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SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

March 1, 2012

**RECEIVED**

MAR 01 2012

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

**S.C. Supreme Court**

Dear Mr. Shearouse:

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

Clifton D. Lyles v. State of South Carolina

3/1/2012

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

Thank you for your assistance in this matter.

Sincerely,

Sharon A. Graham  
Administrative Coordinator



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

JUDGMENT IN A CIVIL CASE  
CASE NO: 2010CP4602919

**Clifton Donell Lyles vs. South Carolina State Of**

CHECK ONE:

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

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

**CONDITIONAL ORDER OF DISMISSAL**

Dated at York, South Carolina, this 2nd day of December, 2010.

Court Reporter:

s/ LEE S. ALFORD

**PRESIDING JUDGE - LEE S. ALFORD**

This judgment was entered on the 22nd day of December, 2010, and a copy mailed first class this 22nd day of December, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Clifton Donell Lyles Brci-Mont-138 4460 Broad  
River Road Columbia, SC 29210

Jennifer A Kinzeler Office Of The Attorney  
General P O Box 11549 Columbia, SC  
292111549

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

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

**David Hamilton**

SCRPC APP-24/FORM 4

David Hamilton - Clerk of Court

STATE OF SOUTH CAROLINA )  
 COUNTY OF YORK )  
 Clifton D. Lyles, #294025 )  
 Applicant, )  
 v. )  
 State of South Carolina, )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE 16<sup>TH</sup> JUDICIAL CIRCUIT  
 Case No: 2010-CP-46-02919

FILED OCTOBER 22 2010  
 2010 DEC 22 PM 12:50  
 YORK COUNTY, SC

**CONDITIONAL ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed July 13, 2010. The Respondent made its Return and Motion to Dismiss, consenting to an Austin<sup>1</sup> review only, on or about November 2010, 2010.

**Procedural History**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. The Applicant was indicted at the November 2002 term of the York County Grand Jury for Trafficking Crack Cocaine (2006-GS-46-2950). James Shadd, III, Esquire, represented the Applicant. On June 16, 2003, the Applicant pled guilty to Trafficking, 2<sup>nd</sup> offense. He subsequently withdrew his guilty plea on October 9, 2003. The Applicant was tried in his absence on April 7, 2004, after which he was found guilty as indicted for Trafficking Crack Cocaine, 3<sup>rd</sup> offense. The Honorable L. Roger Couch sentenced him to confinement for a period of thirty (30) years and a fifty thousand dollar (\$50,000) fine.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. A brief was filed pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. Lyles, Op. No. 2008-UP-

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

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223 (S.C. Ct. App. filed April 11, 2008). The Applicant's Petition for Writ of Certiorari was denied February 19, 2009. The Remittitur was issued on March 2, 2009.

The Applicant also filed a federal Petition for Writ of Habeas Corpus (4:08-1884-PMD-TER) on June 12, 2008. The Petition was subsequently denied on September 9, 2009.

The Applicant then filed his first application Post-Conviction Relief on April 21, 2009 (2009-CP-46-1759). The Respondent made its Return on November 12, 2009. An evidentiary hearing into the matter was convened on December 2, 2009<sup>2</sup>, at the Moss Justice Center in York County. F. Craig Wilkerson, Jr., Esquire, represented the Applicant. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. In his first application, the Applicant raised the following allegations in support of his ineffective assistance of counsel claim<sup>3</sup>:

1. Failure to obtain a continuance because counsel failed to subpoena Crystal Collins;
2. Failure to properly argue the Batson motion;
3. Failure to obtain the identity of the confidential informant;
4. Failure to challenge the search warrant;
5. Failure to sufficiently challenge the knock and announce;
6. Failure to sufficiently challenge the chain of custody;
7. Failure to object to the admission of State's Exhibits #14 and #15 into evidence;
8. Failure to address the different sentences for possession of crack and powder cocaine;
9. Payton violation;
10. Doyle violation; and
11. Brady violation.

<sup>2</sup> The hearing was originally scheduled for December 1, 2009; the Applicant and his attorney indicated they needed more time to prepare, and the evidentiary hearing was held the following day on December 2, 2009.

<sup>3</sup> The Applicant amended and clarified his allegations at the PCR hearing by and through his PCR counsel.

The Honorable Lee S. Alford denied and dismissed Applicant's application by written Order issued on February 26, 2010. Applicant's *pro se* Rule 59(e) motion was denied on June 3, 2010. PCR counsel filed a notice of appeal from the dismissal of the Applicant's first PCR action on May 14, 2010, in addition to a motion to file notice of appeal out of time, indicating he received notice of the entry of the order of dismissal sometime in March 2010 without specifying the date. The Court dismissed the Applicant's appeal on June 17, 2010, for failure to timely serve the notice of appeal.

### **Current Allegations**

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

1. Ineffective assistance of post-conviction relief counsel in that PCR counsel failed to file an appeal of the denial of PCR;
2. Ineffective assistance of post-conviction relief counsel for failing to file a Rule 59(e) motion; and
3. Ineffective assistance of post-conviction relief counsel for failing to communicate with the Applicant.

This Court has before it the York County Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the appellate court records including the trial transcript, and the prior PCR records.

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

This Court has had the opportunity to review the record in its entirety. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-70:

#### **Ineffective Assistance of PCR Counsel**

This Court finds that the current application for post-conviction relief must be summarily dismissed regarding the Applicant's claims that he received ineffective assistance of counsel on his prior post-conviction relief application for failure to communicate and file a Rule

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59(e) motion, as such claims are not cognizable grounds for relief in PCR actions. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under §17-27-90." Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

#### Austin Review Granted

This Court finds, however, and with consent of Respondent, that the Applicant is entitled to an Austin review of his first post-conviction relief action previously denied and dismissed by this Court on February 26, 2010. Austin, supra, recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation." Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. Accordingly, this Court finds the Applicant is entitled to an Austin review of his first PCR action.

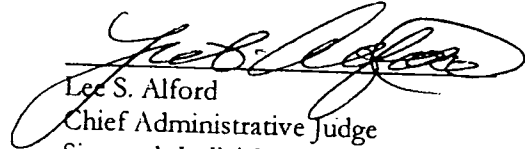
#### Summary

Pursuant to S.C. Code Ann. §17-27-70(b), the Court intends to dismiss any and all other claims related to this application with prejudice unless the Applicant provides specific reasons, factual or legal, why the remaining claims in the instant application should not be dismissed. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the York County Clerk of Court and shall serve opposing counsel at the following address:

Jennifer A. Kinzeler, Esquire  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

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AND IT IS SO ORDERED! This 2<sup>nd</sup> day of December, 2010.

