



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

November 5, 2012

RECEIVED

NOV - 5 2012

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

S.C. Supreme Court

Re: Michael Miller v. State, Appellate Case No. 2012-212581

Dear Mr. Shearouse,

Enclosed please find the original and six copies of the petition for order to reconstruct the record of petitioner's post-conviction relief hearing in the above case and supporting documents.

If you have any questions concerning this matter, please contact me.

Sincerely,

*Susan B. Hackett*

Susan B. Hackett  
Appellate Defender

SBH/eab

Enclosures

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Bamberg County

Edgar W. Dickson, Circuit Court Judge

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MICHAEL MILLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212581

---

PETITION FOR ORDER  
TO RECONSTRUCT THE RECORD OF  
PETITIONER'S SENTENCING HEARING

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Pursuant to Rule 240 of the South Carolina Appellate Court Rules, the undersigned counsel requests an order requiring the parties to reconstruct the record of Petitioner's post-conviction relief hearing held on August 10, 2006 before the Honorable Doyet A. Early.

In accordance with Rule 240(c)(3), SCACR, Petitioner submits the following documents to support this Petition: Post-Conviction Relief Application filed February 7, 2006 (Exhibit 1); the Order of Dismissal filed October 2, 2006 (Exhibit 2); Post-

Conviction Relief Application filed January 26, 2011 (Exhibit 3); Order Granting Belated Appeal (Exhibit 4); and Letter from Court Reporter dated September 8, 2012 (Exhibit 5).

The procedural history of Petitioner's case is as follows. During its February 2000 term, the Bamberg County Grand Jury indicted Petitioner for possession with intent to distribute cocaine within proximity of a park and trafficking in cocaine. Petitioner, who was represented by J. Christopher Wilson, was tried on January 14, 2004. After the jury found Petitioner guilty, the Honorable Reginald Lloyd sentenced Petitioner to twenty-five years on the trafficking in cocaine conviction and fifteen years on the possession with intent to distribute conviction. Petitioner filed a direct appeal thereafter. The Court of Appeals affirmed his convictions and sentences in an unpublished opinion. State v. Miller, 2005-UP-272 (Ct. App. filed April 8, 2005). Petitioner filed an application for post-conviction relief on February 7, 2006. Exhibit 1. An evidentiary hearing convened before the Honorable Doyet A. Early on August 10, 2006. W.D. Rhoad, IV represented Petitioner, and Colleen E. Dixon represented the state. Judge Early denied Petitioner relief by ordered filed on October 2, 2006. Exhibit 2. No appeal was taken. Petitioner filed another application for post-conviction relief on January 26, 2011. Exhibit 3. The matter proceeded to a hearing before the Honorable Edgar W. Dickson on January 25, 2012. Nicole Singletary represented Petitioner, and Mary Williams represented the state. By order dated March 21, 2012, Judge Dickson granted Petitioner a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Exhibit 4.

Undersigned counsel has been unable to obtain the transcript of the sentencing proceedings. In response to counsel's request for the sentencing transcript, the court reporter indicated the transcript was unavailable. Exhibit 5.

The transcript of the post-conviction relief proceeding conducted on August 10, 2006 is necessary in order to allow review of the post-conviction relief proceedings as it contains the evidence presented to support Petitioner's claims that he is entitled to relief. It is the transcript that will be reviewed by the appellate court for the belated appeal. Additionally, it is part of the lower court record and is necessary for inclusion in the appendix to be compiled in accordance with Rule 227(e), SCACR. As a result, counsel request reconstruction of the hearing.

When a trial transcript has been lost or destroyed, the Court may remand to have the record reconstructed. See Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002); China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); see also Deaton v. Leath, 279 S.C. 82, 302 S.E.2d 335 (1983) (granting the appellant's motion to set aside convictions and remand for a new trial where the court reporter's equipment malfunctioned and there was no transcript of the trial court proceedings in the case from which to base an appeal).

WHEREFORE, the undersigned counsel requests an order for the reconstruction of the record of Petitioner's post-conviction relief proceeding in order to perfect Petitioner's PCR appeal in the case. In addition, undersigned counsel requests the time periods for filing Petitioner's petition for writ of certiorari be held in abeyance pending this Court's decision on this petition.

Respectfully submitted,



Susan B. Hackett  
Appellate Defender

November 5, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Bamberg County

Edgar W. Dickson, Circuit Court Judge

---

MICHAEL MILLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

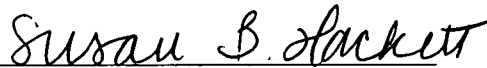
RESPONDENT

---

Affidavit of Susan B. Hackett

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I am the attorney assigned to represent Michael Miller. My office contacted the court reporter to request the transcript from the August 10, 2006 PCR hearing. The court reporter stated the transcript was no longer available.

