

**VOLUME II OF II**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Appeal from Oconee County

Honorable R. Scott Sprouse, Circuit Court Judge

\_\_\_\_\_  
DAN L. TEMPLE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001756

\_\_\_\_\_  
APPENDIX  
\_\_\_\_\_

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S.C. SUPREME COURT

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6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. PCR relief is only proper when the application collaterally attacks the validity of the conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). Claims that affect only the duration of the sentence or quality of the inmate's confinement do not affect the validity of the conviction or sentence and therefore are considered *non-collateral* attacks on the conviction. Cooper v. State, 338 S.C. 202, 525 S.E.2d 886 (2000).

For these reasons and pursuant to Rule 12(b)(6), SCRCP, the Court should dismiss Applicant's first allegation for failing to state a cognizable claim for which relief can be granted under the Post-Conviction Relief Act.

#### IV.

The Respondent construes the Applicant's third allegation as a claim of trial judge error. The Respondent submits these are direct appeal issues which are procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue at trial or on appeal. Respondent notes that Applicant has already appealed his case and the South Carolina Court of Appeals has affirmed his conviction. Therefore, the Court should summarily dismiss this allegation.

#### V.

Respondent interprets Applicant's first allegation as one of ineffective assistance of plea counsel and submits that it is without merit. In a PCR action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of plea counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the plea proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of plea counsel probably raises questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

## VI.

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

*[Signature follows]*

VII.

WHEREFORE, Respondent moves to summarily dismiss Applicant's second and third claims for relief. Respondent requests that an evidentiary hearing be held solely on the issue of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

JOHANNA C. VALENZUELA  
Senior Assistant Deputy Attorney General

By:   
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

May 6, 2016

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF OCONEE )  
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 )  
 DAN L. TEMPLE, #240638 )  
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 )  
 Applicant, )  
 )  
 vs )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 )  
 Respondent, )  
 )

IN THE COURT OF COMMON PLEAS

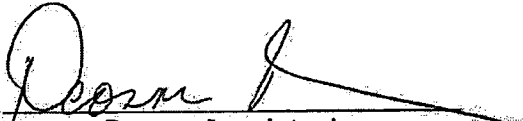
2015-CP-37-0225

AFFIDAVIT OF SERVICE BY MAIL

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

**Hugh Wingo Welborn, Esquire**  
**PO Box 173**  
**Anderson, SC 29622**

DATED this the 6<sup>th</sup> day of May, 2016.

  
 Deonna Rogers, Legal Assistant  
 For Respondent

1 State of South Carolina

In the Court of Common Pleas

2 County of Oconee

3

4 Dan Temple,

5 Applicant,

2015-CP-37-00225

6 -vs-

June 6, 2016

7 State of South Carolina,

8 Respondent.

Transcript of Record

9

10

11

B E F O R E:

12

The Honorable R. Scott Sprouse, Judge

13

14 A P P E A R A N C E S:

15 Hugh W. Welborn, Esquire  
Attorney for Applicant

16

17 Johanna C. Valenzuela, Esquire  
Attorney for Respondent

18

19

20

21

Diane L. Marcengill, RPR, CRR  
Circuit Court Reporter

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*Dan Temple vs. State of South Carolina 2015-CP-37-00225 June 6, 2016*

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E x h i b i t s

For the Applicant:

Marked	Description	I.D.	Admitted
	None offered.		

For the Respondent:

Marked	Description	I.D.	Admitted
	None offered.		

1 (WHEREUPON, court convened with all parties  
2 present and the following proceedings were had  
3 commencing at approximately 11:18 a.m.)

4 MS. VALENZUELA: Your Honor, may it please the  
5 court. I realized in the disk that we sent you with  
6 all the materials, that I think I inadvertently left  
7 the motion off, but I did include my return, and so I'm  
8 just going to hand that up to you. And this is the  
9 motion and the response.

10 And this is in the case of Dan Temple versus South  
11 Carolina, case number 2015-CP-37-225. So we're here  
12 for both a motion and an evidentiary hearing, Your  
13 Honor. So for those purposes, I'll go ahead and  
14 address the motion first which is before you.

15 Applicant is represented by Hugh Welborn on this  
16 PCR, and Mr. Welborn is present in the courtroom, and  
17 he has filed a motion for discovery. And then our  
18 return there is, one, under the statute, you cannot  
19 grant discovery without good cause. We don't think  
20 good cause has been shown.

21 But we are -- we have coordinated with the clerk  
22 for the disk that's at issue in this case, and that's  
23 in the courtroom, depending on how this court should  
24 rule on that motion.

25 THE COURT: Mr. Welborn.

1 MR. WELBORN: Your Honor, I think we have shown  
2 good cause. My client has good cause because he's  
3 incarcerated, and he wants to find all the evidence.  
4 So that in and of itself is good cause. If the court  
5 grants that motion, I would like to try my case and  
6 review that evidence a little bit, and if we need to  
7 come back in here later and finish, do it at that time.  
8 I think that might get some of the -- I don't know how  
9 long that is, is what I'm trying to say.

10 THE COURT: What is the piece of evidence that you  
11 are seeking?

12 MR. WELBORN: He wants to see the videos of --  
13 wants to review the surveillance video of an alleged  
14 controlled buy for distribution of crack cocaine to an  
15 undercover operative working under the direction of the  
16 Seneca Police Department in the 100 block of Bypass  
17 123, Seneca, on or about July 17, 2012.

18 And also he wants to review the surveillance video  
19 of alleged buy for distribution of crack to an  
20 undercover operative working for the Seneca Police  
21 Department at the 100 block of Bypass 123 on or about  
22 July 23, 2012. So those two days.

23 THE COURT: How does this pertain specifically to  
24 your client's allegations in the PCR?

25 MR. WELBORN: Judge, he just claims that -- for

1 some reason I believe he thinks this is exculpatory and  
2 would show that there's some exculpatory evidence in  
3 there.

4 THE DEFENDANT: Excuse me, Your Honor.

5 THE COURT: Mr. Welborn, I think your client wants  
6 to tell you something.

7 THE DEFENDANT: I want to address the court.

8 MR. WELBORN: You address me. I'm your lawyer.

9 THE DEFENDANT: Yeah, but -- Judge, can I address  
10 you, please, sir?

11 THE COURT: You need to talk to your lawyer at  
12 this point. You will have the opportunity to testify  
13 in a moment.

14 (Off-record discussion between Mr. Welborn  
15 and the defendant.)

16 MR. WELBORN: It's exculpatory evidence related to  
17 a motion to suppress.

18 THE COURT: So he's alleging that his attorney did  
19 not produce exculpatory evidence in his possession --

20 MR. WELBORN: That's correct.

21 THE COURT: -- at trial?

22 MR. WELBORN: That's correct.

23 THE COURT: Ms. Valenzuela, is the CD or DVD  
24 available now?

25 MS. VALENZUELA: I believe -- this is -- I believe

1 this is the DVD that's at issue. I coordinated with  
2 the solicitor's office. And I will say these records  
3 are not in my possession so this motion is most  
4 appropriately addressed by the solicitor's office. I  
5 gave them the opportunity to come and present it, and  
6 they said they were comfortable with me stating the  
7 position that good cause is required and that,  
8 additionally, they would ask this disk not be copied  
9 and given to anybody to be taken outside the courtroom.  
10 But if you were to order it be shown, that it would be  
11 limited to being in the courtroom so it doesn't go back  
12 to prison to be passed around.

13 But I have coordinated with the clerk's office for  
14 the only DVD or DVDs that were part of the record, and  
15 they have brought that with them for us to play. It's  
16 my understanding that this was not played in court,  
17 although it was part of the court record and that it  
18 was part of the underlying search warrant which led to  
19 the police finding the defendant in the hotel room with  
20 the drugs in his possession.

21 So just to clarify, it's not a case where the jury  
22 would have seen this video and that -- or that the  
23 charges are linked to this specific buy. He was  
24 charged on what the police found in his possession when  
25 they walked into the hotel room.

1 THE COURT: Now, this is part of the solicitor's  
2 file; is that correct?

3 MS. VALENZUELA: This is part of the -- yes, but  
4 the solicitor told me that it was already part of the  
5 court's file and that it could be found in the clerk's  
6 office file.

7 THE COURT: They're alleging that it's  
8 exculpatory.

9 Mr. Welborn, I'll allow you to play the DVD.  
10 However, I will put that condition it's not to be  
11 copied and not disseminated. It will be played for the  
12 purposes of this hearing only.

13 MR. WELBORN: Your Honor, thank you. If I knew  
14 how long it was, I would -- if it's five minutes,  
15 that's one thing, but I don't know how long this is.

16 THE COURT: All right. Why don't we do this.  
17 Let's take a short break, allow counsel to look at it,  
18 try to identify the exculpatory portions your client  
19 alleges, and then that will expedite this.

20 Let's take about a ten-minute break.

21 THE DEFENDANT: Your Honor. Your Honor.

22 THE COURT: Talk to your lawyer.

23 (Off-record discussion between Mr. Welborn  
24 and the defendant.)

25 MR. WELBORN: All right. Thank you, Your Honor.

1 THE COURT: Let's take a short break. Y'all look  
2 at this and try to identify the pertinent portions of  
3 it.

4 MS. VALENZUELA: Thank you, Your Honor.

5 (WHEREUPON, a recess was taken from 11:25 a.m.  
6 to 11:39 a.m.)

7 THE COURT: All right. Let's go back on the  
8 record.

9 Mr. Welborn.

10 MR. WELBORN: Your Honor, if it please the court,  
11 for the record, we have tried diligently -- I know this  
12 kind staff has -- to bring up whatever my client was  
13 wanting to see. He did tell me several times that he's  
14 seen this. And I've asked him, well, why do you  
15 want -- what do you want? And I think what he wanted  
16 was something to do with he's trying to show that they  
17 didn't have any evidence to take the drugs.

18 And I said, well, if the judge saw that on his own  
19 time in camera, would that be the same thing? And I  
20 think he agrees with that. We're not trying to find  
21 whatever he's looking for anymore.

22 However, he's now since told me that he wants me  
23 to be relieved as his lawyer, and so I am, without  
24 proper notice to anybody, making that objection right  
25 now or that motion, excuse me, to be relieved as his

1 lawyer.

2 I'll do whatever the court requests. He feels  
3 I've not properly represented him, that I'm not  
4 prepared. Judge, I am prepared. I'm ready to go.

5 THE COURT: All right. Let's do this.

6 Madam Clerk, would you put Mr. Temple under oath.

7 (WHEREUPON, the defendant was sworn.)

8 THE COURT: All right.

9 Mr. Temple, you heard your attorney state that you  
10 now wish that he be relieved as counsel; is that  
11 correct?

12 THE DEFENDANT: I don't think he understands what  
13 I'm saying, Your Honor. I'm trying -- if you would  
14 just give me a minute, I'm not trying to top the court.

