

**IN THE STATE OF SOUTH CAROLINA
In The Supreme Court**

**APPEAL FROM YORK COUNTY
Court of Common Pleas**

The Honorable R. Lawton McIntosh, Presiding in York County

Case No. 2016-CP-46-02740

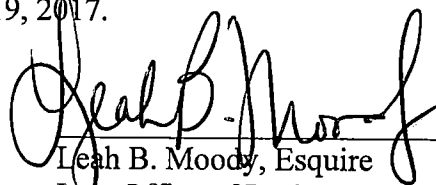
Elder Leach , #197673, Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Elder Leach appeals the order of the Honorable R. Lawton McIntosh, dated September 15, 2017 and mailed on September 18, 2017. Appellant received written notice of entry of the final order on September 19, 2017.



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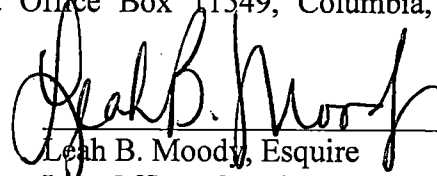
Elder Leach , #197673, Appellant,

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Justin Hunter by depositing a copy of it in the United States Mail, postage prepaid, on September 20, 2017, addressed to its attorney of record, Justin Hunter, Post Office Box 11549, Columbia, South Carolina, 29211-1549.



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September 20, 2017

Cc Elder Leach
Justin Hunter, Esq.
David Hamilton, Clerk of Court, York County
Sharon Graham, SCCID

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP4602740**

Elder P Leach		South Carolina State Of	
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PLAINTIFF(S)	DEFENDANT(S)
Submitted by: Justin Hunter	Attorney for: <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/R. Lawton McIntosh
Circuit Court Judge

2155
Judge Code

9/15/2017
Date

For Clerk of Court Office Use Only

This judgment was entered on September 12, 2017, and a copy mailed first class or placed in the appropriate attorney's box on September 12, 2017, to attorneys of record or to parties (when appearing pro se) as follows:

Leah B. Moody 235 E. Main St., Ste 115 PO Box 1015 Rock Hill, SC 29730

Justin James Hunter PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCP.

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

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

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 Elder P. Leach,)
 S.C.D.C. No. 197673,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 OF THE SIXTEENTH JUDICIAL CIRCUIT

2016-CP-46-2740

ORDER OF DISMISSAL

FILED-RECEIVED
 2017 SEP 15 PM 4:10
 DAVID HAMILTON
 C.C.P. & CS
 YORK COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed September 16, 2016. Respondent made its Return on or about December 22, 2016. An evidentiary hearing into the matter was convened on August 1, 2017, at the Moss Justice Center in York, South Carolina. Applicant was present at the hearing and represented by Leah Moody, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Michael Brown, Esquire, also testified. Assistant Appellate Defender John Strom and Assistant Solicitor Matthew Shelton testified. This Court had before it a copy of Applicant's records from the York County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's PCR Application, and Respondent's Return.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for York County. Applicant was indicted by the March 2014 term of the Grand Jury for York County for one of Trafficking in Crack Cocaine,

28-100 grams, 3rd offense (2014-GS-46-00679), and Trafficking in Crack Cocaine, 10-28 grams, 3rd offense (2014-GS-46-00678). Applicant was represented by Michael Brown Jr., Esquire (hereinafter "Trial Counsel"). Applicant proceeded to a jury trial and on May 14, 2014, he was found guilty as indicted. Applicant was sentenced by the Honorable John C. Hayes, III, to life imprisonment without parole for both charges, to be served concurrently.

Applicant filed a timely notice of appeal. Applicant's was represented by John Harrison Strom, Esquire, (hereinafter "Appellate Counsel") who filed an Anders¹ brief. The South Carolina Court of Appeals dismissed Applicant's appeal in an unpublished opinion submitted August 1, 2015, and filed October 21, 2015. State v. Leach, 2015-UP-499 (S.C. Ct. App. 2015). The Remittitur was returned on November 6, 2015.

PCR Application

In his application for post-conviction relief, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel
 - a. Failure to properly challenge prior convictions
 - b. Trial counsel gave erroneous advice on which Applicant based his decision not to testify
 - c. Failure to show buy bust procedure was defective
 - d. No true billed indictment in Rule 5 Brady Motion
 - e. Did not prove chain of custody was defective once drugs were placed on the ground
 - f. Failure to have video evidence authenticated
 - g. Failure to suppress video evidence
 - h. Allowed video/audio evidence to be muted and deleted during and before trial without objection
 - i. Allowed key witness to authenticate a video, that was different from initial statement
 - j. Allowed unauthenticated video into evidence without objection at trial
 - k. Failure to present different video from same day "there are two videos different from each other"
 - l. Failure to suppress video evidence which had different date and time of actual event

¹ 386 U.S. 738 (1967).

- m. Improper statement to the jury in closing argument
 - n. Failure to present a defense
 - o. Trial counsel never was presented a true billed indictment in Rule 5 Brady, only 1st offense indictments were presented
 - p. Trial Counsel allowed an amendment to indictment at the end of trial
 - q. Failure to challenge prior uncounseled conviction used to secure life without parole conviction
 - r. No motion to suppress evidence or statements
 - s. Trial counsel gave wrong legal advice on which Applicant based his decision not to testify
 - t. Counsel failed to strike pro-prosecution juror
 - u. Sufficiency of charging indictment
 - v. Essential element required to indictment
 - w. Attorney left hearing aid day 2 of trial
 - x. Failure to challenge jury selection or voir dire
2. Ineffective Assistance of Appellate Counsel
- a. Failed to present issues of merit
 - b. Failed to present directed verdict issue
 - c. Failed to present wrong charge to the jury
 - d. Failed to present issue on plain view was defective
 - e. Failed to present issues of subject matter jurisdiction
 - f. Lesser included offense jury instruction not presented to jury
 - g. Jury instruction on Confidential Informant not presented to jury
 - h. Trial Court's duty to assess conflict of interests
 - i. Failed to present merit issue on warrantless search and seizure
3. Prosecutorial Misconduct
- a. Due process violation
 - b. No true billed indictment in Rule 5 Brady
 - c. True Billed outside scope of General Sessions Court...indictment never presented to Grand Jury
 - d. Sufficiency of the charging document
 - e. Essential element required to indictment
 - f. Amendment to indictment after trial is over
 - g. Prosecutor did not present sufficient evidence to support claim that prior conviction was a crime of violence in support of career offender enhancement
 - h. Allowed primary witness false testimony
 - i. Conflict of interest
 - j. Failure to present sufficient evidence of an essential element of trafficking in crack cocaine

II. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the

application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following

findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Counsel's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Ineffective Assistance of Trial Counsel

Failure to properly challenge prior convictions

Applicant alleged that Trial Counsel failed to properly challenge his prior convictions. He testified that he had a prior conviction in 1992 that was not a serious offense. He testified that Trial Counsel's associate, Sean Cronin, represented him when he received the State's notice to seek life without parole (LWOP) and did not challenge the priors.

Trial Counsel testified that Applicant had two prior serious offenses and the State presented him with certified copies of the convictions. The record reflects that the State's notice to seek LWOP was made a court's exhibit at sentencing. The State sought LWOP based on Applicant's two prior serious offenses: his 1992 conviction for distribution of crack and distribution of crack within proximity of a park and his 2005 conviction for trafficking crack cocaine (10-28 grams), second offense. Trial Transcript p. 314 ll. 9-25. Trial Counsel told the trial judge that he did not dispute Applicant's prior record and the State had provided him with copies of the convictions. Trial Transcript p. 315, ll. 10-11.

This Court finds that Applicant's allegation is without merit. This Court finds that Trial Counsel and Assistant Solicitor Shelton provided credible testimony that Applicant had two prior serious convictions that would form the basis of the State's LWOP notice. The record reflects that the State alleged Applicant had two prior serious convictions for distribution of crack cocaine within proximity of a park (1992-GS-46-4099) and trafficking crack cocaine (10-28

grams), second offense (20015-GS-46-0694). Applicant has failed to show that either prior conviction was not “serious” or that his prior convictions were improperly used under § 17-25-45. This Court finds that distribution of crack cocaine within proximity of a park and trafficking crack cocaine are both enumerated as serious convictions under § 17-25-45. Applicant’s prior convictions were properly used as predicate offenses for LWOP and Trial Counsel was not deficient for failing to challenge these prior convictions. Applicant has failed to show that he was prejudiced by Trial Counsel’s actions and this allegation must be dismissed.

Trial counsel gave erroneous advice on which Applicant based his
decision not to testify

Applicant testified that Trial Counsel told him that the State could use his prior convictions against him when he testified. Trial Counsel testified that their trial strategy was for Applicant not to testify given his prior record.

This Court finds that Applicant has failed to show that Counsel gave deficient advice that caused Applicant to decide not to testify. To the extent that Trial Counsel informed Applicant that the State could impeach him with his prior record if he chose to testify, this Court finds that such advice was not deficient. In his colloquy with Applicant, the trial judge also informed Applicant that the State may impeach him based on his prior record and Assistant Solicitor Shelton informed Applicant and the trial judge of Applicant’s possible impeachable offenses. Trial Transcript p. 241-243. Applicant told the trial judge that he understood that these offenses may be used to impeach him and that he had no questions about it. Trial Transcript p. 243. This Court finds that Applicant has failed to show that Trial Counsel provided deficient advice regarding Applicant’s prior convictions. Rule 609 of the Rules of Evidence allows prior convictions to be used for impeachment purposes in certain circumstances and the trial judge correctly advised Applicant of this fact. Furthermore, this Court finds that Applicant has failed to

show that he was prejudiced by Trial Counsel's actions as he has failed to show that the outcome of his trial would have been different had Counsel given different advice regarding Applicant's prior convictions or his right to testify. Accordingly, this allegation must be dismissed.

Failure to show buy bust procedure was defective

Applicant testified that the buy bust procedure was defective when the police officers lost sight of the Confidential Informant ("CI") during the buy. He testified that Trial Counsel should have challenged this deficiency in the procedure, but also testified that Trial Counsel brought this up during trial. Trial Counsel testified that he attacked the gap in the video at trial, pointing out that the CI was out of the officers' surveillance for period of time. Trial Counsel testified that attacking this point was his best defense.

This Court finds that Applicant has failed to show that Trial Counsel's actions were deficient. This Court finds that Trial Counsel testified that he attacked the buy bust procedure at trial, including arguing to the jury in his closing argument that the CI was out of view of any police surveillance for six minutes. See Trial Transcript p. 286. This Court finds that Applicant has failed to show how Trial Counsel's arguments were deficient or what Counsel should have otherwise argued. This Court finds that attacking the buy bust procedure and the CI's absence was part of Trial Counsel's defense strategy and ultimately a question for the jury. This Court finds that Applicant has failed to meet his burden of proving that Trial Counsel was deficient and he has failed to show that the outcome of the trial would have been different had Trial Counsel made different arguments. Accordingly, this allegation must be dismissed.

Indictment issues

Applicant alleged that Trial Counsel was ineffective for failing to object that there were no true-billed indictments for his charges. He testified that he did not receive discovery for over

a year after he was arrested. He testified that Trial Counsel was ineffective because he allowed the State to amend his indictment at the end of the trial to reflect a third offense when he was originally presented an indictment for first offense charge. Applicant testified that Trial Counsel knew that the CDR codes on the indictments were for a first offense. He testified that Trial Counsel told him that the indictment carried ten years and the Court did not have jurisdiction to try him for the third offense charge.

