the following criteria are met: "(1) the defendant's attack is more than conclusory and is supported by more than a mere desire to cross-examine; (2) the defendant makes allegations of deliberate falsehood or of reckless disregard for the truth which are accompanied by an offer of proof; and, (3) the affiant has made the allegedly false or reckless statement"). *State v. Davis*, 354 S.C. 348, 580 S.E.2d 778 (Ct. App. 2003).

To mandate a *Franks* hearing, there must be allegations of deliberate falsehood or of reckless disregard for the truth by the officers. The purpose of *Franks* hearings is to determine whether the probable cause determination was based on intentionally incorrect information. *U.S. v. Akinkoye*, 185 F.3d 192 (4th Cir. 1999). The obvious assumption is that there will be a *truthful* showing. *Franks, supra* at 164. This does not mean "truthful" in the sense that every fact recited in the affidavit is correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered

hastily. *Id.* But it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true. *Id.*

Here, the applicant has failed to meet his burden of proving that intentionally incorrect information was given. Additionally, the arrest itself was valid, even if the warrant was not, because the arresting officers themselves had sufficient information, independent of the warrant, to give them probable cause to make a warrantless arrest. The applicant has failed to establish a reasonable probability that, but for counsel's alleged ineffectiveness, the result of the trial would have been different.

(3) Counsel were ineffective in failing to object to the applicant being subjected to double jeopardy after the acquittal of conspiracy charge and failing to request a curative instruction

Next, the applicant asserts that counsel were ineffective in failing to object to the applicant being subjected to double jeopardy after the trial Court directed a verdict as to the Conspiracy to Violate the Narcotics Laws indictment as well as failing to request a curative instruction in that regard.

The applicant was also indicted for Conspiracy to Violate the Narcotics Laws (1999-GS-10-7111), and the trial judge directed a verdict on that charge because there was no evidence presented that the applicant conspired with another to "purchase" cocaine. ROA pp. 408-409.

The applicant argues that trial counsel should have objected to the submission of the Trafficking indictment to the jury as the offense of Trafficking in Cocaine, under the statute, allowed the jury to convict the applicant for conspiring

to purchase cocaine.¹ Apparently, the trial judge determined that since the defendant was not the purchaser in the transaction, a directed verdict was appropriate on that charge. That did not prohibit the submission of the other indictments, however. The applicant has failed to establish that the result would have been different had counsel moved to dismiss the other charges.

(4) Counsel were ineffective in failing to file a pretrial motion to suppress cocaine found on a co-defendant

The applicant argues that counsel were ineffective in failing to file a pretrial motion to suppress cocaine found on a co-defendant. This seems to be based on documents submitted by SLED pursuant to Rule 6, SCRCrP indicating that the drugs tested were seized from a co-defendant rather than the applicant. This claim is without merit. The Court finds that these documents, even if submitted to the jury or presented in a motion to suppress, do not satisfy the applicant's burden of proof.

Counsel provided reasonably effective assistance in this regard. If counsel erred in any respect in failing to file a pretrial motion to suppress the cocaine found on the co-defendant, the applicant has not established that the outcome would likely have been different.

(5) Counsel were ineffective for failing to call exculpatory witnesses

The applicant next asserts that trial counsel were ineffective in failing to

¹ S.C. Code Section 44-53-370(e) defines the offense of trafficking in cocaine as follows: Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of: (2) ten grams or more of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), is guilty of a felony which is known as "trafficking in cocaine." S.C. Code § 44-53-370(e) [emphasis added].

call potentially exculpatory witnesses, particularly the confidential informant, Jason Matthew Wallace, attorney Joe Condon, and attorney Jim Smiley.

Wallace, the confidential informant, did not testify at trial. He was transported to the Charleston County Detention Center from prison during the week of the applicant's trial and was served with a subpoena by Mr. McGuire.

Mr. McGuire testified at the PCR hearing that he met with Mr. Wallace and determined Mr. Wallace's testimony would be unhelpful to the applicant at trial. He claims this was a strategic decision.

The court believes that Mr. Wallace is confused about whether he actually met Wallace. Nonetheless, the testimony of Wallace on PCR was such that it would not have been particularly beneficial to the applicant at trial. Thus, the Court finds that the applicant has failed to meet his burden of proving counsel were deficient in failing to call Jason Matthew Wallace to testify at trial. Furthermore, even if counsel were deficient in failing to have Wallace testify, the Court finds that the applicant has failed to meet his burden of proving a reasonable probability that the result of the trial would have been different.

Mr. Condon testified at the applicant's PCR hearing that he barely remembered representing the applicant at all and did so only at a preliminary hearing. The applicant has failed to show that Condon's testimony at trial would have benefited the applicant or change the result of the trial.

Jim Smiley did not testify at the PCR hearing. 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

believed to be written by the applicant to co-defendant LaShawn Floyd, to which defense counsel initially requested a redaction. ROA p. 257-259. Floyd informed the Court that she received the letter under her door while housed at the County Jail. ROA p. 258. In the presence of the jury, Floyd testified that she received the letter from the applicant. ROA p. 269. However, she indicated that she did not "really know" the applicant's handwriting. ROA p. 269, line 6. Nevertheless, she testified that from the contents of the letter she could tell that it was from the applicant. ROA p. 270. The letter was admitted over defense counsel's objection. After testifying to its contents, Floyd testified that she did not recognize the name at the bottom of the letter. ROA p. 278.

The State relied heavily on the contents of the letter in its closing argument to the jury, even reading the entire letter to the jury. ROA pp. 389-393. Despite defense counsel's objection to the letter's admission and the failure of any witness to positively identify the letter as being written in the applicant's handwriting, during his closing argument Mr. McGuire acknowledges that the letter was written by the applicant.³

At the PCR hearing, defense counsel McGuire testified that after the Court admitted the letter into evidence, he acknowledged the letter was from the applicant to Floyd in an attempt to build credibility with the jury.

the cocaine, even detailing a written statement to provide to attorneys. ROA pp. 275-277.

³ During his closing McGuire argues to the jury as follows: "And he writes a letter. What would you do? You know she won't give up Eddie, the real uncle. [The applicant] wrote that letter in an inarticulate and desperate attempt to provide Shawn Floyd with a viable statement that she can write so she could save Eddie who you know she's got to keep an eye on. And Earnie—Earnie couldn't say, 'Tell the truth and tell them Eddie did it . . .'. The only option was for Earnie to try and save his life. So he writes a letter. And it wasn't the smartest thing to do. To be honest with you, it looks bad, and I am afraid the letter will actually prevent you from seeing the truth." ROA pp. 402, lines 18-25, 403, lines 1-5.

Even counsel's concession of a client's guilt does not automatically constitute deficient performance. *Young v. Catoe*, 205 F.3d 750 (4th Cir. 2000). Rather, the Court must heed *Strickland*'s admonition to consider the totality of the circumstances confronting the lawyer in order to accurately evaluate the reasonableness of the conduct at issue. *Id.* Under *Strickland*, trial strategy designed to maintain counsel's credibility with the jury could be reasonable, notwithstanding the possibility of short-term harm to the defendant. *Id.* Some remarks of complete concession may constitute ineffective assistance of counsel, but tactical retreats may be reasonable and necessary within the context of the entire trial. *Id.*

Although the admission by trial counsel that this letter was written by the applicant despite the lack of testimony to conclusively establish that conclusion causes this Court concern, the Court finds counsel's concession to be an exercise of valid trial strategy under an objective standard of reasonableness. Counsel did not concede guilt, but merely made a tactical retreat which this Court finds to be reasonable and necessary since the trial Court had allowed the letter in evidence. Furthermore, even if counsel's actions were unreasonable, the Court finds that the applicant has not met his burden that a reasonable probability exists that but for counsel's actions, the result of the trial would have been different.

(10) Counsel were ineffective in failing to object to the Solicitor's improper vouching

The applicant argues that trial counsel were ineffective in failing to object

to a portion of the Solicitor's closing argument which the applicant characterizes as improper vouching.

During his closing argument, Assistant Solicitor Mike Bosnak argued to the jury with respect to the testimony of the State's chief witness, LaShawn Floyd, as follows: "[S]he had no reason to lie. She's told the truth about that. Matt Wallace was going to buy the drugs from her. She was trying to make a few bucks." ROA p. 388, lines 22-25.

Vouching occurs when a prosecutor states a personal belief that a particular witness is telling the truth. *Nelson v. United States*, 2001 WL 34366572 (D.S.C. 2001). It is impermissible for a prosecutor to vouch for the testimony of government witnesses in arguments to the jury. *United States v. Sanchez*, 118 F.3d 192 (4th Cir. 1997). However, even though these actions are improper, they do not always invalidate a conviction. *Nelson, supra*. The relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Id.* The Fourth Circuit has detailed four factors a court should consider in determining whether the comments prejudicially affected a criminal defendant: (1) the degree to which the comments could have misled the jury; (2) whether the comments were isolated or extensive; (3) the strength of proof of guilt absent the inappropriate comments; and (4) whether the comments were deliberately made to divert the jury's attention. *Nelson, supra* at 3.

The comment made in the instant case by Assistant Solicitor Bosnak borders on improper vouching as Bosnak stated a personal belief that LaShawn

Floyd "told the truth about that." Nevertheless, the Solicitor's comment does not rise to the level of unfairly prejudicing the applicant. The Court finds that even if the comment vouched for an important State's witness, the degree to which the comment could have misled the jury is minimal. Furthermore, said comment, appearing at the middle of the deputy solicitor's closing remarks, was rather isolated. Finally, the Court finds that the comment was not deliberately made to divert the jury's attention in the instant case. Thus, the comment did not so infect the trial with unfairness as to make the resulting conviction a denial of due process and the applicant's instant ground is denied.

(11) Counsel were ineffective in failing to move for a mistrial upon Solicitor's improper closing argument

The applicant next asserts that trial counsel were ineffective in failing to move for a mistrial upon the Solicitor's alleged appeal to the passion or prejudice of the jury during his closing argument.

During his closing argument, the Assistant Solicitor offered the following arguments to the jury:

Poison, that's what this is. This stuff causes more crime in this country than anything else. It does more to destroy families. More violent crime in this country is caused by this stuff right here in this pouch that Mr. Battle is putting on our streets. . . . But, ladies and gentlemen, we have to do something about this. . . . We've got to do something about this, especially in this quantity. That's what makes this case so, so important. It's a 1999 case. It was old. . . . I couldn't plead it. I couldn't let it go, because we really in society have to be concerned about people that sell this much drugs.

ROA pp. 380, lines 15-19, 393, lines 21-22, 394, lines 21-25, and 395, lines 1-2. Following this argument, defense counsel McGuire objected and requested that

the Court admonish the prosecutor for using that type of argument. ROA p. 395. The Court agreed, indicating that "It's not a matter of battling drugs. It's a matter of this case." ROA p. 395, lines 7-8.

Although defense counsel's objection to the argument was sustained and an admonishment given, defense counsel did not make a motion for a mistrial, an inaction the applicant argues constitutes ineffective assistance of counsel.

The Assistant Solicitor's closing argument included an appeal to the have the jury convict the applicant to protect the community from "a pressing social problem" in violation of *State v. Liberte*, 336 S.C. 648, 521 S.E.2d 744 (Ct. App. 1999). However, in light of the timely objection raised by trial counsel and the trial judge's admonition of the Assistant Solicitor in the jury's presence, in addition to the trial judge's clarification that the decision of the jury was not to be based on the subject of the improper argument, the Court finds that the improper argument did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. Even if trial counsel were deficient in failing to move for a mistrial, the applicant has failed to meet his burden that a reasonable probability exists that the result of the trial would have been different.

- (12) Counsel were ineffective in failing to object to an incomplete mere presence jury charge or request a more complete jury charge in that regard

Next, the applicant argues that trial counsel were ineffective in protecting the applicant's rights with respect to a jury instruction on "mere presence."

Mr. McGuire requested a "mere presence" jury instruction, and the

instruction given by the trial judge was sufficient.

"The purpose of a mere presence charge in a drug case is to inform the jury that any inference which is permissibly drawn from the presence of the defendant at the location where drugs are found is, as a matter of law, insufficient by itself to convict a defendant of the possession or possession with the intent to distribute drugs. In other words, the law does not allow a jury to conclude guilt beyond a reasonable doubt based solely upon the inferences drawn from presence in the proximity of drugs. It is possible for the jury to infer knowledge of the drugs and the intent to exercise dominion and control over them from the mere presence. The law does not condemn this inference. However, the law will not allow that inference, without more, to prove possession beyond a reasonable doubt." *State v. Brownlee*, 318 S.C. 34, 38, 455 S.E.2d 704, 706 (Ct. App. 1995).

It is argued that the trial judge did not specifically state that mere presence of the applicant in the location where drugs were found is insufficient by itself to convict him of possession or possession with the intent to distribute drugs. The trial judge adequately instructed the jury that mere presence at or near the scene of a crime would not support a finding of guilt.

(13) Counsel were ineffective in failing to object to the judge's charge on reasonable doubt and circumstantial evidence

The applicant's final issue involves counsel's failure to object to the trial judge's instructions to the jury on reasonable doubt and circumstantial evidence.

In *State v. Manning*, 305 S.C. 413, 409 S.E.2d 372 (1991), the South

Carolina Supreme Court granted the defendant a new trial based on a defective charge. See also *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998).⁴ The *Manning* charge was defective because the trial judge (1) defined "reasonable doubt" as synonymous with the term "moral certainty;" (2) defined a reasonable doubt as a "doubt which honest people, such as you, when searching for the truth can give a real reason;" and (3) required the jury to "seek some reasonable explanation of the circumstances" other than guilt when considering circumstantial evidence. *Needs*, *supra* [emphasis added]. The Court held that the circumstantial evidence instruction turn[ed] the state's burden of proof on its head by requiring the jury find a "reasonable explanation" of the evidence inconsistent with a defendant's guilt before it [could] find him not guilty. *Id.*⁵ The South Carolina Supreme Court has since explained that it was the combination of defective instructions, especially the "moral certainty" and "real reason" language, that prompted finding a due process violation in *Manning*. *Id.*

The Supreme Court of South Carolina discussed the evolution of the standard for evaluating reasonable doubt charges in *Todd v. State*, 355 S.C. 396, 585 S.E.2d 305 (2003). The Court noted that the United States Supreme Court's opinion in *Cage* analyzed challenged reasonable doubt charges from Nebraska

⁴ In evaluating the instructions on reasonable doubt and circumstantial evidence given in this trial, the PCR court has also considered *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990); *State v. Raffaldt*, 318 S.C. 110, 456 S.E.2d 390 (1995); *State v. Hoffman*, 312 S.C. 386, 440 S.E.2d 869 (1994); *State v. Rabon*, 275 S.C. 459, 272 S.E.2d 634 (1980) (a jury charge which is substantially correct and covers the law does not require reversal); *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888, *cert. denied*, 493 U.S. 895, 110 S.Ct. 246 (1989); *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997).

⁵ In *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004), the South Carolina Supreme Court again cited *Manning* in that it held that a circumstantial evidence charge which requires the jury to seek some reasonable explanation other than the defendant's guilt turns the State's burden of proof on its head by requiring the jury to find a "reasonable explanation" of the evidence inconsistent with a defendant's guilt before it can find him not guilty.

and California in which the phrase "moral certainty" was used and found that neither of the phrases automatically rendered a reasonable doubt charge constitutionally defective. In *Todd*, the South Carolina Supreme Court upheld a charge referencing "moral certainty," finding that such language "cannot be sequestered from its surroundings." *Id.* at 309. The Court further held that there was no reasonable likelihood that the jurors who determined Todd's guilt applied the judge's instruction in a way that violated the Due Process Clause of the Fourteenth Amendment. *Id.*

In the instant case, the instructions viewed in their totality violate due process. The majority of the "burden-shifting" language was used in response to a direct question by the jury. There was a dilution of the State's burden to prove the applicant guilty beyond a reasonable doubt and a reasonable likelihood that the jurors who determined the applicant's guilt applied the judge's instruction in a way that violated the Due Process Clause of the Fourteenth Amendment.

The jury was instructed on reasonable doubt as follows:

Now what do we mean when we say that the State must prove someone guilty beyond a reasonable doubt? What do those words mean? The term "reasonable doubt" may be best understood by giving it its plain and ordinary meaning. A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. If after considering all the evidence in this case you hesitate to convict Mr. Battle on the basis of that evidence, then he's entitled to a verdict of not guilty.

A reasonable doubt may arise from the evidence that's been presented in this case or from the lack of evidence in the case. You alone, you are the sole judges of the facts of this case. You alone must make the decision as to whether or not the State has proven him guilty of the charge beyond a reasonable doubt.

ROA p. 415, lines 2-10. This instruction on reasonable doubt is constitutional,

though the court has concerns about the judge's reference to "the lack of evidence" without clarifying that he is referring to a lack of evidence presented by the State.

The instructions on circumstantial evidence, in part, were as follows:

To the extent that the State relies on circumstantial evidence, it must prove all the circumstances relied on beyond a reasonable doubt. These circumstances must in every way perfectly be consistent with one another; and they must point conclusively, that is, to a moral certainty, to the guilt of the accused to the exclusion of every other reasonable hypothesis or explanation. In other words, the circumstances must be absolutely inconsistent with any other reasonable hypothesis or explanation than the guilt of the accused.

ROA p. 419, lines 5-14 [emphasis added]. Under *Todd* and *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239 (1994), such language alone does not conclusively violate the constitution, although under *Cherry* the Court found it served to confuse the jury by leading it to believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence.

The jury delivered a note to the Court stating, "Can we please have a copy or a transcript of your instructions to the jury at the end of the trial?" ROA p. 427, lines 18-20. The trial judge denied the request and informed the jury that the Court would reinstruct them as to particular portions of the jury charge. The Court then asked the jury if they could narrow the question. The jury foreman replied, "There was a portion about a reasonable person. Could there be another scenario possible: Would a reasonable person consider that something else happened instead of what's claimed by the prosecution?"

ROA p. 428, lines 8-11 [emphasis added]. Without objection from defense

counsel, the Court replied, "Okay. I'm not sure if what you're asking about was what I discussed or I mentioned when I was talking about two types of evidence, the two ways that we classify evidence." ROA p. 428, lines 12-15. The Court went on to again instruct the jury on circumstantial evidence in part as follows:

You can have proof of circumstances that lead to that conclusion beyond a reasonable doubt, as I've defined that for you. So that's what I'm talking about when I'm talking about circumstantial evidence. But the circumstances proved by the State must be complete. They must lead to that conclusion beyond a reasonable doubt.

And in the evaluation of circumstantial evidence, you must search for, consider, any other reasonable hypothesis or explanation than that which the State advances and the claim made by the State. You have to examine every other reasonable hypothesis or explanation other than the guilt of the accused when considering circumstantial evidence.

That's the essence, I think, of my instructions to you on circumstantial evidence. It's not necessary to prove every fact that the State has to prove in order to be entitled to a verdict of guilty by direct evidence. They can prove it by circumstantial evidence, but it must be a complete chain; that is, all the circumstances that the State relies on, other than direct testimony, all the circumstances that the State relies on to establish an element, some part that's necessary to prove the defendant guilty, some part of the crime that he is accused of committing, they must establish all those circumstances, as I said, beyond a reasonable doubt.

And in consideration of that, it's your duty to examine any other reasonable hypothesis or explanation than the guilt of the accused. And if there is another reasonable explanation for the circumstance, then you cannot rely on that circumstance in finding the defendant guilty.

ROA pp. 429-430 [emphasis added]. Although defense counsel did request and was denied an instruction that when the jury considered each piece of evidence, all doubts must be resolved in favor of the defendant, defense counsel did not object to the Court's further instructions.

