

# The South Carolina Court of Appeals

Marcus Timmons, #217397, Applicant,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-000469

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ORDER

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This case is transferred to the Supreme Court of South Carolina pursuant to Rule 204(a) of the South Carolina Appellate Court Rules.

FOR THE COURT

BY V. Claire Allen, Deputy  
CLERK

Columbia, South Carolina

cc:

William G. Yarborough, III, Esquire  
Alan McCrory Wilson, Esquire  
Patrick Lowell Schmeckpeper, Esquire  
The Honorable Daniel E. Shearouse

**FILED**

3/8/16

**RECEIVED**

MAR - 9 2016

**SC SUPREME COURT**

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
General Sessions Court

**RECEIVED**

Honorable Judge Clyde N. Davis, Jr., Common Pleas Court Judge

MAR 03 2016

SC Court of Appeals

Common Pleas Case No: 2003-CP-32-0759

The State,

Respondent

v.

Marcus Timmons,

Appellant

**NOTICE OF APPEAL**

Appellant Marcus Timmons appeals the Order Denying Post-Conviction Relief by the Honorable Clyde N. Davis, Jr. filed on March 15, 2006. The Appellant is presently confined in the South Carolina Department of Corrections after a jury found him guilty and sentenced him to the following:

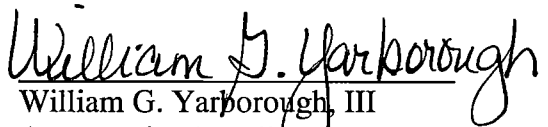
Murder	1994-GS-32-0362 (count 1)	Life imprisonment
Armed Robbery	1994-GS-32-0362 (count 2)	Twenty-five (25) years, consecutive to murder
Criminal Conspiracy	1994-GS-32-0362 (count 3)	Five (5) years, concurrent
Criminal Conspiracy	1994-GS-32-0364	Five (5) years, concurrent
Armed Robbery	1994-GS-32-0367 (count 1)	Twenty-five (25) years, consecutive to murder
Pointing a Firearm	1994-GS-32-0367 (count 2)	Five (5) years, concurrent
Pointing a Firearm	1994-GS-32-0367 (count 3)	Five (5) years, concurrent

Pointing a Firearm	1994-GS-32-0367 (count 4)	Five (5) years, concurrent
Assault and Battery of a High and Aggravated Nature (ABHAN)	1994-GS-32-0367 (count 5)	Ten (10) years, concurrent
Possession of a Weapon During the Commission of a Violent Crime	1994-GS-32-0367 (count 6)	Five (5) years, concurrent
Attempted Armed Robbery	1994-GS-32-2738 (count 1)	Twenty (20) years, concurrent
Pointing a Firearm	1994-GS-32-2738 (count 2)	Five (5) years, concurrent
Pointing a Firearm	2000-GS-32-3326	Five (5) years, concurrent
Pointing a Firearm	2000-GS-32-3327	Five (5) years, concurrent
Attempted Armed Robbery	2000-GS-32-3328	Five (5) years, concurrent

The issues for appeal are as follows:

1. Post-Conviction counsel abandoned PCR even with a Judge's request for follow-up brief.
2. Post-Conviction counsel did not file a timely appeal on the Order to Deny dated March 15, 2006.
3. Appellant did not voluntarily waive his right to appeal the post-Conviction Relief Court's denial and dismissal.
4. An Order from the Honorable Judge D. Craig Brown was filed on February 25, 2016 granting an appeal of the first post-conviction action.

Respectfully submitted,

  
 William G. Yarborough, III  
 Attorney for Appellant  
 522 N. Church Street  
 Greenville, SC 29601  
 Bar# 10271

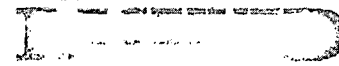
Other Counsel of Record:

The Honorable Alan Wilson  
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PO Box 11549  
Columbia, SC 29211

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**Jenny Abbott Kitchings**  
**Clerk of Court**  
**SC Court of Appeals**  
**PO Box 11629**  
**Columbia, SC 29211**



MAR 03 2016

SC Court of Appeals



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SC Court of Appeals

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF LEXINGTON ) FOR THE ELEVENTH JUDICIAL CIRCUIT

Marcus Timmons, # 217397, 2016 FEB 25 A 11:05 2012-CP-32-2150

Applicant BE H A GARRIGG  
CLERK OF COURT  
LEXINGTON, SC

ORDER GRANTING AN APPEAL  
PURSUANT TO AUSTIN V. STATE<sup>1</sup>

v.

