

# The Supreme Court of South Carolina

Antwan Wade,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Paul M. Burch  
York County  
Trial Court Case No. 2010-CP-46-00688

---

## ORDER

---

For good cause shown, the request for an extension until April 18, 2012 to serve and file the Petition for Writ of Certiorari and Appendix in this matter is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what measures are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

March 20, 2012

cc: Appellate Defender Dayne C. Phillips  
Assistant Attorney General Harrison D. Brant

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to York County  
Paul M. Burch, Circuit Court Judge

---

RECEIVED

MAR 19 2012

S.C. Supreme Court  
PETITIONER,

ANTWAN WADE,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

MOTION FOR AN EXTENSION OF TIME  
IN WHICH TO FILE THE PETITION FOR WRIT OF  
CERTIORARI AND APPENDIX

---

(3)

Counsel for Antwan Wade respectfully requests an extension of a **final** thirty (30) days in which to file the petition for writ of certiorari and appendix in this case. This motion is made pursuant to the Order of the South Carolina Supreme Court dated March 18, 2009. This is a third request for an extension. In support of this request, counsel shows:

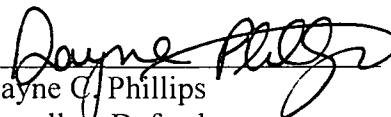
1. The petition for writ of certiorari and appendix is due to be served and filed with the Court today, March 19, 2012.
2. Counsel for Mr. Wade respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage his caseload, counsel hopes that no further extension requests will be required.
3. Counsel will be filing the petition for writ of certiorari and appendix in Cedric Perkins v. State on today. On March 13, 2012 counsel filed the petition for writ of certiorari and appendix

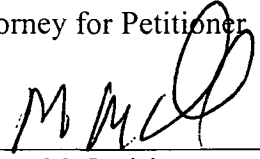
in Billy S. Tucker v. State. On March 6, 2012, counsel filed the petition for writ of certiorari and appendix in Victor Brown v. State. On February 16, 2012 counsel filed the petition for writ of certiorari and appendix in William Head v. State. On February 13, 2012 counsel had an oral argument in State v. Adrian Eaglin. On February 8, 2012 counsel filed the initial brief of appellant and designation of matter in Robert Lee Banks v. State. On February 2, 2012 counsel filed the initial brief of appellant and designation of matter in Dan Williams v. State.

4. Counsel makes this request in good faith and not for purpose of delay.
5. As indicated by signature below, J. Rutledge Johnson, of the South Carolina Attorney General's Office, does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a **final** thirty day extension, in which to file the petition for writ of certiorari and appendix in this case based upon the above exigent circumstances. Counsel requests that time limits for filing the petition be held in abeyance pending a ruling on this motion.

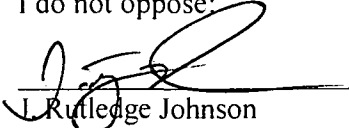
Respectfully submitted,

  
Dayne C. Phillips  
Appellate Defender  
Attorney for Petitioner

  
Robert M. Dudek  
Chief Appellate Defender

March 19, 2012

I do not oppose:

  
J. Rutledge Johnson

# The Supreme Court of South Carolina

Antwan Wade, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Paul M. Burch  
York County  
Trial Court Case No. 2010-CP-46-00688

---

## ORDER

---

For good cause shown, the request for an extension until March 19, 2012 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Brenda J. Shealy*  
Clerk

Columbia, South Carolina *Chief Deputy*

February 17, 2012

cc: Appellate Defender Dayne C. Phillips  
Assistant Attorney General Harrison D. Brant

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to York County  
Paul M. Burch, Circuit Court Judge

---

ANTWAN WADE,

PETITIONER, **S.C. Supreme Court**

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

MOTION FOR AN EXTENSION OF TIME  
IN WHICH TO FILE THE PETITION FOR WRIT OF  
CERTIORARI AND APPENDIX

---

**ORIGINAL**

**RECEIVED**

FEB 16 2012

(2)

Counsel for Antwan Wade respectfully requests an extension of thirty (30) days in which to file the petition for writ of certiorari and appendix in this case. This motion is made pursuant to the Order of the South Carolina Supreme Court dated March 18, 2009. This is a second request for an extension. In support of this request, counsel shows:

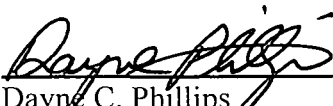
1. The petition for writ of certiorari and appendix is due to be served and filed with the Court today, February 16, 2012.
2. Counsel for Mr. Wade respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage his caseload, counsel hopes that no further extension requests will be required.
3. Today, counsel will be filing the petition for writ of certiorari and appendix in William Head v. State. On February 13, 2012 counsel had an oral argument in State v. Adrian Eaglin.

