THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable William A. McKinnon, Sixteenth Circuit Court Judge

Case No. 2017-CP-46-01911

Darnell Keri Slaton #290534,.....Petitioner,

v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Petitioner, Darnell Keri Slaton, by and through undersigned counsel, William G. Yarborough III, hereby appeals the Honorable William A. McKinnon's Order dismissing Petitioner's application for post-conviction relief in the above-captioned case. Respondent served the filed order on Counsel on September 18, 2018 by mail, and Counsel received it on September 21, 2018. A copy of the order is attached to this notice.

Respectfully Submitted,

By: _____

William G. Yarborough III, #10271
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Greenville, SC
October 17, 2018

PROOF OF SERVICE

The undersigned hereby certifies, swears, and affirms that copies of the Notice of Appeal was mailed through U.S. postal mail for filing and service upon Respondent respectively, with sufficient postage attached, to the following addresses:

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

Senior Assistant Attorney General Megan Jameson
SC Attorney General
P.O. Box 11549
Columbia, S.C. 29211

The undersigned further certifies that all parties required to be served pursuant to the appellate court rules have been served.

This 17th day of October, 2018

Sandy Ignacio
Administrative Assistant
William G. Yarborough III, Attorney at Law, LLC

Sworn before me this 17th day of October, 2018

Notary Public of South Carolina
My commission expires: 06-08-2022

RACHAEL L. ALEJANDRO NOTARY PUBLIC MY COMMISSION EXPIRES 6/8/2022 SOUTH CAROLINA

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
Darnell Keri Slaton, SCDC #290534, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2017-CP-46-01911 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed on June 30, 2017, by retained counsel William G. Yarborough, III, on behalf of Darnell Keri Slaton (Applicant). The State (Respondent) served its return on October 17, 2017, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened July 30, 2018, at the Moss Justice Center in York County. Applicant was present at the hearing and represented by counsel Yarborough. Senior Assistant Deputy Attorney General Megan Harrigan Jameson from the South Carolina Attorney General's Office appeared on behalf of the State. After a review of the record and all evidence presented, this Court finds Applicant failed to meet his requisite burden of proof and denies this application with prejudice.

PROCEDURAL HISTORY

The records before this Court establish Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. On July 25, 2013, Applicant was arrested for distribution of marijuana in connection with a controlled purchase of marijuana to a confidential informant working with the York County Multijurisdictional Drug Enforcement Unit. During its December 12, 2013, term, the York County

Grand Jury indicted Applicant for distribution of marijuana. Assistant Public Defender Melissa Inzerillo of the York County Public Defender's Office represented Applicant. Assistant Solicitor Matthew Shelton of the Sixteenth Circuit Solicitor's Office prosecuted the case. On April 20, 2015, Applicant proceeded to a jury trial in the York County Court of General Sessions before the Honorable John C. Hayes, III, circuit court judge. On April 21, 2015, the jury convicted Applicant as indicted. Judge Hayes sentenced Applicant to twelve years' imprisonment for distribution of marijuana, as the conviction was his third drug offense. [1]

Applicant filed a timely notice of appeal and was represented by William G. Yarborough, III, Esquire. On appeal, Applicant argued: (1) the trial court erred in conducting a hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972), to determine the admissibility of a video recording that showed a confidential informant identifying him in a photo lineup; and (2) the trial court erred in denying his motion or a directed verdict. Following briefing, the Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion filed on May 17, 2017. State v. Slaton, Op. No. 2017-UP-203 (S.C. Ct. App. filed May 17, 2017). The remittitur was returned to the circuit court on June 23, 2017.

SUMMARY OF FACTS ADDUCCED AT TRIAL

In 2012, Sergeant John Rainier of the Rock Hill Police Department was working as an investigator with the York County Multijurisdictional Drug Enforcement Unit (DEU). (Tr. 122). As a member of the DEU, Rainier investigated and enforced narcotics and vice crimes, often with the assistance of confidential informants. (Tr. 122-25).

[1] Applicant's prior drug offenses include two convictions for possession of marijuana, one conviction for possession of crack cocaine, and one conviction for distribution of crack cocaine.

On October 19, 2012, Rainier met with Jacob "Jake" Ballard, a confidential informant who had been working with the DEU for a few months following a July 2012 arrest for possession of marijuana and driving under suspension. (Tr. 89-93, 123-25). Ballard told Rainier he could purchase marijuana from an individual called "Dough" who lived in Apartment 105 in his apartment complex, located on 151 Clegan Road in Rock Hill, South Carolina. (Tr. 93-95,101, 124-25). Ballard had been to Dough's apartment ten times, was familiar with Dough, and knew he could purchase marijuana from Dough. (Tr. 39, 44). Rainier arranged to meet Ballard at a designated location near Dough's apartment complex in a DEU car. (Tr. 93-95, 125). Investigator Harrellson, a fellow law enforcement officer working with the DEU, accompanied Rainier. (Tr. 136).