State of South Carolina,  
Respondent.

ORIGINAL

This matter comes before the Court by way of an application for post-conviction relief filed May 24, 2012. The Respondent made its Return on or about March 11, 2015, requesting an evidentiary hearing solely on the issue of whether Applicant was entitled to an appellate review of his first post-conviction relief action pursuant to Austin. An evidentiary hearing on the matter was convened on December 10, 2015, at the Lexington County Courthouse. Applicant was present at the hearing and represented by William Yarborough, Esquire. Patrick Schmeckpeper, Esquire, of the South Carolina Office of the Attorney General represented the Respondent.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. Applicant was indicted on numerous charges as shown below. Applicant was originally convicted of murder, two counts of armed robbery, two counts of criminal conspiracy, four counts of pointing a firearm, assault and battery of a high and aggravated nature, possession of a firearm during an armed robbery, and attempted armed robbery. The South Carolina Supreme Court reversed his convictions on direct appeal from his first trial. State v. Timmons, 327 S.C. 48, 488 S.E.2d 323 (1997). The State retried Applicant, where he was found guilty on all counts as indicted. Applicant was represented

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

at his second trial by Carey M. Ayer, Esquire. The Honorable H. Dean Hall sentenced Applicant as follows:

<u>Charge</u>	<u>Indictment(s)</u>	<u>Sentence</u>
Murder	1994-GS-32-0362 (count 1)	Life imprisonment
Armed Robbery	1994-GS-32-0362 (count 2)	Twenty-five (25) years, consecutive to murder
Criminal Conspiracy	1994-GS-32-0362 (count 3)	Five (5) years, concurrent
Criminal Conspiracy	1994-GS-32-0364	Five (5) years, concurrent
Armed Robbery	1994-GS-32-0367 (count 1)	Twenty-five (25) years, consecutive to murder
Pointing a Firearm	1994-GS-32-0367 (count 2)	Five (5) years, concurrent
Pointing a Firearm	1994-GS-32-0367 (count 3)	Five (5) years, concurrent
Pointing a Firearm	1994-GS-32-0367 (count 4)	Five (5) years, concurrent
Assault and Battery of a High and Aggravated Nature (ABHAN)	1994-GS-32-0367 (count 5)	Ten (10) years, concurrent
Possession of a Weapon During the Commission of a Violent Crime	1994-GS-32-0367 (count 6)	Five (5) years, concurrent
Attempted Armed Robbery	1994-GS-32-2738 (count 1)	Twenty (20) years, concurrent
Pointing a Firearm	1994-GS-32-2738 (count 2)	Five (5) years, concurrent
Pointing a Firearm	2000-GS-32-3326	Five (5) years, concurrent
Pointing a Firearm	2000-GS-32-3327	Five (5) years, concurrent
Attempted Armed Robbery	2000-GS-32-3328	Five (5) years, concurrent

Applicant again sought a direct appeal. Aileen P. Clare, Esquire, of the South Carolina Office of Appellate Defense submitted a final brief and petition to be relieved as counsel pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal pursuant to Anders and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991). State v. Timmons, Op. No. 2002-UP-382 (S.C. Ct. App. filed May 29, 2002). The remittitur was sent on June 6, 2002.

Applicant subsequently filed for post-conviction relief on February 25, 2003 (2003-CP-32-0759), where he raised the following issues:

1. Ineffective assistance of counsel, in that counsel:
  - a. Failed to make a contemporaneous objection to preserve identification issue for appellate review.