  
Lee S. Alford  
Chief Administrative Judge  
Sixteenth Judicial Circuit

York, South Carolina

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STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF YORK )  
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 )  
 )  
 Clifton D. Lyles, #294025, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 SIXTEENTH JUDICIAL CIRCUIT

2010-CP-46-2919

DEC - 1 PM 12:36

FINAL ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed July 13, 2010. In its Return and Motion to Dismiss, Respondent consented to an Austin<sup>1</sup> review only, and asked that all other allegations in the Application be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal dated December 2, 2010, finding the Applicant was entitled to an Austin review of the denial of his first PCR action, and provisionally denying and dismissing all other allegations. The Applicant was given twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated December 29, 2010, serving the above-mentioned Conditional Order of Dismissal on the Applicant.<sup>2</sup> Additionally attached and incorporated are an Order, dated March 9, 2011 and the Remittitur, dated March 25, 2011, from the Supreme Court of South Carolina dismissing without prejudice the Applicant's Notice of Appeal from the Conditional Order of

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

<sup>2</sup> This Court takes notice that the Applicant was served twice with the Conditional Order of Dismissal. The first being December 29, 2010 and the second being March 10, 2011. This Court construes the true date of service as December 29, 2010.

*Jo H. H. 1*

Dismissal pursuant to Lewis.<sup>3</sup> Further attached and incorporated is an Order from the Supreme Court of South Carolina denying the Applicant's motion to file a late motion for rehearing, dated August 31, 2011, pursuant to Wise.<sup>4</sup>

The Applicant filed a response to the State's motion to dismiss on January 4, 2011, and filed a response to the Conditional Order of Dismissal on January 26, 2011. Additionally, the Applicant filed a Notice of Appeal and a "Motion to Appeal," stating his opposition to the Conditional Order of Dismissal. This Court construes the Applicant's "Motion to Appeal" as additional responses to the Conditional Order of Dismissal. In his responses, the Applicant asserts his current application is not successive or untimely filed because he raised issues concerning the ineffectiveness of prior PCR counsel at the prior PCR hearing, and these issues could not have been raised in his prior PCR application because the violations had not occurred yet. The Applicant also asserts he has a right to allege prior PCR counsel was ineffective for failing to file a 59(e) motion. This Court disagrees. As stated in this Court's Conditional Order of Dismissal:

There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under §17-27-90." Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

Moreover, although pursuant to Austin a PCR applicant may petition the S. C. Supreme Court for discretionary review of the dismissal of their application, Austin "is limited to its particular factual situation." Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). In Aice, the Court held a

<sup>3</sup> Lewis v. State, 368 S.C. 630, 630 S.E.2d 464 (2006) (Notice of Appeal dismissed without prejudice because the order (Conditional Order of Dismissal) is not an appealable order).

<sup>4</sup> Wise v. South Carolina Dept. of Corrections, 372 S.C. 173, 642 S.E.2d 551 (2007) (if the remittitur has been properly sent, appellate jurisdiction has ended and no further motion can be considered by the appellate court).

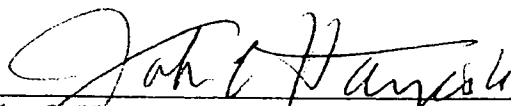
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successive application is not allowed on the basis that a prior PCR application was insufficient due to ineffective PCR counsel. Id. at 448, 409 S.E.2d at 393. Therefore, this Court finds the Applicant's response is not sufficient to show why the Conditional Order of Dismissal served upon him should not become final.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the application for PCR is hereby denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 17<sup>th</sup> day of November, 2011.

  
\_\_\_\_\_  
John C. Hayes, III  
Chief Administrative Judge #3  
Sixteenth Judicial Circuit

York, South Carolina

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

JUDGMENT IN A CIVIL CASE  
CASE NO: 2009CP4601759

Clifton Donell Lyles vs. South Carolina State Of

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S.C. SUPREME COURT

CHECK ONE:

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

IT IS ORDERED AND ADJUDGED:

See attached order;

Statement of Judgment by the Court:

ORDER OF DISMISSAL

Dated at York, South Carolina, this 25th day of January, 2010.

Court Reporter:

s/ LEE S. ALFORD

PRESIDING JUDGE - LEE S. ALFORD

This judgment was entered on the 26th day of February, 2010, and a copy mailed first class this 26th day of February, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

F Craig Wilkerson Jr Attorney At Law 242  
Oakland Avenue Rock Hill, SC 29732

Suzanne H. White Office Of The Attorney  
General P.O. Box 11549 Columbia, SC  
292111549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

SCRPC APP-24/FORM 4

David Hamilton - Clerk of Court

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF YORK )  
 )  
 Clifton Donell Lyles, #294075, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 SIXTEENTH JUDICIAL CIRCUIT  
 Case No.: 2009-CP-46-1759

DAVID HAMILTON  
 C.C.P. & G.S.  
 YORK COUNTY, SC

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**ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 21, 2009. The Respondent made its Return on November 12, 2009. An evidentiary hearing into the matter was convened on December 1, 2009, at the Moss Justice Center in York County, South Carolina. F. Craig Wilkerson, Jr., Esquire, represented the Applicant. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. James Shadd, III, Esquire, also testified. This Court also had before it a copy of the records of the York County Clerk of Court, records from the South Carolina Department of Corrections, the Appellate Court records, and the trial transcript.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. The Applicant was indicted at the November 2002 term of the York County Grand Jury for Trafficking Crack Cocaine (2006-GS-46-2950). James Shadd, III, Esquire, represented the Applicant. On June 16, 2003, the Applicant pled guilty to Trafficking, 2<sup>nd</sup> offense. He subsequently withdrew his guilty plea on October 9, 2003. The Applicant was tried in his absence on April 7, 2004, after which he was found guilty as indicted

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for Trafficking Crack Cocaine, 3<sup>rd</sup> offense. The Honorable L. Roger Couch sentenced him to confinement for a period of thirty (30) years and a fifty thousand dollar (\$50,000) fine.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. A brief was filed pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. Lyles, Op. No. 2008-UP-223 (S.C. Ct. App. filed April 11, 2008). The Applicant's Petition for Writ of Certiorari was denied February 19, 2009. The Remittitur was issued on March 2, 2009.

The Applicant also filed a federal Petition for Writ of Habeas Corpus (4:08-1884-PMD-TER) on June 12, 2008. The Petition was subsequently denied on September 9, 2009.

### ALLEGATIONS

In his current application<sup>1</sup>, Applicant alleges that he received ineffective assistance of counsel for the following reasons:

1. Failure to obtain a continuance because counsel failed to subpoena Crystal Collins;
2. Failure to properly argue the Batson motion;
3. Failure to obtain the identity of the confidential informant;
4. Failure to challenge the search warrant;
5. Failure to sufficiently challenge the knock and announce;
6. Failure to sufficiently challenge the chain of custody;
7. Failure to object to the admission of State's Exhibits #14 and #15 into evidence;
8. Failure to address the different sentences for possession of crack and powder cocaine;

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<sup>1</sup> The Applicant amended and clarified his allegations at the PCR hearing by and through his PCR counsel.

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9. Payton violation;
10. Doyle violation; and
11. Brady violation.

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

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

#### **Applicant's Motion for Summary Judgment**

At the hearing, the Applicant moved for summary judgment under Rule 56 of the South Carolina Rules of Civil Procedure. The Applicant based his motion on the ground that the State did not file a timely Return to his application. He testified that the State did not respond to his application within thirty (30) days, and that the State did not ask for any extensions. He argued that, because the State did not follow the rule, the court should grant him summary judgment as a matter of law.