On February 8, 2012 counsel filed the initial brief of appellant and designation of matter in Robert Lee Banks v. State. On February 2, 2012 counsel filed the initial brief of appellant and designation of matter in Dan Williams v. State. On January 26, 2012 counsel filed the petition for writ of certiorari and appendix in Joshua Manning v. State. On January 18, 2012 counsel filed the petition for writ of certiorari and appendix in Jeffrey Higgins v. State. On January 17, 2012 counsel filed the petitions for writ of certiorari and appendices in Billy James Lupo v. State and Stanley O. Williams v. State. On January 9, 2012 counsel filed the petitions for writ of certiorari and appendices in Joseph Samuel Whitt v. State and Edward Thompson v. State. On January 5, 2012 counsel filed the petition for rehearing in State v. Bradley Scott Senter. On January 3, 2012 counsel filed the petition for writ of certiorari and appendix in Willie James v. State.

4. Counsel makes this request in good faith and not for purpose of delay.
5. Counsel for the Attorney General's office has been informed of this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension, in which to file the petition for writ of certiorari and appendix in this case based upon the above exigent circumstances. Counsel requests that time limits for filing the petition be held in abeyance pending a ruling on this motion.

Respectfully submitted,

  
Dayne C. Phillips  
Appellate Defender

Attorney for Petitioner

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to York County  
Paul M. Burch, Circuit Court Judge

---

ANTWAN WADE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

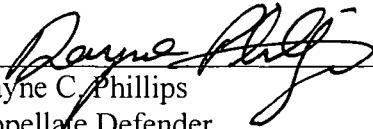
RESPONDENT

---

CERTIFICATE OF SERVICE

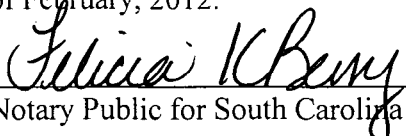
---

I certify that a true copy of the motion for an extension of time in which to file the petition for writ of certiorari and appendix in the above case has been served upon J. Rutledge Johnson, Esquire, this 16<sup>th</sup> day of February, 2012.

  
Dayne C. Phillips  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16<sup>th</sup> day  
of February, 2012.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: June 21, 2020.

# The Supreme Court of South Carolina

Antwan Wade,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Paul M. Burch  
York County  
Trial Court Case No. 2010-CP-46-00688

---

## ORDER

---

The request for an extension until February 16, 2012 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Lrenda J. Shealy*  
Clerk

*Chief Deputy*  
Columbia, South Carolina

January 18, 2012

cc: Appellate Defender Dayne C. Phillips  
Assistant Attorney General Harrison D. Brant



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

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

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

January 17, 2012

RECEIVED

JAN 17 2012

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

S.C. Supreme Court

Re: Antwan Wade v. State of South Carolina


Dear Mr. Shearouse:

The petition for writ of certiorari and appendix in the above-referenced case are due to be served and filed today. Because of my present workload, I respectfully request a thirty-day extension of this deadline. No prior extensions have been requested in this case.

By copy of this letter to Assistant Attorney General Harrison Brant, I am informing him of this request.

Thank you for your assistance in this matter.

Sincerely,

  
Dayne C. Phillips  
Assistant Appellate Defender

DCP/fkb

cc: Harrison Brant, Esquire



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

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

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

November 17, 2011

RECEIVED

NOV 17 2011

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

S.C. Supreme Court

Dear Mr. Shearouse:

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

Antwan Wade v. State of South Carolina

11/17/2011

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

Thank you for your assistance in this matter.