When Ballard arrived at the meeting spot, Rainier thoroughly searched Ballard to ensure he did not have any contraband or private money on his person. (Tr. 96, 126). Rainier then equipped Ballard with two cameras (one on his shirt and another on his watch) to record the anticipated marijuana purchase from Dough. (Tr. 97, 126-27). He provided Rainier with forty dollars in documented funds to be used in the controlled purchase of two grams of marijuana from Dough. (Tr. 96, 126). Ballard identified Dough's vehicle in the parking lot to Rainier. (Tr. 25, 137). Rainier then used the vehicle's license plate to obtain utility and Department of Motor Vehicle records (including a photograph and address) of the vehicle's registered owner, Applicant Darnell Keri Slaton. (Tr. 137). Ballard then left the DEU vehicle and proceeded to Dough's apartment. (Tr. 97, 127). Rainier was able to maintain audio surveillance of Ballard through the recording equipment. (Tr. 127-28). On his walk to Dough's apartment, Ballard spoke with Dough

by phone and received instructions from Dough to enter his apartment through an unlocked door. (Tr. 100-101).

Upon reaching Dough's apartment, Ballard entered through the unlocked front door and went into the kitchen pursuant to Dough's instructions. (Tr. 100-102). Ballard then used the forty dollars given to him by law enforcement to purchase two grams of marijuana from Dough. (Tr. 102-03). The two discussed the quality of the marijuana before Ballard left. (Tr. 103-04). Ballard was able to record the transaction on both cameras. (Tr. 98, 100, 130). Additionally, Rainier heard the entire transaction live through the recording equipment worn by Ballard. (Tr. 127-28).

Ballard exited Dough's apartment with marijuana and headed directly to Rainier and the DEU vehicle. (Tr. 105, 129). Upon reaching the vehicle, Ballard relinquished the marijuana to Rainier. (Tr. 105-06, 129). Rainier searched Ballard again to ensure he did not have any contraband. (Tr. 129). Rainier then presented Ballard with a six-person photo lineup (including Applicant's photograph obtained through the DMV records for Dough's car) and asked Ballard to see if he could identify the person who sold him marijuana. (Tr. 106-08, 136-39). Ballard identified Applicant as the person who sold him marijuana minutes before. (Tr. 106-08, 139-40). Ballard then accompanied Rainier to the police station to give a statement. (Tr. 106, 140-41). Once at the station, Rainier deposited the marijuana in the secured evidence locker. (Tr. 135).

On November 13, 2013, Cynthia Mitchum, a drug chemist in the York County Sheriff's Office Drug Analysis Lab, tested the marijuana sample Rainier had deposited in the evidence locker. (Tr. 148-58). Mitchum identified the sample as marijuana and noted its total weight was 2.52 grams. (Tr. 157-58).

Applicant proceeded to a jury trial on April 20, 2015. At the start of trial, the State requested a hearing pursuant to Neil v. Biggers[2]. (Tr. 20). Applicant did not object to the trial court conducting a Biggers hearing and did not argue that such a hearing was unnecessary or prejudicial to him. (Tr. 20). During the Biggers hearing, the State presented testimony from Rainier and Ballard. Rainier testified he showed Ballard the lineup in the backseat of his DEU vehicle shortly after the controlled purchase. (Tr. 24-25). He testified it was daylight when he showed Ballard the lineup. (Tr. 24-25). He testified he received Applicant's name and picture through utility and DMV records obtained when Ballard showed him Dough's car prior to the purchase. (Tr. 25-26, 32). He testified the lineup contained six pictures, including Applicant, and he selected the other five people based on similar physical descriptions to Applicant. (Tr. 25-26). He testified the photographs were not marked in any way. (Tr. 25-26). He testified prior to showing Ballard the lineup, he advised him the suspect may or may not be included in the lineup and did not suggest whom he should select. (Tr. 25-27). Rainier testified Ballard identified Applicant "almost immediately." (Tr. 27). He testified Applicant was the only light skinned person included in the lineup, but noted the lineup was in black and white. (Tr. 33-34).

