

STATE OF SOUTH CAROLINA )

COUNTY OF EDGEFIELD )

FREDY DELEON, #304977, )

Applicant, )

v. )

STATE OF SOUTH CAROLINA, )

Respondent. )

IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-19-304

ORDER GRANTING APPLICATION  
FOR POST-CONVICTION RELIEF

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THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed September 19, 2012. The State made its Amended Return and Motion to Dismiss on July 9, 2013. An evidentiary hearing into this matter was convened on August 12, 2013. The Applicant was present and was represented by Jeremy A. Thompson, Esquire. The Respondent was represented by Walt Whitmire, Assistant Attorney General.

**I.  
PROCEDURAL HISTORY**

The Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Edgefield County Clerk of Court's orders of commitment. The Applicant and his three co-defendants, Raphael Hernandez, Honorio Guerrero, and Alfredo Avila-Arojono, were indicted by the Edgefield County Grand Jury for trafficking marijuana 100 to 2,000 pounds in violation of S.C. Code Ann. §44-53-370(e)(1)(b). On March 23-25, 2004, the Applicant and his co-defendants proceeded to trial by jury before the Honorable William P. Keesley. This trial ended in a mistrial. Subsequently, on June 28-July 6, 2004, the Applicant and his co-defendants again proceeded to trial by jury before Judge Keesley. After several hours of deliberation, all four co-defendants were convicted as charged.

The Applicant's co-defendants proceeded to each file direct appeals whereas the Applicant did not do so due to his attorney's failure to file a direct appeal following the conclusion of the trial. The Applicant then filed his first Application for Post-Conviction Relief, and was represented by Michael S. Waddington, Esquire. This PCR application was granted to permit the Applicant to pursue a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Attorney Waddington continued to represent the Applicant on direct appeal. While the Applicant's belated direct appeal was pending, the Applicant's co-defendants' convictions and sentences were reversed by the Supreme Court of South Carolina due to the trial court's refusal to grant a directed verdict with regard to each of those defendants. See State v. Hernandez, 382 S.C. 620, 677 S.E.2d 603 (2009). Subsequently, Tricia A. Blanchette, Esquire,<sup>1</sup> was substituted as counsel on the Applicant's direct appeal. On September 9, 2011, the South Carolina Court of Appeals granted review of the Applicant's convictions and sentences pursuant to White and affirmed. DeLeon v. State, 2011-UP-418 (S.C. Ct. App. filed Sep. 9, 2011).

## II. ALLEGATIONS RAISED

In his Application for Post-Conviction Relief, as well as the Memorandum of Law that accompanied the Application, the Applicant alleged that he is being held unlawfully for the following reasons:

1. Ineffective assistance of belated direct appeal counsel.

He alleged generally that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated during his belated direct appeal. The Memorandum contained the following specific allegations of ineffective assistance of appellate counsel:

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<sup>1</sup> Throughout this Order, when this Court refers to "appellate counsel" or "belated direct appeal counsel," this Court refers to Attorney Waddington and not to Attorney Blanchette.

1. Appellate counsel was ineffective for failing to argue that the “extended border search” doctrine did not authorize a warrantless search of his business in violation of his rights under the Fourth and Fourteenth Amendments, see generally United States v. Saint Prix, 672 F.2d 1077, 1083 (2nd Cir. 1982) (footnote 10) (“The ‘border search’ exception does not justify searches of homes or business establishments”);
2. Appellate counsel was ineffective for failing to argue that the trial court improperly denied his motion for a directed verdict;
3. Appellate counsel was ineffective for failing to argue that the Applicant’s conviction was barred due to double jeopardy in violation of the Applicant’s rights under the Fifth and Fourteenth Amendments inasmuch as the Applicant’s first trial ended in a mistrial due to prosecutorial misconduct;
4. Appellate counsel was ineffective for failing to argue that defense counsel did not open the door to testimony from Investigator Roosevelt Young that the Applicant was a drug trafficker and explaining how he came to that conclusion;
5. Appellate counsel was ineffective for failing to argue that the trial court erred in refusing to grant the Applicant’s motion for a mistrial based on Investigator Young’s testimony.


At the evidentiary hearing in this matter, the Applicant proceeded on these allegations.

### III. EVIDENCE BEFORE THE COURT

At the Post-Conviction Relief hearing held in this case on August 12, 2013, the Applicant presented testimony from attorney Tricia A. Blanchette, Esquire, as well as his own testimony.<sup>2</sup> In addition to this testimony, this Court has before it a transcript of the trial, a copy of the briefs

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<sup>2</sup> Attorney Waddington did not testify at this proceeding. This Court was informed that the State attempted to contact him, but that he now resides in Puerto Rico and could not be compelled to attend this hearing.