  
Susan B. Hackett

SWORN TO BEFORE ME this 5th day  
of November, 2012.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina

My Commission Expires: October 2, 2013.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_

Certiorari to Bamberg County

Edgar W. Dickson, Circuit Court Judge

\_\_\_\_\_

MICHAEL MILLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,


RESPONDENT

\_\_\_\_\_

CERTIFICATE OF SERVICE

\_\_\_\_\_

The undersigned attorney hereby certifies the petition for order to reconstruct the record of petitioner's post-conviction relief hearing in the above referenced case has been served upon Megan Harrigan, Esquire, Assistant General, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, and Michael Miller, #259269, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 5<sup>th</sup> day of November, 2012.



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 5<sup>th</sup> day of November, 2012.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 2, 2013.

# **Exhibit #1**

FORM 5

STATE OF SOUTH CAROLINA )  
 )  
County of BAMBERG )

IN THE COURT OF COMMON PLEAS

*2006-CP-05-00023*

Michael R. Miller #259269 )  
Full name and prison number (if any) of Applicant )

v. )

State of South Carolina )

APPLICATION FOR  
POST-CONVICTION RELIEF

2006 FEB -7 PM 1:57

FILED  
CLERK OF COURT  
BAMBERG COUNTY

**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 McCormick Correctional Institution  
386 Redemption way, McCormick South Carolina 29899
2. Name and location of Court which imposed sentence Bamberg County General Sessions
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:  
(a) 2000-GS-05-055, Trafficking in Cocaine (25) years, \$200,000 fine.

**RECEIVED**

FEB 10 2006

Referred to Magargle ds:

- (b) 2000-GS-05-054, Possession With Intent to Distribute Cocain Within  
The Proximity of Park (15) years, \$10,000. fine.  
(c) \_\_\_\_\_

5. The date upon which sentence was imposed and the terms of the sentence:

- (a) January 14, 2004.  
(b) \_\_\_\_\_  
(c) \_\_\_\_\_

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty \_\_\_\_\_  
(b) after a plea of not guilty Yes  
(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. \_\_\_\_\_  
iii. \_\_\_\_\_  
(b) the result in each such Court to which you appealed:  
i. Denied/ sentence affirmed  
ii. \_\_\_\_\_  
iii. \_\_\_\_\_  
(c) the date of each such result:  
i. April 1, 2005  
ii. \_\_\_\_\_  
iii. \_\_\_\_\_  
(d) if known, citations of any written opinion or orders entered pursuant to such results:  
i. Anders V. California 386 U.S. 738 (1967)  
ii. State V. Williams 305 S.C. 116. 406 S.E.2d 357 (1991).  
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 counsel (SEE ATTACHED)
- (b) Jail Credit (SEE ATTACHED)
- (c) Petitioner reserves the right to amend this application.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) SEE ATTACHED
- (b) SEE ATTACHED
- (c) \_\_\_\_\_
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? SEE SUBPARAGRAPH (9)
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? \_\_\_\_\_
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? \_\_\_\_\_
- (d) any other petitions, motions or applications in this or any other Court? \_\_\_\_\_
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. SEE ATTACHED
- ii. SEE ATTACHED
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_
- (b) the name and location of the Court in which each was filed:
- i. South Carolina Court of Appeals
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

- iv. \_\_\_\_\_
- (c) the disposition thereof:
  - i. See Paragraph (9)
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (d) the date of each such disposition:
  - i. See Attached Paragraph (9)
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
  - i. Same
  - 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. N/A
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
- (b) the proceedings in which each ground was raised:
  - i. N/A
  - 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) Applicant's first PCR and issues raised are not proper for Direct Appeal.
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Richard B., Ness Esq.
- (b) your trial, if any? J. Christopher wilson Esq.
- (c) your sentencing? J. Christopher Wilson Esq.
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Robert M. Pachak Esq Office of Appellate Defense.
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A
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. Richard B. Ness (Public Defender's Office)
- J. Christopher Wilson (Public Defender's Office)
- ii. Robert M. Pachak (Office of Appellate Defense)
- \_\_\_\_\_
- iii. \_\_\_\_\_
- \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
- i. Richard B. Ness (Preliminary Hearing and Arraingment from 1998-March 17,00).
- J. Christopher Wilson (Trial and Sentencing) from 2000-2004.
- ii. Robert Pachak, Appeal from conviction. (Court of Appeals S.C.).
- \_\_\_\_\_
- iii. \_\_\_\_\_
- \_\_\_\_\_

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

Vacation of conviction and sentence and remand for new trial

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

NO

Revised 3/2003

STATE OF SOUTH CAROLINA )  
 )  
County of BAMBERG )

VERIFICATION

I, Michael R. Miller, 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.

Michael Miller

SWORN to and subscribed before me this 3  
day of Feb, 2006

John J. Young (L.S.)  
Notary Public

My Commission Expires: 7 28 2011

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

I, Michael R. Miller #259269, 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.