Ballard testified he purchased marijuana from Applicant on October 19, 2012. (Tr. 38). He testified he made the controlled buy during the daylight in Applicant's well-lit kitchen. (Tr. 37-38). He testified he had known Applicant for a year and had seen him approximately ten times, but acknowledged he only knew his by his nickname, Dough. (Tr. 38-39). He testified he identified Applicant from the photo line-up shortly after the controlled buy "as soon as [he] got in the vehicle." (Tr. 40). He testified law enforcement did not suggest any particular suspect to him (Tr.

[2] 409 U.S. 188 (1972).

40). He testified he gave law enforcement a description of the man who sold him marijuana, including that he was an African American male who was heavy set and had a full beard. (Tr. 41, 43). He testified he was able to select Applicant immediately and that he was "a hundred percent sure" Applicant was the person who sold him marijuana. (Tr. 41).

At the conclusion of the hearing, Applicant moved to suppress Ballard's identification, making the following argument:

> Your Honor, for purposes of this hearing, I would ask the Court to make findings where—I would just make just a few points. I would ask the Court to take into consideration the photographs that has been provided and placed into evidence by the State. Mr. Slaton, who was the third photograph by the page that is listed as Image 3, or the second photograph for the first column, is the only light-skinned black male in the six-pack lineup. It's been testified to by both witnesses that that is the only picture of both—that the confidential informant focused in on and went to. We would ask the Court to take that into consideration as to the suggestibility of that photograph.
>
> Officer Rainier despite looking at the photo—the lineup, did not go back and ask for it to be redone in any way. He had not seen Mr. Slaton before, that—that the skin tones between the remaining pictures and Mr. Slaton is significant enough as to, I believe, rise to the level of suggestibility.
>
> Mr. Ballard did indicate he had interacted with the person he knows as Dough prior to this. The only description, however, that he gave to officers was an African-American, heavy-set man, full beard and scruffy. So, no height weight description, nothing else that would help the officers narrow down any particular description.
>
> Moreover, your Honor, in his own—and in his testimony he gave the ten prior instances. Less than five of those, he was under the influence of marijuana when interacting with the person he knows as Dough. I would ask the Court to take that into consideration in terms of any findings of suggestibility in the identification procedure in this case.

(Tr. 47-49). Notably, Applicant did not argue that a Biggers hearing was improper or prejudicial. In reply, the State argued the lineup was not suggestive and noted Ballard was absolutely certain Applicant was the person who sold him drugs minutes prior. (Tr. 48-49). The trial court found the lineup procedure was not impermissibly suggestive, noting,

> Well, you never have six identical-looking individuals. In this particular lineup, Mr. Slaton does have lighter skin and a fuller beard. But looking at the totality of the circumstances I cannot find—or, I find that the Defense has not shown, by a preponderance of the evidence, that the identification procedure was impermissibly suggestive.

(Tr. 49). The trial court elaborated that the manner in which Rainier presented the lineup to Ballard was also "not impermissibly suggestive looking at the totality of the entire procedure." (Tr. 49). The trial court further found there was no substantial likelihood of irreparable misidentification and that the identification was reliable. (Tr. 49-51).

During its case, the State presented Ballard, Rainier, and Mitchum. The State also presented Jamie Faulkenberry, an officer with the City of Rock Hill Police Department also assigned to the DEU. (Tr. 163-64). Faulkenberry arrested Applicant on July 25, 2013. (Tr. 164). When asked his address during booking, Faulkenberry reported Applicant listed his address as the same apartment where Ballard purchased marijuana—151 Clegan Road, Apartment 105 in Rock Hill, South Carolina. (Tr. 35, 38, 95,101, 137, 164).

At the close of the State's case, Applicant moved for a directed verdict without any supporting argument. (Tr. 166). The trial court denied Applicant's motion, finding "substantial direct evidence or plenty of direct evidence from which a jury could conclude that a distribution of marijuana took place, and that Mr. Slaton was, in fact, the individual involved in distributing the marijuana to Mr. Ballard on the date and that the time and place in question . . . ." (Tr. 166-

67). Applicant elected not to present any witnesses. The jury convicted Applicant as indicted. (Tr. 208).

ALLEGATIONS RAISED

On June 30, 2017, Applicant, through counsel Yarborough, filed an application for post-conviction relief, alleging:

1. "Ineffective assistance of counsel for not objecting to the admissibility of a video recording showing a confidential informant identifying the Applicant from a photo lineup and by not objecting to the admission of the photographic lineup from the video."

2. "The trial court erred in conducting a Neil v. Biggers hearing to determine the admissibility of a video recording that showed a confidential informant identifying him from a photo lineup."