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filed on the belated direct appeal, a copy of the Court of Appeals' opinion on the belated direct appeal, a copy of the records of the Edgefield County Clerk of Court regarding the subject conviction, a copy of the Applicant's records with the South Carolina Department of Corrections, and the exhibits introduced by the parties during the evidentiary hearing. What follows below are findings of fact and rulings of law made by this Court in accordance with the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 *et seq.*

As a threshold matter, this Court would note that on the facts of this case this Court finds that the combined effects of appellate counsel's errors and omissions was such that the Applicant was denied the effective assistance of counsel on appeal. For that reason, this Court finds that appellate counsel failed to provide the Applicant reasonable, professional assistance of counsel.<sup>3</sup>

#### IV. RELEVANT FACTS

In general, the relevant factual background for this case is well presented by the Supreme Court of South Carolina in its decision in the Applicant's co-defendants' appeal:

At a border crossing in Laredo, Texas, federal officials stopped and searched an eighteen-wheeler tractor-trailer ("tractor-trailer") entering the United States from Mexico. The officials discovered approximately 900 pounds of marijuana concealed in a shipment of wooden furniture destined for Tienda DeLeon in Trenton, South Carolina. Agents found the marijuana compressed into bricks and hidden inside twenty-three wooden chimneys. The officials seized the shipment, replaced the driver with an undercover agent, and continued transporting it to South Carolina for a controlled delivery.

When the tractor-trailer arrived at Tienda DeLeon, Fredy DeLeon, the owner of the store, along with two other individuals who arrived at Tienda DeLoen in a Ford Thunderbird unloaded several pieces of furniture. The three men then directed the undercover

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<sup>3</sup> This Court finds that Attorney Blanchette was not ineffective. She represented the Applicant in an exemplary fashion, and did everything that she could to salvage the Applicant's appeal from Attorney Waddington's manifestly deficient representation. This Court's finding of ineffectiveness only pertains to Attorney Waddington's representation of the Applicant.

agents to transport the rest of the shipment to Billy's Super Store, also located in Trenton.


The undercover agents drove the tractor-trailer to Billy's Super Store as directed and parked it next to the loading bay. After approximately twenty-five minutes, the agents witnessed the same Thunderbird they saw at Tienda DeLeon drive past Billy's Super Store and reappear a few minutes later along with a Ryder moving truck ("the Ryder truck") driven by Petitioner Guerrero and with Petitioners Avila-Arjona and Hernandez as passengers. The Thunderbird pulled beside the tractor-trailer, and the Ryder truck parked in front of the tractor-trailer. The passenger of the Thunderbird exited the car and attempted to enter the cab of the tractor-trailer, but the undercover agent indicated that he was not allowed inside the tractor-trailer. The Thunderbird passenger then directed the undercover agents to follow him, while the driver of the Thunderbird spoke with Petitioners who were still in the Ryder truck. The three vehicles formed a caravan, with the Thunderbird leading, followed by the Ryder truck, and the tractor-trailer in the rear.

The caravan drove down a dirt road for a while. Subsequently, the Ryder truck and the tractor-trailer became stuck in the mud. The undercover agents decided to call off the operation and promptly arrested Petitioners. The Thunderbird drove away and the men were never apprehended. The agents searched the Ryder truck and found the cargo portion of the truck empty. However, the agents discovered a receipt indicating that Petitioner Guerrero rented the Ryder truck the day before and a receipt from a motel for the night before the controlled delivery took place.

State v. Hernandez, *supra*, 382 S.C. at 622-623, 677 S.E.2d at 604 (footnote omitted). Where appropriate, additional factual background will be provided in the discussion of the allegations for relief.

V.  
**STANDARD OF REVIEW**

The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRCP. The Sixth and

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Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). This guarantee includes the effective assistance of counsel in the defendant's first appeal as of right. Evitts v. Lucey, 469 U.S. 387 (1985). In the context of an allegation of ineffective assistance of appellate counsel, the operative question becomes whether but for appellate counsel's errors and omissions, the result on appeal would have been different. Smith v. Murray, 477 U.S. 527 (1986); see also Smith v. Robbins, 528 U.S. 259, 285 (2000) (“[T]he proper standard for evaluating Robbins’ claim that appellate counsel was ineffective in neglecting to file a merits brief is that enunciated in Strickland v. Washington”).

**VI.**  
**THE STATE’S MOTION TO DISMISS**

In its Amended Return and Motion to Dismiss, the State argues that “this Application for Post-Conviction Relief should be summarily dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act.” Return at 3; see also S.C. Code Ann. § 17-27-70(c) (“The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law”). The State further argues that “[t]he post-conviction relief act does not provide a remedy for ineffective assistance of PCR appellate counsel for performance related to a White v. State review.” Return at 3. This Court finds these arguments unpersuasive.