This Court denied the Applicant's motion for summary judgment at the hearing, because the Applicant demonstrated no prejudice as a result of the State's delay.

#### **Ineffective Assistance of Counsel**

The Applicant alleges he received 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 Rule 71.1(e), SCRCF).

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Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland; Bannister v. State, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998)(the applicant must show his counsel's performance fell below an objective standard of reasonableness). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

*Failure to Obtain a Continuance and Subpoena Crystal Collins*

In his first allegation, the Applicant contends trial counsel was ineffective for failing to

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subpoena his girlfriend at the time, Crystal Collins, to testify at trial. He alleged that if trial counsel had subpoenaed her for trial, the trial could have been continued when she absconded. The Applicant testified that he originally pled guilty on June 13, 2003 to protect Collins, but that he withdrew his guilty plea after Collins submitted an affidavit dated September 4, 2003 in which she claimed the drugs belonged to her, not to the Applicant. He testified that Collins was present at his motion to suppress hearing on trial counsel's motion to suppress, but that she did not come back the next day for the end of the hearing or for the trial. The Applicant testified that he maintained throughout the trial that the drugs belonged to Collins, not him. He testified that he only gave statements to law enforcement admitting his involvement, because he was under duress. He explained that if trial counsel had subpoenaed Collins to testify at trial, she would have testified to the jury that the drugs were really hers. The Applicant further testified that trial counsel was ineffective because if trial counsel had Collins under subpoena, the trial judge would have granted trial counsel's motion for a continuance when she did not appear for the trial. He also testified that Collins was not present at the PCR hearing to testify on his behalf.

On cross-examination, the Applicant testified that he was under oath when he initially entered his guilty plea during which he admitted to possessing the drugs. The Applicant testified that he did not know whether trial counsel knew he was not going to appear for his trial. He denied that trial counsel told the trial court Collins was not coming to testify at the trial on behalf on the Applicant, because she had to stay home with a sick child.

Trial counsel testified that he has been practicing law for over ten (10) years. He testified the Applicant retained him to investigate his case in order to determine whether going to trial was an option, or to negotiate a favorable sentence for him. He stated the Applicant eventually decided to

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plead guilty. He testified that he represented the Applicant in 2003 when the Applicant initially pled guilty to a reduced charge of trafficking, 2<sup>nd</sup> offense. He testified that the Applicant was originally charged with trafficking, 3<sup>rd</sup> offense, and that he was sentenced to confinement for fifteen (15) years when he pled guilty to the reduced offense. Trial counsel testified that he assisted with the Applicant's subsequent withdraw of his guilty plea on October 9, 2003 after Collins submitted her affidavit claiming she possessed the drugs.

Trial counsel testified that he was fully prepared for trial, and that he planned to call three witnesses for the defense: Mary Mitchell, Crystal Collins, and the Applicant to testify. He testified that he made a motion for a continuance, because his witnesses and his client were not present. He stated that Collins was present at the pre-trial Jackson v. Denno hearing, and that he was prepared to call her to testify at the Denno hearing that evening. Trial counsel testified that Judge Couch decided to hear the defense's side of the hearing the next morning, because it was getting late in the evening. He testified that he fully expected Collins to be present the next morning to help the Applicant, who was her fiancé. Trial counsel stated that the record clearly reflects this sequence of events.

Trial counsel testified that he was prepared to serve Collins with a subpoena, but that he was unable to do so. He testified that as a practical matter, he planned to serve it upon her at the Denno hearing, but that the Solicitor asked the trial court to sequester the witnesses. He testified that he told Collins to leave the courtroom, but to stay in the courthouse because he was going to need her. Trial counsel testified that he did not realize at the time that she completely left the courthouse. He testified that Collins voluntarily showed up the first day of pre-trial hearings, so he did not have reason to think she would not come back the next day.

Trial counsel testified that Collins' testimony was part of his defense at trial, part of his

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defense was going to be Collins' testimony at trial, because he expected her to testify that the drugs were hers. He testified that neither Collins nor the Applicant were present the next day for the end of the hearing or for the trial, and that he specifically told the trial court he needed a continuance because Collins' testimony was critical. Counsel testified that he told the court about his efforts to find both Collins and the Applicant, but the trial court denied his motion for a continuance. Trial counsel testified that he did not believe the court's decision to deny his motion hinged on the fact that Collins was not under subpoena.

Trial counsel testified that he called his assistant frequently to see if the Applicant, or a member of the Applicant's family, called while he was in the court room, but that Collins was the only person with whom he could make contact. He testified that when he talked to Collins, she told him the Applicant was on his way but that she was not coming because her child was sick, and that she would not testify for the Applicant.

Trial counsel stated that, at first, he felt confident about the Applicant's trial, especially because the Applicant's family from North Carolina was present for pre-trial hearings the day before the trial started. He further stated that no one was present for the next day after all of his pre-trial motions were denied, and that he felt hamstrung without the Applicant being present during trial. He also stated that after all of the evidence was presented at trial, he made a motion for a new trial, but the trial court denied his motion.

Trial counsel testified that he felt his defense depended on the credibility of witnesses, and that he felt confident he could create reasonable doubt in the minds of the jurors. He testified that testimony from both Collins and the Applicant would have been crucial and would have assisted his defense. Counsel further testified that he does not know whether Collins spoke with a separate

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attorney, but that he is certain he told the Applicant that if she testified at trial that the drugs were hers, they could both be charged with trafficking.

This Court finds the Applicant's allegation that trial counsel was ineffective for failing to obtain a continuance because he failed to subpoena Crystal Collins is without merit. Trial counsel moved for a continuance that was denied by the trial judge. Regardless, this allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). A post-conviction relief application cannot assert any issues that could have been raised at trial and on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The decision to grant a continuance is in the discretion of the trial judge. In support of this allegation, the Applicant contends trial counsel was ineffective in failing to issue a subpoena for Collins. This was one of the factors the trial judge considered, but there were a number of other factors he considered in denying the continuance. Furthermore, the Applicant could have raised this issue in his *pro se* Anders brief on direct appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, this allegation is denied.

This Court further finds that trial counsel did not render ineffective assistance in not serving a subpoena on Crystal Collins. The Applicant abandoned his trial counsel after the jury was selected, and after the first afternoon of motions. Nevertheless, trial counsel mounted a vigorous defense. The Applicant and his girlfriend, Crystal Collins, lived together in North Carolina, did not appear the next day to complete the motions and for the trial. The Applicant never contacted trial counsel or anyone else, and he was picked up by law enforcement months later. Collins, the Applicant's live-in girlfriend and mother of his child, did not appear, but she called and stated the child was sick and that she had to take the child to the doctor. Both the Applicant and Collins were present the first day

H 8  
2018

and trial counsel had no reason to believe Lyles' live-in girlfriend, mother of his child, and over whom he had influence, would not appear.