The concern of the PCR court is the jury's ability to differentiate the

standards applicable to the reasonable doubt charge and those applicable to circumstantial evidence. The trial Court had used "moral certainty" language in the original instructions when defining circumstantial evidence in its initial charge. Now, the jury asked about whether "a reasonable person [would] consider that something else happened instead of what's claimed by the prosecution." The instructions that followed went into issues of having the jury *search for* any other reasonable hypothesis or explanation than that which the State advances. A charge requiring the jury to "search for" or "seek" some reasonable explanation other than the defendant's guilt was the instruction that the South Carolina Supreme Court in *Manning* held to "turn the State's burden of proof on its head" by requiring the jury to find a "reasonable explanation" of the evidence inconsistent with a defendant's guilt before it [could] find him not guilty. See *Manning, supra, Needs, supra, Cherry, supra*.

Viewed in totality, the jury instructions unconstitutionally diluted the State's burden to prove the applicant guilty beyond a reasonable doubt. In view of the burden-shifting language, the PCR court is unable to conclude that the trial judge's correct initial reasonable doubt charge is sufficient to remedy the other instructions given. Counsel's failure to object and pursue the objections made was deficient and undermines the Court's confidence in the outcome of the applicant's trial.⁶

⁶ The applicant argues that the jury instruction is tantamount to a structural error, an error in which is not subject to the harmless error analysis or arguably the prejudice prong of *Strickland*.

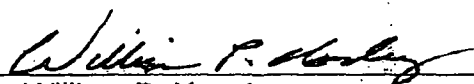
The United States Supreme Court has delineated several areas which are not subject to a harmless error analysis. See *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (delineating examples); cf. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (shifting burden of proof in definition of reasonable doubt); *McKaskle v.*

Based on the foregoing, the Court finds that defense counsel's representation in the instant case was constitutionally ineffective and the applicant is entitled to a new trial.

As to any claim raised but not specifically ruled upon, the court finds that the applicant has failed to meet his burden of proof and denies the claim.

The Clerk of Court shall provide a copy of this order to counsel of record.

IT IS SO ORDERED.



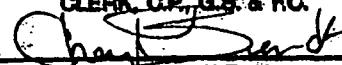
William P. Keesley
Presiding Judge, Ninth Judicial Circuit

Edgefield, South Carolina
July 5, 2006

Attorney for Applicant:
Attorney for Respondent:
Court Reporter:

Rad S. Deaton, Esquire
Colleen E. Dixon, Assistant Attorney General
Heather Burns

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & R.O.

By 
DEPUTY CLERK

Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (right to self representation); **432 *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (total lack of counsel); *Turney v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased judge). Most recently, the Court reversed its prior holding in *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), and held that a jury charge on reasonable doubt identical to the one given in *Cage*, *supra*, was not subject to a harmless error analysis. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). *State v. Jefferies*, 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994).

A "structural" error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. *Johnson v. U.S.*, 520 U.S. 461, 117 S.Ct. 1544 (1997). Unlike an erroneous presumption regarding an element of the offense, a deficient reasonable-doubt instruction vitiates all the jury's factual findings. A reviewing court in such a case can only engage in pure speculation—its view of what a reasonable jury would have done. *Sullivan*, *supra*. The PCR Court declines to address whether the instruction amounts to a structural error.

WITNESSES

JOHN BURNETT AND/OR

KEITH HAIR

KEUCHLER, NCPD

99025582

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

NOVEMBER TERM 1999

THE STATE

vs.

EARNEST BATTLE

ARREST WARRANT NUMBER

F980726

JULY 16, 1999

ACTION OF GRAND JURY

TRUE BILL

E. E. S.

Foreperson of Grand Jury

NOV 02 1999

VERDICT

GUILTY

Indictment for
TRAFFICKING COCAINE

Forfeiture of Petit Jury

[Signature]

Date:

6/8/01

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

INDICTMENT FOR
TRAFFICKING COCAINE

At a Court of General Sessions, convened on November 1, 1999 the Grand Jurors of Charleston County present upon their oath:

That Earnest Battle did in Charleston County on or about July 15, 1999 while at [REDACTED], North Charleston, South Carolina knowingly, sell, manufacture, deliver, purchase, or bring into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession in excess of twenty-eight (28) grams of Cocaine. This is in violation of Section 44-53-370 of the South Carolina Code of Laws (1976) as amended.

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


ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Charleston

STATE

VS.

Barnest Battle

AKA:

Race: Black Sex: Male Age: 40

DOB: _____ SS#: _____

Address:

N. Charleston, S.C.

DL# _____ SID#: _____

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:1999 -GS- 10 - 7107A/W#: F 980726Date of Offense: 7/16/1999S.C. Code §: 44-53-370CDR Code #: 0111418☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Trafficking Cocaine 28 to 100 grams 3d offensein violation of § 44-53-370 of the S.C. Code of Laws, bearing CDR Code # 0111418☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45The 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:

Michael S. Calhoun
SolicitorBarnest Battle
DefendantJ. L. Hughes
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center for a determinate term of 25 years or ☐ under the Youthful Offender Act not to exceed _____ year and to pay a fine of \$ 50,000; 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 probation, which are incorporated by reference.

☒ The Defendant is to be given credit for _____ days/months jail time.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: \$ 50,000.00§14-1-206 (Assessments 100%)... \$ 50,000.00§14-1-211(A)(1) (Surcharge) \$ 100.00

§14-1-211(A)(2) (Surcharge) \$ _____

§56-5-2995 (DUI Assessment)... \$ _____

3% to County (if paid in installments) RS 3,600.00 RSTOTAL \$ 103,100.00

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab. or Job Corps _____

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: _____

PRESIDING JUDGE J. L. HughesJudge Code: 0101018

ARREST WARRANT

F- 980726

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
CHARLESTON

THE STATE
against

EARNEST BATTLE

Address: CHARLESTON, SC 29403

Phone: Sex: M Race: B Height: 5'8 Weight: 165

DL State: NI. #: Agency ORI #:

DOB: Prosecuting Agency: NCPD

Prosecuting Officer: KEUCHLER

Offense: TRAFFICKING CRACK

COCAINE

Code/Ordinance Sec. 44-53-375

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality of

The accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge (L.S.)

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant EARNEST BATTLE
on 07-16-99

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

THE RUSSELL BUILDING
2144 MELBOURNE STREET, ROOM 201
NORTH CHARLESTON, S. C. 29405

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
CHARLESTON

AFFIDAVIT

PFC. R. MILLER

EARNEST BATTLE

Personally appeared before me the affiant
being duly sworn deposes and says that defendant
did within this county and state on 7-15-99

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of CHARLESTON violate the criminal laws

in the following particulars:
TRAFFICKING CRACK COCAINE
44-53-375

I further state that there is probable cause to believe that the defendant named above did
the crime set forth and that probable cause is based on the following facts:

SEE ATTACHED AFFIDAVIT

Sworn to and subscribed before me
on July 16, 1999

Signature of Issuing Judge (L.S.)

Signature of Affiant
Affiant's Address 4900 LACROSS ROAD
NORTH CHARLESTON, SC 29405
Affiant's Telephone 554-5700

STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
CHARLESTON

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe
on 7-15-99 defendant EARNEST BATTLE

☒ County/ ☐ Municipality of
CHARLESTON did violate the criminal laws of the State of South Carolina (or ordinance of
TRAFFICKING CRACK COCAINE
44-53-375 as set forth below:

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or
me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered
defendant at the time of its execution, or as soon thereafter as is practicable.
3841 LEEDS AVE.

Signature of Issuing Judge (L.S.)
Judge Code: 611
Judge's Address CHARLESTON, SC 29405
Judge's Telephone 529-7482
Issuing Court ☒ Magistrate ☐ Municipal

BAIL set by

Judge

2

on

Type and Amount

2000.00

Name of Surety

PRELIMINARY HEARING held by

Judge

on

Defense Attorney

Decision

BY JUDGE

disposition by

Judge

on

by

(indicate jury trial, bench trial, plea, not, pros, etc.)

Disposition

Sentence

JURORS

SUM. CRT. CASE #

OW CASE #

REPORT GROUP

DISP. CODE

Name

Address

Telephone

Name

Address

Telephone

Name

Address

Telephone

Name

Address

Telephone

Name

Address

Telephone

Name

Address

Telephone

Name

Address

Telephone

Name

Address

Telephone

CODENDANTS

RECEIVED

9/17/99

STATE OF SOUTH CAROLINA

**COUNTY OF CHARLESTON
CITY OF NORTH CHARLESTON**

AFFIDAVIT

OCA# 9902558209716
INV. A. KUECHLER

Personally appeared before me, a magistrate of this County, one R. MILLER
who, first being duly sworn, deposes and says that (name of the defendant)
ERNEST BATTLE

did within this County and State on the 15th day of July, 1999, violate the criminal laws of the State of South Carolina in the following particulars:

**DESCRIPTION OF OFFENSE
TRAFFICKING IN COCAINE
VIOLATION OF SECTION 44-53-370**

The affiant states there is probable cause to believe that the defendant named above did commit the crime(s) set forth, and that such probable cause is based on the following facts:

That on or about 07-15-99, while at [REDACTED], located in the City, County and State aforesaid, one Ernest Battle, did commit the offense of **TRAFFICKING IN COCAINE** in violation of section 44-53-370 of the South Carolina Code of Laws of 1976, as amended. In that the defendant did willfully, unlawfully, and knowingly, have in his possession and under his control approximately (83) grams of a white powder like substance, which field tested presumptive for Cocaine. Facts to establish the aforesaid are that the NCPD Narcotics Unit conducted a controlled purchase of cocaine utilizing a confidential informant. The defendant drove to the corner of St. Johns Ave. and Reddin Rd. where he agreed to meet the co-defendant, Lashawn Shantelle Floyd, to deliver to her a approximately 4 ounces of a white powder like substance that she intum agreed to sell to the confidential informant. Upon the defendant meeting with the co-defendant, the substance was turned over to the co-defendant. All this done against the form of the Statute and against the peace and dignity of the State of South Carolina. Detectives A. Kuechler, Lt. Cumbee, G. Gould, and Det. VanOoteghem are witnesses to prove the same.

Sworn to and Subscribed before me
this _____ day of JUL 16 1999
19__.

[Signature]
(AFFIANT)

[Signature]
Signature of Judge

Address: 4900 Lacross Rd.
North Charleston, SC 29419
Phone: (803) 554-5700

WITNESSES

JOHN BURNETT AND/OR

KEITH HAIR

KEUCHLER, NCPD

99025582

ARREST WARRANT NUMBER

F980727

JULY 16, 1999

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

NOV 02 1999

VERDICT

GUILTY

Foreperson of Petit Jury

Date:

6/8/01

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

NOVEMBER TERM 1999

THE STATE

vs.

EARNEST BATTLE

Indictment for

**POSSESSION WITH INTENT TO
DISTRIBUTE COCAINE WITHIN
PROXIMITY OF A SCHOOL**

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

INDICTMENT FOR
POSSESSION WITH INTENT TO DISTRIBUTE
COCAINE WITHIN PROXIMITY OF A SCHOOL

At a Court of General Sessions, convened on November 1, 1999 the Grand Jurors of Charleston County present upon their oath:

That Earnest Battle did in Charleston County on or about July 15, 1999 while at [REDACTED], North Charleston, South Carolina distribute, sell, purchase, manufacture, or have in his possession with intent to distribute a quantity of Cocaine, a controlled substance, said location being within a one-half mile proximity of St. John's Catholic School, [REDACTED], North Charleston, South Carolina, in violation of Section 44-53-445 of the South Carolina Code of Laws (1976) as amended.

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


ASSISTANT SOLICITOR

F- 980727

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
CHARLESTONTHE STATE
against

EARNEST BATTLE

Address
CHARLESTON, SC 29403Phone: _____
Sex: M Race: B Height: 5' 8 Weight: 165
DL State: _____ DL #: _____DOB: _____ Agency ORI #: _____
Prosecuting Agency: NCPDProsecuting Officer: KEUCHLER
Offense: TRAFFICKING CTR SUBSTANCEPROX SCHOOL Offense Code: _____
Code/Ordinance Sec. 44-53-445This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality of _____The accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge _____

(L.S.)

Date: _____

RETURN

A copy of this arrest warrant was delivered to
defendant EARNEST BATTLE
on 07-16-99

Signature of Constable/Law Enforcement Officer _____

RETURN WARRANT TO:

CLERK OF SUPERIOR HEARING COURT
THE RUSSELL BUILDING
2144 MELBOURNE STREET, ROOM 201
NORTH CHARLESTON, S.C. 29405
M.O. 5072☒ County/ ☐ Municipality of
CHARLESTON

AFFIDAVIT

SCCA 616

Personally appeared before me the affiant PIC. R. MILLER
being duly sworn deposes and says that defendant EARNEST BATTLE
did within this county and state on 7-15-99 violate the criminal laws of
State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of CHARLESTON
in the following particulars:

DESCRIPTION OF OFFENSE:

TRAFFICKING CTR SUBSTANCE PROX SCHOOL
44-53-445I further state that there is probable cause to believe that the defendant named above did
the crime set forth and that probable cause is based on the following facts:

SEE ATTACHED AFFIDAVIT

Sworn to and subscribed before me
on JULY 16, 1999

Signature of Issuing Judge _____

(L.S.)

Signature of Affiant _____
Affiant's Address 4900 LACROSS ROAD
NORTH CHARLESTON, SC 29405
Affiant's Telephone 554-5700STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
CHARLESTON

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe
on 7-15-99 defendant EARNEST BATTLE
did violate the criminal laws of the State of South Carolina (or ordinance of☒ County/ ☐ Municipality of CHARLESTON as set forth below:
DESCRIPTION OF OFFENSE: TRAFFICKING CTR SUBSTANCE PROX SCHOOL
44-53-445Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her
me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered
defendant at the time of its execution, or as soon thereafter as is practicable.

Signature of Issuing Judge _____

(L.S.)

Judge's Address 3841 LEEDS AVE.
CHARLESTON, SC 29405Judge's Telephone 529-7482Judge Code: 611Issuing Court: ☒ Magistrate ☐ Municipal ☐

ORIGINAL

WITNESSES

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

CODEFENDANTS

BALC set by

1339

Amount: _____

Surety: _____

PRELIMINARY HEARING held by _____

Attorney: _____

FILED
 1999 JUL 20 PM 2:25
 JULIE ARMSTRONG
 CLERK OF COURT
 BY _____
 (Indicate jury trial, bench trial, plea, npt. pros., etc.)

JURORS

CL. CH. CASE # 5548
 COURT # 3707
 PORT GROUP 6108
 P. CODE

WITNESS

YOU ARE REQUIRED TO APPEAR IN COURT FOR THE
 PRELIMINARY HEARING ON JULY 20, 1999 AT 2:00 PM
 IN COURT ROOM 100, 1000 N. 1ST ST., ANCHORAGE, ALASKA
 IF YOU DO NOT APPEAR, YOU MAY BE CONSIDERED
 IN DEFAULT AND YOUR DEFENSE WILL BE HELD
 WITHOUT YOU. IF YOU HAVE A CHANGE OF ADDRESS,
 PLEASE NOTIFY THE COURT CLERK IMMEDIATELY.

9/17/99 8:30
 AL

STATE OF SOUTH CAROLINA

COUNTY OF Charleston

STATE

VS.

AKA: Ernest BattleRace: Black Sex: Male Age: 40DOB: 00 SS#: 00

Address

N. Charleston, S.C.DL# 00 SID# 00

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

1999 -GS- 10 - 7110A/W#: F980727Date of Offense: 7/16/1999S.C. Code §: 44-53-443CDR Code #: 011017☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Distribution with intent to Distribute Prod. of Schoolin violation of § 44-53-443 of the S.C. Code of Laws, bearing CDR Code # 011017☐ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45The 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:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center for a determinate term of 10 years or ☐ under the Youthful Offender Act not to exceed 10 year and/or to pay a fine of \$ 10,000.00; provided that upon the service of 0 days/months/years and/or payment of \$ 0; plus costs and assessments as applicable*; the balance is suspended with probation for 0 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference. FINE - \$10,000.

☒ The Defendant is to be given credit for 0 days/months jail time.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 0

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ 0 plus 20% fee: \$ 0Payment Terms: 0☐ set by SCDPPPS 0Recipient: 0*Fine: 10,000.00§14-1-206 (Assessments 100%)... \$ 10,000.00§14-1-211(A)(1) (Surcharge)..... \$ 100.00§14-1-211(A)(2) (Surcharge)..... \$ 0§56-5-2995 (DUI Assessment)..... \$ 03% to County (if paid in installments) 0TOTAL..... \$ 10,100.00PTUP 00 days/hours Public Service EmploymentObtain GED 0Attend Voc Rehab. or Job Corps 0May serve W/E beginning 0Substance Abuse Counseling 0Random Drug/Alcohol Testing 0

Fine may be pd. in equal, consecutive weekly/month

pmts. of \$ 0 beginning 0\$ 0 paid to Public Defender Fund.Other: 0PRESIDING JUDGE T.L. BattleJudge Code: 01010180

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON
CITY OF NORTH CHARLESTON

AFFIDAVIT

OCA# 99025582
INV. A. KUECHLER

Personally appeared before me, a magistrate of this County, one R. MILLER
who, first being duly sworn, deposes and says that (name of the defendant)
ERNEST BATTLE

did within this County and State on the 15th day of July, 1999, violate the criminal laws of the State of South Carolina in the following particulars:

DESCRIPTION OF OFFENSE
TRAFFICKING COCAINE W/IN ½ MILE PROXIMITY OF A SCHOOL
VIOLATION OF SECTION 44-53-445

The affiant states there is probable cause to believe that the defendant named above did commit the crime(s) set forth, and that such probable cause is based on the following facts:

That on or about 07-15-99, while at [REDACTED], located in the City, County and State aforesaid, one Ernest Battle, did commit the offense of **TRAFFICKING COCAINE W/IN ½ MILE PROXIMITY OF A SCHOOL** in violation of section 44-53-445 of the South Carolina Code of Laws of 1976, as amended. In that the defendant did willfully, unlawfully, and knowingly, have in his possession and under his control approximately (83) grams of a white powder like substance, which field tested presumptive for Cocaine. Facts to establish the aforesaid are that the NCPD Narcotics Unit conducted a controlled purchase of cocaine utilizing a confidential informant. The defendant drove to the corner of St. Johns Ave. and Reddin Rd., in the company of a co-defendant, one James Nelson, where he met another co-defendant, Lashawn Shantelle Floyd, and did deliver to her approximately (4) ounces of a white powder like substance which she had agreed to sell to the confidential informant. Upon the defendant meeting with the co-defendant (Floyd), the substance was turned over to her. This occurred within a ½ mile proximity of St. John's Catholic School located at [REDACTED]. All this done against the form of the Statute and against the peace and dignity of the State of South Carolina. Detectives A. Kuechler, Lt. Cumbee, G. Gould, and Det. VanOoteghem are witnesses to prove the same.

Sworn to and Subscribed before me
this _____ day of JUL 16 1999
19____.

[Signature]
Signature of Judge

[Signature]
(AFFIANT)

Address: 4900 Lacross Rd.
North Charleston, SC 29419
Phone: (803) 554-5700

WITNESSES

JOHN BURNETT AND/OR

KEITH HAIR

KEUCHLER, NCPD

99025582

ARREST WARRANT NUMBER

F980728

JULY 16, 1999

ACTION OF GRAND JURY

TRUE BILL

[Signature]
Foreperson of Grand Jury NOV 02 1999

VERDICT

Grand Jurors
Verdict Not Guilty.