The State’s essential argument is that an allegation of ineffective assistance of belated direct appeal counsel is not cognizable in collateral review. This Court disagrees. S.C. Code Ann. § 17-27-20(A)(1) provides that “[a]ny person who has been convicted of, or sentenced for, a crime and who claims [t]hat the conviction or sentence was in violation of the Constitution of

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United States or the Constitution of law of this State” may file an Application for Post-Conviction Relief. A claim of ineffective assistance of counsel is a valid collateral claim pursuant to § 17-27-20(A)(1). Consequently, the inquiry for this Court is whether or not the Applicant had the right to the effective assistance of counsel on his belated direct appeal. This Court finds that there is such a right, just as there is a constitutional right to “the effective assistance of counsel on” a defendant’s “first appeal as of right.” Evitts v. Lucey, *supra*, 469 U.S. at 388-389. A belated direct appeal is nothing more than a direct appeal that is conducted later in time than it should normally occur. There is no articulable reason why the Applicant was not entitled to the effective assistance of counsel on his belated direct appeal. See generally United States v. Orozco-Ramirez, 211 F.3d 862, 869 (5th Cir. 2000) (permitting claim of “ineffective assistance of counsel during the out-of-time appeal” to proceed forward on the merits”). Accordingly, this Court denies the State’s motion to dismiss.

## VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Applicant contends that appellate counsel was ineffective in his representation of the Applicant on the Applicant’s White v. State appeal. The Applicant requests that this Court grant him a new trial due to appellate counsel’s ineffectiveness. This Court agrees with the Applicant that appellate counsel was ineffective; however, this Court finds that the appropriate remedy for appellate counsel’s ineffectiveness is to permit the Applicant to proceed forward with a new appeal. This Court will address each of Strickland’s prongs individually before turning to the issue of the appropriate remedy.

### A. Appellate Counsel’s Performance Was Deficient

This Court concludes, based on all of the evidence presented, that appellate counsel’s performance fell woefully below “the range of competence demanded of attorneys” practicing

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criminal appellate law. Strickland, supra, 466 U.S. at 687. This Court will focus its discussion of deficient performance on two major aspects of appellate counsel's representation: (1) his failure to comply with appellate procedures and rules throughout the course of his representation of the Applicant which resulted in arguments contradicted by the record being presented to South Carolina's appellate courts; and (2) his relationship with the Applicant, including his communication regarding the claims that he planned on presenting on appeal, which culminated in his abandonment of the Applicant.

1. Appellate Counsel's Failure to Comply with Appellate Procedures and the Deficient Presentation of the Applicant's Claims on Appeal

Appellate counsel failed to comply with appellate procedures at virtually every stage of the case. Initially, appellate counsel filed the notice of appeal with the Court of Appeals instead of the Supreme Court, which is not the appropriate procedure. See Rule 243(a)-(b), SCACR. Appellate counsel then filed a document captioned "Brief of Appellant," which was dated November 12, 2007, which included a Designation of Matter filed pursuant to Rule 209, SCACR, again with the Court of Appeals. In a filing dated January 11, 2008, appellate counsel filed a "Petition for a Writ of Certiorari" with the Supreme Court which re-argued the direct appeal issues and did not argue that the Applicant should receive a belated direct appeal. Appellate counsel had not filed an appendix to accompany these previous filings.

In response to these filings, the Clerk of the Supreme Court sent appellate counsel an extensive letter on February 15, 2008, which explained that nothing appellate counsel had filed was filed in compliance with the South Carolina Appellate Court Rules. On the second page of this letter, the Clerk also stated that the certiorari petition contained an incorrect statement that the Applicant had a direct appeal, noting that "I assume this is erroneous since the existence of

such an appeal would most likely destroy his right to relief under White.” The Clerk asked that the correct documents be filed within thirty days of the letter.

Instead of complying with the Clerk’s letter, appellate counsel did not timely file a certiorari petition or an appendix. This failure resulted in the dismissal of the Applicant’s appeal by the Supreme Court in an order filed March 27, 2008. Appellate counsel then had to file a motion to reinstate the appeal, which the Supreme Court granted. Subsequently, appellate counsel filed an amended certiorari petition and a brief that was bound with a blue cover and blue back in an extremely unusual fashion.

The argument portion of the amended certiorari petition is one page long. The presentation of the issue is so inadequate that this Court finds that it is necessary to reproduce the argument in full here:

#### QUESTIONS PRESENTED

1. Did the petitioner knowingly and intelligently waive his right to direct appeal?

#### STATEMENT OF THE CASE

On July 6, 2004, the jury found the defendant guilty and sentenced him to imprisonment for twenty-five years. { Insert waiver of appeal facts here }

{Procedural History – Jacque }

On July 6, 2004, petitioner was convicted and was sentenced to twenty-five years imprisonment.

Petitioner then brought this action seeking post-conviction relief in August 3, 2005. He alleged that trial counsel failed to file a perfect [sic] an appeal of the original conviction and sentence after being instructed to do so. The court denied the application on February 14, 2007, and a notice of appeal was served on February 15, 2007, and an Amended notice of appeal was served on December 5, 2007. Petitioner now seeks a writ of certiorari to review this denial.

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## ARGUMENT

1. PETITIONER DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE THE RIGHT TO DIRECT APPEAL.

{Insert Argument for above }

Amended Certiorari Petition at 2.<sup>4</sup> This document was so woefully prepared that appellate counsel filed it without realizing that he had—on three separate occasions—called for the insertion of the facts, the procedural history, and the argument in support of the petition. Furthermore, even the brief presentation of the procedural history is incorrect, as the petition gives the impression that the PCR judge denied the request for a belated direct appeal when, in fact, the PCR judge had granted the request with the consent of the State.