Applicant, through appointed counsel, Melissa Kimbrough, Esquire, submitted an amendment to application for Post-Conviction Relief which raised the following issues:

1. Ineffective assistance of counsel, in that counsel
  - a. Failed to contemporaneously object to unreliable identification testimony and
  - b. Failed to object to the prosecutor's closing argument that constituted a violation of Doyle v. Ohio, 426 U.S. 610 (1976).
2. Ineffective assistance of appellate counsel, in that counsel
  - a. Failed to raise the preserved issue of the admission of the autopsy photographs and
  - b. Failed to raise the preserved issued that the photographic lineup was improperly admitted under State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986).

An evidentiary hearing was convened on January 24, 2006, in which Applicant was present with counsel Kimbrough. The State was represented by Assistant Attorney Sabrina C. Todd, Esquire. Applicant did not testify and failed to offer any evidence. Ms. Kimbrough argued the allegations of ineffective assistance of trial and appellate counsel. On March 15, 2006, the Honorable Clyde N. Davis, Jr., issued an order denying post-conviction relief that found both trial and appellate counsel were not ineffective. Applicant did not appeal.

### ALLEGATIONS

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

1. Ineffective assistance of trial counsel
2. Trial counsel failure to make contemporaneous objection.

3. Applicant was denied State and federal rights to appeal by law in accordance to SCRCPC his post-conviction relief counsel failure to communicate following January '06 PCR. Attorneys failure to file notice of appeal. Mellissa J. Kimbrough, Esq. (Due Process Violation).

Applicant, through counsel, filed an amended application<sup>2</sup> on May 8, 2015, alleging the following additional grounds for relief:

1. Applicant was denied the effective assistance of PCR Counsel due to PCR Counsel's abandonment of the Applicant's Application for PCR by failing to file a brief of the issues before the PCR Court after the PCR Judge required such a brief. The failure to file the brief resulted in summary dismissal of the PCR.
2. Applicant did not knowingly or intelligently waive his right to a direct appeal of the denial of his PCR claim.

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

#### **Austin Appeal**

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his prior application. Prior to the start of the evidentiary hearing, the State indicated to this Court that they would be consenting to the grant of an Austin appeal. The State explained that they were consenting to relief after discussions with Applicant's PCR Counsel.

After review of the facts and circumstances surrounding the waiver of the Applicant's right to appeal the denial of his post-conviction relief application, this Court finds that the Applicant is entitled to appeal the denial of his first post-conviction relief application (2003-CP-32-0759) pursuant to Austin v. State. This Court finds that Applicant did not voluntarily waive his right to appeal the post-conviction relief court's denial and dismissal of his prior post-conviction relief action.

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<sup>2</sup> Applicant initially filed a new application, (2015-CP-32-1731). The two actions were merged into one application in an order by this Court dated and filed December 10, 2015.

### All Other Allegations

This Court summarily dismisses Applicant's remaining allegations. Applicant's allegations that trial counsel was ineffective are procedurally barred by the statute of limitations. S.C. Code Ann. §17-27-45(a) (2015) ("An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of a final decision upon an appeal, whichever is later). They are also barred because they are successive to his previous application. S.C. Code §17-27-90 (2015); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991) (holding that successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications).

Applicant's claim that PCR counsel was ineffective does not constitute a "sufficient reason" to warrant a successive application. Martinez has no bearing on Applicant's ability to raise ineffective assistance of counsel claims in a subsequent, successive PCR application filed in the circuit courts of this state. Rather, in Martinez, the United States Supreme Court held that "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." Kelly v. State, 404 S.C. 365, 365, 745 S.E.2d 377 (2013) (quoting Martinez, 132 S.Ct. at 1320). Concerning state court, however, the Supreme Court of South Carolina has recognized that "the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." Id. Consequently, Applicant's contention that she received ineffective assistance

of prior PCR counsel is not a cognizable claim for relief, nor does it raise any genuine issue of material fact for this Court to consider in evaluating the application.


**CONCLUSION**

Based upon the foregoing, this Court finds that the granting of an appeal of the Applicant's first post-conviction relief action (2003-CP-32-0759) pursuant to Austin v. State is warranted. Applicant's remaining allegations are summarily dismissed with prejudice.