In any event, the Applicant has not shown any prejudice. A purported affidavit of Crystal Collins, dated September 4, 2003, was offered to the Court in which she purportedly states that she possessed the crack cocaine with which Lyles was charged, and that he did not possess it. The purported affidavit also states that she was advised to seek the advice of an attorney. Even if the child of the Applicant and Collins was sick, someone could have watched the child, and she could have testified at trial. Trial counsel, James Shadd, III, testified at the PCR hearing that Collins told him she would not testify for Lyles at the trial.

If Collins had testified at the trial, Lyles could have been convicted anyway, and she would have been charged as well if she claimed the drugs were hers. The Applicant gave a voluntary statement to law enforcement, and he knew the approximate weight of the crack cocaine without seeing it when it was found. Two or more persons can be convicted of possessing the same drugs, and that is certainly true in a trafficking charge in which conspiracy to possess more than ten (10) grams of crack cocaine is an element of the offense. The trial judge would have had to advise Collins of her Fifth Amendment right to remain silent, and would have had to have an attorney appointed to advise her of her Constitutional rights including possible prosecution in which her sworn testimony could have been used against her. Importantly, Collins was not called to testify in this matter, and the burden is on the Applicant to prove his grounds for post-conviction relief. Furthermore, no evidence was offered to show that the child was taken to see a doctor on the day in question. This Court finds that the Applicant has failed to meet his burden of proving he is entitled to relief on this ground. Accordingly, this allegation is denied.

### *Failure to Properly Argue the Batson Motion*

The Applicant alleges trial counsel did not adequately protect his rights during the Batson motion. The Applicant testified that the Solicitor struck a juror, because the juror had a prior conviction for larceny and breaking and entering a motor vehicle. He testified that the Solicitor later said she was not sure if the juror she struck actually had a prior conviction. The Applicant stated that he believed the Solicitor struck the juror because he was the only possible juror who was black. He further stated that the State also struck a Hispanic juror.

Trial counsel testified that he made several motions, including a Batson motion, but that the trial court denied the motion.

First, the Court finds that the record directly refutes the Applicant's allegation that trial counsel did not make or argue a proper Batson motion. Trial counsel made and argued the Batson motion properly. Nevertheless, the trial court denied trial counsel's Batson motion. Trial counsel's conduct did not fall below an objective standard of reasonableness. Therefore, the Applicant is not entitled to post-conviction relief on this ground.

Second, the allegation that the trial court erred in denying counsel's Batson motion raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley, 260 S.C. at 436, 196 S.E.2d at 501. Trial court error, therefore, is not a cognizable claim for PCR. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue in his *pro se* Anders brief on direct appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, this allegation is denied.

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*Failure to Obtain the Identity of the Confidential Informant*

The Applicant testified that trial counsel was ineffective for failing to obtain the identity of the confidential informant. He testified that trial counsel made the trial harder on himself by telling the trial judge that he could prove the confidential informant participated in the search of residence. The Applicant explained that the judge considered it, and later made it a requirement that trial counsel had to prove. The Applicant stated that trial counsel never addressed the issue again. He testified that the confidential informant's identity was also significant because three people were present when the house was searched, but they were not charged with anything. He also testified that even a drug dog could not find the drugs.

Trial counsel testified that during his preparation for trial, he spoke with the Applicant and Collins about the voluntariness of the Applicant's statements he gave to law enforcement when the residence was searched. He said they discussed the circumstances surrounding the execution of the search warrant, and that evidence developed indicating that the confidential informant was a drug dealer himself and was present during the execution of the search warrant.

Trial counsel testified that he made a motion to compel the State to disclose the identity of the confidential informant, and that he submitted a packet of case law in support of his motion. Trial counsel testified that he tried to convince the judge that the Applicant was framed, because the individual was more than just a confidential informant. He stated that he told the trial court he believed the house was used to hold drugs for dealers, including the confidential informant. He testified that he argued to the trial court the confidential informant was present during the search, and the confidential informant specifically told the officers to look for drugs in the bottom of the trashcan. Trial counsel testified the trial court denied his motion, but that during the trial, he was

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able to get an officer to acknowledge that three people came to the house to execute the search warrant, and that one of them stayed outside on the porch.

First, this Court finds the Applicant's testimony that counsel was ineffective for failing to obtain the identity of the confidential informant is not credible, while also finding that counsel's testimony is credible. The Applicant testified that even a drug dog did not find the drugs. The transcript reflects that the drug dog was not available that week and was not used. The Applicant also testified that three people showed up outside the residence while the search was in progress. Further, that none of these three persons was charged. He intimated in his testimony that one of the three persons was the confidential informant referred to in the search warrant, and that the confidential informant must have hidden the drugs previously and told the police where to look when they did not find the drugs themselves. The Applicant testified the drugs were found under the trash bag in the trashcan. Testimony of the officers at trial revealed that the three persons who showed up were relatives and a friend of either the Applicant or Collins. They were searched, cleared for outstanding warrants, and let go.

Lieutenant Lovelace testified that she found the drugs in a plastic bag mixed in with the trash. She testified she searched the refrigerator and other places in the residence where drugs are frequently found. She testified that she also found drugs in numerous trashcans in other cases. She described the search of the trashcan that was conducted with the help of Officer Schmittel. They used gloves and transferred the trash piece by piece into another trash bag. She and other officers testified that the Applicant, having been advised of his Constitutional rights, admitted the drugs were his. When asked the weight of the drugs, he gave a weight that was very close to the actual weight without seeing the package of drugs.

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Therefore, this Court finds that trial counsel was not ineffective for failing to obtain the confidential informant's identity. In addition to trial counsel's testimony, the record clearly establishes that trial counsel did argue a motion to compel the State to disclose the confidential informant's identity. The trial court denied counsel's motion.

This Court further finds the trial court's denial of trial counsel's motion to compel the State to disclose the identity of the confidential informant raises a direct appeal issue that is 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, 260 S.C. at 436, 196 S.E.2d at 501. Trial court error, therefore, is not a cognizable claim for PCR. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Trial counsel made a motion to compel the State to disclose the confidential informant's identity. The trial court was well within its discretion to deny trial counsel's motion. The Applicant could have raised the issue that the trial court erred in denying counsel's motion on direct appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, this allegation is denied.

*Failure to Challenge the Search Warrant*

The Applicant alleges trial counsel was ineffective for failing to challenge the search warrant. The Applicant testified that the search of the residence stemmed from a controlled buy, and that he was out of the state when the confidential informant made the controlled buy. The Applicant testified that Officer Ligon told the magistrate judge he had an arrest warrant for the Applicant for distribution. The Applicant testified that the Solicitor said during trial that the officer was mistaken

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about the outstanding arrest warrant, because he was never charged with distribution. The Applicant also testified that trial counsel told him he could not get any information about the basis of the search warrant, and that hindered trial counsel's ability to show that Officer Ligon was not credible.