[Signature]
Foreperson of Petit Jury Date: 6/8/01.

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

NOVEMBER TERM 1999

THE STATE

vs.

EARNEST BATILE

Indictment for

**CONSPIRACY TO VIOLATE SOUTH
CAROLINA NARCOTICS LAWS**

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

INDICTMENT FOR
CONSPIRACY TO VIOLATE SOUTH CAROLINA
NARCOTICS LAWS

At a Court of General Sessions, convened on November 1, 1999 the Grand Jurors of Charleston County present upon their oath:

That Earnest Battle did in Charleston County on or about July 16, 1999 while at North Charleston, South Carolina, willfully, knowingly and unlawfully conspire with another to purchase an illegal narcotic, to wit: Cocaine. This is in violation of Section 44-53-420 of the South Carolina Code of Laws (1976) as amended.

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


ASSISTANT SOLICITOR

ARREST WARRANT

F- 980728

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
CHARLESTONTHE STATE
against

EARNEST BATTLE

Address: CHARLESTON, SC 29403

Phon.

Sex: M Race: B Height: 5'8 Weight: 165DL State: SC DL #:DOB: ---Prosecuting Agency: NCPD Agency ORI #:Prosecuting Officer: KEUCHLEROffense: CONSPIRACY VIOLATE SC

NARC LAWS

Code/Ordinance SC 44-53-420 Offense Code:This warrant is **CERTIFIED FOR SERVICE** in the
☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge

(L.S.)

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant EARNEST BATTLE
on 07-16-99

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

JUDGE, ROOM 201
NORTH CHARLESTON, S. C. 29405
(602) 940-5873

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
CHARLESTON

AFFIDAVIT

SCCA 518

Personally appeared before me the affiant

being duly sworn deposes and says that defendant

did within this county and state on 7-15-99State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of CHARLESTON violate the criminal laws

In the following particulars:

DESCRIPTION OF OFFENSE:

CONSPIRACY VIOLATE SC NARC LAWS
44-53-420I further state that there is probable cause to believe that the defendant named above did
the crime set forth and that probable cause is based on the following facts:

SEE ATTACHED AFFIDAVIT

Sworn to and subscribed before me
on JULY 16, 1999

Signature of Issuing Judge

(L.S.)

Signature of Affiant
Affiant's Address 4900 LACROSS ROAD
NORTH CHARLESTON, SC 29405Affiant's Telephone 554-5700☒ County/ ☐ Municipality of
CHARLESTON

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe
on 7-15-99 defendant EARNEST BATTLE
did violate the criminal laws of the State of South Carolina (or ordinance of☒ County/ ☐ Municipality of CHARLESTON as set forth below:
DESCRIPTION OF OFFENSE: CONSPIRACY VIOLATE SC NARC LAWS
44-53-420Now, therefore, you are empowered and directed to arrest the said defendant and bring him or
me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered
defendant at the time of its execution, or as soon thereafter as is practicable.

Signature of Issuing Judge

(L.S.)

Judge's Address 3841 LEEDS AVE.
CHARLESTON, SC 29405Judge's Telephone 529-7482Judge Code: 611Issuing Court: ☒ Magistrate ☐ Municipal

ORIGINAL

Ball set by

Judge

on

JUL 13 1999

Type and Amount

5000

Name of Surety

PRELIMINARY HEARING held by

Judge

on

Defense Attorney

Decision

BY

JUL 13 1999
CLERK OF COURT

Judge

on

by

(Indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition

Sentence

JURORS

688

ON

DATE

5548

3207

0027

03

WITNESSES

Name

Address

Telephone

Name

Address

Telephone

Name

Address

Telephone

Name

Address

Telephone

Name

Address

Telephone

Name

Address

Telephone

Name

Address

Telephone

Name

Address

Telephone

CODEFENDANTS

NOTICE TO APPEAR

YOU MUST APPEAR FOR THE ABOVE ACCUSED OR
PLEA OR FOR THE ABOVE ACCUSED FOR THE
COMPTON, CALIF. COUNTY OF LOS ANGELES
IN 1945 BORN [REDACTED] [REDACTED]
BOURNE 1000 [REDACTED] [REDACTED] ON
THE 2ND FLOOR AT [REDACTED]
ON 9/17/99 8
IF YOU DO NOT RESPOND, AN ARREST
WARRANT WILL BE ISSUED FOR YOU

STATE OF SOUTH CAROLINA

AFFIDAVIT

COUNTY OF CHARLESTON
CITY OF NORTH CHARLESTON

OCA# 99025582

Personally appeared before me, a magistrate of this County, one R. MILLER, who, first being duly sworn, deposes and says that (name of the defendant)

ERNEST BATTLE

did within this County and State on the 15th day of July, 1999, violate the criminal laws of the State of South Carolina in the following particulars:

DESCRIPTION OF OFFENSE**CONSPIRACY TO VIOLATE S.C. NARCOTICS LAWS****VIOLATION OF SECTION 44-53-420**

The affiant states there is probable cause to believe that the defendant named above did commit the crime(s) set forth, and that such probable cause is based on the following facts:

That on or about 07-16-99 at approximately 2310 hours, while at 1., located in the city, county and state aforesaid, one Ernest BATTLE did commit the offense of **CONSPIRACY TO VIOLATE S.C. NARCOTICS LAWS**, in violation of section 44-53-420 of the South Carolina Code of Laws of 1976, as amended. In that the defendant did willfully, unlawfully, and knowingly conspire with co-defendants Lashawn Shantelle FLOYD, and James NELSON to sell a quantity of cocaine to a confidential informant, utilized by the NCPD Narcotics Unit. The facts to establish the aforesaid are that the North Charleston Narcotic Unit utilized a confidential informant to purchase a quantity of cocaine from the defendants Ernest BATTLE and Lashawn Shantelle FLOYD. The confidential informant called the co-defendant Lashawn Shantelle FLOYD who arranged for the defendant Ernest BATTLE to deliver approximately four (4) ounces of cocaine, so she could, in turn sell it to the NCPD informant for the agreed purchase price of \$4,800.00 dollars. The defendant arrived a short time later driving a black 89 Cadillac four door bearing South Carolina license plate 733-GCM with co-defendant James NELSON as a passenger in the front seat of the car. The black Cadillac pulled to the corner of Saint Johns and Reddin Road, where both the defendant Ernest BATTLE and co-defendant James NELSON exited the black Cadillac. Co-defendant Lashawn Shantelle FLOYD then walked from [REDACTED] to the corner of Reddin Road and Saint Johns to the defendant Ernest BATTLE and co-defendant James NELSON where defendant Ernest BATTLE gave co-defendant Lashawn Shantelle FLOYD (83) grams of a white powder substance, which field tested presumptive for cocaine. Co-defendant Lashawn Shantelle FLOYD then transported the cocaine back to [REDACTED] and attempted to go into her apartment. Upon the co-defendant Lashawn Shantelle FLOYD seeing these Detectives the co-defendant Lashawn Shantelle FLOYD did toss the substance to the ground. Defendant Ernest BATTLE and co-defendant James NELSON were arrested in the front yard of [REDACTED] as co-defendant Lashawn Shantelle FLOYD walked away from defendant Ernest BATTLE and co-defendant James NELSON. The deal was captured on audio tape and was monitored by members of the NCPD Narcotics Unit. All this being done against the form of the State Statute and against the law, peace and dignity of the State of South Carolina. Detectives Lachica, Campbell, Kuechler, Gould, Van Ooteghem, Sgt Hux, Lt. Cumbee, Morris, Myers, Hardy, are witnesses to prove to same.

Sworn to and Subscribed before me
this _____ day of JUL 16 1999
1999.


Signature of Judge


(AFFIANT)

Address: 4900 Lacross Rd.
N. Charleston, SC 29411
Phone: 554-5700

CMTI330D
OMCOMITA
SCDC# > 165247
BATTLE, ERNEST -

SCDC OFFENDER MANAGEMENT SYSTEM
RELEASE DATE SCREEN

03/24/05
C023981

LOC: LIEBER

SCDC CLASSIFICATION... VIOLENT

SEXUAL REGISTRY...: N
OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL PREDATOR...: NOT APP
DNA STATUS...: COMPLETED
TOTAL SENTENCE...: 025-03-000 CONSECUTIVE SENTENCE ...: Y
CURRENT SENTENCE: 025-03-000 CURRENT SENT START DATE: 06/07/2001
PROJECTED COMPLETION DATES
MAXOUT DATE: 10/26/2022 CURRENT EWC ..: 3 F 5
YOA SIX YEAR DATE: / / CURRENT EEC ..: NOT CURRENTLY EARNING EEC
INITIAL PAROLE DATE: 09/07/2022 NEXT PAROLE HEARING DATE: 09/07/2022

TOTAL GT DAYS EARNED: 000000 LABOR CREW/WORK PROG DATE: 99/99/9999
TOTAL EARNED WORK CREDITS ...: 000325 LABOR CREW DISQ REASON:
TOTAL EDUCATION CREDITS: 000000 OFFENSE > CAT 3
TOTAL EXTRA EARNED CREDITS ..: 000
TOTAL SERVICE TIME EARNED ...: 001367

PFKEYS: 5: HISTORY OF DATE CHANGES

4-0

1 Sess-1 167.7.50.33

TNET1244

3/11

STATE OF SOUTH CAROLINA

COUNTY OF Charleston

STATE VS:

Earnest BattleAKA: BRace: Black Sex: Male Age: 40

DOB: _____ SS#: _____

Address: N. Charleston, S.C.

DL# _____ SID#: _____

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

1997 -GS- 10 - 7110A/W#: F980727Date of Offense: 7/16/1999S.C. Code §: 44-53-445CDR Code #: 0/1/0/7☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Distribution with intent to Distribute Prop. of Schoolin violation of § 44-53-44 of the S.C. Code of Laws, bearing CDR Code # 0/1/0/7☐ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand JuryThe plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State

ATTEST:

[Signature]

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Centfor a determinate term of 10 months/years or ☐ under the Youthful Offender Act not to exceed 10 yeand/or to pay a fine of \$ 10,000; provided that upon the service of _____ days/months/years and/or paym

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

probation, which are incorporated by reference. FINE - \$10,000 ATTEST: A TRUE COPY☒ The Defendant is to be given credit for _____ days/months jail time. JULIE J. ARMSTRONG (SEAL)☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: [Signature] DEPUTY CLERK

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:\$ _____

\$14-1-206 (Assessments 100%)\$ _____

\$14-1-211(A)(1) (Surcharge)\$ 100.00

\$14-1-211(A)(2) (Surcharge)\$ _____

\$56-5-2995 (DUI Assessment)\$ _____

3% to County (if paid in installments)\$ 3.00TOTAL\$ 103.00Michael P. Callan

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab. or Job Corps _____

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: _____

PRESIDING JUDGE T.L. [Signature]Judge Code: 0/0/0/80

STATE OF SOUTH CAROLINA

COUNTY OF Charleston

STATE VS.

Earnest Battle

AKA:

Race: Black Sex: Male Age: 40

DOB _____ SS# _____

Address:

N. Charleston, S.C.

DL# _____ SID# _____

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:

1999 -GS- 10 - 7107

A/W#: E 980726

Date of Offense: 7/16/1999

S.C. Code §: 44-53-370

CDR Code #: 0 / 1 / 1 / 8

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO: Trafficking Cocaine 28 to 100 grams 3d offense

in violation of § 44-53-370 of the S.C. Code of Laws, bearing CDR Code # 0 / 1 / 1 / 8

☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ 17-25-4:

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:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center for a determinate term of 25 years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$50,000.; 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 probation, which are incorporated by reference.

☒ The Defendant is to be given credit for _____ days/months jail time.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, P.S.S.
By Michael S. Calhoun
DEPUTY CLERK

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:\$ _____

\$14-1-206 (Assessments 100%).....\$ _____

\$14-1-211(A)(1) (Surcharge)\$ 100.00

\$14-1-211(A)(2) (Surcharge)\$ _____

\$56-5-2995 (DUI Assessment).....\$ _____

3% to County (if paid in installments)....\$ 3.00

TOTAL\$ 103.00

Michael S. Calhoun

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc Rehab. or Job Corps _____
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: _____

PRESIDING JUDGE

T. L. Hightower

STATE OF SOUTH CAROLINA) BENCH WARRANT
)
) CASE NO. 2000-SU-78-007061 (02)
COUNTY OF CHARLESTON) COURT OF: MAGISTRATE BONNIE L. KOONTZ

TO ALL THE SHERIFFS, DEPUTY SHERIFFS, CONSTABLES, AND OTHER PEACE OFFICERS OF THE STATE:

BATTLE, ERNEST

IT IS, THEREFORE, ORDERED THAT YOU MAKE DILIGENT SEARCH FOR THE ABOVE NAMED AND TAKE HIM TO THE COUNTY JAIL WHERE HE WILL BE SAFELY HELD UNTIL HE MAY BE BROUGHT BEFORE THIS COURT, OR OTHERWISE DISCHARGED BY DUE COURSE OF LAW.

IT IS FURTHER ORDERED THAT THE COUNTY JAILER NOTIFY THE CLERK OF THE ISSUING COURT IMMEDIATELY, DURING THE NORMAL OPERATING HOURS OF THE ISSUING OFFICE, THAT THE ABOVE NAMED DEFENDANT IS IN CUSTODY.

WITNESS, THE MAGISTRATE FOR THE COUNTY OF CHARLESTON ON THE
29TH DAY OF NOVEMBER, 2000

MAGISTRATE BONNIE L. KOONTZ

BENCH WARRANT
STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

STATE OF SOUTH CAROLINA VS. BATTLE, ERNEST

CHARLESTON , SC 29403

RACE: B SEX: M DOB: 11 DL STATE: SC
SSN: HT: 5 07 EYES: HAIR: TAG#: S
OFFICER: SHARPE AGENCY: CCSO - CHARLESTON CO SHERIFF
DISPOSITION: TRIED IN ABSENCE - GUILTY

TERMS OF SENTENCE: BW/ REST + \$166.00 OR 30 DAYS JAIL

THE ABOVE OUTLINED SENTENCE WILL RUN CONSECUTIVELY WITH ANY OTHER CHARGES.

DATE: 11/29/2000

MAGISTRATE BONNIE L. KOONTZ

RECEIVED BY: MS/PS DATE: 6-21-01

2000-0315

IN THE MAGISTRATE'S COURT

STATE OF SOUTH CAROLINA) BENCH WARRANT
) CASE NO. 2000-SU-78-007061-(03)
 COUNTY OF CHARLESTON) COURT OF: MAGISTRATE BONNIE L. KOONTZ

STATE OF SOUTH CAROLINA VS. BATTLE, ERNEST

TO ALL THE SHERIFFS, DEPUTY SHERIFFS, CONSTABLES, AND OTHER PEACE
 OFFICERS OF THE STATE:

WHEREAS, AT THE TERM OF AFORESAID COURT HELD ON 10/26/2000, ORDERED BY
 JUDGE BONNIE L. KOONTZ THAT A BENCH WARRANT SHOULD BE ISSUED FOR
 THE ARREST OF:

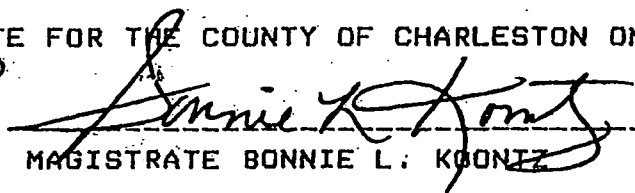
BATTLE, ERNEST

IN WHICH HE FAILED TO ANSWER THE CHARGE OF:
 FRAUD CHECK LESS THAN \$500 (1S - TICKET/WARRANT #: G280192
 BW/ REST + \$166.00 OR 30 DAYS JAIL

IT IS, THEREFORE, ORDERED THAT YOU MAKE DILIGENT SEARCH FOR THE ABOVE
 NAMED AND TAKE HIM TO THE COUNTY JAIL WHERE HE WILL BE SAFELY HELD UNTIL
 HE MAY BE BROUGHT BEFORE THIS COURT, OR OTHERWISE DISCHARGED BY DUE COURSE
 OF LAW.

IT IS FURTHER ORDERED THAT THE COUNTY JAILER NOTIFY THE CLERK OF THE
 ISSUING COURT IMMEDIATELY, DURING THE NORMAL OPERATING HOURS OF THE ISSUING
 OFFICE, THAT THE ABOVE NAMED DEFENDANT IS IN CUSTODY.

WITNESS, THE MAGISTRATE FOR THE COUNTY OF CHARLESTON ON THE
 29TH DAY OF NOVEMBER, 2000


 MAGISTRATE BONNIE L. KOONTZ

L.S.

BENCH WARRANT
 STATE OF SOUTH CAROLINA
 COUNTY OF CHARLESTON

STATE OF SOUTH CAROLINA VS. BATTLE, ERNEST

CHARLESTON, SC 29403

RACE: B SEX: M DOB: DL DL STATE: SC
 SSN: 5 07 EYES: HAIR: TAG#: SC
 OFFICER: SHARPE AGENCY: CCSO - CHARLESTON CO SHERIFFS
 DISPOSITION: TRIED IN ABSENCE - GUILTY

TERMS OF SENTENCE: BW/ REST + \$166.00 OR 30 DAYS JAIL

THE ABOVE OUTLINED SENTENCE WILL RUN CONSECUTIVELY WITH ANY OTHER CHARGES.

DATE: 11/29/2000

MAGISTRATE BONNIE L. KOONTZ

SERVED BY: 

DATE: 6-21-01

2000-03153

IN THE MAGISTRATE'S COURT

STATE OF SOUTH CAROLINA) BENCH WARRANT
) CASE NO. 2000-98-78-007061 (01)
 COUNTY OF CHARLESTON) COURT OF: MAGISTRATE BONNIE L. KOONTZ

STATE OF SOUTH CAROLINA VS. BATTLE, ERNEST

TO ALL THE SHERIFFS, DEPUTY SHERIFFS, CONSTABLES, AND OTHER PEACE
 OFFICERS OF THE STATE:

WHEREAS, AT THE TERM OF AFORESAID COURT HELD ON 10/26/2000, ORDERED BY
 JUDGE BONNIE L. KOONTZ THAT A BENCH WARRANT SHOULD BE ISSUED FOR
 THE ARREST OF:

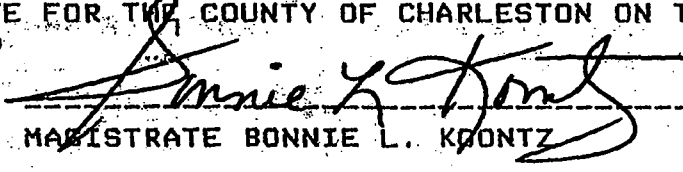
BATTLE, ERNEST

IN WHICH HE FAILED TO ANSWER THE CHARGE OF:
 FRAUD CHECK LESS THAN \$500 (IS - TICKET/WARRANT #: G321315
 REST MADE + 166 BW OR 30 DAYS

IT IS, THEREFORE, ORDERED THAT YOU MAKE DILIGENT SEARCH FOR THE ABOVE
 NAMED AND TAKE HIM TO THE COUNTY JAIL WHERE HE WILL BE SAFELY HELD UNTIL
 HE MAY BE BROUGHT BEFORE THIS COURT, OR OTHERWISE DISCHARGED BY DUE COURSE
 OF LAW.

IT IS FURTHER ORDERED THAT THE COUNTY JAILER NOTIFY THE CLERK OF THE
 ISSUING COURT IMMEDIATELY, DURING THE NORMAL OPERATING HOURS OF THE ISSUING
 OFFICE, THAT THE ABOVE NAMED DEFENDANT IS IN CUSTODY.