**IT IS THEREFORE ORDERED:**

1. That the Applicant be granted an appeal of case 2003-CP-32-0759 pursuant to Austin v. State;
2. That Applicant's remaining allegations be dismissed with prejudice; and
3. That the Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 18 day of February, 2016.

  
D. CRAIG BROWN  
Presiding Judge  
Eleventh Judicial Circuit

Florence, South Carolina.

FILED  
2016 FEB 25 A 11:04  
SHERIFF'S OFFICE  
CLERK OF COURT  
LEXINGTON, SC

FORM 4

STATE OF SOUTH CAROLINA  
 COUNTY OF LEXINGTON  
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
 CASE NUMBER 2012CP3202150

Marcus Timmons #217397

Robert Stevenson  
 Warden

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for:  Plaintiff  Defendant  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order; (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

2/26/2016

Date

**For Clerk of Court Office Use Only**

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on **February 26, 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

**William G. Yarborough III** 522 North Church Street  
Greenville, SC 29601

**Patrick Lowell Schmeckpeper** PO Box 11549 Columbia, SC  
29211

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**ATTORNEY(S) FOR THE DEFENDANT(S)**

Beth A. Carrigg/kpk

**Court Reporter**

**Beth A. Carrigg - Clerk of Court**

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF FLORENCE )  
 )  
 Marcus Timmons, )  
 S.C.D.C. No. 217397, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS **FILED**

2003-CP-32-0759

2006 MAR 15 A 10:32

BETH A. CARRIGG  
 CLERK OF COURT  
 LEXINGTON SC

**ORDER DENYING  
 POST-CONVICTION RELIEF**

**RECEIVED**  
 MAR 03 2016  
 SC Court of Appeals

**PROCEDURAL HISTORY**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed February 25, 2003. Respondent made its return on November 8, 2004. Applicant has also amended his application. An evidentiary hearing into the matter was convened on January 24, 2006 at the Lexington County Courthouse. Applicant was present at the hearing and was represented by Melissa Kimbrough, Esquire. Sabrina C. Todd, Esquire of the South Carolina Office of the Attorney General represented Respondent.

Applicant did not testify or offer any evidence. Instead, PCR counsel argued the allegations of ineffective assistance of trial and appellate counsel. Carey M. Ayer, Esquire, testified on behalf of Respondent. The Court had before it a copy of the trial transcript, Applicant's appellate records, the records of the Lexington County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the application for PCR, Respondent's return to the same, and the amended application for PCR. The Court also had an opportunity to view the autopsy photographs introduced into evidence and the photocopies of the lineups introduced into evidence.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. In August of 2000, Applicant was tried on the following charges:

Murder	94-GS-32-0362
Armed robbery	94-GS-32-0362
Criminal conspiracy	94-GS-32-0362
Criminal conspiracy	94-GS-32-0364
Armed robbery	94-GS-32-0367
Pointing a firearm	94-GS-32-0367
Pointing a firearm	94-GS-32-0367
Pointing a firearm	94-GS-32-0367
Assault and battery of a high and aggravated nature	94-GS-32-0367
Possession of a weapon during the commission of a violent crime	94-GS-32-0367
Attempted armed robbery	94-GS-32-2738
Pointing a firearm	94-GS-32-2738
Pointing a firearm	00-GS-32-3326
Pointing a firearm	00-GS-32-3327
Attempted armed robbery	00-GS-32-3328.