The amended petition was filed in support of White v. State review, and the brief filed by appellate counsel in connection with that review raised two issues that developed as a result of a juror conducting her own internet research during deliberations. The arguments contained in these appellate documents made numerous references to actions taken and statements made by the judge, the defense attorneys, and the jurors, both during the trial and during the post-trial hearings where the jurors were examined. However, appellate counsel's brief does not contain one citation to the record. This fact, standing alone, shows deficient conduct as the brief does not comply with Rule 208(b)(4), SCACR, which requires that all briefs "shall contain references to the transcript, pleadings, orders, exhibits, or other materials ... to support the salient facts alleged."

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<sup>4</sup> This Court recognizes that the preparation of the amended certiorari petition is technically a collateral appeal action, where the Applicant did not have the right to the effective assistance of counsel, instead of a direct review action, where the Applicant did have the right to the effective assistance of counsel. Nevertheless, this Court finds that it is appropriate to review the preparation of the amended certiorari petition because the certiorari petition had to be granted before the belated direct appeal claims could be reviewed. Furthermore, the lack of care and diligence in the preparation of the amended certiorari petition is indicative of appellate counsel's performance as a whole.

Appellate counsel's deficient performance, unfortunately, went further than the mere failure to cite to the transcript. Most of the argument on the issues is framed in terms of what the trial judge did and did not do during the examination of the jurors at a post-trial hearing held November 22, 2004. When appellate counsel prepared this brief, though, he did not have that transcript in his possession. Instead, according to the testimony of Attorney Blanchette, he prepared the brief based on discussions he had with trial counsel about trial counsel's recollection of the November 22, 2004, proceeding. Without providing the transcript to the appellate court, the appellate court would not have had the authority to rule in the Applicant's favor. See Rule 220(b), SCACR ("In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and *fairly arising upon the record of the court* must be stated in writing) (emphasis added). Even if the appellate court had the authority to grant relief, it would not have done so due to appellate counsel's failure to produce the record. See Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 339, 611 S.E.2d 485, 487-488 (2005) ("Appellant asserts that it is entitled to a new trial because the circuit court's jury charge was improper. The jury charge is not in the Record on Appeal, and Appellant had the burden of providing a sufficient record. ... We therefore decline to address the merits of Appellant's claim"). Accordingly, appellate counsel's deficient performance in failing to present the Applicant's appeal is undeniable.

Finally, the record that was ultimately produced contradicted the primary arguments advanced for relief in appellate counsel's brief. The central lynchpin of the brief is the trial court's failure to ask "the following questions proposed by the defense: What was the content of the discussions about the penalties; whether the penalties were discussed before or after the decision to convict; and whether the discussion on penalties changed the vote to either acquit or

convict.” Brief at 9-10. The trial court’s failure to ask these questions forms the principal basis of the argument that relief should be granted because “[t]he judge asked limited and vague questions of the jurors” and “[w]here the court controls the scope and quantity of the questions, it is fundamentally unfair for the defense to be required to show prejudice.” Brief at 11-12. However, the questioning requests were not made at the juror misconduct hearing convened on November 22, 2004; instead, they were made at the hearing convened on April 14, 2005, when the one remaining juror who was not questioned at the November hearing appeared. See Trial Tr. p. 973, line 7-p. 974, line 3. Those requests were also limited to that juror. Furthermore, similar requests were not made during the November hearing following the trial court’s questioning of the other eleven jurors. See November Juror Misconduct Tr. pp. 64-81. Consequently, the argument for relief presented in the brief is not preserved for appellate review as the objections to the scope of the questioning were never made at the November misconduct hearing. Inasmuch as the record contradicts the arguments made in the brief, this Court finds that appellate counsel’s performance can be nothing less than deficient.

2. Appellate Counsel’s Misleading Communication with the Applicant and Ultimate Abandonment of the Applicant

Appellate counsel’s deficient performance extended to his relationship and communication with the Applicant as well. On December 21, 2006, appellate counsel wrote the first of several letters to the Applicant explaining the issues he planned to raise on appeal. In that letter, appellate counsel informed the Applicant that he would raise the following claims on a belated direct appeal: (1) juror misconduct; (2) the search of the Applicant’s business conducted pursuant to the extended border doctrine; and (3) the lack of evidence. In this letter, appellate counsel noted that only the lack of evidence issue had been raised by the Applicant’s co-defendants in their appeals. Ultimately, only the juror misconduct issue would be presented on

the Applicant's appeal. Based on this advice, the Applicant agreed to waive all other PCR claims and seek only a belated direct appeal.

Appellate counsel subsequently filed the brief with the Court of Appeals which only alleged the juror misconduct claim. In response to the Applicant's questions about why the other claims were not raised, appellate counsel sent a letter to the Applicant dated December 13, 2007, that stated that "there is no substantial basis to challenge the search and seizure issue, nor the lack of evidence issue." Appellate counsel further informed the Applicant that "the co-defendants in this matter raised these issues and lost, and their positions were much stronger than yours." This information was incorrect on two fronts, as the co-defendants did not raise the search and seizure issue (which appellate counsel apparently knew, based on his December 21, 2006, letter) and they would not have had a stronger case than the Applicant on that claim since the improper search was conducted at the Applicant's business. Appellate counsel concluded the letter by informing the Applicant that he would raise the issues if the Applicant wanted him to do so by filing a supplemental brief.