15 I'm trying to get him to understand during the  
16 pretrial motion, he never told the judge that we  
17 reviewed the video to show that the controlled buy was  
18 never established because he was arguing about the  
19 video was never -- the controlled buy was never  
20 established, but he didn't tell the judge he reviewed  
21 it. There was no controlled buy. That's the point I'm  
22 trying to make to my attorney.

23 THE COURT: Okay. So you're not questioning the  
24 existence of the video or the ability to look at it;  
25 you're just saying your attorney at the trial didn't

1 argue what you just stated?

2 THE DEFENDANT: That's exactly what I'm trying to  
3 get the court to understand.

4 THE COURT: I understand your argument.

5 THE DEFENDANT: I'm not an attorney, but my life  
6 is on the line, so I'm asking you to be patient with  
7 me. And he don't seem to be patient with me.

8 THE COURT: I want you to have ample -- again, the  
9 way this thing works is you're going to get to testify.  
10 You're going to get to take the witness stand and tell  
11 me anything that is relevant to your claim. So we're  
12 just not at that stage of the proceeding yet.

13 THE DEFENDANT: Yes, sir.

14 THE COURT: With that statement that you just made  
15 to Mr. Welborn, are you still seeking that he be  
16 relieved as counsel?

17 THE DEFENDANT: No, sir. If all my issues can be  
18 addressed and heard, Your Honor, I'd like to go forward  
19 with him, go to trial -- I mean continue with the  
20 hearing.

21 THE COURT: Thank you, Mr. Temple.

22 Mr. Welborn, I think that resolves that issue.

23 MR. WELBORN: Thank you, Your Honor.

24 THE COURT: All right.

25 Ms. Valenzuela, you ready?

1 MS. VALENZUELA: I am, Your Honor. And then in  
2 doing this, I exchanged an e-mail with the solicitor,  
3 so I want to be clear for the record that she said that  
4 there were videos in this case. Those were never  
5 admitted, and that these were photos that were  
6 admitted.

7 It's my understanding from what Mr. Temple just  
8 said that it's not the substance of the video that he  
9 wants to argue, it's the fact that his attorney never  
10 argued that. And so I think we're going to reach that  
11 whenever we put him up. But I wanted to --

12 THE COURT: That's my understanding. He's not  
13 attacking the video. He's attacking his attorney.

14 MS. VALENZUELA: That's my understanding as well.  
15 I just wanted to make sure that I clarified everything  
16 after seeing that last e-mail.

17 So this is the case of Dan Temple versus the State  
18 of South Carolina. Mr. Temple filed this application  
19 March 16, 2015. He is currently confined to the SCDC,  
20 and this is because he was indicted in the January 2013  
21 term by the grand jury for manufacturing or  
22 distributing cocaine base third or subsequent offense  
23 and possession of another controlled substance,  
24 Schedule I to V, second or subsequent offense.

25 The applicant elected to go to trial. He was

1 represented by Mr. Delane Rosemond. He went to trial  
2 on March 18th to the 21st before the Honorable  
3 Alexander Macaulay and a jury. The jury ended up  
4 finding the applicant guilty of the lesser-included  
5 offense of possession of crack cocaine third offense  
6 and as indicted for possession of the other controlled  
7 substance second or subsequent.

8 Judge Macaulay ended up sentencing the applicant  
9 to a term of ten years for the possession of crack  
10 cocaine and to a term of imprisonment of one year for  
11 the other controlled substance, and those sentences  
12 were to be served consecutively.

13 Additionally, there was a -- there is a footnote  
14 in the return that gives additional history as to the  
15 applicant's criminal history that factors into the  
16 sentence.

17 A timely notice of appeal was filed and perfected  
18 on the applicant's behalf, and the South Carolina Court  
19 of Appeals affirmed the applicant's conviction, and  
20 that remittitur was issued on February 23rd of 2015.

21 In his current application, the applicant is  
22 alleging the following: That trial counsel failed to  
23 properly object to the admission of drug evidence such  
24 that the suppression was not preserved for appellate  
25 review; that counsel failed to investigate, review the

1 record where the applicant was indicted for a second  
2 offense for possession of a controlled substance when  
3 applicant never had a first conviction; that trial  
4 counsel was ineffective for not motioning the court to  
5 recuse a magistrate judge from presiding over his  
6 preliminary hearing date. And the argument is that  
7 that magistrate judge also signed off on the search  
8 warrant that led to the applicant's conviction.

9 And, additionally, that trial counsel was  
10 ineffective because he did not interview his twin  
11 brother, David Temple. And as a defense, the applicant  
12 alleges that his twin brother could have been the one  
13 on the video that led to a search warrant of his motel  
14 on July 25, 2012.

15 The applicant also alleged -- and I think that has  
16 to do with his earlier, but I will let PCR counsel  
17 clarify -- that the trial counsel failed to investigate  
18 the 1989 prior Georgia conviction that led to him being  
19 sentenced for a third offense; and that there was trial  
20 judge error in denying the suppression and on deciding  
21 this question of law in that the trial judge erred by  
22 not questioning Tim Honeycut regarding the controlled  
23 buy that was not established.

24 And I believe in this case, I know that Hugh  
25 Welborn, PCR counsel, sent a letter to our office

1 asking that it serve as an amendment which we agreed  
2 to. And in that amendment he stated -- Mr. Welborn  
3 stated that he wants a formal request to amend to  
4 allege that his trial counsel was ineffective in  
5 failing to properly object to the admission of drug  
6 evidence such that the suppression hearing was not  
7 preserved for appellate review, which I think was in  
8 the application.

9 THE COURT: Okay.

10 Mr. Welborn.

11 MR. WELBORN: Please the court. We'd call Dan  
12 Temple at this time.

13 THE COURT: Mr. Temple, come around to the witness  
14 chair, please.

15 DAN TEMPLE,

16 BEING PREVIOUSLY SWORN, TESTIFIED AS FOLLOWS:

17 THE COURT: You're already under oath.

18 DIRECT EXAMINATION

19 BY MR. WELBORN:

20 Q Mr. Temple, I'm going to hand this water to you.  
21 You drank a whole cup a minute ago. I know you're  
22 thirsty.

23 You're Dan Temple?

24 A Yes, sir.

25 Q Mr. Temple, everything that was stated a moment

1 ago, do you understand that and agree with those  
2 allegations?

3 A Only that in the video, it never showed the  
4 controlled buy. There was no drug substance.

5 Q I gotcha. Now, you have alleged in your  
6 application that trial counsel failed to properly  
7 object to the admission of drug evidence so that the  
8 suppression was not preserved for appellate review.

9 Now, for the court's edification, your conviction  
10 was affirmed, and then the trial court stated that your  
11 lawyer had made a motion in limine to exclude that  
12 evidence but it was not preserved for appellate review.

13 So, are you asking the court to find that had your  
14 lawyer made a motion to suppress the evidence not in  
15 limine, that means on the record, that would have been  
16 a time for him to make it, but he made no proper  
17 objection on the record --

18 A No. I'm stating that later on during trial.

19 Q I understand. Let me finish.

20 A Okay.

21 Q And as a matter of fact, you're alleging that your  
22 trial lawyer said, "No objection, Your Honor," when  
23 they moved to let the drug evidence come into evidence;  
24 is that correct?

25 A Correct.

*Dan Temple vs. State of South Carolina 2015-CP-37-00225 June 6, 2016*  
*Dan Temple - Direct Examination*

1 Q And so when we made no objection and said, "We  
2 have no objection," then, in effect, you're alleging  
3 that he should have done that, that he should have  
4 moved to suppress your drug evidence, and that the  
5 motion in limine where he was with the court alone, not  
6 on the record, that that wasn't enough to preserve the  
7 motion to suppress for appellate review. Is that your  
8 argument, sir?

9 A My argument is later on during trial. The motion  
10 to suppress, he argued that. The judge denied that.  
11 Later on, during trial, the judge asked him, when they  
12 went to admit the drugs into evidence, the judge asked  
13 him on transcript page 248, line 4 through 12, the  
14 judge asked him, trial counsel, asked him was there any  
15 objection. Trial counsel said, "No objection, Your  
16 Honor." But that's what I'm saying. He didn't object.

17 Q I think you stated it better than I just stated.  
18 I asked a very long, convoluted question.

19 But, basically, you're saying there was not an  
20 objection for appellate review?

21 A Stated specifically his objection.

22 Q All right. Now, you've told the court you're very  
23 concerned about some pictures or a video, as you refer  
24 to it, that you think would have helped lead to the  
25 suppression of evidence. Now, I want you to explain

1 what you mean by that to this court, please.

2 A Well, first I would like to tell the courts why I  
3 feel how he prejudiced me by not objecting to the drugs  
4 that were admitted into evidence.

5 Q Go ahead.

6 A During the pretrial motion, in the pretrial  
7 motion, the pretrial motion was based on a search  
8 warrant. The affidavit did not contain any information  
9 about the confidential informant's reliability. The  
10 magistrate judge did not have that in front of him to  
11 attest whether or not the confidential informant had at  
12 any time had a chance of being unreliable. And because  
13 he did not have that information in front of him in an  
14 affidavit, he failed to meet the Fourth Amendment  
15 requirement. Do you understand that?

16 Q There was no allegation in the search warrant of  
17 the reliability of the informant; is that correct?

18 A Correct.

19 Q And your lawyer didn't object to that?

20 A That's right.

21 Q On the record he didn't; is that correct?

22 A On the record he didn't.

23 Q And if he had, then that might have led to a  
24 different result during this trial; is that what you're  
25 trying to tell the court?

1 A That's exactly what I'm trying to say. And it was  
2 very important that the trial counsel make that  
3 particular objection as required by the South Carolina  
4 Court of Appeal rule to preserve the issue for review  
5 or issues.

6 Q Go ahead.

7 A Had counsel preserved the error that the trial  
8 court made during the application -- excuse me --  
9 during the applicant's motion to suppress the drug  
10 evidence at pretrial hearing on the Fourth Amendment  
11 violation, his conviction would have been vacated.

12 Furthermore, counsel failed to object, clearly led  
13 the jury to believe all the drugs the applicant --  
14 excuse me. If counsel would have objected -- counsel's  
15 failure to object led the jury to believe that all the  
16 drugs was the applicant's.

17 Most importantly, applicant was put on trial for  
18 the drugs the State knew was not all the applicant's,  
19 transcript page 139, line 1 through 25, page 140, lines  
20 1 through 3. His codefendant was charged jointly and  
21 testified for the State against him after planting the  
22 drugs belonging to the applicant.

23 There is a reasonable probability if counsel  
24 would -- if it wasn't for counsel's error, the result  
25 would have been different. That's what I'm stating on

1 that issue.