WITNESS, THE MAGISTRATE FOR THE COUNTY OF CHARLESTON ON THE
 29TH DAY OF NOVEMBER, 2000


 _____ L.S.
 MAGISTRATE BONNIE L. KOONTZ

BENCH WARRANT
 STATE OF SOUTH CAROLINA
 COUNTY OF CHARLESTON

STATE OF SOUTH CAROLINA VS. BATTLE, ERNEST

CHARLESTON, SC 29403

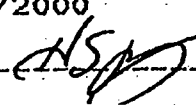
RACE: B SEX: M DOB: DL STATE: SC
 SSN: : 5 07 EYES: HAIR: TAG#: SC
 OFFICER: SHARPE AGENCY: CCSO - CHARLESTON CO SHERIFF
 DISPOSITION: TRIED IN ABSENCE - GUILTY

TERMS OF SENTENCE: REST MADE + 166 BW OR 30 DAYS

THE ABOVE OUTLINED SENTENCE WILL RUN CONSECUTIVELY WITH ANY OTHER CHARGES.

DATE: 11/29/2000

MAGISTRATE BONNIE L. KOONTZ

SERVED BY: 

DATE: 6-21-01

Exhibit I-A

STATE OF SOUTH CAROLINA	)	
COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS
ERNEST BATTLE, #165247,	)	
Applicant,	)	
-vs-	)	ORDER
STATE OF SOUTH CAROLINA,	)	Case Number 2004-CP-1032
Respondent.	)	

 BY
 JULIE L. ARMSTRONG
 CLERK OF COURT

2006 JUN -1 PM 3:08

FILED

WPK
 #1

Mr. Ernest Battle filed this post-conviction relief (PCR) action related to convictions in June 2001 for Trafficking Cocaine and Distribution of Cocaine Within Proximity of a School or Park. The application is granted on the claim of ineffective assistance of trial counsel for failing to properly protect the applicant's rights to correct and clear charges on reasonable doubt, mere presence, and circumstantial evidence, particularly as to the charge given to the jury in response to a question submitted by the jury to the court during deliberations. The remaining claims are denied.

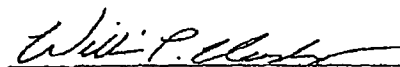
Counsel for the applicant is to submit a proposed Order to the court within 30 days. The proposed Order is to be submitted via email in a Microsoft Word format, with a copy sent to opposing counsel when it is sent to the court.

The court is also concerned about two issues: the admission by trial counsel that his client sent a letter to Ms. Floyd and the failure to move for a mistrial based on the State's improper closing argument. However, as to the first issue, the court accepts that this was a valid trial strategy made after the trial judge denied the objection to admitting the letter. As to the second issue, the court finds that the defendant has not established

Exhibit 1-8

the prejudice prong, in view of the totality of the evidence, the timely objection raised by trial counsel, ^{Whe} and the trial judge's admonition of the Assistant Solicitor in the jury's presence and clarification that the decision was not to be based on those aspects that were improperly argued to the jury.

AND IT IS SO ORDERED.


William P. Keesley
Presiding Judge

Charleston, South Carolina

May 30, 2006

#2

Exhibit II

DEATON LAW FIRM, LLC

RAD S. DEATON
ATTORNEY AT LAW

2170 ASHLEY PHOSPHATE ROAD, SUITE 402
NORTH CHARLESTON, SOUTH CAROLINA 29406
TELEPHONE: (843) 225-5723
AFTER HOURS: (843) 557-6852
FAX: (843) 797-0202
E-MAIL: deatonlawfirm@yahoo.com

July 5, 2006

Ernest Battle, #165247
Lieber Correctional Institution
P.O. Box 205
Ridgeville, South Carolina 29472

Re: Ernest Battle v. State of South Carolina, 04-CP-10-3794

Dear Ernie:

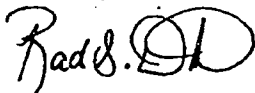
Pursuant to Judge Keesley's Order, a copy of which you have already received, I prepared a detailed proposed order for the Court. I have enclosed a copy of that order for your records.

Although it is difficult to draft an order denying grounds which we believe to be meritorious, I was required to draft an order reflecting the Court's decision. Nevertheless, as you and I have discussed on numerous occasions, we only need to prevail on one issue to win the entire case.

Obviously, as you are well aware, the State will appeal Judge Keesley's decision, so be prepared for another fight in the appellate courts.

Thank you for your attention to this matter.

Sincerely,



Rad S. Deaton

Enclosures as stated

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas
The Honorable William P. Keesley, Presiding Judge

ERNEST BATTLE,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

BRIEF OF PETITIONER

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

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QUESTION PRESENTED

Did the post-conviction relief court err in finding that counsel was ineffective for failing to object to the judge's charges on reasonable doubt and circumstantial evidence?

STATEMENT OF THE CASE

The Respondent is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Respondent was indicted at the November 1999 term of the Charleston County Grand Jury for trafficking cocaine (1999-GS-10-7109), possession with intent to distribute cocaine within proximity of school (1999-GS-10-7110), and conspiracy to violate South Carolina narcotics laws (1999-GS-10-7111). William McGuire, Esquire, and Leslie Sarji, Esquire, represented the Respondent at trial. The Respondent proceeded to trial on June 4, 2001, after which he was found guilty of trafficking cocaine and possession with intent to distribute cocaine within proximity of a school. On June 8, 2001, the Honorable Thomas L. Hughston, Jr. sentenced him to confinement for twenty-five (25) years for trafficking cocaine and ten (10) years for possession with intent to distribute cocaine within proximity of a school. The sentences were to run concurrently.

A timely Notice of Appeal was filed on Respondent's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Respondent's conviction and sentence. State v. Battle, Op. No.2003-UP-348 (S.C. Ct. App. filed May 20, 2003).

The Respondent subsequently filed an application for post-conviction relief on September 10, 2004. The Petitioner made its Return on May 25, 2005. An evidentiary hearing was convened on May 30, 2006 at the Charleston County Courthouse. Rad S. Deaton, Esquire, represented the Respondent, who was present at the hearing. Colleen E. Dixon of the Attorney General's Office represented the State. By Order dated July 5, 2006, the Honorable William P. Keesley granted post-conviction relief solely on the issue of counsel's failure to object to jury instructions on reasonable doubt and circumstantial evidence.

The State appealed and filed a Petition for Writ of Certiorari. The Respondent submitted a Return to Petition for Writ of Certiorari, and this Court granted certiorari. This brief follows.

ARGUMENT

The post-conviction relief court erred in finding that counsel was ineffective for failing to object to the judge's charges on reasonable doubt and circumstantial evidence.

The post-conviction relief court granted Respondent relief solely on the issue of counsel's failure to object to the judge's instructions on reasonable doubt and circumstantial evidence. The Petitioner submits that the PCR judge erred in so finding.

A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321 (2007)(citing State v. Burkhardt, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002)). Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions that may be misleading do not constitute reversible error. State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000)(citing State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994)). The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. Aleksey, 538 S.E.2d at 251 (citing Estelle v. McGuire, 502 U.S. 62 (1991); Boyde v. California, 494 U.S. 370 (1990)).

The PCR court relied on this Court's holding in State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991). In Manning, the South Carolina Supreme Court held that the jury charge was defective because the trial judge (1) defined "reasonable doubt" as synonymous with the term "moral certainty;" (2) defined "reasonable doubt" as a "doubt which honest people, such as you, when searching for the truth can give a real reason," and (3) required the jury to "seek some reasonable explanation of the circumstances" other than guilty when considering circumstantial evidence. Id.

In State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995), this Court again confronted the issue of a circumstantial evidence charge that instructed the jury to “seek” reasonable explanations other than a guilty verdict. In Raffaldt, this Court found that the trial court extensively charged that the State had the burden of proving the defendant guilty beyond a reasonable doubt and that the court properly defined “reasonable doubt” as the “kind of doubt which would cause a reasonable person to hesitate to act,” as recommended by this Court in Manning. Id. Since the jury charge in Raffaldt contained a correct reasonable doubt charge, this Court found that, reading the jury charge as a whole, the error in the circumstantial evidence charge was harmless and upheld the conviction. Id. This Court also upheld a challenged conviction in State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1999). There, this Court found that a circumstantial evidence charge that instructed jurors to “seek some other rational or logical explanation other than the guilt of the accused” was harmless error when coupled with a proper instruction on reasonable doubt. Id. In Todd v. State, 355 S.C. 396, 585 S.E.2d 305 (2003), this Court found that despite the trial judge’s inclusion of the phrase “moral certainty” in his reasonable doubt charge, the judge’s instruction as a whole effectively communicated the high burden of proof that the State was required to establish. In Todd, this Court reasoned that “the moral certainty language cannot be sequestered from its surroundings.” Id. (citing Victor v. Nebraska, 511 U.S. 1 (1994)).

In the present case, the trial judge exhaustively instructed the jury on reasonable doubt and the State’s burden of proof. (App. p. 423, line 17 – p. 424, line 16; p. 426, line 25 – p. 427, line 4; p. 428, lines 5-7; p. 432, lines 1-5; p. 434, lines 3-17; p. 438, line 6 – p. 439, line 9). The trial judge properly defined “reasonable doubt” as follows:

The term "reasonable doubt" may be best understood by giving it its plain and ordinary meaning. A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. If after considering all the evidence in this case you hesitate to convict Mr. Battle on the basis of that evidence, then he's entitled to a verdict of not guilty.

(App. p. 424, lines 4-10). The definition used here was recommended in Manning and deemed a correct definition in Raffaldt. The trial judge used the phrase "moral certainty" one time during his extensive charge on reasonable doubt and circumstantial evidence (App. p. 428, lines 7-11), but the jury instruction, when viewed in its entirety, was not misleading or erroneous. Consistent with the standard delineated in Aleksey, there is no reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution.

The trial judge also adequately charged the jury on circumstantial evidence. (App. p. 427, line 21 – p. 428, line 14; p. 437, line 18 – p. 439, line 14). The trial judge properly explained to the jury that the State must prove all circumstantial evidence beyond a reasonable doubt. (App. p. 428, lines 5-7). After the original charge on circumstantial evidence, the jury asked a question about evidence. The trial judge further instructed the jury as follows:

You can have proof of circumstances that lead to that conclusion beyond a reasonable doubt, as I've defined that for you. So that's what I'm talking about when I'm talking about circumstantial evidence. But the circumstances proved by the State must be complete. They must lead to that conclusion beyond a reasonable doubt. And in the evaluation of circumstantial evidence, you must search for, consider, any other reasonable hypothesis or explanation than that which the State advances and the claim made by the State. You have to examine every other reasonable hypothesis or explanation other than the guilt of the accused when considering circumstantial evidence....They can prove it by circumstantial evidence, but it must be a complete chain; that is, all the circumstances that the State relies on, other than direct testimony, all the circumstances that the State relies on to establish an element, some part that's necessary to prove the defendant guilty, some part of the crime that he is accused of committing, they must establish all those circumstances, as I said, beyond a reasonable doubt. And in consideration of that, it's your duty to examine any other reasonable hypothesis or explanation than the guilt of the accused. And if

there is another reasonable explanation for the circumstance, then you cannot rely on that circumstance in finding the defendant guilty.

(App. p. 438, lines 10-22; p. 439, lines 1-14). The Petitioner submits that even if the jury instruction on circumstantial evidence is deemed improper, it was harmless error when coupled with the otherwise proper charge. The Petitioner asserts the trial judge's charge as a whole effectively conveyed to the jury that any circumstantial evidence that the States relies on must be proven beyond a reasonable doubt.

The PCR Court erred in relying on the language of Manning and ignoring the standard outlined in Aleksey. The Petitioner submits there is no probative evidence to support a finding that trial counsel was ineffective for failing to object to the judge's jury instructions on reasonable doubt and circumstantial evidence. The jury charges, when viewed in their entirety, were properly administered and were not misleading. The Petitioner respectfully submits that the PCR court's finding should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the order of the PCR court.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General

By: Matthew J. Friedman
ATTORNEYS FOR PETITIONER

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

February 11, 2008.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable William P. Keesley, Presiding Judge

Case No. 2004-CP-10-3794

Ernest Battle,.....Respondent,

v.

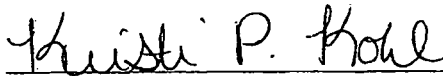
State of South Carolina,.....Petitioner.

PROOF OF SERVICE

I, KRISTI P. KOHL, certify that I have served the Brief of Petitioner on opposing counsel by depositing two copies each in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

This 11th day of February, 2008.



KRISTI P. KOHL
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3737

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas
William P. Keesley, Circuit Court Judge.

ERNEST BATTLE,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

BRIEF OF RESPONDENT

KATHRINE H. HUDGINS
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

Did the PCR judge correctly find defense counsel ineffective in failing to object to the erroneous circumstantial evidence charge which violated the Due Process Clause of the Fourteenth Amendment by diluting the State's burden of proof beyond a reasonable doubt?

STATEMENT

In November 1999, the Charleston County Grand Jury indicted Battle for trafficking in cocaine, possession with intent to distribute cocaine within the proximity of a school and conspiracy to violate narcotic laws, indictments #99-GS-10 -7109, 10, 11. Battle proceeded to jury trial before the Honorable Thomas L. Hughston. The jury returned verdicts of guilty of trafficking and the proximity charge. Judge Hughston sentenced Battle to twenty five years.

The South Carolina Court of Appeals affirmed Battle's sentence and conviction. State v. Battle, Op.No.2003-UP- 348 (S.C.Ct.App. filed May 20, 2003). The South Carolina Supreme Court denied the petition of writ of certiorari on February 5, 2004.

Battle filed an application for post conviction relief on September 10, 2004, alleging eight separate allegations of ineffective assistance of counsel. Specifically, Battle alleged that counsel was ineffective in failing to object to the trial judge's erroneous charge on reasonable doubt and circumstantial evidence. (App. p. 568). On May 30, 2006, an evidentiary hearing was held before the Honorable William P. Keesley. In a written order signed July 5, 2006, Judge Keesely found that defense counsel's representation was constitutionally ineffective and granted a new trial. Judge Keesley wrote:

Viewed in the totality, the jury instruction unconstitutionally diluted the State's burden to prove the applicant guilty beyond a reasonable doubt. In view of the burden-shifting language, the PCR court is unable to conclude that the trial judge's correct initial reasonable doubt charge is sufficient to remedy the other instructions given. Counsel's failure to object and pursue the objections made was deficient and undermines the Court's confidence in the outcome of the applicant's trial.
(Order p. 20).

The State appealed and filed a petition of writ of certiorari. Battle filed a return. This Court granted certiorari. The State filed a brief of petitioner. This brief of respondent follows.

ARGUMENT

The PCR judge correctly found defense counsel ineffective in failing to object to the erroneous circumstantial evidence charge which violated the Due Process Clause of the Fourteenth Amendment by diluting the State's burden of proof beyond a reasonable doubt.

The trial judge's initial reasonable doubt and circumstantial evidence charge used "moral certainty" language. (App. p. 428, lines 2-14). After approximately an hour and a half of deliberations the jury returned with a question about the instructions given by the judge and asked, "There was a portion about a reasonable person. Could there be another scenario possible: Would a reasonable person consider that something else happened instead of what's claimed by the prosecution?" (App. p. 437, lines 8-11). The trial judge re-charged the jury on circumstantial evidence, instructing them that, "And in the evaluation of circumstantial evidence, you must search for, consider, any other reasonable hypothesis or explanation than that which the State advances and the claim made by the State. You have to examine every other reasonable hypothesis or explanation other than the guilt of the accused when considering circumstantial evidence." The judge concluded the re-charge stating, "And in consideration of that, it's your duty to examine any other reasonable hypothesis or explanation than the guilt of the accused. And if there is another reasonable explanation for the circumstance, then you cannot rely on that circumstance in finding the defendant guilty." (App. p. 438, lines 17-22; p. 439, lines 10-14). The trial judge did not re-charge the jury on reasonable doubt or burden of proof. Defense counsel took no exception to the re-charge. The circumstantial evidence re-charge instructing the jury to search for other explanations was erroneous and violated the Due Process Clause of the Fourteenth Amendment.

The facts of this particular case combined with the specific question asked by the jury made the circumstantial evidence re-charge critical. James "Eddie" Nelson, LaShawn Floyd and Ernest

Battle were arrested in July of 1999, and charged with drug offenses resulting from a drug sale set up through a confidential informant, Matt Wallace, and the North Charleston Police Department. The confidential informant contacted LaShawn Floyd and arranged to purchase drugs. (App. p. 252, lines 2-14). After her arrest, Floyd told police she got the drugs from "E". (App. p. 266, lines 1-5). At trial, Floyd testified that she was involved in arranging a sale of drugs from Ernest Battle to Matt Wallace. (App. p. 252, lines 6-15).

Nelson also testified against Battle. Nelson testified that his family called him Eddie. (App. p. 222, lines 23-25). Both Nelson, and Battle are cousins of Floyd. (App. p. 251, lines 1-22). Nelson admitted to knowing about the drug sale but denied involvement with the drugs. (App. p. 228, lines 12 – p. 229, lines 1-4). Nelson testified that the drugs belonged to Battle. (App. p. 218, lines 12-17). The question at trial became from whom did Floyd receive the drugs.

The standard of review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the instruction in a way that violates the Constitution. Estelle v. McGuire, 502 U.S. 62 (1991); Boyde v. California, 494 U.S. 370 (1990); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000). The initial circumstantial evidence charge contained the "moral certainty" language disfavored in State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991). While the "moral certainty" language alone may not render the charge unconstitutional, the "moral certainty" language combined with the re-charge containing the "search for other explanations" language without a re-charge on reasonable doubt violates due process. The "seek other explanations" language is what the Court in Manning held to "turn the State's burden of proof on its head by requiring the jury to find a 'reasonable explanation' of the evidence inconsistent with a defendant's guilt before it [could] find him guilty." As the Court noted in State v. Needs, 333, S.C. 134, 508 S.E.2d 857, 867 (1999), "We again take this opportunity to strongly urge the trial courts to

avoid using the “seek” language, or any of the other offending terms [moral certainty] described above when charging jurors on either reasonable doubt or circumstantial evidence. Such language is unnecessary and runs the risk of unconstitutionally shifting the burden of proof to a defendant.”

The present case is different from other cases finding an erroneous circumstantial evidence charge harmless because, in this case, the re-charge was given without a re-charge on reasonable doubt and burden of proof. The PCR court correctly noted, “The concern of the PCR court is the jury’s ability to differentiate the standards applicable to the reasonable doubt charge and those applicable to circumstantial evidence.” (Order pp. 19-20). There is a reasonable likelihood that the jury applied the burden shifting language of the re-charge on circumstantial evidence in a way that unconstitutionally diluted the State’s burden to prove guilt beyond a reasonable doubt.

In Todd v. State, 355 S.C. 396, 585 S.E.2d 305 (2003), the Court found that viewing the instruction as a whole there was not a reasonable likelihood that the jury applied the “moral certainty” and “seek other explanation” language in a way that violated the Due Process Clause of the Fourteenth Amendment. The present case is clearly distinguished from Todd. First, the trial judge in Todd used an alternative method in describing reasonable doubt. “While the trial judge equated ‘reasonable doubt’ with ‘moral certainty,’ he also used alternative methods of describing the standard. He said: Our South Carolina Supreme Court has stated this presumption of innocence is like a robe of righteousness placed about the shoulders of the defendant, and it remains with him and assigns him to that class, the innocent, until that presumptive robe of righteousness has been stripped from his body by evidence satisfying you of that guilt beyond a reasonable doubt. Todd at 308. The trial judge in the present case did not define reasonable doubt in the alternative way the Court found saving in Todd.

