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**MACPHAIL LAW FIRM, LLC**

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March 5, 2014

**RECEIVED**

MAR 11 2014

**S.C. SUPREME COURT**

Clerk of Court  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

RE: Noel Michael Lyles, #174105 v. State of South Carolina  
2012-CP-42-1955

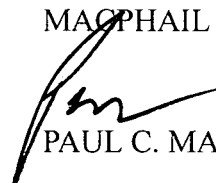
Dear Clerk:

Please find enclosed a Notice of Appeal in the above referenced matter for filing, along with a certificate of service. By copy of this letter, I am serving notice of this filing to opposing counsel. I am also enclosing a copy of the order appealed from.

Mr. Lyles is indigent. I am forwarding his file to SC Indigent Defense for further representation. I would request on Mr. Lyles' behalf that all filing fees and court costs be waived.

With kind regards, I am

Sincerely Yours,  
MACPHAIL LAW FIRM, LLC

  
PAUL C. MACPHAIL

/pcm  
Enclosures

CC: SC Attorney General's Office  
Client  
SC Indigent Defense

NOTICE OF INTENT TO APPEAL

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY

COURT OF COMMON PLEAS

HONORABLE R. LAWTON MCINTOSH

CASE NO. 2012-CP-42-1955

**RECEIVED**

MAR 11 2014

**S.C. SUPREME COURT**

IN RE:

Noel Michael Lyles, #174105.....Applicant

v.

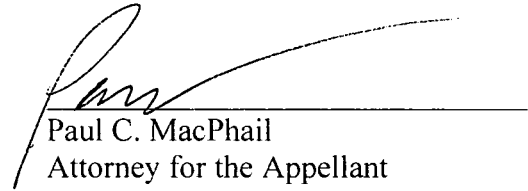
State of South Carolina.....Respondent

Of Whom

Noel Michael Lyles, #174105..... Appellant

NOTICE OF APPEAL

Appellant appeals from the order of dismissal of the Honorable R. Lawton McIntosh clocked of record January 9, 2014 and received by the undersigned attorney on January 14, 2014. A Motion to Alter or Amend Judgment was filed on January 17, 2014. An order dismissing the Appellant's Motion to Alter or Amend Judgment was filed on February 14, 2014, and received by the undersigned attorney by hand-delivery from the Clerk of Court on March 5, 2014.



Paul C. MacPhail  
Attorney for the Appellant  
P.O. Box 6321  
Spartanburg, SC 29304

March 7, 2014  
Spartanburg, South Carolina

NOTICE TO CLERK OF COURT: Notify S.C. court administration immediately upon receipt of this Notice of Appeal, so that the Court Reporter may be directed to prepare the transcript.

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

IN THE FAMILY COURT

CASE NO.: 2012-CP-42-1955

Noel Michael Lyles, #174105,

Plaintiff,

vs.

State of South Carolina,

Defendant.

**CERTIFICATE OF SERVICE**

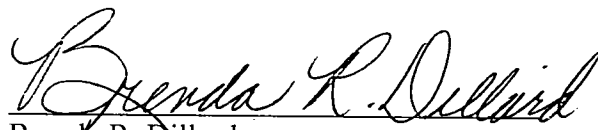
PERSONALLY appeared before me the undersigned, who, being duly sworn, states that she is employed in the law office of Paul C. MacPhail, P. O. Box 6321, Spartanburg, SC 29304, and she is a person of such age and discretion as to be competent to serve papers.

That on **March 7, 2014**, she mailed a copy of the **Notice of Intent To Appeal and Memorandum** in the above-captioned case by placing same in a postpaid envelope, addressed to the person hereinafter named, at the place and address stated below, by depositing said envelope and contents in the United States Mail at Spartanburg, South Carolina.