The Applicant testified that trial counsel should have challenged the search warrant, because the warrant did not contain any information establishing Officer Ligon's basis of knowledge, the confidential informant's reliability, the amount of drugs the confidential informant purchased, or how much money he paid for them. The Applicant also testified that the identity of the confidential informant was critical, because the search warrant did not state the basis of the confidential informant's reliability. He further testified that a hearing was never held to determine the veracity or credibility of the confidential informant. The Applicant also testified that he did not live in the house where the drugs were found; rather, he was an overnight guest.

On cross-examination, the Applicant agreed that trial counsel argued a motion to suppress the evidence obtained from the search warrant, because the officer never established the confidential informant's reliability. He also agreed that trial counsel made a motion to compel the State to disclose the confidential informant's identity, and that he argued the State's failure to do so was a violation of the Applicant's constitutional right to confront witnesses. The Applicant acknowledged that trial counsel's motions were denied.

Trial counsel testified that the State obtained most of its evidence against the Applicant from the search warrant. He testified that he made a motion to suppress all of the evidence obtained from the search warrant, but that the trial court denied his motion. He testified that Officer Lovelace found a bag of seven individually wrapped bags of crack cocaine in a trashcan in the kitchen. He stated that the amount of crack cocaine found in the trashcan amounted to approximately one gram.

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This Court finds that the Applicant's testimony regarding trial counsel's failure to obtain the identity of the confidential informant was not credible, while also finding that trial counsel's testimony is credible. Trial counsel made a motion to suppress the crack cocaine on the basis that the search warrant was defective. The trial court denied counsel's motion. Therefore, this Court finds trial counsel was not ineffective for failing to challenge the search warrant.

This Court further finds the trial court's denial of counsel's motion to suppress on the ground that the search warrant was defective raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). The issue was preserved for appellate review by trial counsel, and the Applicant raised the issue in his *pro se* appellate brief. However, both the trial court and the appellate court denied the issue. Therefore, this allegation is denied.

*Failure to Sufficiently Challenge the Knock and Announce*

The Applicant also alleges trial counsel was ineffective for failing to sufficiently challenge the knock and announce during the execution of the search warrant. The Applicant testified that, although trial counsel addressed this issue in the Jackson v. Denno hearing, he stopped pursuing it. He testified that Officer Clark did not properly knock and announce. According to the Applicant, Officer Clark testified that the front door of the house open, but the screened door was closed. The Applicant stated that Officer Clark admitted he saw a lady inside, opened the screen door, and then said "police, search warrant" before walking into the residence. The Applicant testified that Officer Clark never gave a reason why he did not knock and announce. He further testified that trial counsel was ineffective for not challenging the issue any further.

Trial counsel testified that he made several pre-trial motions, including a motion to suppress the Applicant's statements given to law enforcement based on an illegal search and seizure. Trial

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counsel challenged the search warrant and cross-examined Officer Clark regarding the procedure the officers used to execute the search warrant-specifically the knock and announce. The Solicitor objected, and the trial court sustained the Solicitor's objection.

This Court finds that trial counsel sufficiently challenged the search warrant, and the knock and announce. This Court finds that counsel did not render ineffective assistance of counsel for failing to sufficiently challenge the knock and announce. Trial counsel made several pre-trial motions, vigorously challenged the search warrant, and specifically cross-examined the State's witness about the knock and announce. Therefore, trial counsel's performance was not deficient, and his conduct did not fall below an objective standard of reasonableness. The Applicant failed to show any prejudice that may have resulted from trial counsel's alleged deficient performance. Accordingly, this allegation is denied.

*Failure to Adequately Challenge the Chain of Custody*

The Applicant alleges trial counsel was ineffective for failing to adequately challenge the chain of custody. The Applicant testified that Gary Rollins was the custodian of the drugs, and that Rollins never appeared in court to testify about what he did with the drugs while they were in his possession. The Applicant testified that the Solicitor failed to follow Rule 6(b) of the South Carolina Rules of Criminal Procedure requiring the State to produce a sworn affidavit from Rollins stating what he did with drugs since Rollins was not present to testify in person. The Applicant testified that as a result, trial counsel should have continued to argue that the chain of custody had been broken. However, the Applicant acknowledged that trial counsel made several arguments and objections to the chain of custody, but that the trial court overruled counsel's objections.

Trial counsel testified that he absolutely objected to the chain of custody. He stated he

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believed Rollins' role in the chain of custody was to pick up the drugs and deliver them to the chemist where they were tested and stored. He testified that Rollins would not have necessarily had the drugs in *his* custody for the one and a half years that elapsed between arrest and trial, and that Rollins was unavailable to testify at trial.

This Court finds that the chain of custody pertaining to the evidence was established as far as is practicable. The testimony in the transcript clearly establishes each person who handled the evidence, and how long they had it in their possession until the time it was signed out of the evidence room by an officer for trial. The only person in the chain who did not testify was Gary Rollins. The testimony established that he worked in the evidence room as a technician and that his only involvement in the handling of evidence was to sign it out to an officer for fingerprinting. Rollins was off duty and his presence was not requested. Trial counsel objected and did everything he could to protect the record. Furthermore, the Applicant failed to demonstrate any prejudice. Therefore, this allegation is denied.

This Court further finds that the trial court's decision to overrule trial counsel's objection to the chain of custody raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). The decision to admit or exclude evidence is within the trial court's sound discretion. Campbell v. Jordan, 382 S.C. 445, 675 S.E.2d 801 (Ct. App. 2009); Gamble v. Int'l Paper Realty Corp., 323 S.C. 367, 474 S.E.2d 438 (1996). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley, 260 S.C. at 436, 196 S.E.2d at 501. Trial counsel objected to the chain of custody several times. The trial court was well within its discretion to deny trial counsel's motion. The Applicant could have raised the issue that the trial court erred in overruling counsel's objections on direct appeal. His failure to do so

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has waived this allegation as a ground for relief. Therefore, this allegation is denied.

*Failure to Object to the Admission of Exhibits #14 and #15 Into Evidence*

The Applicant also alleges that trial counsel was ineffective for failing to object to the admission of State's Exhibits #14 and #15 into evidence. The Applicant testified that State's Exhibit #14 was allegedly 20.34 grams of crack cocaine, and that State's Exhibit #15 was allegedly a trace amount of crack cocaine. The Applicant acknowledged that trial counsel objected to the admission of these exhibits into evidence from the very beginning of the trial, but that trial counsel later retracted his objections and allowed the exhibits to be entered into evidence.

Trial counsel testified that he objected to the State admitting exhibits #14 and #15 into evidence, and that he believed he was able to preserve the record for the Applicant. He testified that in addition to making several objections to the State's evidence, he also renewed his objections that he made the previous day. This court finds that the Applicant's testimony regarding trial counsel's alleged failure to object to the admission of this evidence at trial is not credible, while also finding that trial counsel's testimony is credible. Trial counsel made the necessary objections and preserved the issue for appeal. Therefore, counsel's performance was not deficient and his conduct did not fall below an objective standard of reasonableness. Furthermore, the Applicant failed to show any prejudice resulting from any alleged deficiency.