Trial Counsel testified that the initial indictment with the CDR code referencing a first offense was probably presented to them prior to the State's notice to seek LWOP. He testified that the discrepancies in CDR codes are due to initially being presented with pre-filed indictments prior to the presentment to the grand jury. Trial Counsel testified that he probably told Applicant the potential penalty based on the warrants before the State's LWOP notice. Trial Counsel testified that he gives advice based on the criminal statutes, and further testified that any issues Applicant has with the indictments did not affect his sentencing.

Assistant Solicitor Matthew Shelton testified that the CDR codes on the true-billed indictments were accurate. He testified that he did not recall giving Trial Counsel unfiled indictments but may have gave him initial drafts prior to presenting the case to the grand jury. He testified that the grand jury was presented with accurate indictments.

This Court finds that Applicant has failed to meet his burden of proving Trial Counsel was ineffective for his actions concerning Applicant's indictments. First, this Court finds that Applicant's indictments are both stamped "true billed" with the signature of the grand jury foreperson and the date "3/20/2014." Applicant's allegation that Trial Counsel failed to object that there were no true-billed indictments for his charges must be dismissed.

To the extent that Applicant alleges that Trial Counsel was ineffective for failing to argue

that only first-offense indictments were presented, this Court finds that this allegation must be dismissed. Trial Counsel and Assistant Solicitor Shelton testified that Applicant was initially presented with pre-filed indictments that may have listed the CDR code for trafficking first offense. This Court finds that Applicant and Trial Counsel both received the true-billed indictments to trafficking third offense such that Applicant was put on notice of the charges against him. This Court finds that Applicant has failed to show that Trial Counsel's actions were deficient. This Court further finds that Applicant has failed to show that he was prejudiced by Trial Counsel's actions. This Court agrees with Trial Counsel's testimony that Applicant's sentence would not have changed if the charge was a first offense or second offense because he was noticed for a sentence of LWOP. As Applicant has failed to meet his burden, this allegation must be dismissed.

Furthermore, Applicant has failed to meet his burden of proving that Trial Counsel was ineffective for allowing an amendment to the indictment at the end of trial. This Court finds Applicant has provided no evidence that his indictments were altered or amended at the end of his trial. Thus, he has failed to show that Counsel was deficient or that the outcome of his trial would have been different. Accordingly, this allegation must be dismissed.

Did not prove chain of custody was defective once drugs were placed on the ground

Applicant testified that the chain of custody for the drugs was defective because the CI placed the drugs on the ground when the police showed up. He testified that the police officers stated they found the drugs on the ground and Trial Counsel should have objected. Trial Counsel testified that he did question the State's witnesses on this fact.

This Court finds that Applicant has failed to prove that Trial Counsel was ineffective for failing to prove a defective chain of custody as the drugs were placed on the ground by the CI.

This Court finds that testimony was elicited from Trial Counsel and the State that when police busted the drug transaction, the CI placed a bag containing drugs on the ground and this bag was immediately recovered by Officer Robin Gardner. See Trial Transcript pp. 139-146. Officer Gardner testified that he secured the bag and maintained control of it in a sealed evidence bag until he gave it to another officer at the law center. See Trial Transcript pp. 147-148. Applicant has failed to show that there were any defects in the chain of custody and that Trial Counsel's actions were deficient. Additionally, Applicant has failed to show that the outcome of his trial would have been different had Trial Counsel acted differently regarding to the chain of custody. Accordingly, this allegation must be dismissed.

Video Authentication

Applicant made several allegations concerning the CI buy video. He alleged that Trial Counsel was ineffective for failing to have the videotape authenticated and for allowing an unauthenticated video into evidence at trial. He testified that the CI testified at trial to a videotape that did not match what actually happened. He testified that the video played at trial did not show a drug transaction. This Court finds that Applicant has failed to prove that Trial Counsel was ineffective for failing to have the videotape from the CI buy authenticated and for allowing an unauthenticated video into evidence without objection. The record reflects that the CI authenticated the video and audio of the CI buy before the State entered it into evidence. Trial Transcript p. 111, l. 9 -- 112, l. 20. The CI testified at trial that he was equipped with audio and video recording equipment for the buy, he reviewed the video and audio recording, and he believed it was a true and accurate representation of the events surrounding the buy. Trial Counsel did not object when the recording was moved into evidence.

This Court finds that Applicant has failed to show that Trial Counsel should have

objected as he has failed to show that the video was not properly authenticated. This Court finds that the CI's authentication was proper under Rule 901 of the South Carolina Rules of Evidence, and Trial Counsel was not deficient for failing to object. This Court finds that Applicant has failed to show that the outcome of the trial would have been different had Trial Counsel objected to the CI's authentication. Accordingly, this allegation must be dismissed.

Applicant also alleged that Trial Counsel was ineffective for allowing the CI to authenticate the video without using the CI's inconsistent statement to impeach him. He also testified that he did not see a statement from the CI to impeach. This Court finds that Applicant has failed to prove that Trial Counsel was ineffective for allowing a witness to authenticate a video that was different from an initial statement. Trial Counsel testified that he was not aware of a statement from the CI that would have been different than the video.

This Court finds that Applicant has failed to produce such a statement to show that Trial Counsel should have objected. Furthermore this Court finds, as shown above, that Applicant has failed to show that the CI's authentication of the video was improper. Applicant has also failed to prove that the outcome of the trial would have been different as he has failed to produce the CI's statement and because such a statement would have been merely impeaching. Accordingly, this allegation must be dismissed.

Failure to present a second video

Applicant alleged that Trial Counsel was ineffective for failing to present another video from the same day. He testified that he saw another video with Commander Brown that showed two hands and a bag but neither hand was his hand and no transaction took place. Applicant testified that the video had a different date on it. Trial Counsel testified that there was not a second video produced. He testified that the State had one tape of solely audio and another tape

of audio and video together.

This Court finds that Applicant has failed to show that Trial Counsel was deficient for failing to present a different video from the CI buy. This Court finds Trial Counsel provided credible testimony that only one video of the CI buy existed. This Court finds that Applicant has failed to show that he was prejudiced by Trial Counsel's actions as he has failed to show that a second video exists and has failed to produce such video at the PCR hearing. This Court finds that Applicant has failed to prove that Counsel was ineffective and this allegation must be dismissed.

Failure to suppress video evidence

Applicant testified that the CI buy video should have been suppressed. He further testified that the video should have been suppressed because the video had a different date and time than the actual event. This Court finds that Applicant has failed to show that Trial Counsel's actions were deficient for failing to suppress the CI buy video. The record reflects that Sergeant John Ranier testified as to why the time and date stamp on the video was different than the actual date. He testified that the battery to the video equipment died overnight and when they recharged it, it produced a different time stamp. See Trial Transcript pp. 226-227. This Court finds that Applicant has failed to show that there was anything objectionable about the videotape that would justify Trial Counsel making a motion to suppress. This Court finds that Applicant has failed to show that the different time and date stamp on the videotape, and issue which was clarified by Sergeant Rainer at trial, would cause it to be objectionable or inadmissible at trial. This Court also finds that Applicant has failed to prove that he was prejudiced as he has failed to show that such a motion would have been successful. Accordingly, this allegation must be dismissed.

Allowed video/audio evidence to be muted and deleted during and before trial without objection

Applicant testified that Trial Counsel was ineffective for allowing the audio and video to be redacted at certain points when it was played during the trial. This Court finds the record reflects that the State and Trial Counsel agreed to redact certain parts of the CI buy video. The trial court noted that it would give the jury an instruction that the redactions were done for purposes that were not important to their deliberations. The trial judge gave a curative instruction during the CI's testimony and mentioned the redactions during his jury charge. See Trial Transcript pp. 114-115, 300. Assistant Solicitor Shelton told the trial court "I think there are some noticeable gaps that are just silence. We didn't cut it out of any of the recordings except for the very end. We cut some of the irrelevant stuff off from the very end, but there are some pockets of time there will be deal silence for about a minute." Trial Transcript p. 60, ll. 17-21. Trial Counsel confirmed that he had agreed to redactions. This Court finds that Applicant has failed to show that Trial Counsel's actions were deficient in this regard. This Court finds that Trial Counsel had agreed to redactions and the State provided a reasonable explanation at trial for the redactions. This Court further finds that Applicant has failed to show that he was prejudiced as he has failed to show how his trial was affected by these redactions and because this Court will not speculate as to the content of the redactions. Accordingly, this allegation must be dismissed.

Improper statement to the jury in jury charge²

Applicant testified that Trial Counsel was ineffective for failing to object to the improper statement during the jury charge that referenced the muted redactions in the audio and video.

² This Court notes that Applicant's allegation listed in his application reads "Improper statement to the jury in closing argument," however it was clear from his testimony at trial that he was referring to the jury charge and not either party's closing argument.

This Court finds the record reflects the trial judge charged the jury as follow:

Now, in this case there have been, as you recall, in the audio I mentioned earlier that there were gaps, in TV language parts were blipped; here they were just muted. You are not to give that any consideration whatsoever. They were taken out of that audio because they had no value to this case, no relevance to this case and may have caused confusion in this case. So don't be concerned about the fact that there are certain portions of the audio which were removed.

Trial Transcript 300, ll. 13-21.

This Court finds that Applicant has failed to show that Trial Counsel was deficient for failing to object to the jury charge. "A charge is sufficient if, when considered as a whole, it covers the law applicable to the case." State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct.App. 1996). This Court finds that the jury charge is not objectionable and the portion in question simply mirrors a curative instruction that the trial judge had previously given to the jury informing them why certain gaps in the audio and video exist. Applicant has failed to show that he was prejudiced by Trial Counsel's failure to object to the jury instruction because he has failed to show that such a curative instruction was improper or that an objection would have been successful. As he has failed to prove that counsel was ineffective in this regard, the allegation must be dismissed.

Failure to present a defense

Applicant testified that Trial Counsel was ineffective for failing to present a defense. He testified that Trial Counsel discussed the State's case with him and told him that they were not presenting evidence. Trial Counsel testified that the main defense strategy that he discussed with Applicant was to move to suppress the drugs and to attack the CI. Trial Counsel testified that his best defense was to argue about the CI's short absence in surveillance that occurred when he pulled over before the CI buy.

This Court finds that Applicant has failed to show that Trial Counsel's actions were

deficient regarding his defense strategy. This Court finds that Trial Counsel articulated a valid trial strategy that involved moving to suppress the drugs and attacking the CI. This Court finds the record reflects that Trial Counsel made a motion to suppress the drug evidence but was unsuccessful and he consistently attacked the CI's credibility and actions during the buy. Applicant has neither shown how Trial Counsel's defense strategy was deficient nor what other strategy Trial Counsel should have employed. Without showing how the outcome of his trial would have been different, Applicant has failed to show that he was prejudiced by Counsel's actions. Accordingly, this allegation must be dismissed.

Failure to challenge prior uncounseled conviction used to secure
life without parole conviction

Applicant alleged that Trial Counsel was ineffective for failing to challenge his prior convictions that were used as prior offenses to seek life without parole sentence. Trial Counsel testified that Applicant had prior serious convictions and he was provided certified copies from the State of these convictions. Trial Counsel testified that the certified copies of Applicant's prior convictions were confirmed on his rap sheet. He testified that he met with Applicant often to explain the State's notice of LWOP and his prior convictions. Assistant Solicitor Matthew Shelton testified that he provided certified copies of Applicant's prior convictions to Applicant and Trial Counsel prior to trial.

This Court finds that Applicant's allegation is without merit. As stated above, the record reflects that the State alleged Applicant had two prior serious convictions for distribution of crack cocaine within proximity of a park (1992-GS-46-4099) and trafficking crack cocaine (10-28 grams), second offense (20015-GS-46-0694). Applicant has failed to show that either prior conviction was not "serious" or that his prior convictions were improperly used under § 17-25-45. This Court finds that distribution of crack cocaine within proximity of a park and trafficking

crack cocaine are both enumerated as serious convictions under § 17-25-45. This Court finds that Applicant's concern that a prior conviction was uncounseled does not invalidate its use as a predicate "serious" felony for LWOP notice. This Court finds that Applicant's prior convictions were properly used as predicate offenses for LWOP and as such, Trial Counsel was not deficient for failing to challenge his priors. Applicant has failed to prove that he was prejudiced by Trial Counsel's actions as he has failed to show that the outcome of his trial would have been different. Accordingly, this allegation must be dismissed.

No motion to suppress evidence or statements

Applicant alleged that Trial Counsel was ineffective for failing to make a motion to suppress the statements. Trial Counsel testified that moving to suppress the evidence was part of his defense strategy. Applicant has failed to show that Trial Counsel was ineffective in this regard as he did move to suppress the drug evidence and statements. This Court finds the record reflects that Trial Counsel made a motion to suppress the drug evidence and challenged Officer Robin Gardner *in camera*. After Trial Counsel made his argument, the trial judge denied his motion to suppress. The record also reflects that Trial Counsel made a successful motion to suppress documents showing the ownership of Applicant's vehicle. The record reflects that Trial Counsel made a successful motion to suppress a statement from Commander Marvin Brown concerning the ownership of Applicant's vehicle. The record also reflects that Trial Counsel made a successful motion to keep out hearsay statements from the CI about where Applicant told him to be for the drug deal. Trial Transcript p. 62-63. As Trial Counsel did make these motions, Applicant cannot show that he was deficient for failing to do so or that he was prejudiced by Trial Counsel's actions.

Counsel failed to strike pro-prosecution juror

Applicant alleged that Trial Counsel was ineffective for failing to strike a pro-prosecution juror. He testified that Juror #77 told the court that he had two sons-in-law who are York County police officers. Trial Counsel testified that he had no reason to challenge this juror. This Court finds the record reflects the following exchange took place during jury selection:

THE COURT: The next question is, are any of you, or a member of your family, involved at any level in law enforcement or in the prosecution of criminal cases? Law enforcement at any level, either Federal Marshals, military police or prosecution at any level, from the solicitor to the U.S. attorney, anything like that, if so, please stand?

...

THE COURT: Yes, sir. Your name and number?

JUROR #77: Number 77, Scott Garrison. I have two son-in-laws that are York County officers.

THE COURT: All right. This is a City case; not a County case. Would that effect your ability to be fair and impartial in this case?

JUROR #77: I don't think so.

THE COURT: Okay. You'll remain with us then.

Trial Transcript p. 11, l. 7 – 12, l. 6.

This Court finds that Applicant has failed to show that Trial Counsel's acted deficiently by failing to strike Juror #77. This Court finds that it was not unreasonable for Trial Counsel to refrain from moving to strike Juror #77. When questioned by the court, he informed the court that he could be fair and impartial. Likewise, Juror #77's sons-in-law were not employed with the prosecuting or law enforcement agencies in Applicant's case. Thus, Applicant has failed to show that the outcome of the trial would have been different as he has failed to show that Juror #77's inclusion on the jury was improper and that a motion to strike this juror would have been successful. Accordingly, this allegation must be dismissed.

Sufficiency of charging indictment

Applicant alleged that Trial Counsel was ineffective for failing to challenge the indictment because the chemist testified at trial that she tested the drugs for powder cocaine. Applicant alleged that Trial Counsel should have objected because he was indicted for trafficking crack cocaine. Trial Counsel testified that the chemist informed the trial court that she does the same chemical test for powder cocaine and crack cocaine. This Court finds the record reflects that the chemist testified at trial that she uses the same chemical test to identify crack cocaine and powder cocaine. Trial Transcript p. 215, ll. 4-23. The record reflects that Trial Counsel argued at trial that the court should grant a directed verdict as to Applicant's crack cocaine charge because the State did not clearly establish that it was crack cocaine as opposed to powder cocaine. Trial Transcript p. 239, ll. 9-17. The trial judge denied the directed verdict, asserting that it was a question for the jury. This Court finds Trial Counsel argued the possible discrepancy between powder and crack cocaine from the chemist's test in his closing argument.

This Court finds that Applicant has failed to show that Trial Counsel was deficient for failing to object to the indictment. Indictments are sufficient when they allege time and place, as required by law, and charge the crime substantially in the language of the statute or the common law which prohibits the crime or so plainly that the offense charged may be easily understood and, if the offense is statutory, that the offense is contrary to the statute involved. S.C. Code Ann. § 17-19-20 (2003). All indictments must be viewed with a "practical eye" to determine whether they fulfill their function to notify the accused of the charge he must answer, notify the court of what judgment and sentence to pronounce, and present a bar to subsequent prosecution. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Moreover, "an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so

plainly that the nature of the offense charged may be easily understood.” Id. at 63, 700 S.E.2d at 443 (citing State v. Tumbleston, 376 S.C. 90, 98, 654 S.E.2d 849, 853 (Ct. App. 2007.)) This Court finds Applicant has failed to show that the indictments were defective in any way or that they were improperly issued. As he has failed to show a defect, he has also failed to show that Trial Counsel should have made an objection and that such an objection would have been successful. This Court finds that Applicant has failed to show that Counsel was deficient and that he was prejudiced by Counsel’s actions. Accordingly, this allegation must be dismissed.

Attorney left hearing aid day 2 of trial

Applicant alleged that Trial Counsel was ineffective for leaving his hearing aid on the second day of trial. He testified that he is not sure how this may have affected the outcome of the trial. The record reflects that on the first day of trial, just after jury selection but before the Biggers³ and Denno⁴ hearings, Trial Counsel asked the court if he could step outside to retrieve his hearing aid. Trial Transcript p. 34, ll. 7-10. Trial Counsel gave no indication that he had difficulty with any part of the pre-trial matters and there is nothing to suggest that his performance was deficient as a result of not having his hearing aid for jury selection. Applicant has failed to provide any evidence to support this allegation and this Court finds that he has failed to show Counsel provided deficient performance or that he was prejudiced. Accordingly, this allegation must be dismissed.

Ineffective Assistance of Appellate Counsel

Applicant alleged that Appellate Counsel was ineffective for failing to raise meritorious issues on appeal. He testified that he talked to Appellate Counsel over the phone and told him everything about the trial. He testified that Appellate Counsel failed to present issues including

³ 409 U.S. 188 (1972).

⁴ 378 U.S. 368 (1964).

the warrantless search and seizure, failure to grant a directed verdict, an incorrect jury charge, defective plain view doctrine analysis, lack of subject matter jurisdiction due to the defective indictments, failure to present lesser included offenses to the jury, and conflict of interest between Assistant Solicitor Shelton and the CI.

Appellate Counsel argued that he had multiple phone calls with Applicant. He testified that he reviewed the entire transcript. He testified that he decided to write an Anders brief because there were not meritorious issues for appeal. He testified that Applicant's case was a traditional CI buy with an immediate bust by police. He testified that there were no Confrontation Clause issues because the CI testified at trial. Appellate Counsel testified that there were no issues that were unpreserved but there was an academic question about whether Applicant engaged in one act or two acts of trafficking. He testified that Applicant was sentenced to LWOP on both trafficking charges so Applicant's sentence would not have changed. Appellate Counsel further testified that he had no reason not to raise a meritorious issue if one existed. The record reflects that Appellate Counsel submitted an Anders brief arguing that the trial court erred in upholding the warrantless seizure and search of Applicant's vehicle under the plain view doctrine.

Applicable Law

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial.

See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

“Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is ‘difficult to demonstrate that counsel was incompetent.’” United States v. Mason, No. 3:06–607–CMC, 2012 WL 5845807 at *1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). While appellate counsel is required to provide effective assistance of counsel, “appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990), citing Jones v. Barnes, 463 U.S. 745 (1983). “For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .” Jones, 463 U.S. at 754. Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). “‘Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.’” Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not deficient performance. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th

Cir. 1985).

“To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal.” United States v. Mason, 2012 WL 5845807 at *1 (citing Smith v. Robbins, 528 U.S. at 285-86, 120 S. Ct. at 764).

Deficiency

This Court finds that Applicant has failed to prove that Appellate Counsel was deficient for failing to raise certain issues on appeal. Appellate Counsel provided persuasive testimony that he reviewed the entire record in analyzing potential issues. He testified that he did not believe any issues had merit and that was why he filed an Anders brief. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). This Court finds Appellate Counsel made the reasonable strategic decision to brief the issue he considered strongest and in filing a brief pursuant to Anders. This Court finds Applicant has failed to meet his burden in proving deficiency. Applicant has failed to prove that the proposed issues are stronger than the one raised by Appellate Counsel. This Court finds that, pursuant to the Anders procedure, even if Appellate Counsel somehow missed an issue that had merit, the Court of Appeals would not have granted his request to be relieved and would have instructed him to brief that issue. Appellate Counsel briefed the issues of the warrantless search and seizure and the plain view doctrine. Applicant also submitted a *pro se* brief to the Court of Appeals, which the Court of Appeals considered in dismissing the appeal. Accordingly, this Court finds that Applicant has failed to meet his burden of proving that Appellate Counsel was deficient.

Prejudice

This Court finds Applicant has failed to meet his burden in proving he was prejudiced by the brief submitted by Appellate Counsel because he would not have been successful on appeal had he argued the trial court erred in failing to grant a directed verdict, giving an incorrect jury charge, lacking subject matter jurisdiction, failing to present lesser included offenses to the jury, and failing to assess the conflict of interest between Assistant Solicitor Shelton and the CI. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167 (no prejudice where there is no merit to arguments that were not briefed). The Court also finds that Applicant failed to meet his burden in proving the omitted issues were stronger than the issue of the warrantless search and seizure and the plain view doctrine.

Further, Applicant suffered no prejudice because the South Carolina Court of Appeals conducted an Anders review and ultimately dismissed the appeal. In State v. McKennedy, 348 S.C. 270, 559 S.E.2d 850 (2002), this Court outlined the Anders procedure as follows:

[A]ccording to Anders, the reviewing court is obligated to make a full examination of the proceedings on its own. After such an examination, if the reviewing court agrees with the attorney, it may dismiss the appeal or proceed to a decision on the merits. On the other hand, if the court disagrees with the attorney's analysis of the appeal, it must afford the defendant 'the assistance of counsel to argue the appeal.' The purpose of filing a brief under Anders is to ensure the merits of the appeal are not overlooked. The court has to conclude independently, regardless of counsel's conclusion, whether or not the appeal has merit before it can dismiss the appeal.

McKennedy, 348 S.C. at 279, 559 S.E.2d at 855. A presumption of regularity attaches to judicial proceedings, and this presumption should extend to the Court of Appeal's review under the Anders procedure. See Pringle v. State, 287 S.C. 409, 410-11, 339 S.E.2d 127, 128 (1986) (citations omitted). This Court finds the Court of Appeals reviewed the issue concerning the warrantless search and seizure and the plain view doctrine before dismissing Applicant's direct

appeal and found that it had no merit. See McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 46 (2013) (“Under the Anders procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any preserved issues with potential merit.” (citing State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991))). If the Court of Appeals believed the trial court’s ruling was questionable, it would have directed Appellate Counsel to file a merits brief.

Applicant has failed to show that he was prejudiced by Appellate Counsel’s failure to raise the issue that the trial court erred in denying a directed verdict, as there is not a reasonable probability that this issue would not have been successful on appeal. In reviewing a motion for directed verdict, the trial court is concerned with the existence of evidence, not with its weight. State v. Phillips, 416 S.C. 184, 192, 785 S.E.2d 448, 452 (2016). “If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury.” State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001). On appeal from the denial of a directed verdict, the appellate court must view the evidence in the light most favorable to the State. See State v. McCombs, 368 S.C. 489, 629 S.E.2d 361 (2006). In Applicant’s case, Trial Counsel moved for a directed verdict generally and specified that he was moving for a directed verdict on the crack charges because the chemist said she tested the crack cocaine using the same test she uses for powder cocaine. Trial Transcript 239, ll. 3-17. The trial judge denied the directed verdict motion, finding there was sufficient evidence to send the case to the jury and finding that the question of whether the drugs were crack cocaine or powder cocaine was a question for the jury. See Trial Transcript pp. 239-240. Viewing the evidence in the light most favorable to the State, this Court finds that the trial judge did not abuse his discretion in denying

Applicant's motion for a directed verdict. Chemist Cynthia Michum testified at trial that the results of her drug analysis showed the drugs were crack cocaine. Trial Counsel elicited testimony from Michum that the test she used is the same test she uses for powder cocaine. As there is evidence in the record that the results were crack cocaine, and a possible discrepancy that Trial Counsel could argue to the jury, it is not likely that an appellate court would find the trial court abused its discretion in admitting the statement. This Court finds Applicant has failed to show that he was prejudiced by Appellate Counsel's failure to raise this issue on appeal.

Applicant has failed to show that he was prejudiced by Appellate Counsel's failure to raise the issue that the trial court erred by presenting the wrong charge to the jury. Applicant has failed to specify what incorrect charge was presented to the jury or that a specific jury charge was improper. He has failed to show that this issue would have been stronger than the issue briefed or that the issue would have any success on appeal. This Court finds that such an issue would not be successful on appeal as there is no evidence that an incorrect charge was sent to the jury or that the jury charges contained any errors. This Court finds Applicant has failed to show that he was prejudiced by Appellate Counsel's failure to raise this issue on appeal.

Applicant has failed to show that he was prejudiced by Appellate Counsel's failure to raise the issue that the trial court did not have subject matter jurisdiction. Subject matter jurisdiction is the power of a court to hear a particular class of cases. State v. Gentry, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005). An applicant may challenge the subject matter jurisdiction of the trial court at any time. Id. However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Id. at 101, 610 S.E.2d at 499. Thus, an applicant challenging subject matter jurisdiction must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Applicant's convictions involved criminal

charges in General Sessions Court and thus, the circuit court had subject matter jurisdiction. A claim that the trial court lacked subject matter jurisdiction would not have been successful on appeal. This Court finds Applicant has failed to show that he was prejudiced by Appellate Counsel's failure to raise this issue on appeal.

Applicant has failed to show that he was prejudiced by Appellate Counsel's failure to raise the issue that the trial court erred by failing to give a lesser included jury instruction to the jury. Applicant has failed to specify what lesser included instruction should have been presented to the jury. He has failed to show that this issue would have been stronger than the issue briefed on appeal and would have been successful. Applicant has failed to show that he was entitled to a charge on a lesser included offense and this Court finds that this issue would not have been successful on appeal. This Court finds Applicant has failed to show that he was prejudiced by Appellate Counsel's failure to raise this issue on appeal.

Applicant has failed to show that he was prejudiced by Appellate Counsel's failure to raise the issue that the trial court erred in assessing a conflict of interest. Applicant argued that he believed a conflict existed because Assistant Solicitor Shelton was the prosecutor for the CI's charges as well. This Court finds that Applicant has failed to show that an actual conflict of interest existed that improperly affected the outcome of his trial. The solicitor's involvement in the CI's case, which had not been resolved at the start of Applicant's trial, is not a conflict of interest that would require a new trial or a new prosecuting solicitor for Applicant's case. As no conflict existed, this Court finds that there is not a reasonable probability that the issue would have been successful if raised on appeal. Applicant has failed to show that this issue would have been stronger than the issue briefed on appeal and would have been successful. This Court finds Applicant has failed to show that he was prejudiced by Appellate Counsel's failure to raise this

issue on appeal.

Prosecutorial Misconduct

Applicant alleged prosecutorial misconduct. Several of his grounds concern the indictment. He alleged that there was no true-billed indictment in his Rule 5/Brady material. He alleged that the indictment was never presented to the grand jury. He alleged that the indictment was amended after the conclusion of the trial.

Applicant alleged that the State did not present sufficient evidence to support claim that prior conviction was a crime of violence in support of career offender enhancement. Applicant testified that the State failed to properly look into his prior record and testified that he does not have a conviction from 1992.

Applicant also alleged that the State did not present sufficient evidence of an essential element of trafficking crack cocaine because the cocaine tested by the chemist was wet. He further alleged that the State presented false testimony and that the prosecuting solicitor had a conflict of interest because Assistant Solicitor Shelton was the prosecutor for the CI's charges as well.

First, this Court finds that prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issues that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief.

Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v.

Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). This Court finds that Applicant has failed to prove prosecutorial misconduct as it relates to the indictment. This Court finds that Applicant's indictments are both stamped "true billed" with the signature of the grand jury foreperson and the date "3/20/2014." This was provided to Applicant and Trial Counsel prior to the trial. Applicant has failed to show that the State committed prosecutorial misconduct for "no true billed indictment in Rule 5/Brady, true billed outside scope of General Sessions Court...indictment never presented to Grand Jury, sufficiency of the charging document, and essential element required to indictment." He has failed to show any deficiencies in his indictments, that they were improperly returned, or that the State committed misconduct in obtaining the indictments. Accordingly, these allegations must be dismissed.