As noted above, appellate counsel got the opportunity to file a new brief when the Supreme Court notified him that all of his previous filings had been improperly prepared. In a letter to the Applicant with an alleged supplemental brief dated March 25, 2008, appellate counsel informed the Applicant that the supplemental brief had been filed with "the issue of the search and seizure added." Of course, appellate counsel had made no such filing; instead, the appeal was dismissed two days later and the final arguments filed with the Supreme Court did not include the search and seizure issue.

Nevertheless, appellate counsel continued to inform the Applicant that the search and seizure issue was being presented on appeal. On April 15, 2011, appellate counsel sent a letter to

the Applicant which stated that “[b]efore I filed the appeal, you made modifications and, at your request, I included them in the appeal.” Clearly, appellate counsel was either continuing to mislead the Applicant about the issues being presented on appeal, or he was mistaken about what he had actually presented on the appeal. Either way, appellate counsel’s performance was unmistakably deficient. See Strickland, *supra*, 466 U.S. at 691 (“[I]nquiry into counsel’s conversations with the defendant may be critical to a proper assessment of counsel’s ... litigation decisions”); Comment 5, Rule 1.1, Rule 407, SCACR (“Competent handling of a particular matter ... includes adequate preparation”); Rule 1.4(a)(3), Rule 407, SCACR (“A lawyer shall keep the client reasonably informed about the status of the matter”).

Appellate counsel’s poor relationship with the Applicant led the Applicant and appellate counsel to both request, on multiple occasions, that appellate counsel be relieved as the Applicant’s attorney. Ultimately, however, in the April 15, 2011, letter, appellate counsel informed the Applicant, in no uncertain terms, that he was closing his law practice, “moving to Puerto Rico in June 2011,” and that the Applicant needed to find another attorney to represent him on the appeal. It was at this point that Attorney Blanchette, who had previously not wanted to intervene in the case because appellate counsel had handled the case for so long, agreed to take over representation of the Applicant. Even then, the transition was not a smooth one as appellate counsel moved to Puerto Rico and Attorney Blanchette had to go to extreme lengths to obtain the Applicant’s records to ensure that the appeal was completed. Indeed, appellate counsel did not even have a copy of the appendix to provide to Attorney Blanchette. Appellate counsel’s essential abandonment of the Applicant constitutes deficient conduct. See Castellanos v. United States, 26 F.3d 717, 720 (“[A] lawyer’s abandonment of his client is ineffective *per se*”).

### 3. Summary

After failing to properly follow appellate court rules to such an extent that the Applicant's appeal was dismissed, appellate counsel filed a grossly inadequate certiorari petition and a White v. State brief on the merits without reviewing, or even possessing, the transcript supporting his arguments. The transcript that was ultimately produced contradicted the central arguments advanced by appellate counsel. Furthermore, appellate counsel apparently misled the Applicant about the issues that he would present, and had presented, on appeal, and then abandoned the Applicant in the late stages of the appeal. This Court finds that "deficient" does not sufficiently describe the dearth of representation the Applicant received. Appellate counsel's performance was abysmal, totally inadequate, and a complete abdication of a lawyer's duty to his client. Accordingly, this Court finds that the Applicant has met his burden of demonstrating deficient performance under Strickland's first prong.

#### **B. Appellate Counsel's Deficient Performance Prejudiced the Applicant**

Having concluded that appellate counsel's performance was deficient, this Court turns to the question of whether or not that deficient performance prejudiced the Applicant. Under Smith v. Robbins, *supra*, the Applicant must demonstrate that there is "a reasonable probability that, but for counsel's [deficient conduct], he would have prevailed on his appeal." 528 U.S. at 285. See also People v. Griffin, 178 Ill.2d 65, 74, 687 N.E.2d 820, 827 (1997) ("A defendant who contends that appellate counsel rendered ineffective assistance, *e.g.*, by failing to argue an issue, must show that the failure to raise that issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have been reversed").

While the Applicant contends that there are five meritorious appellate claims that should have been raised by appellate counsel, this Court finds it appropriate to address only the first

claim: the denial of the Applicant's Fourth Amendment motion. This Court concludes that since the Applicant has shown that there is a reasonable likelihood that the outcome of his belated appeal would have been different had this issue been presented, then the Applicant should have the opportunity to present this claim—and any other claims he has raised before this Court—on his new appeal.