This was Applicant's second trial. The South Carolina Supreme Court reversed his convictions on direct appeal from his first trial. State v. Timmons, 327 S.C. 48, 488 S.E.2d 323 (1997). Applicant was represented at his second trial by Carey M. Ayer, Esquire. Applicant was found guilty on all counts. (Trial tr. p.655, line 6 - p.656, line 10.) The Honorable H. Dean Hall sentenced Applicant as follows:

Murder	Life
Armed robbery	25, consecutive to murder
Criminal conspiracy	5, concurrent
Criminal conspiracy	5, concurrent
Armed robbery	25, consecutive to murder
Pointing a firearm	5, concurrent
Pointing a firearm	5, concurrent
Pointing a firearm	5, concurrent
Assault and battery of a high and aggravated nature	10, concurrent
Possession of a weapon during the commission of a violent crime	5, concurrent
Attempted armed robbery	20, concurrent
Pointing a firearm	5, concurrent
Pointing a firearm	5, concurrent

Pointing a firearm  
Attempted armed robbery

5, concurrent  
5, concurrent

Applicant again sought a direct appeal. Aileen P. Clare of the South Carolina Office of Appellate Defense submitted a final brief and petition to be relieved pursuant to Anders v. California, 386 U.S. 738 (1967), asserting the appeal lacked merit. "After a review of the record," the South Carolina Court of Appeals dismissed the appeal pursuant to Anders and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), holding "there are no directly appealable issues that are arguable on their merits." State v. Timmons, Op. No. 2002-UP-382 (S.C. Ct. App. filed May 29, 2002).

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

1. Ineffective assistance of trial counsel, in that counsel:
  - a. Failed to make a contemporaneous objection to preserve identification issue for appellate review.

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

1. Ineffective assistance of trial counsel, in that counsel:
  - a. Failed to <sup>and</sup> contemporaneously object to unreliable identification testimony and
  - b. Failed to object to the prosecutor's closing argument that constituted a violation of Doyle v. Ohio, 426 U.S. 610 (1976).
2. Ineffective assistance of appellate counsel in that counsel:
  - a. Failed to raise the preserved issue of the admission of the autopsy photographs and

- b. Failed to raise the preserved issue that the photographic lineup was improperly admitted under State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986).

At the onset of the PCR hearing, PCR counsel asserted Applicant wished to proceed on the issues raised in his amended application but that he did not intend to submit any evidence regarding the issues.

### **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 witness presented at the hearing and closely pass upon his credibility. Upon careful consideration of the testimony and record, the Court concludes the Applicant has failed to satisfy his burden of establishing his allegations of ineffective assistance of counsel. Set forth below are the relevant findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

#### **Ineffective Assistance of Trial Counsel Claims**

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), SCRPC). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). 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." Id. at 117-18, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 689). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

#### A. Identification issue

Applicant alleges trial counsel failed to preserve a challenge to witness Peggy Williams' identification of him at trial by failing to contemporaneously object to her testimony. Williams ~~was~~ testified Applicant held her at gunpoint during the attempted robbery of the Pantry while the other robber was holding the store's clerk at gunpoint. (Tr. p.309, line 9 – p.325, line .7) This Court finds the issue was preserved and that the trial court properly permitted the witness to identify Applicant.

Although generally a ruling in limine is not final and a contemporaneous objection is required to preserve the issue for appellate review, where the evidence is introduced immediately after the court's ruling, the party need not renew the objection in order to preserve the issue for appellate review. State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001). In Forrester, the

defense moved before opening statements to suppress cocaine. The South Carolina Supreme Court concluded that because the State's witness was the first witness at trial, and thus no other evidence was taken before the cocaine's admission, it was unnecessary to object at the time of admission because no opportunity existed for the court to change its ruling. Such is the case here. A hearing was held on the identification issue, at the conclusion of which, the trial court ruled the witness would be permitted to identify Applicant. (Tr. p.242, line 12 – p.302, line 8.) She was the very next person to testify; thus because no intervening evidence was admitted, there was no basis for the court to change its ruling and the issue was preserved for appellate review. (Tr. p.302, line 8 – p.308, line 20; p.324, line 15 – p.325, line 2.) Indeed, counsel testified that because the trial court had just ruled on the issue, he did not believe it was necessary for him to object when Ms. Williams identified Applicant before the jury.