2 Q Now, let me ask you this. You're also alleging  
3 trial counsel was ineffective because they didn't  
4 interview your twin brother, and that would have -- he  
5 could have been the person that did this crime. Is  
6 that what you're saying?

7 A Correct.

8 Q Now, I'm going to ask you this. Is your brother,  
9 are y'all identical twins?

10 A We're fraternal, but in our community, everybody  
11 thinks we're -- they see him, they think he's Dan and  
12 they think I'm Dave.

13 Q Did you tell your lawyer you had a twin brother?

14 A At first they was going to take me to trial for  
15 the three charges that's listed on the search warrants.  
16 On two occasions, on the 17th and on the 23rd. But  
17 then when I told Delane about my brother, he said,  
18 well, I'm going to interview your brother. So then he  
19 came back and said they're going to take you to trial  
20 for the drugs they found in the motel room.

21 So they switched up on me. First they was going  
22 to take me to trial for these three things for the two  
23 days. They said I had distribution of crack cocaine.  
24 That's listed on the search warrant. But when I told  
25 him about my brother, he said, I'm going to go look at

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*Dan Temple - Direct Examination*

1 your brother and talk to him. But then he came back to  
2 visit me in the county jail and told me the solicitor  
3 had been up all night this weekend preparing the case,  
4 and they was going to take you to trial on the --

5 Q So for the court to understand all this, he didn't  
6 interview your twin brother; is that it?

7 A No, sir. Not at all. Not at all.

8 Q And but for that error, you could have had a  
9 different result; is that what you're telling me?

10 A My brother was willing to talk to Delane, too.

11 Q He was what, sir?

12 A He was willing to talk to him and testify on my  
13 behalf.

14 Q All right. Now, you also allege that the trial  
15 counsel failed to investigate a 1989 prior Georgia  
16 conviction for a noncontrolled substance that led to  
17 you being sentenced for a third offense, and he did  
18 not -- he was ineffective by not reviewing this record  
19 which led you to be sentenced or have an enhancement of  
20 a sentence when you didn't have a first conviction; is  
21 that correct?

22 A Sort of. You're on the right page.

23 Q You tell the court, then -- clarify that for the  
24 court.

25 A In 1989 I was charged with another controlled

1 substance in Georgia, state of Georgia. State of South  
2 Carolina, at that time, when I was charged in South  
3 Carolina -- I mean Georgia, it wasn't a narcotic drug.  
4 So I explained to Delane, they keep using that Georgia  
5 conviction and enhancing my sentence. He told me it  
6 was too late for that. He told me that in his office  
7 before I went to county jail and remained in jail until  
8 trial. He told me it was too late for that.

9 Q So you were sentenced based on a non- --

10 A Controlled substance.

11 Q -- controlled substance in Georgia that they  
12 looked at as a controlled substance here; is that  
13 correct?

14 A In South Carolina. Now it is a controlled  
15 substance. They made it that now over the years since  
16 my conviction.

17 Q Since your conviction?

18 A No. My last conviction on the first time I went  
19 to prison for drugs.

20 Q Okay. All right.

21 Now, I'm trying to understand what you have  
22 written in your return here that you've got your  
23 allegations.

24 A Yes, sir.

25 Q Do you have them in front of you, sir?

1 A Yes, I do. Yes, sir.

2 Q All right. I want you to tell the court and  
3 address any of these other allegations in here and  
4 explain to the court why you think your counsel is  
5 ineffective in that regard and how you were prejudiced  
6 by that.

7 A Well, dealing with number -- well, C and 1C.

8 Q That's in the return, 1C. Go ahead.

9 A 1C. The reason why I say trial counsel was  
10 ineffective in representing me, because Magistrate Will  
11 Derrick is the magistrate who issued the search warrant  
12 for the three controlled substance buys in the search  
13 warrant. And then for those same charges -- excuse me.  
14 Let me back up. I'm sorry. I'm nervous.

15 Q That's okay. Take your time.

16 A Magistrate Judge Will Derrick was the same  
17 judge -- he issued the search warrant for them to come  
18 to my hotel room. When they searched, they found drugs  
19 in my hotel room. So on October 29th when the  
20 preliminary hearing was held, he presided on the  
21 preliminary hearing and issued the search warrants on  
22 all the charges that I was in jail for. He signed on  
23 the preliminary hearing.

24 Q How should your attorney have objected to that,  
25 and how were you prejudiced by his nonobjection to

1 that?

2 A Well, I think he should have asked him to  
3 recuse -- a motion for him to recuse himself to allow  
4 somebody else to decide my case because he knew all the  
5 facts surrounding my case, the alleged facts  
6 surrounding my case, and he was the one who issued the  
7 search warrant. He couldn't have been detached or  
8 neutral or impartial because he already knew my case.

9 Q All right. What else in your application --  
10 because you're doing pretty good explaining to the  
11 court, tell him what else you're complaining about.

12 A I think I would have had a better chance before  
13 another magistrate judge to have my case -- some of  
14 them charges dismissed, if not all of them, if another  
15 magistrate judge presided over my preliminary hearing.

16 Q Okay. Continue in your application. You have got  
17 the return. -- You referred to stuff in the return. Go  
18 ahead. Anything you want to tell the court?

19 A Well, at sentencing, when the judge sentenced me  
20 to consecutive sentences, I think trial counsel should  
21 have asked the judge to run my sentences concurrent  
22 instead of consecutive because the solicitor didn't ask  
23 that I receive consecutive. The probation officer did.  
24 So it's in the transcript. But I think he could have  
25 at least asked the judge, "Could Your Honor run the

1 time concurrent, all his sentences?" He didn't say  
2 anything. He just allowed it.

3 Q What else?

4 A That's really about it.

5 Q Now, it's your day in court, Mr. Temple, and I  
6 want to make sure we've covered everything. Is there  
7 anything that I have not covered in your application  
8 that you want the court to hear about?

9 A No, sir. That's about all, I think.

10 Q Thank you.

11 Answer anything opposing counsel may have.

12 MS. VALENZUELA: Your Honor, may I have just one  
13 moment?

14 THE COURT: Yes, ma'am.

15 CROSS-EXAMINATION

16 BY MS. VALENZUELA:

17 Q Okay. Mr. Temple, taking these one at a time,  
18 your -- you had an attorney represent you on appeal in  
19 this case in the underlying trial, correct?

20 A Yes, ma'am.

21 Q And were you able to see what your attorney argued  
22 to the court in that case?

23 A Yes, ma'am.

24 Q And your appellate attorney argued that your trial  
25 attorney had, in fact, preserved the issue on appeal?

1 A Oh, she did. Yes.

2 Q And she argued that your attorney with specificity  
3 argued what the issues were to try to suppress the drug  
4 evidence in this case based on the search warrant?

5 A Yes, ma'am.

6 Q And she cited how your attorney argued four  
7 different reasons to the judge on that issue, correct?

8 A Repeat that, ma'am.

9 Q Your appellate attorney argued to the court that  
10 your trial attorney had argued four different reasons  
11 for a reason to suppress that video -- I mean to  
12 suppress the search warrant and therefore the drugs?

13 A As I remember, she was talking about the  
14 reliability of the informant, and the controlled buy  
15 was never established. And the officer didn't testify  
16 to any of that. That's what I remember.

17 Q But your appellate attorney said that your trial  
18 attorney had done a good job of preserving that issue?

19 A Oh, yeah. They told me --

20 Q That's what she said?

21 A -- he failed to object to preserve the issue.

22 Q But she argued that it had been preserved?

23 A Yeah, she said that. Yeah.

24 Q She argued that it had been preserved because the  
25 trial judge made a final ruling on that motion to

1 suppress?

2 A Yes, ma'am. You're correct.

3 Q And because it was a final ruling, at that point  
4 the issue had been preserved on appeal. That's what  
5 she argued to the court?

6 A Yes, ma'am. She did argue that, yes, ma'am.

7 Q Okay. I was trying to follow your argument on the  
8 twin brother.

9 Am I correct that you're saying that you were  
10 charged -- you had more charges than what you ended up  
11 going to trial for?

12 A No, I'm not saying that. I'm saying that -- yeah,  
13 I'm saying that, but I'm saying I don't know who sold  
14 the drugs.

15 Q We're going to go through one at a time.

16 Before you went to trial, though, when you were  
17 talking to your trial attorney --

18 A Yes, ma'am.

19 Q -- you had additional drug charges that were  
20 pending and that you didn't go to trial on, correct?

21 A That's correct.

22 Q And it was those that had a video that showed a  
23 controlled buy?

24 A No. None of them.

25 Q Those had photographs that showed images of

1 someone who looked like you?

2 A I had a twin brother. It showed one of us sitting  
3 in the car, but there was no controlled buy.

4 Q So it had separate charges, though, had some sort  
5 of video or photographs?

6 A No, ma'am.

7 Q No?

8 A No, ma'am.

9 Q Okay. The charges that you went to trial for were  
10 when the police officers went into your hotel room?

11 A Correct. And this is the search warrants.

12 Q And the police officers found you in your bed and  
13 your girlfriend in the hotel room?

14 A Correct.

15 Q And your twin brother was not in that hotel room?

16 A Correct.

17 Q So the charges that you went to trial for, the  
18 charges that are at issue today involved you, your  
19 co-conspirator, your girlfriend, and that's it,  
20 correct?

21 A Yes, ma'am.

22 Q Okay. And, in fact, do you remember that in the  
23 middle of trial your co-conspirator, your girlfriend,  
24 brought up another person who she claimed had driven  
25 her to get the drugs?

1 A No, she didn't bring it up. My trial attorney  
2 brought that up. She didn't bring up that. She was  
3 trying to hide that.

4 Q That's fine. We'll go with that story line.  
5 So your attorney, in the middle of trial,  
6 identified another person who could say that your  
7 girlfriend was the one who purchased the drugs?

8 A Correct.

9 Q And your trial attorney, in the middle of court,  
10 once he found out about that person, what did he do?

11 A He had the judge to bring them to court to  
12 testify.

13 Q So in the middle of trial, when he identified an  
14 additional witness, he subpoenaed that witness into  
15 trial to testify for you?

16 A He had the subpoena. I had already told him about  
17 that.

18 Q But he did have that person come into trial to  
19 testify?

20 A Correct, ma'am.

21 Q On your behalf?

22 A Yes, ma'am.

23 Q Okay. And where was your brother during that  
24 time?

25 A On the streets.

1 Q And you asked your brother to come in and testify?

2 A Well, I was trying to get -- yeah. He said he  
3 would testify. Not my mother but my cousin -- my  
4 family was coming to see us, and I told them to come to  
5 trial. He was waiting on Delane to come and see him  
6 but he never did.

