

Volume II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County

John C. Hayes, III, Circuit Court Judge

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JUL 30 2012

S.C. Supreme Court

CLIFTON D. LYLES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2011-205286

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1 that served on her?

2 A. Right, and I can explain. As a practical matter, my
3 plan was to serve her with that at some time during that
4 during the time of the pretrial hearing.

5 Judge Couch -- well, Ms. Weaver, the solicitor, asked
6 that the witnesses be sequestered. So I told the family --
7 well, actually told Ms. Collins, because she was a potential
8 witness, she was on the witness list, to leave the
9 courtroom, and explained to her that, you know, we would
10 need her testimony later on, because I fully expected we
11 would finish our hearing that evening.

12 What I did not realize was that at that time was that
13 Ms. Collins left the courthouse. I don't know if the time
14 just went so long and she just had to get back to North
15 Carolina, but she ended up leaving. But since she had
16 voluntarily showed up the day of the pretrial conference, I
17 still expected her to come back the next morning, so I
18 failed to subpoena her. I don't know if that was Wednesday
19 night or Tuesday night, but that evening when she was here,
20 but had she shown up that morning, I would have made sure
21 she had it, just in case something else came up.

22 Q. You expected her to testify to the drugs in question
23 were hers, correct?

24 A. That was part of our defense, yes.

25 Q. Is was an important part of your defense?

1 A. Sure, one of many.

2 Q. And you proffered that to the court and were able to
3 put it on the record in page 189 through 92 of the
4 transcript, correct?

5 A. Yes, in support of my motion to continue it, because I
6 felt she was a material witness.

7 Q. And when the court found out that she was not under
8 subpoena, they denied your motion for a continuance?

9 A. After I told him that I was unable to subpoena her the
10 night before, because she had left the courthouse, yes. He
11 did not make a -- he didn't explain his ruling as to why he
12 denied it. He just said he denied the motion to continue
13 it.

14 THE COURT: Let me -- I hate to interject here,
15 and I don't have the transcript here in front of me and I'm
16 going to look at it, but you -- because I have got it on a
17 disk, but you -- did the judge deny your motion for a
18 continuance based on the fact that you had not subpoenaed
19 her, or just the fact that she wasn't here?

20 THE WITNESS: It was my understanding because she
21 wasn't there.

22 THE COURT: Okay.

23 THE WITNESS: Yes, sir.

24 THE COURT: Okay. I'll look at the transcript.

25 MR. WILKERSON: Your Honor, that's on page 192,

1 section three. It's where they begin discussing the
2 subpoena and the judge denies the motion for a continuance.

3 THE COURT: Okay.

4 BY MR. WILKERSON:

5 Q. In regards to the search warrant, you have sat here
6 through the testimony. Is there anything else that you
7 would like to address in regards to the search warrant, the
8 issues of the confidential informant?

9 A. Yes. In preparation for this trial I had conversations
10 with Mr. Lyles and also obviously with Ms. Collins. As I
11 said, her testimony would have assisted with his defense,
12 not only the voluntariness of Mr. Lyles' statements at the
13 house. Couldn't explain why, you know, the statement at the
14 jail, but it would at least explain his -- the totality of
15 the circumstances with regard to his statements at the
16 house, which she was present for. But she would have been
17 crucial, because it ended up -- the evidence developed, at
18 least from our side, that there was a -- that the informant
19 was actually a drug dealer himself who showed up at the
20 house during the search warrant.

21 The police officers, as I understood it from Mr. Lyles
22 and Ms. Collins, was that the police officers spent a
23 significant amount of time at that house, searched all
24 through that house; brought in drug dogs, could not find
25 anything. But lo and behold, and I was able to get the

1 officers to acknowledge, that there were three people who
2 showed up at the house. They all came in together, as I
3 recall. It was either in testimony or Mr. Lyles told me,
4 those persons stayed outside of the house, but like were on
5 the porch, or something. I think the officer may have said
6 they were on the porch. I only -- at that time I had only
7 had a nickname from Ms. Collins or Mr. Lyles of that person.
8 I didn't have who that person was.

9 Our plan was to try to somehow convince the judge that
10 that informant was not just a tipster from the 14th, but
11 that had actually showed up on the day of the search. We
12 believe it was coordinated so that -- and that informant
13 specifically said "oh, the drugs are in the bottom of the
14 trash can," and that would have shown at least that he had
15 been framed, that had been placed there shortly before the
16 officers had gotten there. Not on the 14th, but on the 21st
17 or the 20th. And so that he was more than just a tipster
18 from the 14th, which led up to the search warrant. And so
19 that's why we wanted the court to order the State, because
20 we knew that the State does not have a duty to identify
21 their confidential informants, unless they show that they
22 are a participant, and we believed -- or he believed that
23 the informant actually showed up at the -- which should be
24 reflected in the record, that the informant had actually
25 shown up at the house on the 21st during the search warrant.

1 Q. Why was --

2 A. And, I'm sorry, I need to add. The reason why I'm
3 saying that that person was a drug dealer is because
4 consistent with what the officers had said before, there was
5 a lot of activity, a lot of drug activity going through that
6 house, but our contention was that these drugs dealers were
7 using this house as a place to store drugs and sell drugs
8 out of. In fact, I think Ms. Collins has a couple of
9 cousins that were drug dealers, who we would have expected
10 her to testify that she held drugs for them, in addition to
11 this informant.

12 Q. Why wasn't there a Brady hearing in regards to the tape
13 and the confidential informant?

14 A. I'm sorry, what tape?

15 Q. The tape from the controlled buy. I assume the
16 electronic recording. I assume it was a tape recording.

17 A. He was not on trial for distribution.

18 Q. You didn't seek to get that information, other than in
19 the motion?

20 A. No. Had he been charged with it, I would have insisted
21 on it. I'm sure Ms. Weaver would have sent it to me,
22 because it related to that charge. It didn't relate to the
23 trafficking charge for the 21st.

24 Q. And you addressed the issues of the Batson motion, as
25 well as -- and objected to that as well, correct?

1 A. Yes.

2 Q. In regards to the actual cocaine, Exhibits 14 or 15,
3 you initially started with an objection, and then you
4 allowed them into evidence with no objection. Can you
5 explain why?

6 A. Well, I didn't allow them into -- as I recall, and I
7 think -- after reviewing the transcript I think on
8 yesterday, the -- I did not make the objection for when it
9 was entered into by the State. This was five years ago. I
10 know that I thought I had protected the record for my
11 client, who had left. When I had made objections earlier,
12 and I don't if a few pages earlier, but I had tried to make
13 several objections at that time with regard to information
14 coming in. In fact, what I had done was I renewed my
15 objections from the day before when I made objections to the
16 chain of custody, or maybe it -- it might have been that
17 morning with Officer Lovelace and some of the other evidence
18 custodians.

19 Q. Was Mr. Lyles insistent about trying to get that
20 information regarding the confidential informant and the
21 other information on the search warrant?

22 A. Was he insistent?

23 Q. Or did he request it? Do you think that was important,
24 if you recall?

25 A. I guess that's hard to say. I filed the motion. I did

1 it, based on the information he had given to me, and I
2 thought it would assist in his case. He didn't -- he didn't
3 tell me not to file it, but I filed it.

4 Q. Please answer any questions that the State may have.

5 CROSS EXAMINATION BY MS. WHITE:

6 Q. Thank you, Mr. Shadd.

7 A. Yes, ma'am.

8 Q. If you wouldn't mind, give us a little background on
9 yourself. How long have you been practicing law?

10 A. Now I'm going into my tenth year.

11 Q. So at the time you had been practicing about five
12 years?

13 A. Right.

14 Q. Is that correct?

15 A. Uh-huh.

16 Q. And do you do primarily criminal law, or civil, or --

17 A. Yes. In fact, then I was doing a lot more criminal
18 than anything else.

19 Q. Okay. And you said that you were retained by Mr.
20 Lyles, is that right?

21 A. Yes.

22 Q. And you represented him for about how long? Can you
23 give us a time frame after he was arrested, the guilty plea
24 and trial?

25 A. Bear with me.

1 Q. Sure.

2 A. I believe he hired me shortly after his arrest. Not
3 long after his arrest, so whatever year that was, it was --

4 Q. He was indicted in like November of 2002?

5 A. Right.

6 Q. And then I think he pled guilty originally in June of
7 2003?

8 A. Originally, right.

9 Q. Right.

10 A. Right.

11 Q. Okay. Now, he pled guilty originally -- what was the
12 charge that he pled guilty to? Do you remember? Was it
13 trafficking?

14 A. I think it was trafficking, second. We were able to
15 reduce it to a second, because he was originally -- well, he
16 was originally charged with trafficking, fifth offense.

17 Q. Okay. And what was his sentence he was given at that
18 time?

19 A. Fifteen years.

20 Q. Okay. And then a couple months later you were able to
21 get that plea withdrawn?

22 A. Yes.

23 Q. And had you --

24 A. Surprisingly.

25 Q. Right.

1 You had been working with him the whole time then, and
2 had you been preparing for trial originally, or had he
3 always wanted to plead guilty, according to your memory, if
4 you can remember?

5 A. As I recall, he hired me to investigate, to see if
6 trial would be an option, but at the same time he wanted me
7 to see if we could negotiate a sentence that would be
8 favorable to him.

9 Q. Okay.

10 A. And at some point he said "we will go ahead and take
11 the deal."

12 Q. Okay. Now, just to clarify, you went through numerous
13 pretrial motions on his behalf?

14 A. Yes.

15 Q. At that point did you feel like you were prepared for
16 trial?

17 A. Oh, yes. I was.

18 Q. Okay. And you had had enough time to meet with him and
19 discuss all the options and discuss the testimony?

20 A. Yes.

21 Q. Okay.

22 A. And Ms. Collins.

23 Q. And in regards to a couple of different issues that he
24 brought up, I know we have gone over the confidential
25 informant's identity, and you have testified that he was not

1 charged with anything as a result of that controlled buy, is
2 that right?

3 A. That's correct.

4 Q. In regards to the objections to evidence, you objected
5 numerous times to the evidence. Do you remember what basis
6 that you objected?

7 A. Well, I guess I need some help. On which areas,
8 because I objected a lot.

9 Q. And I think to begin, you did make a lot of objections
10 and there are several -- would it have been primarily chain
11 of custody issues?

12 A. Oh, yes, absolutely.

13 Q. And do you remember how much evidence or what the
14 evidence was that they were entering on this case?

15 A. Yes. Most of it -- most of it, the evidence, came in
16 from the search warrant? There were -- there was a large
17 bag that was found by Officer Lovelace, or maybe Officer
18 Schmittle -- no, I'm sorry, Officer Lovelace in the
19 kitchen -- in the trash can under a bag of trash. And it
20 was in -- I forgot what you call the bag, Seneca -- a Seneca
21 bag, or something. And inside that bag and all those pieces
22 of evidence were -- they were trying to get those in.
23 Inside of that there were seven individually wrapped bags,
24 ziplock bags, that were tied in corners and they had cocaine
25 in it and -- crack cocaine. And so all those seven

1 individual bags. And the amounts were eventually weighed by
2 the chemist and tested -- well weighed first by Officer
3 Lovelace and then tested by the chemist.

4 Q. And so in addition to the crack, I think there were
5 maybe some photographs of the location?

6 A. Yes. Yes.

7 Q. And so that was the extent of the evidence.

8 Did you feel like y'all had a good defense or a case at
9 the time?

10 A. I thought we had a decent defense. It just -- a lot of
11 it depended on credibility. A lot of it depended on -- this
12 was a situation where we felt Crystal Collins was -- would
13 have assisted in the -- in his defense. Mr. Lyles
14 definitely would have been crucial to his case.

15 Q. Uh-huh.

16 A. So going into the trial, I felt fairly confident that
17 we would -- you know, provided that we were able to present
18 our case to the jury, that we would have at least created
19 some reasonable doubt.

20 However, you know, the evidence was very overwhelming,
21 especially the comments that Mr. Lyles had made prior to
22 being arrested, and even post-arrest, the comments that he
23 made. For example, I don't know how we were going to get
24 around -- you know, he would have had to explain it, but I
25 don't know how we would have gotten around to the fact that

1 before the drugs were presented to him of what they had
2 found, the officer asked "well, how much did the drugs
3 weigh?"

4 Q. Uh-huh.

5 A. And he said about 22 grams.

6 Q. And isn't it true that that was probably I think within
7 a tenth, or so, of the amount that they found?

8 A. Yes, which, of course, would have shown he had
9 knowledge of it.

10 Q. Right. Okay.

11 In addition to the motions, you made pretrial
12 objections and motions you made during the trial, you also
13 made a motion for a new trial at the end, is that right?

14 A. Oh, yes.

15 Q. Okay. And that was denied by the judge?

16 A. Yes.

17 Q. Okay.

18 MS. WHITE: I think that's all I have at this
19 time, Your Honor.

20 THE COURT: Okay.

21 RECROSS EXAMINATION BY MR. WILKERSON:

22 Q. Ultimately the defense didn't call any witnesses, did
23 they?

24 A. No, we were incapable of doing that.

25 MR. WILKERSON: No further questions.

1 THE COURT: All right.

2 MS. WHITE: Thank you, Your Honor.

3 THE COURT: Let me ask you couple of questions.

4 THE WITNESS: Yes, sir.

5 THE COURT: You are incapable of doing that
6 because they didn't show up?

7 THE WITNESS: They did not show up, Your Honor,
8 and I -- it was the first time, and hopefully the only time,
9 that I was trying a defense case without the defendant being
10 there, without some valid excuse.

11 THE COURT: Okay. Would it have been helpful to
12 you to have the defendant here?

13 THE WITNESS: Oh, absolutely, Your Honor. Yes, I
14 felt very hamstrung with him not being here.

15 THE COURT: Okay.

16 THE WITNESS: And just to further explain, Your
17 Honor, I still felt confident about the case, even though
18 the pretrial motions hadn't gone our way, but I really felt,
19 especially when his family members were there the day before
20 from North Carolina. They had traveled that long and then
21 for me to show up the next morning with no one there, it was
22 obvious they must have had some kind of conversation and
23 felt like the motions weren't going their way, so,
24 therefore, he just felt there was no need to be at the
25 trial.

1 THE COURT: All right. He never called you and
2 told you why he was not going to be here, or he wasn't going
3 to be here, or why he wasn't here?

4 THE WITNESS: No, sir. I had had my assistant
5 check the voicemail just to see if he had called overnight.
6 There were no messages from him. I was frantically having
7 her call and I had the numbers in my file of where to call
8 and couldn't reach his family. The only one I reached was
9 Ms. Collins, and she said "oh, he should be on his way. He
10 left me early this morning." And, you know, unfortunately
11 she said she was not going to come, and she said it was due
12 to her child, but I never heard back from either him or Ms.
13 Collins.

14 THE COURT: Is that a frequent excuse when
15 somebody who is not going to show up, "my child is sick,"
16 sir?

17 THE WITNESS: Yes, sir.

18 THE COURT: You have been practicing quite awhile
19 now?

20 THE WITNESS: Quite awhile, yes, sir. They put it
21 on the child.

22 THE COURT: That's a pretty common excuse, isn't
23 it?

24 THE WITNESS: Yes.

25 THE COURT: "My child is sick. That's the reason

1 I didn't show up."

2 Let me ask you about Ms. Collins' affidavit in
3 which she alleges these were her drugs. And that she
4 supposedly come in and testify that these were her drugs,
5 she could have been charged, or both of them could have been
6 charged, isn't that right?

7 THE WITNESS: Oh, yes, sir, because it's still --

8 THE COURT: Because two people can possess the
9 same drugs, particularly with knowledge, is that right?

10 THE WITNESS: Yes, sir, and I have explained that,
11 that more than one person can possess drugs.

12 THE COURT: And, of course, if you have knowledge,
13 that's a strong presumption that you possessed the drugs, if
14 you knew they were there, is that correct?

15 THE WITNESS: That's correct.

16 THE COURT: And he knew how much drugs were there?

17 THE WITNESS: According to the officers, that's
18 what -- that's the statement that he gave. He gave a close
19 to --

20 THE COURT: According to the officers?

21 THE WITNESS: Yes, sir.

22 THE COURT: Let me ask you. On the -- do you
23 think you did all you needed to do in order to protect the
24 record, insofar as the chain of custody of the evidence is
25 concerned, is that correct?

1 THE WITNESS: Yes, sir.

2 THE COURT: You felt like you had protected the
3 record and objected?

4 THE WITNESS: Oh, yes, sir, more than
5 sufficiently, Your Honor.

6 THE COURT: Let me ask you, and I don't know what
7 happened in this particular case. I would have to look at
8 the record and see, and I don't have that opportunity right
9 now, but normally the deputy that he refers to who was not
10 present in court, normally his job is simply -- he's a
11 retired deputy. What's the deputy's name? He's --

12 THE WITNESS: I think Mr. Lyles said Mr. Rollins.

13 THE COURT: Rollins, yeah. Gary Rollins.

14 He has testified in many cases up here, but his
15 job was to go pick the drugs up from Rock Hill, Fort Mill,
16 and transport them and deliver them to the chemist here, and
17 they are stored there first and receives them and put them
18 in. Do you recall if that was the case?