3. "There was insufficient evidence of the Applicant's guilt since the State's only evidence against the Applicant was a skewed photo lineup which was improperly admitted and the doubtful testimony of a confidential informant. Thus, the trial court erred in denying the Applicant's motion for a directed verdict in violation of the Applicant's 4th and 14th Amendment due process rights."

The State served its return and partial motion to dismiss on October 17, 2017, arguing the allegations pertaining to trial court error and sufficiency of the evidence were not proper grounds for post-conviction relief. Thereafter, on April 4, 2018, Applicant, through counsel, filed an amended application alleging the following grounds:

1. Ineffective assistance of counsel for failing to object to the admission of the lineup at trial, including the video's depiction of the lineup, on the grounds that it improperly bolstered the credibility of the CI

2. Ineffective assistance of counsel for failing to properly argue for a directed verdict.

3. Ineffective Assistance of counsel for failing to challenge discovery restrictions in previous plea offers

4. Ineffective Assistance of counsel for failing to request a jury instruction on the proper purpose of considering photo lineup

5. Ineffective Assistance of counsel for failing to request a jury instruction on the credibility of the CI who may benefit from guilty plea.

6. Ineffective assistance of counsel for failing to question law enforcement officers about recording of codes on money given to the CI and failure to recover currency matching those codes from Applicant.

Applicant proceeded forward on the allegations in his amended application at the evidentiary hearing.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the start of the evidentiary hearing, Applicant was sworn and questioned by the court about whether he wished to waive any and all allegations of in effective assistance of appellate counsel against counsel Yarborough, who represented him on his direct appeal and now currently represents him in this post-conviction relief action. Applicant informed this Court he wished to freely, intelligently, and voluntarily waive any claims against counsel Yarborough with prejudice.

Thereafter, Applicant called trial counsel Melissa Inzerillo. Counsel testified she was appointed to represent Applicant on October 22, 2013. She testified Applicant had three pending distribution of marijuana charges (all which would be third drug offenses), but the State only proceeded to trial on one offense and dismissed the other two offenses after Applicant was convicted. She testified after reviewing all the discovery, interviewing the confidential informant, and meeting with Applicant, the trial strategy/defense was not to challenge Applicant's identity, but to argue no drug transaction had taken place. She testified the videos of the transaction

supported this defense because no hand-to-hand transaction was shown and there was no blatant reference to a marijuana sale taking place.

Counsel testified there was an offer from the State to allow Applicant to plead guilty to one count of distribution of marijuana as a first offense (rather than a third offense) for a sentence of three years imprisonment and dismissal of the other offenses. She testified this plea offer was conditioned on Applicant not watching the videos of the drug transactions, a common term of plea offers to allow the State to protect the identity of the informant. She testified she conveyed these offers to Applicant and he rejected them. She recalled that Applicant was scheduled to reject the offer on the record on April 10th, but due to scheduling issues, they met with Assistant Solicitor Shelton and discussed a protective order to view the videos.

Counsel testified the Solicitor's Office had an open file policy for all documents other than those that pertained to the identity of the confidential informant. She testified the Solicitor's office does not provide the identity of the confidential informant or the full video of the drug transaction until a protective order is in place, typically once all plea offers have expired. However, she testified in accordance with the solicitor's office policy regarding confidential informants, she was provided with several still shot photographs from the video in discovery. She testified these photographs included shots of Applicant's face during the alleged transaction, which is typical of the solicitor's office policy to "pull the clearest stills" included head shots of the suspect. She testified she met with Applicant and showed him these still shots. She testified she entered (with Applicant's express consent) into two protective orders, introduced as State's Exhibit No. 1 and 2, which allowed her and later Applicant to watch the full videos of the drug transaction. She testified the videos, introduced as part of Applicant's Exhibit No. 1, appeared to be a drug transaction

involving Applicant and that his face was clearly visible, but that neither video depicted a hand-to-hand transaction. She testified there was some discussion on the video that alluded to the taste and quality of the marijuana, but nothing that explicitly stated a marijuana sale was taking place. She testified she described the videos to Applicant and called him on April 13th, April 14th, and April 15th to ask him to come to her office to watch the videos, but he did not return her calls and did not come watch the videos. She testified they met on April 20th, which was the day his trial started. She did not recall meeting with Applicant or his family the Friday prior to trial. She testified she did meet with a member of Applicant's family at some point. She testified that Applicant's concern had always been wanting to know the identity of the informant and watching the videos, but when he had the opportunity to view the videos, he never came by her office to watch the videos despite her numerous efforts.