Sincerely,

Sharon A. Graham  
Administrative Coordinator



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

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

September 12, 2011

RECEIVED

SEP 12 2011

Ms. Wanda S. Nelson  
Circuit Court Reporter  
1428 Dove Landing Road  
York, SC 29745

S.C. Supreme Court

Dear Ms. Nelson:

Please provide us with the following transcript:

Antwan Wade v. State of South Carolina                      Case #:                      10-CP-46-00688

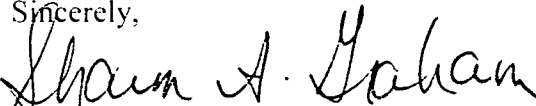
County: York    Date of Trial: February 1, 2011

Presiding Judge: Paul M. Burch

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,  
  
Sharon A. Graham  
Administrative Coordinator

cc: S.C. Supreme Court  
Attorney General's Office

# The Brooks Law Offices, LLC

---

**Charles T. Brooks, III**  
Attorney

309 Broad Street  
Sumter, South Carolina 29150  
Post Office Box 3512, Sumter, SC 29151  
Post Office Box 291226, Columbia, SC 29229  
OFFICE: (803) 418-5708  
FAX: (803) 934-9618 TOLL FREE: (877) 770-8792  
Email: [cbrooks@ctbrooks.com](mailto:cbrooks@ctbrooks.com)

**Irma R. Brooks**  
Attorney

July 25, 2011

South Carolina Supreme Court  
PO Box 11330  
Columbia, SC 29211

RE: Antwan Wade v State of South Carolina  
Case No. 2010-Cp-46-688

Dear Sir or Madam:

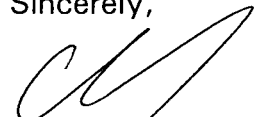
Enclosed herewith you will find the **Notice of Appeal, Order of Dismissal**, along with a **Proof of Service** in reference to the above named Applicant.

Also, please be advised that we only received this via email today after we requested it on behalf of the client.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,



Charles T. Brooks, III  
CTB/jlb

Enclosed as stated

Cc: Harrison D. Brant, Office of Attorney's General  
South Carolina Office of Appellate Defense  
Antwan Wade, 262442

**RECEIVED**

JUL 27 2011

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM YORK COUNTY  
Court of Common Pleas  
Honorable Paul M. Burch, Circuit Court Judge

---

Case No: 2010-CP-46-688

Antwan Wade, . . . . . Appellant  
S.C.D.C. No.: 262442


v.  
The State . . . . . Respondent

---

NOTICE OF APPEAL

Antwan Wade appeals his Denial for Post Conviction Relief in this case. The Order of Dismissal was imposed and signed by the Honorable Paul M. Burch, on April 4, 2011, which I, Charles T. Brooks, III, received on July 25, 2011.

July 25, 2011



---

Charles T. Brooks, III  
309 Broad Street  
Post Office Box 3512  
Sumter, South Carolina 29151  
(803) 418-5708  
Attorney for Appellant

Other Counsel on Record:  
Harrison D. Brant, Esquire  
Assistant Attorney General  
Post Office Box 11549  
Columbia, SC 29211-1549  
(803) 734-3970

RECEIVED

JUL 27 2011

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM YORK COUNTY  
Court of Common Pleas  
Honorable Paul M. Burch, Circuit Court Judge

---

Case No: 2010-CP-46-688

Antwan Wade.....Appellant  
S.C.D.C. No.: 262442

v.

The State.....Respondent

---

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 25<sup>th</sup> day of July, 2011, I served the foregoing Notice of Appeal, Order of Dismissal, as well as Proof of Service in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on July 25, 2011 addressed to the following as indicated below:


South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

South Carolina Office of Appellate Defense  
1330 Lady Street, Suite 401  
PO Box 11589  
Columbia, SC 29211-1589

Office of Attorney's General  
Attn: Harrison D. Brant, Esquire  
Post Office Box 11549  
Columbia, South Carolina 29211-1549

Antwan Wade, 262442  
McCormick Correctional Institution  
386 Redemption Way  
McCormick, South Carolina, 29899

Dated: July 25, 2011



---

Charles T. Brooks, III  
Attorney for the Appellant  
309 Broad Street  
Sumter, South Carolina 29150  
(803) 418-5708

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

COURT OF COMMON PLEAS

2010-CP-46-<sup>688</sup>~~1303~~

DAVID HAMILTON  
C.C.C.P. & GS  
YORK COUNTY, SC

2011 APR 27 PM 2: 10

FILED-RECEIVED

Antwan Wade, 262442,  
Applicant,  
v.  
State of South Carolina,  
Respondent.