7 Q Your brother never did?

8 A But he was under a lot of stress. They was  
9 seeking a life sentence for him. He was stressed out.

10 Q Your brother was stressed out during that time so  
11 he couldn't come to court?

12 A No. He would have came. He would have came.

13 Just to be clear, ma'am, if you don't mind, the  
14 days that are listed in the search warrant, the  
15 controlled buys is when I'm talking about my brother  
16 could have been the one that allegedly sold these drugs  
17 on these days but did not have no videos showing that  
18 it was any drugs distributed at this particular time on  
19 these days listed on the search warrant.

20 Q So we've got to focus on the charges that are  
21 before you today. And so going to that, your other  
22 claim was that you had a conviction in Georgia for a  
23 noncontrolled substance?

24 A Yes, ma'am.

25 Q Correct?

1 A Yes, ma'am.

2 Q And, in fact, you have had a prior conviction  
3 based on that Georgia conviction?

4 A Yes, ma'am.

5 Q And you made a PCR -- you made a postconviction --  
6 you brought a postconviction relief allegation based on  
7 that Georgia conviction, based on that prior  
8 conviction?

9 A Yes, ma'am, I did.

10 Q And you actually argued that issue to another  
11 judge, correct?

12 A Yeah. Yes, ma'am. 982000, something like that.

13 Q And a judge refused to hear it, and then y'all  
14 ended up having a second case where the second PCR  
15 judge heard your argument on why that Georgia  
16 conviction should not have been used to enhance your  
17 drug conviction?

18 A Actually, it was Judge Macaulay. He actually  
19 agreed, but at the particular time, I think because I  
20 had got into some trouble in the Department of  
21 Corrections, he said, "I'm ruling in 30 days," but it  
22 took him 13 months to rule on that, and he ruled  
23 against me, but he actually agreed.

24 Q So just for clarity for the presiding judge  
25 here --

1 A Yes, ma'am.

2 Q -- you did bring this issue up before a  
3 postconviction relief judge where this served as an  
4 enhancement, and that postconviction relief judge ruled  
5 against you on this issue?

6 A Yes, ma'am. Yes, ma'am.

7 Q And then, in addition, Judge Macaulay, your  
8 presiding judge at trial, talked about this issue  
9 during your sentencing, correct?

10 A Yes, ma'am.

11 Q You raised it and your attorney raised it?

12 A No. I think I raised it. My attorney didn't -- I  
13 don't think my attorney -- I think I'm pretty sure my  
14 attorney didn't even speak about it, but I spoke about  
15 that.

16 Q It was raised before Judge Macaulay, and Judge  
17 Macaulay explained to you that had served as a  
18 conviction, that you already had a second or  
19 subsequent, and then he listed out all your different  
20 drug convictions and how even regardless of the Georgia  
21 conviction, you would still have sufficient number to  
22 qualify under the third or subsequent drug charge?

23 A I remember --

24 Q Whether you agreed with him or not, is that what  
25 was discussed with Judge Macaulay at your sentencing?

1 A I don't know if you could say exactly that, ma'am,  
2 but he did speak on it. To be honest with you on that,  
3 he did speak on it. I didn't go back and review that.  
4 I just wanted to review my main issues in my  
5 transcript.

6 Q So it was raised before the judge, he addressed it  
7 and looked at it and still sentenced you accordingly?

8 A Yes, ma'am.

9 Q Now, the magistrate judge recusing himself, your  
10 problem, your concern is with the magistrate judge,  
11 correct?

12 A Not only the magistrate judge, but my trial  
13 counsel.

14 Q But you believe that the magistrate judge would  
15 have had something that would have caused him to recuse  
16 himself?

17 A Had to because in the transcript, it tells you  
18 that Officer Tim Honeycut testified he went to his  
19 home. And, Counsel, you bypass two judges to go all  
20 the way down here to get a warrant from a county judge  
21 instead of getting it from a city judge that you  
22 normally would go to? So, I mean --

23 Q So when you say trial counsel argued that, in  
24 fact, trial counsel throughout your trial to the  
25 presiding judge and to the jury made a big point of

1 pointing out that the officers had chosen to go to one  
2 magistrate judge versus another magistrate judge who  
3 would have been closer, correct?

4 A I think he quoted "his favorite judge." I think  
5 that's what he called him.

6 Q So he did argue that in front of both the  
7 presiding judge and the jury?

8 A Yes, ma'am.

9 Q Multiple times throughout the trial?

10 A Yes, ma'am.

11 Q And they had that when they made their decision,  
12 the jury?

13 A Yes, ma'am.

14 No. No. No. Excuse me. Let me back up. No --  
15 yes, they did. You're right. I thought it was during  
16 the pretrial motions, but I think he did.

17 MS. VALENZUELA: Nothing further from the State.

18 THE COURT: Anything further?

19 MR. WELBORN: No, sir.

20 THE COURT: All right.

21 Thank you, Mr. Temple.

22 MR. WELBORN: That's our case.

23 MS. VALENZUELA: Your Honor, at this point we  
24 would move for a directed verdict on any allegation  
25 that wasn't addressed on the applicant's case, and so I

1 have that as being limited to the issue for the drugs  
2 not being preserved for appeal, the issue of not  
3 interviewing a twin brother and having him testify at  
4 trial, the Georgia conviction serving to enhance, the  
5 magistrate judge not being recused, and trial counsel  
6 not asking for a concurrent sentencing.

7 THE COURT: Mr. Welborn.

8 MR. WELBORN: We stand by our application, Your  
9 Honor. We stand by it.

10 THE COURT: Okay. All right.

11 Are there other matters that you assert were  
12 brought up in his testimony other than those that she  
13 just outlined?

14 MR. WELBORN: No, sir.

15 THE COURT: Okay. Well, then, the court's  
16 decision will be based on those issues. If there are  
17 any other issues that were raised in the application  
18 and not testified to or evidence presented, then those  
19 would be dismissed.

20 MR. WELBORN: That's correct. Your Honor, so I'm  
21 understanding, whatever we presented a while ago, I  
22 think we presented everything in his application, and  
23 based on the return, I think that's before the court.  
24 That's what I'm understanding.

25 THE COURT: I'm not aware -- I'm looking at the

1 application.

2 And, Ms. Valenzuela, let's make this simpler. Are  
3 there allegations that you allege were in the  
4 application that were not testified to?

5 MS. VALENZUELA: Yes, sir.

6 THE COURT: My recollection of the testimony is  
7 accurate -- if my recollection based on my notes is  
8 accurate, those are the areas that he testified to.

9 MS. VALENZUELA: I would strike section three  
10 because it has -- I don't think anything was raised  
11 related to that, and it has only to do with trial judge  
12 error and not counsel error.

13 And to the extent that it deals with the search  
14 warrant, I think that's dealt with earlier. So for  
15 clarity's sake, it would be limited to points one and  
16 two.

17 MR. WELBORN: That's correct, Your Honor. I  
18 didn't bring that up because --

19 (Off-record discussion between Mr. Welborn  
20 and the defendant.)

21 THE DEFENDANT: Your Honor, I brought up that,  
22 Your Honor. That's brought up. The suppression  
23 hearing, the trial court judge error in -- okay. About  
24 the informant. That's brought up.

25 MR. WELBORN: I just explained to my client. He

1 wanted to know why I didn't specifically mention  
2 anything in three, and it has been brought up in the  
3 body of the other allegations. I just didn't need to  
4 repeat it.

5 THE COURT: I'll interpret that. That would be  
6 contained in what he's testified to, and I'll consider  
7 that.

8 MS. VALENZUELA: Okay. Thank you, Your Honor.

9 And the State would now call Mr. Delane Rosemond  
10 to the stand.

11 EDWARD DELANE ROSEMOND,  
12 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:  
13 DIRECT EXAMINATION

14 BY MS. VALENZUELA:

15 Q Mr. Rosemond, can you please state your full name  
16 for the record, please.

17 A Edward Delane Rosemond.

18 Q And, Mr. Rosemond, how long have you been  
19 practicing law?

20 A 18 years.

21 Q And about how much of that has been spent  
22 representing or doing criminal defense?

23 A 16 years.

24 Q And were you appointed or retained in this case at  
25 the time?

1 A I was appointed.

2 Q How many times did you end up meeting with the  
3 applicant prior to going to trial on his charges?

4 A Three or four times.

5 Q Did the applicant cooperate with you during the  
6 course of your representation?

7 A For the most part. I mean, Mr. Temple certainly  
8 was argumentative sometimes, but, I mean, did he  
9 cooperate with me, yes, he did.

10 Q Did you file any Brady or Rule 5 motions in this  
11 case?

12 A I did.

13 Q And did you review the discovery material that you  
14 received with the applicant prior to his trial?

15 A We sat down and went over it.

16 Q Did he indicate to you that he understood the  
17 evidence and the discovery material that you were  
18 reviewing with him?

19 A He indicated to me that he understood it, but he  
20 did not agree with it.

21 Q Did you go over the elements of the charges and  
22 what the State had to prove with the applicant prior to  
23 trial?

24 A Yes. We talked about that.

25 Q And did you discuss his version of the facts with

1 him?

2 A I did.

3 Q Did you discuss possible defenses with him?

4 A Yes. We talked about those.

5 Q Can you briefly go over for the court what the  
6 State's evidence was against the applicant going into  
7 trial?

8 A The evidence was that they had information that he  
9 and his girlfriend had drugs in the hotel room called  
10 the Town & Country. And based upon that evidence, they  
11 executed a search warrant there. He was charged with a  
12 distribution of crack cocaine. He was charged with  
13 possession of crack, I believe, and maybe one or two  
14 other ancillary possession of a controlled substance.

15 Q And the distribution of crack charge, they  
16 actually found the crack in your client's possession in  
17 the hotel room or -- I'm sorry, near your client in the  
18 hotel room?

19 A They did find some crack in the hotel room.

20 Q And that was part of the evidence that they had?

21 A That was a part of the evidence that they used to  
22 charge my client.

23 Q And then, additionally, they had the Xanax pills  
24 that were the possession of the other controlled  
25 substance charge?

1 A They did.

2 Q And they had the codefendant, the girlfriend,  
3 testify at trial, and she claimed that she had only  
4 used a small portion of the crack and that the rest of  
5 the crack belonged to your client?

6 A She did testify at trial. And, certainly, she  
7 deflected much of the guilt away from her.

8 Q Now, did applicant ever tell you to interview his  
9 twin brother?

10 A He did.

11 Q And did you?

12 A No, I didn't.

13 Q And why not?

14 A Those were not the charges that were -- that were  
15 brought up that day for trial. So for the particular  
16 cases that we talked about, his twin brother had  
17 absolutely nothing to do with it.