Counsel testified she spoke to the confidential informant prior to trial and the informant indicated he had known Applicant for a while. She testified it was also obvious from the videos that Applicant and the informant knew each other, which she conceded could have bolstered the informant's credibility. However, she testified she did not object to the videos based on bolstering because she believed they would have been admitted because they were corroborative, not bolstering. Moreover, she testified the videos helped her trial strategy and defense that a drug transaction did not take place. She elaborated that neither video showed a hand-to-hand drug transaction, so the introduction of the videos during trial helped with her defense. She testified she was able to argue to the jury that neither video showed a drug transaction taking place. She testified she did not ask for the final portions of the videos where Applicant is making the identification of Applicant from a lineup to law enforcement to be redacted. She elaborated this is because they

were not challenging Applicant's identity but rather, that a drug transaction never took place. She similarly testified this is why she did not object to any of law enforcement's comments during the identification procedure. She testified she did object to the informant's identification of Applicant and the trial court allowed the identification to be admitted following a pre-trial Neil v. Biggers[3] hearing. She testified her arguments in favor of suppression were that Applicant's photograph was much lighter than the other five photographs, that Applicant had much lighter skin than the other five men in the photo lineup, and that the informant was often under the influence of drugs when with Applicant which would have affected his identification. She testified she contemporaneously objected to the identification, preserving the issue for appellate review. Counsel testified she moved for a directed verdict at the close of the State's case based on a lack of sufficiency of the evidence, which was denied by the trial court.

She testified that a jury always considers the credibility of a confidential informant, like any other witness. She testified the trial court gave a jury instruction about weighing the credibility of witnesses, but she did not ask for a specific jury instruction pertaining specifically to the credibility of the confidential informant and possible benefits he would derive from a guilty verdict. She testified she thinks such an instruction would likely be a comment on the facts of the case, and therefore, impermissible. However, she argued about the informant's credibility in her closing. She similarly testified the trial court gave a standard jury instruction on identifications, but she did not ask for a jury instruction on the purpose of the photo lineup while deliberating. She testified she also thinks this instruction would be a comment on the facts. She also testified that because Applicant's identity was not at issue, she did not see a reason to request such a charge.

[3] 409 U.S. 188 (1972)

Counsel testified she could not recall if the funds used by the informant during the transaction were documented for this particular drug transaction. She testified she did not argue whether any documented funds were recovered because Applicant was not arrested until nearly nine months after the transaction and therefore, it is unlikely any funds would have been recovered.

Applicant testified next on his own behalf. Applicant testified counsel represented him for approximately one to one-and-a-half years prior to his trial and he met with her fifteen to twenty-five times. He testified these meetings only lasted five to ten minutes. He testified his mother occasionally accompanied him to these meetings with counsel. He testified these meetings were more like reports, where counsel would confirm his contact information and where he was employed, but they would never discuss his case. He testified despite all these meetings, counsel never reviewed discovery with him and never discussed the facts of his case. He testified he wanted to see the videos of the drug transactions and asked counsel numerous times to allow him to watch the video. He testified counsel never showed him the videos and did not show him the still photographs until the Friday before trial. He testified when the videos were shown during trial, he wondered where they came from. He testified he never saw the photo lineup prior to trial and was surprised when he saw it because none of the other men looked like him. He testified counsel never discussed the photo lineup with him, or possible ways to suppress his identification, before trial. He testified counsel did not discuss the weight of the marijuana with him. He testified he does not believe he was treated fairly because he was not "brought up to speed" with the evidence in his case.

Applicant testified counsel presented him with a three year offer from the State, but he turned it down because he did not think he was guilty and should not have to accept a term of

imprisonment merely because his face was in the videos and still photographs. He confirmed that because no transaction was recorded, he wanted to proceed to trial. He also testified he proceeded to trial because he wanted to see the videos. He testified he told counsel he was not going to make a decision regarding the plea offer until he saw all the evidence, including the videos. However, Applicant testified he always knew who the informant was and had known him for over two years. He elaborated the informant lived in the same apartment building as him. He testified his identity was not at issue, it was that he did not sell drugs to the informant. He testified he does not recall counsel calling him to come watch the videos. He testified he asked counsel to request a continuance of his trial to allow him time to watch the videos but counsel refused to do so. He testified he never met with the assistant solicitor. He testified he would have accepted the plea offer if he had seen the videos.

He testified he was under the impression that these charges were not that serious. However, he acknowledged this was his third drug offense, had prior convictions that had resulted in incarceration, and was facing multiple distribution charges. Applicant testified he was arrested at the same apartment where the alleged transaction took place. He testified he was arrested for failure to appear for a probation matter, not for distribution.