An additional difference from the Todd case is the fact that the offending “seek other explanation” language was given as a re-charge after the initial instructions. The erroneous re-charge was given in isolation without reference to reasonable doubt or burden of proof. Given the fact that the initial charge did not contain the saving language discussed in Todd and the fact that the re-charge was given without reference to reasonable doubt or burden of proof, there is a likelihood that the jury applied the instruction in a way that violates the Constitution. The initial charge can not cure the constitutional infirmities in the re-charge.

In State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995) and in State v. Needs, 333, S.C. 134, 508 S.E.2d 857, 867 (1999), the Court found the erroneous circumstantial evidence charge requiring the jury to seek some other explanation other than the guilt of the accused constituted harmless error in light of the judge’s proper instruction defining reasonable doubt. In the present case the initial charge contained the disfavored “moral certainty” language and the judge failed to give a proper instruction defining reasonable doubt after the erroneous re-charge on circumstantial evidence requiring the jury to search for other reasonable explanations.

In State v. Blassingame, 271 S.C. 44, 244 S.E.2d 528 (1978), the Court found that an initial correct instruction on the law of manslaughter did not serve to correct the erroneous instruction given when the jury returned from deliberation with a question. In the present case the initial charge does not correct the erroneous charge given later when the jury returned with a question.

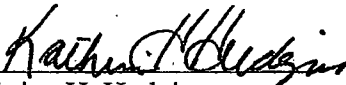
The PCR judge correctly found that the jury instructions unconstitutionally diluted the State’s burden to prove the applicant guilty beyond a reasonable doubt. The evidence in the record supports the finding of the PCR judge. This Court will uphold the factual finding of the PCR order if supported by any probative evidence in the record. Webb v. State, 281 S.C. 237, 314 S.E.2d 819 (1984); Tate v. State, 351 S.C. 418, 570 S.E.2d 522 (2002). The PCR judge properly

applied the reasonable likelihood standard set forth in State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), specifically addressing the standard in the order granting relief and citing Todd. (App. pp. 792 – 793). The PCR judge’s order granting Battle a new trial should be affirmed.

CONCLUSION

Based on the above argument, the finding of the PCR judge granting a new trial should be affirmed.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 11th day of June, 2008

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas
William P. Keesley, Circuit Court Judge

ERNEST BATTLE,

RESPONDENT,

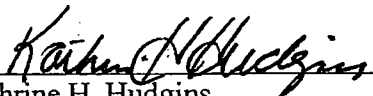
V.

STATE OF SOUTH CAROLINA,

PETITIONER

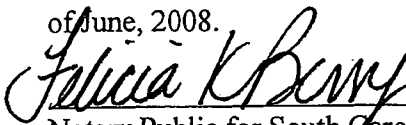
CERTIFICATE OF SERVICE

I certify that a true copy of the brief of respondent, in this case has been served on Matthew J. Friedman, Esquire, this 11th day of June, 2008.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day
of June, 2008.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: August 15, 2010

Westlaw.

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Supreme Court of South Carolina.
Ernest BATTLE, Respondent,
 v.
 STATE of South Carolina, Petitioner.

No. 26633.
 Submitted Dec. 4, 2008.
 Decided April 13, 2009.

Background: Defendant, who had been convicted of trafficking in cocaine, possession with intent to distribute within proximity of a school, and conspiracy to violate narcotic laws, filed a petition for post-conviction relief. The Circuit Court, Charleston County, Thomas L. Hughston, J., granted the petition. The State petitioned for certiorari review.

Holding: After granting review, the Supreme Court, Toal, C.J., held that jury instructions on reasonable doubt and circumstantial evidence did not violate defendant's due process rights.

Reversed.

West Headnotes

[1] **Criminal Law 110** ⚡1613

110 Criminal Law
 110XXX Post-Conviction Relief
 110XXX(C) Proceedings
 110XXX(C)2 Affidavits and Evidence
 110k1613 k. Burden of Proof. Most Cited Cases

The burden of proof is on the applicant in post-conviction proceedings to prove the allegations in his application.

[2] **Criminal Law 110** ⚡1158.36

110 Criminal Law
 110XXIV Review
 110XXIV(O) Questions of Fact and Findings

110k1158.36 k. Post-Conviction Relief. Most Cited Cases

On certiorari, the post-conviction relief (PCR) court's ruling should be upheld if it is supported by any evidence of probative value in the record.

[3] **Constitutional Law 92** ⚡4639

92 Constitutional Law
 92XXVII Due Process
 92XXVII(H) Criminal Law
 92XXVII(H)4 Proceedings and Trial
 92k4635 Instructions
 92k4639 k. Degree of Proof; Reasonable Doubt. Most Cited Cases

Criminal Law 110 ⚡822(16)

110 Criminal Law
 110XX Trial
 110XX(G) Instructions: Necessity, Requisites, and Sufficiency
 110k822 Construction and Effect of Charge as a Whole
 110k822(16) k. Reasonable Doubt. Most Cited Cases

Jury instructions on reasonable doubt and circumstantial evidence, when read as a whole, did not violate defendant's due process rights, even though the court used the phrases "moral certainty" and "search for" in a supplemental instruction; the trial court repeatedly stated that the State bore the burden of proving defendant's guilt beyond a reasonable doubt. U.S.C.A. Const.Amends. 6, 14.

[4] **Criminal Law 110** ⚡1519(4)

110 Criminal Law
 110XXX Post-Conviction Relief
 110XXX(B) Grounds for Relief
 110k1511 Counsel
 110k1519 Effectiveness of Counsel
 110k1519(4) k. Deficient Representation and Prejudice. Most Cited Cases
 In order to prove counsel was ineffective, a

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post-conviction relief (PCR) applicant must show that counsel's performance was deficient and that he suffered resulting prejudice. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 110 ⚡822(1)

110 Criminal Law

110XX Trial

110XX(G) Instructions: Necessity, Requisites, and Sufficiency

110k822 Construction and Effect of Charge as a Whole

110k822(1) k. In General. Most Cited Cases

In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution.

****737** Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Matthew J. Friedman, all of Columbia, for Petitioner.

Assistant Appellate Defender Kathrine Hudgins, South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

Chief Justice TOAL:

***199** In this post-conviction relief (PCR) case, we granted a writ of certiorari to review the PCR court's order granting Respondent **Ernest Battle** relief. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

Respondent was indicted for trafficking cocaine, possession with intent to distribute within proximity of a school, and conspiracy to violate narcotic laws. At trial, the State presented evidence that a confidential informant contacted LaShawn Floyd and arranged to purchase drugs. After the informant and Floyd exchanged money, Floyd walked

behind a nearby building and shortly reappeared with cocaine. Officers arrested Floyd as she was completing the transaction with the informant. Officers also arrested Respondent and James Nelson as they appeared from behind the building. Floyd and Nelson ^{FN1} testified that the cocaine was Respondent's.

FN1. Floyd, Nelson, and Respondent are all cousins.

The trial judge first charged the jury on reasonable doubt:

A reasonable doubt may arise from the evidence that's been presented in this case or from the lack of evidence in the case. You alone, you are the sole judges of the facts of this case. You alone must make the decision as to whether or not the State has proven him guilty of the charge beyond a reasonable doubt.

Now, as I told you at the outset, [Respondent] has said, "I'm not guilty of either one of those charges," and that places the burden of proving him guilty on the State. A person who is charged is never required to prove himself or herself innocent. The burden of proof is on the State throughout the trial to convince you the jury of his guilt beyond a reasonable doubt.

A person who is charged is presumed innocent from the moment of his arrest, throughout any arraignment, throughout the trial itself, until you the jury have reached a conclusion in the jury room that the State has proven him guilty by the evidence presented here in court beyond a reasonable doubt. If the State doesn't do that, then he's ***200** entitled to a verdict of not guilty. Now, what do we mean when we say that the State must prove someone guilty beyond a reasonable doubt? What do those words mean? The term "reasonable doubt" may be understood by giving it its plain and ordinary meaning. A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. If, after con-

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sidering all the evidence in this case, you hesitate to convict [Respondent]**738 on the basis of that evidence, then he's entitled to a verdict of not guilty.

A reasonable doubt may arise from the evidence that's been presented in this case or from the lack of evidence in the case. You alone, you are the sole judges of the facts of this case. You alone must make the decision as to whether or not the State has proven him guilty of the charge beyond a reasonable doubt

...

[T]he burden of proof is on the State to convince you of his guilt beyond a reasonable doubt. There's no burden on him to explain or to do anything. The burden of proof is on the State to produce the evidence here in court to convince you of his guilt beyond a reasonable doubt.

The trial court then instructed the jury on circumstantial evidence:

There is another type of evidence that we refer to as indirect or circumstantial evidence. That is evidence which may prove a particular fact to be proved, not by evidence based upon the physical senses of testifying witness but rather on the basis of the proof of other facts which infer the proof of a particular fact as a necessary consequence.

The commission of a crime may be proved by circumstantial or indirect evidence as by direct evidence of an eyewitness. Circumstantial evidence is permissible provided it meets the legal test. To the extent that the State relies on circumstantial evidence, it must prove all the circumstances relied on beyond a reasonable doubt. These circumstances must in every way perfectly be consistent with one another; and they must point conclusively, that is, to a moral certainty, to the guilt of the accused to the exclusion of every other reasonable hypothesis or explanation.^{FN2} In other words, the *201 circumstances must be

absolutely inconsistent with any other reasonable hypothesis or explanation than the guilt of the accused.

FN2. This portion of the charge reflects the traditional circumstantial evidence charge as articulated in *State v. Edwards*, which provides that when the State relies upon circumstantial evidence to prove its case, the jury may not convict the defendant unless:

Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances so proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

298 S.C. 272, 275, 379 S.E.2d 888, 889 (1989) (citing *State v. Littlejohn*, 228 S.C. 324, 89 S.E.2d 924, 926 (1955)). At the time this case was tried, although the *Edwards* circumstantial evidence charge was acceptable, the Court recommended a different circumstantial evidence charge. See *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997). However, in 2004, a majority of the Court held that the *Grippon* charge was the sole and exclusive charge to be given in circumstantial evidence cases. *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) (Toal, C.J., dissenting).

Shortly after the jury began deliberating, the foreman sent a note requesting a transcript of the jury charges. The trial court refused, but told the jury it would recharge portions of the instructions. The foreman then asked, "There was a portion about reasonable person. Could there be another scenario possible: Would a reasonable person consider that something else happened instead of what's claimed by the prosecution?" The trial court

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responded:

Okay, I'm not sure if what you're asking about was what I discussed or mentioned when I was talking about two types of evidence, the two ways that we classify evidence ... As I said, there are two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence, such as testimony of a witness. The other is indirect or circumstantial evidence, the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts; that's what we're talking about when I talk about circumstantial evidence.

...

You can have proof of circumstances that lead to that conclusion beyond a reasonable doubt, as I've defined that for you.

So that's what I'm talking about when I'm talking about circumstantial evidence. But the circumstances proved by *202 the State must be complete. They must lead to that conclusion beyond a reasonable doubt.

And in the evaluation of circumstantial evidence, you must search for, consider, **739 any other reasonable hypothesis or explanation than that which the State advances and the claim made by the State. You have to examine every other reasonable hypothesis or explanation other than the guilt of the accused when considering circumstantial evidence.

That's the essence, I think, of my instructions to you on circumstantial evidence. It's not necessary to prove every fact that the State has to prove in order to be entitled to a verdict of guilty by direct evidence. They can prove it by circumstantial evidence, but it must be a complete chain; that is, all the circumstances that the State relies on, other than direct testimony, all the circumstances that the State relies on to establish an element, some part that's necessary to prove the de-

fendant guilty, some part of the crime that he is accused of committing, they must establish all those circumstances, as I said beyond a reasonable doubt.

And in consideration of that, it's your duty to examine any other reasonable hypothesis or explanation than the guilt of the accused. And if there is another reasonable explanation for the circumstance, then you cannot rely on that circumstance in finding the defendant guilty.

Trial counsel did not object to any portion of the charges. The jury returned a guilty verdict, and the court of appeals affirmed. *State v. Battle*, Op. No.2003-UP-348 (S.C. Ct.App. filed May 20, 2003).

Respondent filed an application for PCR and alleged that trial counsel was ineffective for failing to object to the portion of the jury charges on reasonable doubt and circumstantial evidence. Although the PCR court found that the first portion of the reasonable doubt charge was constitutional, it found that other portions of the charges were improper. Specifically, the PCR court expressed concern over the trial court's use of the "moral certainty" language and the portion of the charge requiring the jury to "search for" or "seek" a reasonable explanation other than Respondent's guilt. Accordingly, the PCR court ruled that, viewed in its totality, the charge *203 diluted the State's burden to prove Respondent guilty beyond a reasonable doubt.

We granted the State's request for a writ of certiorari to review the PCR court's order granting relief to review the following issue:

Did the PCR court err in finding trial counsel ineffective for failing to object to the jury charges?

STANDARD OF REVIEW

[1][2] The burden of proof is on the applicant in post-conviction proceedings to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). On certior-

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ari, the PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

LAW/ANALYSIS

[3] The State argues that the PCR court erred in finding trial counsel ineffective for failing to object to the jury charges. We agree.

[4][5] In order to prove counsel was ineffective, a PCR applicant must show that counsel's performance was deficient and that he suffered resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution. *Todd v. State*, 355 S.C. 396, 399, 585 S.E.2d 305, 306 (2003).

Trial courts should avoid using "seek" language in instructing the jury because such language is unnecessary and runs the risk of unconstitutionally shifting the burden of proof. *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998). Additionally, "moral certainty" language, although not *per se* reversible error, is disfavored. See *State v. Johnson*, 306 S.C. 119, 131, 410 S.E.2d 547, 554 (1991) (recognizing that courts have affirmed convictions where the trial court did not *204 use "moral certainty" language in conjunction with "substantial" or "grave" doubt in defining reasonable doubt).

**740 In our view, there is not a reasonable likelihood that the jury applied the trial court's instruction in a way that violated the Constitution. The trial court repeatedly emphasized that the State retained the burden to prove Respondent's guilt beyond a reasonable doubt in its initial instruction. The trial court mentioned "moral certainty" in explaining circumstantial evidence, but he also stated that the circumstances must point "conclusively" to

the defendant's guilt, and that guilt must be shown to the exclusion of every other reasonable hypothesis. See *Todd*, 355 S.C. at 403, 585 S.E.2d at 309 (upholding a similar charge and recognizing that the " 'moral certainty' language cannot be sequestered from its surroundings"). While we recognize that the trial court employed the "search for" language in a supplemental instruction,^{FN3} the court used "search for" only one time and emphasized that the State retained the burden to prove Respondent's guilt beyond a reasonable doubt. Therefore, we find that this language did not shift the burden to Respondent to put forth a reasonable hypothesis which would exculpate him. Finally, we believe that any portion of the charge reflecting an *Edwards* instruction favored Respondent. Accordingly, we hold that when read as a whole, in its entirety, the jury instructions did not violate Respondent's due process rights.

FN3. See *Lowry v. State*, 376 S.C. 499, 507, 657 S.E.2d 760, 764 (2008) (finding the fact that the improper charge occurred in a supplemental instruction relevant to the analysis due to the prominence of the charge).

CONCLUSION

For these reasons, we reverse the PCR court's order granting Respondent relief.

WALLER, PLEICONES, KITTREDGE, JJ., and Acting Justice JAMES E. MOORE, concur.

S.C., 2009.
Battle v. State
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END OF DOCUMENT

FORM 5

STATE OF SOUTH CAROLINA)

County of Charleston)Ernest Battle, 165247)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

2010-CP-10-8511e
IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

CLERK OF COURT

2010 OCT 12 PM 4:20

FILED

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention L Lieber Correctional Institution, P.O. Box 205
Ridgeville, S.C. 29472
2. Name and location of Court which imposed sentence Charleston County Court
Of General Session, Charleston, S.C.
3. Name(s) of co-defendant(s) (if any) Lashawn Floyd and James Nelson
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 99-10-7109- Trafficking in Cocaine

- (b) 99-10-7110- Possession With Intent to Distribute
- (c) cocaine Within Proximity of a School
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) Trafficking in Cocaine- Twenty Five (25) years
- (b) P.W.I.D. Cocaine Within the proximity of a School- Ten (10) years concurrent.
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty N/A
- (b) after a plea of not guilty xx
- (c) after a plea of nolo contendere N/A
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. South Carolina Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Dismissed
- ii. Denied
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A

- (b) N/A
- (c) N/a
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of PCR Counsel
- (b) Denial of Procedural Due Process and Right to Appellate Review
- (c) Violation of §17-27-90, §17-27-100 Sup. Ct. Rule 50(a), U.S.C.A. Const. Amend 6., S.C.R.C. Proc. 71.1 (g) Appellate Review.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Attached Memorandum of Law
- (b) See Attached Memorandum of Law
- (c) See Attache memorandum of Law
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (d) any other petitions, motions or applications in this or any other Court? N/A
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Post-Conviction Relief Application
- ii. Rule 60(b) Relief from judgement order
- iii. State Habeas Corpus Petition
- iv. 2254 Federal Habeas Corpus Petition
- (b) the name and location of the Court in which each was filed:
- i. Charleston Court of Common Pleas
- ii. Charleston Court of Common Pleas
- iii. Supreme Court of South Carolina

iv. United States District Court For South Carolina

(c) the disposition thereof:

i. Post-Conviction Relief Granted

ii. N/A

iii. Denied

iv. Dismissed

(d) the date of each such disposition:

i. May 30, 2006

ii. N/A

iii. May 27, 2009

iv. August 31, 2010

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. 2004-CP-10-3794

ii. N/A

iii. Case Tracking No. 2009124886

iv. Case No. 1:09-2038-JFA

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

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

(a) which grounds have been presented:

i. N/A

ii. N/A

iii. N/A

(b) the proceedings in which each ground was raised:

i. N/A

ii. N/A

iii. N/A

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Ineffective Assistance of PCR Counsel- See Attached
 - (b) Denial of Procedural Due Process, and Right to Appellate Review- See Attached
 - (c) Violation of §17-27-90, §17-27-100, Sup. Ct. Rule 50(a), U.S.C.A. Amend. 6, S.C.R.C Proc. 71.1(g) See Attached.
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? N/A
 - (b) your trial, if any? Yes
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. William S. McGuire and Leslie Sarji- Charleston, S.C.
 - ii. Daniel E. Stacey- Columbia, S.C.
 - iii. Rad S. Deaton
Kathrine H. Hudgins- Columbia, S.C.
 - (b) the proceedings at which each such attorney represented you:
 - i. William S. McGuire and Lesli Sarji- Trial and Sentencing
 - ii. Daniel E. Stacey- Direct Appeal
 - iii. Rad S. Deaton- Post-Conviction Relief
Kathrine H. Hudgins- State's Petition For Writ of Certorari

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

An Evidentiary Hearing on issue of whether applicant requested
and was denied opportunity to seek appellate review of claims
denied in his first PCR application

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

No

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Charleston)

VERIFICATION

I, Ernest Battle #165247, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Ernest Battle #165247
 Ernest Battle #165247

SWORN to and subscribed before me this 28th
 day of September, 2010.

Ludrean Bryant (L.S.)
 Notary Public

My Commission Expires: May 26, 2020

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

I, Ernest Battle #165247, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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

Ernest Battle #165247
Applicant
Ernest Battle #165247

SWORN or affirmed to and subscribed before me this

28th day of September, 2010.