### 1. Factual Background

At the outset of the trial which ended in a mistrial, the Applicant moved to suppress all evidence seized at his business as an unconstitutional warrantless search. Mistrial Tr. p. 19, line 14-p. 23, line 16. To justify the search, the State presented the testimony of two witnesses: Brian Patrick Mize, an agent with U.S. Customs, and Eric Owenby, a narcotics investigator with the Aiken County Sheriff's Department. Agent Mize testified that he, acting in an undercover capacity, the Applicant, and the two individuals in the Thunderbird, unloaded thirteen pieces of furniture, including one chimney containing marijuana, into the Applicant's rear storeroom at his grocery store. Mistrial Tr. p. 49, line 18-p. 50, line 6; p. 52, lines 10-15. Agent Mize further testified that Customs agents are instructed that they can search businesses, but not dwellings, without a search warrant in an "extended border search." Mistrial Tr. p. 80, line 15-p. 81, line 16. Investigator Owenby testified that he was conducting surveillance on the business following the delivery of the furniture. Mistrial Tr. p. 91, lines 1-24. After witnessing several customers come in and out of the grocery store, the officers decided to enter the store because they were afraid that the chimney had been opened and that the marijuana was being distributed to the customers. Mistrial Tr. p. 96, line 16-p. 97, line 23. The officers did not know where the furniture was located when they entered the store, and were taken to the storeroom by the Applicant's wife, who was working at the store. Mistrial Tr. p. 105, lines 6-17. He further

testified that he believed the door to the storeroom from inside the store was closed. Mistrial Tr. p. 107, line 25-p. 108, line 9. At the conclusion of the testimony, the trial judge denied the motion. See Mistrial Tr. p. 183, line 20-p. 185, line 8.

When the second trial began, the Applicant again moved to suppress the drugs seized at his business. Trial Tr. p. 41, lines 4-10. Although several additional witnesses testified as to the seizure of the drugs, the facts as set forth regarding the initial storage of the furniture and the ultimate seizure of the furniture in the previous trial remained the same. The trial court denied the motion again, “incorporat[ing] [the testimony from the mistrial] by reference,” and concluding:

[I]t appears that basically the law provides that when something crosses the border into the United States and there’s evidence as was presented here that the items were sealed and then moved to another location in the United States, that basically the border is considered to move with those items.

Trial Tr. p. 186, lines 3-12. When the State introduced evidence that drugs were seized in the Applicant’s business, the Applicant renewed his objection to the evidence, which was overruled. See Trial Tr. p. 286, line 24-p. 286, line 10. The same sequence of events occurred when the chimney that was seized from the business was introduced. See Trial Tr. p. 457, line 11-p. 462, line 9. Finally, when the actual marijuana was introduced, the trial judge again stated that “[a]ll the chimneys were opened at the direction of the federal agents under the extended border doctrine.” Trial Tr. p. 761, lines 15-17.

## 2. Discussion

The Fourth Amendment to the United States Constitution guarantees that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” The United States Supreme Court has held that the

Fourth Amendment's protections "extend to commercial premises." Mancusi v. DeForte, 392 U.S. 364, 367 (1968). "The 'search of private property without proper consent' violates the Fourth Amendment's prohibition against unreasonable searches 'unless it has been authorized by a valid search warrant' or it falls within 'certain carefully defined classes of cases' that permit warrantless searches." United States v. Perez, 393 F.3d 457, 460 (4th Cir. 2004) (quoting Camara v. Municipal Court of San Francisco, 387 U.S. 523, 528-529 (1967)); see also State v. Bultron, 318 S.C. 323, 331, 457 S.E.2d 616, 621 (Ct. App. 1995) ("Generally, a warrantless search is per se unreasonable and thus violative of the Fourth Amendment's prohibition against unreasonable searches and seizures").

A search of a person or a vehicle that is conducted at the border is *per se* reasonable. United States v. Ramsey, 431 U.S. 606 (1977). Customs agents may also conduct searches of "persons and things after they have entered the country" under the "extended border search" doctrine. United States v. Richards, 638 F.2d 765, 771 (5th Cir. 1981). "The typical extended border search takes place at a location 'away from the border where entry is not apparent, but where the dual requirements of reasonable certainty of a recent border crossing and reasonable suspicion of criminal activity are satisfied.'" United States v. Stewart, \_\_\_ F.3d \_\_\_, 2013 WL 4711054, \*5 (6th Cir. 2013) (quoting United States v. Guzman-Padilla, 573 F.3d 865, 878-79 (9th Cir. 2009)). "The key feature of an extended border search is that an individual can be assumed to have cleared the border and thus regained an expectation of privacy in *accompanying belongings*." United States v. Cotterman, 709 F.3d 952, 961 (9th Cir. 2013) (*en banc*) (emphasis added).

While "[b]order' is an elastic concept," however, "it cannot be stretched to include the interiors of dwellings or business establishments." Lee v. Raab, 576 F.Supp. 1267, 1272 (S.D.

Ohio 1983) (quoting Ramsey, 431 U.S. at 616). “The ‘border search’ exception does not justify searches of homes or business establishments.” United States v. Saint Prix, 672 F.2d 1077, 1083 (2nd Cir. 1982) (footnote 2) (quoting Ramsey, 431 U.S. at 616). The government does not “have the general right to make a warrantless search of a private warehouse or dwelling for the purpose of terminating a controlled delivery.” United States v. Singh, 811 F.2d 758, 761 (2nd Cir. 1987). The Ninth Circuit has categorically held that 19 U.S.C. § 1595(a) requires Customs agents to obtain a warrant whenever they want to enter a dwelling or business, and that the extended border search doctrine is inapplicable in such cases because the statute takes precedence. United States v. Mendoza-Ortiz, 262 F.3d 882 (9th Cir. 2001).

This Court concludes that there is a reasonable probability that the result of the Applicant’s belated appeal would have been different had the Fourth Amendment issue been presented. This Court finds that it is arguable that the trial court erred in using of a standard of review that is inapplicable to searches of homes and businesses. In most extended border search cases, including a significant number of those cited by the trial court in its consideration of this matter, the defendants challenge the search on the basis of their expectation of privacy in the object that was seized: either the tangible object or their persons. See generally Illinois v. Andreas, 463 U.S. 765, 771 (1983) (in discussing an extended border search controlled delivery, “whether an individual has a legitimate expectation of privacy in the contents of a previously lawfully searched *container*”) (emphasis added); United States v. Yang, 286 F.3d 940 (7th Cir. 2002) (expectation of privacy in luggage);<sup>5</sup> United States v. Bilir, 592 F.2d 735 (4th Cir. 1979) (expectation of privacy in a suitcase);<sup>6</sup> United States v. Cardenas, 9 F.3d 1139 (5th Cir. 1993)

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<sup>5</sup> Cited at Mistrial Tr. p. 128, lines 14-16.

<sup>6</sup> Cited at Mistrial Tr. p. 128, lines 19-24.

(expectation of privacy of the defendant's person);<sup>7</sup> United States v. Gaviria, 805 F.2d 1108 (2nd Cir. 1986) (expectation of privacy in a shipment of goods).<sup>8</sup> In Cardenas, the Fifth Circuit outlined three factors to be applied in such cases:

Accordingly, this court has determined that three factors must be demonstrated before an extended border search is deemed reasonable and hence constitutionally permissible: (1) a showing of a "reasonable certainty" or a "high degree of probability" that a border crossing has occurred; (2) a showing of a "reasonable certainty" that no change in the condition of the *person or vehicle* being inspected occurred from the time of the border crossing until the search and that the contraband found was present when the person or vehicle crossed the border; and (3) a showing of a "reasonable suspicion" that criminal activity was occurring.

9 F.3d at 1148 (emphasis added) (citing United States v. Espinoza-Seanez, 862 F.2d 526, 531 (5th Cir. 1988)). The trial court's ruling denying the motion directly applied these three factors to find the search reasonable. See Mistrial Tr. p. 184, lines 22-24 ("The question goes to those three factors. We've been over those three factors").

In this case, however, the challenge was not made as to the search of the object that was seized by the authorities. Instead, the Applicant argued that his expectation of privacy in his *business* was violated by the warrantless entry onto his property. As noted above, in cases where the challenge arises out of an expectation of privacy in business, and not in the object seized, courts have routinely held that a warrant must be obtained before a search may be conducted. See Saint Prix, *supra*; Lee, *supra*; Mendoza-Ortiz, *supra*. In the lone case where such a warrantless search was upheld, the Second Circuit was quick to note that the contraband that was seized on the business premises was "located just inside the open storeroom doors, under direct government surveillance and constructively in the government's possession." Singh, *supra*, 811 F.2d at 761. The Second Circuit clarified that the government did not possess "the general right

<sup>7</sup> Cited at Mistrial Tr. p. 129, lines 23-24.

<sup>8</sup> Cited at Mistrial Tr. p. 129, line 25-p. 130, line 1.

to make a warrantless search of a private warehouse ... for the purpose of terminating a controlled delivery.” Id. The “warrantless search of a private warehouse ... for the purpose of terminating a controlled delivery” is precisely what occurred in this case. Investigator Owenby’s testimony makes it clear that the authorities did not know where the furniture was located, that the furniture was not in plain view of the authorities, and that they had to enter into a closed storeroom to seize it. The facts are unmistakably inapposite from those presented in Singh. Consequently, there is a reasonable probability that had this argument been presented on appeal, then the Court of Appeals would have agreed with the Applicant that the trial court employed the wrong standard of review and erred in failing to grant the Applicant’s motion to suppress the evidence seized from his store.

There is also a reasonable likelihood that the Court of Appeals would have found that the failure to exclude the evidence seized in the search prejudiced the Applicant. The evidence against the Applicant was very weak. The primary thrust of the Supreme Court’s opinion in the Applicant’s co-defendants’ case was that there was no substantial circumstantial evidence to demonstrate that the co-defendants knew that the tractor trailer contained drugs. There was a similar dearth of evidence with regard to the Applicant’s knowledge of the existence of the drugs. There were no “acts, declarations, or specific conduct” presented at trial that showed that the Applicant knew that drugs were concealed in the furniture. Hernandez, supra, 382 S.C. at 605, 677 S.E.2d at 605. The furniture looked like ordinary furniture. Trial Tr. p. 405, lines 10-13. The Applicant did not direct that any particular piece of furniture be unloaded at his business. Trial Tr. p. 405, lines 8-9. In fact, the State’s lead local narcotics investigator admitted at the preliminary hearing that there was no indication that the Applicant knew anything was