ORDER OF DISMISSAL

This matter comes before this Court by way of an application for post-conviction relief filed February 17, 2010 and Amended Application containing eighteen (18) pages dated September 28, 2010. The State made return on June 30, 2010. An evidentiary hearing was convened on February 1, 2011, at the Moss Justice Center in York, South Carolina. The Applicant was present at the hearing and represented by Charles T. Brooks, III, Esquire. Assistant Deputy Attorney General Salley W. Elliott represented the Respondent.

Applicant and Erik D. Delaney, Esquire, testified at the hearing. This Court also had before it the application and amended application for post-conviction relief, the Respondent's return, records of the York County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate court documents referenced in the Respondent's return.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was

indicted at the November 2007 term of the York County Grand Jury for distribution of cocaine base (crack cocaine) – 3<sup>rd</sup> or subsequent offense (2007-GS-46-3940). Erik D. Delaney, Esquire, represented him. On January 9 – 10, 2008, Applicant underwent trial, pursuant to which he was found guilty as indicted. The Honorable Lee S. Alford sentenced him to confinement for a period of seventeen (17) 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. Wade, Op. No. 2010-UP-041 (S.C. Ct. App. filed January 26, 2010). The Remittitur was sent on February 17, 2010.

#### ALLEGATIONS

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

1. Ineffective assistance of counsel in that trial counsel failed to preserve for appeal the issue of improper bolstering of the confidential informant's testimony;
2. Ineffective assistance of trial counsel for counsel's failure to "suppress the evidence of the crack cocaine" based upon contradictions as to the number and weight of the drugs and the improper chain of custody;
3. Ineffective assistance of trial counsel for counsel's failure to move to dismiss on the ground of prosecutorial misconduct relating to the arrest warrant;
4. Ineffective assistance of trial counsel in that Applicant was forced to appear at his preliminary hearing without counsel;
5. Ineffective assistance of trial counsel for counsel's failure to move to dismiss the charge based upon the destruction of exculpatory evidence;
6. Ineffective assistance of trial counsel for counsel's failure to properly investigate, call witnesses, and request a continuance;

7. Ineffective assistance of trial counsel for counsel's failure to impeach State's witnesses with prior statements.
8. Denial of Equal Protection in that Applicant's race was not fairly represented by a fair cross-section of the community.

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

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

### **INEFFECTIVE ASSISTANCE OF COUNSEL**

At the evidentiary hearing the Applicant testified that he received ineffective assistance of trial counsel because his trial attorney failed to object when the prosecutor improperly bolstered the testimony of a State's witness and that he was sentenced under an incorrect statute which exposed him to a greater punishment. This Court finds Applicant's claims to be without merit.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance 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. For reasons set forth below, this Court finds that the Applicant's allegations respecting trial counsel are without merit.

This Court finds that the Applicant was represented by an experienced criminal practitioner who properly conferred with the Applicant. During conferences with the Applicant, counsel discussed the pending charge, the elements of the charge, the law applicable to the charge and issues relating to trial, the penalty, Applicant's constitutional rights, the evidence the State would have to present against Applicant at trial to establish guilt, Applicant's version of the facts, and possible defenses. This Court finds that Counsel also properly investigated the case in preparation for trial, including visits to the scene, and review of the State's file and all discovery material. Counsel made motions to reveal any

deals extended to the confidential informant, to exclude the testimony of a second confidential informant not timely disclosed, suppress evidence and testimony respecting two cigar tubes seized during the execution of a later search warrant and other bad act evidence and to exclude testimony of the law enforcement officer about the content of the missing audio tape. Counsel was aware of the evidence the State planned to present against Applicant at trial and engaged in a discussion with Applicant about the issues and law presented by the facts of the case. To the extent the Applicant contends counsel should have requested a continuance, this Court finds the issue to be without merit. Counsel was fully prepared for trial and had no reason to request a continuance. Moreover, the Applicant failed to show what other investigation or other matter could have been explored had a continuance been requested and granted. He also failed to present any evidence respecting defense witnesses that could have been offered to his benefit at trial. Accordingly, deficient performance and the requisite prejudice have not been established.