Ludreen Bryant
Notary Public

My Commission Expires: May 26, 2020

2010-CP-10-8516

STATE OF SOUTH CAROLINA
 COUNTY OF CHARLESTON
 ERNEST BATTLE #165247
 Applicant
 v.
 State of South Carolina

) IN THE COURT OF COMMON PLEAS
) MEMORANDUM OF LAW IN SUPPORT
) OF POST-CONVICTION RELIEF
) APPLICATION, PURSUANT TO S.C.
) CODE OF LAWS §17-27-10, -160.

2010 OCT 12 PM 4:21
 JUDGE J. A. STINE
 CLERK OF COURT

Now comes the applicant, Ernest Battle, who respectfully submit in support of his application this Memorandum of Law, pursuant to S.C. Code Ann. §17-27-10, -160 in support thereof.

Respectfully Submitted,
 S/ Ernest Battle
 Ernest Battle #165247

CLAIMS PRESENTED

1. Whether applicant's P.C.R. Counsel was ineffective by failing to timely file cross-appeal seeking appellate review of denial of claims in applicant's first post-conviction relief application, after applicant requested and was told by P.C.R. Counsel that a cross-appeal would be filed?

2. Whether applicant is entitled to a belated review of claims presented and denied in his first and original post-conviction relief application where P.C.R. Counsel failed to seek timely appellate review of those claims which resulted in a denial of applicant's procedural due process and his State Law rights as set forth in S.C. Code Ann. §17-27-100 and Supreme Court Rule 50(9)?

3. Whether applicant's P.C.R. Counsel's ineffectiveness by his failure to seek timely appellate review of claims presented and denied in his first post-conviction relief application resulted in a violation §17-27-90, §17-27-100, Sup. Ct. 50(9), U.S.C.A. Amend. 6, and S.C.R.Civ. Proc. 71.1(g)? Appellate Review?

A. Introduction

The applicant seeks an Evidentiary Hearing to determine whether he requested and was denied the opportunity to seek appellate review of denial of claims presented in his first original Post-Conviction relief application.

B. Standard of Review

In order to be entitled to a successive or subsequent post-conviction relief application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application. Code 1976, §17-27-90. Tilly v. State, 334 S.C. 24, 511 S.E.2d 689 (1999).

The right to seek appellate review of the denial of post-conviction relief is expressly authorized by State law. S.C. Code Ann. §17-27-100 (1985), Supreme Court Rule 50(9). Whether such review granted is discretionary with the Supreme Court. Knight v. State, 284 S.C. 138, 325 S.E.2d 535 (1985).

Continued from 10(a).

ALLEGATION I

Applicant's Post-Conviction Relief counsel was ineffective by failing to timely seek appellate review from denial of claims presented in applicant's first and Original P.C.R. application where applicant requested and was told by P.C.R. counsel that a cross-appeal would be filed.

An Evidentiary hearing was held at Charleston County Court of Common Pleas on May 30, 2006, where applicant was present and represented by Rad S. Deaton, Esquire. The State was represented by Colleen Dixon, Esquire. Honorable William P. Neesley, presiding Judge.

The applicant raised the following claims:

1. The applicant was arrested without probable cause thus in violation of his 4th and 14th Amendment Right of the United States Constitution and Article I, §3 of the South Carolina Constitution.

2. Counsel's were ineffective for failing to file a pretrial motion challenging the validity of the warrant affidavit pursuant to Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978).

3. Counsel was ineffective in failing to object to the applicant being subjected to double jeopardy after the acquittal of conspiracy charge and failing to request a curative instruction.

4. Counsel was ineffective in failing to file a pretrial motion to suppress cocaine found on a co-defendant.

5. Counsel was ineffective for failing to raise the issue insufficiency of evidence presented or more for a dismissal on that ground.

6. Counsel was ineffective for failing to call exculpatory witnesses.

7. Counsel was ineffective for failing to move for dismissal based on State's failure to preserve potentially exculpatory evidence, specifically the audio tape from the preliminary hearing.

8. Counsel was ineffective by failing to request a jury instruction on constructive possession.

9. Counsel was ineffective by failing to object to an incomplete mere presence jury charge or request a more complete jury charge in that regard.

10. Counsel was ineffective by admitting to the jury in his closing argument that a handwritten letter was written by the applicant.

11. Counsel was ineffective in failing to object to the Solicitor's improper vouching.

12. Counsel was ineffective in failing to move for mistrial upon Solicitor's improper closing argument.

13. Counsel was ineffective by failing to object to the judge's charge on reasonable doubt and circumstantial evidence.

Applicant raised and pursued (13) separate claims of ineffective assistance of trial counsel. The P.C.R. judge ultimately granted relief on four (4) separate claims of ineffective assistance of trial counsel in his initial order dated May 30, 2006, and then when P.C.R. counsel prepared the proposed order reflecting relief granted on those claims, the P.C.R. judge rejected the proposed order and instructed P.C.R. counsel to prepare and submit another proposed order narrow'ing relief to one claim. The sole claim of ineffective assistance of trial counsel by failing to object to judge's charge on reasonable doubt and circumstantial evidence. In order to be entitled to a successive post-conviction relief application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application. Code 1976 §17-27-90. Tilly v. State, 334 S.C. 24, 511 S.E.2d 689 (1999).

Under the P.C.R. rules, an applicant is entitled to a full adjudication on the merits of the original petition, or "one bite at the apple" this "bite" includes an applicant's right to appeal the denial of a P.C.R. application and the right to assistance of counsel in the appeal. See Austin v. State, 409 S.E.2d 395, Our Supreme Court held: In Austin the petitioner expressed his desire to seek review of the denial of his P.C.R. application pursuant to his State law rights as set forth in S.C. Code Ann. §17-27-100 and in Supreme Court Rule 50(9). Austin never received a full "bite" at the apple, as he was prevented from seeking any review of the denial of his P.C.R. application. Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991). Where convict alleged in his second post-conviction relief(PCR) application that he expressed desire to seek review of denial of his first PCR application but that his counsel failed to timely seek review, convict stated claim of ineffective assistance, thus requiring remand for evidentiary hearing on issue of whether in fact convict requested and was denied opportunity to seek appellate review. Code 1976 §17-27-100, Sup. Ct. Rule 50(9)(Repealed); U.S.C.A. Const. Amend. 6.

See Also Odum v. State, 337 S.C. 256, 523 S.E.2d 753 (S.C.1999) which held that: Petitioner was entitled to evidentiary hearing on issue of whether he knowingly and intelligently waived his right to appellate counsel after his first application was summarily dismissed, and one-year statute of limitations does not apply to petitioner's appeal from summary denial of application for post-conviction relief based on denial of right to appeal. Hope v. State, 328 S.C. 78, 492 S.E.2d 76 n.1 (1977).

Applicant specifically requested P.C.R. counsel to file an appeal on the other twelve (12) claims presented and denied in his original P.C.R. application. P.C.R. counsel told applicant that he would appeal the other (12) claims presented and denied, but failed to do so. In response to applicant's request to seek appellate review of his (12) claims presented and denied, P.C.R. counsel responded with a letter advising applicant that:

"Although it is difficult to draft an denying grounds which we believe to be meritorious, I was required to draft an order reflecting the Court's decision. Nevertheless, as you and I have discussed on numerous occasions, we only need to prevail on one issue to win the entire case.

Obviously, as you are aware, the State will appeal Judge Keesley's decision, so be prepared for another fight in the appellate courts". See applicant's attached exhibit I.

Applicant discussed with P.C.R. counsel on numerous occasions, after the evidentiary hearing when he was made aware that the P.C.R. judge narrowed relief from initially granting relief on four (4) of applicant's claims to one (1) in proposed order submitted and filed on July 5, 2006, and especially after being made aware that the State intended to appeal, that he requested P.C.R. counsel to appeal other twelve (12) claims in his first and original P.C.R. application. ON one occasion when applicant spoke with P.C.R. counsel requesting that an appeal be filed seeking appellate review of claims denied, prior to P.C.R. counsel receiving a copy of notice of appeal from the State, applicant was advised by P.C.R. counsel that his representation ended with the evidentiary hearing over and that it was not his duty or obligation to appeal claims denied, because we had won and it was the Appellate Defense's duty to file appeal. In Austin supra, the Court held that: Because petitioner is entitled to the assistance of appellate counsel on P.C.R., and because we must craft a remedy to correct the unfairness which occurred, we find his allegation that counsel failed to seek review in this case sufficiently states a claim of ineffective assistance.

See; S.C.R.C.P. Rule 71.1(g) Appellate Review; Continuing Representation.

A final decision entered under the act shall be reviewed according to the procedure specified by Rule 227, SCACR. If an applicant represented by counsel desires to appeal, counsel shall serve and file a Notice of Appeal as by Rule 227, SCACR; and shall continue to represent the applicant on appeal unless

automatically relieved under SCACR-602.

See S.C. Jurisprudence: Appeal and Error §32.

A respondent may institute a Cross-Appeal by serving a notice of appeal on all adverse parties. The respondent must be aggrieved by the ruling from which he seeks to cross-appeal. SCACR 203(c); A respondent may institute a cross-appeal by serving a notice of appeal on all adverse parties within five (5) days after receipt of appellant's notice of appeal or within the time prescribed by Rule 203(b), whichever period last expires.

For the reasons stated, the applicant is entitled to an evidentiary hearing to determine whether he knowingly and intelligently waived his right to seek appellate review of claims denied in his first PCR application.

ALLEGATION II

Denial of Procedural Due Process, and Right to Appellate Review.

Applicant raised and pursued thirteen (13) claims set out in his first initial (PCR) application. The (PCR) court granted relief on (4) separate claims in his initial Order dated May 30, 2006. The (PCR) court then advised (PCR) counsel to prepare a proposed order reflecting the court's decision. Once proposed order was prepared by (PCR) counsel reflecting relief on four (4) claims outlined in the court's initial order, the court rejected the proposed order and (PCR) counsel was required to prepare and re-submit another proposed order narrowing relief from the initial (4) claims, to reflect relief on only one (1) claim. When applicant received a copy of the second proposed order narrowing relief to one (1) claim, applicant informed (PCR) counsel that he wanted (PCR) counsel to appeal the court's decision, because being aware that the State's intention was to file an appeal on the one (1) claim granted by the court, applicant told (PCR) counsel he needed quote "safety net" in the event the Supreme Court reversed the (PCR) court's ruling, he would still have (12)

claims ripe and preserved for appellate review. (PCR) counsel told applicant that he would appeal the (PCR) court's order, thus preserving applicant's claims, but failed to do so, thus denying him appellate review of claims presented and adjudicated in his original and first PCR application depriving applicant of his full "bite at the apple".

See PPG Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc. (1998 App.) 297 S.C. 176, 375 S.E.2d 331, which held: It was within the discretion of a trial judge to re-consider his previous order relating to a motion for summary judgement made during the course of trial since a trial judge, until final judgement, controls the trial of a case before him or her and as a general rule may amend, correct, modify, or otherwise change his or her findings of fact and conclusion of law before entry of a judgement or decree.

See also S.C. Rule of Civ. Proc. Rule 58 Entry of Judgement.

First Union Nat. Bank v. Hitman Inc., (1991) (S.C. App.) 441 S.E.2d 681, aff'd (S.C. 1992) S.C. Lexis 135. Until written and entered, the trial judge retains discretion to change his mind and amend oral ruling accordingly. The trial judge was without authority to amend or modify earlier order to include award of attorney fees, where decretal paragraph of earlier order did not express award fees, and judge's authority to amend judgement ended with the expiration of term of court during which judgement was rendered.

Hunter Bro. Electronic Corp. v. James P. Baldwin, Inc., 293 S.C. 301, 360 S.E.2d 306.

The PCR court violated applicant's Substantial and Procedural Due Process rights when he entered a written order and then instructed PCR counsel to prepare a proposed order narrowing the scope of relief granted in earlier initial order.

ALLEGATION III

Applicant's State Law rights were violated as well as §17-27-90, §17-27-100, S. Ct. Rule 50(9), U.S.C.A. Amend. 6., and S.C.R.Civ. Proc. 71.1(g). When PCR counsel failed to seek timely appellate review requested by applicant.

The right to seek appellate review of the denial of PCR is expressly authorized by State law. S.C. Code Ann. §17-27-100 (1985), Supreme Court Rule 50(9). Whether such review is granted is discretionary with the Court Knight v. State, 284 S.C. 138, 325 S.E.2d 535 (1985). Section 71.1(g) HCR Civ. Proc. specifically authorized that a final decision entered under the act shall be reviewed according to the procedure specified by Rule 227, S.C.A.C.R.

In order to be entitled to a successive of second post-conviction relief application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application. Code 1976 §17-27-90. Tilly v. State, 334 S.C. 24, 511 S.E.2d 689 (1994).

Where convict alleged in his second post-conviction relief (PCR) application that he expressed desire to seek review of denial of his first PCR application but that his counsel failed to timely seek review, convict stated claim of ineffective assistance, thus requiring remand for evidentiary hearing on issue of whether in fact convict requested and was denied opportunity to seek appellate review. Code 1976 §17-27-100; S.Ct. Rule 50(9); U.S.C.A. Const. Amend. 6.

Austin v. State, 409 S.E.2d 395, Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991); Odum v. State, 377 S.C. 256, 523 S.E.2d 753 (S.C. 1999); Hope v. State, 324 S.C. 78, 492 S.E.2d 76 H.1 (1977).

WITNESSED TO AND SUBSCRIBED BEFORE ME

ON 28th DAY OF September

2010

Ludleen Bryant

NOTARY PUBLIC
STATE OF SOUTH CAROLINA

MY COMMISSION EXPIRES May 26, 2020

Respectfully Submitted
S/ Ernest Battle #165247
Ernest Battle #165247

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Ernest Battle, #165247.)

Applicant.)

v.)

State of South Carolina.)

Respondent.)

IN THE COURT OF COMMON PLEAS

2010-CP-10-8516

RETURN AND MOTION TO DISMISS

In response to the post-conviction relief application filed October 12, 2010, the Respondent would show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Applicant was indicted at the November 1999 term of the Charleston County Grand Jury for trafficking cocaine (28-100 grams) (3rd offense) (1999-GS-10-7109), possession with intent to distribute cocaine within proximity of school (1999-GS-10-7110), and conspiracy to violate South Carolina narcotics laws (1999-GS-10-7111). William McGuire, Esquire, and Leslie Sarji, Esquire, represented the Applicant at trial. Applicant proceeded to trial on June 4, 2001, after which he was found guilty of trafficking cocaine and possession with intent to distribute cocaine within proximity of a school. On June 8, 2001, the Honorable Thomas L. Hughston, Jr. sentenced him to confinement for twenty-five (25) years for trafficking cocaine and ten (10) years for possession with intent to distribute cocaine within proximity of a school. The sentences were to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Following an Anders brief, the South Carolina Court of Appeals dismissed the appeal. State v. Battle, Op. No. 2003-UP-348 (S.C. Ct. App. filed May 20, 2003). The Remittitur was issued on February 9, 2004.

The Applicant subsequently filed an application for post-conviction relief on September 10, 2004, in which he raised the following grounds for relief:

1. Applicant was arrested without probable cause, thus in violation of his 4th and 14th Amendment Rights to the U.S. Constitution and S.C. Const., Article I, § 3.
2. Former attorney Joseph Condon and trial attorney was ineffective by failing to file a pre-trial motion challenging the validity of the warrant affidavit, pursuant to Franks v. Delaware, 98 S.Ct. 2674 (1978); thus in violation of applicant's 4th, 5th, and 14th Amendment Rights to the U.S. Constitution and properly raise and litigate applicant's claims.
3. Trial attorney was ineffective by failing to object to applicant being subjected to Double Jeopardy after acquittal of conspiracy charge where prosecution had opened and closed charging conspiracy, and trial court failed to give curative instructions, thus in violation of applicant's 5th, and 6th Amendment Rights to the U.S. Constitution.
4. Trial counsel was ineffective by failing to file pre-trial motion to suppress cocaine found on co-defendant and not applicant, failure to raise issue of insufficient evidence at end of trial or move for dismissal based on insufficient evidence, violated applicant's 6th and 14th Amendment Right to the U.S. Constitution.
5. Trial counsel was ineffective by failing to call known exculpatory witness and state's failure to preserve potentially exculpatory evidence violated the applicant's Right to Due Process guaranteed by the U.S. Constitution.
6. Trial counsel was ineffective by failing to request a charge on constructive possession and objecting to the improper an[d] incomplete mere presence charge.
7. Counsel was ineffective by failing to hire a handwriting expert, which the admission of the letter was highly prejudicial to petitioner, which allowed the state to attack his character when it was not offered as evidence, made

improper comments, plead to jury's passion, interject his personal opinion as to guilt, placed prestige of government behind witnesses by vouching for their credibility, counsel also conceded the applicant's guilt.

8. The trial judge erroneously instructed the jury on reasonable doubt charge and concomitantly, charge on circumstantial evidence constituted burden-shifting easing the prosecution's burden of proof was highly prejudicial to petitioner, counsel's failure to object constituted ineffective assistance of counsel.

The State made its Return on May 25, 2005. An evidentiary hearing was convened on May 30, 2006 at the Charleston County Courthouse. Rad S. Deaton, Esquire, represented the Applicant, who was present at the hearing. Colleen E. Dixon of the Attorney General's Office represented the State. By Order dated July 5, 2006, the Honorable William P. Keesley granted post-conviction relief solely on the issue of counsel's failure to object to jury instructions on reasonable doubt and circumstantial evidence.

The State appealed Judge Keesley's Order. Applicant did not file a cross-appeal on the allegations that were denied. The Supreme Court granted the State's petition for writ of certiorari and then reversed the PCR court. Battle v. State, Op. No. 26633 (S.C. Sup. Ct. filed April 13, 2009). The Remittitur was issued on April 29, 2009.

Applicant filed a Petition for Writ of Habeas Corpus with the United States District Court for the District of South Carolina on August 3, 2009. The State made its Return and Memorandum in Support of Motion for Summary Judgment on December 18, 2009. United States Magistrate Judge Shiva V. Hodges issued a Report and Recommendation on August 2, 2010, in which she recommended that the State's motion for summary judgment be granted. By Order dated August 31, 2010, United States District Judge Joseph F. Anderson, Jr. granted the State's motion for summary judgment and dismissed the action with prejudice.

Attached and incorporated herein by reference are the records of the Charleston County Clerk of Court regarding the subject convictions. Applicant's records from the South Carolina Department of Corrections, the Record on Appeal, the Final Anders Brief, the Court of Appeals' opinion dismissing the appeal, the Remittitur dated February 9, 2004, the prior PCR application, the State's Return thereto, Applicant's Memorandum in Support of Reasonable Doubt/Circumstantial Evidence Issue, Judge Keesley's Order granting post-conviction relief, a July 5, 2006 letter from prior PCR counsel Rad Deaton to Applicant, the Appendix from the PCR appeal, the PCR appeal briefs, the Supreme Court's opinion reversing the PCR court, Applicant's federal habeas corpus petition filed August 3, 2009, the State's Return and Memorandum in Support of Motion for Summary Judgment, Judge Hodges' Report and Recommendation, and Judge Anderson's Order granting the State's motion for summary judgment and dismissing the action with prejudice.

II.

In his second and current application for post-conviction relief, the Applicant alleges the following grounds for relief:

1. Ineffective assistance of PCR counsel in that PCR counsel failed to timely file cross-appeal seeking appellate review of denial of claims in Applicant's first PCR application.
2. Denial of due process and right to appellate review based on PCR counsel's failure to seek timely appellate review of the claims that were denied in the PCR application.
3. PCR counsel's ineffectiveness resulted in a violation of S.C. Code Ann. § 17-27-90, § 17-27-100, and SCRCP 71.1(g).