19 THE WITNESS: I'm pretty sure that's --

20 THE COURT: But he wasn't here to actually say
21 that.

22 THE WITNESS: Yes, sir, he was off.

23 THE COURT: His name was on the custody list that
24 they have to keep for the drugs, do you remember?

25 THE WITNESS: I believe it was, Your Honor.

1 THE COURT: Okay. So his job was simply to pick
2 them up. That is usually his job. Pick them up and deliver
3 them here for storage and testing by the sheriff's
4 department?

5 THE WITNESS: That's correct, yes, sir.

6 THE COURT: Ms. Taylor at that time, now Mitchem,
7 the chemist?

8 THE WITNESS: Ms. Mitchem.

9 THE COURT: Is that right?

10 THE WITNESS: Yes, sir.

11 THE COURT: So that would have been his role,
12 picking them up and delivering them. I think the applicant
13 is saying he had them in his custody for a year and a half,
14 but the technical situation is that the -- in fact, the
15 drugs were stored here at the sheriff's department in the
16 drug unit there, or the chemist unit there until she tested
17 them, and they are still kept there until the time of trial.
18 Somebody signs for Mr. Rollins, a form down there.

19 THE WITNESS: Yes, sir.

20 THE COURT: And they have them and that's where
21 they are normally stored. To the best of your memory, was
22 that the situation?

23 THE WITNESS: Yes, sir, and my understanding is
24 that -- I don't know if there is ever a time where law
25 enforcement would keep drugs outside and taken away and

1 just -- I don't know, have them in his car, or have them in
2 his house, or what have you.

3 THE COURT: I mean, it's possible, I guess, but
4 that's usually -- that's Mr. Rollins' usual role in all the
5 years that I have been doing this and the testimony that's
6 come in, that's his usual role. To the best of your memory,
7 that's what --

8 THE WITNESS: My understanding as well.

9 THE COURT: Okay. So he would have only had them
10 in his custody at the time that he picked them up and
11 delivered them? Somebody else signed for them?

12 THE WITNESS: Yes, sir.

13 THE COURT: And they --

14 THE WITNESS: And I believe the evidence bag would
15 have shown that as well when they signed them.

16 THE COURT: They have a list?

17 THE WITNESS: Yes, sir.

18 THE COURT: I don't know. Now, Mr. Rollins was
19 out for quite a while with some severe health problems. You
20 don't remember if that was the case here?

21 THE WITNESS: I'm not sure, Your Honor.

22 THE COURT: He just wasn't available, you don't
23 know that?

24 THE WITNESS: No.

25 THE COURT: Okay. Did Ms. Collins ever talk to a

1 lawyer that she could have been charged with trafficking of
2 these drugs, if she admitted to that?

3 THE WITNESS: I'm not sure if she ever spoke to an
4 attorney separately, Your Honor, but I know that I would
5 have had that conversation with Mr. Lyles.

6 THE COURT: Well, with Mr. Lyles, right?

7 THE WITNESS: Yes.

8 THE COURT: But did Ms. Collins ever, to your
9 knowledge, talk to an attorney about being charged herself?

10 THE WITNESS: Not to my knowledge.

11 THE COURT: Okay.

12 THE WITNESS: I don't know if she was comfortable
13 in the fact that they didn't arrest her during that time, or
14 even after had affidavit was done several months before the
15 trial started. I would assume that the solicitor's office
16 didn't believe her.

17 THE COURT: Right. I mean, but if she had come in
18 and testified under oath, they certainly could have charged
19 her?

20 THE WITNESS: Yes, sir, sure, or for perjury, if
21 they felt she was lying about that.

22 THE COURT: Okay. But to your knowledge, the best
23 of your knowledge, she never talked to an attorney, her own
24 attorney, about that or --

25 THE WITNESS: Not to my acknowledges, no, sir.

1 THE COURT: All right. I think that's all the
2 questions that I have.

3 Any questions related to the questions I asked?

4 MR. WILKERSON: One followup question, Your Honor.

5 REDIRECT EXAMINATION BY MR. WILKERSON:

6 Q. Do you know if there was an evidence log or paper list
7 of evidence that was submitted to the court showing the
8 custody of it?

9 A. If it was submitted to the court, I'm not sure. I
10 don't think that there was a log submitted to Judge Couch.

11 Q. Okay. Do you recall if you learned of Mr. Rollins for
12 the first time when Mr. Lovelace testified that that was his
13 role, is moving the drugs, or do you recall if it was
14 anything written that stated who had had possession and
15 when?

16 A. Five years ago, I'm not sure. I mean, I guess you can
17 let the transcript.

18 THE COURT: We will have to look at that.

19 MR. WILKERSON: That's all.

20 MS. WHITE: I just have one or two followup
21 questions.

22 RECROSS EXAMINATION BY MS. WHITE:

23 Q. In regards to the fact that the defendant wasn't
24 present, you still attempted to get a lot of these issues in
25 front of the jury, is that right?

1 A. Oh, yes.

2 Q. So you definitely felt like you presented the case to
3 the best of your ability?

4 A. Yes. I guess the fighter in me still thought that I
5 could still win the case without a client.

6 Q. Okay.

7 A. But secondarily I wanted to make sure that the record
8 was clear too, so just in case he wanted to file a direct
9 appeal, he would have that right.

10 Q. And just to follow up on the evidence and the chain of
11 custody questions, you went through -- there were several
12 witnesses that testified as to the chain of custody of the
13 several materials in the case?

14 A. Yes.

15 Q. And you cross-examined each of those witnesses?

16 A. Yes.

17 Q. Thank you.

18 MS. WHITE: No further questions.

19 MR. WILKERSON: Nothing further.

20 THE COURT: Thank you, sir. You may stand down.

21 THE WITNESS: Thank you.

22 MR. WILKERSON: That's all of the witnesses.

23 MS. WHITE: The State has no witnesses at this
24 time, Your Honor.

25 THE COURT: Okay. All right. I'll take the

1 matter under advisement.

2 MR. WILKERSON: Your Honor, could I draw your
3 attention again to the cite in regards to the subpoena?

4 On my desk, because I have the disc, it appears
5 that it's page 194, although it's actually page 192, and it
6 starts off with the "I believe her testimony is crucial to
7 my case," on line one, and it goes through to line 16, where
8 the court denies the motion for the continuance.

9 THE COURT: All right. All right. I'll make that
10 notation.

11 Let me point out to you, counsel, that it appears
12 to me that that's an appealable issue, a direct appeal
13 issue. He certainly could have appealed the judge's
14 decision to deny a continuance to make that witness
15 available.

16 Now, I guess his argument is that he should have
17 subpoenaed them and the judge might have changed his mind,
18 if she had been subpoenaed and didn't show up, but I'm
19 assuming -- I don't have the record here in front of me.
20 I'm at a disadvantage on that, but that Mr. Shadd told them
21 that he had talked with her. She had been there the night
22 before. She was supposed to be back the next day for the
23 hearing. He expected her to be there. She had called in
24 and said she was not going to be here, that she had a sick
25 child, or something, and he was aware of all that in denying

1 the motion for a continuance. And I -- I don't know of
2 anything that requires a subpoena to be issued or served in
3 order to get a continuance. I think that's kind of
4 discretionary with the court, but it certainly could be
5 something could be raised on direct appeal.

6 Was that issue on appeal, to your knowledge?

7 MR. WILKERSON: No, sir, that issue has not been
8 raised at all before today.

9 THE COURT: Well, couldn't it have been raised on
10 direct appeal?

11 MR. WILKERSON: I could have been raised, but the
12 issue would have been but for the --

13 THE COURT: Did the judge err in not allowing a
14 continuance in order to get a material witness there or not?

15 MR. WILKERSON: Yes, sir.

16 THE COURT: That's the question. Did the judge
17 err in failing to grant a continuance when defense counsel
18 made a motion to continue it because there was a material
19 witness, a very important witness, a crucial witness who was
20 not there. If all of that was on the record, couldn't he
21 appeal that on direct appeal?

22 MR. WILKERSON: I believe it could, but it could
23 also -- from Mr. Lyles standpoint be the linchpin of the
24 case, had she been subpoenaed, he would have had the
25 testimony that said that the drugs were not his, which could

1 be outcome-determinative testimony. It's not a harmless
2 error. It's not a factor. It is strong testimony if you
3 had something that says under oath "those were my drugs."
4 And it gets us into the issue of credibility and everything,
5 but we didn't get there because of very unusual --

6 THE COURT: I don't disagree with you, counsel,
7 but --

8 MR. WILKERSON: Okay.

9 THE COURT: But, you know, having said it, if
10 someone was going to come in and say "they were my drugs,"
11 they still could have convicted him, obviously. It's been
12 done many times in this courtroom where two people can be
13 charged and one wants to take credit for it, both of them
14 get charged and both of them be convicted. Two people can
15 possess the same drugs that are in the house. And the
16 fiance and -- and they are in the same house, but I don't
17 have to say all that.

18 I'm just saying to you that if he made the motion
19 for a continuance based on the fact that a crucial material
20 witness is not present and the judge denied it, isn't that a
21 direct appealable issue, regardless of whether he actually
22 served her with a subpoena or she was here the night before
23 and was supposed to be back here the next day, meant for her
24 to be here? And, you know, if he made a motion for
25 continuance, couldn't that be a direct appeal issue?

1 MR. WILKERSON: It could be, Your Honor.

2 THE COURT: Yes.

3 MR. WILKERSON: Also it could be ineffective for
4 failure to serve the subpoena.

5 THE COURT: Well, assuming that without a subpoena
6 the judge had to grant it because she had been subpoenaed,
7 you got any authority for that?

8 MR. WILKERSON: No, sir.

9 THE COURT: The subpoena has been issued, the
10 judge has to grant a continuance, an error not to; but there
11 hadn't been a subpoena issued, that it's not error that --
12 do you understand what I'm saying? Have you got a case that
13 says if there is a subpoena issued, the judge has to grant
14 the continuance?

15 MR. WILKERSON: No, sir, but the court clearly
16 says in the transcript the factor of the subpoena -- "the
17 issue of the subpoena is a factor for the court to
18 consider." And obviously it was, when he tells him he
19 didn't subpoena her, the court denies the motion, so I just
20 want to bring that up.

21 MS. WHITE: And, your Honor, if I may, just in
22 regards to ineffectiveness for not having Ms. Collins
23 testify, the defendant -- it's pure speculation as to the
24 fact that she would have even testified that those were her
25 drugs, simply based on that one affidavit.

1 THE COURT: No question. No question.

2 MS. WHITE: We don't know that.

3 THE COURT: No question.

4 MS. WHITE: And she's not here to say otherwise,
5 so --

6 THE COURT: No question about it. That's
7 exactly -- no question about that.

8 All right. You know, if she was here and was
9 going to testify these were her drugs, I think the court
10 would have advised her about her Constitutional Right not to
11 incriminate herself and try to offer her an attorney at that
12 point before she ever made any statements. I think that
13 would have been very important at the time. In any event,
14 she chose not to appear, so I -- as the applicant chose not
15 to appear.

16 In any event, I'll take it under advisement.

17 I'm going to need to look at the transcript.

18 Y'all don't have the transcript the court can use, written?

19 MS. WHITE: I have them. It's about five hundred
20 pages. It's a little bit more stuff, but you are welcome
21 to -- or we can get one printed. I think we have it scanned
22 and we can -- I mean, it's the same thing as the --

23 THE COURT: Well, I mean, I'm -- you know, I got
24 to do this at my own expense. They have cut our expense
25 money, and so, you know --

1 MS. WHITE: Your Honor, if you would like, I can
2 print one off and just have it mailed to you by the end of
3 the week.

4 THE COURT: All right, if you can do that, I would
5 appreciate it.

6 MS. WHITE: Yeah, certainly.

7 THE COURT: Okay. I prefer to read the
8 transcript, not on computer, but written. I would rather
9 read it --

10 MS. WHITE: Sure.

11 THE COURT: -- and make my own notes and look at
12 it and make sure I can go back and forth to it. So if you
13 can do that, I appreciate it.

14 MS. WHITE: Sure.

15 THE COURT: Anything else? If not, I'll have it
16 under advisement. It would be a little while, because I'm
17 going to have to get the transcript and read that.

18 MR. WILKERSON: Thank you.

19 MS. WHITE: Thank you, Your Honor.

20 (END OF REQUESTED TRANSCRIPT OF RECORD)
21
22
23
24
25

CERTIFICATE

I, the undersigned, Michael R. Watts, Official Court Reporter for the Sixteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for YORK County, South Carolina, on the 2nd day of December, 2009.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

FEBRUARY 19, 2012

Michael R. Watts

Michael R. Watts
Circuit Court Reporter

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Clifton Donell Lyles, #294075,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
Case No.: 2009-CP-46-1759**ORDER OF DISMISSAL**DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

2010 FEB 26 AM 10:42

FILED-RECEIVED

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 21, 2009. The Respondent made its Return on November 12, 2009. An evidentiary hearing into the matter was convened on December 1, 2009, at the Moss Justice Center in York County, South Carolina. F. Craig Wilkerson, Jr., Esquire, represented the Applicant. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. James Shadd, III, Esquire, also testified. This Court also had before it a copy of the records of the York County Clerk of Court, records from the South Carolina Department of Corrections, the Appellate Court records, and the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. The Applicant was indicted at the November 2002 term of the York County Grand Jury for Trafficking Crack Cocaine (2006-GS-46-2950). James Shadd, III, Esquire, represented the Applicant. On June 16, 2003, the Applicant pled guilty to Trafficking, 2nd offense. He subsequently withdrew his guilty plea on October 9, 2003.

The Applicant was tried in his absence on April 7, 2004, after which he was found guilty as indicted

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for Trafficking Crack Cocaine, 3rd offense. The Honorable L. Roger Couch sentenced him to confinement for a period of thirty (30) years and a fifty thousand dollar (\$50,000) fine.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. A brief was filed pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. Lyles, Op. No. 2008-UP-223 (S.C. Ct. App. filed April 11, 2008). The Applicant's Petition for Writ of Certiorari was denied February 19, 2009. The Remittitur was issued on March 2, 2009.

The Applicant also filed a federal Petition for Writ of Habeas Corpus (4:08-1884-PMD-TER) on June 12, 2008. The Petition was subsequently denied on September 9, 2009.

ALLEGATIONS

In his current application¹, Applicant alleges that he received ineffective assistance of counsel for the following reasons:

1. Failure to obtain a continuance because counsel failed to subpoena Crystal Collins;
2. Failure to properly argue the Batson motion;
3. Failure to obtain the identity of the confidential informant;
4. Failure to challenge the search warrant;
5. Failure to sufficiently challenge the knock and announce;
6. Failure to sufficiently challenge the chain of custody;
7. Failure to object to the admission of State's Exhibits #14 and #15 into evidence;
8. Failure to address the different sentences for possession of crack and powder cocaine;

¹ The Applicant amended and clarified his allegations at the PCR hearing by and through his PCR counsel.

9. Payton violation;
10. Doyle violation; and
11. Brady violation.

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 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).

Applicant's Motion for Summary Judgment

At the hearing, the Applicant moved for summary judgment under Rule 56 of the South Carolina Rules of Civil Procedure. The Applicant based his motion on the ground that the State did not file a timely Return to his application. He testified that the State did not respond to his application within thirty (30) days, and that the State did not ask for any extensions. He argued that, because the State did not follow the rule, the court should grant him summary judgment as a matter of law.

This Court denied the Applicant's motion for summary judgment at the hearing, because the Applicant demonstrated no prejudice as a result of the State's delay.

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), 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. Id. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. 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; Bannister v. State, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998) (the applicant must show his counsel's performance fell below an objective standard of reasonableness). 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 Obtain a Continuance and Subpoena Crystal Collins

In his first allegation, the Applicant contends trial counsel was ineffective for failing to

subpoena his girlfriend at the time, Crystal Collins, to testify at trial. He alleged that if trial counsel had subpoenaed her for trial, the trial could have been continued when she absconded. The Applicant testified that he originally pled guilty on June 13, 2003 to protect Collins, but that he withdrew his guilty plea after Collins submitted an affidavit dated September 4, 2003 in which she claimed the drugs belonged to her, not to the Applicant. He testified that Collins was present at his motion to suppress hearing on trial counsel's motion to suppress, but that she did not come back the next day for the end of the hearing or for the trial. The Applicant testified that he maintained throughout the trial that the drugs belonged to Collins, not him. He testified that he only gave statements to law enforcement admitting his involvement, because he was under duress. He explained that if trial counsel had subpoenaed Collins to testify at trial, she would have testified to the jury that the drugs were really hers. The Applicant further testified that trial counsel was ineffective because if trial counsel had Collins under subpoena, the trial judge would have granted trial counsel's motion for a continuance when she did not appear for the trial. He also testified that Collins was not present at the PCR hearing to testify on his behalf.