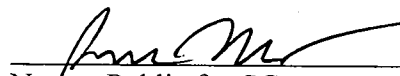
Clerk of Court  
Supreme Court of South Carolina  
P. O. Box 11330  
Columbia, SC 29211

State of South Carolina  
Office of the Attorney General  
Attn: Suzanne White  
Post Office Drawer 11549  
Columbia, South Carolina 29211

The Honorable R. Lawton McIntosh  
P. O. Box 8002  
Anderson, South Carolina 29622

  
Brenda R. Dillard

SWORN to before me this 7  
day of March, 2014

  
Notary Public for SC  
My commission expires 11/25/2019

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SPARTANBURG )  
 )  
Noel Michael Lyles, )  
SCDC No. 174105, )  
Applicant, )  
v. )  
 )  
State of South Carolina, )  
Respondent )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

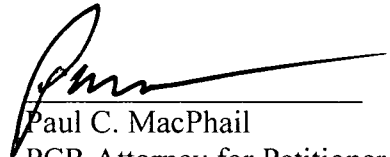
CASE NO.  
2012-CP-42-1955

MEMORANDUM

FOR APPEAL OF  
ORDER DISMISSING PCR

Mr. Lyles argues that the PCR court erred in determining that the ineffective assistance of his counsel, and resulting prejudice, was not sufficient cause to grant Petitioner's Application for PCR under the precedent set by Lounds v. State, 380 S.C. 454 (2008) and such other case law as appellate counsel may identify and cite. Further, Mr. Lyles reserves the right to submit further issues for appeal upon advice of appellate counsel. Mr. Lyles requests that the trial court's decision be reversed, and that the relief sought in his PCR application be granted.

MACPHAIL LAW FIRM, LLC

  
\_\_\_\_\_  
Paul C. MacPhail  
PCR Attorney for Petitioner  
P.O. Box 6321  
Spartanburg, SC 29304

March 5, 2014  
Spartanburg, South Carolina

AM

STATE OF SOUTH CAROLINA )  
 COUNTY OF SPARTANBURG )  
 Noel Michael Lyles, #174105. )  
 Applicant, )  
 vs. )  
 State of South Carolina, )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 SEVENTH JUDICIAL CIRCUIT

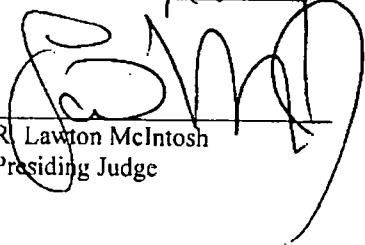
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**ORDER**

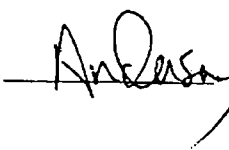
This matter comes before the Court by way of Applicant's Motion for Reconsideration pursuant to Rule 59(e), SCRPC. The Respondent made its Return to this response on February 4, 2014.

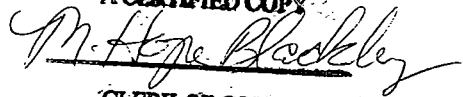
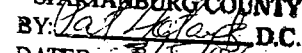
The Order of Dismissal in this matter was signed by me on January 6, 2014. Based upon careful reconsideration of all the evidence in this case and upon full consideration of Applicant's response and objections, this Court is not persuaded to alter or amend the judgment. This Court further finds that oral argument would not aid in the reconsideration of the original judgment. Therefore, this Court finds that the Order of Dismissal, which was signed on January 6, 2014, shall stand as it was written.

AND IT IS SO ORDERED this 7 day of February, 2014.

  
 R. Lawton McIntosh  
 Presiding Judge

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 South Carolina

A CERTIFIED COPY  
  
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 BY:  D.C.  
 DATED 3/5/14

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STATE OF SOUTH CAROLINA )  
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 COUNTY OF SPARTANBURG )  
 )  
 Noel Michael Lyles, #174105, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 SEVENTH JUDICIAL CIRCUIT

2012-CP-42-1955

**ORDER OF DISMISSAL**

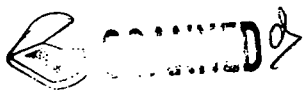
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This matter comes before this court by way of an application for post-conviction relief filed on May 8, 2012. The Respondent filed its Return on September 11, 2012. An evidentiary hearing into the matter was convened on April 5, 2013, at the Spartanburg County Courthouse. The Applicant was present and represented by Paul C. MacPhail, Esquire. Suzanne H. White, Esquire, represented the Respondent, State of South Carolina.

At the hearing, the Applicant testified on his own behalf. Kathleen Hodges, Esquire, and J. Roger Poole, Esquire, both testified on Respondent's behalf. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, the trial transcript, Applicant's exhibits and memoranda provided by both parties.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the May 2009 term of the Spartanburg County Grand Jury for armed robbery and kidnapping (09-GS-42-2199, count 1 and 2), assault and battery of a high and aggravated nature



(09-GS-42-2200) and grand larceny (09-GS-42-2201). He was represented by J. Roger Poole, Esquire and Kathleen J. Hodges, Esquire at trial. On November 9, 2009, the Applicant proceeded to trial after which a jury found him guilty of armed robbery, assault and battery of a high and aggravated nature, and grand larceny. The jury returned a verdict of not guilty on the kidnapping charge. He was sentenced by the Honorable J. Derham Cole to confinement for life without parole for armed robbery, a concurrent ten (10) years for assault and battery of a high and aggravated nature, and a consecutive five (5) years for grand larceny.

A timely Notice of Appeal and Anders brief were filed on Applicant's behalf. He was represented by Wanda H. Carter on appeal. The South Carolina Court of Appeals dismissed Applicant's appeal. State v. Lyles, Op. No. 2012-UP-190 (filed March 14, 2012). The Remittitur was submitted on March 30, 2012.

### ALLEGATIONS

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

1. Ineffective assistance of trial counsel, in that;
  - a. Counsel failed to "ask for continuance to prepare for trial."
  - b. Counsel failed to adequately prepare for trial, in that;
    - i. Counsel failed to meet with Applicant in a timely manner, investigate, or "present motion of discovery in a timely manner."
  - c. Counsel failed to notify Applicant of kidnapping charge, challenge the sufficiency of the kidnapping indictment prior to trial or make a motion for a continuance due to short notice of kidnapping charge;
  - d. Counsel engaged in a conflict of interest by continuing to represent Applicant despite

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- Applicant's request to have alternate counsel appointed.<sup>1</sup>
- e. Counsel failed to challenge first most serious conviction based on aggravating circumstances.
2. Ineffective assistance of appellate counsel, in that;
    - a. Appellate counsel failed to "submit correct argument of identification on appeal."
  3. Chain of custody was violated, in that;
    - a. There were "discrepancies of testimony of investigators Williams and Bryant."
    - b. "I.D. investigator Nix failed under S.C. Code Ann. § 16-3-1535 to implement itemized list of property for use of evidence for trial."
  4. Violation of the Eighth Amendment, in that;
    - a. Trial judge failed to consider relevant mitigating evidence during sentencing.
    - b. Trial judge failed to instruct jury that latest offense was not a repetitive offense.
    - c. Trial judge and counsel failed to instruct jury that upon conviction Applicant would receive a life sentence without parole.

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### FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

#### Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e),

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<sup>1</sup> Applicant asked trial judge to remove Mr. Poole as counsel and requested that Kathy Hodges represent him instead. Initially, the court denied this request, but prior to the commencement of trial, Kathy Hodges agreed to assist in Applicant's defense alongside Mr. Poole.

SCRCF). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

*Failure to move for a continuance to prepare for trial and  
Failure to adequately investigate and prepare for trial and failure to meet with Applicant in a  
timely manner and present discovery materials in a timely manner*

Both the Applicant and Poole testified that Poole first met with the Applicant the Friday before Applicant's trial was set to begin the next Monday. Applicant had been arrested on the charges in March 2009 and the trial was to begin on November 9, 2009. Applicant testified that

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he was not aware that he had an attorney until he received the notice that the State intended to seek life without parole in October and the trial was set for November. Applicant testified that at the beginning of trial, Applicant expressed concern over his lack of meetings with Poole and wanted another attorney to represent him. Poole indicated to the court that he had reviewed discovery materials and was not aware of any additional witnesses that should be called. Applicant testified that Poole never made a motion for a continuance to have more time to prepare, never interviewed the witnesses from the car wash, never talked with the Solicitor's office about a possible plea bargain, and never subpoenaed the victim's medical records to either impeach the victim's alleged timeline nor to verify her medical condition.