III.

Respondent submits that Applicant is not entitled to a belated PCR appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to

the rule barring claims of ineffective assistance of PCR counsel where prior PCR counsel fails to appeal the denial of the application. However, Austin is limited to its particular factual situation. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Austin never received a full "bite" at the apple, as he was prevented from seeking any review of the denial of his PCR application. Id. Here, Applicant was granted post-conviction relief on one allegation and the remaining allegations were denied. The State filed a PCR appeal on the issue upon which relief was granted. Applicant did not file a cross-appeal on the allegations that were denied.

In his federal habeas corpus petition and his current PCR application, Applicant acknowledged that he knew he had the right to cross-appeal and he requested a cross-appeal. He contends that PCR counsel and appellate counsel both refused to file a cross-appeal. In a letter dated July 5, 2006, prior PCR counsel Rad Deaton, Esquire, explained to Applicant that he was required to draft an order reflecting the PCR court's decision, but they only needed to prevail on one issue to be granted relief. Mr. Deaton further explained that the State would appeal the PCR court's decision to the appellate court. The letter makes no reference to a cross-appeal on the issues that were denied by the PCR court.

Respondent submits that Applicant received a full "bite" at the apple. The State appealed the one issue upon which the PCR court granted relief, and Applicant had the opportunity to cross-appeal the issues that were denied. Based on his federal habeas corpus petition and this PCR application, Applicant was aware of his right to cross-appeal. In Austin, the applicant was prevented from seeking any review of the denial of his prior PCR application. In the present case, the Supreme Court of South Carolina heard the first PCR case on appeal and Applicant was aware of his right to file a cross-appeal. Respondent submits that Applicant obtained a complete

adjudication on the merits of his original application, including an appeal, and he is thus not entitled to a belated PCR appeal pursuant to Austin.

IV.

Respondent denies each allegation that is not expressly admitted, qualified, or explained.

V.

WHEREFORE, Respondent moves to summarily dismiss the application based on the fact that Applicant obtained a complete adjudication on the merits of his first application and Applicant acknowledged in his federal habeas corpus petition and this PCR application that he was aware of his right to cross-appeal.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General

By: Matthew J. Friedman
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

May 9, 2011.

m 9

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Ernest Battle, #165247,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2010-CP-10-8516

CONDITIONAL ORDER
OF DISMISSAL

BY
JULIE J. ARISTON
CLERK OF COURT
2011 AUG 16 PM 4:13

FILED

This matter comes before this Court by way of an application for post-conviction relief filed October 12, 2010. The Respondent made its Return and Motion to Dismiss on May 9, 2011, requesting that the application be summarily denied and dismissed.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Applicant was indicted at the November 1999 term of the Charleston County Grand Jury for trafficking cocaine (28-100 grams) (3rd offense) (1999-GS-10-7109), possession with intent to distribute cocaine within proximity of school (1999-GS-10-7110), and conspiracy to violate South Carolina narcotics laws (1999-GS-10-7111). William McGuire, Esquire, and Leslie Sarji, Esquire, represented the Applicant at trial. Applicant proceeded to trial on June 4, 2001, after which he was found guilty of trafficking cocaine and possession with intent to distribute cocaine within proximity of a school. On June 8, 2001, the Honorable Thomas L. Hughston, Jr. sentenced him to confinement for twenty-five (25) years for trafficking cocaine and ten (10) years for possession with intent to distribute cocaine within proximity of a school. The sentences were to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Following an Anders brief, the South Carolina Court of Appeals dismissed the appeal. State v. Battle, Op. No. 2003-UP-348 (S.C. Ct. App. filed May 20, 2003). The Remittitur was issued on February 9, 2004.

The Applicant subsequently filed an application for post-conviction relief on September 10, 2004, in which he raised the following grounds for relief:

1. Applicant was arrested without probable cause, thus in violation of his 4th and 14th Amendment Rights to the U.S. Constitution and S.C. Const., Article I, § 3.
2. Former attorney Joseph Condon and trial attorney was ineffective by failing to file a pre-trial motion challenging the validity of the warrant affidavit, pursuant to Franks v. Delaware, 98 S.Ct. 2674 (1978); thus in violation of applicant's 4th, 5th, and 14th Amendment Rights to the U.S. Constitution and properly raise and litigate applicant's claims.
3. Trial attorney was ineffective by failing to object to applicant being subjected to Double Jeopardy after acquittal of conspiracy charge where prosecution had opened and closed charging conspiracy, and trial court failed to give curative instructions, thus in violation of applicant's 5th, and 6th Amendment Rights to the U.S. Constitution.
4. Trial counsel was ineffective by failing to file pre-trial motion to suppress cocaine found on co-defendant and not applicant, failure to raise issue of insufficient evidence at end of trial or move for dismissal based on insufficient evidence, violated applicant's 6th and 14th Amendment Right to the U.S. Constitution.
5. Trial counsel was ineffective by failing to call known exculpatory witness and state's failure to preserve potentially exculpatory evidence violated the applicant's Right to Due Process guaranteed by the U.S. Constitution.
6. Trial counsel was ineffective by failing to request a charge on constructive possession and objecting to the improper an[d] incomplete mere presence charge.
7. Counsel was ineffective by failing to hire a handwriting expert, which the admission of the letter was highly prejudicial to petitioner, which allowed the state to attack his character when it was not offered as evidence, made

improper comments, plead to jury's passion, interject his personal opinion as to guilt, placed prestige of government behind witnesses by vouching for their credibility, counsel also conceded the applicant's guilt.

8. The trial judge erroneously instructed the jury on reasonable doubt charge and concomitantly, charge on circumstantial evidence constituted burden-shifting easing the prosecution's burden of proof was highly prejudicial to petitioner, counsel's failure to object constituted ineffective assistance of counsel.

The State made its Return on May 25, 2005. An evidentiary hearing was convened on May 30, 2006 at the Charleston County Courthouse. Rad S. Deaton, Esquire, represented the Applicant, who was present at the hearing. Colleen E. Dixon of the Attorney General's Office represented the State. By Order dated July 5, 2006, the Honorable William P. Keesley granted post-conviction relief solely on the issue of counsel's failure to object to jury instructions on reasonable doubt and circumstantial evidence.

The State appealed Judge Keesley's Order. Applicant did not file a cross-appeal on the allegations that were denied. The Supreme Court granted the State's petition for writ of certiorari and then reversed the PCR court. Battle v. State, Op. No. 26633 (S.C. Sup. Ct. filed April 13, 2009). The Remittitur was issued on April 29, 2009.

Applicant filed a Petition for Writ of Habeas Corpus with the United States District Court for the District of South Carolina on August 3, 2009. The State made its Return and Memorandum in Support of Motion for Summary Judgment on December 18, 2009. United States Magistrate Judge Shiva V. Hodges issued a Report and Recommendation on August 2, 2010, in which she recommended that the State's motion for summary judgment be granted. By Order dated August 31, 2010, United States District Judge Joseph F. Anderson, Jr. granted the State's motion for summary judgment and dismissed the action with prejudice.

Before this Court are the records of the Charleston County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Record on Appeal, the Final Anders Brief, the Court of Appeals' opinion dismissing the appeal, the Remittitur dated February 9, 2004, the prior PCR application, the State's Return thereto, Applicant's Memorandum in Support of Reasonable Doubt/Circumstantial Evidence Issue, Judge Keesley's Order granting post-conviction relief, a July 5, 2006 letter from prior PCR counsel Rad Deaton to Applicant, the Appendix from the PCR appeal, the PCR appeal briefs, the Supreme Court's opinion reversing the PCR court, Applicant's federal habeas corpus petition filed August 3, 2009, the State's Return and Memorandum in Support of Motion for Summary Judgment, Judge Hodges' Report and Recommendation, Judge Anderson's Order granting the State's motion for summary judgment and dismissing the action with prejudice, the current PCR application, and the State's Return and Motion to Dismiss thereto.

In his second and current application for post-conviction relief, the Applicant alleges the following grounds for relief:

1. Ineffective assistance of PCR counsel in that PCR counsel failed to timely file cross-appeal seeking appellate review of denial of claims in Applicant's first PCR application.
2. Denial of due process and right to appellate review based on PCR counsel's failure to seek timely appellate review of the claims that were denied in the PCR application.
3. PCR counsel's ineffectiveness resulted in a violation of S.C. Code Ann. § 17-27-90, § 17-27-100, and SCRCP 71.1(g).

This Court finds that Applicant is not entitled to a belated PCR appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to the rule barring claims of ineffective assistance of PCR counsel where prior PCR counsel fails to appeal the denial of the application. However, Austin is limited to its particular factual situation. Aice

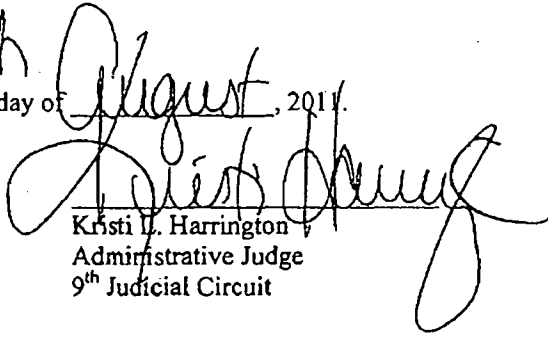
v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Austin never received a full "bite" at the apple, as he was prevented from seeking any review of the denial of his PCR application. Id. Here, Applicant was granted post-conviction relief on one allegation and the remaining allegations were denied. The State filed a PCR appeal on the issue upon which relief was granted. Applicant did not file a cross-appeal on the allegations that were denied.

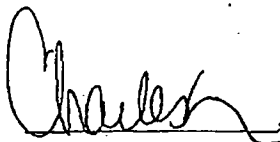
In his federal habeas corpus petition and his current PCR application, Applicant acknowledged that he knew he had the right to cross-appeal and he requested a cross-appeal. He contends that PCR counsel and appellate counsel both refused to file a cross-appeal. In a letter dated July 5, 2006, prior PCR counsel Rad Deaton, Esquire, explained to Applicant that he was required to draft an order reflecting the PCR court's decision, but they only needed to prevail on one issue to be granted relief. Mr. Deaton further explained that the State would appeal the PCR court's decision to the appellate court. The letter makes no reference to a cross-appeal on the issues that were denied by the PCR court.

This Court finds that Applicant received a full "bite" at the apple. The State appealed the one issue upon which the PCR court granted relief, and Applicant had the opportunity to cross-appeal the issues that were denied. Based on his federal habeas corpus petition and this PCR application, Applicant was aware of his right to cross-appeal. In Austin, the applicant was prevented from seeking any review of the denial of his prior PCR application. In the present case, the Supreme Court of South Carolina heard the first PCR case on appeal and Applicant was aware of his right to file a cross-appeal. This Court finds that Applicant obtained a complete adjudication on the merits of his original application, including an appeal, and he is thus not entitled to a belated PCR appeal pursuant to Austin.

Based upon its review of the pleadings in this matter, this Court does not see the need to appoint counsel to represent the Applicant and expresses its intent to summarily dismiss this matter unless the Applicant advises this Court with specific reasons, factual or legal, why it should not dismiss the matter in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final by filing any reasons he may have with the Clerk of Court for Charleston County, South Carolina. Applicant must also serve a copy of his response to opposing counsel Matthew J. Friedman of the Attorney General's Office at P.O. Box 11549, Columbia, SC 29211.

AND IT IS SO ORDERED this 16th day of August, 2011.


Kristi L. Harrington
Administrative Judge
9th Judicial Circuit

 South Carolina.

STATE OF SOUTH CAROLINA)
 COUNTY OF CHARLESTON)
 ERNEST BATTLE, 165247)
 APPLICANT)
 -vs-)
 STATE OF SOUTH CAROLINA,)
 RESPONDENT.)

IN THE COURT OF COMMON PLEAS

2010-CP-10-8516

OBJECTION AND RESPONSE

TO

CONDITIONAL ORDER OF DISMISSAL

Now comes the applicant, who will respectfully show this Honorable Court the following specific reasons, factual or legal, why it should not dismiss the matter in its entirety.

FACTUAL

1. Applicant raised (13) separate claims of ineffective assistance of counsel.

2. The (P.C.R.) judge granted relief on (4) separate claims in applicant's initial P.C.R. application, then instructed applicant's (P.C.R.) counsel to narrow relief when submitting proposed Order.

3. The State continued to ignore the fact that the (P.C.R.) judge issued a pre-Order granting relief on (4) separate claims, the Order was signed and filed with the clerk of Court. See attached.

4. See letter dated June 7, 2006, by applicant's P.C.R. counsel, referencing the Order entered by Judge Keesley, July 5, 2006 letter from P.C.R. counsel admitting drafting an Order denying ground believed to be meritorious, but was required to do so per instruction of the P.C.R. Judge, letter to applicant from P.C.R. counsel advising applicant of significant changes to Order by P.C.R. judge.

LEGAL

1. In order to be entitled to a successive or subsequent Post-Conviction Relief Application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application. Code 1976, §17-290. Tilley v. State, 334 S.C. 24, 571 S.E.^{2d} 689 (1999). The right to seek appellate review of the denial of post conviction relief is expressly authorized by State Law. S.C. Code Ann. §17-27-100 (1985).

2. Under the P.C.R. rules, an applicant is entitled to a full adjudication on the merits of the original petition, or "one bite at the apple," this "bite" includes an applicant's right to appeal the denial of application and the right to assistance of counsel in the appeal. Austin v. State, 409 S.E.^{2d} 395.

3. Where convict alleged in his second post conviction relief (P.C.R.) application that he desire to seek review of denial of his first P.C.R. application, but that his counsel failed to timely seek review, convicted stated claim of ineffective assistance of counsel, thus requiring remand for evidentiary hearing on issue of whether in fact convict requested and was denied opportunity to seek appellate review. Code 1976, §17-27-100. See also Odum v. State, 337 S.C. 256, 523 S.E.^{2d} 753 (S.C. 1999); Hope v. State, 328 S.C. 78, 492 S.E.^{2d} 76n.1 (1977).

AFFIDAVIT OF SERVICE

I, ERNEST BATTLE, #165247, DISPOSES AND SWEARS UNDER PENALTY OF PERJURY, I FORWARDED TO THE CLERK'S OFFICE, HONORABLE JULIE J. ARMSTRONG, ONE (1) ORIGINAL OBJECTION AND RESPONSE TO CONDITIONAL ORDER OF DISMISSAL FOR FILING AND A TRUE COPY WAS FORWARDED THIS 19 DAY OF SEPTEMBER 2011 TO THE S.C. ATTORNEY GENERAL'S OFFICE, MATTHEW J. FRIEDMAN, Esq., VIA U.S. MAIL 1st CLASS POSTAGE PREPAID.

Respectfully submitted,

s/ Ernest Battle

Ernest Battle, #165247

Sworn to and subscribed before me on this
19th day of Sept 2011

Ludrean Bryant
My commission expires on May 26, 2020.

Exhibit I-A

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

ERNEST BATTLE, #165247,

Applicant,

-vs-

STATE OF SOUTH CAROLINA,

Respondent.

ORDER

Case Number 2004-CP-10324

BY JULIE J. ARMSTRONG
CLERK OF COURT

2006 JUN -1 PM 3:08

FILED

Mr. Ernest Battle filed this post-conviction relief (PCR) action related to convictions in June 2001 for Trafficking Cocaine and Distribution of Cocaine Within Proximity of a School or Park. The application is granted on the claim of ineffective assistance of trial counsel for failing to properly protect the applicant's rights to correct and clear charges on reasonable doubt, mere presence, and circumstantial evidence, particularly as to the charge given to the jury in response to a question submitted by the jury to the court during deliberations. The remaining claims are denied.

Counsel for the applicant is to submit a proposed Order to the court within 30 days. The proposed Order is to be submitted via email in a Microsoft Word format, with a copy sent to opposing counsel when it is sent to the court.

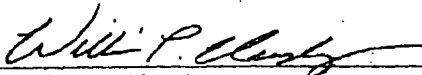
The court is also concerned about two issues: the admission by trial counsel that his client sent a letter to Ms. Floyd and the failure to move for a mistrial based on the State's improper closing argument. However, as to the first issue, the court accepts that this was a valid trial strategy made after the trial judge denied the objection to admitting the letter. As to the second issue, the court finds that the defendant has not established

WPK
#1

Exhibit 1-13

the prejudice prong, in view of the totality of the evidence, the timely objection raised by trial counsel, and the trial judge's admonition of the Assistant Solicitor in the jury's presence and clarification that the decision was not to be based on those aspects that were improperly argued to the jury.

AND IT IS SO ORDERED.


William P. Keesley
Presiding Judge

Charleston, South Carolina

May 30, 2006

#2

DEATON LAW FIRM, LLC

RAD S. DEATON
ATTORNEY AT LAW

2170 ASHLEY PHOSPHATE ROAD, SUITE 402
NORTH CHARLESTON, SOUTH CAROLINA 29406
TELEPHONE: (843) 225-5723
AFTER HOURS: (843) 557-6852
FAX: (843) 797-0202
E-MAIL: deatonlawfirm@yahoo.com

June 7, 2006

Ernest Battle, #165247
Lieber Correctional Institution
P.O. Box 205
Ridgeville, South Carolina 29472

Re: Ernest Battle v. State of South Carolina, 04-CP-10-3794

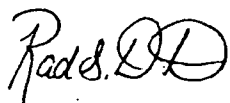
Dear Ernest:

I received your letter on June 6, 2006. I very much appreciate your compliments regarding my trial performance. I am certainly glad my clients feel that I have their best interest in mind in pursuing their claims.

Additionally, please find enclosed a copy of an order entered by Judge Keesley in your case. I believe the order speaks for itself.

Thank you for your attention to this matter. I will certainly provide you with a copy of the proposed order submitted to the Court.

Sincerely,



Rad S. Deaton

Enclosures as stated

Exhibit II

DEATON LAW FIRM, LLC

RAD S. DEATON
ATTORNEY AT LAW

2170 ASHLEY PHOSPHATE ROAD, SUITE 402
NORTH CHARLESTON, SOUTH CAROLINA 29406
TELEPHONE: (843) 225-5723
AFTER HOURS: (843) 557-6852
FAX: (843) 797-0202
E-MAIL: deatonlawfirm@yahoo.com

July 5, 2006

Ernest Battle, #165247
Lieber Correctional Institution
P.O. Box 205
Ridgeville, South Carolina 29472

Re: Ernest Battle v. State of South Carolina, 04-CP-10-3794

Dear Ernie:

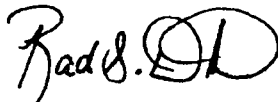
Pursuant to Judge Keesley's Order, a copy of which you have already received, I prepared a detailed proposed order for the Court. I have enclosed a copy of that order for your records.

Although it is difficult to draft an order denying grounds which we believe to be meritorious, I was required to draft an order reflecting the Court's decision. Nevertheless, as you and I have discussed on numerous occasions, we only need to prevail on one issue to win the entire case.

Obviously, as you are well aware, the State will appeal Judge Keesley's decision, so be prepared for another fight in the appellate courts.

Thank you for your attention to this matter.

Sincerely,



Rad S. Deaton

Enclosures as stated

DEATON LAW FIRM, LLC

RAD S. DEATON
ATTORNEY AT LAW

2170 ASHLEY PHOSPHATE ROAD, SUITE 402
NORTH CHARLESTON, SOUTH CAROLINA 29406
TELEPHONE: (843) 225-5723
AFTER HOURS: (843) 557-6852
FAX: (843) 797-0202
E-MAIL: deatonlawfirm@yahoo.com

July 12, 2006

Ernest Battle, #165247
Lieber Correctional Institution
P.O. Box 205
Ridgeville, South Carolina 29472

Re: Ernest Battle v. State of South Carolina, 04-CP-10-3794

Dear Ernie:

I received your letter regarding the proposed order. My proposed order did not address the "structural error" analysis in order to minimize any issues on appeal and increase the likelihood that the case survives the appellate attack by the Attorney General.