On cross-examination, the Applicant testified that he was under oath when he initially entered his guilty plea during which he admitted to possessing the drugs. The Applicant testified that he did not know whether trial counsel knew he was not going to appear for his trial. He denied that trial counsel told the trial court Collins was not coming to testify at the trial on behalf on the Applicant, because she had to stay home with a sick child.

Trial counsel testified that he has been practicing law for over ten (10) years. He testified the Applicant retained him to investigate his case in order to determine whether going to trial was an option, or to negotiate a favorable sentence for him. He stated the Applicant eventually decided to

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plead guilty. He testified that he represented the Applicant in 2003 when the Applicant initially pled guilty to a reduced charge of trafficking, 2nd offense. He testified that the Applicant was originally charged with trafficking, 3rd offense, and that he was sentenced to confinement for fifteen (15) years when he pled guilty to the reduced offense. Trial counsel testified that he assisted with the Applicant's subsequent withdraw of his guilty plea on October 9, 2003 after Collins submitted her affidavit claiming she possessed the drugs.

Trial counsel testified that he was fully prepared for trial, and that he planned to call three witnesses for the defense: Mary Mitchell, Crystal Collins, and the Applicant to testify. He testified that he made a motion for a continuance, because his witnesses and his client were not present. He stated that Collins was present at the pre-trial Jackson v. Denno hearing, and that he was prepared to call her to testify at the Denno hearing that evening. Trial counsel testified that Judge Couch decided to hear the defense's side of the hearing the next morning, because it was getting late in the evening. He testified that he fully expected Collins to be present the next morning to help the Applicant, who was her fiancé. Trial counsel stated that the record clearly reflects this sequence of events.

Trial counsel testified that he was prepared to serve Collins with a subpoena, but that he was unable to do so. He testified that as a practical matter, he planned to serve it upon her at the Denno hearing, but that the Solicitor asked the trial court to sequester the witnesses. He testified that he told Collins to leave the courtroom, but to stay in the courthouse because he was going to need her. Trial counsel testified that he did not realize at the time that she completely left the courthouse. He testified that Collins voluntarily showed up the first day of pre-trial hearings, so he did not have reason to think she would not come back the next day.

Trial counsel testified that Collins' testimony was part of his defense at trial, part of his

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defense was going to be Collins' testimony at trial, because he expected her to testify that the drugs were hers. He testified that neither Collins nor the Applicant were present the next day for the end of the hearing or for the trial, and that he specifically told the trial court he needed a continuance because Collins' testimony was critical. Counsel testified that he told the court about his efforts to find both Collins and the Applicant, but the trial court denied his motion for a continuance. Trial counsel testified that he did not believe the court's decision to deny his motion hinged on the fact that Collins was not under subpoena.

Trial counsel testified that he called his assistant frequently to see if the Applicant, or a member of the Applicant's family, called while he was in the court room, but that Collins was the only person with whom he could make contact. He testified that when he talked to Collins, she told him the Applicant was on his way but that she was not coming because her child was sick, and that she would not testify for the Applicant.

Trial counsel stated that, at first, he felt confident about the Applicant's trial, especially because the Applicant's family from North Carolina was present for pre-trial hearings the day before the trial started. He further stated that no one was present for the next day after all of his pre-trial motions were denied, and that he felt hamstrung without the Applicant being present during trial. He also stated that after all of the evidence was presented at trial, he made a motion for a new trial, but the trial court denied his motion.

Trial counsel testified that he felt his defense depended on the credibility of witnesses, and that he felt confident he could create reasonable doubt in the minds on of the jurors. He testified that testimony from both Collins and the Applicant would have been crucial and would have assisted his defense. Counsel further testified that he does not know whether Collins spoke with a separate

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attorney, but that he is certain he told the Applicant that if she testified at trial that the drugs were hers, they could both be charged with trafficking.

This Court finds the Applicant's allegation that trial counsel was ineffective for failing to obtain a continuance because he failed to subpoena Crystal Collins is without merit. Trial counsel moved for a continuance that was denied by the trial judge. Regardless, this allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). A post-conviction relief application cannot assert any issues that could have been raised at trial and on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The decision to grant a continuance is in the discretion of the trial judge. In support of this allegation, the Applicant contends trial counsel was ineffective in failing to issue a subpoena for Collins. This was one of the factors the trial judge considered, but there were a number of other factors he considered in denying the continuance. Furthermore, the Applicant could have raised this issue in his *pro se* Anders brief on direct appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, this allegation is denied.

This Court further finds that trial counsel did not render ineffective assistance in not serving a subpoena on Crystal Collins. The Applicant abandoned his trial counsel after the jury was selected, and after the first afternoon of motions. Nevertheless, trial counsel mounted a vigorous defense. The Applicant and his girlfriend, Crystal Collins, lived together in North Carolina, did not appear the next day to complete the motions and for the trial. The Applicant never contacted trial counsel or anyone else, and he was picked up by law enforcement months later. Collins, the Applicant's live-in girlfriend and mother of his child, did not appear, but she called and stated the child was sick and that she had to take the child to the doctor. Both the Applicant and Collins were present the first day

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and trial counsel had no reason to believe Lyles' live-in girlfriend, mother of his child, and over whom he had influence, would not appear.

In any event, the Applicant has not shown any prejudice. A purported affidavit of Crystal Collins, dated September 4, 2003, was offered to the Court in which she purportedly states that she possessed the crack cocaine with which Lyles was charged, and that he did not possess it. The purported affidavit also states that she was advised to seek the advice of an attorney. Even if the child of the Applicant and Collins was sick, someone could have watched the child, and she could have testified at trial. Trial counsel, James Shadd, III, testified at the PCR hearing that Collins told him she would not testify for Lyles at the trial.

If Collins had testified at the trial, Lyles could have been convicted anyway, and she would have been charged as well if she claimed the drugs were hers. The Applicant gave a voluntary statement to law enforcement, and he knew the approximate weight of the crack cocaine without seeing it when it was found. Two or more persons can be convicted of possessing the same drugs, and that is certainly true in a trafficking charge in which conspiracy to possess more than ten (10) grams of crack cocaine is an element of the offense. The trial judge would have had to advise Collins of her Fifth Amendment right to remain silent, and would have had to have an attorney appointed to advise her of her Constitutional rights including possible prosecution in which her sworn testimony could have been used against her. Importantly, Collins was not called to testify in this matter, and the burden is on the Applicant to prove his grounds for post-conviction relief. Furthermore, no evidence was offered to show that the child was taken to see a doctor on the day in question. This Court finds that the Applicant has failed to meet his burden of proving he is entitled to relief on this ground. Accordingly, this allegation is denied.

Failure to Properly Argue the Batson Motion

The Applicant alleges trial counsel did not adequately protect his rights during the Batson motion. The Applicant testified that the Solicitor struck a juror, because the juror had a prior conviction for larceny and breaking and entering a motor vehicle. He testified that the Solicitor later said she was not sure if the juror she struck actually had a prior conviction. The Applicant stated that he believed the Solicitor struck the juror because he was the only possible juror who was black. He further stated that the State also struck a Hispanic juror.

Trial counsel testified that he made several motions, including a Batson motion, but that the trial court denied the motion.

First, the Court finds that the record directly refutes the Applicant's allegation that trial counsel did not make or argue a proper Batson motion. Trial counsel made and argued the Batson motion properly. Nevertheless, the trial court denied trial counsel's Batson motion. Trial counsel's conduct did not fall below an objective standard of reasonableness. Therefore, the Applicant is not entitled to post-conviction relief on this ground.

Second, the allegation that the trial court erred in denying counsel's Batson motion raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley, 260 S.C. at 436, 196 S.E.2d at 501. Trial court error, therefore, is not a cognizable claim for PCR. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue in his *pro se* Anders brief on direct appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, this allegation is denied.

Failure to Obtain the Identity of the Confidential Informant

The Applicant testified that trial counsel was ineffective for failing to obtain the identity of the confidential informant. He testified that trial counsel made the trial harder on himself by telling the trial judge that he could prove the confidential informant participated in the search of residence. The Applicant explained that the judge considered it, and later made it a requirement that trial counsel had to prove. The Applicant stated that trial counsel never addressed the issue again. He testified that the confidential informant's identity was also significant because three people were present when the house was searched, but they were not charged with anything. He also testified that even a drug dog could not find the drugs.

Trial counsel testified that during his preparation for trial, he spoke with the Applicant and Collins about the voluntariness of the Applicant's statements he gave to law enforcement when the residence was searched. He said they discussed the circumstances surrounding the execution of the search warrant, and that evidence developed indicating that the confidential informant was a drug dealer himself and was present during the execution of the search warrant.

Trial counsel testified that he made a motion to compel the State to disclose the identity of the confidential informant, and that he submitted a packet of case law in support of his motion. Trial counsel testified that he tried to convince the judge that the Applicant was framed, because the individual was more than just a confidential informant. He stated that he told the trial court he believed the house was used to hold drugs for dealers, including the confidential informant. He testified that he argued to the trial court the confidential informant was present during the search, and the confidential informant specifically told the officers to look for drugs in the bottom of the trashcan. Trial counsel testified the trial court denied his motion, but that during the trial, he was

able to get an officer to acknowledge that three people came to the house to execute the search warrant, and that one of them stayed outside on the porch.

First, this Court finds the Applicant's testimony that counsel was ineffective for failing to obtain the identity of the confidential informant is not credible, while also finding that counsel's testimony is credible. The Applicant testified that even a drug dog did not find the drugs. The transcript reflects that the drug dog was not available that week and was not used. The Applicant also testified that three people showed up outside the residence while the search was in progress. Further, that none of these three persons was charged. He intimated in his testimony that one of the three persons was the confidential informant referred to in the search warrant, and that the confidential informant must have hidden the drugs previously and told the police where to look when they did not find the drugs themselves. The Applicant testified the drugs were found under the trash bag in the trashcan. Testimony of the officers at trial revealed that the three persons who showed up were relatives and a friend of either the Applicant or Collins. They were searched, cleared for outstanding warrants, and let go.

Lieutenant Lovelace testified that she found the drugs in a plastic bag mixed in with the trash. She testified she searched the refrigerator and other places in the residence where drugs are frequently found. She testified that she also found drugs in numerous trashcans in other cases. She described the search of the trashcan that was conducted with the help of Officer Schmittel. They used gloves and transferred the trash piece by piece into another trash bag. She and other officers testified that the Applicant, having been advised of his Constitutional rights, admitted the drugs were his. When asked the weight of the drugs, he gave a weight that was very close to the actual weight without seeing the package of drugs.

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Therefore, this Court finds that trial counsel was not ineffective for failing to obtain the confidential informant's identity. In addition to trial counsel's testimony, the record clearly establishes that trial counsel did argue a motion to compel the State to disclose the confidential informant's identity. The trial court denied counsel's motion.

This Court further finds the trial court's denial of trial counsel's motion to compel the State to disclose the identity of the confidential informant raises a direct appeal issue that is procedurally barred 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, 260 S.C. at 436; 196 S.E.2d at 501. Trial court error, therefore, is not a cognizable claim for PCR. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Trial counsel made a motion to compel the State to disclose the confidential informant's identity. The trial court was well within its discretion to deny trial counsel's motion. The Applicant could have raised the issue that the trial court erred in denying counsel's motion on direct appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, this allegation is denied.

Failure to Challenge the Search Warrant

The Applicant alleges trial counsel was ineffective for failing to challenge the search warrant. The Applicant testified that the search of the residence stemmed from a controlled buy, and that he was out of the state when the confidential informant made the controlled buy. The Applicant testified that Officer Ligon told the magistrate judge he had an arrest warrant for the Applicant for distribution. The Applicant testified that the Solicitor said during trial that the officer was mistaken

about the outstanding arrest warrant, because he was never charged with distribution. The Applicant also testified that trial counsel told him he could not get any information about the basis of the search warrant, and that hindered trial counsel's ability to show that Officer Ligon was not credible.

The Applicant testified that trial counsel should have challenged the search warrant, because the warrant did not contain any information establishing Officer Ligon's basis of knowledge, the confidential informant's reliability, the amount of drugs the confidential informant purchased, or how much money he paid for them. The Applicant also testified that the identity of the confidential informant was critical, because the search warrant did not state the basis of the confidential informant's reliability. He further testified that a hearing was never held to determine the veracity or credibility of the confidential informant. The Applicant also testified that he did not live in the house where the drugs were found; rather, he was an overnight guest.

On cross-examination, the Applicant agreed that trial counsel argued a motion to suppress the evidence obtained from the search warrant, because the officer never established the confidential informant's reliability. He also agreed that trial counsel made a motion to compel the State to disclose the confidential informant's identity, and that he argued the State's failure to do so was a violation of the Applicant's constitutional right to confront witnesses. The Applicant acknowledged that trial counsel's motions were denied.

Trial counsel testified that the State obtained most of its evidence against the Applicant from the search warrant. He testified that he made a motion to suppress all of the evidence obtained from the search warrant, but that the trial court denied his motion. He testified that Officer Lovelace found a bag of seven individually wrapped bags of crack cocaine in a trashcan in the kitchen. He stated that the amount of crack cocaine found in the trashcan amounted to approximately one gram.

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This Court finds that the Applicant's testimony regarding trial counsel's failure to obtain the identity of the confidential informant was not credible, while also finding that trial counsel's testimony is credible. Trial counsel made a motion to suppress the crack cocaine on the basis that the search warrant was defective. The trial court denied counsel's motion. Therefore, this Court finds trial counsel was not ineffective for failing to challenge the search warrant.

This Court further finds the trial court's denial of counsel's motion to suppress on the ground that the search warrant was defective raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). The issue was preserved for appellate review by trial counsel, and the Applicant raised the issue in his *pro se* appellate brief. However, both the trial court and the appellate court denied the issue. Therefore, this allegation is denied.

Failure to Sufficiently Challenge the Knock and Announce

The Applicant also alleges trial counsel was ineffective for failing to sufficiently challenge the knock and announce during the execution of the search warrant. The Applicant testified that, although trial counsel addressed this issue in the Jackson v. Denno hearing, he stopped pursuing it. He testified that Officer Clark did not properly knock and announce. According to the Applicant, Officer Clark testified that the front door of the house open, but the screened door was closed. The Applicant stated that Officer Clark admitted he saw a lady inside, opened the screen door, and then said "police, search warrant" before walking into the residence. The Applicant testified that Officer Clark never gave a reason why he did not knock and announce. He further testified that trial counsel was ineffective for not challenging the issue any further.

Trial counsel testified that he made several pre-trial motions, including a motion to suppress the Applicant's statements given to law enforcement based on an illegal search and seizure. Trial

counsel challenged the search warrant and cross-examined Officer Clark regarding the procedure the officers used to execute the search warrant-specifically the knock and announce. The Solicitor objected, and the trial court sustained the Solicitor's objection.

This Court finds that trial counsel sufficiently challenged the search warrant, and the knock and announce. This Court finds that counsel did not render ineffective assistance of counsel for failing to sufficiently challenge the knock and announce. Trial counsel made several pre-trial motions, vigorously challenged the search warrant, and specifically cross-examined the State's witness about the knock and announce. Therefore, trial counsel's performance was not deficient, and his conduct did not fall below an objective standard of reasonableness. The Applicant failed to show any prejudice that may have resulted from trial counsel's alleged deficient performance. Accordingly, this allegation is denied.

Failure to Adequately Challenge the Chain of Custody

The Applicant alleges trial counsel was ineffective for failing to adequately challenge the chain of custody. The Applicant testified that Gary Rollins was the custodian of the drugs, and that Rollins never appeared in court to testify about what he did with the drugs while they were in his possession. The Applicant testified that the Solicitor failed to follow Rule 6(b) of the South Carolina Rules of Criminal Procedure requiring the State to produce a sworn affidavit from Rollins stating what he did with drugs since Rollins was not present to testify in person. The Applicant testified that as a result, trial counsel should have continued to argue that the chain of custody had been broken. However, the Applicant acknowledged that trial counsel made several arguments and objections to the chain of custody, but that the trial court overruled counsel's objections.

Trial counsel testified that he absolutely objected to the chain of custody. He stated he

believed Rollins' role in the chain of custody was to pick up the drugs and deliver them to the chemist where they were tested and stored. He testified that Rollins would not have necessarily had the drugs in *his* custody for the one and a half years that elapsed between arrest and trial, and that Rollins was unavailable to testify at trial.

This Court finds that the chain of custody pertaining to the evidence was established as far as is practicable. The testimony in the transcript clearly establishes each person who handled the evidence, and how long they had it in their possession until the time it was signed out of the evidence room by an officer for trial. The only person in the chain who did not testify was Gary Rollins. The testimony established that he worked in the evidence room as a technician and that his only involvement in the handling of evidence was to sign it out to an officer for fingerprinting. Rollins was off duty and his presence was not requested. Trial counsel objected and did everything he could to protect the record. Furthermore, the Applicant failed to demonstrate any prejudice. Therefore, this allegation is denied.

