



ALAN WILSON
ATTORNEY GENERAL

May 7, 2012

VIA HAND-DELIVERY

LaNelle Cantey DuRant, Esquire
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

RECEIVED

MAY -7 2012

S.C. Supreme Court

RE: **Tarren Lee Richburg v. State of South Carolina**
Post-Conviction Relief Appeal – Horry County

Dear Ms. DuRant:

The State is in receipt of the Petition for Writ of Certiorari and Appendix which you recently filed in the above-referenced post-conviction relief appeal. The Petition and Appendix were served upon Matthew J. Friedman; however, please be advised that I will be representing the State in this matter.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,

Christina J. Catoe
Assistant Attorney General

CJC/

cc: The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Steven H. John., Circuit Court Judge

RECEIVED

APR - 6 2012

S.C. Supreme Court

TARREN RICHBURG,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

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

(3)

Counsel for Tarren Richburg respectfully requests a **final extension of thirty (30) days until May 7, 2012** in which to file the petition for writ of certiorari and appendix in this case. This motion is made pursuant to the Order of the South Carolina Supreme Court dated March 18, 2009. This is a final request for an extension. In support of this request, counsel shows:

1. The petition for writ of certiorari and appendix is due to be served and filed with the Court today.
2. Counsel for Mr. Richburg respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage his caseload, counsel hopes that no further extension requests will be required.

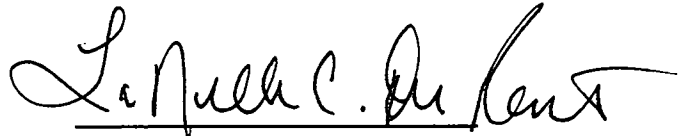
3. Counsel is preparing to file the initial brief of appellant and designation of matter in the case of State v. Trey Williams today, April 6, 2012. On April 4, 2012, counsel filed the brief of petitioner in the case of State v. Jeffery Evans, the petition for writ of certiorari and appendix in the case of Janice Clasby v. State and the petition for rehearing in the case of State v. Joel Robinson. On March 28, 2012, counsel filed the petition for writ of certiorari, the Johnson petition for writ of certiorari pursuant to Austin v. State and appendix in the case of Donald Hulon v. State and the initial brief of appellant and designation of matter in the case of State v. Eric Spratt. On March 22, 2012, counsel filed the petition for rehearing in the case of State v. Shane Epting. On March 19, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Clarence Logan and the petition for writ of certiorari, the Johnson petition for writ of certiorari pursuant to Austin v. State and appendix in the case of Jerry Galbreath v. State. On March 14, 2012, counsel had an oral argument in the case of State v. Cameron Hammonds in the Court of Appeals. On March 13, 2012, counsel had an oral argument in the case of State v. Bennie Golston in the Court of Appeals. On March 8, 2012, counsel filed the petition for rehearing in the cases of State v. Andre Massey and State v. Jake Wilson. On March 7, 2012, counsel had an oral argument in the case of In the Matter of the Care and Treatment of Bobby Manigo in this Court. On March 6, 2012, counsel had an oral argument in the case of State v. Patrick Herb in this Court.

4. Counsel makes this request in good faith and not for purpose of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

5. Counsel for the Attorney General's office consents to this request as shown by signature below.

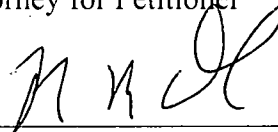
WHEREFORE, the undersigned counsel would respectfully request a **final thirty (30) day extension until May 7, 2012**, in which to file the petition for writ of certiorari and appendix in this case based upon the above exigent circumstances.