18 Q Just for clarity, the charges that were brought to  
19 trial, those facts were that the police went into a  
20 hotel room, and in that hotel room were only two people  
21 present, your client and his girlfriend, and the drugs  
22 were found near or around either your client or the  
23 girlfriend?

24 A That's correct.

25 Q Do you feel you had ample time to prepare for the

1 trial?

2 A Yes. Based upon the results that we got from the  
3 trial, I had ample time to prepare for it.

4 Q We're going to get to that in a little bit.

5 Tell me about what your trial strategy was for the  
6 applicant's trial.

7 A My trial strategy was to -- I had two people in  
8 the hotel room, and I was trying to deflect as much of  
9 the liability away from Mr. Temple and put it on his  
10 girlfriend.

11 Q And I think this goes to your point that you were  
12 making a little while ago. What was your client  
13 originally charged with going into the trial? Was  
14 it -- it was more than possession, possession with  
15 intent to distribute and separately a possession  
16 charge, correct?

17 A And also a distribution charge, I believe.

18 Q The possession with intent to distribute -- or a  
19 distribution charge. And what was your strategy as to  
20 what to do with that specific charge? Were you trying  
21 to get a lesser included?

22 A The lesser included that we were shooting for was  
23 the possession charge.

24 Q Okay.

25 A And ultimately that's what happened.

1 Q So your overall strategy is to try to have all the  
2 drugs -- the jury believe that all these drugs were  
3 actually in the possession of the co-conspirator, the  
4 girlfriend, and therefore find your client completely  
5 not guilty. But, alternatively, if they could just  
6 find that he was in possession of a smaller amount and  
7 not enough to distribute, to find him guilty of the  
8 lesser-included charges?

9 A That's correct.

10 Q And tell me, what did that do to his sentencing  
11 exposure to have him found guilty of a lesser included  
12 versus the distribution charge?

13 A The distribution charge carried, if I'm not  
14 mistaken, 30 years for a distribution third. Coupled  
15 with the other charges of the possession with intent to  
16 distribute as well as the possession of controlled  
17 substance, he was ultimately looking at around 35 years  
18 in jail if he was convicted on all of those charges.

19 Q And, instead, after being convicted of those two  
20 charges, he only -- and getting consecutive sentences,  
21 he only got 11 years out of the charges that arose from  
22 that trial, correct?

23 A That's what he received, yes.

24 Q Now, what was your strategy as to suppressing the  
25 drugs and your motion to suppress that you brought

1 prior to trial?

2 A The strategy there was to simply argue that the  
3 Fourth Amendment required the suppression of the drugs  
4 in this particular matter, and that's why we filed that  
5 suppression motion.

6 Q And did you feel like you had gotten a final  
7 ruling from the judge in the pretrial motion?

8 A I did. I mean, it's -- I mean, it happens where  
9 the judge indicates to you that there's no need to make  
10 any other motions in trial as to a particular ruling  
11 that he makes preliminarily.

12 Q If you had won on your motion to suppress, would  
13 the trial have been essentially over right there?

14 A Trial would have been over.

15 Q So when the judge ruled against you and proceeded  
16 forward, you understood that to be a final ruling and  
17 did not believe that you needed to make another  
18 objection in order to preserve that issue for appeal?

19 A That is correct.

20 Q And do you recall bringing up the underlying  
21 Georgia conviction to the trial judge at the time of  
22 sentencing?

23 A I argued -- or we argued, as it was a joint effort  
24 between Mr. Temple and myself, that the Georgia  
25 conviction was insufficient for any enhancements in

1 South Carolina.

2 Q And do you remember what the judge's ruling was on  
3 that?

4 A The judge indicated, "Even if you were correct,  
5 Mr. Rosemond, Mr. Temple has two other convictions on  
6 his record, one for 12 years, the other one for seven.  
7 I believe that would qualify as an enhancement of this  
8 particular charge to a third offense."

9 Q So regardless of the Georgia conviction, there  
10 were enough -- the applicant has enough convictions to  
11 satisfy that enhancement?

12 A You are correct.

13 Q Okay. Now, did you discuss with your client at  
14 any time the concept of this magistrate judge having to  
15 recuse himself due to being involved in two separate  
16 warrants with the applicant?

17 A I don't ever recall discussing that with  
18 Mr. Temple.

19 Q And that was a large part of your strategy before  
20 the trial judge and before the jury, that there was  
21 something about the officers' conduct in going to this  
22 magistrate judge that should be questionable?

23 A Well, I remember that the underlying offense took  
24 place in the city of Seneca, right directly across from  
25 my office. The warrants were signed by a city judge,

1 either Judge Singleton or his associate judge,  
2 Ms. Lowing (phonetic), but the search warrant was  
3 signed by a county magistrate. I don't recall why Tim  
4 Honeycut went to Mr. Derrick's house. It could have  
5 been it was after hours. But, certainly, at some point  
6 I made the argument that he bypassed Judge Simmons'  
7 office in the city of Seneca as well as probably Judge  
8 Norton's office in Walhalla to go all the way to Judge  
9 Derrick's house. And you only do that because, number  
10 one, some other judges are not available.

11 Q You argued to the jury that there were other  
12 things that they could get out of that belief. The  
13 State was saying that other judges weren't available,  
14 but you were arguing that perhaps the officers thought  
15 they would get a more favorable ruling from one of the  
16 magistrate judges over the other?

17 A In my opinion, I don't care what magistrate you go  
18 to. If you put a search warrant in front of them,  
19 they're going to sign it. So it really didn't matter  
20 who he went to, they was going to sign that search  
21 warrant.

22 Q Which goes to my second point. So assuming that a  
23 motion to recuse a magistrate judge had been done, what  
24 would be the resulting effect? Would it have been that  
25 that warrant would have just gone in front of

1 another -- assuming that the judge even agrees with  
2 you, assuming that the judge recused himself or herself  
3 at that point, would that have gone to another  
4 magistrate judge to review for probable cause?

5 A Assuming that he would have recused himself, it  
6 would have. So then you have the other problem. It  
7 has two other judges here, Judge Norton or Judge  
8 Simmons. The problem with Judge Simmons is his wife  
9 works in the solicitor's office. So now you're back  
10 down to just one judge. So if we want to play this  
11 shell game, it simply could become a two -- or each  
12 defendant to come to court at the preliminary hearing  
13 and ask for that judge to be recused, playing this  
14 shell game with the entire court system. I saw no  
15 reason to ask Judge Derrick to recuse himself.

16 On occasion Judge Derrick has thrown out some  
17 cases for me that did not meet all the elements as well  
18 as the other two judges around here. I thought we  
19 would get as fair a shot from Judge Derrick at the  
20 preliminary hearing as we would any other judge.

21 Q And so you did not believe there was a reason to  
22 ask him to recuse himself. Even if he had or even if  
23 you had presented that motion, the judge would have  
24 seen that as judge shopping because it would have  
25 eliminated and narrowed down to one judge. In your

1 opinion, that could have happened. And then,  
2 additionally, in terms of going to the prejudice of  
3 this, that search warrant still would have gone in  
4 front of another judge and the only prejudice to that  
5 would be to show that that judge would have refused to  
6 sign it, which brings me to my last question.

7 Before you took your client to trial, his  
8 indictments were true billed by a Grand Jury, correct?

9 A That is correct.

10 Q And the grand jury did make a determination on  
11 probable cause, correct?

12 A They did.

13 Q Okay. So separate and aside from what judge  
14 reviewed the warrant to begin with, the grand jury did  
15 have an opportunity to review and did find sufficient  
16 probable cause for those indictments to be true billed?

17 A That statement is exactly correct.

18 Q Do you remember if you asked for concurrent  
19 sentencing at the sentencing portion of this trial?

20 A Of course I remember. I would never ask for a  
21 consecutive sentence for a client.

22 Q And so the judge did end up sentencing him to  
23 consecutive time, but you asked the judge for  
24 concurrent time, correct?

25 A I asked the judge for concurrent time. I may not

1 have used that particular word, "concurrent time," but  
2 certainly a lawyer is not going to go before a  
3 sentencing judge asking for anything other than,  
4 "Judge, please run all these sentences concurrent."

5 Q And, in fact, on page 409 of the transcript, you  
6 state to the judge, "And certainly I ask you not to run  
7 that consecutively and certainly run all those  
8 sentences concurrently and allow Mr. Temple to serve  
9 his time that way," correct?

10 A Yes. We did that -- I did ask that question.

11 Q In the sentencing portion what -- describing it  
12 generally, what was your client's criminal history that  
13 the sentencing judge had before him in deciding what  
14 the sentence was in this case?

15 A Bad.

16 Q Okay. Thank you.

17 Please answer any questions that Mr. Welborn has  
18 for you.

19 MR. WELBORN: May it please the court.

20 CROSS-EXAMINATION

21 BY MR. WELBORN:

22 Q Mr. Rosemond, you stated a little while ago that  
23 if the drugs had been suppressed, there would be no  
24 trial. There would be no conviction; is that correct?

25 A That's correct.

1 Q And you know and are aware that my client did  
2 appeal this case and it was affirmed by the court of  
3 appeals. I guess you had seen that?

4 A I've seen it -- you said it for the first time  
5 today.

6 Q And you are aware, then, that they affirmed it  
7 because they made a statement that making a motion in  
8 limine to exclude evidence at the beginning of a trial  
9 does not preserve an issue for review because a motion  
10 in limine is not a final determination?

11 A That's an accurate statement of law.

12 Q And you stated a minute ago that you felt that he  
13 had already -- it was a final ruling from the judge; is  
14 that correct?

15 A If memory serves me correct, yes.

16 Q Can you explain to the court how, then, if it were  
17 a final ruling, the judge would once again ask if  
18 there's any objection to the admission of these drugs?

19 A I can explain it by probably had it -- you know,  
20 certainly I would tend to think that Judge Macaulay's  
21 happiness to always ask that question during the middle  
22 of trial and certain times when they're trying to admit  
23 any evidence. Having had many trials with Judge  
24 Macaulay, I do believe that he would either say or  
25 indicate that there's no need to make contemporaneous

1 objections later on in the trial.

2 Q And in spite of that being your experience with  
3 him, the court of appeals still found that had not been  
4 a final determination. You would agree with that,  
5 wouldn't you?

6 A If that's what the court of appeals' finding is, I  
7 would say yes.

8 Q And you would agree on page 248 of the transcript  
9 that -- and I'm just going to quote -- that there is a  
10 question from the judge about any objection to  
11 admission of evidence which would have been the drug  
12 evidence, and you stated, "No objection, Your Honor."  
13 You don't disagree with that, do you?

14 A I do not disagree with that.

15 Q And so would it be fair to say, Mr. Rosemond, that  
16 perhaps you made a mistake on hearing the judge or  
17 feeling that maybe it was a finalized decision when in  
18 reality it wasn't at that point a final decision?