This Court further finds that the trial court's decision to overrule trial counsel's objection to the chain of custody raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). The decision to admit or exclude evidence is within the trial court's sound discretion. Campbell v. Jordan, 382 S.C. 445, 675 S.E.2d 801 (Ct. App. 2009); Gamble v. Int'l Paper Realty Corp., 323 S.C. 367, 474 S.E.2d 438 (1996). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley, 260 S.C. at 436, 196 S.E.2d at 501. Trial counsel objected to the chain of custody several times. The trial court was well within its discretion to deny trial counsel's motion. The Applicant could have raised the issue that the trial court erred in overruling counsel's objections on direct appeal. His failure to do so

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has waived this allegation as a ground for relief. Therefore, this allegation is denied.

Failure to Object to the Admission of Exhibits #14 and #15 Into Evidence

The Applicant also alleges that trial counsel was ineffective for failing to object to the admission of State's Exhibits #14 and #15 into evidence. The Applicant testified that State's Exhibit #14 was allegedly 20.34 grams of crack cocaine, and that State's Exhibit #15 was allegedly a trace amount of crack cocaine. The Applicant acknowledged that trial counsel objected to the admission of these exhibits into evidence from the very beginning of the trial, but that trial counsel later retracted his objections and allowed the exhibits to be entered into evidence.

Trial counsel testified that he objected to the State admitting exhibits #14 and #15 into evidence, and that he believed he was able to preserve the record for the Applicant. He testified that in addition to making several objections to the State's evidence, he also renewed his objections that he made the previous day. This court finds that the Applicant's testimony regarding trial counsel's alleged failure to object to the admission of this evidence at trial is not credible, while also finding that trial counsel's testimony is credible. Trial counsel made the necessary objections and preserved the issue for appeal. Therefore, counsel's performance was not deficient and his conduct did not fall below an objective standard of reasonableness. Furthermore, the Applicant failed to show any prejudice resulting from any alleged deficiency.

This Court further finds that the trial court's decision to overrule trial counsel's objection to the admission of Exhibits #14 and #15 into evidence raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). The decision to admit or exclude evidence is within the trial court's sound discretion. Campbell v. Jordan, 382 S.C. 445, 675 S.E.2d 801 (Ct. App. 2009); Gamble v. Int'l Paper Realty Corp., 323 S.C. 367, 474 S.E.2d 438 (1996). A post-conviction

relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley, 260 S.C. at 436, 196 S.E.2d at 501. Trial counsel objected to the chain of custody several times. The trial court was well within its discretion to deny trial counsel's motion. The Applicant could have raised the issue that the trial court erred in denying counsel's motion on direct appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, this allegation is denied.

Failure to Address Different Sentences for Crack Cocaine and Powder Cocaine

The Applicant also alleged that trial counsel was ineffective for failing to address the sentencing disparity between crack and powder cocaine. The Applicant testified that the sentencing guidelines are prejudicial, because they impose harsher sentences on people charged with possessing crack cocaine than they do on people charged with possessing powder cocaine. The Applicant argued that a recent United States Supreme Court case held that the different sentences imposed for crack cocaine offenses, compared to powder cocaine offenses, is prejudicial. He testified that he could not recall the case name or statute, but that he knows the Court made its ruling "retroactive to the states."

This Court addressed the Applicant's allegation, explaining that the Federal Sentencing Guidelines to which the Applicant referred do not apply in state court. This Court noted that South Carolina law does not contain any law or remedy regarding the alleged prejudicial effect of disparate sentences for crack offenses compared to powder cocaine offenses. This Court finds that trial counsel was not ineffective for failing to address any sentencing disparity between crack and powder cocaine. Accordingly, this allegation is denied.

Payton Violation

The Applicant alleged trial counsel was ineffective for failing to challenge his warrantless arrest under Payton v. New York.² The Applicant testified that the officers told him he was under arrest as soon as they walked in, but that an hour passed before the officers found any drugs. He testified he did think there was an outstanding arrest warrant for him at that time.

The Applicant stated that once the officers found the drugs, they handcuffed him and made him sit down in the living room. The Applicant also stated that two girls were also present, and that they sat in the living room with him, but they were not under arrest. He testified that the officers told him to "own up," or else they would arrest everyone. The Applicant testified that his warrantless arrest was a Payton violation because the officers did not have a warrant for his arrest and there were no exigent circumstances. He testified that trial counsel was ineffective for failing to challenge his arrest at trial on these grounds.

Trial counsel testified that he made a pre-trial motion to suppress the evidence and statements obtained by law enforcement during the execution of the search warrant based on a Fourth Amendment illegal search and seizure. During trial counsel's motions, the circumstances regarding the Applicant's statements to law enforcement, evidence that was found, and his subsequent arrest necessarily probed the circumstances surrounding his arrest.

At the hearing, this Court noted that the search warrant affidavit said the confidential informant bought drugs from the Applicant. Thus, the Applicant's arrest was likely based on probable cause to arrest given information obtained from the confidential informant after the controlled buy. The Applicant's arrest likely did not have anything to do with the search warrant.

This Court finds trial counsel was not ineffective for failing to specifically argue the

Applicant's Fourth Amendment rights were violated under Payton. According to the record, law enforcement had probable cause to arrest the Applicant as a result of the controlled buy, not the search warrant. Trial counsel made several challenges to the search warrant and to law enforcement's reliance on the information obtained from the confidential informant after the controlled buy. The trial court denied trial counsel's motions. Therefore, trial counsel's performance did not fall below an objective standard of reasonableness for not specifically arguing Payton in his pre-trial motions. The Applicant has not presented any evidence that the result would have been different had trial counsel made the argument the way the Applicant alleges he should have. Therefore, this allegation is denied.

Doyle Violation

The Applicant also alleged that trial counsel was ineffective for failing to sufficiently challenge a violation of his Fifth Amendment right to remain silent under Doyle v. Ohio.³ The Applicant testified that he requested an attorney when he "owned up to the drugs." He testified that during the trial, the Solicitor commented on this exercise of his right to remain silent. The Applicant further testified that trial counsel objected to the Solicitor's comment, and that trial counsel argued his objection during the Doyle hearing.⁴ The Applicant also acknowledged that trial counsel's earlier motion to suppress the Applicant's statements was denied.

Trial counsel testified that the State had overwhelming evidence against the Applicant, because he gave statements to law enforcement both before and after he was arrested. Trial counsel testified that before the Applicant was arrested, and before any drugs were found in the house, an

² Payton v. New York, 445 U.S. 573 (1980).

³ Doyle v. Ohio, 426 U.S. 610 (1976).

⁴ The record reflects that a "Doyle hearing" was never held, but that trial counsel argued his objection to the Solicitor's comment outside the presence of the jury.

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officer asked him "how much you got." Counsel stated the Applicant told the officer approximately twenty-two (22) grams, and that the Applicant's response was significantly accurate - within one tenth of the amount the officers actually found. Trial counsel also testified that he had particular difficulty handling this statement, because it appeared very self-incriminating.

The record also reflects that trial counsel objected to the Solicitor's comment during her direct examination of Officer Brown regarding the Applicant's choice to "own up," rather than exercise his Fifth Amendment right to remain silent. Trial counsel offered a lengthy argument in support of this objection, but the trial court overruled his objection. Therefore, this Court finds that trial counsel's performance was not deficient and his conduct did not fall below an objective standard of reasonableness. Further, this Court finds the Applicant has shown no prejudice from this alleged deficiency.

This Court further finds that the issue as to whether the trial court erred in overruling trial counsel's objection to the Solicitor's comment is an issue that can only be raised on direct appeal and is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons, 264 S.C. at 417, 215 S.E.2d at 883. A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley, 260 S.C. at 436, 196 S.E.2d at 501. Trial court error, therefore, is not a cognizable claim for PCR. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Trial counsel made the necessary objection and preserved the issue for appeal. The Applicant could have raised the issue on direct appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, this allegation is denied.

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Brady Violation

The Applicant alleged trial counsel was ineffective for failing to ask the trial court to hold the Brady⁵ hearing on the record. The Applicant testified that it was important to have the hearing on the record, because the State would have been required to bring forth the audiotape, drugs, and identity of the confidential informant. He testified that he did not believe the State actually had any of this evidence, and that if trial counsel had requested the hearing be held on the record, the record would show that the State fabricated all of the evidence in order to obtain the search warrant. The Applicant also testified that the search warrant referred to an electronic listening device that was used during the controlled buy, and that the State's failure to disclose the recording was a Brady violation.

Trial counsel testified that he did not request a Brady hearing, because the Applicant was not charged with or on trial for distribution of the drugs involved in the controlled buy that was the subject of the electronic recordings. He explained that the electronic listening device or recording was completely unrelated to the trafficking charge at issue.

In evaluating post-trial Brady claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268.

This Court finds trial counsel's decision not to request a Brady hearing on the record did not

fall below an objective standard of reasonableness. The audiotape was not related to the crime with which the Applicant was charged, and therefore was not exculpatory evidence to which the Applicant would have been entitled. Second, trial counsel made a motion to compel the State to disclose the confidential informant's identity, but his motion was denied. This does not constitute a violation under Brady. Regardless, the Applicant failed to present any evidence that the material he alleges the State withheld was material or favorable to him. Therefore, this allegation is denied.

Applicant's Rebuttal Testimony

After the State concluded its cross-examination of the Applicant, the Applicant offered further testimony in rebuttal. With regard to the allegations the Court ruled were direct appeal issues, the Applicant testified that the Appellate Court granted the Anders brief, but that the Court did not make a decision on the merits of any of the issues he raised in his *pro se* brief.

This Court explained to the Applicant that the Appellate Court's holding meant that it did not find any merit in the issues he raised in his brief. Further, that the issues that are raised and decided by the Court of Appeals are final unless the South Carolina Supreme Court grants certiorari. This Court further clarified that the Supreme Court does not grant certiorari in every case.

Summary

This Court finds in regards to the allegations of ineffective assistance of counsel, the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel defended the Applicant vigorously throughout the trial with numerous motions and objections, as well as, aggressive cross-examination of the State's witnesses. Trial counsel was thoroughly competent in his representation, and his conduct does not fall below the

⁵ Brady v. Maryland, 373 U.S. 83 (1963)

objective standard of reasonableness.

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

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

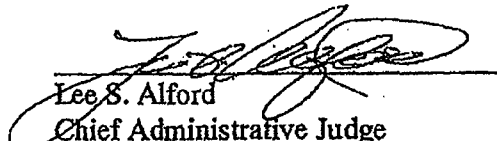
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises 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.

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!


Lee S. Alford
Chief Administrative Judge
Sixteenth Judicial Circuit

January 25, 2010
Yall, South Carolina

26
2010

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Clifton D. Lyles, #294075,

Applicant,

v.

State of South Carolina,

Respondent.

2010 MAY 25

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

SIXTEENTH JUDICIAL CIRCUIT
No.: 2009-CP-46-1759

RETURN TO APPLICANT'S PRO SE
RULE 59(e) MOTION and NOTICE
INTENT TO APPEAL

2010 MAY 25 AM 10:33
RECEIVED
CLERK OF COURT
YORK COUNTY, SC

Respondent, making its Return to the Applicant's pro se Rule 59 (e) Motion to Amend or Alter Judgment and Notice of Intent to Appeal filed May 12, 2010, respectfully submits the following:

Applicant's motion pertains to the Order of this Court filed February 26, 2010. In his pro se Rule 59(e) motion, Applicant asserts that the Court did not rule on each issue raised or make its own specific findings, that Respondent failed to respond to his application within thirty days, and that he was forced go to forward with the hearing despite advising the Court that he was "not comfortable" with PCR counsel's representation due to insufficient time to meet. Applicant requests the Court to have his hearing "remanded back down for the Judge to make a specific finding of facts and conclusion of law."¹

Respondent respectfully submits that the Court does not have jurisdiction to consider Applicant's pro se Rule 59(e) Motion and that the Motion must be denied and dismissed. Pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, a motion to alter or amend the judgment must be served no later than ten (10) days after receipt of written notice of entry of the order. Applicant's motion was dated May 12, 2010. Neither Applicant nor his attorney specifies the date either received the Order of Dismissal. However, according to the Court's certificate of service accompanying the Order, both Respondent and Applicant's attorney were served with a copy of the Order of Dismissal on

¹ Applicant also requests "that the audio transcripts be preserved." Rule 607(j), SCACR governs the retention of tapes. It provides that a court reporter shall retain the primary and back-up tapes of a proceeding that has not been transcribed for a period of at least five years after the date of the proceeding.

February 26, 2010. Respondent received a copy of the Order of Dismissal on March 1, 2010. Presumably Applicant's attorney also received the Order at that time. In fact, Applicant's attorney states in his Motion to be Allowed to File Notice of Intent to Appeal Out of Time, dated May 14, 2010² that "the clocked in Order was mailed to counsel where it was erroneously filed and not forwarded to Lyles/Appellant." Counsel stated he "did not realize he had been provided a copy of the Order until May 12, 2010." Further, on January 26, 2010, Applicant's attorney mailed to Applicant a copy of the proposed Order submitted to the Court.

Thus, Applicant's Rule 59(e) Motion, assuming *arguendo* the Court considers it a properly filed motion as further discussed below, should have been served and filed well before May 12, 2010. For all intents and purposes, the Rule 59(e) Motion should have actually been served and filed no later than March 11, 2010, which is ten (10) days after Applicant's attorney presumably received written notice of entry of the Order.³ Therefore, Applicant's pro se Rule 59(e) Motion must be dismissed because it is not timely and the Court lacks jurisdiction to consider the Applicant's request. See Rule 59(e), SCRPC.

Further, Respondent submits Applicant's pro se Rule 59(e) Motion should be denied and dismissed because Applicant is represented in the post-conviction relief proceeding by F. Craig Wilkerson, Jr., Esquire. Pursuant to Rule 11, SCRPC, counsel shall sign every motion of a party represented by an attorney. Applicant's pro se Motion is not proper.⁴ State law does not permit or recognize "hybrid representation," this is, representation that is partially by counsel and partially pro se. See e.g. Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989).

Moreover, and based on the record before the Court, Respondent contends there are no grounds upon which Applicant's Rule 59(e) Motion should be granted. The Order of Dismissal sufficiently addresses all of the issues raised, and sufficiently states all of the relevant findings of fact and

² Filed in the South Carolina Court of Appeals.

³ Presuming Applicant's attorney received the Order the same day Respondent did, in light of the fact the Order was mailed to both parties on the same day (February 26, 2010).

⁴ Applicant's attorney filed a Motion to Set Aside Order pursuant to SCRPC Rules 59(e) and 60(b) on or about May 14, 2010, to which Respondent is simultaneously filing a separate response.

conclusions of law. To be clear, the Court did in fact make its own specific findings of fact and conclusions of law regarding this action as evidenced by the Court's letter to both Respondent and Applicant's counsel dated December 21, 2009, in which the Court stated its findings and requested Respondent prepare the Order. Furthermore, of those findings, the Court specifically indicated that Applicant failed to show any prejudice as a result of the Respondent's delay in filing its Return. Likewise, in response to Applicant's concern that he did not have enough time to meet with counsel, the Court continued Applicant's hearing to the next day to allow Applicant and counsel adequate time to confer. Respondent submits Applicant does not provide any valid grounds in support of his request to alter or amend the judgment but is merely seeking an opportunity to reassert evidence and argument presented and rejected by the Court at the hearing and in its Order of Dismissal.

With regard to Applicant's pro se motion captioned Notice of Intent to Appeal, Respondent submits the motion must also be summarily denied and dismissed. First, there is no indication the Notice was filed with the Clerk of the Supreme Court as required under SCACR Rule 203. Second, and as previously stated, Applicant is represented in the post-conviction relief proceeding by F. Craig Wilkerson, Jr., Esquire. Therefore, Applicant's pro se motion is not proper.⁵ SCRCR Rule 11, SCRCR; See also, e.g., Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989).

Finally, Applicant's pro se motion regarding an appeal from the Court's Order is untimely. A notice of intent to appeal (from the Court of Common Pleas) must be filed within thirty (30) days of receipt of written notice of entry of the order or judgment. While Applicant's counsel is not certain of the date he received the order, both parties were aware that Applicant's PCR application was dismissed as early as December 21, 2009. On January 26, 2010, Applicant and his attorney were in receipt of the proposed Order of Dismissal. Respondent received a copy of the Order of Dismissal on March 1, 2010. Presumably Applicant's attorney also received the Order at that time. In fact, as previously stated,

⁵ Applicant's attorney filed a Motion to Set Aside Order pursuant to SCRCR Rules 59(e) and 60(b) on or about May 14, 2010, to which Respondent is simultaneously filing a separate response. Applicant's attorney also filed in the Court of Appeals a Motion to Be Allowed to File Notice of Intent to Appeal Out of Time and Notice of Appeal on May 14, 2010.