Respectfully submitted,



LaNelle C. Durant
Appellate Defender

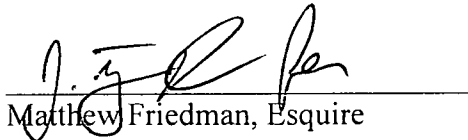
Attorney for Petitioner



Robert M. Dudek
Chief Appellate Defender

April 6, 2012

I Consent:



Matthew Friedman, Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Steven H. John., Circuit Court Judge

REC
MAR 7 2009
S.C. Supreme Court

TARREN RICHBURG,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

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

(2)

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

1. The petition for writ of certiorari and appendix is due to be served and filed with the Court today.
2. Counsel for Mr. Richburg respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage his caseload, counsel hopes that no further extension requests will be required.

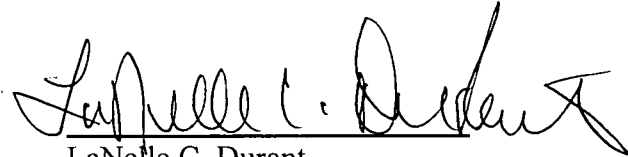
3. Counsel has an oral argument in the case of In the Matter of the Care and Treatment of Bobby Manigo in this Court today, March 7, 2012. On March 6, 2012, counsel had an oral argument in the case of State v. Patrick Herb in this Court. On February 23, 2012, counsel filed the petition for rehearing in the case of State v. James Nash. On February 21, 2012, counsel filed the initial reply brief of appellant in the case of State v. Brian Phillips and the return to petition for rehearing in the case of In the Matter of the Care and Treatment of Orlando Williams. On February 15, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Daniel Rogers. On February 14, 2012, counsel had an oral argument in the case of State v. Jaymes Wood in the Court of Appeals and filed the initial brief of appellant and designation of matter in the case of State v. Alonza Dennis. On February 13, 2012, counsel had an oral argument in the case of State v. Kevin Epting in the Court of Appeals. On February 10, 2012, counsel filed the petition for writ of certiorari and appendix in the case of Mario Hunter v. State and the return to petition for writ of certiorari to the Court of Appeals in the case of State v. Phillip Sawyer. On January 27, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Anthony Tilmon. On January 25, 2012, counsel filed the return to petition for writ of certiorari to the Court of Appeals in the case of In the Matter of the Care and Treatment of Vincent Way and the petition for writ of certiorari and appendix in the case of Andre Methelus v. State. On January 19, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Shawn Reaves and the petition for rehearing in the case of In the Matter of the Care and Treatment of Gilbert Gonzalez.

4. Counsel makes this request in good faith and not for purpose of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

5. Counsel for the Attorney General's office has been informed of this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension, in which to file the petition for writ of certiorari and appendix in this case based upon the above exigent circumstances.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LaNelle C. Durant", written over a horizontal line.

LaNelle C. Durant
Appellate Defender

Attorney for Petitioner

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Steven H. John., Circuit Court Judge

RECEIVED

MAR 7 2012

S.C. Supreme Court

TARREN RICHBURG,

PETITIONER,

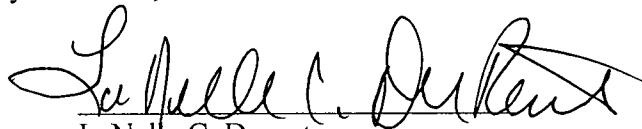
v.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

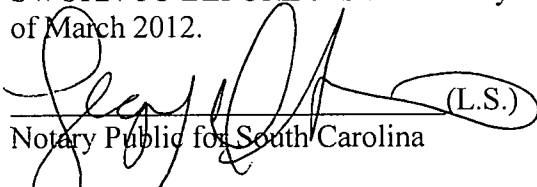
I certify that a true copy of the motion for an extension of time in which to file the petition for writ of certiorari and appendix in the above case has been served upon Matthew Friedman, Esquire, this 7th day of March, 2012.



LaNelle C. Durant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of March 2012.



(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.



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

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

February 6, 2012

RECEIVED

FEB 06 2012

S.C. Supreme Court

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

Re: Tarren Richburg v. The State

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix in this case are due to be served and filed with the Court February 6, 2012. However, because of my heavy workload at this time, I am requesting an extension for 30 days, in which to serve and file the petition.