The Applicant testified that although he tried desperately to relieve Poole, the trial court denied the Applicant's request to relieve Poole and proceed *pro se*. However, because of the apparent conflict between the Applicant and Mr. Poole, the trial court recessed from Monday, November 9<sup>th</sup>, until Thursday, November 12<sup>th</sup>. During that time, the court also appointed Kathleen Hodges, at Applicant's request, to assist in representing Applicant at trial. On November 12<sup>th</sup>, Hodges indicated to the court that she was prepared to proceed with the trial, fully understood the legal issues in the case and the issues Applicant had, and the only thing that more time would offer is the chance to be more concrete with the facts of the case. However, Mr. Poole was still present to assist Mrs. Hodges.

At the hearing, Poole testified that he had previously handled cases as serious as death penalty cases. Poole testified that although he did not meet with the Applicant until the Friday before trial, he had prepared for trial. This preparation included reviewing all discovery materials, including the lengthy witness statements. Poole testified that he met with the Applicant, reviewed the elements of each charge and discussed Applicant's understanding of

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what each witness would offer. However Poole acknowledged that he did not conduct an independent investigation, did not visit the scene of the crime, and did not interview any witnesses.

The Applicant testified that Hodges never requested a motion for continuance in order to prepare more for the trial. Hodges testified that she never considered filing a motion for continuance at that time because she did feel prepared to represent Applicant at trial. Hodges testified that she had subpoenaed someone independently after reviewing the case file and discovery materials, but was not aware of any other witnesses that Applicant wanted called. Hodges also testified that she had discussed the case with Applicant and Mr. Poole and received and reviewed all discovery materials. The record reflects that Hodges made several pre-trial motions on Applicant's behalf, including a motion for a change of venue based upon publicity related to a separate incident, and a request for a Neil v. Biggers hearing regarding the photo line-up identification of Applicant. Applicant introduced two documents and explained how he believed his attorneys should have investigated further based upon their content. Exhibit #1, an affidavit, and Exhibit #2, the investigative report. Also, Applicant testified that that SLED should have been involved in the investigation of the case since one of the victims was an Officer's wife.

Hodges also testified that she met with the Applicant several times prior to trial and discussed concerns regarding identifications and publicity from a separate incident. Hodges also testified that she was not informed of any potential witnesses by Applicant, but instead subpoenaed a witness on her own following review of the case file. Hodges also testified that Poole was able to assist her during cross-examination by pointing out various inconsistencies in

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witness statements and testimony. Hodges testified that she was prepared for trial and only believed that she could have possibly done additional research had she had more time to prepare.

In this case, the Applicant was accused of stealing a truck, assaulting a woman and stealing personal items while driving the stolen truck, and then being arrested in possession of the stolen truck and items. Applicant was identified through a photo line-up by the two victims as the person who robbed each of them. Additionally, the Applicant was arrested driving the truck stolen from one of the victims, with items in the truck that belonged to the second victim. The two witnesses who saw Applicant robbing and assaulting the second victim also identified Applicant. The second victim was able to recall the license tag number of the vehicle that was being driven by the man who attacked her. Finally, the passenger in the stolen truck identified the Applicant as the person in the truck who attempted to sell several rings to him. The jury found the Applicant guilty of armed robbery, assault and battery of a high and aggravated nature, and grand larceny over \$5,000. The jury acquitted Applicant of the kidnapping charge. The deliberations took only approximately two hours.

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To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Furthermore, the "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from counsel's

alleged lack of time to prepare. United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990).

This Court finds that Applicant failed to establish that had his attorneys taken different actions or had more time to prepare, the outcome of his trial would have been any different. Applicant did not allege that there were additional witnesses that should have been interviewed or subpoenaed for trial. In fact, other than subpoenaing the medical records of the victim, doing an independent investigation or demanding a SLED investigation, Applicant offered no witnesses that should have been called, defenses that could have been developed, or information that would have assisted at trial that either Counsel failed to obtain because of the lack of preparation time or investigation. All witnesses and their statements were known to his counsel prior to trial based upon the discovery responses from the State. The Applicant failed to demonstrate how the information in the documents introduced would have affected the outcome of the case.

By his own admission, Poole's late entry into the case, failure to independently investigate the case and failure to question witnesses is deficient. However, after hearing the testimony and reviewing both parties' memoranda, this Court finds that although there was deficient conduct on behalf of Counsel, there was no evidence of prejudice to the Applicant. Applicant offered no witnesses or specific testimony to show how additional preparation would have resulted in a different outcome or that he would have had a defense if he had had additional time to prepare for trial. Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); See Skeen v. State, 325S.C. 210, 481 S.E.2d 129 (1997)(where PCR applicant fails to establish what evidence he could have procured had counsel moved for a continuance, he fails to establish how he was prejudiced by counsel's incomplete preparation); Kibler v. State, 267 S.C. 250, 227

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S.E.2d 199 (1976)(Court will not speculate concerning what might have occurred if counsel had conducted further investigation).

Further, this Court finds that because of the overwhelming evidence of guilt, there was no prejudice. “[N]o prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt. Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010) (citing Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009)). Therefore, this claim is denied and dismissed.

*Failure to notify Applicant of kidnapping charge, challenge the sufficiency of the kidnapping indictment prior to trial or make a motion for a continuance due to short notice of kidnapping charge*

The Applicant testified that Poole failed to notify Applicant of the indictments, including the kidnapping charge. However, Poole testified that he did not recall Applicant indicating that he was surprised when they discussed the kidnapping charge. The jury ultimately acquitted Applicant of the kidnapping charge. This Court finds that this allegation lacks merit. This Court finds the Applicant's testimony to lack credibility, in particular when Applicant was aware of the intent to seek life without parole in October. This Court finds Poole's testimony that he reviewed all charges and the required elements of each charge with the Applicant prior to trial to be credible. Therefore, this claim is denied and dismissed.

*Operated under a conflict of interest when continued to represent Applicant despite Applicant's request to have alternate counsel appointed.<sup>2</sup>*

As discussed earlier, Applicant was represented by two attorneys at his trial, Kathleen Hodges and J. Roger Poole. As the record and testimony reflected, Mr. Poole first met with the Applicant the Friday before his trial was set to begin the next Monday. Applicant had been

<sup>2</sup> Applicant asked trial judge to remove Mr. Poole as counsel and requested that Kathy Hodges represent him instead. Initially, the court denied this request, but prior to the commencement of trial, Kathy Hodges agreed to assist in Applicant's defense alongside Mr. Poole.

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arrested on the charges in March 2009 and the trial was to begin on November 9, 2009. At the beginning of trial, after Applicant expressed concern over his lack of meetings with Poole, Poole indicated to the court that he had reviewed discovery materials and was not aware of any additional witnesses that should be called. However, because of the apparent conflict between the Applicant and Mr. Poole, the trial court recessed from Monday, November 9<sup>th</sup>, until Thursday, November 12<sup>th</sup>.

During that time, the court also appointed Kathleen Hodges, at Applicant's request, to assist in representing Applicant at trial. On November 12<sup>th</sup>, Hodges indicated to the court that she was prepared to proceed with the trial, fully understood the legal issues in the case and the issues Applicant had, and the only thing that more time would offer is the chance to be more concrete with the facts of the case. However, Mr. Poole was still present to assist Mrs. Hodges. Poole did not actively participate in the Applicant's defense by calling any witnesses or cross-examining any witnesses. Hodges testified that Poole assisted her at trial by giving her feedback and information regarding particular witnesses' credibility.

The mere possibility of a conflict of interest is insufficient to challenge a criminal conviction. Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993). "In order to establish violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809 (1984). The Applicant must show that his attorney actually owed duties to a party whose interests were adverse to the Applicant. Id; Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001).

This Court finds that the Applicant failed to meet his burden of proof as to this claim. There was no testimony or evidence of a conflict of interest on Poole's behalf and the fact that he

remained on Applicant's case did not detrimentally affect Applicant's case, but as Hodges testified, he was helpful during the trial. Therefore, this claim is denied and dismissed.