Applicant's attorney concedes the time by which the Notice of Intent to Appeal must be filed has expired in his Motion to be Allowed to File Notice of Intent to Appeal Out of Time, dated May 14, 2010.⁶ Thus, by Applicant's counsel's own candid admission, the time to appeal from the Court's Order dismissing this action has expired. For the foregoing reasons, Applicant's pro se motion captioned "Notice of Intent to Appeal" should also be denied and dismissed.

WHEREFORE, based on the foregoing, Respondent submits Applicant's pro Rule 59(e) Motion and pro se Notice of Intent to Appeal should be denied and dismissed.

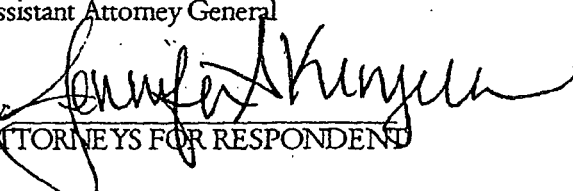
Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

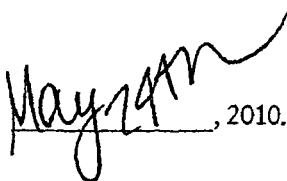
SALLEY W. ELLIOTT
Assistant Deputy Attorney General

JENNIFER A. KINZELER
Assistant Attorney General

By 

ATTORNEYS FOR RESPONDENT

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

 , 2010.

⁶ Filed in the South Carolina Court of Appeals.

STATE OF SOUTH CAROLINA } IN THE COURT OF COMMON PLEAS
 COUNTY OF YORK } SIXTEENTH JUDICIAL CIRCUIT
 Case No.: 2009-CP-46-1759

Clifton D. Lyles, # 294075,

DAVID HAMILTON
 CLERK OF COURT
 YORK COUNTY, SC

v.

RETURN TO MOTION TO SET ASIDE
 ORDER

State of South Carolina,

Respondent.

2010 MAY 25 AM 10:33
 C.C.P. & GS
 YORK COUNTY, SC

Respondent, making its Return to Applicant's (counsel's) Motion to Set Aside Order, pursuant to the South Carolina Rules of Civil Procedure Rule 59(e) and Rule 60(b) served upon Respondent on May 14, 2010, respectfully submits the following:

Counsel's motion pertains to the Order of this Court filed February 26, 2010. In his Motion, counsel seeks to have the Court's Order set aside because Applicant himself was not provided a copy of the Order of Dismissal through no fault of his own. As a result, counsel contends, Applicant was unaware that the time period within which he was required to file a Notice of Intent to Appeal had expired.

Counsel's Motion Pursuant to Rule SCRPC Rule 59(e)

Respondent respectfully submits that the Court does not have jurisdiction to consider counsel's motion as made pursuant to SCRPC Rule 59(e) and that the Motion must be denied and dismissed. Pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, a motion to alter or amend the judgment must be served no later than ten (10) days after receipt of written notice of entry of the order. Counsel's motion was dated May 14, 2010. Counsel cannot specify the date he received the Order of Dismissal. However, according to the Court's certificate of service accompanying the Order, both Respondent and counsel were served with a copy of the Order of Dismissal on February 26, 2010. Respondent received a copy of the Order of Dismissal on March 1, 2010. Presumably counsel also received the Order at that time. In fact, counsel states in his Motion to be Allowed to File Notice of Intent to Appeal Out of Time, dated May 14,

2010¹ that “the clocked in Order was mailed to counsel where it was erroneously filed and not forwarded to Lyles/Appellant.” Counsel stated he “did not realize he had been provided a copy of the Order until May 12, 2010.” Further, on January 26, 2010, counsel mailed to Applicant a copy of the proposed Order submitted to the Court.

Thus, counsel’s motion, as made pursuant to SCRCF Rule 59(e), should have been served and filed well before May 14, 2010. For all intents and purposes, the motion pursuant to Rule 59(e) should have actually been served and filed no later than March 11, 2010, which is ten (10) days after counsel presumably received written notice of entry of the Order.² Therefore, counsel’s Motion as made pursuant to Rule 59(e) Motion must be dismissed because it is not timely and the Court lacks jurisdiction to consider counsel’s request. See Rule 59(e), SCRCF.

Moreover, and based on the record before the Court, Respondent contends there are no grounds upon which counsel motion, as made pursuant to SCRCF Rule 59(e), should be granted. The Order of Dismissal sufficiently addresses all of the issues raised, and sufficiently states all of the relevant findings of fact and conclusions of law. Respondent submits that counsel does not provide any valid grounds in support of his request to alter or amend the judgment pursuant to SCRCF Rule 59(e) but is merely seeking an opportunity to aside the Order to essentially start the thirty (30) day period over because the time to appeal this Order has expired.

Counsel’s Motion Pursuant to Rule SCRCF Rule 60(b)

With regard to counsel’s motion as made pursuant to SCRCF Rule 60(b), Respondent submits the motion must also be summarily denied and dismissed. Counsel states the Appellant was not provided with a copy of the Order of Dismissal filed on February 26, 2010 through no fault of his own, and, as a result, Appellant was unaware that the time frame within which to file a Notice of Intent to Appeal had expired.

Relief from judgment is available upon a showing of excusable neglect and a meritorious defense. Stearns Bank Nat. Ass’n v. Glenwood Falls, LP, 373 S.C. 331, 644 S.E.2d 793 (Ct. App. 2007). The standard

¹ Filed in the South Carolina Court of Appeals.

² Presuming counsel received the Order the same day Respondent did, in light of the fact the Order was mailed to both parties on the same day (February 26, 2010).

for granting relief from judgment on the ground of mistake, inadvertence, or excusable neglect, is more stringent than the "good cause" standard for granting relief from an entry of default. Bage, LLC v. Southeastern Roofing Co. of Spartanburg, Inc., 373 S.C. 457, 646 S.E.2d 153 (Ct. App. 2007). Where an attorney is merely neglectful when judgment is entered against a client, the general rule applies and relief from judgment is unavailable. Stearns Bank, *supra*.

Here, it must be clarified that counsel's reference to "Appellant" in his motion pertains to the Applicant, Mr. Lyles, not to counsel himself. Counsel represents Applicant Lyles in the instant action; thus, it is of no consequence that "Appellant [Lyles] was unaware that the time frame within which to file a Notice of Intent to Appeal had expired." It was counsel's obligation to file the Notice of Intent to Appeal – not Appellant Lyles'. Any attempt from Appellant Lyles to file a pro se Notice of Intent to Appeal would have been improper, as State law does not permit or recognize "hybrid representation," this is, representation that is partially by counsel and partially pro se. See e.g. Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989). Thus, Appellant Lyles' unawareness of the time to appeal is of minor consequence where a proper Notice of Intent to Appeal could only have been properly filed by counsel, not Lyles. Respondent respectfully submits it is counsel's awareness of the time to appeal, not Lyles', about which the Court should be concerned in considering counsel's motion.

In the present case, counsel was aware per the Court's letter dated December 21, 2009, that Lyles' application for post-conviction relief was dismissed and that a formal Order of Dismissal would follow. Counsel was further aware that he should have been expecting a signed, clocked formal Order of Dismissal shortly after January 26, 2010 given that counsel received, and forwarded to Lyles on that date, a copy of the proposed Order of Dismissal. The signed, clocked Order of Dismissal was mailed to Respondent and counsel on the same day: February 26, 2010. Presumably counsel received the Order on or about the same time Respondent received it: March 1, 2010. Indeed, counsel was aware Lyles' PCR action had been dismissed and that a proposed Order of Dismissal had been submitted to the Court. It follows that counsel should have been aware a formal Order was forthcoming, thus beginning the time frame within which he had to appeal the Court's decision. Therefore, Respondent submits counsel's neglect was not excusable and

provides no justifiable grounds to support reopening or setting aside the Court's decision to dismiss Lyles' post-conviction relief application.

To be clear, counsel's motion is based upon his failure to timely file a Notice of Intent to Appeal on Lyles' behalf, a mistake which resulted, by counsel's own admission, from counsel's (or his secretary's) erroneous filing.³ In considering a Rule 60(b) motion, the Court may correct such mistakes, omissions, or clerical errors that are not the result of the exercise of judicial function. Ex parte Strom, 343 S.C. 257, 539 S.E.2d 699 (S.C. 2000)(holding that failure to file a motion to be relieved as counsel of record was not clerical error, thus attorney of record in pending case was not entitled to relief under Rule 60(b) permitting the court to correct clerical errors); Dion v. Ravenel, Eiserhardt Assocs., 316 S.C. 226, 230, 449 S.E.2d 251, 253 (Ct.App.1994).⁴

Respondent further contends, respectfully, that the Notice of Appeal is a jurisdictional requirement and the court of common pleas does not have the authority to extend or expand the time in which the Notice of Appeal must be served and filed. Burnett v. South Carolina State Highway Dep't, 252 S.C. 568, 167 S.E.2d 571 (1969)(holding that the court of common pleas did not have authority to extend time for landowner to appeal from a decision of the board of condemnation after the statutory time limit for appeal had expired); Sadisco of Greenville, Inc. v. Greenville County Bd. of Zoning Appeals, 340 S.C. 57, 530 S.E.2d 383 (2000)(affirming the circuit court's reliance on Burnett, *supra* in denying petitioner's Rule 60 motion). In Sadisco, the South Carolina Supreme Court discussed the Burnett decision, and opined that if the Court allowed a party to file a Rule 60 motion whenever a party failed to timely serve a Notice of Appeal, the Court would be exceeding its jurisdictional limits by allowing a party to extend or expand the time in which a Notice of Appeal may served. Id. at 59, 384.

Therefore, based on the foregoing, Respondent respectfully submits that that the court cannot correct counsel's failure to timely file the Notice of Intent to Appeal through relief under SCRCP Rule 60(b).

³ See counsel's Motion to Be Allowed to File Notice of Intent to Appeal Out of Time, dated May 14, 2010 and filed with the South Carolina Court of Appeals.

⁴ Here, Respondent acknowledges counsel's motion does not state "clerical error" as a ground for relief in his motion. However, Respondent contends that counsel's failure to timely file the Notice of Intent to Appeal resulted in fact from a clerical error within his office that the Court, respectfully, cannot correct through relief under SCRCP Rule 60(b).

WHEREFORE, based on the foregoing, Respondent submits counsel's Motion to Set Aside Order pursuant to the South Carolina Rules of Civil Procedure Rules 59(e) and 60(b) should be denied and dismissed.

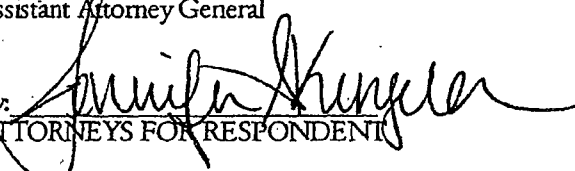
Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

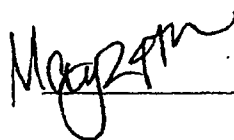
SALLEY W. ELLIOTT
Assistant Deputy Attorney General

JENNIFER A. KINZELER
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

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

, 2010.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Clifton D. Lyles, # 294075,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
Case No.: 2009-CP-46-1759

ORDER DENYING APPLICANT'S
PRO SE RULE 59(e) MOTION and
NOTICE OF INTENT TO APPEAL

2010 JUN -3 AM 9:08
YORK COUNTY
CLERK OF COURT

This matter comes before this Court by way of Applicant's pro se Rule 59(e) Motion to Alter and/or Amend filed May 12, 2010. Applicant's motion pertains to the Order of this Court filed February 26, 2010. In his pro se Rule 59(e) motion, Applicant asserts that the Court did not rule on each issue raised or make its own specific findings, that Respondent failed to respond to his application within thirty days, and that he was forced go to forward with the hearing despite advising the Court that he was "not comfortable" with PCR counsel's representation due to insufficient time to meet. Applicant requests this Court have his hearing "remanded back down for the Judge to make a specific finding of facts and conclusion of law."¹

This Court first finds that it does not have jurisdiction to consider Applicant's pro se Rule 59(e) Motion and that the Motion must be denied and dismissed. Pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, a motion to alter or amend the judgment must be served no later than ten (10) days after receipt of written notice of entry of the order. Applicant's motion was dated May 12, 2010. Neither Applicant nor his attorney specifies the date either received the Order of Dismissal. However, according to the Court's certificate of service accompanying the Order, both Respondent and Applicant's attorney were served with a copy of the Order of Dismissal on February 26, 2010.

¹ Applicant also requests "that the audio transcripts be preserved." Rule 607(i), SCACR governs the retention of tapes. It provides that a court reporter shall retain the primary and back-up tapes of a proceeding that has not been transcribed for a period of at least five years after the date of the proceeding.

#1
20

Respondent received a copy of the Order of Dismissal on March 1, 2010. Presumably Applicant's attorney also received the Order at that time. In fact, Applicant's attorney states in his Motion to be Allowed to File Notice of Intent to Appeal Out of Time, dated May 14, 2010² that "the clocked in Order was mailed to counsel where it was erroneously filed and not forwarded to Lyles/Appellant." Counsel stated he "did not realize he had been provided a copy of the Order until May 12, 2010." Further, on January 26, 2010, Applicant's attorney mailed to Applicant a copy of the proposed Order submitted to the Court.

Thus, Applicant's Rule 59(e) Motion, if properly filed, should have been served and filed well before May 12, 2010. For all intents and purposes, the Rule 59(e) Motion should have actually been served and filed no later than March 11, 2010, which is ten (10) days after Applicant's attorney presumably received written notice of entry of the Order.³ Therefore, Applicant's pro se Rule 59(e) Motion must be dismissed because it is not timely and the Court lacks jurisdiction to consider the Applicant's request. See Rule 59(e), SCRCF.

This Court further finds Applicant's pro se Rule 59(e) Motion must be denied and dismissed because Applicant is represented in the post-conviction relief proceeding by F. Craig Wilkerson, Jr., Esquire. Pursuant to Rule 11, SCRCF, counsel shall sign every motion of a party represented by an attorney. Applicant's pro se Motion is not proper.⁴ State law does not permit or recognize "hybrid representation," this is, representation that is partially by counsel and partially pro se. See e.g. Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989).

Moreover, and based on the record before it, this Court finds there are no grounds upon which Applicant's Rule 59(e) Motion should be granted. The Order of Dismissal sufficiently addresses all of the issues raised, and sufficiently states all of the relevant findings of fact and conclusions of law. To be

² Filed in the South Carolina Court of Appeals.

³ Presuming Applicant's attorney received the Order the same day Respondent did, in light of the fact the Order was mailed to both parties on the same day (February 26, 2010).

⁴ Applicant's attorney filed a Motion to Set Aside Order pursuant to SCRCF Rules 59(e) and 60(b) on or about May 14, 2010, to which Respondent is simultaneously filing a separate response.

clear, this Court did in fact make its own specific findings of fact and conclusions of law regarding this action as evidenced by this Court's letter to both Respondent and Applicant's counsel dated December 21, 2009, in which the Court stated its findings and requested Respondent prepare the Order. Furthermore, of those findings, this Court specifically indicated that Applicant failed to show any prejudice as a result of the Respondent's delay in filing its Return. Likewise, in response to Applicant's concern that he did not have enough time to meet with counsel, the Court continued Applicant's hearing to the next day to allow Applicant and counsel adequate time to confer. The Court finds Applicant does not provide any valid grounds in support of his request to alter or amend the judgment but is merely seeking an opportunity to reassert evidence and argument presented and rejected by this Court at the hearing and in its Order of Dismissal.

With regard to Applicant's pro se motion captioned Notice of Intent to Appeal, this Court finds the motion must also be summarily denied and dismissed. First, there is no indication the Notice was filed with the Clerk of the Supreme Court as required under SCACR Rule 203. Second, and as previously stated, Applicant is represented in the post-conviction relief proceeding by F. Craig Wilkerson, Jr., Esquire. Therefore, Applicant's pro se motion is not proper.⁵ SCRCP Rule 11, SCRCP; See also, e.g., Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989).

Finally, Applicant's pro se motion regarding an appeal from the Court's Order is untimely. A notice of intent to appeal (from the Court of Common Pleas) must be filed within thirty (30) days of receipt of written notice of entry of the order or judgment. While Applicant's counsel is not certain of the date he received the order, both parties were aware that Applicant's PCR application was dismissed as early as December 21, 2009. On January 26, 2010, Applicant and his attorney were in receipt of the proposed Order of Dismissal. Respondent received a copy of the Order of Dismissal on March 1, 2010. Presumably Applicant's attorney also received the Order at that time. In fact, as previously stated,

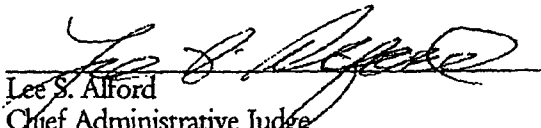
⁵ Applicant's attorney filed a Motion to Set Aside Order pursuant to SCRCP Rules 59(e) and 60(b) on or about May 14, 2010, to which Respondent is simultaneously filing a separate response. Applicant's attorney also filed in the Court of Appeals a Motion to Be Allowed to File Notice of Intent to Appeal Out of Time and Notice of Appeal on May 14, 2010.