19 A It would be fair to say that on March 19, 2013, I  
20 felt like it was a final decision as to the admission  
21 of evidence when he made it pretrial.

22 Now, as of today, as you look at this dry  
23 recollection of the day's events or the transcript, I  
24 would say one can draw that conclusion.

25 Q I know you did the best you could, Mr. Rosemond.

1 We have caught the fog of battle at times. But you  
2 would have to agree, though, that still it wasn't --  
3 that issue was not preserved for appellate review when  
4 you say "no objection"?

5 A I would have to agree with that because the court  
6 of appeals said that. Now, when you say, "You did the  
7 best you could," Mr. Temple and I did much better than  
8 the best we could. We walked into court that day  
9 looking at 37 years, and we walked out with eleven.  
10 Not only did I do an excellent job of representing  
11 Mr. Temple, he got a far better trial than he even  
12 imagined.

13 Q And I don't disagree with that, but by your own  
14 statement, this would have been no trial if those drugs  
15 would have been suppressed, correct?

16 A Absolutely not.

17 MR. WELBORN: Thank you. That's all I have.

18 MS. VALENZUELA: Your Honor, just a brief  
19 redirect.

20 REDIRECT EXAMINATION

21 BY MS. VALENZUELA:

22 Q Mr. Rosemond, you've been before Judge Macaulay  
23 before, correct?

24 A Yes.

25 Q Do you remember how Judge Macaulay addresses

1 objections at times? Do you have a transcript in front  
2 of you?

3 A I do have it.

4 Q So if you want to turn to page 274. When you  
5 objected at different points in the trial, did the  
6 court turn to the jury and spend a lengthy time  
7 explaining the different law related to why he was  
8 deciding to overrule or sustain an objection? And you  
9 can look at page 274 to 275 as an example.

10 A I would say that Judge Macaulay took a lengthy  
11 amount of time in this case at this issue with two  
12 pages of explanations to the jury as to what we're  
13 talking about.

14 Q Do you remember at different times, because I know  
15 this is a lengthy transcript, at different times there  
16 were, even in front of the jury, the judge would  
17 explain at length why he was ruling one way or the  
18 other on objections?

19 A I think Judge Macaulay takes an inordinate amount  
20 of time in a good way to explain to juries what's going  
21 on in the trial, whether or not it's a ruling or  
22 whether or not it's an evidentiary motion. He takes a  
23 great deal of care in making sure they understand, so  
24 yes, he does.

25 Q And as a defense attorney, when deciding when to

1 make objections and when not to make objections, do you  
2 take into account Judge Macaulay's, you know, efforts  
3 to make sure that he explains things to the jury in  
4 deciding what you want to be emphasized to the jury or  
5 what you don't want to be reemphasized to a jury?

6 A I mean, I think that's one factor that a trial  
7 counsel thinks about in the middle of trial, but you  
8 have other factors, too. I also have to think about  
9 how many times you have objected in the last couple of  
10 minutes. You have got to make sure that that jury over  
11 there does not get turned off by your constant  
12 objections. You have got to make sure that the  
13 admission of evidence is worthy of an objection or is  
14 it going to be harmless. So, I mean, those are things  
15 that we think about in terms of when do we object to  
16 admission of evidence.

17 Q Okay. Thank you.

18 RECCROSS-EXAMINATION

19 BY MR. WELBORN:

20 Q You do believe, though, you had a meritorious  
21 suppression reason why the drugs should have been  
22 suppressed?

23 A I do.

24 MR. WELBORN: Thank you.

25 THE COURT: All right.

1 Anything further?

2 MR. WELBORN: No.

3 MS. VALENZUELA: No.

4 THE COURT: All right.

5 Thank you, Mr. Rosemond.

6 Anything further from the State?

7 MS. VALENZUELA: I have some cases to hand up for  
8 the court. One of them is *State v. Bellamy*, 323 S.C.  
9 199. That deals with an informant and a search warrant  
10 affidavit. And turning specifically -- and I've  
11 highlighted the copy that I'll be handing up to you.  
12 But to pin cite 204, "A determination regarding  
13 Stanley's credibility need not be based solely on  
14 whether Agent Bach stated either by affidavit or by  
15 oral testimony that Stanley was a reliable informant."

16 And it further says, "Deficiency in veracity may  
17 be compensated for by a strong showing of basis of  
18 knowledge or by some other indicia of reliability."

19 And then certainly the court has before it as part  
20 of the record the briefing by appellate counsel and the  
21 State's briefs, and then, of course, the court's order.  
22 The appellate court did end up ruling that it wasn't  
23 preserved, but in order for you to find for the  
24 applicant on this case, you would actually have to find  
25 that there's prejudice here so that there is a

1 likelihood that even if this had been correctly  
2 preserved and it had gone up to the court of appeals,  
3 that the court of appeals would have had to agree that  
4 this entire case would have been suppressed based on  
5 that. And that's why I hand up that case and I ask the  
6 court to pay attention to the briefing that was done in  
7 both of those cases because it did reach the merits,  
8 the briefing reached the merits of the argument.

9 And then I would point out, I also have *State v.*  
10 *McClure*, 277 S.C. 432, which deals with an indictment  
11 and a preliminary hearing. State law is that once the  
12 indictment has been true billed by the grand jury, the  
13 preliminary hearing is not an issue anymore. So that  
14 has been brought up by the applicant. We would just  
15 point out that regardless of whether there should have  
16 been a motion to recuse, there was a true billed  
17 indictment in this case, so there is no prejudice so  
18 you don't even reach that point. But, additionally,  
19 there has been testimony that there was no reason to  
20 recuse.

21 And then, finally, I hand up *State vs. Cabiness*,  
22 *C-a-b-i-n-e-s-s*, 273 S.C. 56, which deals with judicial  
23 disqualification. And there a case was brought against  
24 the trial judge who had sentenced the defendant on  
25 previous criminal proceedings, and the defendant was

1 arguing that he should have to recuse himself before  
2 getting to get his next case. And the court there, the  
3 supreme court said that, no, regardless of whether a  
4 judge has sentenced a defendant in the past, he can  
5 still sentence him on different things, and we would  
6 argue that it's a similar situation in using the  
7 allegations that were brought up against the magistrate  
8 judge here.

9 The twin brother issue, we think there's been  
10 testimony even from the applicant that that dealt with  
11 separate charges and was not at issue here.  
12 Additionally, the 1989 Georgia conviction has taken up  
13 sufficient court time and has no merit. There has been  
14 a PCR on this. It's already been reviewed by a judge.  
15 In addition, it was reviewed by Judge Macaulay at  
16 sentencing. There is no legal basis for why that  
17 would -- why that would show any prejudice. But,  
18 additionally, applicant's counsel did actually raise  
19 that issue and could not have done more for the client  
20 if he had tried.

21 And then, finally, the last argument was that he  
22 should have asked for a concurrent sentencing, which  
23 it's established from the transcript that he did ask  
24 for concurrent sentencing.

25 THE COURT: All right.

1 Mr. Welborn, I'll give you the last word.

2 MR. WELBORN: Thank you. May it please the court.  
3 I'm arguing basically on closing based on one issue  
4 about this warrant. I've gotten a copy of the case  
5 that opposing counsel gave me. And they talk in this  
6 case about is there some other indicia of reliability.  
7 And, you know, we don't have any of that. We simply  
8 hope that that warrant, because it's in the transcript,  
9 I've read it, that this is a good guy. The law is  
10 pretty clear here if you don't make a motion and make  
11 sure it's preserved for review, then you don't have a  
12 good motion.

13 We have had evidence that the warrant was  
14 deficient. That's in the trial transcript itself. And  
15 that went up on appeal and it wasn't preserved. So,  
16 you know, we'd simply say on that issue, we've  
17 certainly presented where he should have some relief.  
18 I think we've presented suitable testimony as to his  
19 other issues, but I'm not going any further into it. I  
20 think we have given sufficient testimony. Thank you,  
21 Your Honor.

22 THE COURT: There are several things that I want  
23 to read. So, again, I'm going to take this under  
24 advisement, and I'll let the attorneys know my  
25 decision. Thank you.

1 MS. VALENZUELA: Thank you, Your Honor.

2 MR. WELBORN: Thank you, Your Honor.

3 (WHEREUPON, the hearing ended at 12:39 p.m.)

4 \*\*\*END OF REQUESTED TRANSCRIPT OF RECORD\*\*\*

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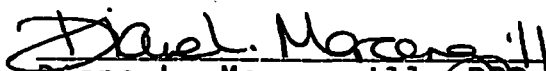
Certificate of Reporter

I, Diane L. Marcengill, Official Court Reporter for the Tenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of a portion of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Oconee County, South Carolina, on the 6th day of June 2016.

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

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

November 1, 2016

  
Diane L. Marcengill, RPR, CRR  
Circuit Court Reporter

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF OCONEE )

IN THE COURT OF COMMON PLEAS )  
 )  
FOR THE TENTH JUDICIAL CIRCUIT )

Dan L. Temple, )  
S.C.D.C. No. 240638, )  
 )  
Applicant, )

C.A. No. 2015-CP-37-0225

v. )

ORDER OF DISMISSAL

State of South Carolina, )  
 )  
Respondent. )

FILED OCONEE COUNTY, SC  
BEVERLY H. WHITEFIELD  
CLERK OF COURT  
2016 AUG 15 P 3:19

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed March 16, 2015. Respondent made its return on or about May 6, 2016. An evidentiary hearing was held on June 6, 2016, at the Oconee County Courthouse. Applicant was present and represented by Hugh W. Welborn, Esquire. Senior Assistant Deputy Attorney General Johanna C. Valenzuela represented Respondent.

Applicant and his trial counsel, E. Delane Rosemond, Esquire testified at the hearing. The Court had before it Applicant's trial transcript, the Oconee County Clerk of Court records, Applicant's appellate records, the South Carolina Department of Corrections records, the PCR application, and the Return.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Oconee County Clerk of Court. Applicant was indicted by the January 2013 term of the Oconee County Grand Jury for manufacture, distribution, etc. of

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cocaine base, third or subsequent offense (2013-GS-37-0184) and possession of other controlled substance in schedule I to V, second or subsequent offense (2013-GS-37-0185). R. Delane Rosemond, Esq., represented Applicant. On March 18-21, 2013, Applicant proceeded to a trial before the Honorable Alexander S. Macaulay and a jury. He was found guilty of the lesser included offense of possession of crack cocaine; and as indicted for possession of other controlled substance, second or subsequent. Judge Macaulay sentenced Applicant to a term of imprisonment for ten (10) years for possession of crack cocaine; and to a term of imprisonment for one (1) year possession of other controlled substance. These sentences were to be served consecutively.