The Applicant elicited testimony from trial counsel respecting a missing audio tape, contending that counsel provided ineffective assistance for failing to move to dismiss the charge based upon the destruction of an audio tape of the drug transaction. This Court recognizes that due process requires that a criminal defendant be afforded a meaningful opportunity to present a complete defense, including the right to request and obtain from the prosecution evidence that is material to the guilt of the defendant or relevant to the punishment to be imposed. State v. Mabe, 306 S.C. 355, 358, 412 S.E.2d 386, 388 (1991), citing California v. Trombetta, 467 U.S. 479 (1984); State v. Jackson, 302 S.C. 313, 314, 396 S.E.2d 101, 101 (1990). However, the right is not absolute such that due process is violated any time evidence is destroyed or becomes unavailable before the defendant has an

opportunity to examine the evidence. “The state does not possess an absolute duty to preserve potentially useful evidence which could be subjected to tests which might exonerate a defendant.” State v. Mabe, 306 S.C. 355, 358, 412 S.E.2d 386, 388 (1991), citing Arizona v. Youngblood, 488 U.S. 51 (1988); see also State v. Hutton, 358 S.C. 622, 595 S.E.2d 876 (Ct. App. 2004); State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). “Furthermore, ‘[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect’s defense.’” State v. Hutton, 358 S.C. at 630, 595 S.E.2d at 881, citing Trombetta, 467 U.S. at 488.

“To establish a due process violation where the State failed to preserve evidence, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means.” Id. at 631, 595 S.E.2d at 881, citing State v. Cheeseboro, 346 S.C. 526, 538, 552 S.E.2d 300, 307 (2001); see also Arizona v. Youngblood, 488 U.S. 51 (1988). “[R]equiring a defendant to show bad faith on the part of the police” in order for the destruction of potentially useful evidence to constitute a denial of due process “both limits the extent of the police’s obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.” State v. Jackson at 315, 396 S.E.2d at 102, citing Arizona v. Youngblood.

This Court finds that the Applicant failed to establish a due process violation because the audio tape was unavailable to the defense and rejects the Applicant's claim that counsel's treatment of the issue constituted ineffective assistance of counsel. This Court finds that counsel was advised before trial that an audio tape of the drug transaction had been lost when it was reused in another drug enforcement matter involving a suspect with a similar name. Counsel investigated the circumstances surrounding the loss of the audio tape and determined the destruction of the audio tape was inadvertent and did not involve bad faith or intentional destruction on the part of law enforcement officials. Counsel testified that he did not discover any evidence to establish that the content of the audio tape was exculpatory. He also testified that, had the audiotape been available, it might have been detrimental to the Applicant's defense. However, because the audio tape was not available, counsel was able to use that fact to the Applicant's benefit at trial.

This Court finds the Applicant failed to present any evidence at the evidentiary hearing to establish animus on the part of the law enforcement officers toward the Applicant or of a conscious effort to destroy the audiotape as exculpatory evidence. See State v. Adams, 304 S.C. 302, 305, 403 S.E.2d 678, 680 (1991). Further, the Applicant failed in any way to demonstrate, in the alternative, that the audio tape had exculpatory value that was apparent before it was destroyed and that no other comparable evidence was available. The Applicant offers mere speculation. "Speculation about such things, our Supreme Court has held, will not do." State v. Adams, 304 S.C. 302, 305, 403 S.E.2d 678, 680 (1991) citing State v. Newton, 274 S.C. 287, 262 S.E.2d 960 (1980); see also State v. Hutton, at 632, 595 S.E.2d at 882 (defining exculpatory evidence as "evidence which creates a reasonable doubt about the defendant's guilt.").

Moreover, trial counsel was able to use the fact that the audio tape was unavailable to the Applicant's advantage at trial.

Because the Applicant failed to show bad faith on the part of law enforcement officers or, alternatively, that the missing evidence possessed exculpatory value apparent to officers before it was destroyed, the claim is without merit. There is no reasonable probability that a motion to dismiss based upon a due process violation would have been granted. The Applicant failed to establish that trial counsel's conduct in this regard was deficient or resulted in prejudice such that there is a reasonable probability the outcome of the trial would have been different. Therefore, the allegation must be denied and the application dismissed.