The "structural error" analysis, pursuant to my research, has not been applied in the PCR context in South Carolina. Thus, if the Court addresses that issue, the appellate courts have to address the issue for the first time on appeal. If they don't agree, it makes it easier for the appellate courts to reverse the case. In other words, why address new law when you don't have to. Nevertheless, as you will see with the enclosed filed order with Judge Keesley's changes, the portion of the order regarding a structural error was significantly changed by the Court. As I thought he would, he declined to address whether the error amounted to a structural error.

With respect to your request for a "vacated sentence," your convictions and sentences are vacated when a new trial is granted. This is common in PCR cases. See Cobbs v. State, 305 S.C. 299, 408 S.E.2d 223 (1991), Owens v. State, 331 S.C. 582, 503 S.E.2d 462 (1998). Additionally, please review the case of Gilstrap v. State, 252 S.C. 625, 168 S.E.2d 88 (1969), and its discussion of whether a PCR applicant is entitled to absolute release. See also Grant v. MacDougall, 244 S.C. 387, 137 S.E.2d 270 (1964), which was applied in the PCR context in Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993).

The Court cannot just vacate your conviction and sentence and just forget the case. Your case is being vacated on ineffective assistance of counsel. You are only entitled to effective assistance of counsel, which you will receive, ideally, with a new trial. Judge Keesley has made changes to the proposed order that I submitted to reflect his opinion as to the entire case. I believe that the appropriate relief has been granted; additionally, I believe that the order has been crafted in such a way that your case will withstand appellate attack.

FILED

STATE OF SOUTH CAROLINA)

2012 APR 17 AM 9:46

COUNTY OF CHARLESTON)

JULIE J. ARMSTRONG
CLERK OF COURT

IN THE COURT OF COMMON PLEAS

2010-CP-10-8516

Ernest Battle, #165247, BY _____)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

FINAL ORDER

FILED
2012 APR - 23 PM 8:27
JULIE J. ARMSTRONG
CLERK OF COURT
Clocked
BY _____

This matter comes before the Court pursuant to an application for post-conviction relief filed October 12, 2010. The State made its Return and Motion to Dismiss on May 9, 2011, requesting that the application be summarily denied and dismissed.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, the Honorable Kristi L. Harrington issued a Conditional Order of Dismissal dated and filed on August 16, 2011, provisionally denying and dismissing this action. This Court gave Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Attached herewith are the Conditional Order of Dismissal and the Affidavit of Personal Service, dated February 29, 2012, serving the Order on the Applicant.

The Applicant responded to the Conditional Order of Dismissal by submitting a document captioned "Objection and Response to Conditional Order of Dismissal," dated September 19, 2011, in which he raised the following reasons he is entitled to an evidentiary hearing:

1. Applicant raised 13 separate claims of ineffective assistance of counsel. The PCR judge granted relief on 4 claims, and PCR counsel failed to seek review of the claims that were denied. See Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

This Court finds that Applicant's response is not sufficient to show why the Conditional

KCH
4/4/12

Order of Dismissal served upon him should not become final. As stated in the Conditional Order of Dismissal, Applicant acknowledged in his federal habeas corpus petition and his current PCR application that he knew he had the right to cross-appeal and he requested a cross-appeal. He contends that PCR counsel and appellate counsel both refused to file a cross-appeal. In a letter dated July 5, 2006, prior PCR counsel Rad Deaton, Esquire, explained to Applicant that he was required to draft an order reflecting the PCR court's decision, but they only needed to prevail on one issue to be granted relief. Mr. Deaton further explained that the State would appeal the PCR court's decision to the appellate court. The letter makes no reference to a cross-appeal on the issues that were denied by the PCR court.

This Court finds that Applicant received a full "bite" at the apple. The State appealed the one issue upon which the PCR court granted relief, and Applicant had the opportunity to cross-appeal the issues that were denied. Based on his federal habeas corpus petition and this PCR application, Applicant was aware of his right to cross-appeal. In Austin, the applicant was prevented from seeking any review of the denial of his prior PCR application. In the present case, the Supreme Court of South Carolina heard the first PCR case on appeal and Applicant was aware of his right to file a cross-appeal. This Court finds that Applicant obtained a complete adjudication on the merits of his original application, including an appeal, and he is thus not entitled to a belated PCR appeal pursuant to Austin.

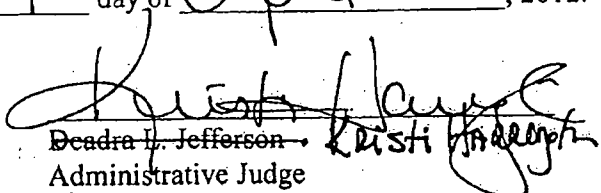
IT IS THEREFORE ORDERED that, for the reasons set forth in the Conditional Order of Dismissal, the application for PCR is hereby denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR.

4/3/12
4/4/12

Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 4th day of April, 2012.


~~Deadra L. Jefferson~~
Administrative Judge
9th Judicial Circuit

Cherish, South Carolina.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Deadra L. Jefferson, Circuit Court Judge

ERNEST BATTLE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212081

PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

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

ATTORNEY FOR PETITIONER

INDEX

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ISSUE PRESENTED

Whether petitioner's case should be remanded for an evidentiary hearing on the issue of whether PCR counsel was ineffective in failing to seek appellate review, by way of cross-appeal, any of those issues that were denied by the PCR court?

STATEMENT

Petitioner was convicted of trafficking in cocaine and for possession with intent to distribute cocaine within proximity of a school on June 4, 2001, after a jury trial held before the Honorable Thomas L. Hughston, Jr. in Charleston County. Respective sentences of twenty-five (25) years and ten (10) years were imposed. William McGuire, Esquire, and Leslie Sarji, Esquire, represented petitioner.

Petitioner appealed his convictions and the appeal was dismissed after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Battle, Op. No. 2003-UP-348 (S.C. Ct. App. filed May 20, 2003).

Petitioner filed an application for post-conviction relief on September 10, 2004. An evidentiary hearing was held on May 30, 2006, before the Honorable William P. Keesley. Petitioner was present and was represented by Rad S. Deaton, Esquire. Respondent was represented by Colleen E. Dixon, Assistant Attorney General. On July 5, 2006, Judge Keesley issued an order granting relief on the issue of trial counsel's failure to object to jury instructions on reasonable doubt and circumstantial evidence.

Respondent appealed Judge Keesley's order, but petitioner did not file a cross-appeal on the additional allegations that were dismissed. The Court granted respondent's petition for writ of certiorari and reversed Judge Keesley's order. Battle v. State, 382 S.C. 197, 675 S.E.2d 736 (2009).

Petitioner filed this current application for post-conviction relief on October 12, 2010. Petitioner raised the following allegations in this application:

1. Ineffective assistance of PCR counsel in that PCR counsel failed to timely file cross-appeal seeking appellate review of denial of claims in Applicant's first PCR application.

2. Denial of due process and right to appellate review based on PCR counsel's failure to seek timely appellate review of the claims that were denied in the PCR application.
3. PCR counsel's ineffectiveness resulted in a violation of S.C. Code Ann § 17-27-90, § 17-27-100, and SCRCP 71.1(g).

Respondent filed a return and motion to dismiss dated May 9, 2011. The Honorable Kristi L. Harrington filed a conditional order of dismissal dated August 16, 2011. The order granted petitioner twenty (20) days to show why the order should not become final. Petitioner filed an objection and response to the conditional order of dismissal dated September 19, 2011.

On April 4, 2012, Judge Harrington issued a final order denying and dismissing petitioner's application for post-conviction relief.

This petition follows.

ARGUMENT

Petitioner's case should be remanded for an evidentiary hearing on the issue of whether PCR counsel was ineffective in failing to seek appellate review, by way of cross-appeal, any of those issues that were denied by the PCR court.

Petitioner's application for post-conviction relief that was filed on September 10, 2004, raised the following grounds for relief:

1. Applicant was arrested without probable cause, this in violation of his 4th and 14th Amendment Rights to the U.S. Constitution and S. C. Const., Article 1, § 3.
2. Former attorney Joseph Condon and trial attorney was ineffective by failing to file a pre-trial motion challenging the validity of the warrant affidavit, pursuant to Franks. v. Delaware, 98 S.Ct. 2674 (1978); thus in violation of applicant's 4th, 5th, and 14th Amendment Rights to the U.S. Constitution and properly raise and litigate applicant's claims.
3. Trial attorney was ineffective by failing to object to applicant being subjected to Double Jeopardy after acquittal of conspiracy charge where prosecution had opened and closed charging conspiracy, and trial court failed to give curative instructions, thus in violation of applicant's 5th, and 6th Amendment Rights to the U.S. Constitution.
4. Trial counsel was ineffective by failing to file pre-trial motion to suppress cocaine found on co-defendant and not applicant, failure to raise issue of insufficient evidence at end of trial or move for dismissal based on insufficient evidence, violated applicant's 6th and 14th Amendment Right to the U.S. Constitution.
5. Trial counsel was ineffective by failing to call known exculpatory witness and state's failure to preserve potentially exculpatory evidence violated the applicant's Right to Due Process guaranteed by the U.S. Constitution.
6. Trial counsel was ineffective by failing to request a charge on constructive possession and objecting to the improper an[d] incomplete mere presence charge.
7. Counsel was ineffective by failing to hire a handwriting expert, which the admission of the letter was highly prejudicial to petitioner, which allowed the state to attack his character when it was not offered as

evidence, made improper comments, plead to jury's passion, interject his personal opinion as to guilt, placed prestige of government behind witnesses by vouching for their credibility, counsel also conceded the applicant's guilt.

8. The trial judge erroneously instructed the jury on reasonable doubt charge and concomitantly, charge on circumstantial evidence constituted burden-shifting easing the prosecution's burden of proof was highly prejudicial to petitioner, counsel's failure to object constituted ineffective assistance of counsel.

On July 5, 2006, Judge Keesley issued an order granting relief only on the issue #8 concerning trial counsel's failure to object to the jury instructions on reasonable doubt and circumstantial evidence.

Respondent appealed and filed a petition for writ of certiorari. Petitioner failed to cross-appeal on the remaining issues that were denied. The Supreme Court granted respondent's petition and reversed the decision of the PCR court. Battle v. State, 382 S.C. 197, 675 S.E.2d 736 (2009).

Petitioner filed this current application for post-conviction relief alleging ineffective assistance of PCR counsel in failing to cross-appeal seeking appellate review of the denial of the claims presented in his first PCR application. Respondent filed a return and motion to dismiss which was followed by a conditional order of dismissal. Petitioner filed his objection and response to the conditional order of dismissal. The PCR court issued a final order denying and dismissing petitioner's current application for post-conviction relief.

Both respondent and the PCR court mistakenly believe no PCR applicant has a right to appeal the denial of his application by way of cross-appeal when the State files a petition for writ of certiorari successfully challenging the grant of PCR to an applicant on one issue, even when there are still remaining issues which have not been appealed by the applicant. Note that the PCR court, in its conditional order of dismissal, acknowledged that petitioner knew he had the right to cross-appeal and he requested a cross-appeal (App. p. 854). The PCR court then stated PCR counsel

wrote petitioner that the State would appeal the PCR court's decision granting PCR, but that the letter made no reference to the cross-appeal. (App. p. 854).¹

In Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991), the Court held that "once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of prior PCR counsel." In Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), the Court noted that the "right to seek appellate review of the denial of PCR is expressly authorized by state law. S.C. Code Ann. § 17-27-100 (1985); Supreme Court Rule 59(9)." Hence, PCR counsel can be held ineffective if he fails to seek appellate review of the denial of PCR. The Court held that a remand was required "for an evidentiary hearing on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review." (emphasis supplied). In Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999), the Court held that a petitioner was entitled to an evidentiary hearing on the issue of whether he knowingly and intelligently waived his right to appellate counsel after his first application was summarily dismissed. More recently, in Martinez v. Ryan, ___ U.S. ___, 132 S.Ct. 1309 (2012), the Supreme Court of the United States held that a remand was required to determine whether petitioner's attorney in his first state collateral proceeding was ineffective.

Petitioner in this case did not waive appellate review of his cross-appeal issues. Instead, he requested appellate review. He is entitled to have his case remanded for an evidentiary hearing on whether PCR counsel was ineffective in failing to cross-appeal.

¹ The letter can be found at App. p. 862.

CONCLUSION

Petitioner's case should be remanded with the appointment of counsel for an evidentiary hearing on the issue of whether PCR counsel was ineffective in failing to seek appellate review, by way of cross-appeal, any of those issues that were denied by the PCR court. As in Austin, petitioner has not had a full "bite" at the apple.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of October, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Deadra L. Jefferson, Circuit Court Judge

ERNEST BATTLE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212081

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 Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 15th day of October, 2012.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of October, 2012.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR
RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE
268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ernest Battle, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212081

ON WRIT OF CERTIORARI

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Memorandum Opinion No. 2013-MO-010
Submitted March 5, 2013 – Filed March 13, 2013

REMANDED

Appellate Defender Robert M. Pachak, South Carolina
Commission on Indigent Defense, Division of Appellate
Defense, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General
John W. McIntosh, Assistant Deputy Attorney General Salley
W. Elliott, and Assistant Attorney General Ashleigh Rayanna
Wilson, all of Columbia, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari to review the decision of the circuit court denying his application for post-conviction relief (PCR). We grant the petition, dispense with further briefing, and remand the matter to the circuit court.

In 2004, petitioner filed his first PCR application, alleging several grounds for PCR. The PCR judge granted petitioner relief on one of the grounds, and denied the application as to the remaining grounds. This Court granted the State's petition for a writ of certiorari and reversed the order of the PCR judge. *Battle v. State*, 382 S.C. 197, 675 S.E.2d 736 (2009).

Petitioner filed a second PCR application in 2010 alleging his first PCR counsel was ineffective in failing to file a Notice of Appeal from the prior PCR order. The PCR judge dismissed the application without a hearing.

Petitioner is entitled to effective assistance of counsel on appellate review in a PCR action and may pursue a claim for ineffective assistance of counsel for failing to seek review of a PCR order. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). A PCR applicant is entitled to an *Austin* review of a prior PCR order if there is an affirmative finding that the applicant either: (1) requested and was denied an opportunity to seek appellate review of the prior PCR order; or (2) did not knowingly and intelligently waive the right to appellate review of the prior PCR order. *King v. State*, 308 S.C. 348, 417 S.E.2d 868 (1992).

Because he has alleged ineffective assistance of prior PCR counsel in failing to seek appellate review of the prior PCR order, petitioner is entitled to an evidentiary hearing after which the PCR judge must determine whether petitioner is entitled to an *Austin* review of the prior PCR order. Accordingly, we remand this matter to the PCR judge to conduct an evidentiary hearing on petitioner's 2010 PCR application.

REMANDED.

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ.,
concur.**

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Ernest Battle, #165247,)
Applicant,)
vs.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS

2010-CP-10-8516

CONSENT ORDER GRANTING AN
APPEAL PURSUANT TO AUSTIN V. STATE

FILED
2013 JUL 23 AM 10:31
JULIE H. STRONG
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 12, 2010.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment by the Charleston County Clerk of Court. The Applicant was indicted during the November 1999 term of the Charleston County Grand Jury for trafficking cocaine 28-100 grams, third offense (1999-GS-10-7109), possession with intent to distribute cocaine within the proximity of a school (1999-GS-10-7110), and conspiracy to violate South Carolina drug laws (1999-GS-10-7111).

The Applicant proceeded to trial and was convicted of trafficking cocaine and possession with intent to distribute cocaine within the proximity of a school. The conspiracy charged was *nolle prossed* pursuant to the Applicant's directed verdict motion at trial. The Honorable T. L. Hughston sentenced the Applicant to confinement for twenty-five (25) years with a \$50,000 fine for trafficking cocaine and for ten (10) years with a \$10,000 fine for possession with intent to distribute within the proximity of the school.

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The Applicant filed a timely Notice of Appeal. The Applicant's appeal was dismissed by the South Carolina Court of Appeals on May 20, 2003. The Applicant petitioned for rehearing which was denied by the Court of Appeals on June 26, 2003. The Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court which was denied on February 5, 2004. The Remittitur was issued on February 9, 2004.

The Applicant filed his first application for post-conviction relief on September 10, 2004 (2004-CP-10-3794). The Applicant was represented by Rad Deaton, Esquire. By Order dated July 5, 2006, the Honorable William P. Keesley granted the Applicant's application for post-conviction relief on the ground that counsel was ineffective for failing to object to the judge's charge on reasonable doubt and circumstantial evidence. The Court denied and dismissed the remaining allegations in the Applicant's application.

The State of South Carolina filed a timely Notice of Appeal. After full briefing by both sides, the post-conviction relief court's granting of the Applicant's post-conviction relief application was reversed and the Applicant's convictions and sentences were affirmed.

The Applicant filed a second application for post-conviction relief on October 12, 2010 (2010-CP-10-8516). The Applicant alleged his post-conviction relief counsel failed to timely cross-appeal on the allegations that were denied and dismissed by the post-conviction relief court. The State filed a Return and Motion to Dismiss the application as successive and untimely. The application was summarily dismissed by the Honorable Kristi L. Harrington by Order dated April 4, 2012.

The Applicant filed a timely Notice of Appeal. The South Carolina Supreme Court granted the Applicant's Petition for Writ of Certiorari, dispensed with further briefing and

remanded the matter to the lower court for an evidentiary hearing to determine whether the Applicant is entitled to an Austin review of the prior PCR order.

The 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 their application.

After review of the facts and circumstances surrounding the waiver of the Applicant's right to cross-appeal the denial of allegations in the Applicant's post-conviction relief application, the parties below have consented to the granting of an appeal pursuant to Austin v. State of the Applicant's first post-conviction relief application (2004-CP-10-3794). While the Applicant's application for post-conviction relief was originally granted on a limited issue, the parties agree that the Applicant did not voluntarily waive his right to appeal the post-conviction relief court's denial and dismissal of the Applicant's remaining issues. PCR counsel for the Applicant has indicated the Applicant expressed a desire to cross-appeal his first application for post-conviction relief and that he failed to file a timely Notice of Appeal of the application.

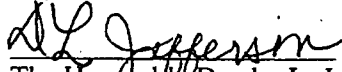
Based upon the foregoing, this Court finds that the granting of an appeal of the Applicant's first PCR (2004-CP-10-3794) pursuant to Austin v. State is warranted. It is appearing the below listed individuals all consent to the granting of a PCR appeal in this matter.

IT IS THEREFORE ORDERED:

1. That the Applicant remain in the custody of the South Carolina Department of Corrections and/or the South Carolina Parole and Community Corrections Department if under the supervision of either agency; and
2. That the Applicant be granted an appeal of case #2004-CP-10-3794 pursuant to Austin v. State.

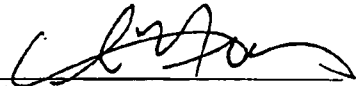
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AND IT IS SO ORDERED this 22nd day of July, 2013.


The Honorable Deadra L. Jefferson
Presiding Judge
9th Judicial Circuit

Charleston, South Carolina.

I CONSENT:


Christopher L. Murphy, Esquire
Attorney for Applicant


Ernest Battle, Applicant


Ashleigh Wilson, Esquire
Assistant Attorney General
Attorney for Respondent

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FILED
JUL 18 2013

JUL 26 2013