Furthermore, this Court concludes there was no legitimate basis for excluding Williams' identification of Applicant. A two-prong inquiry exists for determining the admissibility of an identification. First, the court must determine whether the identification procedure was unduly suggestive. If it was, the court must then decide whether the identification is nevertheless so reliable that no substantial likelihood for misidentification existed. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). The factors outlined in Neil v. Biggers and discussed at trial include (1) the witness' opportunity to view the accused; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty the witness demonstrated identification; and (5) the time elapsed between the crime and the identification. Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

Consideration of the second prong of the test is necessary only if the out-of-court identification procedure was suggestive. Moore, 343 S.C. 282, 540 S.E.2d 445. Here, trial

counsel testified at the PCR hearing that he was attempting to exclude Williams' identification of Applicant as generally unreliable; he did not assert to the trial court, nor does this Court find, the out-of-court identification process was suggestive. (Tr. p.300, line 23 - p.301, line 8.) Essentially, he was challenging Williams' credibility, which was a question for the jury, not the trial court. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). This Court declines to accept Applicant's argument that because the photo lineup was compiled using booking photographs, the identification process was tainted. There is nothing in the record to indicate anyone suggested to Williams which of the 18 lineup photos to pick.

#### B. Doyle issue

Next, Applicant contends trial counsel should have objected when the prosecutor referred in his closing argument to Applicant's refusal to answer questions posed by law enforcement. He says the argument violates the principal set forth in Doyle v. Ohio, 426 U.S. 610 (1976). This Court concludes the transcript of Applicant's trial does not demonstrate a Doyle violation occurred and Applicant has failed to prove trial counsel should have objected.

In Doyle, the United States Supreme Court held a prosecutor violates due process by impeaching a defendant's exculpatory story, told for the first time at trial, through cross-examination of the defendant about his failure to tell the story to police after receiving Miranda warnings at the time of his arrest. Doyle, 426 U.S. 610. The Court reasoned that the Miranda warning that an accused has the right to remain silent carries an implicit assurance to one who receives the warnings that his silence will not carry a penalty. Id. The rule does not prevent the use of the defendant's silence prior to arrest or after arrest if no Miranda warnings are given, because there has been no implied assurance that silence <sup>CPD</sup> ~~that silence~~ will carry no penalty. Brecht v. Abrahamson, 507 U.S. 619 (1993).

In Applicant's case, an officer testified that during a traffic stop, Applicant refused to identify himself and during the officer's attempt to learn his identity, Applicant "wouldn't respond to [the officer's] questions with any more than an occasional grunt." (Tr. p.383, lines 13-24.) The prosecutor referred to this exchange during his closing argument. (Tr. p.626, lines 17-25.) The transcript does not indicate Applicant was under arrest during the exchange with law enforcement, nor does it indicate he had been given Miranda warnings. (Tr. p.375, line 1 – p.385, line 7; p.626, line 17 – p.627, line 10.) Therefore, any reference to Applicant's silence to the officer's questions was not a violation of due process under Doyle.

Moreover, "[t]he Fifth Amendment prohibits only compelled testimony that is incriminating." Hiibel v. Sixth Judicial District Court of Nevada, 542 U.S. 177, 189 (2004). Refusing to provide one's own name upon request from law enforcement would tend to be incriminating <sup>Cv</sup> ~~under~~ only in unusual circumstances. Id. at 191. Applicant has made no showing that identifying himself by name during the traffic stop would itself have been incriminating. Therefore, because there is no evidence he had a right under the Fifth Amendment to refuse to identify himself upon request, the prosecutor's comment on his refusal does not constitute a violation of Doyle. ~~Additionally, the Court would note Applicant was not silent, but rather grunted at the officer. The Court finds Applicant's behavior distinct from an individual who exercises his right to remain silent.~~

#### **Ineffective Assistance of Appellate Counsel Claims**

An applicant asserting a claim of ineffective assistance of appellate counsel must prove both that counsel's performance was deficient and that the deficient performance prejudiced him. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). "To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have

prevailed on appeal.” Id. at 434, 581 S.E.2d at 835. Although a defendant is entitled to effective assistance of appellate counsel, counsel is not required to raise every non-frivolous issue presented by the record. Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004). Appellate counsel is not required to raise every conceivable issue on direct appeal, but rather has a professional duty to choose among potential issues according to their merit and counsel’s tactical approach. Jones v. Barnes, 463 U.S. 745 (1983).