The Applicant also testified that he received ineffective assistance of counsel when trial counsel failed to preserve for appeal the issue of the prosecutor's alleged bolstering of the confidential informant's testimony. Improper bolstering occurs when a prosecutor places the prestige of the government behind a witness by making personal assurances of the veracity of the witness or where a prosecutor vouches for the veracity of a witness by indicating information not presented to the jury supports the testimony. State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001). However, when the defendant opens the door, the comment is not improper. Ellenburg v. State, 367 S.C. 66, 625 S.E.2d 224 (2006); see also Rules 608 (a)(2) and 801(d)(1), SCRE; State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991); State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981). When a party introduces evidence about a matter, the opposing party is entitled to explain it. State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984); State v. Beam, 336 S.C. 45, 518 S.E.2d 297 (Ct. App. 1999); State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998).

Counsel for the Applicant testified at the hearing that he was advised by the prosecutor on the eve of trial that the confidential informant had only then revealed that he made an earlier drug purchase from the Applicant and used the drugs in the Applicant's presence without law enforcement involvement or knowledge and in violation of the informant's agreement with law enforcement officers. The trial transcript reflects and counsel acknowledged a discussion with the trial judge and the prosecutor on the issue of opening the door to all information relating to the prior purchase from the Applicant and consumption of crack cocaine in the Applicant's presence if counsel questioned the informant about this violation of the agreement. Specifically, the record reflects that the informant breached his agreement with officers by going to the Applicant's home the night before the controlled drug transaction where the informant purchased crack cocaine from the Applicant and smoked it at the Applicant's home. The State indicated it did not intend to offer evidence of this matter but would do so if counsel opened the door by questioning the informant about this violation of the informant's agreement with officers. The trial court indicated that counsel could not ask the informant about using drugs in violation of the agreement without opening the door to all of the facts surrounding the incident. The trial court also indicated that counsel must assess the benefits of impeaching the informant and opening the door to a full presentation of the facts about the prior drug purchase and use. Counsel affirmed his understanding of the ramifications of questioning the informant about the matter. (Tr. p. 22 – 26).

Counsel testified at the evidentiary hearing that, based upon his experience, discussions with the Applicant, the results of his investigation and the demeanor and testimony of the confidential informant, a strategic decision was made to attack the

credibility of the informant through cross-examination about the informant's use of drugs in violation of the informant's agreement with law enforcement officers to reveal that the informant was acting as a rogue informant who failed to follow the directions and agreements with officers. During cross-examination of the confidential informant, counsel for the Applicant questioned the informant about use of drugs while working for law enforcement officers in violation of the agreement. (Tr. p. 158 – 159). The informant denied the drug use. A discussion out of the jury's presence ensued during which the prosecutor explained that she cautioned the informant not to disclose the fact that he smoked crack at the Applicant's house the night before the controlled buy to avoid the inadvertent disclosure of improper evidence. The prosecutor explained that her conversation must have confused the informant. The trial court ruled the informant could answer the question about the prior incident and explain the reason for his initial answer denying the drug use. On cross-examination by counsel for the Applicant, the informant explained that he went to the Applicant's house, purchased crack cocaine, and smoked it in Applicant's presence a night or two before the incident resulting in the charge. Counsel cross-examined the informant extensively about the incident, the informant's failure to disclose the incident to officers, the informant's motive, and the informant's veracity.

On redirect examination, the prosecutor elicited testimony from the informant about her instructions concerning the prior purchase and use in the Applicant's home. The informant also explained that the reason for the earlier purchase was to enable him to gain the Applicant's trust for the later controlled buy that would involve law enforcement officers.

Counsel testified at the evidentiary hearing that the informant was greatly

discredited through counsel's cross-examination. Counsel also testified that he could have objected when the prosecutor rehabilitated the informant by eliciting information about her instructions to him but that the objection would not have been successful because the trial judge had already ruled the rehabilitation proper. (Tr. 162). Counsel's action in engaging in cross-examination of the informant about the prior drug purchase and use in violation of the agreement and opening the door to the questions the Applicant now claims were objectionable was based upon reasonable trial strategy. See Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000).

This court finds that improper bolstering did not occur in this case because the Applicant opened the door to the rehabilitative testimony. For that reason, there was no valid basis for objection and the issue would not have been meritorious on appeal. Ellenburg v. State, 367 S.C. 66, 625 S.E.2d 224 (2006). The issue would not have been successful on appeal for the additional reason that a party who opens the door to admission of evidence cannot complain of its admission on appeal. State v. White, 361 S.C. 407, 605 S.E.2d 540 (2004).

This Court notes the Applicant raised the improper bolstering issue on appeal to the South Carolina Court of Appeals. While the opinion dismissing the Applicant's appeal referenced the Court's inability to consider an issue not properly preserved for appellate review, it also recited State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984), for the proposition that a party is entitled to present evidence of explanation or rebuttal in response to an opposing party's evidence even where the explanation or rebuttal might otherwise have been incompetent had it been offered initially. Clearly, the issue was not meritorious for appeal.

This Court finds that counsel's failure to object for the purpose of preserving the bolstering issue for appeal did not constitute deficient performance and did not result in the requisite prejudice to the Applicant.

The Applicant also complained that trial counsel provided ineffective assistance for failing to move to suppress the drug evidence on because of discrepancies in the number of rocks of crack cocaine and weight involved. Counsel testified that he investigated the facts surrounding the number of rocks and weight involved and discovered no ground for dismissal but used the discrepancy to the Applicant's advantage at trial. This Court agrees and finds trial counsel's treatment of the discrepancies to be a reasonable trial strategy based upon counsel's investigation, knowledge of the facts, and discussions with the Applicant.

The Applicant further complained that he did not have counsel to assist at his preliminary hearing. Trial counsel testified that he was not appointed to represent the Applicant until after the preliminary hearing was held. The Court also finds that the Applicant failed to establish any prejudice resulting from his appearance without counsel and that the issue is without merit.

The Applicant alleged in his application that counsel provided ineffective assistance when he failed to move to dismiss the charge on the ground of prosecutorial misconduct and when he failed to impeach State's witnesses. However, this Court finds the Applicant failed to establish that any prosecutorial misconduct occurred or what impeachment questions counsel should have asked in addition to those posed at trial. Accordingly, the issues are without merit.

Lastly, the Applicant contended that he received ineffective assistance of counsel for counsel's failure to object when the trial court sentenced the Applicant using an incorrect statute. The Applicant asserted that his sentence was greater than permitted because he was sentenced pursuant to S.C. Code Ann. Section 44-53-375 (B) rather than Section 44-53-375 (A). This Court finds the issue to be completely without merit. The Applicant was indicted for distribution of crack cocaine in violation of S.C. Code Ann. Section 44-53-375. Specifically, the indictment charged that the Applicant "did distribute, dispense, deliver a quantity of crack cocaine . . . ." This charging language is consistent with the sentencing provisions of 44-53-375(B) pursuant to which the Applicant was actually sentenced. S.C. Code Ann. Section 44-53-375 (B) proscribes the act of distribution and the statutory provision the Applicant claims should have been used for sentencing proscribes the act of possession. The Applicant was charged with and convicted of distribution of crack cocaine and not possession. The allegation is without merit.

#### **DENIAL OF EQUAL PROTECTION**

Lastly, Applicant asserts that he was denied Equal Protection because his jury did not represent a fair cross-section of the community. This Court finds the claim is a direct appeal issue that is procedurally barred from post-conviction relief by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue at trial or on appeal. Therefore, it is not cognizable for post-conviction relief and is denied and dismissed.

## CONCLUSION

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

This Court advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf.

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 4<sup>th</sup> day of April, 2011.



Paul M. Burch.  
Presiding Judge  
Sixteenth Judicial Circuit

Pageland, South Carolina

**Josie Ball**

---

**From:** Josie Ball  
**Sent:** Friday, July 22, 2011 3:14 PM  
**To:** 'Harrison Brant'  
**Subject:** PCR Antwon Wade 2010 CP 46 0688

Mr. Brant, do you have the final order on this PCR yet. Hearing was on February 1, 2011. York County. Client is calling inquiring about it.

Jo

**Josie Ball**

---

**From:** Harrison Brant [HBrant@scag.gov]  
**Sent:** Monday, July 25, 2011 11:28 AM  
**To:** Josie Ball  
**Subject:** Re: PCR Antwon Wade 2010 CP 46 0688  
**Attachments:** 59713\_1.PDF

Josie,

I have attached a copy of the order that we received. Let me know if you need anything else.

Harrison

CHARLES T. BROOKS, III  
THE BROOKS' LAW OFFICES, LLC  
309 BROAD STREET  
POST OFFICE BOX 3512  
SUMTER, SOUTH CAROLINA, 29151

*Antwan  
Wade*

South Carolina Supreme Court  
PO Box 11330  
Columbia, SC 29211