A timely notice of appeal was filed and perfected on Applicant's behalf. Carmen Ganjehsani, Esq., represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Temple, Op. No. 2015-UP-061 (S.C. Ct. App. filed February 5, 2015). The Remittitur was issued on February 23, 2015.

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

This Court has had the opportunity to review the case law presented at the hearing, to review the record in its entirety, to hear the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required

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<sup>1</sup> Applicant's criminal history is also relevant. Although not charged in this application, Applicant pled guilty to voluntary manslaughter (2002-GS-03-0152) in Allendale County on August 23, 2004, for an incident occurring while in prison. Applicant was sentenced to eleven (11) years imprisonment and, upon his release, he began serving probation for 1997-GS-37-0089. After the jury found Applicant guilty of the charges he is challenging in this

by S.C. Code Ann. § 17-27-80 (2003).

**Ineffective Assistance of Counsel**

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing SCRCP 71.1(e)). Where the application alleges ineffective assistance of counsel as a ground for relief, 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, 286 S.C. at 442, 334 S.E.2d at 814.

First, the applicant must show that counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

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; see Strickland v. Washington, 466 U.S. 668, 688, 692, 104 S. Ct. 2052, 2065, 2067 (1984) ("[T]he

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application, Judge Macaulay revoked his probation and sentenced Applicant to five (5) years in prison. This was

defendant must show that counsel's representation fell below an objective standard of reasonableness [and] . . . any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."'); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) ("PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case.").

And "where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006 (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992))).

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052).

"Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Id. (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

This Court will now address each allegation of ineffective assistance of counsel:

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also to be served consecutively.

***I. Failure to preserve objection.***

Applicant argued that because Applicant's counsel failed to object, and therefore preserve, the admission of the drug evidence in his case, that trial counsel was ineffective. This failure to object has been held by the appellate courts to be ineffective assistance of counsel. However, Applicant failed to prove he was prejudiced by this failure to preserve. Applicant has not met his burden of establishing the magistrate's finding of probable cause and issuance of the search warrant would have resulted in the case being reversed had trial counsel objected during the trial in addition to making the argument in pretrial. State v. Bellamy, 323 S.C. 199, 205, 473 S.E.2d 838, 842 (Ct. App. 1996). The Court cannot make a finding that there is a reasonable probability of a different outcome; therefore, this claim fails.

***II. Failure to investigate the first indictment.***

Applicant has failed to present sufficient evidence of this allegation to meet his burden of proof.

***III. Failure to interview the twin brother.***

Applicant argues trial counsel was ineffective for failing to call his twin brother as a witness in his trial. Applicant testified that his twin brother, while fraternal, looks like him. Trial counsel testified he did not interview the twin brother because the charges that the State ended up proceeding to trial on involved law enforcement finding only Applicant and Applicant's friend in a hotel room with the drugs and arresting them on sight. Separate charges where Applicant's identity could have been challenged were not the charges involved at the trial. Applicant did not present any testimony from his twin brother at the hearing. This Court finds Applicant has failed

to prove how counsel's failure to call Applicant's brother as a witness could have affected the case and has thus failed to meet his burden of proof on this issue.

***IV. Failure to investigate the Georgia conviction for enhancement purposes.***

Applicant argued trial counsel was ineffective for not objecting to his prior conviction that arose out of Georgia. This conviction was presented to and considered by the sentencing judge and has been the subject of a prior post-conviction relief application. (Trial Tr. p. 410, l. 20 – p. 412, l. 13.) Furthermore, as the sentencing judge noted, even without the Georgia conviction, Applicant was two other convictions that would qualify. (Trial Tr. p. 418, ll. 2-11.) This Court finds Applicant has failed to meet his burden of proof on this allegation in light of the fact that the Court outlined at sentencing other convictions that triggered enhanced sentencing for Applicant.

***V. Failure to ask the Magistrate to Recuse himself at the Preliminary Hearing.***

Applicant argued his trial counsel was ineffective for failing to object to the magistrate judge presiding over his preliminary hearing. Applicant has failed to meet his burden of proof on this allegation. This has no bearing on Applicant's conviction. The State indicted Applicant, rendering the Preliminary Hearing moot. See State v. McClure, 277 S.C. 432, 434, 289 S.E.2d 158, 160 (1982) ("The indictment itself constitutes a finding of probable cause and thus avoids the need for a preliminary hearing." (citing U.S. v. Werbrouck, 589 F.2d. 273 (7th Cir. 1978))). This Court finds there was no prejudice for this alleged ineffective assistance of counsel.

***VI. Failure to request concurrent sentences***

Applicant argues his trial counsel was ineffective for failing to request concurrent sentences. The trial transcript shows trial counsel did in fact request the sentencing court impose concurrent sentences. (Trial Tr. p. 409, ll. 18-21 ("I ask you not to run that consecutively and certainly run all those sentences concurrently and allow [Applicant] to serve his time that way.")) Therefore, Applicant's claim fails.

#### All Other Allegations

As to any additional allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds Applicant has abandoned any such allegations.

#### CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial or sentencing proceedings. Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.


This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

#### **IT IS THEREFORE ORDERED:**

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


2. That Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 12 day of August, 2016.

  
R. Scott Sprouse  
Presiding Judge  
Tenth Judicial Circuit

FILED OCONEE COUNTY, S  
BEVERLY H. WHITFIELD  
CLERK OF COURT  
20 16 AU 6 15 P 3: 4

Wallula, South Carolina.

**A TRUE COPY**  
AUG 15 2016  
  
CLERK OF COURT - OCONEE COUNTY

*Hugh W. Welborn*

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September 7, 2016

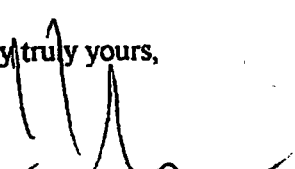
South Carolina Office of Appellate Defense  
P. O. Box 11589  
Columbia, South Carolina 29211-1589

In RE: Dan L. Temple, #240638 vs. State of South Carolina  
Case #: 2015-CP-37-0225

Dear Sir or Madam:

I was the post-conviction relief attorney for Dan L. Temple, #240638. Mr. Temple recently filed a pro se Rule 59(e) motion with the Clerk of Court of Oconee County, a copy of which I have enclosed. Mr. Temple had requested I file a Rule 59(e) motion. I had several conversations and letters with Mr. Temple addressing this matter, since he wanted me to file a Rule 59(e) by letter dated July 15, 2016 even prior to the order being prepared, no matter what the order stated. I believed his motion to be frivolous and did not file one. Everything in Mr. Temple's PCR application and agreed upon amendments was addressed at his PCR hearing before the Honorable R. Scott Sprouse on June 6, 2016. Obviously, I could not file a motion I knew was frivolous. Accordingly, the Order of Dismissal was filed with the Court on August 15, 2016 and Mr. Temple was sent his copy on August 25, 2016. I filed the Notice of Appeal, Proof of Service and sent copies to all concerned parties at that time. I no longer represent Mr. Temple and therefore am forwarding any correspondences from him to your office. You may copy Mr. Temple with this letter if you believe it is appropriate, but I desire no further contact with him and have advised him of this. I am copying Johanna C. Valenzuela, Attorney for the Office of Attorney General and Beverly H. Whitfield, the Oconee County Clerk of Court with this letter to advise that I do not continue to represent Mr. Temple.

Very truly yours,

  
Hugh W. Welborn

HWW/sba  
Enclosure

cc: Johanna C. Valenzuela, Office of Attorney General  
Beverly H. Whitfield, Oconee County Clerk of Court

RECEIVED

SFP 9 2016

**RECEIVED**

AUG 26 2018

MAILROOM  
TURBEVILLE CI.

CA. NO. 2015-CP-37-0221

Dan Lavert Temple SCDC # 240638 Has served a copy of his Motion Rule 59<sup>e</sup> New Trials Alter or Amend Judgement. to Johanna C. Valenuela Senior Assistant Deputy Attorney General. Office of the Attorney General P.O. Box 11549 Columbia, SC 29211 and the same has been served to the Oconee County Clerk of Court PO Box 678 Walhalla, SC 29691 also be advise that a copy of the same has been forward to The South Carolina Supreme Court. Clerk Court. Daniel E Shearduse PO Box 11330 Columbia, SC 29211. To Place in my record.

Thankyou

STATE OF South Carolina  
County of Oconee

STATE OF South Carolina  
v Respondent  
Dan Laveret Temple  
SCDC # 240638  
Applicant,

In The Court of Common Pleas  
For The Tenth Judicial Circuit  
CA NO. 2015-CP-37-0225  
Rule 54<sup>e</sup> New Trials Motion  
to Alter or Amend Judge's

This Matter comes before the Court by way of  
the applicant PCR filed March 16, 2015. Respondent  
made its return on May 6, 2016. An Evidentiary hearing  
was held on June 6, 2016 at the Oconee County Courthouse.  
Applicant was appointed by Hugh W. Welborn, Esquire  
Senior Assistant Deputy Attorney General. Johanna C.  
Valenzuela represented Respondent.

Applicant and his trial counsel, E. Delane Roseman, Esquire  
testified at the hearing.

### Procedural History

Applicant is presently confined in the South Carolina  
Department of Correction pursuant to order of commitment  
of the Oconee County of Court. Applicant was indicted by the

January 2013 term of the Oconee County Grand jury for Manufacture, distribution, ect. of cocaine base, third or subsequent offense (2013-GS-37-0184) and possession of other controlled substance in Schedule I to V, second or subsequent offense (2013-GS-37-0185). R. Delane Rosemond, E.Sq., represented Applicant. On March 18-21, 2013, Applicant proceeded to a trial before the Honorable Alexander S. Macaulay and a jury. He was found guilty of the lesser included offense of possession of crack cocaine; and as indicted for possession of other controlled substance, second or subsequent. Judge Macaulay sentenced Applicant to a term of imprisonment for ten (10) years for possession of crack cocaine; and to a term of imprisonment for one (1) year possession of other controlled substance. These sentence were to be served consecutively.

A timely notice of appeal was filed and perfected on Applicant behalf. Carmen Ganjehsani E.Sq., represented Applicant on appeal.

The South Carolina Court of Appeal affirmed the applicant conviction State v Temple Op. NO 215-up-061 (SC Ct App Filed February 5, 2015). The Remittitur was issued on February 23, 2015.

On June 6, 2016, The applicant testified at the PCR hearing to the following issues.

1. Ineffective assistance of Counsel

- a. Trial Counsel failed to inform the trial judge, at the suppression hearing that Counsel reviewed the alleged controlled buys video with the applicant, before trial in that's alleged in the search warrant affidavit dated July 24, 2012. That led to the search of applicant Motel room 103 and there was not a controlled buy in the video that could ~~not~~ not be established. 3 of 14

b. Trial Counsel was ineffective for not motioning to the court to recuse, Magistrate Judge, William F. Derrick from presiding over the preliminary hearing dated October 29, 2012 since he was the same judge, Magistrate who signed off on the search warrant affidavit dated, July 24, 2014 that led to the applicant conviction.

c. At the outset of trial, Trial Counsel filed a motion in limine seeking the suppression of the evidence discovered during the search. Where the affidavit in support of the search warrant was not supported by probable cause and lacked any information as to the informant's reliability.