This Court further finds that the trial court's decision to overrule trial counsel's objection to the admission of Exhibits #14 and #15 into evidence raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). The decision to admit or exclude evidence is within the trial court's sound discretion. Campbell v. Jordan, 382 S.C. 445, 675 S.E.2d 801 (Ct. App. 2009); Gamble v. Int'l Paper Realty Corp., 323 S.C. 367, 474 S.E.2d 438 (1996). A post-conviction

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relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley, 260 S.C. at 436, 196 S.E.2d at 501. Trial counsel objected to the chain of custody several times. The trial court was well within its discretion to deny trial counsel's motion. The Applicant could have raised the issue that the trial court erred in denying counsel's motion on direct appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, this allegation is denied.

*Failure to Address Different Sentences for Crack Cocaine and Powder Cocaine*

The Applicant also alleged that trial counsel was ineffective for failing to address the sentencing disparity between crack and powder cocaine. The Applicant testified that the sentencing guidelines are prejudicial, because they impose harsher sentences on people charged with possessing crack cocaine than they do on people charged with possessing powder cocaine. The Applicant argued that a recent United States Supreme Court case held that the different sentences imposed for crack cocaine offenses, compared to powder cocaine offenses, is prejudicial. He testified that he could not recall the case name or statute, but that he knows the Court made its ruling "retroactive to the states."

This Court addressed the Applicant's allegation, explaining that the Federal Sentencing Guidelines to which the Applicant referred do not apply in state court. This Court noted that South Carolina law does not contain any law or remedy regarding the alleged prejudicial effect of disparate sentences for crack offenses compared to powder cocaine offenses. This Court finds that trial counsel was not ineffective for failing to address any sentencing disparity between crack and powder cocaine. Accordingly, this allegation is denied.

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### *Payton Violation*

The Applicant alleged trial counsel was ineffective for failing to challenge his warrantless arrest under Payton v. New York.<sup>2</sup> The Applicant testified that the officers told him he was under arrest as soon as they walked in, but that an hour passed before the officers found any drugs. He testified he did think there was an outstanding arrest warrant for him at that time.

The Applicant stated that once the officers found the drugs, they handcuffed him and made him sit down in the living room. The Applicant also stated that two girls were also present, and that they sat in the living room with him, but they were not under arrest. He testified that the officers told him to “own up,” or else they would arrest everyone. The Applicant testified that his warrantless arrest was a Payton violation because the officers did not have a warrant for his arrest and there were no exigent circumstances. He testified that trial counsel was ineffective for failing to challenge his arrest at trial on these grounds.

Trial counsel testified that he made a pre-trial motion to suppress the evidence and statements obtained by law enforcement during the execution of the search warrant based on a Fourth Amendment illegal search and seizure. During trial counsel’s motions, the circumstances regarding the Applicant’s statements to law enforcement, evidence that was found, and his subsequent arrest necessarily probed the circumstances surrounding his arrest.

At the hearing, this Court noted that the search warrant affidavit said the confidential informant bought drugs from the Applicant. Thus, the Applicant’s arrest was likely based on probable cause to arrest given information obtained from the confidential informant after the controlled buy. The Applicant’s arrest likely did not have anything to do with the search warrant.

This Court finds trial counsel was not ineffective for failing to specifically argue the

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Applicant's Fourth Amendment rights were violated under Payton. According to the record, law enforcement had probable cause to arrest the Applicant as a result of the controlled buy, not the search warrant. Trial counsel made several challenges to the search warrant and to law enforcement's reliance on the information obtained from the confidential informant after the controlled buy. The trial court denied trial counsel's motions. Therefore, trial counsel's performance did not fall below an objective standard of reasonableness for not specifically arguing Payton in his pre-trial motions. The Applicant has not presented any evidence that the result would have been different had trial counsel made the argument the way the Applicant alleges he should have. Therefore, this allegation is denied.

#### *Doyle Violation*

The Applicant also alleged that trial counsel was ineffective for failing to sufficiently challenge a violation of his Fifth Amendment right to remain silent under Doyle v. Ohio.<sup>3</sup> The Applicant testified that he requested an attorney when he "owned up to the drugs." He testified that during the trial, the Solicitor commented on this exercise of his right to remain silent. The Applicant further testified that trial counsel objected to the Solicitor's comment, and that trial counsel argued his objection during the Doyle hearing.<sup>4</sup> The Applicant also acknowledged that trial counsel's earlier motion to suppress the Applicant's statements was denied.

Trial counsel testified that the State had overwhelming evidence against the Applicant, because he gave statements to law enforcement both before and after he was arrested. Trial counsel testified that before the Applicant was arrested, and before any drugs were found in the house, an

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2 Payton v. New York, 445 U.S. 573 (1980).

3 Doyle v. Ohio, 426 U.S. 610 (1976).

4 The record reflects that a "Doyle hearing" was never held, but that trial counsel argued his objection to the Solicitor's comment outside the presence of the jury.

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officer asked him "how much you got." Counsel stated the Applicant told the officer approximately twenty-two (22) grams, and that the Applicant's response was significantly accurate - within one tenth of the amount the officers actually found. Trial counsel also testified that he had particular difficulty handling this statement, because it appeared very self-incriminating.

The record also reflects that trial counsel objected to the Solicitor's comment during her direct examination of Officer Brown regarding the Applicant's choice to "own up," rather than exercise his Fifth Amendment right to remain silent. Trial counsel offered a lengthy argument in support of this objection, but the trial court overruled his objection. Therefore, this Court finds that trial counsel's performance was not deficient and his conduct did not fall below an objective standard of reasonableness. Further, this Court finds the Applicant has shown no prejudice from this alleged deficiency.

This Court further finds that the issue as to whether the trial court erred in overruling trial counsel's objection to the Solicitor's comment is an issue that can only be raised on direct appeal and is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons, 264 S.C. at 417, 215 S.E.2d at 883. A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley, 260 S.C. at 436, 196 S.E.2d at 501. Trial court error, therefore, is not a cognizable claim for PCR. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Trial counsel made the necessary objection and preserved the issue for appeal. The Applicant could have raised the issue on direct appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, this allegation is denied.

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*Brady Violation*

The Applicant alleged trial counsel was ineffective for failing to ask the trial court to hold the Brady<sup>5</sup> hearing on the record. The Applicant testified that it was important to have the hearing on the record, because the State would have been required to bring forth the audiotape, drugs, and identity of the confidential informant. He testified that he did not believe the State actually had any of this evidence, and that if trial counsel had requested the hearing be held on the record, the record would show that the State fabricated all of the evidence in order to obtain the search warrant. The Applicant also testified that the search warrant referred to an electronic listening device that was used during the controlled buy, and that the State's failure to disclose the recording was a Brady violation.

Trial counsel testified that he did not request a Brady hearing, because the Applicant was not charged with or on trial for distribution of the drugs involved in the controlled buy that was the subject of the electronic recordings. He explained that the electronic listening device or recording was completely unrelated to the trafficking charge at issue.

In evaluating post-trial Brady claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268.

This Court finds trial counsel's decision not to request a Brady hearing on the record did not

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fall below an objective standard of reasonableness. The audiotape was not related to the crime with which the Applicant was charged, and therefore was not exculpatory evidence to which the Applicant would have been entitled. Second, trial counsel made a motion to compel the State to disclose the confidential informant's identity, but his motion was denied. This does not constitute a violation under Brady. Regardless, the Applicant failed to present any evidence that the material he alleges the State withheld was material or favorable to him. Therefore, this allegation is denied.

#### *Applicant's Rebuttal Testimony*

After the State concluded its cross-examination of the Applicant, the Applicant offered further testimony in rebuttal. With regard to the allegations the Court ruled were direct appeal issues, the Applicant testified that the Appellate Court granted the Anders brief, but that the Court did not make a decision on the merits of any of the issues he raised in his *pro se* brief.

This Court explained to the Applicant that the Appellate Court's holding meant that it did not find any merit in the issues he raised in his brief. Further, that the issues that are raised and decided by the Court of Appeals are final unless the South Carolina Supreme Court grants certiorari. This Court further clarified that the Supreme Court does not grant certiorari in every case.

#### *Summary*

This Court finds in regards to the allegations of ineffective assistance of counsel, the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel defended the Applicant vigorously throughout the trial with numerous motions and objections, as well as, aggressive cross-examination of the State's witnesses. Trial counsel was thoroughly competent in his representation, and his conduct does not fall below the

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objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

### CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

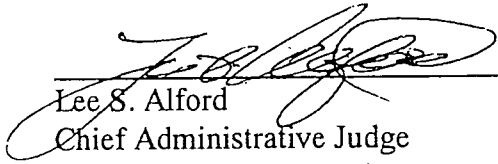
This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel’s assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant’s behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

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1. That the application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED!**

  
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Lee S. Alford  
Chief Administrative Judge  
Sixteenth Judicial Circuit

January 25, 2010  
Yale, South Carolina

# 26  
6/2/10

Dear Mr. Daniel E. Shearouse,

Please find enclosed one copy  
of the "Final order of Dismissal" issued by Judge John C. Hayes, III,  
on both the 22<sup>nd</sup> day of August, and the 17<sup>th</sup> day of November,  
as requested by this Court.

12-22-11

Sincerely,

Clifton Dyer

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S.C. SUPREME COURT

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U.S. SHIRAZI COURT



issues concerning the ineffectiveness of prior PCR counsel at the prior PCR hearing, and these issues could not have been raised in his prior PCR application because the violations had not occurred yet. The Applicant also asserts he has a right to allege prior PCR counsel was ineffective for failing to file a 59(e) motion. This Court disagrees. As stated in this Court's Conditional Order of Dismissal:

There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under §17-27-90." Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

Moreover, although pursuant to Austin a PCR applicant may petition the S. C. Supreme Court for discretionary review of the dismissal of their application, Austin "is limited to its particular factual situation." Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). In Aice, the Court held a successive application is not allowed on the basis that a prior PCR application was insufficient due to ineffective PCR counsel. Id. at 448, 409 S.E.2d at 393. Therefore, this Court finds the Applicant's response is not sufficient to show why the Conditional Order of Dismissal served upon him should not become final.

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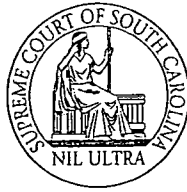
IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the application for PCR is hereby denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 22 day of August, 2011.

John C. Hayes, III  
John C. Hayes, III  
Chief Administrative Judge # 3  
Sixteenth Judicial Circuit

John South Carolina



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211  
TELEPHONE: (803) 734-1080  
FAX: (803) 734-1499

TO: Myron Lyles SCDC# 294075

DATE: 12-16-11

We are in receipt of your notice of appeal. It will be necessary for you to provide this office with the following required documents within **ten (10)** days of the date of this notice. Failure to provide the requested documents may result in the dismissal of this matter.

*PCR?  
need order*

proof of service showing notice of appeal was served on (Attorney General's Office)

a copy of the final order of dismissal

a copy of the conditional order of dismissal (if one was issued)

a copy of the conditional order of dismissal dated \_\_\_\_\_.

*2010 - CP - 46 - 02919*

Please return this sheet with the requested documents. Thank you!

*All orders on appeal.*

RECEIVED

DEC 16 2011

S.C. SUPREME COURT

Dear Honorable Mr. Daniel E. Shearouse,

please find enclosed one  
Motion of Notice, and Motion to appeal The final order of dismissal  
dated November 17<sup>th</sup> 2011, by The Honorable Judge John C. Hayes, III.

Sincerely

Clifton D. Lyles

State of South Carolina  
 County of York  
 Clifton D. Lyles, # 294625, Applicant,  
 v.  
 State of South Carolina, Respondent.

In The Court of Common Pleas  
 Sixteenth Judicial Circuit  
 Case No.: 2010-CR-46-02919  
 Motion of Notice, And Motion  
 To Appeal.

Based on the following, Applicant hereby objects to the final order of dismissal and files this Motion for appeal.

In his honor's final order of dismissal, Paragraph 2, page(s) 1-2, His Honor states that Applicant asserted in his response(s) to the State's motion to dismiss, and Conditional order of dismissal, that "his current application is not successive or untimely filed because he raised issues concerning the ineffectiveness of prior PCR Counsel at the prior PCR hearing. And that these issues could not have been raised in his prior PCR application because the violations had not occurred yet." His Honor also averred that Applicant asserts he has a right to allege prior PCR Counsel was ineffective for failing to file a 53(c) motion, which His Honor disagrees with.

Applicant avers that these facts are inaccurate. Although it is true that Applicant avers that his second PCR is not successive, based on Applicant raising the ineffectiveness of PCR Counsel at his prior PCR hearing, PCR to p. 5, line 21 - p. 9, line 13, it is not true that Applicant avers that this particular issue could not have been raised at his prior PCR hearing, being that Applicant did raise the issue as cited above.

His Honor was also incorrect with his averment that Applicant avers that he has a right to allege prior PCR counsel was ineffective for failing to file a 59(e) motion" in the context that His Honor stated.

Applicant alleged that the failure of PCR counsel to file a 59(e) motion could not have been raised at his prior PCR hearing due to that particular violation not occurring until after the hearing was over, so the first opportunity for Applicant to raise this issue is on a second application.

Applicant also disagrees with his honor's assertion as far as the context in which he states "There is no constitutional right to effective assistance of counsel for collateral review of a conviction." To explain Applicant's view on this matter, please examine Applicant's "Motion of objection to final order of dismissal, And Motion of Notice of Appeal," filed with His Honor on August 22<sup>nd</sup>, 2011. In which, Applicant attaches a copy of, to this Notice and Motion to Appeal.

#### Conclusion

Applicant asks that this Honorable Court reverse the PCR Judge's final order, and allow Applicant to move forward with all issues raised in his second PCR application.

By: Edward R. Lyder #294025  
Attorney

State of South Carolina

County of York

Clifton D. Lyles, #294075,  
Applicant,

v.

State of South Carolina, Respondent.

In the Court of Common Pleas

Sixteenth Judicial Circuit

Case No: 2010-CF-46-2919

Objection to Final Order of Dismissal  
and Motion of Notice of Appeal.

Applicant, by and through this Motion asks that the states proposed Final order of Dismissal be rejected based on the following:

The South Carolina Supreme Court Rules 50(5), and 11.1(D) make it mandatory, that Post-Conviction attorneys make sure that all available grounds are raised in Post-Conviction proceedings. After filing a pro se post-conviction application, and after being given court appointed counsel, a pro se litigant can not thereafter file any further pleadings, and any amendments to his application must be made by counsel, State v. Sanders, 269 S.C. 215, 237 S.E.2d 53 (1977), Foster v. State, 298 S.C. 306, 379 S.E.2d 90 (1989). Thus, if post-conviction counsel does not amend the pro se application, the Applicant has no way to have all supporting grounds heard.

Since State v. Carpenter, 277 S.C. 309, 286 S.E.2d 384 (1982), and State v. Cornsheras, 290 S.C. 251, 350 S.E.2d 150 (1986) prohibits South Carolina litigants from raising claims of ineffective assistance of trial counsel during their initial direct appeals, the Post-Conviction proceeding "must be viewed as the first appeal as of right on that particular claim." The South Carolina Supreme Court's decision in Lee v. State, 409 S.E.2d 392 (1991), holding that there is no Constitutional right to counsel in state post-conviction proceedings is based on a far stretched reading of the

Supreme Court's decision in Pennsylvania v. Finley, 481 U.S. 551, 102 S. Ct. 1290, 95 L. Ed. 2d 539 (1982). The decision in Finley, merely held that there is no constitutional right to counsel in state court discretionary appeals after the appellate stage has been exhausted. Id., 102 S. Ct. at 1293-1994.

Because the claim of ineffective assistance of trial counsel cannot be exhausted until an application for post conviction relief is filed, South Carolina litigants clearly have a right to effective assistance of counsel in presenting their claims of ineffective assistance of trial counsel. Cf. Evitts v. Lucey, 469 U.S. 382, 105 S. Ct. 330, 83 L. Ed. 2d 821 (1985); Coleman v. Thompson, U.S. 111 S. Ct. 2546, 2548 (1991). As a result, when an applicant is not assisted by a post-conviction attorney in setting forth all grounds to support his claim of ineffective assistance of trial counsel in his initial application, he or she should not be barred thereafter from submitting a second application to include additional grounds for a court's review.

In Carroll v. State, 293 S.C. 528, 362 S.E.2d 20 (1987), and again in Aice supra The South Carolina Supreme Court cited Forsyth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980), and South Carolina Code of Laws, section 17-27-90 for the general proposition, that successive applications are viewed with disfavor, and that the Applicant has the burden of showing that a new ground for relief could not have been raised in a previous application. However, Aice supra does not give attention to the court's decision in Case v. State, 277 S.C. 474, 259 S.E.2d 413 (1982), which held that if the

If such grounds are omitted to appeal from the findings of the conviction relief under Aspin v. State, 109 S.E.2d 395 (1991) if they can establish that they did not voluntarily waive their right to appeal, then they should also be allowed to file a subsequent application alleging that all grounds supporting a claim of ineffective assistance of trial counsel were not presented in the first application due to ineffective assistance of post-conviction counsel, who in reality is not post-conviction counsel

the first

right to have the grounds raised in the subsequent application heard in fact, unless it can find that the applicant intentionally waived his or her despite its success because the first application lacked specific circumstances should find that the second application should be heard that of the applicant in Case v. State, supra, the court under such circumstances must be seen to be "without counsel" and in the same position as in light of State v. Sanders, supra, and State v. State, supra, he or she knew how to raise them, and is heard from preliminary proceedings. In a situation where a post-conviction application is not assigned by his post-conviction attorney in properly amending his first application to include all supporting grounds underlying a claim of ineffective assistance of trial counsel, and does not know of such grounds, or does not know how to raise them, and is heard from preliminary proceedings.

Winters, State v., 109 S.E.2d at 394.

whether, in point of fact that he could have raised the appropriate argument, no attorney in his first application, and that it was highly doubtful success of the application. The facts in Case, established that the applicant meets the burden, a hearing must be afforded despite the success of the application, and that it was highly doubtful

On such claim, but instead is an appellate attorney in the first appeal as of right on that particular claim.

So for the above mentioned facts, as well as the (2) two earlier responses to the state's motion to dismiss filed on January 4<sup>th</sup>, 2011, and January 26<sup>th</sup>, 2011, Applicant asks that the state's Proposed Final Order of Dismissal should be rejected and that Applicant be allowed to move forward in having his application heard in its entirety.

By: Walter Dorrell Copley #1544  
Date

State of South Carolina  
 County of York  
 Clifton D. Lyles, # 294075  
 Applicant,  
 v.  
 State of South Carolina, Respondent.

In The Court of Common Pleas  
 sixteenth Judicial Circuit  
 Case No: 2010-CR-46-2919  
 Certificate of Service

I, Clifton D. Lyles, # 294075, do hereby promise that I have on this day served the objection to final order of dismissal and Motion of Notice of Appeal, on the following, by depositing the same in the United States mail postage prepaid:

Harrison D. Brant  
 Assistant Attorney General  
 P.O. Box 11549  
 Columbia, S.C. 29211

on this 22<sup>nd</sup> day of August 2011.

By: Clifton D. Lyles # 294075  
 Applicant

State of South Carolina

County of York

Clifton D. Lyles, #294075, Applicant,

v.

State of South Carolina, Respondent.

In the Court of Common Pleas

Sixteenth Judicial Circuit

Case No: 2010-cp-46-02919

Certificate of Service.

I, Clifton D. Lyles, #294075, do hereby promise that I have on this day served the Motion of Notice, and Motion To Appeal, on the following, by depositing the same in the United States mail postage prepaid:

Harrison D. Brant

Assistant Attorney General

P.O. Box 11544

Columbia, S.C. 29211, And

David Hamilton, York County Clerk of Court

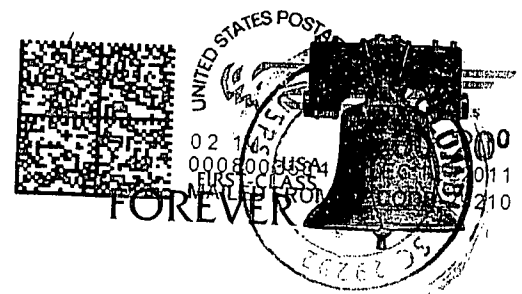
P.O. Box 644

York, S.C. 29745

OR This 12<sup>th</sup> day of December 2010.

By: Clifton D. Lyles  
#294075

Clifton Lyles # 294075  
BRCI-Mur-216  
4460 BroadRiver Rd.  
Columbia, S.C. 29210



**RECEIVED**  
DEC 12 2011  
BRCI  
MAILROOM

The Supreme Court of South Carolina  
Daniel E. Shearouse  
Clerk of Court  
P.O. Box 11330  
Columbia, South Carolina 29211

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