Applicant's attorney concedes the time by which the Notice of Intent to Appeal must be filed has expired in his Motion to be Allowed to File Notice of Intent to Appeal Out of Time, dated May 14, 2010.⁶ Thus, by Applicant's counsel's own candid admission, the time to appeal from the Court's Order dismissing this action has expired. For the foregoing reasons, this Court finds Applicant's pro se motion captioned "Notice of Intent to Appeal" must also be denied and dismissed.

IT IS THEREFORE ORDERED that Applicant's pro se Rule 59(e) Motion to Alter and/or Amend is denied and dismissed.

AND IT IS SO ORDERED this 25th day of May, 2010.

Yank, L.C.


Lee S. Alford
Chief Administrative Judge
Sixteenth Judicial Circuit

⁶ Filed in the South Carolina Court of Appeals.

#4
2010

The Supreme Court of South Carolina

Clifton Donell Lyles, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Lee S. Alford
York County
Trial Court Case No. 2009-CP-46-01759

ORDER

The notice of appeal in this matter was served on May 14, 2010. Petitioner's counsel admits that he received written notice of entry of the order on appeal sometime in March 2010.

The notice of appeal is dismissed for failing to timely serve the notice of appeal. Rules 243(b) and 203)(b)(1), SCACR. This dismissal is without prejudice to petitioner's ability to seek relief under Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). The motion to allow a late appeal is

denied. Rule 263(b), SCACR (time for serving notice of appeal under Rules 203 and 243 may not be extended).

IT IS SO ORDERED.

 C.J.

FOR THE COURT

Columbia, South Carolina

June 17, 2010

cc: Appellate Defense
Assistant Attorney General Jennifer Kinzeler
F. Craig Wilkerson, Jr., Esquire

FORM 5

2010CP4602919

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

County of York)Clinton Darrell Lyles #294025)

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

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS B READ CAREFULLY

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

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

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

1. Place of detention Broad River Correctional Institution
2. Name and location of Court which imposed sentence York, York County Court
House / Court of General Sessions
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2002-65-46-2950 Trafficking Crack Cocaine 3rd

FILED - RECEIVED
2010 JUL 13 PM 12:08
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

CERTIFIED TRUE COPY
2010 JUL 15 AM 9:12
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

- (b) _____
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) April 5th 2004
- (b) 30 Years and a 50 Thousand Dollar fine.
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered Ayes@ to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. South Carolina Supreme Court
- iii. United States District Court
- (b) the result in each such Court to which you appealed:
- i. Granted The Anders brief filed by Appellate defense attorney
- ii. Declined To hear The certiorari
- iii. Dismissed until this P.C.R. has been completed
- (c) the date of each such result:
- i. April 11th 2008
- ii. February 19th 2009
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. unpublished
- ii. _____
- iii. _____
9. If you answered Ano@ to (7), state your reasons for not so appealing:
- (a) _____

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of P.C.R. Counsel - see Attachment
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Ineffective assistance of P.C.R. Counsel ~~see Attachment~~
- (b) for failure to timely seek Appellate Review of Denial of prior
- (c) P.C.R. Application, See Attachment.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no
- (d) any other petitions, motions or applications in this or any other Court? no
13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. I filed a Prior P.C.R. in which appointed Counsel failed to Appeal.
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. See Question 2 of This Application
- ii. _____
- iii. _____

- iv. _____
- (c) the disposition thereof:
 - i. Application was denied
 - ii. _____
 - iii. _____
 - iv. _____
- (d) the date of each such disposition:
 - i. February 26th 2010
 - ii. _____
 - iii. _____
 - iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____

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

no

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

- (a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

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

- i. _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) _____
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? _____
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
18. If you answered Ayes@ to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. James Shadd III, 1615 Barnwell Street, P.O. Box 1431, Columbia, SC, 29202
- ii. CC))
- iii. Eleanor Cleary Diffy, Appellate Defense, Columbia, SC, 29202
F. Craig Wilkerson JR., 242 Oakland Avenue, Rock Hill, SC, 29730
- (b) the proceedings at which each such attorney represented you:
- i. Trial
- ii. Sentencing
- iii. Direct Appeal
P.C.R.

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

To have my Prior PCJ application Ruling reversed or allow me to bring
file a 59(e) motion to have Judge Alford rule on the 5 specific issues in my
prior application, and to file an Appeal of the denial of my Petition.

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

no

Revised 3/2003

STATE OF SOUTH CAROLINA)

VERIFICATION

County of York)

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

Clifton Donnell Lyles

SWORN to and subscribed before me this 12th
 day of July, 2010.

Susan J. Johnson (L.S.)
 Notary Public

My Commission Expires
 March 5, 2018

My Commission Expires: _____

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

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

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

Clifton Donnell Lyles
Applicant

SWORN or affirmed to and subscribed before me this

21st day of July, 2010.
Susan J. Johnson
Notary Public

My Commission Expires

My Commission Expires: March 5, 2018

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In re Perkins, 515 SE.2d 96

In re Stratos, 648 SE.2d 607 (S.C. 2007)

Johnson v. State, 364 SE.2d 201 (1988)

King v. State, 417 SE.2d 868 (1992)

Matter of Acker, 417 SE.862

Matter of Gaines, 309 SE.2d 5

Matter of Harvey, 292 SE.2d 595

SC.A.C.R., 243(b); (203)(b)(1)

S.C. Code Ann. §17-27-100 (1985)

S.C.T. Rule 50(9)

S.C.R.C.P., 59(e); 60(b)

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Statement of Issues on Appeal

(1) Was PCR Counsel Ineffective for failing to timely appeal the denial of Applicant's first PCR Application?

(2) Was PCR Counsel Ineffective for not filing a Rule 59(e) motion upon seeing that Judge Alford had failed to make a ruling on the five (5) specific issues raised in Applicant's first application?

(3) Was PCR Counsel Ineffective for failure to communicate with Applicant, and instruct him as to what issues could or couldn't be raised in a PCR hearing?

Statement of Case

Applicant appeared before The Honorable Lee S. Alford on December 2nd, 2004 for a Post-Conviction Relief hearing. Applicant was represented by F. Craig Wilkerson, JR. Judge Alford made his ruling denying Applicant's application on February 26th, 2010. PCR counsel failed to appeal the decision by the 30 day deadline, but instead, filed a Motion to appeal out of time some 60 days later. The South Carolina Supreme Court denied this motion as violative of SCACR 243(b), and (203X.bX1), and directed Applicant to seek relief pursuant to Austin v. State, 409 SE 2d 395 (1991).

5 of 90

Ground(1): Was PCR Counsel Ineffective for failing to timely appeal
The denial of Applicant's first Post Conviction Relief application?

Relevant Facts

After The Initial hearing, PCR Judge stated that he would make his ruling at a later date. PCR Judge, on January 26th 2010 made his final order denying Applicant's application. PCR Counsel failed to forward that Ruling to Applicant until May 14th 2010, at which time Applicant's time to both, file a 59(e) Motion to Alter or Amend Judgment, or Notice of Intent to appeal had expired.

Discussion

The right to seek appellate review of The denial of PCR is expressly authorized by State Law, S.C. Code Ann. §17-27-100(1985); Supreme Court Rule 50(9). While Applicant is aware that The Constitutional right to counsel does not extend to discretionary appeals on collateral attack, he is aware that The South Carolina Supreme Court has ruled that Anders v. California, 386 U.S. 738, 87 S.Ct. 1396(1967), shall continue to apply in PCR matters. Johnson v. State, 294 S.C. 310, 364 S.E.2d 201(1988).

"Anders" requires appellate counsel to brief arguable issues, despite counsel's belief The appeal is frivolous, as a safeguard of The right to appeal. In applying "Anders" on PCR, The South Carolina Supreme Court has recognized a prisoner's right to The assistance of appellate counsel in seeking review of The denial of PCR; Supreme Court Rule 50(6) expressly provides for The appointment of counsel to seek appellate Review on PCR.

In The case at bar, upon reception of PCR Judge's ruling denying Applicant's application,¹ Applicant immediately sent To PCR Counsel a Pro Se 59(e) motion To Alter or Amend Judgment, and Notice of Intent To appeal,² and asked That he file it.

PCR Counsel, after notifying Applicant That he had in fact allowed Applicant's time for filing Notice of appeal To expire, informed Applicant That he would file a Motion of Notice of Intent To appeal out of time, and a Rule 59(e) and 60(b) motion To Alter or Amend Judgment, but That he didn't think it would be allowed. In which, The South Carolina Supreme Court rejected The motion as a violation of Rule 243(b) and (203)(b)(1) S.C.A.C.R., but stated That The dismissal is without prejudice To Applicant's ability To seek relief under Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991); King v. State, 417 S.E.2d 868 (1992). But also, The court's stated in In re Strates, 374 S.C. 212, 648 S.E.2d 607 (S.C. 2007) That "Public reprimand was appropriate sanction for attorney's admitted misconduct of neglecting client's criminal appeal, including his failure To adequately and timely communicate with his client, in violation of rules of professional conduct."

so but for Counsel's Admitted Mistake of not filing Applicant's Notice of appeal, Applicant's case would have come out differently, being That ^{Applicant} had several meritorious issues, That had The Appellate court's had proper jurisdiction, it's highly likely That They would have reversed The Lower court's decision.

¹ See order of dismissal dated 1-25-10

² See The State's Return To Applicant's Pro Se Rule 59(e) Motion and Notice of Intent To appeal. Conclusion

Applicant's PCR application should be granted.

Ground (2) Was PCR Counsel Ineffective for failing to file a Rule 59(e) motion being that The PCR Judge had failed to make a ruling on The five (5) specific issues raised in Applicant's first application?

Relevant Facts

Applicant raised five specific issues in his first PCR application that The PCR Judge failed to rule on:

(A) Whether Trial counsel was ineffective for failing to request for The Trial Judge to make a ruling concerning the hearing to reveal The confidential informant's?

(B) Whether Trial counsel was ineffective for failing to object to The Trial Judge's ruling, limiting his questioning of The State's witnesses concerning The confidential informant's?

(C) Whether Trial counsel was ineffective for failing to seek a hearing concerning Rule 31.09 of The 4th Amendment's Knock & Announcement clause?

(D) Whether Trial counsel was ineffective for failing to object to Exhibits #14 and #15 being put in as evidence, being that The State failed to present a complete chain of custody?

(E) Whether Trial counsel was ineffective for failing to request a Brady hearing due to Solicitor Weaver failing to turn over The evidence from The Control buy?, PCR Counsel failed to inform Applicant of The PCR Judge's final order denying Applicant's application until after four (4) months had passed.

Discussion

Pursuant to Rule 59 of The South Carolina Rules of Civil Procedure, a

Motion to alter or amend the judgment must be served no later than ten (10) days after receipt of written notice of entry of the order. Applicant avers that he was never afforded this remedy due to PCR Counsel's failure to make him aware of the final order filed on January 26th 2010, until May 12th 2010, some four months later. Nor did PCR Counsel after examining the final order, file a 59(e) motion on his own accord, thereby disqualifying applicant from being able to have those five (5) issues reviewed by the appellate courts. Proitt v. State, 423 SE 2d 127 (SC 1992)¹ "to preserve an issue for review, parties are required to make sure that the lower court's final judgment reflects a ruling on the issue, and if the final judgment does not contain such a ruling, parties are usually required to file a motion to amend judgment."

So but for PCR Counsel's failure to perform his duties by not examining the Judge's final order to make sure that all issues had been ruled on, and if not, to file a 59(e) motion to amend, Applicant's case would have come out differently being that ~~that~~ the Appellate courts would have allowed these issues to be reviewed.

¹ See order of Supreme Court filed 6-17-10.

Conclusion

Applicant's application should be granted.

Ground (3) Was PCR Counsel Ineffective for failure to communicate with Applicant, and instruct him as to what issues could or couldn't be raised in a PCR hearing?

Relevant Facts

At The PCR hearing, Applicant informed The Judge That due to him not having any communication with appointed counsel prior to The PCR hearing, That he was not comfortable with appointed counsel representing him. PCR counsel informed Judge Alford That he concurred with Applicant's statement.

Then PCR Judge informed applicant That he would allow him and appointed counsel a moment to go out and confer, but That in the meantime, That he would be taking testimony from Applicant's trial attorney. Applicant quickly objected by informing Judge Alford That, to do That, would be prejudicial to him, being That he had other issues That needed to be amended to his PCR application That would require more testimony from trial counsel.

Discussion

Rule 21.18(d) SCRPC, Provides: "The court shall promptly appoint counsel to assist The Applicant. Counsel shall be given a reasonable time to confer with The Applicant. Counsel shall insure That all available grounds for relief are included in the application." The purpose of The act is to provide an applicant a fair opportunity to present his claims to The court. PCR counsel failed to carry out The above mentioned provisions in That he, of his own admission, informed The PCR Judge That he in fact concurred with Applicant's statement That "he had no prior communications with Applicant before The actual hearing." The South Carolina court of appeals frowned on such conduct, and cited pursuant of *In re Blackmon*, 629 SE2d 369 (SC App. 2006) "... failing to provide clients with competent or

diligent representation and in failing to adequately communicate with them concerning status of their case. . . was ~~was~~ in violation of rules of professional conduct." In re Perkins, 515 SE.2d 96; Matter of Acker, 417 SE.2d 862.

But also, by Applicant having to instruct the PCR Judge on his own accord that he had other ~~issues~~ issues that needed to be amended to his application, shows that PCR Counsel did not act with diligence in preparing to represent Applicant, due to the fact that he wasn't aware already that Applicant needed to do this. Again, this is conduct that is ~~found~~ frowned upon by the Appellate courts in which they reflected pursuant of Matter of Gaines, 309 SE.2d 5 "Neglect of a legal matter and handling a legal matter without preparation adequate in the circumstances warrants public reprimand." Matter of Harvey, 292 SE.2d 595.

So by Counsel failing to advise Applicant as to what issues could and couldn't be raised in PCR, Judge Alford denied several issues under the guise that Applicant already had a direct appeal, and was barred from raising those issues in PCR.

So but for Counsel's failure in communicating with Applicant, and alerting him as to what issues could or couldn't be raised, Applicant's case would have come out differently being that he could have spent more time on the meritorious issues that was raised properly, and thereby kept the PCR Judge's concentration on those issues opposed to dividing it amongst a whole bunch of procedurally barred issues.

Conclusion

Applicant's application should be granted.

State of South Carolina

County of York

Clifton Donell Lykes,

Applicant

v.

State of South Carolina,

Respondent.

In The Court of Common Pleas

Case No: 2009-CP46-1759

Certificate of Service

I, Clifton Donell Lykes, #294025, do hereby certify that on this date, I have served the Application for Post-Conviction Relief on the clerk of court for York County, by depositing one copy of the same in the United States Mail, first class postage prepaid, and addressed as follows:

The honorable David Hamilton

Clerk of Court York County

Post office Box 649

York, South Carolina, 29745

FILED - RECEIVER
2010 JUL 13 PM 12:08
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

This 12th day of July, 2010.

By: Clifton Donell Lykes #294025
Applicant

Sworn to and subscribed before

me This 12th day of July, 2010.

Susan J. Johnson

Notary

My Commission Expires

March 5, 2018

Expire, Commission

Dear Clerk,

Please find enclosed one (1) Post-Conviction Relief application with one (1) ten page Brief to be filed together with application as an attachment.

Please return to sender one (1) clock stamped copy after you have filed.

I'd like to thank you in advance for your speedy reply in this matter.

Thank you
Clifton Lytle #244025

FILED - RECEIVED
2010 JUL 13 PM 12:06
DAVID HAMILTON
O.C.C.P. & G.S.
YORK COUNTY, SC

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Clifton D. Lyles, #294025)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE 16TH JUDICIAL CIRCUIT
Case No: 2010-CP-46-02919

RETURN AND MOTION TO DISMISS
WITH CONSENT TO AUSTIN
REVIEW ONLY

FILED - RECEIVED
2010 DEC - 1 PM 1:06
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

In response to the post-conviction relief application filed July 13, 2010, the Respondent would show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. The Applicant was indicted at the November 2002 term of the York County Grand Jury for Trafficking Crack Cocaine (2006-GS-46-2950). James Shadd, III, Esquire, represented the Applicant. On June 16, 2003, the Applicant pled guilty to Trafficking, 2nd offense. He subsequently withdrew his guilty plea on October 9, 2003. The Applicant was tried in his absence on April 7, 2004, after which he was found guilty as indicted for Trafficking Crack Cocaine, 3rd offense. The Honorable L. Roger Couch sentenced him to confinement for a period of thirty (30) years and a fifty thousand dollar (\$50,000) fine.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. A brief was filed pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. Lyles, Op. No. 2008-UP-223 (S.C. Ct. App. filed April 11, 2008). The Applicant's Petition for Writ of Certiorari was denied February 19, 2009. The Remittitur was issued on March 2, 2009.