Applicant also called his mother, Linda Elder, as a witness. She testified she lived in Charlotte and Applicant lived in Rock Hill, but she would sometimes take Applicant to his appointments with counsel in York. She estimated she accompanied Applicant to four or five meetings with counsel and acknowledged that Applicant usually met with counsel alone. She testified in these few meetings she did attend, they never discussed plea offers. However, she testified she accompanied her son to a meeting the Friday before trial and they did discuss a plea

offer for three to five years. She testified that like her son, she did not believe the charges were that serious and was surprised the offer was for so much time. However, she acknowledged her son had prior drug convictions and had served a five year term of imprisonment based on these prior convictions. She testified counsel had her telephone number and could have called her if she was trying to reach Applicant to watch the videos. She testified she often discussed the case with her son and was shocked at trial by the videos of the transaction.

Following Applicant's case, the State called Assistant Solicitor Shelton, who prosecuted the case. He testified he took over the case from a fellow assistant solicitor in his office, Jennifer Colton, about a year into the case's pendency. He testified a plea offer for three years to distribution as a first offense and the dismissal of the other two indictments was already extended when the case was assigned to him. He testified the case was docketed as a potential trial and he reached out to counsel to see if Applicant wanted to accept the plea or proceed to trial. He testified this case was a true third offense and therefore, had a mandatory minimum term of imprisonment Applicant faced if convicted. He testified one of the terms of the three year plea offer was that the State would not reveal the identity of the informant to protect the integrity of the informant. He testified this is standard practice for his office when a case involves a confidential informant. He testified in accordance with this policy, his office provided Applicant and counsel with still photographs from the videos that clearly showed Applicant's face. He testified videos of confidential informant drug transactions are only provided pursuant to protective orders pursuant to his office's policy after all plea offers have been rejected and that two such protective orders were entered into in this case. He testified both protective orders were entered into with Applicant's consent based on his discussions with counsel. The first protective order (State's Exhibit No. 1) allowed counsel to view

the videos and describe them to Applicant. He testified the second protective order (State's Ex. No. 2) allowed Applicant to watch the videos. He testified all plea offers were off the table once the videos were turned over to counsel. He testified counsel told him that Applicant wanted to see the videos of the transaction. He testified a hearing was scheduled for Applicant to turn down the plea offer on the record, but did not happen due to a court scheduling issue. He testified he does not recall ever meeting with Applicant and does not meet with defendants as a general practice.

Assistant Solicitor Shelton testified the lineups were turned over to counsel prior to trial and that counsel objected to the identifications prior to trial. He testified following the Biggers hearing, the trial court ruled the identification was admissible. He testified he introduced the lineup, the informant's identification, and the videos of the drug transaction at trial to prove his case and Applicant's identity. He testified the trial court gave a standard jury instruction on identification and does not believe a charge on the purpose of photo lineups during deliberations would have been proper because it is a comment on the facts. He similarly testified the trial court instructed the jury on the credibility of witnesses and believes a charge on the credibility of the informant and potential benefits he might yield from a guilty verdict would be an impermissible comment on the facts of this case.

Assistant Solicitor Shelton testified he could not recall if this case involved documented funds, but two out of the three pending distribution cases with Applicant did. He testified this was not an issue in Applicant's trial because he was not arrested for nearly nine months after the drug transaction.

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 hearings. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her 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 [it] cannot be relied upon as having produced a just result." Strickland, 466 U.S. 668. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made

all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden of proof and had not established any ineffectiveness of counsel. Below are the findings in regards to each specific allegation of ineffective assistance of counsel raised by Applicant:

Allegation: Ineffective assistance of counsel for failing to object to the admission of the lineup at trial, including the videos' depiction of the lineup, on the grounds that it improperly bolstered the credibility of the confidential informant

Applicant asserts counsel was ineffective for failing to object to the admission of the lineup at trial, including the videos' depiction of the lineup, on the grounds that it improperly bolstered the credibility of the confidential informant. Specifically, Applicant alleges, "Because Applicant's face is seen on the video, a photo lineup and Neil v. Biggers hearing were unnecessary and the jury could decide for itself whether it was Applicant in the video. The lineup thus improperly bolstered the credibility of the confidential informant ("CI") in his testimony that a controlled buy indeed took place between the Applicant and himself." (Amended APCR p. 2). This Court finds