By copy of this letter, I am informing Matthew J. Friedman, of the Attorney General's Office, of my request.

Sincerely,

LaNelle C. Durant
Appellate Defender

LCD/pds

cc: Matthew J. Friedman, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

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

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

December 8, 2011

RECEIVED

DEC - 8 2011

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

S.C. Supreme Court

Dear Mr. Shearouse:

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

Tarren Lee Richburg v. State of South Carolina

12/8/2011

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

Thank you for your assistance in this matter.

Sincerely,

Sharon A. Graham
Administrative Coordinator



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 13, 2011

RECEIVED

OCT 13 2011

Mr. Henry P. Young
Circuit Court Reporter
11 Roxanna Drive
Ninety Six, SC 29666

S.C. Supreme Court

Dear Mr. Young:

Please provide us with the following transcript:

Tarren Lee Richburg v. State of South Carolina Case #: 11-CP-26-00574

County: Horry Date of Trial: August 23, 2011

Presiding Judge: Steven H. John

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

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

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

Sincerely,

Sharon A. Graham
Administrative Coordinator

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

LONG & MILLSAPS, P.A.
-ATTORNEYS AT LAW-

J. Scott Long
Shannon A. Millsaps
Heather Cannon*
*Family Court Mediator

4375 Oleander Drive
Myrtle Beach, SC 29577
Office: 843-213-0853
Fax: 843-213-0769

September 20, 2011

The Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: Tarren L. Richburg #271746 vs. State of South Carolina
2011-CP-26-0574

To whom it may concern,

Enclosed you will find the Notice of Appeal in the above PCR case, which I hereby serve upon you by Proof of Service. I am filing this Notice on behalf of my client to protect his interests. I was appointed in this matter by Order of Judge Larry B. Hyman, Jr. My client is currently incarcerated and is indigent. By copy of these documents, I am requesting that the Office of Appellate Defense handle this Appeal for Mr. Richburg.

Also enclosed are the following:

1. Notice of Appeal
2. Proof of Service of the Notice of Appeal to Attorney General
3. Proof of Service of Notice of Appeal to the Supreme Court
4. A copy of the Order which is to be challenged on appeal
5. Order appointing counsel

Should you have any questions, please feel free to contact me.

With kind regards, I am

Sincerely,
Long & Millsaps, P.A.


Heather M. Cannon

Enclosures

RECEIVED

SEP 20 2011

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Steven H. John, Circuit Court Judge

CASE NO. 2011-CP-26-0574

Terran L. Richburg, #271746.....Appellant

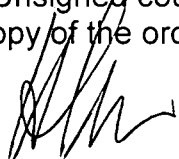
v.

State of South Carolina.....Respondent

NOTICE OF APPEAL

Terran L. Richburg, #271746, appeals the Honorable Steven H. John's August 31, 2001 order denying post-conviction relief to the Respondent. Unsigned counsel received notice of entry of the order on September 12, 2011. A copy of the order on appeal is attached to this notice.

Date: September 20, 2011



Heather M. Cannon, Esquire
Attorney for Appellant
4375 Oleander Drive
Myrtle Beach, SC 29577

Other counsel of record:
Christina J. Catoe
PO Box 11549
Columbia, SC 29211-1549

RECEIVED

SEP 26 2011

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Stephan H. John, Circuit Court Judge

CASE NO. 2011-CP-26-0574

Terran L. Richburg, # 271746.....Appellant

v.

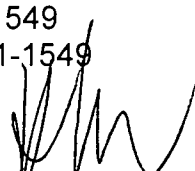
State of South Carolina.....Respondent

PROOF OF SERVICE

I hereby certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of the Notice in the United States Mail, postage prepaid, on Tuesday, September 20, 2011, addressed to the attorney of record:

Christine J. Catoe, Esq.
Office of the Attorney General
Rembert C. Dennis Building
Post Office Box 11549
Columbia, SC 29211-1549

Date: September 20 2011



Heather M. Cannon, Esquire
Trial counsel for the
Applicant Terran L. Richburg, #271746
4375 Oleander Drive
Myrtle Beach, SC 29577
(843) 213-0853
Fax: (843) 213-0769

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Steven H. John, Circuit Court Judge

CASE NO. 2011-CP-26-0574

Tarren L. Richburg, #271746.....Appellant

v.