The Applicant also filed a federal Petition for Writ of Habeas Corpus (4:08-1884-PMD-TER) on June 12, 2008. The Petition was subsequently denied on September 9, 2009.

The Applicant then filed his first application Post-Conviction Relief on April 21, 2009 (2009-CP-46-1759). The Respondent made its Return on November 12, 2009. An evidentiary hearing into the matter was convened on December 2, 2009¹, at the Newberry County Courthouse. F. Craig Wilkerson, Jr., Esquire, represented the Applicant. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. In his first application, the Applicant raised the following allegations in support of his ineffective assistance of counsel claim²:

1. Failure to obtain a continuance because counsel failed to subpoena Crystal Collins;
2. Failure to properly argue the Batson motion;
3. Failure to obtain the identity of the confidential informant;
4. Failure to challenge the search warrant;
5. Failure to sufficiently challenge the knock and announce;
6. Failure to sufficiently challenge the chain of custody;
7. Failure to object to the admission of State's Exhibits #14 and #15 into evidence;
8. Failure to address the different sentences for possession of crack and powder cocaine;
9. Payton violation;
10. Doyle violation; and
11. Brady violation.

¹ The hearing was originally scheduled for December 1, 2009; the Applicant and his attorney indicated they needed more time to prepare, and the evidentiary hearing was held the following day on December 2, 2009.

² The Applicant amended and clarified his allegations at the PCR hearing by and through his PCR counsel.

The Honorable Lee S. Alford denied and dismissed Applicant's application by written Order issued on February 26, 2010. Applicant's *pro se* Rule 59(e) motion was denied on June 3, 2010. PCR counsel filed a notice of appeal from the dismissal of the Applicant's first PCR action on May 14, 2010, in addition to a motion to file notice of appeal out of time, indicating he received notice of the entry of the order of dismissal sometime in March 2010 without specifying the date. The Court dismissed the Applicant's appeal on June 17, 2010, for failure to timely serve the notice of appeal.

II.

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of post-conviction relief counsel in that PCR counsel failed to file an appeal of the denial of PCR;
2. Ineffective assistance of post-conviction relief counsel for failing to file a Rule 59(e) motion; and
3. Ineffective assistance of post-conviction relief counsel for failing to communicate with the Applicant.

Attached herewith and incorporated herein are the York County Clerk of Court records regarding the subject convictions; the Applicant's records from the South Carolina Department of Corrections, the appellate court records including the trial transcript, and the prior PCR records by reference. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

The Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a cognizable ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance

of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under §17-27-90." Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation." Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. Upon information and belief the Respondent does not request an evidentiary hearing on the matter of the Applicant's entitlement to an Austin Review. Austin, 305 S.C. 453, 409 S.E.2d 395.

With regard to the Applicant's remaining claims of ineffective assistance of PCR counsel, the Respondent moves for summary dismissal of those claims as they are not cognizable in a successive action for post conviction relief. Aice, supra. A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

V.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VI.

WHEREFORE, Respondent moves to summarily dismiss the application because it is successive to the Applicant's prior PCR action and was filed after the statute of limitations had expired.

V.

WHEREFORE, Respondent moves to consent to an Austin Review and to summarily dismiss any and all other remaining claims regarding ineffective assistance of PCR counsel.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

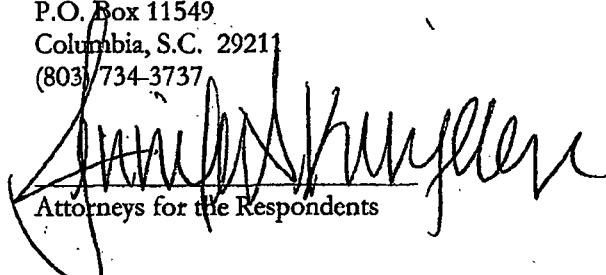
JOHN W. McINTOSH
Chief Deputy Attorney General

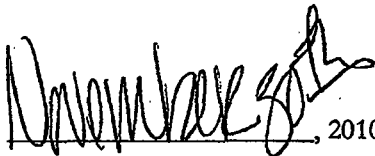
SALLEY ELLIOTT
Assistant Deputy Attorney General

JENNIFER A. KINZELER
Assistant Attorney General

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

By:


Attorneys for the Respondents


2010

STATE OF SOUTH CAROLINA

COUNTY OF YORK

CLIFTON D. LYLES,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2010-CP-46-2919

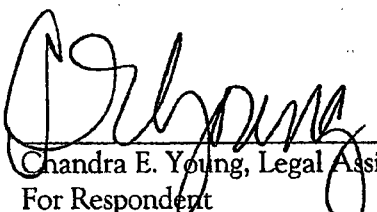
AFFIDAVIT OF SERVICE BY MAIL

FILED - RECEIVED
 2010 DEC - 1 PM 1:06
 DAVID HAMILTON
 C.C.P. & GS
 YORK COUNTY, SC

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

Clifton D. Lyles, 294025
 Broad River Correctional Institution
 4460 Broad River Road
 Columbia, SC 29210

DATED this 30th day of November, 2010.


 Chandra E. Young, Legal Assistant
 For Respondent

STATE of SOUTH CAROLINA
COUNTY of YORK

CLIFTON D. LYLES #294075
APPLICANT

VS.

STATE of SOUTH CAROLINA
RESPONDENT

) IN THE COURT of COMMON PLEAS

) 2010-CP-46-2919

) RETURN TO THE STATES RETURN AND
) MOTION TO DISMISS WITH CONSENT
) TO AUSTIN REVIEW ONLY

FILED-RECEIVED
2010 JAN -4 PM 2:25
AND HAMILTON
S.C.P. & GS
YORK COUNTY, SC

Applicant by and through this return motion makes this reply to the state's proposed order of dismissal. Applicant ask's that the states proposed order for summary judgement be dismissed and that a hearing regarding applicant's (P.C.R.) Application be granted based on the following:

Applicant avers that his (P.C.R.) Application should not be deemed Successive because all issue raised were either raised at the Original (P.C.R.) hearing or could not have been raised due to the violation not existing at the time of the Original (P.C.R.) hearing.

Applicant would first like to direct the court's attention to the record (1) of (P.C.R.) hearing. On page 5 line 21 Applicant at that sighting first made a motion with the courts to relieve MR. WILKERSON as counsel on the grounds of his failure to have any meaningful communication or preparation in handling applicant's (P.C.R.) hearing. Also see page 7 lilne 17, where applicant again informed the judge that he was not comfortable with his (P.C.R.) counsel's representation.

So clearly Applicant did raise the issue of ineffectiveness based on the failure of (P.C.R.) counsel to communicate with him during original hearing, inwhich the (P.C.R.) Judge rules against, thereby complying with §17-27-90 and making AICE VS, STATE, 409 S.E. 2d 393(S.C.1991) inapplicable.

Applicant would next like to address the issue of failure of (P.C.R.) counsel to file a RULE 59(E) MOTION. Clearly RULE 59(E) was put in place to assure the a (P.C.R.) Judge fully complied with §17-27-80 inthat the (P.C.R.) JUDGE is to make ruling on every issue raised in the Original Application, PRUITT VS. STATE, 432 S.E. 2d 127(1992), to assure that each issue is preserved for Appellate review.

Pursuant to FOSTER VS. STATE 379 S.E.2d 907(1989), there is no Constitutional Right to Hybrid Representation either at trial or appeal. Therefore, an Applicant is barred from filing any motion on his behalf if a (P.C.R.) JUDGE fails to make a ruling on all of his issues due to him having appointed counsel.

So to assure fundamental fairness, the SOUTH CAROLINA LEGISLATURE came up with RULE 59(E) S.C.R.C.P., which The SOUTH CAROLINA SUPREME COURT INTERPRETED to be OBLIGATORY on appointed counsel, MARLAR VS. STATE opinion No. 26391"... even after an order is filed, counsel has an obligation to review the order and file a RULE 59(E), S.C.R.C.P., motion to alter or amend if the

order fails to set forth the finding and the reason for those findings as required by § 17-27-80 and RULE 52(A), S.C.R.C.P." PRUITT VS. STATE, 310 S.C. 256, 432 S.E. 2d 128.

So even through THE UNITED STATES CONSTITUTION doesn't guarantee Effective assistance of counsel on STATE POST-CONVICTION RELIEF actions, PENNSYLVANIA VS. FINLEY 481 U.S. 551, 107 S.Ct (1990), COLEMAN VS. THOMPSON 501 U.S. 772, 111 S.Ct. 2546 (1991), § 17-27-80 RULE 52(A), RULE 59(E), S.C.R.C.P. All coupled with appellate court RULE 407, RULE of PROF. Conduct, RULE 1.1, 1.3, 3.2, 3.4(C) 8.1(B), and 8.4(E), forms a "STATE CREATED" call for effective assistance of counsel, which through the 14th AMENDMENTS DUE PROCESS CLAUSE assures that, these rules should apply to everyone including applicant.

So in the case at bar, Applicant not only by law has the right to argue the ineffectiveness of his (P.C.R.) counsel for not filing a RULE 59(E) MOTION after (P.C.R) JUDGE failed to rule on the five original issues in applicant's application (2) but reasonableness dictated the applicant be allowed to raise this issue due to RULE 59(E) stating that "... (if) issues are not adequately addressed, counsel has an obligation to file 59(E) MOTION, which could only be done after the judge has made his order" So for the STATE to reason that Applicant, pursuant to AICE VS. STATE, 409 S.E. 2d 392 (1991) should or could have raised this issue in his original application would be prejudicial.

What's more, is that due to (P.C.R.) counsel's failure to inform Applicant of judge ALFORD ruling until well after the deadline to file either a RULE 59(E) MOTION or an appeal, should nullify the AICE VS STATE effect in this particular case.

CONCLUSION

The state motion for summary judgement should be dismissed and a full hearing should be granted.

FOOTNOTE

(1) Applicant, although he is using this particular transcript to make a showing of his issues, do state that he is at this time filing in challenging the accuracy of the transcript and seek to have the primary and back-up tape audio tape preserved.

(2) See original (P.C.R.) Application: The state attempts to justify failure to rule on the issue by avering that applicant through his (P.C.R.) Attorney Amended his application and clarified his allegations at the (P.C.R) hearing. The state then attempts to corroborate this averment with the doctored up transcript of record that applicant is vehemently challenging and requesting that the Primary and Back-Up Audio Tapes be preserved.

Clifton D. Lyles #294075
CLIFTON D. LYLES #294075
ATTORNEY/PRO SE

DECEMBER 8, 2010

Clifton D. Lyles 0294075
B.R.C.I. MONTICELLO DORM CELL 224
4460 BROAD RIVER ROAD
COLUMBIA S.C. 29210

CLERK of COURT
ATTN: DAVID HAMILTON
MOSS JUSTICE CENTER
1675 YORK HIGHWAY
YORK S.C. 29745

Dear MR DAVID HALIMTON

Please find enclosed one (1) MOTION of RETURN TO RESPONDENT PROPOSED ORDER for DISMISSAL of APPLICANT'S (PCR) APPLICATION MARKED 2010-CP-46-2919 and one (1) MOTION PURSUANT TO 607 (i) S.C.A.C.R. requesting the Primary and Back-Up Audio Tapes to Applicant's Original (PCR) hearing, held on DECEMBER 1st and 2nd of 2009, be preserved for review.

RESPECTFULLY SUBMITTED,

Clifton D. Lyles

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Clifton D. Lyles, #294025)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE 16TH JUDICIAL CIRCUIT
Case No: 2010-CP-46-02919FILED
2010 DEC 22 PM 12:50
CLERK OF COURT
YORK COUNTY, SC**CONDITIONAL ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed July 13, 2010. The Respondent made its Return and Motion to Dismiss, consenting to an Austin¹ review only, on or about November 2010, 2010.

Procedural History

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. The Applicant was indicted at the November 2002 term of the York County Grand Jury for Trafficking Crack Cocaine (2006-GS-46-2950). James Shadd, III, Esquire, represented the Applicant. On June 16, 2003, the Applicant pled guilty to Trafficking, 2nd offense. He subsequently withdrew his guilty plea on October 9, 2003. The Applicant was tried in his absence on April 7, 2004, after which he was found guilty as indicted for Trafficking Crack Cocaine, 3rd offense. The Honorable L. Roger Couch sentenced him to confinement for a period of thirty (30) years and a fifty thousand dollar (\$50,000) fine.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. A brief was filed pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. Lyles, Op. No. 2008-UP-

¹ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

#1
200

223 (S.C. Ct. App. filed April 11, 2008). The Applicant's Petition for Writ of Certiorari was denied February 19, 2009. The Remittitur was issued on March 2, 2009.

The Applicant also filed a federal Petition for Writ of Habeas Corpus (4:08-1884-PMD-TER) on June 12, 2008. The Petition was subsequently denied on September 9, 2009.

The Applicant then filed his first application Post-Conviction Relief on April 21, 2009 (2009-CP-46-1759). The Respondent made its Return on November 12, 2009. An evidentiary hearing into the matter was convened on December 2, 2009², at the Moss Justice Center in York County. F. Craig Wilkerson, Jr., Esquire, represented the Applicant. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. In his first application, the Applicant raised the following allegations in support of his ineffective assistance of counsel claim³:

1. Failure to obtain a continuance because counsel failed to subpoena Crystal Collins;
2. Failure to properly argue the Batson motion;
3. Failure to obtain the identity of the confidential informant;
4. Failure to challenge the search warrant;
5. Failure to sufficiently challenge the knock and announce;
6. Failure to sufficiently challenge the chain of custody;
7. Failure to object to the admission of State's Exhibits #14 and #15 into evidence;
8. Failure to address the different sentences for possession of crack and powder cocaine;
9. Payton violation;
10. Doyle violation; and
11. Brady violation.

² The hearing was originally scheduled for December 1, 2009; the Applicant and his attorney indicated they needed more time to prepare, and the evidentiary hearing was held the following day on December 2, 2009.

³ The Applicant amended and clarified his allegations at the PCR hearing by and through his PCR counsel.

The Honorable Lee S. Alford denied and dismissed Applicant's application by written Order issued on February 26, 2010. Applicant's *pro se* Rule 59(e) motion was denied on June 3, 2010. PCR counsel filed a notice of appeal from the dismissal of the Applicant's first PCR action on May 14, 2010, in addition to a motion to file notice of appeal out of time, indicating he received notice of the entry of the order of dismissal sometime in March 2010 without specifying the date. The Court dismissed the Applicant's appeal on June 17, 2010, for failure to timely serve the notice of appeal.

Current Allegations

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of post-conviction relief counsel in that PCR counsel failed to file an appeal of the denial of PCR;
2. Ineffective assistance of post-conviction relief counsel for failing to file a Rule 59(e) motion; and
3. Ineffective assistance of post-conviction relief counsel for failing to communicate with the Applicant.

This Court has before it the York County Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the appellate court records including the trial transcript, and the prior PCR records.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-70:

Ineffective Assistance of PCR Counsel

This Court finds that the current application for post-conviction relief must be summarily dismissed regarding the Applicant's claims that he received ineffective assistance of counsel on his prior post-conviction relief application for failure to communicate and file a Rule

59(e) motion, as such claims are not cognizable grounds for relief in PCR actions. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under §17-27-90." Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

Austin Review Granted

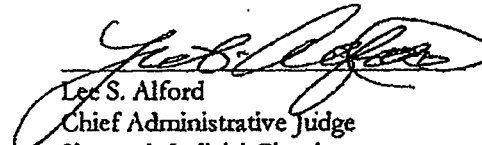
This Court finds, however, and with consent of Respondent, that the Applicant is entitled to an Austin review of his first post-conviction relief action previously denied and dismissed by this Court on February 26, 2010. Austin, supra, recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation." Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. Accordingly, this Court finds the Applicant is entitled to an Austin review of his first PCR action.

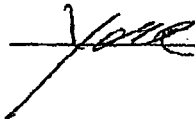
Summary

Pursuant to S.C. Code Ann. §17-27-70(b), the Court intends to dismiss any and all other claims related to this application with prejudice unless the Applicant provides specific reasons, factual or legal, why the remaining claims in the instant application should not be dismissed. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the York County Clerk of Court and shall serve opposing counsel at the following address:

Jennifer A. Kinzeler, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED! This 2nd day of December, 2010.


Lee S. Alford
Chief Administrative Judge
Sixteenth Judicial Circuit

 South Carolina

#5
2010

State of South Carolina
County of York
Clifton D. Lyles, #294025,
Applicant,
vs.
State of South Carolina,
Respondent.