Michael Miller  
Applicant

SWORN or affirmed to and subscribed before me this  
3 day of Feb, 2006

Joyce L Young  
Notary Public  
My Commission Expires: 8/28/2011

## STATEMENT OF FACTS

The Applicant was arrested on July 31, 1998, for Trafficking Cocaine and Possession with intent to distribute within the Proximity of a Park. While awaiting trial on the Trafficking and PWID within Proximity charges, applicant was sentenced and convicted by way of guilty plea, of escape in violation of S.C. Code §24-13-410 from the Bamberg County Detention Center on July 17, 1999, by the Honorable Gary C. Clay, and sentenced to five years in the Department of Corrections.

On December 1999, the Applicant was brought to Bamberg County for a preliminary hearing on the Trafficking Charges and the PWID within a Proximity charges, the hearing was rescheduled due to problem with the evidence. The court ordered that the Solicitor's office present its case against the Applicant within (90) ninety days or the charges would be dismissed for failure to present a case.

While awaiting rescheduling for the preliminary hearing Trial Counsel Richard B. Ness, motioned to be relieved as counsel due to a conflict in representation the court granted counsel's motion March 17, 2000, however a week after counsel's release and apply Prior to appointment of counsel to replace Mr. Ness, Applicant made parole on the escape charge and was released from SCDC on March 22nd, 2000. SCDC records did not indicate a detainer or hold at that time and granted Applicant out of state parole to Florida.

The Applicant was arrested for a bench warrant issued by the Bamberg County General Sessions Court on December, 9, 2002, for failure to appear at roll call on December 2000, for the Trafficking and Possession with intent within a proximity charges.

On February 3, 2003 J. Christopher Wilson Esq, was appointed to represent the Applicant. On March 21, 2003, after appointment of counsel a preliminary hearing was rescheduled before the Honorable Danny Singletc however the hearing was continued to April and scheduled to be heard by the Honorable James R. Barber III, which was subsequently rescheduled to be heard in September. Each Hearing was rescheduled due to an issue of evidence. Trial Counsel waived the Applicant's Preliminary Hearing and the charges were scheduled for jury trial.

On January 14, 2004, a jury trial was held before the Honorable Reginald Lloyd. The jury found the Applicant guilty of the charges and the Court sentenced the applicant to twenty five (25) years and a \$200, 000, dollar fine to run concurrent to fifteen years and a \$10,000 dollar fine, on each charge.(Transcript Page 151, Lines 17-25).

10. (a), The Applicant's sentence was in violation of the United States Consitution and South Carolina Constitution and Code of Laws depriving the applicant of due process rendering his conviction unlawful.

11 (a), The Applicant's conviction and sentence is in violation of the United States Constitution and South Carolina Constitution and code of laws for the following reasons:

A.1.) Generally amendments are permitted for purpose of correcting an error of form to an indictment such as an a scrivener's error. Otherwise, if the defendant objects to an amendment on grounds that± the amended indictment would change the nature of the offense, the trial judge is obligated to inform the parties of the necessity of reindictment "OR OBTAIN A WAIVER OF PRESENTMENT FROM THE DEFENDAT". The Solicitor in the present case sought to amend the two indictments for trafficking in cocaine and for possession with intent to distribute within the proximity of a park. Defense counsel opposed any amendments and moved to have the indictments quashed. Adding the words knowingly and intentionally would be material changes to the indictments. (Tr. p. 5, line 12-p. 6, line 7).At one point the trial judge ruled that the Solicitor should go back and have the grand jury re-indict appellant, but decided to proceed with the trial with

allowing the Solicitor to amend the indictments without taking them before the grand jury. Trial Counsel failed to object to the court's oral waiver to the amendments., South Carolina Criminal Code requires a defendant to "SIGN A WRITTEN WAIVER OF INDICTMENT", Phillips V. State, 281 S.C. 41, 42, 314 S.E. 2d 313, 314. (1984), By their plain language S.C. Code §17-23-130-140, makes it mandatory for a written waiver of presentment, State V. Clarkson, [Oral waiver of indictment failed to comply with statutory requirements], Counsel should have objected to such oral waiver.

A.2.) Rule 6 (a)(2)(c) SCRCrim.P. provides that Trial Court "Shall" require the presence of the chemist upon objection by the defendant, such provision of the Rule is mandatory not permissive. State V. Joesph, \_\_\_\_\_ S.C. \_\_\_\_\_, 491 S.E.2d 275, 281 (Ct. App. 1997). In the present case trial counsel stipulated to the chain of custody and testimony without need of the SLED chemist, or other custodians. (Tr. P. 11, Lines 20-25, P. 12, Lines 1-10, Tr. P. 99 Lines 19-25, P. 26, Lines 1-10, Tr. P. 126-127.) The Trial Court agreed to the stipulation vouching for the credibility of the SLED chemist. However during trial the first link to the chain of custody, (Judy Walton), testified that she recovered two items believed to be drugs from a pillow, that she secured the drugs and went back to the police station, during trial the state moved to introduce the drugs as evidence,. In questioning officer Walton as to the paperwork and identification numbers, the state introduced three containers of drugs instead of two as earlier testified to by Officer Walton. Officer Walton claimed that the chemist must have broken them down into three separate quantity's for testing, then sent them back with the same identification numbers on them (Tr. P. 70 Lines 22-25, P.80 Lines, 1-25, P.81, Lines 1-18.): Applicant contends that counsel rendered ineffective for failing to object to the introduction of this evidence under Rule 6 (a) (2) (c), and the testimony entered, further counsel's stipulation to the chain of custody and chemist report has prejudiced the Applicant, where such testimony by Officer Walton contradicts the evidence presented in the chemist reports submitted to the jury, which stipulates that only two quantities of drugs were tested.

A.3.) Custodial signatures on an evidence bag fail to establish an adequate chain of custody where the custodians do not provide testimony under oath or produce "Sworn" statements pursuant to Rule 6 (b) S.C.R.Crim.P.. As an alternative to presenting testimony of the intervening custodians, the State utilized Rule 6 (b), as stipulated and agreed to by trial counsel (Tr. p. 11, lines 20-25, p. 12, lines 1-10). The chain of custody was admitted into evidence without objection (Tr. P. 83, lines 21-24), in the present case there are two reports on the chain of custody, case number L98-09314, and L98-09313. Both reports state that on August 4, 1998, the SLED drug box submitted both cases for examination and testing. The chemist swore under oath by way of notary republic to each report on November 4, 1999, fifteen months after receipt of each case. Further on case number L98-09313 the initial link in the chain is not a sworn affidavit by way of notary republic, nor does it indicate when, Captain Joe Bell came into possession of the evidence. On case number L98-09314, the second link, Captain Joe Bell, stipulated that he received the evidence on August 4, 1998, however the notary shows a date of July 3, 1998, one month prior to actual arrest on the charges the applicant is accused of. Furthermore Christine Simpkins the last chain in the custody doesn't give or state who received the delivery to the drug box for SLED. A complete chain of custody, tracing possession from the initial control to it's final analysis, must be established as far as practicable State V. Carter, 344 S.C. 419, 544 S.E.2d 835 (2001), if a substance has passed through multiple custodians, it must not be left to conjecture concerning who had the evidence and what was done with it between taking and analysis. State V. Joseph, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997), not only does the procedure before analysis, as shown above, raise questions as to admissibility, but the fifteen month delay, which has caused several preliminary hearings to be rescheduled, raises a question as to whether the evidence was stored in the same condition and returned in the same condition as well as where, which evidently was an issue at trial (Tr. p. 79-81, lines 1-18). Applicant contends that trial counsel was ineffective for failing to make a proper objection pursuant to Rule 6 (b) S.C.R.Crim.P., and prejudiced the Applicant when he waived the Applicant's prelim-

inary hearings, where prior counsel Richard B. Ness, made such objections pursuant to Rule 6(b), before being relieved as counsel.

A.4.) Section §24-13-40; mandates a prisoner be given credit for all time served prior to trial unless one of two exceptions exist, (1.) Either the prisoner was an escapee or, (2.) The prisoner was already serving a sentence on one offense, However, neither exception applies as applicant was neither an escapee, nor was he serving any sentence at the time of arrest, Crooks V. State, 326 S.C. 171, 485 S.E.2d 374 (1997). Allen V. State, 529 S.E.2d 541 (S.C. 2000). On the contrary, Applicant was awaiting trial and sentencing on the pending Trafficking cocaine and possession with intent to distribute within the proximity of a park, when released by S.C.D.C. on parole March 22nd, 2000, for escape, S.C. Code §24-13-410, which the Applicant pled guilty to during pre trial detention. The trial court excepted trial counsel's recommendation on the concurrency of the Trafficking cocaine and Possession with intent to distribute within proximity of a park charges which the jury found Applicant guilty of, however trial counsel was ineffective for failing to bring to the court's attention that Applicant was entitled to a sentence start date of July 31, 1998, on the two offenses, therefore depriving the applicant of jail credit.

THE APPLICANT HEREBY RESERVES THE RIGHT TO AMEND THIS APPLICATION UPON APPOINTMENT OF COUNSEL PURSUANT TO RULE 71.1 (d) SCRCIV.P. AND S.C.CODE §17-27-90.



# **Exhibit #2**



guilty as charged. He was sentenced by the Honorable Reginald Lloyd to confinement for a period of twenty-five (25) years.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals confirmed the Applicant's conviction and sentence. State v. Miller, Op. NO. 2005-UP-272 (S.C. Ct. App. filed April 8, 2005).

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

1. Ineffective assistance of counsel in that:

- a. Counsel failed to object to the oral waiver of presentment on the amended indictment
- b. Counsel erred by stipulating to the chain of custody
- c. Counsel failed to get credit for time served

*YMB #2*  
At the hearing, the Applicant withdrew allegation 1(c) as to time served credits. The Applicant further amended his allegations to include the following:

- d. Counsel failed to present evidence that the signature on the waiver of rights form was not the Applicant's

#### 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 (1985).

At trial, testimony was presented from both the Applicant and trial counsel, Christopher Wilson, Esquire. The Applicant testified that trial counsel informed him that there were no problems

with the chain of custody and that based upon this advice, he agreed to consent to the chain of custody during his trial. He further testified that had he known of the alleged problem with the chain of custody he would not have consented and instead would have made the prosecution present the chain of custody witnesses. The Applicant further testified that he did not understand the waiver of presentment issue and did not wish to waive presentment of the amended indictment. He testified that the only reason he agreed to waive presentment was because counsel erroneously advised him to do so. The Applicant also alleged that he informed trial counsel that the signature on the waiver of rights form was not his own signature and offered to sign a piece of paper that could have been introduced into evidence to prove such.

*YMC*  
*§ 3*  
Trial counsel also testified at the hearing. He testified that he filed for and received discovery, entered into extensive plea negotiations on behalf of the Applicant, and reviewed the multiple plea offers with the Applicant. He testified that the Applicant was offered a plea to 7 - 10 years, which was refused. Trial counsel also stated that during the trial the solicitor offered a ten (10) year plea deal which was also refused by the Applicant. Trial counsel testified that the change of language in the indictments (namely adding the language "knowingly or intentionally") did not change his trial strategy or otherwise affect the notice that the Applicant had been put on regarding the charges he was facing. He further testified that he advised the Applicant that if he objected to the waiver of presentment, then the solicitor would simply re-indict the Applicant but that this trial would not go forward for at least a few months. His testimony indicated that the Applicant, based upon that information, chose to waive presentment and proceed to trial because he did not wish for his trial date to be postponed.

Trial counsel also testified that he received and reviewed the chain of custody evidence. His testimony indicated that he discussed the decision of consenting to the chain of custody with the

Applicant on numerous occasions. Trial counsel testified that his trial strategy did not include challenging that the powder substance was cocaine, but only that it was the Applicant's cocaine. He did not recall speaking with Captain Joe Bell or requesting the missing paperwork from the solicitor's office. However, he testified that he would have reviewed the chain of custody with the Applicant, along with any problems relating thereto, and that the Applicant agreed to consent to the chain of custody. He further testified that he did not want chain of custody witnesses to testify at trial because he believed it emphasized to the jury the amount of cocaine that was found on the Applicant and that would have a negative effect on his case. It was trial counsel's belief that the solicitor would be able to bring in any missing link in the chain of custody to testify had the chain been challenged.

*MJE*  
At the hearing, the Applicant presented evidence relating to the chain of custody. The first, a "Form B (Rule 6)", was signed by Judy Walton of the Denmark Police Department. The form indicated that Judy Walton seized a quantity of white powder from the Applicant and delivered it to Captain Joe Bell. The second form, also a "Form B (Rule 6)" indicates that on the same date (August 8, 1998), Christine Simpkins of the Denmark Police Department received the quantity of white powder from Captain Joe Bell of the Denmark Police Department. No evidence was introduced at the PCR hearing of a form signed by Captain Joe Bell.

#### **A. Chain of Custody**

The Applicant alleges that had his trial counsel not consented to the chain of custody, it is possible that the State would have been unable to prove the chain and the drugs would have been excluded, resulting in a not guilty verdict. This Court initially finds that the Applicant has failed to meet his burden of proof to show that trial counsel was deficient in consenting to the chain of custody. Although the forms presented at the hearing did not establish a full chain of custody, there

has been no evidence admitted to dispute trial counsel's assertion that Captain Joe Bell would have been able to testify to complete the chain of custody had it been necessary.

Further, this Court finds that the two forms presented at the hearing serve to establish who handled the white powder substance. Where the identity of the persons handling the specimen has been established, evidence regarding its care goes only to the credibility of the evidence and not to the admissibility. State v. Mathis, 359 S.C. 450 (S.C. App. 2004) Therefore, trial counsel was not deficient in consenting to the admissibility of the drugs because the alleged "weak link" would not have affected the admissibility of the evidence at trial. Further, this Court finds that no prejudice has been shown as a result from the alleged deficiency, since the Applicant has failed to meet his burden to show that the cocaine would not have been admitted had trial counsel not consented.

*MBE*  
*KS*

**B. Waiver of Presentment**

This Court finds trial counsel's testimony to be credible and the Applicant's testimony on this issue not credible. Trial counsel testified that he discussed the waiver of presentment with the Applicant, and that the Applicant indicated that he wished to consent so that his trial date would not be delayed. A review of the transcript supports this testimony. Further, the Applicant has failed to meet his burden to prove that any alleged deficiency on trial counsel's part resulted in prejudice to him. The solicitor would have reindicted the Applicant with the inclusion of the language and the Applicant would have again proceeded to trial. Therefore, the Applicant has failed to meet his burden of proof to show deficient performance by counsel or prejudice resulting therefrom.

**C. Signature on waiver of rights form**

This Court finds trial counsel's testimony to be credible and the Applicant's testimony on this issue not credible. Trial counsel testified that the Applicant claimed that the signature on the waiver of rights form was not his. However, counsel testified that after looking into the matter, he

did not feel that it was meritorious and did not feel it was properly raised before the Court. The Applicant further claimed that trial counsel should have called a handwriting expert to testify at the trial. No handwriting expert was called at the PCR hearing. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, Id.

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

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. As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

#### CONCLUSION


*MRE*  
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.

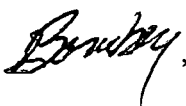
This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, 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 227 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 20<sup>th</sup> day of Sept, 2006.

  
\_\_\_\_\_  
Doyet A. Early  
Presiding Judge  
Second Judicial Circuit

, South Carolina.

# **Exhibit #3**

STATE OF SOUTH CAROLINA )  
 )  
County of Bamberg )

2011-CP-05-00020  
IN THE COURT OF COMMON PLEAS

Michael Miller #259269 )  
Full name and prison number (if any) of Applicant )

v. )

State of South Carolina )  
Attorney General )  
office )  
Respondent )

APPLICATION FOR  
POST-CONVICTION RELIEF

INSTRUCTIONS - 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 McCormick Corr inst 386 Redemp-  
tion Way
2. Name and location of Court which imposed sentence Bamberg Court of  
General Sessions
3. Name(s) of co-defendant(s) (if any) NA
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:  
(a) \_\_\_\_\_

- (d) \_\_\_\_\_
- (c) \_\_\_\_\_

5. The date upon which sentence was imposed and the terms of the sentence:

- (a) January 14, 2004
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty \_\_\_\_\_
- (b) after a plea of not guilty YES
- (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 "yes" to (7), list:

- (a) the name of each Court to which you appealed:
  - i. South Carolina Court of Appeals
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

- (b) the result in each such Court to which you appealed:
  - i. Confirmed
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

- (c) the date of each such result:
  - i. April 8, 2005
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

- (d) if known, citations of any written opinion or orders entered pursuant to such results:
  - i. 2005-4p-272
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

9. If you answered "no" 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) 6th Amendment
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Counsel ineffective failed seek Austin
- (b) Review; (see Attachment Memorandum
- (c) of Law Support.

12. Prior to this application have you filed with respect to this conviction: NO

- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (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 "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
  - i. NO
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (b) the name and location of the Court in which each was filed:
  - i. NO
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

- iv. \_\_\_\_\_
- (c) the disposition thereof:
  - i. \_\_\_\_\_ *ND*
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_

- (d) the date of each such disposition:
  - i. \_\_\_\_\_ *NO*
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_

- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
  - i. \_\_\_\_\_ *NO*
  - 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?  
\_\_\_\_\_ *ND*

15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
    - i. \_\_\_\_\_ *ND*
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (b) the proceedings in which each ground was raised:
    - i. \_\_\_\_\_ *ND*
    - 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) Counsel failed seek Austin Review.

(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? NA

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Trial counsel J. Christopher Wilson

ii. sentence J. Christopher Wilson

iii. S.C. Appellate Defense office

(b) the proceedings at which each such attorney represented you:

i. TRIAL

ii. sentence

iii. notice of Appeal

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

Granted A Belated Appeal Austin  
Review.

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

NA

Revised 3/2003

STATE OF SOUTH CAROLINA )  
 )  
County of McCormick )

VERIFICATION

I, Michael Miller, 259269, 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.

Michael Miller

SWORN to and subscribed before me this 25  
day of January, 2011.

J Franklin (L.S.)  
Notary Public

My Commission Expires: 12.16.2019

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

I, Michael Miller 259269, 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.

Michael Miller  
Applicant

SWORN or affirmed to and subscribed before me this

25 day of 2011 January 2011

[Signature]  
Notary Public

My Commission Expires: 12-16-2019

State of South Carolina	)	In the Court of Common Pleas
County of Bamberg	)	C/A No. <u>2011-CP-05-00020</u>
Michael Miller, #259269,	)	
Applicant,	)	
v.	)	MEMORANDUM OF LAW IN
State of South Carolina,	)	SUPPORT OF POST-CONVICTION
Respondent.	)	RELIEF APPLICATION

---

To Respondent:

Now comes the Applicant in support of his Post-Conviction Relief (PCR), to include the following action based on Austin appeal. The South Carolina Code of Law Ann. § 17-27-100 (2008); Supreme Court Rule 50 (9) (2008); and the Procedural guidelines regarding Austin appeals, respectfully request this Honorable Court to grant a belated appeal.

HISTORY OF THE CASE

Applicant was convicted of trafficking in cocaine and possession with intent to distribute cocaine within proximity of a park at a jury trial held in Bamberg County before the Honorable Reginald Lloyd on January 14, 2004, Applicant was sentenced to twenty five (25) years and was fined \$200,000.00 for trafficking and to fifteen (15) years and a fine of \$10,000.00 for proximity to a park.

A timely Notice of Appeal was filed on the Applicant's behalf and the appeal was perfected.

The South Carolina Court of Appeals confirmed the Applicants conviction and sentence; State v. Miller, Op. No. 2005-UP-272 (S.C.Ct.App. filed April 8, 2005).

Applicant filed a Application for PCR February 7, 2006, an Evidentiary hearing into matter was convened on August 10, 2006, at the Barnwell County Courthouse:

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

1. Ineffective assistance of counsel in that;
  - a. counsel failed to object to the oral waiver of presentment on the amended indictment;
  - b. counsel erred by stipulating to the chain of custody;
  - c. counsel failed to get credit for time served;
  - d. counsel failed to present evidence that the signature on the waiver of right form was not the Applicants.

#### MEMORANDUM OF LAW

Ineffective assistance of counsel failed to timely seek review on his first PCR Application of appeal.

In this case State v. Miller, Applicant filed a second Application for Post-Conviction Relief correctly stated a claim of ineffective assistance of counsel where the Applicant alleged that he expressed a desire to seek review of the denial of his first Application, but that his counsel failed to timely seek

review; thus the matter would be remanded for an Evidentiary hearing on the sole issue of whether the Applicant requested and was denied an opportunity to seek appellate review; cite at, Austin v. State, (S.C. 1991) 305 S.C. 453, 409 S.E.2d 395.

#### STATUTE OF LIMITATIONS

The Honorable Supreme Court of South Carolina has allowed successive PCR Applications where the Applicant has been denied complete access to the Appellate process. Austin v. State, 409 S.E.2d 395 (1991). "That court held, the one year statute of limitations pursuant to S.C. Code Ann. § 17-27-45 (A) is not applicable to appeals filed pursuant to Austin appeals, cite as Odom v. State, 523 S.E.2d at 756 (1999). Austin appeals are considered "belated appeals" and are used to ratify unjust procedural defects, such as when an attorney does not file a timely appeal. Cite as Aice v. State, 409 S.E.2d at 392; Hope v. State, 492 S.E.2d 76 n. 1 (1997) (permitting a belated appeal pursuant to Austin in 1992 from a denial of a (PCR Application in 1989).

An Austin appeal is used when an Applicant is prevented from seeking appellate review of a denial of his or her first PCR Application, such as when an attorney fails to seek timely review, cite as, Aice v. State, supra; Hope, supra, at 76 (permitting an Austin appeal where original PCR counsel failed to appeal from the first denial of PCR courts order.

In the case at bar, it is irrefutable from the record and

Exhibits presented, that counsels performance was ineffective where counsel failed to give effective assistance as to make the belated appeal fair.

CONCLUSION

Wherefore, PCR counsel was ineffective assistance failed to timely seek review for Austin appeal.

State of South Carolina )  
County of Bamberg )  
Michael Miller, #259269, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

---

In the Court of Common Pleas  
C/A No. 2011-CP-05-00020

SUMMONS

RECEIVED  
CLERK OF COURT  
JAN 25 2011  
COURT OF COMMON PLEAS  
BAMBERG COUNTY  
SOUTH CAROLINA

To Respondent:

You are hereby summoned and required to service upon the Applicant Michael Miller, #259269, whose addressed is listed below, an answer to the Post-Conviction Relief which is herewith served upon you, within ninety (90) days after service of this summons upon you, exclusive of the day of service if you fail to do so a Judgement by default will be taken against you in this cause of action.

January 25, 2011

151 Michael Miller

McCormick Corr. Inst. F3B-211  
386 Redemption Way  
McCormick, SC 29899

State of South Carolina )  
County of Bamberg )  
Michael Miller, #259269, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

In the Court of Common Pleas  
C/A No. 2011-CP-05-00020

PROOF OF SERVICE

FILED  
JAN 25 11 00 AM  
CLERK OF COURT

To Respondent:

I certify that Michael Miller, #259269, has served a true copy of the original Post-Conviction Relief upon the Clerk of Court Bamberg County by placing a copy in the United States mail address below.

Bamberg County Clerk of Court,  
James B. Hiers  
P.O. Box 150  
Bamberg, SC 29003

Sworn to and subscribed before me  
this 25 day of January, 2011

JCFranklin  
Notary Public for South Carolina  
My Commission Expires 12-16-2019

151 Michael Miller  
McCormick Corr. Inst. F3B-211  
386 Redemption Way  
McCormick, SC 29899

Michael Miller, #259269  
McCormick, Corr. Inst. F3B-211  
386 Redemption Way  
McCormick, SC 29899

January 25, 2011

Bamberg County Clerk of Court,  
James B. Hiers  
P.O. Box 150  
Bamberg, SC 29003

RE: C/A No. 2011-CP-05-00020

Dear Honorable Clerk,

Enclosed please find for filing within an original copy of  
Post-Conviction Relief Application, along with Summons and Proof  
of Service.