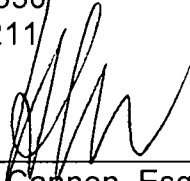
State of South Carolina.....Respondent

PROOF OF SERVICE

I hereby certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of the Notice in the United States Mail, postage prepaid, on Tuesday, September 20, 2011, addressed to the attorney of record:

The Supreme Court
Post Office Box 11330
Columbia, SC 29211

Tuesday, September 20, 2011.



Heather M. Cannon, Esq.
Trial counsel for the
Applicant Tarren L. Richburg, #271746
4375 Oleander Drive
Myrtle Beach, SC 29577
(843) 213-0853
Fax: (843) 213-0769

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Tarren Lee Richburg, # 271746,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2011-CP-26-0574

**ORDER DENYING
POST-CONVICTION RELIEF**

11 SEP -6 AM 10:54
CLERK OF COURT

This matter came before the Court pursuant to an Application for post-conviction relief filed January 19, 2011, by Tarren Lee Richburg. Respondent made a Return on March 8, 2011. An evidentiary hearing was convened at the Horry County Courthouse on August 23, 2011. The Applicant was present in court and represented by Heather M. Cannon, Esquire. The Respondent was represented by Christina J. Catoe, Assistant Attorney General.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to a conviction from Horry County. The Applicant was indicted in November 2006 for trafficking in powder cocaine, 10-28 grams (2006-GS-26-4824). G. Scott Bellamy, Esquire, represented the Applicant. On June 4, 2007, the Applicant was tried and convicted pursuant to a jury trial before the Honorable J. Michael Baxley. Judge Baxley sentenced the Applicant, as a third-time drug offender, to 25 years. A notice of appeal was timely filed, and Kathrine H. Hudgins, Esquire, represented the Applicant on appeal. The South Carolina Court of Appeals affirmed the conviction on April 12, 2010 (2010-UP-235). The case was remitted to the circuit court on May 4, 2010.

STANDARD OF REVIEW

In a post-conviction relief proceeding, the applicant bears the burden of proving his or her allegations by a preponderance of the evidence. Caprood v. State, 338 S.C. 103, 109-110, 525 S.E.2d 514, 517 (2000); Rule 71.1(e). 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The correct measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, supra. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case." Caprood, supra, at 109, 525 S.E.2d at 517 (citations omitted). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use 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, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. When a defendant challenges his conviction after a trial, the proper consideration is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt. Smith v. State, 375 S.C. 507, 515, 654 S.E.2d 523, 527-28 (2007). (citations omitted). In order to receive relief, an

applicant must prove both ineffective assistance and resulting prejudice. See, e.g., Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

ALLEGATIONS

At this PCR hearing, Mr. Richburg alleged that his custody was unlawful for the following reasons:

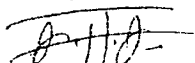
- (1) Ineffective assistance of appellate counsel – failure to raise the issue of ineffective assistance of trial counsel on direct appeal;
- (2) Prosecutorial misconduct – improper comments to the jury in closing argument referencing the defendant’s right to remain silent;
- (3) Ineffective assistance of trial counsel:
 - a. Failure to properly object to the solicitor’s improper comments in his closing argument;
 - b. Failure to suppress drug evidence:
 1. Illegal search and seizure and failure to investigate the BOLO report; and
 2. Failure to object to missing links in the chain of custody.
 - c. Conflict of interest – counsel stated in his closing argument that he was friends with the policemen involved in the case.

The Applicant indicated that he was seeking a new trial.