In this case, Applicant’s appellate attorney submitted a brief to the South Carolina Court of Appeals pursuant to Anders v. California, 386 U.S. 738 (1967), asserting the trial court erred in denying Applicant’s motion to suppress Williams’ identification as unreliable. If meritorious issues are suspected, the appellate court will direct the parties to brief the issues and proceed with the appeal. Anders, 386 U.S. at 738; State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991).

The record before this Court indicates trial counsel opposed the introduction of the photo lineup and the autopsy photos, but that the trial court denied these requests. (Tr. p.302, line 10 – p.307, line 17; p.199, line 24 – p.203, line 10, p.555, lines 7-20.) The South Carolina Court of Appeals reviewed the record in Applicant’s appeal, determined<sup>ed</sup> no preserved issues of arguable merit existed, and dismissed the appeal. Applicant cannot establish ineffective assistance of appellate counsel because the court of appeals considered the trial court’s decision to admit the photo lineup and the autopsy photographs.

Moreover, this Court rejects Applicant’s contention that appellate counsel was ineffective for not seeking a petition for writ of certiorari. This Court notes a defendant does not have the right to a discretionary appeal from the South Carolina Court of Appeals. See Poston v. State, 339 S.C. 37, 528 S.E.2d 422 (2000); Rule 226(b), SCACR (providing a petition for a writ of

certiorari to the South Carolina Court of Appeals is a discretionary appeal). Thus he could not have possibly been denied effective assistance of appellate counsel by counsel's failure to file a petition for writ of certiorari. Wainwright v. Torna, 455 U.S. 586, 587-88 (1982) (holding that because a person has no constitutional right to pursue a discretionary appeal, he could not have been deprived effective assistance by counsel's failure to file a timely application for a discretionary appeal). Accordingly, the allegations regarding ineffective assistance of appellate counsel lack merit and must be denied and dismissed.

#### **Any Other Allegations**

As to any and all allegations that were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice.

#### **CONCLUSION**

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial or during his direct appeal that entitle him to the relief he now seeks. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation.

This Court advises Applicant a notice of intent to appeal must be filed within thirty (30) days from the receipt of this Order if he wants to secure appellate review. Pursuant to Rule 71.1(g), if Applicant wishes to seek appellate review, PCR counsel must file a notice of appeal on his behalf. Applicant and PCR counsel are also directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of

request to appeal has been finally filed.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice and

2. That the writ be denied to the extent of the grounds stated.


Very truly yours,  
[Signature]

intent to appeal has been timely filed.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That Applicant be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 14<sup>th</sup> day of March, 2006.

  
Clyde N. Davis, Jr.  
Presiding Judge  
Eleventh Judicial Circuit

Lexington, South Carolina.

CP-32-0759

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2003 - CP-32 - 0759

MARCUS TIMMONS

STATE OF SOUTH CAROLINA

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC  Rule 41(a), SCRPC (Vol. Nonsuit:  Rule 43(k),  SCRPC (Settled);  Other - \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 400) SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other \_\_\_\_\_

**IT IS ORDERED AND ADJUDGED:**  See attached order;  Statement of Judgment by the Court:

Dated at \_\_\_\_\_, South Carolina, this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_

\_\_\_\_\_  
PRESIDING JUDGE

This judgment was entered on the NA day of NA, 20 ---, and a copy mailed first class this 17 day of MAR, 20 06 to attorneys of record or to parties (when appearing pro se) as follows:

MELISSA KIMBROUGH

SABRINA C TODD

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

ATTORNEY GENERAL'S OFFICE

RECEIVED *3/20/66*

ADMINISTRATIVE INSTRUCTIONS

FILE  OPEN  END

HAVE  COPIES MADE

ROUTE TO \_\_\_\_\_

ORDER:  TRANSCRIPT

PEN RECORDS  CLERK RECORDS

OTHER: *prepare closing letter*

RECEIVED  
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