being delivered other than furniture. See Trial Tr. p. 644, lines 10-13.<sup>9</sup> The State did not present any evidence that the Applicant had any prior dealings with the individuals in the Thunderbird. The State had no evidence of any conversations the Applicant had with anyone in Mexico, other than the fact that his name was on the manifest. See Trial Tr. p. 633, line 4-p. 634, line 14. The State presented no evidence that the Applicant knew his other co-defendants. See Trial Tr. p. 634, line 22-p. 635, line 6. The State did not find any other circumstantial evidence that the Applicant engaged in drug dealings. The Applicant did not open up the chimney; in fact, he left soon after the delivery was completed. See Trial Tr. p. 711, lines 13-25.

Furthermore, the State's primary argument as to the Applicant's involvement in the conspiracy was its contention that the Applicant knew about all of the drugs in the tractor trailer because he would have received a cut of the drugs from the chimney left at his business:

Once the trucks got stuck, they weren't gettin' out. The boys in the Thunderbird left. Sure they knew what was there. So did everybody else in this deal. They offloaded this stuff at Mr. DeLeon's store, *and he got one of the chimneys.*

Now he stuck his neck out. *Ladies and gentlemen, I submit to you the evidence in this case just shows he's gettin' one chimney out of the cut. 100 grand right there. Mr. DeLeon. He was gonna distribute that out from there. He doesn't have to get paid in cash. Gettin' paid in drugs.* These agents many of 'em told you up here from the stand, that's typical of how somebody gets paid. It's not exchanged in cash. *He got it in drugs.* 'Cause they had that part of the furniture loaded back there in the back where they could very easily get it off at Fredy's.

Trial Tr. p. 890, lines 5-17 (emphasis added); see also Trial Tr. p. 886, lines 22-23; p. 891, line 6-p. 892, line 6; p. 898, lines 1-5. Had the State been unable to prove that the Applicant was left with the marijuana from one of the chimneys, the State would have had a much more difficult

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<sup>9</sup> While Investigator Young attempted to clarify that the case was an "ongoing investigation" at that point, there is no indication that any further investigation was actually done after the preliminary hearing. Trial Tr. p. 644, line 14; see Trial Tr. p. 654, lines 2-20 (stating on multiple occasions that the investigation performed following the arrest of the defendants was "very minimal").

time arguing that the Applicant was involved in the conspiracy. Accordingly, the trial court's refusal to suppress the drugs prejudiced the Applicant, and there is a reasonable likelihood that this argument would have resulted in a new trial had it been presented by appellate counsel on appeal. Therefore, this Court finds that the Applicant has met his burden of proof with regard to this claim.

### 3. Remedy

Having concluded that the Applicant has met his burden with regard to both prongs of Strickland, this Court must now consider the appropriate remedy for this constitutional violation. Both the Applicant and the State agree that the only remedy this Court may grant is a new trial. This Court does not agree with the parties' position. Instead, this Court finds that the appropriate remedy is a new appeal so that the appellate court may rule on the merits of the case.

S.C. Code Ann. § 17-27-80 vests this Court with wide discretion to "enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper" "[i]f the court finds in favor of the applicant." Stated differently, the role of a PCR court, when confronted with a meritorious allegation of ineffective assistance of counsel, is to "provide[] a remedy for what [is found] ... to be ineffective assistance of counsel." Rolen v. State, 384 S.C. 409, 415, 683 S.E.2d 471, 474 (2009) (footnote 3); see also Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (fashioning a tailored remedy for a claim of ineffective assistance of counsel for failing to properly advise a defendant of a plea offer).

Although this Court finds that there is a reasonable likelihood that the result of the Applicant's appeal may have been different had appellate counsel performed in a constitutionally

sufficient manner, this Court finds that the appellate courts are better suited to determine whether or not the Applicant deserves a new trial. Whereas a claim of ineffective assistance of trial counsel impacts the validity of the underlying trial, appellate counsel's ineffectiveness only impacted the validity and reliability of the outcome of the appeal. Consequently, the appropriate remedy in this matter is not to remand for a new trial—since that is not where the ineffectiveness occurred—but to permit the Applicant to file a new appeal—since that is where the ineffectiveness occurred. This Court finds that the procedure for which the Applicant should pursue this appeal is pursuant to White v. State, and this Court directs the Applicant to Rule 243(i), SCACR, for the appropriate steps to take in pursuing such an appeal.

**VIII.  
CONCLUSION**

This Application for Post-Conviction Relief is hereby **GRANTED**. This Court finds that the appropriate remedy for appellate counsel's abysmal performance is to permit the Applicant to file for a second belated direct appeal so that his appeal may be properly completed. This Court directs the Applicant to Rule 243(i), SCACR, for the procedures necessary to pursue this belated direct appeal.

**IT IS SO ORDERED.**



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**Edgar W. Dickson**  
Presiding Circuit Court Judge  
Eleventh Judicial Circuit

This 26<sup>th</sup> day of November, 2013.

Orangeburg, South Carolina.

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