Set forth below are the relevant findings of fact and conclusions of law, as required by S.C. Code Ann. § 17-27-80 (2003):

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In considering the Applicant’s case, this Court had before it the Applicant’s PCR file, including all pleadings filed, the records of the Horry County Clerk of Court regarding the conviction, the Applicant’s records from the South Carolina Department of Corrections, the trial transcript, and the direct appeal records. This Court carefully listened to all of the testimony presented at the hearing and weighed the same according to credibility. This Court found the testimony of G. Scott Bellamy, Esquire, to be highly credible in all respects, while the



Applicant's testimony was lacking in credibility.

Issue # 1 – Ineffective Assistance of Appellate Counsel

At the PCR hearing, the Applicant claimed that his appeal attorney was ineffective for failing to raise the issue of ineffective assistance of counsel as an issue on direct appeal. This Court finds that this issue is without merit. Appellate counsel had no reason to raise the issue of ineffective assistance of counsel on direct appeal because this issue is a PCR issue rather than a direct appeal issue. See, e.g., Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000). Therefore, this allegation is denied and dismissed.

Issue # 2 – Prosecutorial Misconduct

The issue of prosecutorial misconduct will be addressed below since the Applicant also framed this issue as one of ineffective assistance of counsel for failure to object to the prosecutorial misconduct.

Issue # 3 – Ineffective Assistance of Trial Counsel

Failure to Object to Improper Comments in Solicitor's Closing Argument:

The Applicant asserted at the PCR hearing that his attorney failed to properly object when the solicitor made improper comments in his closing argument that referenced the defendant's right to remain silent. The Applicant contended that counsel failed to immediately object when the comments were made and that he failed to object after a curative instruction was given on the ground that the curative instruction was not sufficient to cure the prejudice flowing from the solicitor's comments. Notably, the South Carolina Court of Appeals was presented with this issue on direct appeal, but dismissed the issue as not preserved for review because counsel did not object to the sufficiency of the curative instruction.

The record reflects that during the solicitor's closing argument, while discussing the testimony of Officer Santiago, the solicitor stated that "the defense has not put up anything to say

Officer Santiago wasn't telling the truth." (See Trial Transcript, page 164, lines 13-14). Later, toward the end of his closing argument, the solicitor made another similar remark as follows: "There is not one bit of evidence, not one bit of testimony that what these officers testified to you about that that did not occur. They all came, they were sworn to testify truthfully. They testified and there is nothing that the defense has produced to say those events did not occur." (See Trial Transcript, page 166, lines 20-24). After the solicitor completed his closing argument within seconds of those comments, the Applicant's counsel made a motion for mistrial in the jury's presence based upon the solicitor's comments, arguing that the comments were improper because they were burden-shifting. (See Trial Transcript, page 167, lines 13-22). Alternatively, he requested curative instructions. The judge sustained counsel's objection to the comments but declined to grant a mistrial. However, the judge immediately issued a curative instruction to the jurors, first advising them that the comments made by the solicitor could be construed to shift the burden to the defendant to somehow prove his innocence. The judge instructed the jurors as follows:

I am going to sustain that objection with this curative instruction. It's not the Defendant's burden to come in and disprove any fact within the case, or to prove any fact within the case for that matter. The burden as we have said several times, is always on the State to prove its case regardless of whether there is responsive testimony or not. The Defendant has a constitutional right to remain silent. The State cannot invade that. Nor can they require the Defendant to testify. That would not be appropriate constitutionally. So, please understand that the burden at all times is on the State, and you should not take any inference if the Defendant does not put up any evidence on a particular point, or the Defendant does not testify on any point, and I will talk with you further in my charge to you on the law. But that is not to be held against the Defendant in any way. (See Trial Transcript, page 168, lines 11-23).

The trial judge then asked the jurors if they had any questions about the curative instruction. The jurors indicated that there were no questions. Defense counsel made no further objections and proceeded with his closing argument. At the PCR hearing, counsel indicated that

he believed the judge's curative instruction was correct and proper and sufficient to cure any prejudice.