this allegation is without merit, as Applicant has failed to establish a basis for the suppression of either the identification or the videos at trial. The identification of Applicant by the confidential informant and the video were relevant, probative evidence and not unduly prejudicial to Applicant, and therefore, were admissible at trial. See Rule 402 and 403, SCRE. This Court finds Applicant's claim that the videos and identification were only introduced to bolster the informant's identification of Applicant to be without merit. "Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain 'the assessment of witness credibility . . . within the exclusive province of the jury.' " State v. Taylor, 404 S.C. 506, 514–15, 745 S.E.2d 124, 128 (Ct. App. 2013) (quoting State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). Here, the informant's identification and the video of his point of view of the drug transaction and identification procedures immediately following the transaction were relevant to the informant's own testimony, not that of any other witnesses, and were not vouching for or bolstering his credibility, but were merely visual representations of what he testified. As the videos and the lineup were admissible, the Court finds counsel was not deficient for failing to object to their admission.

Additionally, this Court finds Applicant has failed to establish any deficiency of counsel because Counsel timely and properly moved to suppress the identification made by the informant. Applicant's assertion that a Biggers hearing was "unnecessary" because Applicant's face is on the video is without merit, as a Biggers hearing was necessary to determine if the identification was admissible (i.e., not the result of unduly suggestive law enforcement procedures and without substantial risk of misidentification). See State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012) (holding due process required trial court to conduct in camera Neil v. Biggers hearing to determine

reliability of eyewitness' out-of-court identification of murder defendant as shooter, for purposes of determining whether one-person show-up was so impermissibly suggestive as to have created substantial risk of irreparable misidentification, regardless of how well eyewitness knew defendant). After a properly conducted Biggers hearing, the trial court allowed the identification to be admitted. Counsel properly objected contemporaneously to the identification, therefore properly preserving the issues for appellate review.

Moreover, counsel testified she had a strategic reason for not objecting the admission of the videos—both supported her defense that a drug transaction never took place because neither video showed a hand-to-hand drug transaction. She similarly argued this point to the jury during her closing argument. Therefore, because counsel had a valid, strategic reason for not objecting, her performance was reasonable. "When counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citations omitted).

Furthermore, this Court finds Applicant cannot establish any prejudice, as Applicant himself concedes identity was not at issue in this trial and the defense strategy was that a drug transaction had not taken place. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

Allegation: Ineffective assistance of counsel for failing to properly argue for a directed verdict

Applicant asserts counsel was ineffective for failing to properly argue for a directed verdict. Specifically, Applicant argues "trial counsel was ineffective for failing to properly argue for the court to enter a directed verdict in Applicant's favor based upon the State's failure to prove the existence of evidence." This Court finds this allegation is without merit, as counsel timely moved

for a directed verdict and the trial court denied this motion. (Tr. p. 166-67). The Court of Appeals found this issue was preserved for appellate review and affirmed the trial court's denial of a directed verdict. Applicant has failed to establish any additional arguments that would have been successful or resulted in the trial court granting a directed verdict motion. Therefore, this allegation is denied and dismissed with prejudice.

Allegation: Ineffective assistance of counsel for failing to challenge the discovery restrictions in plea offers that denied Applicant access to full discovery

Applicant asserts counsel was ineffective for failing to challenge the discovery restrictions in the plea agreement, which he asserts "denied Applicant's access to discovery, particularly, the denied access to view the videos and audio that were later introduced at trial." (Amended APCR p. 3). Applicant asserts the inability to view the videos resulted in his "inability to make a complete and informed decision about whether to proceed to trial and forego an advantageous plea agreement." This Court finds this allegation is without merit.

Initially, this Court finds this allegation must fail, as Applicant testified he was aware it was him on the videos, he knew who the confidential informant was the entire time, and wanted to proceed to trial not because he was unable to view the videos, but rather, because he did not think the evidence established he had sold marijuana. Therefore, Applicant cannot establish that he would have accepted the plea offer had he viewed the videos while the plea offer was still on the table. See Hyman v. State, 397 S.C. 35, 49, 723 S.E.2d 375, 382 (2012), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) ("Petitioner was fully aware of the inculpatory nature of the videotape throughout the negotiations and the guilty plea proceedings. Consequently, Petitioner has failed to prove how the outcome would have been different had he chosen not to plead guilty until after he watched the videotape himself.").

Moreover, Applicant cannot establish any deficiency of counsel for failing to object to the solicitor's office discovery policy regarding confidential informants, as the policy did not violate any discovery rules and the State provided still photographs from the videos that clearly depicted Applicant in the videos. See Hyman, 397 S.C. 35, 723 S.E.2d 375 (holding the State's refusal to allow drug defendant to view videotape of drug transaction forming basis of charges did not violate its discovery obligations, where existence of videotape was disclosed to defense counsel, the State provided stills from the videotape for defendant to view, defense counsel was allowed to view videotape, and videotape was not exculpatory, in that it depicted defendant engaged in drug transaction with confidential informant). Accordingly, this Court finds Applicant has failed to meet his requisite burden of proof. This allegation is denied and dismissed with prejudice.