*Failure to challenge first most serious conviction based on aggravating circumstances.*

Applicant testified that Counsel never tried to attack the first most serious conviction of burglary, which resulted from a plea eleven years prior. The Applicant has failed to meet his burden of proof as to this claim. Applicant offered no testimony or evidence to indicate that if the prior conviction had been attacked, it would have been found ineligible as a prior offense for purposes of the life without parole statute, S.C. Code Ann. § 17-25-45 (1976). Therefore, this claim is denied and dismissed.

Ineffective Assistance of Appellate Counsel

The Applicant also alleged ineffective assistance of appellate counsel for counsel's failure to raise other potentially viable issues on appeal. Specifically, the Applicant indicated that appellate counsel never contacted Applicant regarding his opinion on viable issues and should have raised issues regarding the conduct of the judge and the judge's failure to grant Applicant's motion for continuance or motion for change of venue. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

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The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

As the record reflects, appellate counsel filed an Anders brief. In Anders v. California, the United States Supreme Court announced the procedure an appointed attorney should follow if that attorney believes the client's appeal is frivolous and without merit. 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The Supreme Court held the attorney could petition for permission to withdraw from the case, but that the petition for withdrawal must be accompanied by a brief "referring to anything in the record that might arguably support the appeal." Id. at 744, 87 S.Ct. at 1400, 18 L.Ed.2d at 498. Under Anders, the defendant must be given time to respond and to raise any additional points after his attorney submits the Anders brief. Id. The court then is obligated to conduct a "full examination" of the record to determine whether the appeal is "wholly frivolous." Id. According to Anders, if the reviewing court finds the appeal is frivolous, "it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires." Id. at 744, 87 S.Ct. at 1400, 18 L.Ed.2d at 498.

This Court finds that the Applicant has failed to meet his burden of proof of establishing that appellate counsel was ineffective. Applicant failed to prove that the issues he discussed had

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merit. Further, this Court finds that an Anders brief was filed; therefore, all properly preserved issues were reviewed and the appeal was denied. Therefore, this claim is denied and dismissed.

Improper Chain of Custody

The Applicant alleged that there was no chain of custody established for the items stolen from the victims and found in the stolen truck. This Court finds that this issue lacks merit. The items were identified by the victims as their items and the items were recovered in the truck when the Applicant was arrested. Therefore, this Court finds that the Applicant failed to meet his burden of proof as to this claim and it is denied and dismissed.

Violations of Eighth Amendment

The Applicant alleged that his Eighth Amendment rights were violated when the trial court failed to consider relevant mitigating evidence during sentencing, failed to instruct the jury that the latest offense was not a repetitive offense, and failed to instruct jury that the Applicant would receive a sentence of life without parole upon his conviction. The Applicant appeared to include these allegations primarily as allegations of ineffective assistance of counsel, for Counsels' failure to present mitigating information to the trial court and failure to request that the Applicant be able to address the jury regarding the mandatory life without parole sentence. This Court finds that the Applicant has failed to meet his burden of proof as to this claim. The Applicant's case was not a capital case and there was no separate sentencing hearing, nor did the trial judge have any sentencing discretion because of § 17-25-45. Further, there is no right which provides an opportunity for the Applicant to speak to the jury regarding his possible punishment if convicted. Therefore, this Court finds that these claims lack merit and are denied and dismissed.

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## SUMMARY

Accordingly, this Court finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsels’ performance. There is no evidence that the outcome of the proceedings would have changed based upon any of the allegations of deficiency. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

## CONCLUSION

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

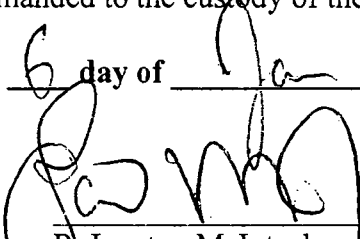
This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel’s assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant’s behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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**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 6 day of Jan, ~~2013~~ 2014

  
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R. Lawton McIntosh  
Presiding Judge  
Seventh Judicial Circuit

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