Trial Counsel <sup>failure</sup> ~~was ineffective~~ to properly object to the admission of drug evidence such that the

Suppression was not preserved for appellate review.

## ARGUMENTS

ONE.

(2) During pre-trial Motion, defense Counsel moved to suppress the drugs found in the applicant Motel room 103 where the affidavit in support of the Search warrant was not supported by probable cause and lacked any information as to the informant's reliability Tr. 42 II. 7-16: 46 1.7- 47, 1.2. During the pre-trial hearing, the State relied upon State v. Dupree 354. SE 676, 583. SE 2d 437. (Ct. App. 2003) in support of its argument that the Magistrate had a substantial basis for concluding probable cause existed to issue the Search Warrant Tr. 47. II, 4-17. In Dupree the Court observed that "an informant's controlled

buy of the drugs can constitute Probable cause sufficient for a Magistrate to issue a warrant Id at 687,583 SE 2d at 443. The Court went further to state: If the controlled buy was properly conducted, it alone can provide facts sufficient to establish Probable cause for a search warrant Id at 689,583 SE 2d at 444.

Trial Counsel did argue that there was no indication in the search warrant that the informant receive drugs from applicant in a properly conducted buy Tr. 48, l. 13-49  
1.10 The Trial Court disagreed and denied the applicant motion to suppress the drug evidence Tr. 57, ll 2-3

Trial Counsel failure to inform the trial judge at the suppression hearing, that Counsel reviewed the alleged controlled buy that's listed on the dates July 17, 2012 and July 23, 2012 in the search warrant a Affidavit dated July 24, 2012 before trial

and there was NO controlled buy from the video that could be established to support the search warrant Affidavit. Trial counsel denied the applicant the right to inform the trial judge of all the facts surrounding the "alleged" video of the controlled buy that clearly showed, that there wasn't a controlled buy that was properly conducted. applicant was prejudice by counsel lack of effectiveness at trial had counsel informed the trial court of this information, the applicant believe the Motion to suppress on March 18, 2013 would have been granted. and the out come would have been different the applicant 4th amendment right was violated.

## ARGUMENT

two

(b) On October 29, 2012 The applicant went before Magistrate judge William F. Derrick, for his preliminary hearing for distribution of crack cocaine to an undercover operative, on two occasions, on July 17, 2012 and distribution of crack cocaine to an undercover operative on July 23, 2012. All above states listed in the Search warrant affidavit, dated July 24, 2012.

The applicant also went before Magistrate, judge William F. Derrick on October 29, 2012 for possession with intent to distribute crack cocaine and possession of other controlled substance, Schedule I-V. from the illegal search of his Motel room 103 dated July 25, 2012.

The applicant "alleged" Trial Counsel was ineffective, because he should have asked that Magistrate Judge William F. Derrick to recuse himself. Since he was the Magistrate Judge who issued the search warrant, by the Magistrate Judge presiding over the Preliminary hearing prejudice the applicant, the Magistrate had first hand knowledge of the alleged facts pertaining to the search warrant affidavit, he couldn't have been detached, <sup>are</sup> ~~or~~ impartial by the Magistrate Judge recusing

himself from presiding over the Preliminary hearing, and allow another Magistrate judge to preside over the hearing. Could have increased the applicant's chance of having all, or some of his charges dismissed.

Three

C. Trial Counsel failure to object to the admission of the drug evidence at trial and preserve the issue for appellate review, prejudice the appellate, the South Carolina Court of Appeals affirmed the applicant's conviction, and was not able to rule on the motion to suppress the drug evidence. Also Counsel failure to object led the jury to believe that all the drugs were the applicant's, when his codefendant was charged jointly for the drugs, and testified for the state, had Counsel made a timely objection the applicant would have received a different outcome. His 4th Amendment was violated.

The applicant has had the opportunity to review the court order of dismissal dated August 12, 2016. The applicant alleges, the order of dismissal doesn't address the issues, applicant testified to at the PCR hearing. The order of dismissal has side step the applicant testimony. The PCR transcript will reflect the issues raised at the hearing. Also please take notice, that the record will reflect that PCR counsel

120F14

Hugh W. Welborn appointed to represent the applicant at the PCR hearing dated June 6, 2016. However Counsel was ineffective at the hearing. Counsel failed to research and investigate issues and raised all available grounds for relief under rule 71.1.d. The applicant must be seen to be without Counsel at the PCR hearing.

## IN CONCLUSION

The applicant respectfully ask this Court to address each issues that the applicant testified to at the PCR hearing accordance to title 17-27-80 and make a specific finding of fact on each issue raised at the PCR hearing. see also PRUITT v. STATE cite as 423 S.E.2d

127 (S.C. 1992) Petitioner shall be entitled to file an amended application if necessary and the order shall address all issues properly raised at the hearing. McCray v. State 305 S.C. 329, 408 S.E.2d 241 (1991) S.C. Code Ann 17-27-80 (1991)

STATE OF SOUTH CAROLINA  
COUNTY OF OCONEE

Dan L. Temple, SCDC # 240638

Applicant,

v.

State of South Carolina,

Respondent.


IN THE COURT OF COMMON PLEAS

CASE NO.: 2015-CP-37-0225

ORDER DENYING APPLICANT'S MOTION  
FOR RECONSIDERATION

After careful consideration of the filings of Applicant and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Plaintiff's Motion, pursuant to Rule 59, SCRPC,<sup>1</sup> is DENIED.

AND, IT IS SO ORDERED.

  
R. SCOTT SPROUSE  
Judge, Tenth Judicial Circuit

FILED OCONEE COUNTY, SC  
BEVERLY H. WHITFIELD  
CLERK OF COURT  
2016 OCT - 7 P 4: 13

Walhalla, South Carolina  
October 7, 2016

A TRUE COPY  
OCT - 7 2016  
CLERK OF COURT - OCONEE COUNTY

<sup>1</sup> The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRPC.

WITNESSES

Tim Hunnicutt, Seneca Police Dept.

*[Signature]*  
Frank Wooten

ARREST WARRANT NUMBER

2012A3720300036

ACTION OF GRAND JURY

True Bill

*[Signature]*

Foreperson of Grand Jury

Date: Jan 23, 2013

VERDICT

Guilty of possession of crack

*[Signature]* 3/21/13  
Foreperson of Petit Jury  
Date:

DOCKET NO. 2013GS37 00184

The State of South Carolina

County of Oconee

COURT OF GENERAL SESSIONS

JAN 23 2013

Term

THE STATE

vs.

Dan Lavert Temple

LSS

Indictment for

DRUGS/MANUFACTURE, DISTRIBUTION, ETC.  
OF COCAINE BASE, 3RD OR SUBS

SC Code: 44-53-0375 (B) (3)

CDR Code: 3039

2013 JAN 28 AM 8 54  
FILED  
CLERK OF COURT  
LYN H. WHITFIELD  
E. SC

ENTERED  
COMPLETED

STATE OF SOUTH CAROLINA )  
COUNTY OF Oconee )

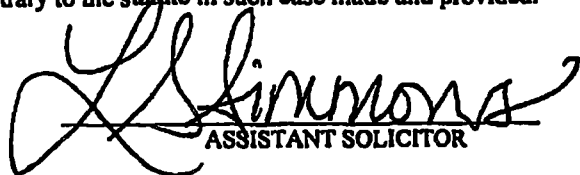
## INDICTMENT

At a Court of General Sessions, convened on JAN 23 2013, the Grand Jurors of Oconee County present upon their oath:

**DRUGS/MANUFACTURE, DISTRIBUTION, ETC. OF COCAINE BASE,**  
**3RD OR SUBS**

That on or about July 25, 2012, in Oconee County, South Carolina, the Defendant, Dan Lavert Temple, did possess with intent to distribute, dispense, or deliver a quantity of Crack Cocaine, a schedule II controlled substance under provisions of Section 44-53-110, et seq., Code of Laws of South Carolina (1976), as amended, or did otherwise aid, abet, attempt, or conspire to manufacture, distribute, dispense, or deliver Crack Cocaine, all in violation of Section 44-53-375, Code of Laws of South Carolina, (1976), as amended.

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

  
ASSISTANT SOLICITOR

DOCKET NO. 2013GS37 00185

WITNESSES

Tim Hunnicutt, Seneca Police Dept.

*[Signature]*  
Franz Wooten

The State of South Carolina  
County of Oconee

COURT OF GENERAL SESSIONS  
JAN 23 2013

Term

ARREST WARRANT NUMBER

2012A3720300037

THE STATE

vs.

Dan Lavert Temple

ACTION OF GRAND JURY

True Bill

LSS

*[Signature]*  
Foreperson of Grand Jury  
Date Jan 23, 2013

Indictment for

VERDICT

Guilty

DRUGS / POSS. OF OTHER CONTROLLED SUB.  
IN SCHED. I TO V - 2ND OR SUB. OFFENSE

SC Code: 44-53-0370(d)(2)  
CDR Code: 0180

*[Signature]*  
Foreperson of Petit Jury  
Date 3/21/13

FILED OCOONEE, SC  
B VERLY H. WHITFIELD  
CLERK OF COURT  
2013 JAN 28 AM 8 54

ENTERED  
JB  
COMPUTER

STATE OF SOUTH CAROLINA )

INDICTMENT

COUNTY OF Oconee )

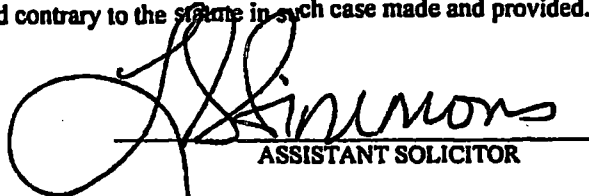
JAN 23 2013

At a Court of General Sessions, convened on \_\_\_\_\_, the Grand Jurors of Oconee County present upon their oath:

**DRUGS / POSS. OF OTHER CONTROLLED SUB. IN SCHED. I TO V -**  
**2ND OR SUB. OFFENSE**

That the Defendant, **Dan Lavert Temple**, on or about **July 25, 2012**, in Oconee County, South Carolina, did knowingly or intentionally possess a quantity of Xanax, a schedule IV controlled substance under provisions of Section 44-53-110, et seq., Code of Laws of South Carolina (1976), as amended, such possession not having been authorized by law, all in violation of Section 44-53-370, Code of Laws of South Carolina (1976), as amended.

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

  
ASSISTANT SOLICITOR