This Court finds Applicant has failed to prove that the State committed misconduct by amending his indictment after the trial is over. There is no evidence in the record to show that the State amended his indictment. Accordingly, this allegation must be dismissed.

This Court finds Applicant has failed to prove that the State committed misconduct by not presenting sufficient evidence to support claim that prior conviction was a crime of violence in support of career offender enhancement. Applicant testified that the State failed to properly look into his prior record and testified that he does not have a conviction from 1992; however Assistant Solicitor Shelton and Trial Counsel credibly testified that they had certified copies of Applicant's prior "serious" convictions and Applicant was aware of these convictions. Accordingly, this allegation must be dismissed.

This Court finds Applicant has failed to prove that the State committed misconduct by allowing false witness testimony. Applicant has provided no evidence to show that the State was instrumental in producing perjured or false testimony. Applicant has not provided evidence to

show what the false testimony consisted of or how the State committed misconduct in that regard. Accordingly, this allegation must be dismissed

This Court finds Applicant has failed to prove that the State committed misconduct because the prosecuting solicitor had a conflict of interest as he was the prosecutor for the CI's charges as well. This Court finds that Applicant has failed to show that an actual conflict exists or that his case was improperly affected. The solicitor's involvement in the CI's case, which had not been resolved at the start of Applicant's trial, is not a conflict of interest that would require a new trial or a new prosecuting solicitor for Applicant's case. Accordingly, this allegation must be dismissed.

This Court finds Applicant has failed to prove that the State committed misconduct by not presenting sufficient evidence of an essential element of trafficking crack cocaine because the cocaine tested by the chemist was wet. This Court finds that the chemist's tests were challenged by Trial Counsel and ultimately remained a question for the jury to consider. Applicant has failed to show that the State committed any sort of misconduct in its direct examination of the chemist. Accordingly, this allegation must be dismissed.

IV. CONCLUSION

Based on the foregoing facts, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Applicant failed to demonstrate that Counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

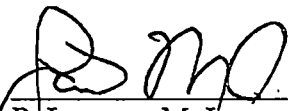
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days

from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 12 day of Sept, 2017.



R. LAWTON MCINTOSH
Presiding Judge
Sixteenth Judicial Circuit

Anders, South Carolina

Law Office of Leah B. Moody, LLC

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Lbmatty@comporium.net

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Facsimile (803) 329-1344

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SEP 26 2017

S.C. SUPREME COURT

September 20, 2017

Mr. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29221

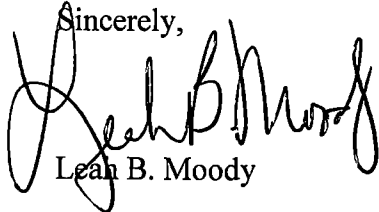
RE: Elder P. Leach, #197673 vs. South Carolina
C.A. No.: 2016-CP-46-02740

Dear Mr. Shearouse:

The York County Court of Common Pleas appointed my office to represent Elder Leach in his Post-Conviction Relief action. Please find enclosed for filing the original and two (2) copies of the Notice of Appeal and Proof of Service in the above-referenced case. Please return the clocked copies to me in the enclosed self-addressed, stamped envelope. Also enclosed is a copy of the Order Dismissing Post-Conviction Relief Application.

Thank you for your assistance with this matter.

Sincerely,



Leah B. Moody

LBM/emb

Enclosures

Cc Elder Leach
Justin Hunter, Esq.
David Hamilton, Clerk of Court, York County
Sharon Graham, SCCID

Law Office of Leah B. Moody, LLC

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September 20, 2017

The Honorable David Hamilton
York County Clerk of Court
Post Office Drawer 649
York, South Carolina 29745

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SEP 20 2017

S.C. SUPREME COURT

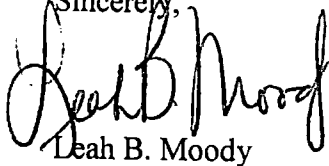
**RE: Elder P. Leach, #197673 vs. South Carolina
C.A. No.: 2016-CP-46-02740**

Dear Mr. Hamilton:

The York County Court of Common Pleas appointed my office to represent Elder Leach in his Post-Conviction Relief action. Please find enclosed a copy of the Notice of Appeal and Proof of Service in this matter.

If you have any questions or concerns, please feel free to contact my office. Thank you for your attention in this matter.

Sincerely,



Leah B. Moody

LBM/emb

Enclosures

cc Elder Leach
Justin Hunter, Esq.
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
Sharon Graham, SCCID

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September 20, 2017

Sharon Graham
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11433
Columbia, South Carolina 29211-1433

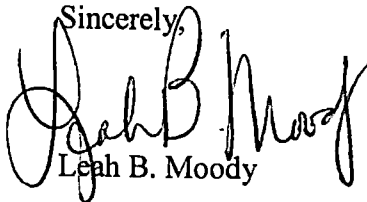
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C.A. No.: 2016-CP-46-02740**

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Sincerely,



Leah B. Moody

LBM/emb

Enclosures

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Justin Hunter, Esq.
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September 20, 2017

Justin Hunter, Esquire
South Carolina Attorney General's Office
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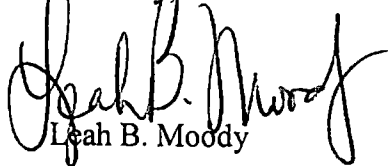
**RE: Elder P. Leach, #197673 vs. South Carolina
C.A. No.: 2016-CP-46-02740**

Dear Mr. Hunter:

The York County Court of Common Pleas appointed my office to represent Elder Leach in his Post-Conviction Relief action. Please find enclosed a copy of the Notice of Appeal and Proof of Service in this matter.

If you have any questions or concerns, please feel free to contact my office. Thank you for your attention in this matter.

Sincerely,



Leah B. Moody

LBM/emb

Enclosures

Cc Elder Leach

Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
David Hamilton, Clerk of Court, York County
Sharon Graham, SCCID

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TO:

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