After careful consideration of the entire record, this Court finds that counsel's conduct in dealing with the solicitor's comments was reasonable, and that the Applicant failed to prove that he suffered prejudiced by the comments. First, it does not appear that the solicitor's comments were directly aimed at referencing the defendant's right to remain silent. Instead, both of the comments appear to be an argument in response to the defense's extensive cross-examination of the officers insinuating that their testimony was not accurate because they did not all fill out proper paperwork, did not have a videotape of the incident, and because they did not request fingerprinting. (See Trial Transcript, pages 68-81; pages 91-104; p. 109-113; p. 120-29; p. 134-35; p. 142-145). It appears that the solicitor was attempting to argue that regardless of the administrative aftermath, there was no reason to disbelieve the officers' testimony under oath regarding what transpired on the day in question.

Even if the comments could be construed as an indirect reference to the defendant's right to remain silent, counsel objected and moved for mistrial at the end of the solicitor's argument in the presence of the jury. His objection came only moments after the solicitor's last comment. (See Trial Transcript, page 166-67). The trial judge sustained the objection and immediately issued a thorough curative instruction emphasizing to the jury that it was not the defendant's burden to disprove any fact within a case. The jurors indicated that they had no questions about this curative instruction. This Court finds that the judge's curative instructions were proper and were sufficient to cure any possible prejudice from the solicitor's comments; therefore, counsel was not ineffective for failing to make further objections.

Moreover, the degree of possible prejudice from the comments was slight because the judge had previously informed the jury during the course of trial that the defendant had no

burden to prove that the State's allegations were incorrect (page 45). Further, just before the State's closing argument, the judge instructed the jury that the defendant had no burden of proof and that he was not required to respond to the charges in any way (page 162). He also told the jurors that what the attorneys say in closing argument is not evidence (page 163).

In addition, after the judge issued his curative instruction in response to counsel's motion for mistrial, counsel reiterated again in his own closing argument that it was not the defendant's burden to contradict the State's evidence (page 174). Subsequently, in the final jury instructions, the judge told the jury that the fact that testimony is not directly controverted does not mean the jury must accept it as true (page 179). The judge also instructed the jurors again that the defendant has the right to remain silent; that he is not required to prove his innocence at any time; and that the burden of proof is on the State to prove its case beyond a reasonable doubt (page 185). This Court would also note that after trial, the judge re-stated his belief that the solicitor's comments were not intended to be a reference to the defendant's right to remain silent, but that even if they could be construed that way, the immediate curative instruction and subsequent instructions cured any possible prejudice (page 201).

Therefore, based upon the foregoing, this Court finds that counsel's performance with respect to the solicitor's comments was reasonable and that the Applicant failed to prove he was prejudiced. See State v. Cooper, 334 S.C. 540, 554, 514 S.E.2d 584, 591 (1999). Accordingly, this allegation is denied and dismissed.

Failure to Suppress the Drug Evidence

BOLO Report Issue:

At his PCR hearing, the Applicant argued that his attorney should have moved to suppress the drug evidence because the officer had no reason to stop him. The Applicant contended that although the officer stated that he stopped him in reliance upon a BOLO report

regarding a carjacking from Conway Police Department, the Applicant stated that the carjacking report was a false report. Further, he claimed that the BOLO was issued for a white Caprice, but he was driving a white Oldsmobile. He stated that had counsel investigated these matters, he could have moved to suppress the drugs based upon an illegal search and seizure without probable cause. In support of his allegations, the Applicant introduced two exhibits. Petitioner's Exhibit # 1, a police incident report made by "Sgt. L. Green" on 8/31/06, was introduced into evidence without objection. Petitioner's Exhibit # 2, a police incident report made by officer "S. Phillips" on 8/31/06, was also introduced without objection.

The trial record reflects that Sergeant Green of the Horry County Police Department testified at the Applicant's trial that on the date in question, August 31, 2006, the City of Conway issued a be-on-the-lookout ("BOLO") report for a white Oldsmobile being operated by two males operating in the Highway 701 area of Conway. (See Trial Transcript, page 58). He stated that the BOLO was issued because that vehicle had recently been involved in a car-jacking incident. He further stated that he happened to be on Highway 701 at the time and he parked his vehicle on the shoulder of the road so that he could spot the vehicle if it drove past.

After a few minutes, a white Oldsmobile being operated by two males went past him. Sergeant Green testified that he turned around to follow the vehicle because it was a white vehicle that roughly matched the description from the BOLO. He stated that he wanted to run the tag on the vehicle to verify whether or not it was the same vehicle; however, before he could do so, the vehicle pulled into a convenience store and both the passenger and the driver (who turned out to be the Applicant) exited the vehicle and began to walk away. He pulled in behind the vehicle and called out for the Applicant to stop and speak with him. The Applicant turned around and walked back toward the officer, and the officer conducted a pat-down for weapons because of the violent nature of the reported car-jacking incident from the BOLO. Sergeant

Green asked for the Applicant's driver's license, and at that point the Applicant stated that his license was suspended. As Sergeant Green went to arrest the Applicant for driving with a suspended license, the Applicant began to resist. Around this time another officer, Corporal Santiago, arrived on the scene and witnessed the Applicant throwing something to the ground when Sergeant Green was not looking. This item was retrieved and it turned out to be a bag containing drugs.

Petitioner's Exhibit # 1 appears to be a police incident report of Sergeant Green regarding the arrest of a suspect named "Terrance Richbourg" on 8/31/06. The report time is listed as 2:00 pm, with a "depart time" of 3:25 pm. The reporting officer is listed as "Sgt. L. Green" and the approving officer is listed as "Sgt. Luke Green." The report indicates that Sergeant Green observed the suspect operating a "white in color Oldsmobile Caprice" on Highway 701 and that the vehicle matched the description of a vehicle involved in a carjacking approximately 30 minutes previously.

Petitioner's Exhibit # 2 appears to be a police incident report; however - perhaps because the document is cut off at the top - there is nothing indicating the police department from which this incident report originated. The "reporting officer" is listed as "S. Phillips" and the date of the incident is 8/31/06. The "approving officer" is listed as "Green." The incident report indicates that one Marcus Beaty made a false report to police regarding a carjacking on 8/31/06. The report indicates a dispatch time of 1:02 pm and an arrival time of 1:14 pm. The "depart time" is listed as 3:00 pm. Notably, the format of the report looks markedly different than the format of Petitioner's Exhibit # 1.

After careful examination of the Applicant's exhibits in conjunction with the trial record, this Court finds that the Applicant failed to meet his burden of proof to show that counsel could have successfully moved to suppress the drugs on the grounds of an illegal search and seizure.

The Applicant contended that had counsel investigated, he could have determined that the officer had no probable cause to stop him. This Court finds that the exhibits the Applicant produced at the PCR hearing fail to establish the Applicant's argument. First, the Applicant failed to prove that Petitioner's Exhibit # 2, the incident report regarding the carjacking, is related to his case in any way. Although the Applicant stated that this report was in reference to the same carjacking mentioned by Sergeant Green at trial, the Applicant has failed to submit any proof to that effect. Second, even assuming that the report refers to the same carjacking, there is no evidence that refutes Sergeant Green's trial testimony that he was relying in good faith upon a BOLO report issued by Conway Police Department. Obviously, Sergeant Green was not the officer dealing with the report of the carjacking, since the reporting officer was "S. Phillips," and since Officer Phillips was on the scene dealing with the carjacking report until 3:00 pm on 8/31/06. Petitioner's Exhibit # 1 indicates that Sergeant Green was involved with the arrest of "Terrance Richbourg" from 2:00 pm until 3:25 pm on 8/31/06. Therefore, Petitioner's exhibits do not in any way establish that Sergeant Green was aware that the carjacking from the BOLO report was actually a false report at the time he stopped the Applicant at 2:00 pm on 8/31/06.

The Applicant also claimed that the police had no probable cause to stop him because the car listed in the BOLO report was a white "Caprice" and his car was a white "Oldsmobile." Again, assuming that Petitioner's Exhibit # 2 is in fact referring to the same carjacking mentioned at the Applicant's trial, Petitioner's Exhibit # 1, Sergeant Green's incident report, supports that Sergeant Green believed that a "Caprice" was made by Oldsmobile. The Applicant has failed to establish that this belief was not genuine and has failed to establish that Sergeant Green's actions in investigating the BOLO were unreasonable. Notably, counsel testified that, prior to trial, he called the officers involved in the Applicant's case to discuss the facts and he received no information at any time that refuted Sergeant Green's testimony that he acted in

good faith pursuant to the BOLO report. In sum, the Applicant has failed to present any evidence that refutes Sergeant Green's testimony that he acted in good faith pursuant to the BOLO report. Therefore, this Court finds that the Applicant failed to prove that counsel could have successfully moved to suppress the drugs on the grounds of an illegal search and seizure. Accordingly, this allegation is denied and dismissed.

Chain of Custody Issue:

At his PCR hearing, the Applicant alleged that counsel should have objected to missing links in the chain of custody. The Applicant failed to point to any missing links that would have justified suppression of the drug evidence. Therefore, this allegation is denied and dismissed.

Conflict of Interest

At his PCR hearing, the Applicant claimed that counsel had a conflict of interest because he stated in his closing argument that he was friends with the officers in the case. (See Trial Transcript, page 169, lines 9-16). The Applicant stated that he believed that this adversely affected counsel's representation of him. At the PCR hearing, counsel explained that he made this comment about being friends with the officers in the context of his argument that, although the police officers were not bad people, they do make mistakes just like everyone does. Counsel testified that he did not feel that the jury would buy an argument that the police were corrupt, but he thought they might be more receptive to an argument that they were good people who made mistakes and incorrect assumptions. This Court accepts counsel's explanation regarding his comment and finds that the Applicant has failed to prove a conflict of interest. Therefore, this allegation is denied and dismissed.

CONCLUSION

In conclusion, based upon the entire record, this Court finds and concludes that the Applicant failed to meet his burden of proof as to any of his claims of ineffective assistance of

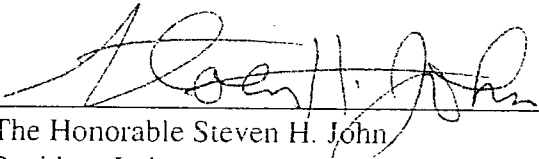
counsel. Therefore, the Application for post-conviction relief must be denied and dismissed with prejudice for failure to meet the burden of proof under Strickland v. Washington, 466 U.S. 668 (1984), and Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Counsel's attention is directed to Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), and Rule 59(e), SCRPC, regarding the filing of a Motion to Alter or Amend should counsel believe this Order fails to adequately address all issues raised as required by S.C. Code Ann. § 17-27-80 (2003). This Court further advises that if Applicant desires to secure appellate review of this Order, a notice of appeal must be filed and served **within thirty (30) days** of the service of this Order. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

IT IS THEREFORE ORDERED THAT:

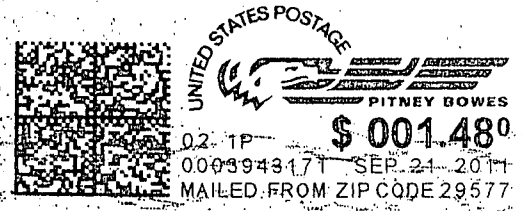
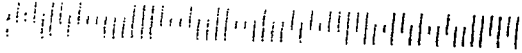
1. The Application for post-conviction relief is **DENIED and DISMISSED with PREJUDICE**.
2. The Applicant must remain in the custody of the State for completion of his sentence.

AND, IT IS SO ORDERED this 31st day of August, 2011.



The Honorable Steven H. John
Resident Judge
Fifteenth Judicial Circuit

Conroy, South Carolina



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