Allegation: Ineffective assistance of counsel for failing to request a jury instruction on the proper purpose of considering the photo lineup while deliberating and a jury instruction on the credibility of the testimony of the informant who may benefit from a guilty verdict

Applicant asserts counsel was ineffective for failing to request jury instructions on the proper purpose of considering the photo lineup while deliberating and the credibility of the testimony of the confidential informant who may benefit from a guilty verdict. Counsel acknowledges she did not request these jury instructions, but that the court did instruct the jury on identifications and the credibility of witnesses. She also testified both proposed instructions Applicant thinks should have been charged could be impermissible comments on the facts. This Court finds these allegations must fail, as such jury charges would have been improper comments on the facts. "Under South Carolina law, it is a general rule that a trial judge should refrain from all comment which tends to indicate to the jury his opinion on the credibility of the witnesses, the weight of the evidence, or the guilt of the accused." State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d

570, 572 (1989) (internal citations omitted); see also State v. Collins, 266 S.C. 566, 573, 225 S.E.2d 189, 193 (1976) ("Defendant's next contention is that the trial judge erred in refusing to charge that the testimony of a codefendant should be carefully scrutinized and that the jury may consider whether the witness is fearful of retribution or has any hope of leniency from the prosecution. We think the trial judge's overall instruction that it was the jury's duty to pass upon the credibility of the testimony of witnesses, and that they could reject any part of the testimony if they found reason for doing so, was adequate. Any further instruction on this point might have invaded the province of the jury to draw inferences from the evidence.") (internal citations omitted). This Court finds Applicant's requested jury instructions both would have amounted to impermissible comments on the facts and would not have been proper for the trial court to give. Therefore, this Court finds trial counsel was not deficient for failing to request these jury instructions. These allegations must be denied and dismissed with prejudice.

Allegation: Ineffective assistance of counsel for failing to question law enforcement officers about the recording or failure to record codes on the money given to the informant and failure of law enforcement to recover currency matching those codes in Applicant's home or possession

Applicant asserts counsel was ineffective for failing to question law enforcement officers about the recording or failure to record codes on the money given to the informant and failure of law enforcement to recover currency matching those codes in Applicant's home or possession. Both counsel and Assistant Solicitor Shelton could not recall if this particular transaction involved documented funds. However, both testified, and Applicant acknowledged, that he was not arrested for approximately nine months after this transaction. Therefore, it is unlikely any money could or would have been recovered even if these funds were documented and is not probative. This Court finds this allegation is without merit and must be denied and dismissed.

CONCLUSION

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

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record 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 post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 29 day of August, 2018.

#2741

WILLIAM A. MCKINNON
Presiding Judge
Sixteenth Judicial Circuit

_____, South Carolina

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

DARNELL KERI SLATON, #290534, Applicant,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

William G. Yarborough, III, Esquire
William G. Yarborough III, Attorney at Law, LLC
522 North Church Street
Greenville, South Carolina 29601

This 18th day of September, 2018.

MEGAN HARRIGAN JAMESON
Attorney for Respondent

SWORN to before me this 18th day of September, 2018.

Notary Public for South Carolina
My Commission Expires: 5/20/2025

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

DARNELL KERI SLATON, #290534, Applicant,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

William G. Yarborough, III, Esquire
William G. Yarborough III, Attorney at Law, LLC
522 North Church Street
Greenville, South Carolina 29601

This 18th day of September, 2018.

MEGAN HARRIGAN JAMESON
Attorney for Respondent

SWORN to before me this 18th day of September, 2018.

Notary Public for South Carolina
My Commission Expires: 5/20/2025

ALAN WILSON
ATTORNEY GENERAL

September 18, 2018

William G. Yarborough, III, Esquire
William G. Yarborough III, Attorney at Law, LLC
522 North Church Street
Greenville, South Carolina 29601

Re: **Darnell Keri Slaton, #290534 v. State of South Carolina**
2017-CP-46-1911

Dear Mr. Yarborough:

Enclosed please find a copy of the signed and filed **Order of Dismissal** in the above mentioned post-conviction relief case. With this letter, we are closing our file in this matter.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General

MHJ/cc
Enclosure(s)

William G. Yarborough III
522 N. Church St.
Greenville SC 29601

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