Respectfully submitted,

151 Michael Miller

SC Attorney General  
**RECEIVED**

JAN 28 2011

Referred to M. W. [Signature]

Answered \_\_\_\_\_

# **Exhibit #4**

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF BAMBERG )  
 )  
 Michael Miller, #259269, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FOR THE SECOND JUDICIAL CIRCUIT  
 Case No.: 2011-CP-05-0020

FILED  
 BAMBERG COUNTY  
 2012 MAR 29 AM 11:20  
 JAMES B. HERR  
 CLERK OF COURT  
 BAMBERG, SC

**ORDER GRANTING BELATED  
 APPEAL PURSUANT TO  
AUSTIN V. STATE**

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed January 26, 2011. An evidentiary hearing into the matter was convened on January 25, 2012, at the Aiken County Courthouse. Applicant was represented by Nicole Singletary, Esquire. Mary S. Williams, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

This Court had before it the records of the Bamberg County Clerk of Court, the appellate records, the prior PCR records, and the Applicant's records from the South Carolina Department of Corrections.

**I.**

The records before this court indicate that The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Bamberg County. The Applicant was indicted during the February 2000 term of the Bamberg County Grand Jury for Trafficking in Cocaine and Possession with Intent to Distribute Cocaine within Proximity of a Park (2000-GS-05-0054/0055) J. Christopher Wilson, Esquire, represented him. Applicant proceeded to a jury trial before the Honorable Reginald Lloyd and



was found guilty of both charges. On January 14, 2004, he was sentenced to twenty-five (25) years imprisonment and a two-hundred thousand dollar (\$200,000) fine for Trafficking in Cocaine, More Than 400 grams, and to fifteen years (15) imprisonment and a ten-thousand dollar (\$10,000) fine for Possession with Intent to Distribute within Proximity.

A timely notice of appeal was filed and an appeal perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Miller, Op. No. 2005-UP-0272 (S.C. Ct. App. April 8, 2005). The Remittitur was sent on May 11, 2005.

Applicant filed his first application for post-conviction relief on February 7, 2006. (2006-CP-05-0023). On August 10, 2006, a hearing was convened before the Honorable Doyet A. Early, III. Applicant was present and represented by W.D. Rhoad, IV, Esquire. Judge Early denied and dismissed the application with prejudice in a written order dated September 25, 2006, and filed October 2, 2006.

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

1. "6<sup>th</sup> Amendment."
  - a. "Counsel ineffective failed seek Austin Review. ..."

## II.

In the Applicant's current PCR application, he argues that Rhoad failed to file a timely notice of appeal from Judge Early's order denying post-conviction relief dated September 25, 2006, and filed October 2, 2006. Rhoad was unable to recall why an appeal was not filed. I therefore find that the Applicant did not knowingly and voluntarily waive his right to appellate review and is therefore entitled to a belated review of the denial of his first PCR application. Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). The Applicant's denial of an appeal



can be remedied by a petition for belated review by his current PCR attorney pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) with regard to C.A. No. 2006-CP-06-0106.

III.

It appearing that Applicant is entitled to the grant of a belated appeal, and in light of the fact that this Court has not been made aware of any violations of the Applicant's constitutional rights, this Application for Post-Conviction Relief is dismissed.

**IT IS THEREFORE ORDERED:**

1. The Application for Post-Conviction Relief is **DENIED AND DISMISSED WITH PREJUDICE**. Within thirty (30) days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate appellate review of the Applicant's first post-conviction relief action. Counsel and the Applicant are directed to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 243, SCACR, for the appropriate procedure for a belated appeal.
2. The Applicant is remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 21<sup>st</sup> day of March, 2012.



EDGAR W. DICKSON  
Presiding Judge  
Second Judicial Circuit

Orangeburg, South Carolina.

# **Exhibit #5**

RECEIVED

SEP 12 2012

SC OFFICE OF  
APPELLATE DEFENSE

Lisa H. Davenport, RPR  
Post Office Box 5485  
Aiken, SC 29804

September 8, 2012

Sharon A. Graham  
SCCID  
Post Office Box 11589  
Columbia, SC 29211

In Re: Michael Miller v State of South Carolina  
2011-CP-05-0020  
August 10, 2006 Hearing  
2012-212581 Appellate Case Number

Dear Ms. Graham,

I received your request for a transcript of record in the above-referenced case. The records for that hearing are not available. Court reporters only keep the records for five years.

Thank you.

Sincerely,



Lisa H. Davenport