In The Court of Common Pleas

Case No: 2010-CP-46-02919

Return to Conditional order of

Dismissal

FILED-RECEIVED
2011 JAN 26 AM 11:51
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

Applicant by and Through This return motion makes this reply to the condition order of Dismissal: Applicant avers that his PCR application should not be dismissed because all issues raised were either raised at the original PCR hearing or could not have been raised due to the violation not existing at the time of the original hearing.

Applicant would first like to direct the Court's attention to the record of the PCR hearing. On page 5, line 21, Applicant at that sitting first made a motion with the Court to relieve Mr. Wilkerson as counsel on the grounds of his failure to have any meaningful communications or preparation in handling Applicant's PCR hearing. Also see page 7, line 17, where Applicant again informed the judge that he was not comfortable with his PCR counsel's representation.

So clearly Applicant did raise the issue of ineffectiveness based on the failure of PCR counsel to communicate with him during original hearing, in which the PCR Judge ruled against, thereby complying with §17-27-90 and making *Aice v. State*, 409 S.E.2d 393 (SC 1991) inapplicable.

Applicant would next like to address the issue of failure of PCR counsel to file a Rule 59(e) motion. Clearly Rule 59(e) was put in place to assure that a PCR Judge fully complied with §17-27-80 in that the PCR Judge is to make a ruling on every issue raised in the original application, *Provine v. State*, 432 S.E.2d 127 (1992), to assure that each issue is preserved for appellate review.

Pursuant to *Foster vs. State*, 379 S.E.2d 907 (1989), there is no constitutional right to hybrid representation either at trial or appeal. Therefore, an Applicant is barred from filing any motion on his or behalf if a PCR Judge fails to make a ruling on all of his issues, due to him having appointed counsel.

So to assure fundamental fairness, The South Carolina Legislature came up with Rule 59(e) SCRPC, which The South Carolina Supreme Court interpreted to be obligatory on appointed counsel, *Marlar v. State*, opinion No: 26391¹ "... even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRPC, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by §17-27-80 and Rule 52(a), SCRPC," *Britt v. State*, 310 SC 256, 432 SE 2d 128.

So, even though The United States Constitution doesn't guarantee effective assistance of counsel on state post-conviction relief actions, *Pennsylvania v. Finley* 481 U.S. 551, 102 S.Ct 1990, 95 (1982), *Coleman v. Thompson*, 501 U.S. 772, 111 S.Ct 2546 (1991), but §17-27-80 and Rule 59(e) together forms a "State created" call for effective assistance of counsel, which through The 14th Amendment of The U.S. Constitution's "Due process clause" applies to Applicant.

So, in the case at bar, Applicant is legally within his rights to raise the ineffectiveness of counsel for failure to file a 59(e) motion to compel The PCR Judge to Rule on the five (5) original issues in Applicant's Original application. PCR Record page 4, line 16 - p. 5 line 6.

Conclusion

The conditional order of dismissal should be lifted, and Applicant's application should be allowed to be heard in its entirety.

Footnote

¹ Applicant, although he is using this particular transcript to make a showing of his issues, do state that he has filed a motion challenging the accuracy of this record.

State of South Carolina } In the Court of Common Pleas
 County of York } Case No: 2010-CR-46-2519
 Clifton D. Lyles, #294025 }
 vs. } Affidavit of Service by mail
 State of South Carolina }
 Respondent. }

I, Clifton D. Lyles, #294025, do hereby swear that I have
 on this day served the Return to Conditional Order of Dismissal
 on the following Person(s) by depositing same in the United States
 mail postage prepaid:

David Hamilton
 Clerk of Court
 PO Box 649
 York, SC, 29745-0649

Dated This 20th day of January, 2011.

Clifton D. Lyles, #294025
 Affidavit of Service

FILED - RECEIVE:
 2011 JAN 26 AM 11:51
 DAVID HAMILTON
 C.O.C.P. & GS
 YORK COUNTY, SC

The Supreme Court of South Carolina

Clifton D. Lyles,

Petitioner,

v.

State of South Carolina,

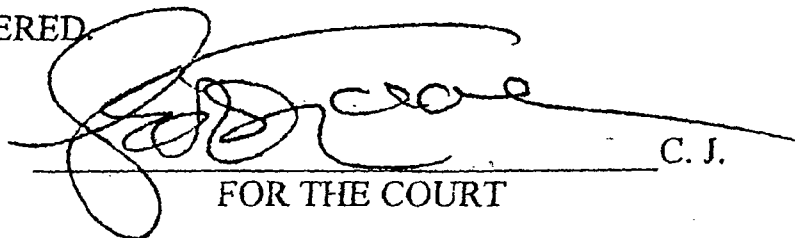
Respondent.

The Honorable Lee S. Alford
York County
Trial Court Case No. 2010-CP-46-02919

ORDER

In this post-conviction relief case, petitioner has filed a notice of appeal from a conditional order of dismissal dated December 2, 2010. The notice of appeal relating to the above matter is hereby dismissed without prejudice because the order is not an appealable order. Lewis v. State, 368 S.C. 630, 630 S.E.2d 464 (2006). The remittitur will be sent as provided by Rule 221, SCACR.

IT IS SO ORDERED.



C. J.
FOR THE COURT

Columbia, South Carolina

March 9, 2011

cc: Division of Appellate Defense
Clifton D. Lyles #294075
Assistant Attorney General Jennifer Kinzeler

STATE of SOUTH CAROLINA
COUNTY of YORK,

CLIFTON DONELL LYLES #294075
APPELLANT

V.

STATE of SOUTH CAROLINA
RESPONDENT

) IN THE COURT OF COMMON PLEAS
) FOR THE 16th JUDICIAL CIRCUIT

) CASE No. 2010-CP-46-02919

) MOTION FOR REHEARING OUT OF TIME

RECEIVED

AUG 11 2011

S.C. SUPREME COURT

Appellant, Clifton Donell Lyles, #294075, respectfully requests that this court grants a motion allowing him to file a notice of MOTION for REHEARING OUT of TIME ON THE FOLLOWING GROUNDS:

Appellant did not receive a copy of the order of dismissal pertaining to this case, and neither was appellant made aware that any briefs or arguments had been submitted to this court for consideration.

Appellant further states that he was never made aware of who Appellant Defense had appointed to represent him in this matter. On FEBRUARY 18th, 2011, Appellant received a letter from the Appellant Defense Office informing him that CHIEF JUSTICE JEAN TOAL informed them that appellant was eligible for representation from their office. they further instructed appellant that upon him returning to their office the enclosed indigency form, that it would take them 90 days from that day to gain access of the PCR Transcripts, as well as an additional 90 days to prepare and submit a brief. Appellant mailed off the form of indigency on FEBRUARY 26th, 2011. (1) On JULY 28th, 2011, appellant called the Appellant Defense Office via institutional phones to check the progress of this case. To his surprise, Appellant Defense Office informed him that he had nothing pending with the SUPREME COURT, and that his case was dismissed and a remittance handed down on MARCH 9th, 2011. Appellant then asked who was his attorney of representation and where was the order dismissing his case. The representative of the Appellant Defense Office stated that their computer did not show any specific attorney as representing appellant in this matter, that it only showed their office as being the representer. she further stated that any other information that appellant needed would have to consult with THE SUPREME COURT to get.

Appellant would like to inform this HONORABLE COURT that he is before this court based on an AUSTIN V. STATE, 409 S.E.2d 395 review due to the failure of previous state appointed counsel (2) to comply with state laws(3) in violation of not only the SOUTH CAROLINA CONSTITUTION, but also the 14th AMENDMENT of THE UNITED STATES CONSTITUTION.

Appellant states at this time, that to force him to go back down to the lower courts and file a Third (3rd) P.C.R. application based on the very same grounds that spurred his second P.C.R. application, would call into question this courts resolve in enforcing the uniformity of it's laws, as well as the effectiveness of the state's appellant process in protecting appellant's U.S. CONSTITUTIONAL RIGHT to DUE PROCESS of LAW.

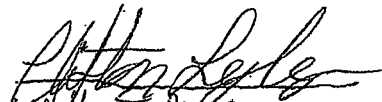
So for the above mentioned reasons, appellant asks that this court please grant this Motion for REHEARING OUT of TIME.

FOOTNOTES:

1 Being that the BROAD RIVER CORRECTIONAL INSTITUTION was on lockdown appellant was unable to have indigence form notarized. He was only able to sign it and give it to the MURRAY DORM LT. to mail.

2 F. Craig Wilkerson, Jr. LLC

3 S.C. Code Ann § 17-27-100 (1985); SUPREME COURT RULE 50(9), and SUPREME COURT RULE 50(b)


Appellant's Prose

SUBSCRIBED AND SWORN to before me this 8th day of August 2011.


NOTARY PUBLIC

My Commission Expires
March 5, 2018

MY COMMISSION EXPIRES: _____

CERTIFICATE OF SERVICE

I, Phyllis Lytle, while serving in the position of APPELLANT
did serve the SOUTH CAROLINA SUPREME COURT on this
dated 8-8-11, by depositing a copy
of the document in the UNITED STATES POSTAL
SERVICE MAIL postage paid, addressed to the SOUTH CAROLINA
SUPREME COURT. This the 8th day of AUGUST 2011.

The Supreme Court of South Carolina

Clifton D. Lyles,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Lee S. Alford
York County
Trial Court Case No. 2010-CP-46-02919

ORDER

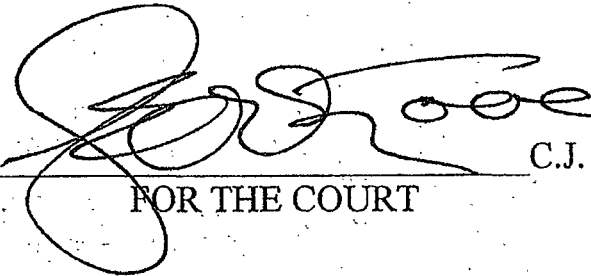
By order dated March 9, 2011, the notice of appeal in this matter was dismissed without prejudice since an appeal cannot be taken from a conditional order of dismissal. The remittitur was sent to the circuit court on March 25, 2011. By petition dated August 8, 2011, and received by this Court on August 11, 2011, petitioner now moves to be allowed to file a late motion for rehearing.¹

In this case, the remittitur was properly sent when no petition for rehearing or reinstatement was received by this Court within the time specified by Rule 221, SCACR. Therefore, the motion to file a late motion

¹ The Public Case Index for York County does not indicate that a final order has been filed in this matter.

for rehearing is denied. Wise v. South Carolina Dept. of Corrections, 372 S.C. 173, 642 S.E.2d 551 (2007) (if the remittitur has been properly sent, appellate jurisdiction has ended and no further motion can be considered by the appellate court).

IT IS SO ORDERED.


C.J.
FOR THE COURT

Columbia, South Carolina

August 31, 2011

cc: Appellate Defense

Mr. Clifton D. Lyles, #294075

Assistant Attorney General Jennifer Kinzeler

(Harrison Brant)

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Clifton D. Lyles, #294025,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

2010-CP-46-2919

FINAL ORDER OF DISMISSAL

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DEC - 1 PM 12:36

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed July 13, 2010. In its Return and Motion to Dismiss, Respondent consented to an Austin¹ review only, and asked that all other allegations in the Application be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal dated December 2, 2010, finding the Applicant was entitled to an Austin review of the denial of his first PCR action, and provisionally denying and dismissing all other allegations. The Applicant was given twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated December 29, 2010, serving the above-mentioned Conditional Order of Dismissal on the Applicant.² Additionally attached and incorporated are an Order, dated March 9, 2011 and the Remittitur, dated March 25, 2011, from the Supreme Court of South Carolina dismissing without prejudice the Applicant's Notice of Appeal from the Conditional Order of

¹ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

² This Court takes notice that the Applicant was served twice with the Conditional Order of Dismissal. The first being December 29, 2010 and the second being March 10, 2011. This Court construes the true date of service as December 29, 2010.

Dismissal pursuant to Lewis.³ Further attached and incorporated is an Order from the Supreme Court of South Carolina denying the Applicant's motion to file a late motion for rehearing, dated August 31, 2011, pursuant to Wise.⁴

The Applicant filed a response to the State's motion to dismiss on January 4, 2011, and filed a response to the Conditional Order of Dismissal on January 26, 2011. Additionally, the Applicant filed a Notice of Appeal and a "Motion to Appeal," stating his opposition to the Conditional Order of Dismissal. This Court construes the Applicant's "Motion to Appeal" as additional responses to the Conditional Order of Dismissal. In his responses, the Applicant asserts his current application is not successive or untimely filed because he raised issues concerning the ineffectiveness of prior PCR counsel at the prior PCR hearing, and these issues could not have been raised in his prior PCR application because the violations had not occurred yet. The Applicant also asserts he has a right to allege prior PCR counsel was ineffective for failing to file a 59(e) motion. This Court disagrees. As stated in this Court's Conditional Order of Dismissal:

There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under §17-27-90." Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

Moreover, although pursuant to Austin a PCR applicant may petition the S. C. Supreme Court for discretionary review of the dismissal of their application, Austin "is limited to its particular factual situation." Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). In Aice, the Court held a

³ Lewis v. State, 368 S.C. 630, 630 S.E.2d 464 (2006) (Notice of Appeal dismissed without prejudice because the order (Conditional Order of Dismissal) is not an appealable order).

⁴ Wise v. South Carolina Dept. of Corrections, 372 S.C. 173, 642 S.E.2d 551 (2007) (if the remittitur has been properly sent, appellate jurisdiction has ended and no further motion can be considered by the appellate court).

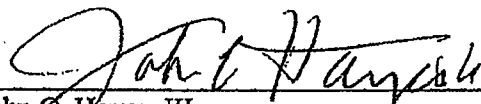
jc H/H 2

successive application is not allowed on the basis that a prior PCR application was insufficient due to ineffective PCR counsel. Id. at 448, 409 S.E.2d at 393. Therefore, this Court finds the Applicant's response is not sufficient to show why the Conditional Order of Dismissal served upon him should not become final.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the application for PCR is hereby denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 17th day of November, 2011.


John C. Hayes, III
Chief Administrative Judge #3
Sixteenth Judicial Circuit

York, South Carolina

WITNESSES

DEU Ligon

vk

ARREST WARRANT NUMBER

H061001

ACTION OF GRAND JURY

TRUE BILL

D. Lindsay Brown
Foreperson of Grand Jury

11-14-02

VERDICT

Guilty

Mark D. Lee
Foreperson of Petit Jury
Date: 4/8/04

DOCKET NO. 2002-GS-46- 2950

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

November 14, Term 2002

THE STATE

vs.

CLIFTON DONNELL LYLES

Indictment for

TRAFFICKING CRACK COCAINE

SC Code: §44-53-375
CDR Code: 0452

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

hereby appear in my own proper person and plead guilty to the within indictment or to

Clifton Dyles
Defendant

Witness: *Linda Muck*
C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA CERTIFIED TRUE COPY INDICTMENT
COUNTY OF YORK 2005 AUG 25 AM 11:37

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

At a Court of General Sessions convened on November 14, 2002, the Grand Jurors of York County present upon their oath:

TRAFFICKING CRACK COCAINE

That on or about August 21, 2002, in York County, South Carolina, the Defendant, Clifton Donnell Lyles, did knowingly sell, deliver, purchase, or bring into this State, or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive possession of ten grams or more of crack cocaine, as defined and otherwise limited in Sections 44-53-375, all in violation of Section 44-53-375, Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

WITNESSES

DEU/Ligon

vk

ARREST WARRANT NUMBER

H061002

ACTION OF GRAND JURY

TRUE BILL

D. Lindsay Brown
Foreperson of Grand Jury

11-14-02

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2002-GS-46- 2951

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

November 14, Term 2002

THE STATE

VS.

CLIFTON DONNELL LYLES

Indictment for

POSSESSION OF CRACK COCAINE WITH
INTENT TO DISTRIBUTE WITHIN
PROXIMITY OF A SCHOOL

SC Code: § 44-53-445
CDR Code: 108

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

CERTIFIED TRUE COPY

INDICTMENT

2005 AUG 25 AM 11:37

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

At a Court of General Sessions, convened on November 14, 2002, the Grand Jurors of York County present upon their oath:

**POSSESSION OF CRACK COCAINE WITH INTENT
TO DISTRIBUTE WITHIN PROXIMITY OF A SCHOOL**

That on or about August 21, 2002, in York County, South Carolina, the Defendant, Clifton Donnell Lyles, did distribute, sell, purchase, manufacture, or unlawfully possess with intent to distribute crack cocaine, a controlled substance, within a one-half mile radius of the grounds of York One Academy, a public school located in York County, South Carolina, such possession with intent to distribute not having been authorized by law, all in violation of Section 44-53-445, Code of Laws of South Carolina (1976), as amended

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR