

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
FEB 02 2021
S.C. SUPREME COURT

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS
Hon. Eugene C. Griffith, Circuit Court Judge
CASE NO. 2020-001619

HERMAN BELTON — PETITIONER

STATE OF SOUTH CAROLINA — RESPONDENT
V.

Appendix

Taylor Z. Smith, AAG
Office of the Attorney Gen.
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent

HERMAN BELTON
Alendale Corr. Inst.
P.O. Box 1151
Fairfax, SC 29827
Pro-Se

Appendix

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STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of ANDERSON)HERMAN BELTON #256396

Full name and prison number, if any, of applicant.)

APPLICATION FOR

POST-CONVICTION RELIEF

v.
STATE of South Carolina)

Name of Respondent)

2010-CP-04-00678

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention PERRY CORR. INST.2. Name and location of Court which imposed sentence Court of General Sessions, Anderson, S.C.

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) #2006-GS-04-1844

(b) _____

(c) _____

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

(a) FEBRUARY 6, 2007 - 25 YEARS

(b) _____

(c) _____

A TRUE COPY

FEB 24 2010

5. Check whether a finding of guilty was made

(a) after a plea of guilty. _____

(b) after a plea of not guilty. _____

(c) after a plea of nolo contendere. _____

6. Did you appeal from the judgment of conviction or the imposition of sentence? YES

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. The South Carolina Court of Appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Appeal Dismissed

ii. _____

iii. _____

(c) the date of each such result:

i. Nov. 19, 2009

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. unpublished opinion No. 2009-up-526

ii. _____

iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) N/A

(b) _____

(c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) "Ineffective Assistance of Counsel"

(b) Prosecutorial Misconduct

(c) Violation of Due Process and Equal Protection of Law

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) Will AMEND LATER: SEE MEMORANDUM

(b) Will AMEND LATER: SEE MEMORANDUM

(c) Will AMEND LATER: SEE MEMORANDUM

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law?

N/A

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

N/A

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)

N/A

(d) any other petitions, motions or applications in this or any other Court?

N/A

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

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4
220

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? N/A

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) N/A
- (b) _____
- (c) _____

16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? _____
- (c) your sentencing? _____
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____

(e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? _____

17. If you answered "yes" to one or more parts of (16), list:

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

- i. KURT TAVERNIER and LANELLE C. DURANT
- ii. 301 CAMSON Rd P.O. Box 11589
- iii. Anderson, S.C. 29635 Columbia, S.C. 29211

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

- i. KURT TAVERNIER - TRIAL AND SENTENCING
- ii. LANELLE C. DURANT - APPEAL (DIRECT)
- iii. _____

18. State clearly the relief you seek in filing this application.

WHATEVER RELIEF THAT'S
REQUIRED BY LAW. COMPENSATORY DAMAGES INCLUDED.
CONVICTION AND SENTENCE VACATED, EXPUNGED, EXONERATED, Full do
etc,
etc

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

NO/2

2
6
222
STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

VERIFICATION

I, HERMAN BELTON, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Herman Belton

Sworn to and subscribed before me

This 18th day of February, 2010.

Steven T. Milantys L.S.

Notary Public for South Carolina

My Commission Expires November 7, 2016

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

I, HERMAN BELTON, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty or perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

Herman Belton
Applicant

Sworn to and subscribed before me

This 18th day of February, 2010.

Steven T. Milantys

Notary Public for South Carolina

My Commission Expires November 7, 2016

A TRUE COPY

FEB 24 2010

CLERK OF COURT

P. 2:19

"INTEMPTANDUM"

10 (A) "INEFFECTIVE Assistance of Counsel"
 Trial Counsel Refused to properly investigate,
 present evidence, cross examine, and make
 motions to suppress the evidence.
 Note: At this point, I am Alleging "Fraud on the
 Court" also "obstruction of Justice" and/or
 "Tampering with Evidence." (on the State)
 Will explain in open court. (possible 3rd party gui

(B) "Prosecutorial Misconduct"
 Prosecutor Refused to fulfill his duty as a
 prosecutor because the prosecutor has a
 duty to disclose exculpatory evidence in its
 possession or control when the evidence may
 be material to the outcome of the case.
 The prosecution's withholding of such information
 violates the defendant's due process rights,
 and is thereby a Brady Violation.
 Brady v Maryland 373 U.S. 83,
 83 S.Ct. 1194 (1963)

Note: At this point I am declaring the State
 to be in violation of § 16-9-10 which is
 perjury and subornation of perjury.
 (see indictment and other documents as exhibits)
 Anything else: I will explain in open court.

Note:

"Cont."

2010	FEB 24 2010
A TRUE COPY	

"MEMORANDUM CONT."

(C) Violation of Due Process and Equal Protection of
By way of "Deliberate Deception" I have
therefore been denied a fair trial that's
due me A&A Right protected by the 6th
United States Constitution Amendment
which is equal to Art. 1 and 14 of the S.C.
State Constitution; As a result of that
action My 14th United States Constitution
Right and/or S.C. State Constitution Art. 1 A
3 Right which is Equal Protection and Due
Process Rights were violated.

And under the (Procedural) Due Process and
Equal protection of law I do declare the
State to be in violation of § 16-17-722;
which is filing a False Police Report (which
I will be glad to enter as exhibit) as well
as being in violation of § 16-17-410; which is
"Conspiracy" OR would you say "Chain Criminal
Conspiracy"? (I will be more than glad to
explain in open court)

Thru out this entire process I have shown
evidence of perjury and subornation of perjur
"fraud on the court" obstruction of justice and
or tampering with evidence as well as
"Abuse of discretion"

I suggest we look at this for what it is,
A "MISCARriage of Justice"

This is just another case of "Malicious
Prosecution" AS A RESULT OF "MALICE."

NOTE: I NEVER RECEIVED A MIA AND A WATKINS!

STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

Herman Belton, #256396)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE 10TH JUDICIAL CIRCUIT
Case No. 2010-CP-04-00678

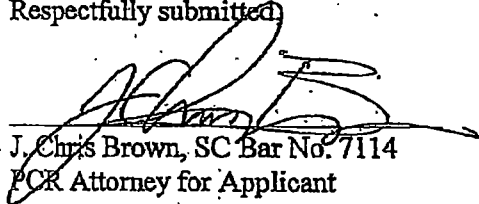
✓ AMENDED POST-CONVICTION

RELIEF APPLICATION

Applicant, making its Amendment to the application for post conviction relief (PCR) filed February 24, 2010, would respectfully show this Court:

1. The Applicant requests the original Post Conviction Relief (PCR) Application filed by him on February 24, 2010, be amended to include the following allegations as outlined in the letters which are attached herewith and incorporated herein by reference.

Respectfully submitted


J. Chris Brown, SC Bar No. 7114
PCR Attorney for Applicant

Date: May 31, 2011

A TRUE COPY

JUN - 3 2011


CLERK OF COURT

10
AWL

HERMAN BELTON #256:

PERRY CORR. INST. Q1-B

430 OAKLAWN

PELZER, S.C. 29

ALAN MARCH 18, 2011

ATT: ~~Alan~~ Wilson

Attorney General's Office

P.O. BOX 11549

Columbia, S.C. 29211

Re: HERMAN BELTON

State of South Carolina

CASE NO: 2010B-CP-04-0678

ARREST WARRANT NO: I-714654

DOCKET NO: 2006-GS-04-1844

SC Attorney General

RECEIVED

MAR 24 2011

Referred to

W. Lee

Answered

DEAR SIR,

OR: TO WHOM IT MAY CONCERN;

I AM WRITTING TO BRING TO YOUR ATTENTION THAT I HAVE BEEN "WRONGFULLY CONVICTED" AS A RESULT OF A "INVALID INDICTMENT" AS WELL AS "MANUFACTURED EVIDENCE" AND "PERJURED TESTIMONY."

I AM ENCLOSEING DOCUMENT(S) WHICH WILL CONFIRM MY ALLEGATIONS:

PAGE #1 IS A COPY OF MY INDICTMENT, RUBBER STAMPED "TRUE BILL" ON JUNE 27, 2006, AND READS:

AT A COURT OF GENERAL SESSIONS CONVENED ON JUNE 27, 2006, THE GRAND JURORS OF ANDERSON COUNTY PRESENT UPON THEIR OATH.

#1

"P. 1"

This is "Perjury" under oath because;
PAGE # II: is a "CERTIFIED TRUE COPY" OF A S.C.
Judicial Dept. Calendar, that plainly show that
indeed, there WAS "NO" general sessions court
in Anderson County during the week of June 26, 2006

Question: How can you present something to a
group of people that "NEVER" existed?

PAGE NO: III is a index sheet for my discovery.
(X) MARKS: The spot: Line #5 of Rule #5, shows
A copy of SLED Report L06-06901 dated
OCTOBER 23, 2006 (4 pages)

PAGE # IV: UNDER EVIDENCE list, plainly shows
that: MIKE BASKIN logs in at SLED and releases
to KARONDA WILLIAMS 5-11-2005 L06-06901;

That alone tells you that L06-06901 is a 2005
CASE, when in fact, my ARREST date is MAY 3, 2006.
Dates don't lie.

PAGE NO: V is a Copy of Form C (Rule 6)

CERTIFICATE OF PROOF OF CHAIN OF PHYSICAL CUSTODY
OR CONTROL. NOTICE: The control numbers have
been marked thru and other numbers have been
Added, as a result of that, that same document
is NOTORIZED. SWORN before me on this 4th
day of APRIL, 2006, which is ONE (1) MONTH before
I WAS ARRESTED. My ARREST date is 5-3-2006.

Form C (Rule 6) is also notarized five (5) weeks before SLED received the alleged drugs on 5-12-2006; Question: How can you notarize a document before hand and it be effective?

Page # VI: Is a letter from Lt. Kenneth R. Sbernickle of the Anderson City Police Dept acknowledging and admitting that indeed I have been "tried and convicted" with "manufactured evidence" and obviously "perjured testimony." My question to you is: What are you going to do about it?

Affidavit

I, HERMAN BELTON do declare (certify, verify or state) under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Herman Belton #256396
NAME AND NUMBER

Sworn to and subscribed before me
this 18 day of March, 2011

Jeff D. Puljes
Notary Public

Sept 25, 2017
Notary Public - State of Missouri

14
21
229

WITNESSES

APD, C. LEMMONS

ARREST WARRANT NO: 1-714654

ACTION OF GRAND JURY
TRUE BILL

JUN 27 2006

Foreman of Grand Jury

Foreperson

VERDICT

DOCKET NO. 2006-GS-04-1844

The State of South Carolina,

County of ANDERSON

COURT OF GENERAL SESSIONS

JUN 27 2006 TERM

THE STATE

RAM

VS.

HERMAN BELTON

Indictment for

TRAFFICKING CRACK COCAINE
44-53-0375(C)(3) [0368]

Exhibit "D"

2006/6/28

15
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FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
ANDERSON)
COUNTY OF _____)

INDICTMENT FOR
TRAFFICKING CRACK COCAINE
44-53-0375(C)(3) [0368]

JUN 27 2006

At a Court of General Sessions, convened on _____
ANDERSON
the Grand Jurors of _____ County present upon their oath:

TRAFFICKING CRACK COCAINE

That Herman Belton did in Anderson County, within the city limits of Anderson, South Carolina, on or about May 3, 2006, knowingly and unlawfully have in his possession more than 100 grams but less than 200 grams of crack cocaine.

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

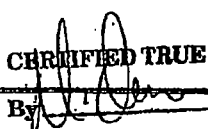
Rene L. Campbell
SOLICITOR

Exhibit "D"

Terms of Circuit and Family Court June 2006

Circuit Number	6/5/2006	6/12/2006	6/19/2006	6/26/2006
10	General Sessions Ocohee Macaulay, Alexander HILD	Common Pleas Anderson Nicholson, J. BRADY General Sessions Anderson Saunders, Wyatt TOLLISON	Common Pleas Non- Jury Macaulay, Alexander HILD General Sessions Anderson Maddox, J. TOLLISON	Common Pleas Non- Jury/PCR Maddox, J. TOLLISON Common Pleas Anderson Nicholson, J. BRADY 26, 27, 28 HILD 29, 30

CERTIFIED TRUE COPY,

By 

South Carolina Court Administration

Exhibit "E"

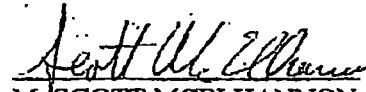
STATE OF SOUTH CAROLINA)
) IN THE COURT OF GENERAL SESSIONS
COUNTY OF ANDERSON)

THE STATE OF SOUTH CAROLINA,)
)
VS.) ANSWER TO DEFENDANT'S
) REQUEST FOR FAVORABLE
) EVIDENCE AND REQUEST FOR
) DISCOVERY AND INSPECTION
HERMAN BELTON,) WARRANT#1714654
DEFENDANT.)

TO: KURT TAVERNIER: ATTORNEY FOR THE DEFENDANT

The State would answer the Defendant's Request for Favorable Evidence and Request for Discovery and Inspection with attachments as follows:

1. Copies of Warrants and/or Indictments (2 pages).
2. Copy of Defendant's Criminal History (12 pages).
3. Copy of Investigation (11 pages).
4. Copy of Photographs (2 pages).
- * 5. Copy of SLED Report L06-06901 dated October 23, 2006 (4 pages).
6. Copy of Letter from Defendant (4 pages).
7. Copy of Notice of Motion and Motion to Revoke Bond (2 pages).
8. Any and all evidence is available for your inspection at the Anderson Police Department and/or SLED.


M. SCOTT MCELHANNON
ASSISTANT SOLICITOR
TENTH JUDICIAL CIRCUIT

Anderson, South Carolina

Dated: 1-25-07

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

0118
233

MARK SANFORD
Governor



REGINALD I. LLOYD
Director

September 30, 2008

Herman Belton, #256396
Perry C.I. / Q3A-107
430 Oaklawn Rd.
Pelzer, SC 29669

RE: SLED Lab#: L06-06901

Dear Mr. Belton:

The above referenced file concerning your case has been copied and reviewed. Please find listed below a breakdown of the charges associated with your request.

10 pages @ \$.25 per page of copy	-	\$ 2.50
Iron Mountain Storage Facility Retrieval Fee	-	12.24
Research and Copying time	-	5.00
TOTAL	-	\$19.74

All fees need to be paid by money order and made payable to the State Law Enforcement Division. Please ensure that your name and FOI# 2008-842 are referenced on the money order. Address the envelope to SLED Public Information Office, P.O. Box 21398, Columbia, SC 29221-1398, Attention: Mary Perry. Upon receipt of your money order, the file will be forwarded to you.

Sincerely,

M. C. Perry

Mary C. Perry
FOIA/Subpoena Compliance Coordinator

MCP/dls/FOI#2008-842



An Accredited Law Enforcement Agency

P.O. Box 21398, Columbia, South Carolina 29221-1398 / (803) 737-9000 / Fax (803) 896-7041

81 19

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LABORATORY REPORT

SLED LAB NO.: L06-06901

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FORENSIC SERVICES LABORATORY REPORT

MARK SANFORD
Governor



ROBERT M. STEWART
Chief

Michael Baskin
Anderson Police Department
401 S. Main Street
Anderson, SC 29624

DRUG ANALYSIS
October 23, 2006
SLED LAB: L06-06901
Your Case No: 06-11213
Incident Date: 5/3/2006
[S] Herman Belton

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEMS OF EVIDENCE:

Sub # 1 On May 12, 2006, items were received in B177528 from Michael Baskin of the Anderson Police Department.

Item: 1 Sealed paper evidence bag containing foil containing paper towel containing rock substance

RESULTS:

Cocaine Base (Crack) found, 106.38 grams (1641.65 grains), C-II.

Chemical Analyst

Jason P. Waldkirch

cc: Anderson County Solicitor's Office



CS
21
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FORM A

REPORT OF ANALYSIS FOR
CONTROLLED DANGEROUS SUBSTANCES
(Substance Found)

I, Jason P. Waldkirch, am a Chemical Analyst employed by the South Carolina State Law Enforcement Division (SLED), certified by SLED as a chemist or analyst qualified to perform testing and analysis for controlled dangerous substances prohibited by law in this State by Title 44, Chapter 53 of the Code of Laws and Rule 61-4 of the Department of Health and Environmental Control.

I have 1 years and 11 months experience as a Chemical Analyst. During that period, I have been qualified as an expert witness and testified in court no less than 0 times. I have received the following training as a chemical analyst.

B.S. Chemistry, University of Wisconsin- Stevens Point, Stevens Point, WI, 1994
Training in Forensic Drug Analysis, South Carolina Law Enforcement Division, 2005
Clandestine Laboratory Certification, Drug Enforcement Administration, 2005
Basic Law Enforcement Training, South Carolina Criminal Justice Academy, 2005
Graduate School Training in Organic Chemistry, The Pennsylvania State Univ., PA, 1998-2004
Production Chemist, Aldrich Chemical Company, Sheboygan, WI, 1994-1998

Sub # 1 - On May 12, 2006, items were received in B177528 from Michael Baskin of the Anderson Police Department.

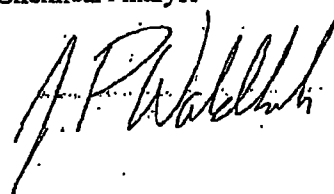
I tested the above item(s) using the following legally reliable forensic laboratory procedures approved by SLED:

☒ Chemical Test
☐ Microscopic Exam
☒ Infrared Spectroscopy
☐ Ultraviolet Spectroscopy

☐ Gas Chromatography
☐ Mass Spectroscopy
☐ Liquid Chromatography
☐ Physical Test
☐ Published Literature

See Drug Analysis Report L06-06901 for Results.

Chemical Analyst



Jason P. Waldkirch

Date: October 23, 2006



CONTROL NO. 111528

PRINT ALL INFORMATION EXCEPT WHERE SIGNATURE IS REQUIRED

FORM B (RULE 6)

CERTIFICATE OF PROOF OF CHAIN OF PHYSICAL

CUSTODY OR CONTROL

(Initials)

This is to certify that I

A. J. H. 150/153

(Name)

am employed by

Police Department

(Name of Agency or Department)

and Station

On

5-8

(Date)

Received from Herman Brown

(Name)

particulars

(Please Whether Subject to a Warrant, Legal Arrest or Otherwise)

at or near

1450 S. 4th Street, St. Cloud, Minn.

(Place Where Seized)

the following substance(s) or container(s):

(Describe in detail or container with sufficient particularity to distinguish it)

1450 S. 4th Street, St. Cloud, Minn. 56301

Roach Substances wrapped in two paper bags

On

5-8

(Date)

I made delivery of the above described

substance(s) to

Police Department

(Name)

Police Department

(Name of Agency)

In substantially the same condition

as when received

Place: Police Dept

Date: May 8, 1968

Sworn before me on this

3 day of May, 1968

Notary Public for

My Commission expires

May 10, 1968

(Signature)

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CONTROL NO. 811755C 15177528

PRINT ALL INFORMATION EXCEPT WHERE SIGNATURE IS REQUIRED

FORM C (RULE 6)

**CERTIFICATE OF PROOF OF CHAIN OF PHYSICAL
CUSTODY OR CONTROL**
(Subsequent Change of Custody)

This is to certify that I Mike Baskin am employed by
(Name)

Anderson PD as Evidence Officer and that on
(Name of Agency or Department) (Capacity of Employment)

5-4, 2004, I received in Person
(Date) (Specify Whether by Mail or in Person)

from Drug Boy of Anderson PD
(Name of Person) (Law Enforcement Agency)

the following substance(s) or container(s) which were originally seized by

Andy Heaton
(Name of Person Making Original Seizure)
(Describe substance or container with sufficient particularity to distinguish it.)
APP Item #14595-1; Aluminum Foil Containing Rocklike Substance
wrapped in Two Paper Towels

On 5-12, 2004, I made delivery of the above described
(Date)

substance(s) or container(s) to for remote witnesses of
(Name)

SLEP in substantially the same condition
(Law Enforcement Agency)

as when I received it.

2
(Signature)

Place: SLEP

Date: 5-12-2004

Sworn before me on this 4th day of April, 2004.

Army W. Sexton
Notary Public for South Carolina
My Commission expires: 7-2007

EV85LED FORM C 3/99

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LO606901 DP

USE BALLPOINT PEN AND PRESS FIRMLY, PRINT ALL INFORMATION
EXCEPT WHERE SIGNATURE IS REQUIRED

SLED DRUG ANALYSIS REQUEST

LAB NO. LO606901 SP3/ CONTROL NO. B177588
COUNTY: Anderson WARRANT NO. 1714654

INCIDENT

Contributing Agency ORI SCO 040100 Contributing Agency Case No. OC-11213
New Case ☒ Additional Evidence ☐ Case No. _____
Type of Crime Trafficking Crack
Incident Date 5-3-2006
Incident Address Hudgens St (Across from in Woods) Anderson, SC

Report should be mailed to:
Mike Baskin Sgt.
Name of Individual Receiving Report _____ Rank _____
Anderson PD 84-332-5700
Department _____ Telephone No. _____
401 S. Main St.
Street Address or Post Office Number _____
Anderson SC 29624
City _____ State _____ Zip Code _____

SUBJECTS

<u>Bellton</u>	<u>Herman</u>	<u>Cnnul</u>	Race <u>B</u>	Sex <u>M</u>	DOB <u>9-5-1947</u>
LAST	FIRST	MIDDLE	DL, SS or FBI No. <u>[REDACTED]</u>		
			Race _____	Sex _____	DOB _____
LAST	FIRST	MIDDLE	DL, SS or FBI No. _____		
			Race _____	Sex _____	DOB _____
LAST	FIRST	MIDDLE	DL, SS or FBI No. _____		

EVIDENCE

The items submitted below will be examined with your assurance that the submitted specimens have not been nor will be submitted to any other laboratory or agency for Technical or Scientific examination.

Specimens submitted for examination: _____
APP Item # 14594-1, Aluminum Foil containing off white
Rocklike Substance wrapped in Two Paper Towels.
JBL 10/16/06

Mike Baskin

PRINT Name of Requesting Officer

2

SIGNATURE Of Requesting Officer

EVBSLED: DAR.1 3/99

45
25
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SLED DRUG ANALYSIS DEPARTMENT WORKSHEET

Case number L06-06901
Criminalist Jason P. Waldkirch
Date October 16, 2006
Container ID
Evidence Sealed ☒ Yes ☐ No

JPW

Names:
[S] Herman Belton

B177528

EVIDENCE NUMBER	WEIGHT	COBALT (SCN) ²⁺	TIN CHLORIDE (SnCl ₂)	MARQUIS	FIEGL'S/ (NaHVO ₂)	INSTRUMENT ANALYSIS		
①	106.38g	NEL	blue			FTIR Cocaine base		
Notes: Sealed paper evidence bag @ foil @ paper towel @ Rock substance								
Notes:								
FW = 106.38g								
Notes:								
Notes:								
Results:								
① Cocaine base (Crack) found 106.38grams (1641.65grams) C-IT								

SOUTH CAROLINA LAW ENFORCEMENT DIVISION
DEPARTMENT OF DRUG ANALYSIS
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CASE NUMBER L06-06901

CHEMIST Jason P. Waldkirch

DESCRIPTION

PAGES

CASE NOTE COVER SHEET

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SLED FORENSIC SERVICES REQUEST (NON-BEST)

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SLED DRUG ANALYSIS WORKSHEET

SLED FORENSIC SERVICES LAB COC

SLED LAB MULTIPLE CASE TRANSFER

FORENSIC SERVICES SWORN TESTIMONY

GC-MS DATA

FT-IR DATA

UV/VIS DATA

HPLC DATA

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FORM B

FORM C

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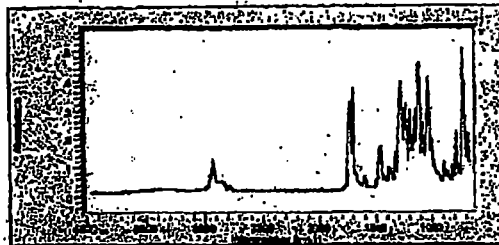
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DATE : 10/16/06 16:39:28
METHOD : "Forensic Drugs"
USERNAME : "admin"
APPLIC : Forensic Drug Analysis Application
CASE : 061016

BKG FILE : BKG.SPC
DATE : 10/16/06 16:37:58

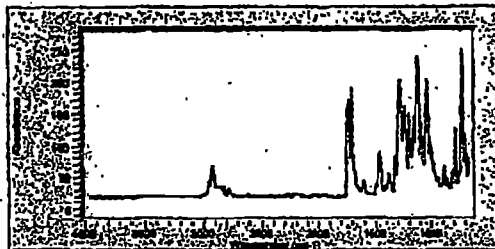


SAMPLE : L06-06901-1
DATAFILE : L06-06901-1_0001.SPC
DATE : 10/16/06 16:39:30

④ cocaine base



LIBRARY : C:\SensIR\QualID\Forensic Drug
Analysis\Library\SLED.lib
BEST MATCH: Cocaine Base Sigma 69H1240



⑤

(A)

RESULTFILE: C:\SensIR\QualID\Forensic Drug Analysis\Data\061016\L06-06901-1_0001.SIR
 DATE : 10/16/06 16:39:28
 METHOD : "Forensic Drugs"
 USERNAME : "admin"
 APPLIC : Forensic Drug Analysis Application
 CASE : 061016

Library Search Result Table

Hit #	Identification Text
1	Cocaine Base Sigma 6941240
2	Cocaine base from Base Extr. from Cocaine HCL Mallinckrodt Lot# 1520SCM165 C-
3	Propylbenzoyllecgonine HCl Alltech 3404 C-II
4	Reserpine ICN 17873 NS
5	Cocaine Hydrochloride Mallinckrodt 1520SCM165 C-II
6	Deserpidine Abbott 27-0328C-01 NS
7	Cocaine HCL Sigma 50K1124
8	Cyclomethycaine SO4 Lilly 6UM90
9	Benzoyllecgonine Hydrate Sigma 68F-4001 C-II
10	Propantheline Br Searle D1325 NS
11	Testosterone Benzoate Sigma 28F0729 CIII
12	19-Nortestosterone 17 Phenyl-propionate Sigma 19F3898 CIII
13	Benoxinate HCl Dorsey 6157 NS
14	*Pipenzolate Br Lakeside 27 NS
15	*Parzone Bitartrate Mallinckrodt E286026 NS
16	Gum Guaiac Sigma 125F-0373 NS
17	Dihydrocodeine Bitartrate Applied Science 410 C-II
18	6-Monoacetylmorphine Applied Science 3 C-I
19	Doxylamine Succinate USP F-1 NS
20	Anisotropine MeBr Endo 73-143 NS

83
29
244

#3

RESULT FILE: C:\SensIR\QualID\Forensic Drug Analysis\Data\061016\06-05901-1_0001.SIR
DATE : 10/16/06 15:39:28
METHOD : "Forensic Drugs"
USERNAME : "admin"
APPLIC : Forensic Drug Analysis Application
CASE : 061016

JPL

Method Information

Method Name : "Forensic Drugs"
Last Modified : 8/15/2003 9:52:46 AM
Owner : "Admin"
Locked By Owner : FALSE
Resolution (cm-1) : 4
Analysis Scans : 32
Background Scans : 32
Continuous Search : No
Minimum Scans : 4
Detector Type : TGS
Y Axis Units : Abs
Spectral X Range (cm-1) : 4000.0 - 650.0
Auto Crystal Check : No
Background Naming : Overwrite
Background Filename : BK01.SPC
Force New Background : No
Alternate Data Path :
Library Search1 : .\SLED.lib , ATR
Library Search2 : .\SensIRfo.lib , ATR
Search Type : Spectral
Quality Type : Percentage (0-100)
Minimum Quality : 30

30

245

CONTROL NO. 51153C B177528 - 28

PRINT ALL INFORMATION EXCEPT WHERE SIGNATURE IS REQUIRED

FORM C (RULE 6)

CERTIFICATE OF PROOF OF CHAIN OF PHYSICAL
CUSTODY OR CONTROL

(Subsequent Change of Custody)

This is to certify that I Mike Baskin am employed by
(Name)Anderson PD as Evidence Officer and that on
(Name of Agency or Department) (Capacity of Employment)5-4, 2006, I received IN Person
(Date) (Specify Whether by Mail or in Person)from Drug Boy of Anderson PD
(Name of Person) (Law Enforcement Agency)

the following substance(s) or container(s) which were originally seized by

Andy Heaton
(Name of Person Making Original Seizure)

(Describe substance or container with sufficient particularity to distinguish it.)

APD Item #14595-1, Aluminum Foil Container: Rocklike Substancewrapped in Two Paper Towelson 5-12, 2006, I made delivery of the above described
(Date)substance(s) or container(s) to SLC of
(Name)SLC in substantially the same condition
(Law Enforcement Agency)

as when I received it.

Place: SLCDate: 5-12-2006I swear before me on this 4th day of April, 2006James W. Sexton

Notary Public for South Carolina

My commission expires: 7-2007

EVS55ED-PRAC3 3/01

Applicant's exhibit#

OE

31

246

The City of Anderson Police Department
401 South Main Street
Anderson, SC 29624



Date: December 30, 2009

Mr. Herman Belton #256396
Perry Corrections Institute Q2A-114
430 Oak lawn Road
Pelzer, SC 29669

Mr. Belton,

I have received your letter/complaint in regards to the false allegations. I am not very clear on what you mean by false allegations. I am guessing you mean by way of the errors that you have located on the enclosed forms. These mistakes do not indicate false allegations. It could however, indicate some mistakes made in processing your paperwork and possibly mistakes made with the evidence paperwork. What you have indicated to me does not say you did not commit the crime and or was falsely accused. However, it does say to me that someone made errors in your paperwork. You need to speak with your attorney about filing a possible appeal due to a possible compromise of the evidence, if you feel that this is the case in this matter. An attorney maybe able to shed more light on this matter for you in regards to if it would be cause for some type of an appeal. I do understand your concerns in this matter and I am sorry I cannot help you further with these issues.

With kind regards,

A handwritten signature in dark ink, appearing to read "Lt. Kenneth R. Ebernickle".

Lt Kenneth R. Ebernickle

Administrations Division
Anderson Police Department
401 South Main Street
Anderson, SC 29624

Applicant's exhibit #

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

2010-CP-04-0678

Herman Belton, #256396,
Applicant,

v.

RETURN

State of South Carolina,
Respondent.

The Respondent, making its Return to the application for post conviction relief (PCR) filed February 24, 2010, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. The Applicant was indicted at the June 2006 term of the Anderson County Grand Jury for Trafficking Crack Cocaine (2006-GS-04-1844). He was represented by Kurt Tavernier, Esquire. On February 5, 2007, the Applicant underwent trial pursuant to which he was found guilty as charged. He was sentenced by the Honorable Thomas W. Cooper to confinement for a period of twenty-five (25) years.

A timely notice of appeal was filed on the Applicant's behalf. The South Carolina Court of Appeals subsequent dismissed the Applicant's appeal by unpublished opinion dated November 19, 2009. (2009-UP-526).

Attached herewith and incorporated herein are the records of the Anderson County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina

Department of Corrections, and the guilty plea transcript. The Respondent reserves the right to amend and/or supplement this Return upon receipt with any relevant materials.

II.

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

1. Ineffective assistance of counsel;
 - a. "Trial counsel refused to properly investigate, present evidence, cross-examine, and make motions to suppress the evidence."
2. Prosecutorial Misconduct
 - a. "Prosecutor has a duty to disclose exculpatory evidence in its possession or control when the evidence may be material to the outcome of the case."
3. Violation of Due Process and Equal Protection Clause

III.

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

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. Nevertheless, the allegation of ineffective assistance of counsel probably raises a question of fact which cannot be conclusively refuted by the record and, therefore, requires that an evidentiary hearing be held. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983); Delaney v. State, 269 S.C. 555, 238 S.E.2d 679 (1977).

IV.

Respondent submits that Applicant's second and third allegations raise direct appeal issues that are procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised these issues at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, the Court should summarily dismiss these allegations.

V.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

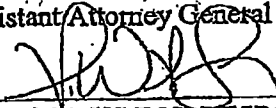
Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

A. WEST LEE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

June 30, 2010.

1 State of South Carolina In the Court of Common Pleas

2 County of Anderson Case No: 2010-CP-04-0678

3
4 Herman Belton,

5 Applicant,

6 -vs-

7 State of South
8 Carolina,

9 Respondent..

)
)
) Transcript of record
) Post-Conviction Relief
) Hearing
)
)
)
)
)

10 June 8, 2011
11 Anderson, South Carolina

12
13 B E F O R E:

14 THE HONORABLE ALEXANDER S. MACAULAY, JUDGE.

15
16 A P P E A R A N C E S:

17 J. Chris Brown, Esq.
18 Attorney for the Applicant

19 Kaelon E. May, Assistant Attorney General
20 Sally Elliott, Assistant Attorney General
21 Attorneys for the Respondent

22
23
24 ROBIN SUE HILD, FCRR, RPR
25 CIRCUIT COURT REPORTER

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Herman Belton -- PCR hearing -- June 8, 2011

1 ** Start of Requested Certified Transcript of Record **

2 (Whereupon, the case of Herman Belton v. The State
3 of South Carolina commenced, with all parties being
4 present, at approximately 3:47 p.m.)

5 THE COURT: All right. The next case is Herman
6 Belton versus State of South Carolina, 2010-CP-04-678.
7 The Applicant, Mr. Belton, is represented by Mr. Brown
8 and the State is represented by Ms. May.

9 The Court has been provided a Plaintiff's motion --
10 well, that would be Applicant's motion to compel
11 disclosure of all criminal case file records, dated
12 today.

13 And I'm not sure -- has it been filed with the
14 Clerk's Office?

15 MR. BROWN: Yes, Your Honor, it has been.

16 THE COURT: All right. Very good.

17 All right. Mr. Brown, as you know, I have looked
18 at the motion.

19 MR. BROWN: Thank you. Thank you. I would renew
20 that motion, Your Honor, that was presented to the Court
21 earlier this afternoon, based primarily on the fact that
22 the two most recent allegations or complaints submitted
23 by my client, Mr. Belton, were dated May 24th, one to
24 the Attorney General's Office, the other to the Internal
25 Affairs Division of the South Carolina Law Enforcement

Herman Belton -- PCR hearing -- June 8, 2011

1. Division. Both were submitted by Mr. Belton directly to
2. the Attorney General's Office and respectively to the
3. Anderson County Clerk of Court.

4. There was a delay in them receiving those documents
5. and forwarding me a copy, so that I have had less than a
6. week to review the contents of those allegations and the
7. Complaint to the Internal Affairs Division.

8. We did quickly move to file an amendment to
9. Mr. Belton's PCR, which he had previously requested. We
10. put not only the contents of the allegations in the
11. complaint filed with the Attorney General's, but several
12. other pieces of correspondence that I had received that
13. had the other allegations listed in them. But they were
14. part of the amendment. To the best of my knowledge they
15. were received by the Attorney General's Office and then
16. accepted as a timely filing by them.

17. But just again, to restate, less than a week to
18. discuss these matters with my client. And due to the
19. nature of the discrepancies in the chain of custody
20. records, I felt it was in his best interests and my
21. interest as his attorney representing him to have
22. additional time to research the criminal case files.

23. Thank you.

24. THE COURT: All right. What does the State have to
25. say? And what we are talking about apparently is a

Herman Belton -- PCR hearing -- June 8, 2011

1 continuance and disclosure of a motion?

2 MS. MAY: Your Honor, the letters dated May 24th
3 and May 23rd, which have been recently amended to the,
4 his file in this record, May 24th is addressing,
5 advising the Court of the fact that he has filed a
6 complaint against the Police Department. I don't
7 believe that has, is relevant to chain of custody. We
8 have chain of custody documented in the file.

9 The May 23rd letter is advising as well that --
10 this is to the Internal Affairs Division concerning the
11 officers I believe that were -- that arrested Mr. Belton
12 and weren't involved in evidence testing and preserving.
13 He's addressed this to the Internal Affairs Division. I
14 don't think, think that this is relevant, aside from the
15 fact that he's alleging, I guess, conflict of interest
16 with the police or something of that nature.

17 And other than the fact that Internal Affairs will
18 choose to do an investigation on them, I don't think
19 there's gonna be anything here, though, we can do about
20 that that will be relevant to this case.

21 THE COURT: All right. Then, but you have been
22 furnished with their amendments to the application?

23 MS. MAY: In the form of letters, yes, for the most
24 part.

25 THE COURT: All right. Do you have any objection

Herman Belton --- PCR hearing -- June 8, 2011

1 to the application being amended to reflect those, as
2 well?

3 MS. MAY: No, Your Honor.

4 THE COURT: All right. So, the amendment is
5 granted.

6 And the continuance is based on what, Mr. Brown?

7 MR. BROWN: Well, in fact, in the, the amendment
8 itself, Your Honor, that's been accepted by the State,
9 an invalid indictment, manufactured evidence, which
10 would go to the altered chain of evidence documents, and
11 perjured testimony --

12 THE COURT: Now, was all of that taken up on the
13 appeal?

14 MS. MAY: The appeal was concerning a motion to
15 suppress and pretrial matters.

16 THE COURT: In other words, the evidence didn't
17 address it in here.

18 Yes, sir.

19 MR. BROWN: Well, I mean, Your Honor, in terms of
20 the chain of evidence, we would, we would be referencing
21 them today; if we were to proceed we would be looking at
22 those documents and referencing back to the transcript.
23 And specifically --

24 THE COURT: Is that ineffective assistance of
25 counsel dealing with failure to perfect an appeal or

Herman Belton -- PCR hearing -- June 8, 2011

1 grounds for appeal?

2 MR. BROWN: Well, it would be, specifically we
3 would, the line of questioning for Mr. Belton would be
4 the fact that those questions or issues about those
5 documents being altered were never raised at trial by
6 counsel.

7 MS. MAY: Your Honor, we are prepared to proceed on
8 that today.

9 THE COURT: All right. Very good. All right.
10 Now, let's see. What are your grounds for the
11 application, Mr. Brown?

12 MR. BROWN: The original application, Your Honor,
13 had the grounds listed under paragraph 9, subsection A,
14 ineffective assistance of counsel; subsection B,
15 prosecutorial misconduct; and subsection C, violation of
16 due process and equal protection of the law.

17 THE COURT: All right. What ineffective assistance
18 of counsel?

19 MR. BROWN: What is the ineffective assistance of
20 counsel?

21 THE COURT: Yes, sir.

22 MR. BROWN: Well, that would be provided during the
23 course of Mr. Belton's testimony --

24 THE COURT: No, sir. No, sir. I can't tell if
25 anything is relevant unless I know what the basis for

Herman Belton --- PCR hearing --- June 8, 2011

1 its submission. So what is, then, what do you allege is
2 ineffective?

3 MR. BROWN: Ineffective would be -- well, first,
4 the chain of custody that --

5 THE COURT: Not challenging or suppressing
6 evidence?

7 MR. BROWN: Correct, yes, sir.

8 THE COURT: All right. Failure to suppress
9 evidence or attempt to suppress evidence. What else?

10 MR. BROWN: Mr. Belton has also raised the issue
11 that there was no challenge to the validity of the
12 indictment itself.

13 THE COURT: Failure to challenge the indictment?

14 MR. BROWN: Yes, sir.

15 THE COURT: All right. And the challenge to the
16 indictment, is that jurisdictional or a defect?

17 MS. MAY: I believe it's to the effect that there
18 wasn't any information that a grand jury had been
19 indicted, which it was. And it was out of turn.

20 MR. BROWN: The court docket that we have received,
21 the evidence that we have received to date, Your Honor,
22 for that term in two thousand --

23 THE COURT: Well, let me ask you something: Did it
24 go to trial on the indictment?

25 MR. BROWN: Yes.

Herman Belton -- PCR hearing -- June 8, 2011

1 THE COURT: I think that waives any defect.

2 MR. BROWN: Well, again --

3 THE COURT: I mean, unless you've got some other
4 authority, I think that's what it's gonna do. But go
5 ahead.

6 MR. BROWN: Well also, Your Honor, there was
7 specifically the Fowler case which was discussed at the
8 time of the trial, and Mr. Belton has indicated that he
9 definitely wanted that, that objection preserved for his
10 appeal and does not feel that it was properly done so.

11 THE COURT: Well, again, that would be the Fowler
12 case? I'm not familiar with the Fowler case. Perhaps
13 you could...

14 MR. BROWN: I will reference back to the transcript
15 here.

16 THE COURT: Okay, please.

17 MR. BROWN: If you will give me just a moment, I
18 will pull it out.

19 MS. MAY: Your Honor, the Anders brief for
20 Mr. Belton's appeal, they used the Fowler argument, it's
21 already been based on Fowler and have denied the appeal.

22 THE COURT: So it was presented on appeal?

23 MS. MAY: Yes. Yes, Your Honor.

24 MR. BROWN: Your Honor, and it's my understanding
25 that even though it was presented in the appeal, it was

Herman Belton: PCR hearing June 8, 2011

1 not properly preserved at trial, so it was not given any
2 merit or consideration during the course of the appeal
3 even though it was included.

4 THE COURT: That sounds like more of an appellate
5 defect.

6 MR. BROWN: The actual case, Your Honor, itself is
7 State v. Fowler, 474 S.E.2d 706, where the circumstances
8 of the arrest were very similar, that the Defendant's
9 conviction was overturned on appeal in that case, and
10 that was the discussion of reference that the trial
11 judge was having at, at the time of trial, or reference
12 that he made.

13 THE COURT: Again, I'm sorry, the Fowler case,
14 what's the, the --

15 MR. BROWN: The cite?

16 THE COURT: Yes, sir.

17 MR. BROWN: Yes, sir. It's 471 S.E.2d, 706.

18 THE COURT: All right. But it was discussed by the
19 Court of Appeals?

20 MS. MAY: Yes, Your Honor.

21 THE COURT: Very good.

22 MS. MAY: Your Honor, it was an Anders case. It
23 wasn't discussed, but it was reviewed and dismissed.

24 MR. BROWN: And, Your Honor, the reference to it
25 would be page 50, 54, and 55 of the transcript, the

Herman Belton --- PCR hearing, -- June 8, 2011

1 trial transcript.

2 THE COURT: It looks like the Court ruled on it at
3 page 57, so that would have been the basis for an
4 appeal.

5 All right. But go ahead. For prosecutorial
6 misconduct. What was the prosecutorial misconduct?

7 MR. BROWN: Your Honor, I had intended during the
8 course of putting Mr. Belton on the stand and allowing
9 him to confirm the grounds of his PCR application and
10 allowing him to, in his own words, expound upon his
11 grounds.

12 THE COURT: Well, that's why we have lawyers --

13 MR. BROWN: Okay.

14 THE COURT: -- because you know what the grounds
15 are.

16 And some of them might be material; some might be
17 relevant, and then some might not.

18 MR. BROWN: Right.

19 THE COURT: So what are the prosecutorial
20 misconduct grounds, or grounds for the prosecutorial
21 misconduct?

22 MR. BROWN: It was based in part on United States
23 v. Bagley, Your Honor.

24 THE COURT: What is -- I just need to know the
25 misconduct.

Herman Belton -- PCR hearing -- June 8, 2014

1 MR. BROWN: Okay. Well, (reading): When favorable
2 evidence is in the hands of the prosecutor but not
3 disclosed, the result may well be that Defendant is
4 deprived of a fair chance --

5 THE COURT: All right. So, in other words, they
6 did not give a proper response to the discovery motion
7 for anything that the --

8 MR. BROWN: Correct, Your Honor. That goes
9 directly to the, to the Plaintiff's -- excuse me -- the,
10 what we had in our motion earlier, he had answer to
11 Defendant's request for favorable evidence and request
12 for discovery. Number five, specifically requests a
13 copy of S.L.E.D. report, four pages, and it was later
14 discovered that there was an actual ten-page actual
15 S.L.E.D. report.

16 THE COURT: All right. And due process?

17 MR. BROWN: Your Honor, the third grounds that's
18 listed in part due to a culmination of the, of the
19 incomplete evidence and altered evidence that was
20 presented during the course of the trial that was not --

21 THE COURT: And what was that? What was the
22 incomplete and altered evidence?

23 MR. BROWN: Incomplete, incomplete evidence or
24 discovery would have been the S.L.E.D. report that
25 was --

Herman Belton -- PCR hearing -- June 8, 2011

1 THE COURT: Well, but he said it was submitted at
2 trial. So, it's an exhibit that's incomplete?

3 MR. BROWN: Well, it was certainly, the S.L.E.D.
4 report was referenced to, and it was a part of the trial
5 in terms of the testimony presented by the State. And
6 likewise, the chain of custody was referenced in the
7 transcript, as well, although it was not completely
8 discussed in terms of how it had been altered and how
9 that would impact --

10 THE COURT: What was the alteration? I looked at
11 it, and I guess those are the copies that were attached
12 to your motion.

13 MR. BROWN: That's correct, Your Honor.

14 THE COURT: What was the alteration?

15 MR. BROWN: We reference under Exhibit A the first
16 Form B, Rule 6, for the initial custody had the control
17 number changed at the top, had the substance or
18 container or person towards the lower portion of the
19 page crossed through and initialed.

20 THE COURT: No. It doesn't look like it was
21 denied; it looks like it was corrected.

22 MR. BROWN: Well --

23 THE COURT: Do you have anything that shows that it
24 was fraudulent or anything?

25 MR. BROWN: Well, I would reference the next page

Herman Belton -- PCR hearing -- June 8, 2011

1 of our Exhibit A, Your Honor, where not only was it
2 corrected, but now it appears to have been crossed
3 through altogether, so that we are uncertain where that
4 evidence was located.

5 THE COURT: Well, it probably wouldn't be in the --
6 I don't know -- the drug box or -- or it was actually --
7 by the way, were these exhibits submitted at trial?

8 MR. BROWN: Your Honor, no, they were not.

9 MS. MAY: Your Honor, in regards to the crossing
10 out --

11 THE COURT: Well, they all seem to be the same
12 thing, though.

13 MR. BROWN: Well, the third exhibit, third page,
14 would be Form C, Rule 6, which is the subsequent chain
15 of custody page, and you will see at the bottom of that,
16 Your Honor, where it was actually notarized five weeks
17 before Mr. Belton was even arrested. And due to those
18 inconsistent --

19 THE COURT: Well, wait a minute now. Again, you
20 are saying that's fraudulent or was just an error?

21 MR. BROWN: Well, at this point we call into
22 question the authenticity of the documents themselves
23 when they are notarized prior to the actual Defendant
24 being apprehended or arrested.

25 MS. MAY: Your Honor, our witness, Mr. Tavernier,

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1 he can address what's raised about the notary and the
2 crossing out of the initials and the numbers and...

3 THE COURT: What, now?

4 MS. MAY: Mr. Tavernier is here --

5 THE COURT: So that will be addressed. All right.
6 Now, did we find out what due process is? Is that
7 just...

8 MR. BROWN: Well, Your Honor, it was again, just
9 restating the fact that due to the fact that so much of
10 this potential evidence was left out of the record at
11 trial, was not presented, it ultimately affected his
12 ability to have a fair trial.

13 THE COURT: I've got you. All right. So it was
14 unfair trial.

15 Very good. You may call your first witness.

16 MR. BROWN: Thank you, Your Honor.

17 THE COURT: Thank you.

18 MR. BROWN: If you will, if I can have the Court's
19 indulgence for just a moment while I speak to my client,
20 Your Honor?

21 THE COURT: Certainly.

22 (The Applicant conferred with his attorney off the
23 record.)

24 MR. BROWN: I would call Mr. Herman Belton.

25 THE COURT: Very well. Come around, sir.

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1 WHEREUPON,

2 Herman Belton,

3 after first having been duly sworn, testified as
4 follows:

5 Direct Examination by Mr. Brown:

6 Q. Would you please state your full name for the
7 Court?

8 A. Herman Belton.

9 Q. And, Mr. Belton, when was the date of your offense?
10 When were you arrested?

11 A. The arrest date was May 3rd, 2006.

12 Q. Okay. And ultimately in the indictment what were
13 you, what was the charge listed under that indictment?

14 A. It was trafficking crack cocaine in more than a
15 hundred but less than 200 grams.

16 Q. Okay. Now, have you had a chance to review a copy
17 of the indictment that's part of the court record?

18 A. Yes, I have.

19 Q. Okay. Have you questioned the validity of the
20 indictment?

21 A. Not until now.

22 Q. Okay. Are you questioning the validity of the
23 indictment?

24 A. Yes, I am.

25 Q. Why are you questioning the validity?

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1 A. Because it plainly states that a Court of General
2 Sessions convened in Anderson County on, rubber stamp,
3 June 27th, 2006. And from research by way of the South
4 Carolina Judicial Department calendar we found out that
5 there was indeed no General Sessions during the week of
6 June 26th, 2006.

7 Q. Okay. And that would be the basis for your
8 objection, correct?

9 A. Yes. That's one.

10 Q. Okay.

11 A. And the other one is, it says, states that on or
12 around May 3rd, Herman Belton was in, knowingly and
13 unlawfully in possession of more than a hundred but less
14 than 200 pounds [sic] of crack, when indeed these are
15 the elements that have to be proven beyond a shadow of a
16 doubt, and they was never proven during my trial.

17 Q. Was there any objection raised by your attorney at
18 trial to the indictment?

19 A. No. No, there wasn't.

20 Q. Who was your attorney at trial?

21 A. Mr. Kurt Tavernier.

22 Q. Is he in the courtroom today?

23 A. Yes, he is.

24 Q. Where is he seated?

25 A. To my left.

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1 Q. At the other, state counsel's table?

2 A. Yes, he is.

3 Q. Okay. And when was your trial?

4 A. My trial was February 6th of 2007.

5 Q. Okay. And what was the sentencing -- were you
6 convicted of those charges?

7 A. Yes, I was.

8 Q. Okay. And what was the sentence at that trial?

9 A. 25 years in the State Department of Corrections.

10 Q. Did you file a timely appeal after that conviction?

11 A. Yes, I did.

12 Q. And was it, was it approved or denied?

13 A. It was approved.

14 Q. Well, the appeal ultimately, was it dismissed or
15 denied by the State Court of Appeals?

16 A. It was dismissed by *per curiam* opinion.

17 Q. And thereafter, did you file an application for
18 PCR?

19 A. Yes, I did.

20 Q. Okay. I'm going to hand up to you what is part of
21 the court record and I want you to take a moment. Does
22 that represent a true and accurate copy of your PCR
23 application that you filed with the court?

24 A. Yes, it is.

25 Q. Would you turn to page, I believe page 2, number 9,

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1 and would you once again just read the grounds that you
2 provided in the application?

3 A. It states (reading):

4 State the sanctions or grounds on which you base
5 your allegations that you are being held in custody
6 unlawfully.

7 A. Ineffective assistance of counsel.

8 B. Prosecutorial misconduct.

9 C. Violation of due process and protection of law.

10 Q. And were you in the courtroom a few moments ago
11 when we were discussing those grounds with the Judge?
12 Did we accurately describe those grounds to the Judge?

13 A. Yes, we did.

14 Q. Okay. I'll let you keep that copy just as a
15 reference for now.

16 All right. Mr. Belton, I'm gonna show you just a
17 few, few documents and I want you to identify that for
18 me. Which document is that?

19 A. It's Form B, Rule 6, which is a certificate of
20 proof of physical chain of custody.

21 Q. Okay. And have there been any changes to that
22 certificate?

23 A. It's been at the top of the control number, B
24 177556 has been marked through, initialed; and beside it
25 is written B 177528.

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1 Q: Do you know why the document was altered?

2 A: I do not.

3 Q: Okay. Have you, so you haven't been provided any
4 information about why it was altered?

5 A: No, I haven't.

6 Q: Okay. To the best of your knowledge was that
7 document entered into the record at the time of your
8 trial?

9 A: No, it wasn't.

10 Q: Okay. Would you like for it to be entered into the
11 record today?

12 A: Sure, I would.

13 MR. BROWN: Your Honor if there's no objections.
14 They're part of the notice of motion. It would be the
15 first...

16 (Counsel confer.)

17 Any objection from the State?

18 MS. MAY: No objection.

19 THE COURT: All right. Without objection.

20 Give it to the court reporter so she can mark it.

21 MR. BROWN: Okay. (Hands to court reporter.)

22 By Mr. Brown:

23 Q: And, Mr. Belton, would you like to make any other
24 comment about the content in this form in the chain of
25 custody?

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1 A. Yes, I would. As a result of B 177556 being marked
2 through and B 177528 added, my second page of my police
3 report plainly shows that the evidence might not have
4 been secured in BEST kit B 177556 in the evidence room
5 to go to S.L.E.D.

6 Q. Okay.

7 A. Not 177528.

8 Q. Okay. So there's a difference between the control
9 numbers, between the report you are referring to and the
10 Form B that we are now entering into evidence?

11 A. Yes, it is.

12 Q. All right. I know this is a poor copy, quality of
13 copy, but I'm gonna have you try to identify that
14 document for us, as well.

15 A. It's allegedly the same copy, other than some of
16 the writings have been marked through.

17 Q. Would you specifically, for the Court's benefit,
18 just state specifically what appears to have been marked
19 through on that second Form B document?

20 A. The name "Mike Baskins" (phonetic) seems to have
21 been marked through and whatever else beside it, drug
22 box, something.

23 Q. Are you stating that seems to have been marked
24 through?

25 A. Yes. It had been marked through.

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1 Q. Okay. Do you have any other information you want
2 to provide to the Court about that particular Form B?

3 A. No, I guess not.

4 MR. BROWN: Any objection --

5 Your Honor, we just ask the State if there is no
6 objections, we would like to enter the --

7 THE COURT: Let's get them all marked.

8 MR. BROWN: Okay. There's three.

9 THE COURT: All right. Give them to the court
10 reporter to mark them.

11 MR. BROWN: (Hands documents to court reporter.)

12 (Applicant's Ex. # 1, chain of custody Form B, was
13 marked for identification and received in
14 evidence.)

15 (Applicant's Ex. # 2, second chain of custody Form
16 B, was marked for identification and received in
17 evidence.)

18 (Applicant's Ex. # 3, chain of custody Form C, was
19 marked for identification and received in
20 evidence.)

21 By Mr. Brown:

22 Q. One more question in regards to Applicant's Exhibit
23 Number 2 that you were just reviewing. Do you recall
24 that being submitted into evidence at the time of trial?

25 A. No, it was not.

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1 Q. Do you recall anyone, including your attorney,
2 objecting to the contents of that chain of custody form?

3 A. There was no objection.

4 Q. And then we'll have one more form from that set of
5 documents, if you would identify it for the court?

6 A. This is a Form C, Rule 6, certificate of proof of
7 chain of physical custody or control, subsequent chain
8 of custody.

9 Q. Is there anything on that form that makes you
10 question its authenticity?

11 A. Yes, it is, quite a few.

12 Q. Okay. Would you please explain to the Court.

13 A. First it reads (reading):

14 This is to certify that I, Mike Baskin (phonetic),
15 am employed by Anderson P.D. as evidence officer and
16 that on 5-4-2006 I received in person from -- and it's a
17 blank that has name of person on it, but in the box
18 itself got "drug box."

19 "Drug box" in my aspect is not the name of a
20 person --

21 Q. Okay.

22 A. -- of Anderson Police Department.

23 And on down it reads (reading):

24 On 5-12-2006 I made delivery of the above-described
25 substances or containers to Corona (phonetic) Williams

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1 of S.L.E.D. in substantially the same condition as when
2 I received it.

3 And as a result above "signature" is just a mark.
4 It's not the signature.

5 And below it's (reading):

6 Sworn before me on this 4th day of April, 2006 --
7 which is indeed four weeks and a day, to be exact,
8 before my arrest.

9 It is also (reading):

10 Sworn before me on the 4th of April, 2006 -- which
11 is five weeks, according to this particular form, before
12 S.L.E.D. received the drugs.

13 Q. Okay. Was that information or that form presented
14 to the Court at your trial?

15 A. No, it wasn't.

16 Q. So, no one made any objection to that form?

17 A. No.

18 Q. Was your chain of custody for the alleged drugs in
19 your possession, was the chain of custody made an issue
20 at trial?

21 A. No, there wasn't.

22 Q. Okay. Do you think if it had been presented at
23 trial, it could have made a difference in the outcome of
24 your conviction?

25 A. Most definitely.

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1 Q. Any other information you would like to share
2 regarding that particular Form C that you have in your
3 possession?

4 A. No, not at this time.

5 Q. Have you requested a -- okay.

6 A. There's two.

7 Q. I'll just allow you to look at all three of the
8 exhibits for just a moment in case you have another
9 comment to share.

10 A. (Whispering to Mr. Brown) Right here it said --

11 Q. You can testify so it can be on the record now.

12 A. It's another difference I noticed in the Form B,
13 Rule 6, and the Form C, Rule 6. And that is when it's
14 describing it, say (reading):

15 Item 15, 14595, one, aluminum foil, contains
16 off-white, rock-like substance wrapped in two paper
17 towels on Form B, Rule 6.

18 On Form C, Rule 6, the off-white is left off and it
19 just says (reading):

20 Aluminum foil contains rock-like substance wrapped
21 in two paper towels.

22 Q. So there is a difference in the description?

23 A. There is a difference there in the description of
24 the alleged drugs.

25 Q. Okay.

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1 A. One said off-white, the other one said just plain
2 rock-like substance.

3 Q. And was that a, was that difference between the two
4 forms, the content of the two forms, was that ever
5 presented at trial?

6 A. No, it wasn't.

7 Q. Okay. Any other comments you would like to share
8 about Exhibits 1 through 3?

9 A. I guess not (handing).

10 Q. Now, there was -- was there a S.L.E.D. report
11 provided as part of your discovery before trial?

12 A. Yes, there was.

13 Q. Okay. Now, if you would please identify that
14 document for the Court.

15 A. This is an index sheet for my motion of discovery.

16 Q. Okay. Specifically number 5, what is contained
17 within the contents of the discovery?

18 A. Number 5 reads: Copy of S.L.E.D. report L 0606901
19 dated October 23rd, 2006. In parentheses it has (four
20 pages).

21 Q. Okay. So, to the best of your knowledge, how many
22 pages were provided to you and your attorney at the time
23 of trial?

24 A. Four.

25 Q. Now, after your trial, this letter is dated after

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1 the date of your trial, if you would identify that for
2 the Court.

3 A. Yeah. This letter is dated -- from the South
4 Carolina Law Enforcement Division dated September 30th,
5 2008.

6 Q. And what, why were they writing to you?

7 A. Because I had wrote in reference to another copy of
8 my S.L.E.D. lab report, and in return the letter states
9 that it wasn't four pages, instead it was ten pages.
10 And that's proof that there was a six-page difference
11 that someone had withheld.

12 Q. Were you aware of your attorney having a copy of
13 the complete report prior to trial?

14 A. I wasn't aware of him having it.

15 Q. Okay. And then I want you to identify this letter
16 dated December 30th, 2009, so its contents can be on the
17 record.

18 A. This is a letter from the Anderson, the City of
19 Anderson Police Department signed by Lieutenant Kenneth
20 R. Ebbernickel (phonetic).

21 Q. And who is it addressed to?

22 A. Mr. Herman Belton.

23 MS. MAY: Your Honor, I'd object to this letter
24 coming in or being read by -- Lieutenant Ebbernickel is
25 not here, who wrote this letter to Mr. Belton from the

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1 Police Department inquiring about these documents.

2 THE COURT: I'm gonna overrule the objection. I
3 guess it's a statement by a party opponent.

4 MR. BROWN: Okay, thank you.

5 THE COURT: I think he would state that if he were
6 here.

7 MR. BROWN: He would, Your Honor.

8 By Mr. Brown:

9 Q. Would you like to read any portion of that into the
10 record today, Mr. Belton?

11 A. Yes, I would.

12 Q. Please do.

13 A. It states --

14 THE WITNESS: May I just read the whole letter?

15 THE COURT: I've seen it. It's attached to your
16 memorandum, or your motion; and as I've mentioned
17 earlier in another proceeding, I do read.

18 THE WITNESS: Okay. Well, can I just read it
19 aloud?

20 THE COURT: Go ahead.

21 What's the, as far as the witness is concerned,
22 what is the critical issue in that letter?

23 THE WITNESS: The mere fact that there were errors
24 and mistakes made --

25 THE COURT: All right, very good.

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1 THE WITNESS: -- in reference to the records.

2 By Mr. Brown:

3 Q. And specifically, Mr. Belton, the errors and
4 mistakes that you just referred to, to the Court, were
5 those presented to the court at trial, those errors and
6 mistakes, presented by you or your counsel?

7 A. They was in my possession, but I wasn't aware of
8 them and it was never mentioned at trial.

9 Q. Okay. All right. Thank you.

10 A. (Handing).

11 Q. Mr. Belton, there was a Fowler case that was
12 contained within the transcript of your trial
13 transcript; is that correct?

14 A. Yes, it was.

15 Q. All right. And to the best of your knowledge, how
16 was the Fowler case that's referenced in your transcript
17 at trial, how was it relevant to your, your defense?

18 A. Because it was basically a mere reflection of my
19 case. In Fowler it states (reading):

20 They seen him coming from the front yard of an
21 alleged or suspected drug house, and he acted as if he
22 was trying to elude them. And they stopped him, and
23 they searched him and found a knife. As a result, when
24 they got him to the police station, they searched him
25 and they found some drugs.

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1 And in that case the Court ruled that the Trial
2 Court did the right thing by suppressing the evidence
3 because they ruled that there wasn't enough evidence to,
4 he had done nothing for them to stop him. There was no
5 probable cause to stop him.

6 And in my case they didn't see me coming from no
7 suspected drug house. They only said they seen a bike
8 that belonged to me, when, in fact, the bike that they
9 describe wasn't mine. And they never caught me, they
10 never had gotten any drugs off me.

11 And the difference is if they suppressed the drugs
12 in the Fowler case and they was right by suppressing
13 them, definitely they was, they should have suppressed
14 them in my case because they had less probable cause to
15 stop me than they did Fowler, because both officers
16 testified that I had broken absolutely no laws when they
17 made initial contact.

18 Q. And were your, were the alleged drugs in your
19 possession suppressed in your trial?

20 A. No, they were not.

21 Q. Was there an objection made?

22 A. There was never an objection made. And, as a
23 matter of fact, I never seen any drugs on the night of
24 my arrest.

25 Q. Okay.

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1 A. They, the policemen said they took pictures of the
2 drugs an hour after they got back to the police station.
3 Why not take pictures of them where they were found at?

4 Q. And were there, were there any other objections
5 that you felt should have been raised at trial by your
6 attorney that weren't raised?

7 A. I felt like he should have made a motion to the
8 Court to take under consideration the mere fact that I
9 pled not guilty.

10 Q. Okay. And was that motion made?

11 A. No, it wasn't.

12 Q. Okay. Any other motions or objections that you
13 felt should have been made at trial that you would like
14 to put on the record today?

15 A. Just the mere objection to the suppression of the
16 drugs.

17 Q. Okay. Which you stated a moment ago?

18 A. Earlier, yeah.

19 Q. Okay. Now, how did you come to be represented by
20 Mr. Tavernier?

21 A. He was appointed.

22 Q. Court appointed?

23 A. I guess. Yeah, I guess.

24 Q. Okay.

25 A. Obviously.

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1 Q. Who, who were the witnesses that were called to
2 represent you at -- who were called as your, as
3 witnesses in the defense of your case?

4 A. Mr. Roger Burns, Mrs. Linda Norris. They were
5 subpoenaed. Also, their daughter, which he refused to
6 call as a witness. And that was in reference to
7 something him and I had talked about before trial.

8 Q. Okay.

9 A. And I feel like he was ineffective as a result of a
10 conflict of interest. Because I had told him before
11 trial that when I was leaving home an hour and a half
12 before my arrest, the people that live in that house
13 next to the woods was having a cookout. And he
14 purposely told me, he said, "no," he said, "let's not
15 say nothing about that."

16 So, I was a little upset. And I asked him, I said;
17 "What the F, F, F, blank do you mean, not to say nothing
18 about that?" And he said, "Trust me. I've been doing
19 this over 20 years."

20 Q. So no other witnesses were called during your
21 trial?

22 A. No other witnesses were called.

23 Q. Were there, was there anyone else that you asked
24 Mr. Tavernier to contact as a potential witness?

25 A. He contacted them and they were there, but he never

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1 called them for a witness.

2 Q. Okay. And who are you referring to?

3 A. Chelsea Norris.

4 Q. Okay. Besides Ms. Norris, anyone else?

5 A. No.

6 Q. Okay. Were there any other defenses that you
7 discussed with Mr. Tavernier or wanted raised at trial?

8 A. I guess not.

9 Q. Okay. How many times did you have an opportunity
10 to actually meet, in person, with Mr. Tavernier before
11 your trial?

12 A. I seen him one other time in July of 2006 over at
13 the courthouse, where there was, he asked me was I gonna
14 plea, was I gonna take a plea, was I gonna plead guilty
15 to something?

16 And the next time I seen him I'd say it was the day
17 of my trial or when they was bringing me upstairs to
18 pick a jury.

19 Q. Now, did you have an opportunity to correspond with
20 Mr. Tavernier by way of letters during that interim
21 period of time?

22 A. I had an opportunity, but I guess that didn't take
23 place.

24 Q. Did you receive any communication from
25 Mr. Tavernier?

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1 A. No, I did not.

2 Q. Did you receive any phone calls from Mr. Tavernier?

3 A. No, I did not.

4 Q. Did you attempt to call Mr. Tavernier yourself?

5 A. No.

6 Q. Okay. You mentioned that you had an opportunity to
7 present a plea or accept a plea. Did Mr. Tavernier
8 explain those options to you in terms of accepting a
9 plea or going to trial?

10 A. Ten, 11 days before my trial they came, and him and
11 his paralegal told me, his paralegal said they would
12 offer me seven years or something. Which I told them,
13 I'm not taking nothing. I'm not taking that. I'm not
14 taking no time because I'm not guilty.

15 And at that time I wasn't taking probation even
16 though I had been locked up for nine months. Because if
17 I'm not guilty, I'm not guilty. And they have a problem
18 understanding the English language of what "not guilty"
19 is misunderstood.

20 Q. And did Mr. Tavernier, did he explain the
21 consequences of going to trial and what could happen if
22 you were convicted?

23 A. Yes, he did. And I don't remember him mentioning
24 anything about an Alford plea, which I later found in my
25 transcript, because at the time I never knew what an

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1 Alford plea was. But he explained to me the difference
2 then, the seven years at 85 percent or if I go to trial
3 and get found guilty, I would get at least 25 years at
4 85 percent, and that's what was at stake on that day.

5 Q. Okay. So, you understood that on the day of your
6 trial?

7 A. Yes, I did.

8 Q. Okay. Mr. Belton, is there any other testimony you
9 would like to provide the Court regarding the second
10 grounds for your PCR application, which is the
11 prosecutorial misconduct, at this time?

12 A. Other than the mere fact that by the prosec- --

13 Q. Take your time.

14 A. Other than the mere fact of the favorable evidence
15 was in the hands of the prosecutor but not disclosed,
16 the result may well be that the Defendant is deprived of
17 a fair chance before the trier of fact, which is the
18 jury. And the trier of fact is deprived of the
19 ingredient necessary to a fair trial when the prosecutor
20 presented evidence but he withheld the dates, which
21 allegedly caused trouble on the Court, and as a result
22 they tried and convicted me with manufactured evidence
23 and obviously perjured testimony, because the dates to
24 evidence is before I ever was arrested and 0606901 is
25 not my case number. My case number is 0611213.

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1 Q. And would you please clarify for the Court what
2 dates on what document you are referring to.

3 A. My Anderson police narcotics report.

4 Q. Okay.

5 A. All right. (Whispering to Mr. Brown): Do you have
6 that piece of paper that you showed me?

7 Q. I'll step back over in just a moment.

8 Any other comments that you want to make about your
9 second grounds listed on your PCR?

10 A. Other than the mere fact that it is the
11 prosecutor's duty to disclose evidence that gonna make a
12 difference in my trial one way or the other?

13 Q. And your third grounds, Mr. Belton, was the
14 violation of due process and equal protection. Do you
15 have any testimony you would like to provide to
16 substantiate the grounds of due process, violation of
17 due process?

18 A. Other than just as a result of the fraudulent acts
19 of the officers of the court, my due process rights were
20 violated as a result. It's none other than a wrongful
21 conviction.

22 Q. Is there any other testimony you would like to
23 provide to the Court today regarding your grounds for
24 your Post-Conviction Relief application?

25 A. State that question again?

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1 Q. Is there any other testimony that you --
2 information, that you would like to provide the Court
3 regarding the grounds of your application?

4 A. None. Other than there was fraud on the Court, and
5 that is in a judicial proceeding a lawyer or a party's
6 misconduct is so serious that it undermines or is
7 intended to undermine the integrity of the proceeding.
8 Example is introduction of fabricated evidence which is
9 what has taken place here today.

10 Q. All right, Mr. Belton. I do not have any further
11 questions for you -- yes, sir. Do you have another
12 comment?

13 A. I just ask that you file a 59(e) on my behalf to
14 make sure that all of my issues are ruled upon.

15 Q. Okay. All right. Point taken.

16 MR. BROWN: Please answer any questions that the
17 Court or the State would have for you at this time.

18 MS. MAY: The State doesn't have any questions.

19 THE COURT: All right. You may step down. Thank
20 you, sir.

21 (Witness leaves stand.)

22 THE COURT: You may call your next witness.

23 MR. BROWN: That would be our only witness.

24 THE COURT: Very well.

25 MS. MAY: The State would like to call

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1 Mr. Tavernier.

2 WHEREUPON,

3 Kurt Tavernier,

4 after first having been duly sworn, testified as

5 follows:

6 Direct Examination by Ms. May:

7 Q. Mr. Tavernier, how long have you been practicing --

8 THE COURT: Give us your full name for the record,
9 spelling your last name.

10 THE WITNESS: Kurt Tavernier. My last name is
11 spelled T as in Tom, a, v as in Victor, e-r-n-i-e-r.

12 THE COURT: Very good, thank you.

13 By Ms. May:

14 Q. How long have you been practicing law?

15 A. Since 1989.

16 Q. And how much of that has been criminal law?

17 A. From the day I got out of law school I have been
18 practicing criminal law.

19 Q. Okay. I'm gonna address the Fowler defense that
20 the Applicant brought up in his amendments and his
21 application. That was addressed during trial?

22 A. Yes. I did file a motion to suppress and that was
23 heard by Judge Cooper.

24 Q. And the issue was reserved for appeal?

25 A. Correct.

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1 Q. And the, your motion to suppress, what were the
2 grounds that you stated for the Court?

3 A. Lack of probable cause for the stop.

4 Q. And that, in fact, was the issue that was heard on
5 appeal?

6 A. Correct. There was almost -- and I think Judge
7 Cooper even addressed it during opening argument when we
8 were handling the motion, that my most -- that
9 Mr. Belton's most hope for the issue was the Fowler case
10 because it was very close in facts; but nevertheless, he
11 still, as would most judges, was gonna allow a hundred
12 grams of crack in.

13 Q. And in regards to the witnesses, did Mr. Belton
14 give you any witnesses that he wanted interviewed in
15 addition to the ones that you called at trial?

16 A. We had -- I noticed that -- and quite frankly when
17 we were talking about it, I don't remember too much
18 about Chelsea Norris. Her name was written in at the
19 last minute for a subpoena to get her, but I have no
20 notes reflecting her. I did interview both Linda Norris
21 and Roger Burns.

22 Q. Okay. And what, what did you develop from their
23 testimony? What was their -- I guess what did your
24 client hope to offer with their testimony?

25 A. Well, basically their testimony conflicted with

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1 what the officers were testifying to regarding what
2 Mr. Belton had in his hand as he was riding down the,
3 down the street. And from their viewpoint when they
4 were sitting on the porch, it appeared to them that the
5 vehicle that Officer Heaton (phonetic) was driving had
6 bumped and knocked Herman off onto the sidewalk and into
7 the woods.

8 That conflicted. They thought he had been hit and
9 that he hadn't gone as far into the woods as the
10 officers reflected in their testimony. And the fact
11 that he was not carrying -- the officers testified that
12 he was carrying a shiny object. And both Roger and
13 Linda testified, Ms. Norris and Mr. Burns testified that
14 they did not observe anything in Mr. Belton's hands as
15 he was riding down the road on his bicycle.

16 Q. And do you have any notes -- I know you mentioned
17 that it was a last-minute thing for the subpoena for
18 Chelsea Norris. Do you have any notes on what
19 Mr. Belton was --

20 A. No, I don't. The first mention I've got of her is
21 on the subpoena. That's it.

22 Q. And concerning the -- let's talk about the comment.
23 Do you ever recall ever telling Mr. Belton --

24 A. I'm sorry, I don't.

25 Q. Do you know what it was in reference to or how that

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1 was relevant to the case?

2 A. I don't recall that particular conversation, and I
3 don't have it reflected in any of my notes in
4 preparation for trial.

5 Q. If that had been beneficial to trial, if somehow
6 that proved to be beneficial and Chelsea Norris as well,
7 would you have addressed that at trial?

8 A. I tried about everything that I thought had any
9 credibility that we could raise and argue with the jury.
10 I'm sure you're gonna get into some issues regarding the
11 lab reports and stuff of that nature. But it was more a
12 factual contest between what the officers had to say and
13 what Mr. Belton, Mr. Burns and Ms. Norris had to say as
14 opposed to actually what the evidence, the stuff that
15 was analyzed, pertained to. It wasn't a -- it was a
16 question of whether he had the drugs, period.

17 Q. And did -- what type of investigation were you able
18 to conduct in addition to the Brady material?

19 A. When -- All right. Amanda Williams was my
20 investigator with the Public Defender's Office. She was
21 assigned, she did most of my initial interviews. I get
22 the file, I look through it. I get the documentation
23 and the discovery from the Solicitor's Office. I went,
24 I spoke with both Andy Heaton and Chris Lemons
25 (phonetic), the officers involved.

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1 One of the things that had jumped out on me and I
2 was aware prior to this incident pertaining to some
3 problems with the lab reports, with the notarization,
4 they had been -- that was a problem throughout the state
5 and most defense attorneys were aware of what was going
6 on and what had happened.

7 And there was a discrepancy when I got discovery
8 from Scott McElhannon on some case numbers or whatever,
9 and I clarified that with Mike Baskin and checked
10 everything out regarding that. I checked the chain of
11 custody.

12 And then I went -- I have a sketch of the, on
13 Hutchins (phonetic) Road where we went down and checked
14 out the houses, checked where the incident occurred,
15 where Mr. Belton was supposed to be coming from. I
16 thought I pretty well covered it.

17 MS. MAY: Your Honor, may I approach?

18 THE COURT: (Nodded head.)

19 By Ms. May:

20 Q. I'm gonna ask you to look at the exhibits that were
21 entered into evidence by the Applicant and just briefly
22 go over the references to these.

23 Regarding to Applicant's Exhibit 1, exhibit Form B,
24 Rule 6, I believe you already addressed the date is
25 before the actual date that --

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1 A. Well, on this particular document notarization is
2 correct. It is dated May 3rd when Heaton took it. The
3 actual notarization snafu that they have is on Form C
4 with Mike Baskin.

5 Q. Okay. And in regards to the number at the top,
6 well, one is crossed out and there's another one
7 written. I believe it's -- well, I'll go ahead and have
8 you read that number that's at the top.

9 A. Okay. The initial number to the left on control
10 number is B 177556. And that is crossed out and Mike
11 has his initials circled just above that. The next
12 number to the right of that is B 177528.

13 Q. And what, what does that number reference? What is
14 that?

15 A. Those numbers reference the BEST kit in which the
16 evidence is packaged once it's taken into custody by the
17 officer. To clarify what Mr. Belton had raised, in this
18 particular instance, Officer Heaton had taken what was
19 the rock-like substance that was in the paper towels in
20 the aluminum foil, and at the time he took it and seized
21 it, it was wet according to the incident report, and he
22 stated as if it had just been manufactured. With that
23 being wet and put in the sealed BEST kit, that was not
24 proper procedure for maintaining evidence. And so Mike
25 had notified S.L.E.D., he cut open the BEST kit, took

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1 that evidence out, repacked it with some additional
2 paper towels in order to let it air dry properly, and
3 then it was put into another BEST kit, which is
4 reflected in the number that isn't crossed out.

5 Q. Okay. During your investigation of the discovery,
6 receiving the evidence when you were able to review it,
7 did you review the chain of custody, and was there ever
8 anything that was called into question?

9 A. There were, there were three issues. Number one, I
10 checked to make sure all the people in the chain of
11 custody were available. And because everybody was
12 available in this particular instance, it didn't appear
13 to me that there were any problems with -- all witnesses
14 were gonna be available from S.L.E.D., all witnesses
15 were gonna be available from the Anderson Police
16 Department.

17 And so that, the chain of custody and the
18 transportation of the evidence, I found no irregularity.
19 As I stated earlier, the only irregularity that we found
20 at all in the paperwork was at some point during the
21 early part of 2006 there was about a six-month period
22 when S.L.E.D. would not notarize the delivery of
23 evidence to their lab. That created a problem
24 state-wide. We were aware of it. And there were a
25 couple of cases that had been tried I think in front of

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1 Judge Maddox where the Police Department had been beat
2 up a little bit because they were pre-notarizing this,
3 in this instance Mike's signature because he had
4 delivered evidence. That's why it was predated. It was
5 notarized. We knew about it. We addressed it. I
6 checked it out.

7 And the ultimate fact came down to whether the
8 evidence was, in fact, tainted, tampered or adulterated
9 in any manner or form during the transport of the, or
10 analyzation of it.

11 And having dealt with these guys before, I was
12 aware in at least two cases where the evidence --
13 officers who have testified, and the jury had basically
14 heard that the paperwork or the notarization was not
15 correct, but it nevertheless didn't make a whole lot of
16 difference because they were able to testify that the
17 evidence had in no way been tampered. The reason we
18 could do that was, or check that is the BEST pack.
19 Everything was always checked out on the BEST pack in
20 whether it had been opened, sealed, or resealed or
21 whatever pertaining to as it went down from one
22 individual to another or held in the drop box or bins
23 awaiting for analyzation.

24 Once that is checked out, we verified that
25 everything is sealed off, and that's what you get once

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1 you get the chain of custody. They are signing off that
2 this has not been tampered with or opened. As I said, I
3 knew Mike, I checked with him, I went to him, questioned
4 why we had the different numbers when I pointed it out
5 to Scott. He told me that it was wet and they had to
6 air dry it the same way they do with blood, they have to
7 wait until it is air dried before they can package it
8 and seal it for evidence storage, and what's what we
9 were dealing with here.

10 Q. And did you develop a strategy about that, this
11 issue of the change in members and the notarization?

12 A. There were two things. Number one, the officers
13 had been beaten up before in a couple other cases
14 regarding false notarization. A friend I had run into,
15 who had served on another trial, not any of mine, had
16 noted that, or questioned that the officer had got
17 beaten up for having things falsely documented or
18 whatever.

19 They didn't particularly care for the fact that the
20 officer had been beaten up on the stand when he hadn't
21 tampered with the evidence. But they were just
22 creating, in their words, was a false rabbit or
23 something to chase. And they didn't really particularly
24 like it when it ultimately came down that the evidence
25 hadn't been tampered with in any way to, in my words,

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1 prejudice the Defendant.

2 So I'd done that. I'd beaten up Mike on a couple
3 of cases after this one, and it didn't do me any good.
4 But in this particular instance I didn't think it would
5 do me a whole lot of good to try and beat up the
6 officers, because it came down to trying to dispute the
7 credibility between Officer Lemons and Officer Heaton
8 regarding whether Mr. Belton had the, had the drugs.
9 The veracity of the drugs or what was in that package
10 wasn't really the issue pertaining to -- what we were
11 trying to disprove is whether Herman Belton had the
12 drugs in his possession, and that was kind of where I
13 focused.

14 Q. And just going back to your representation again,
15 how often were you able to meet with Mr. Belton?

16 A. My notes, my notes reflect that we met with Herman
17 on at least three occasions. There might have been a
18 fourth, but my notes reflect at least three occasions,
19 most definitely. The last one the day before trial on
20 February 4th, and January 30th when we did give him a
21 copy of all the incident report, everything I had in the
22 file, he was given a copy of at that particular point in
23 time.

24 Q. And did you discuss the discovery with him that you
25 had in your file?

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1 A. For the most part, yes. Herman from day one was
2 adamant the drugs were not his and had maintained that
3 throughout. I -- this was not my first time
4 representing Herman. And when he got it in his head,
5 there wasn't a whole lot of talking to Herman and trying
6 to discuss what realities were or what was actually
7 gonna happen to him.

8 He was steadfast. He was stubborn. He was a crack
9 addict. And he just, he would not listen to reason, and
10 even understand the realities that he was probably gonna
11 be convicted based on what the officers were expecting
12 to testify to and what they would testify to after my
13 interviewing them and seeing what they had -- and
14 learning what they had to say and questioning some
15 things.

16 And in spite of that he was still gonna press
17 forward regardless of the consequences. And so I pretty
18 much dotted my I's, crossed my T's, because he was going
19 away for a long time. And I told him that. I told him
20 he was probably gonna be convicted based on the evidence
21 the officers were gonna testify to, that there was no
22 challenging that the crack was crack.

23 My basic argument was who was gonna give a crack
24 addict ten thousand dollars' worth of crack and let them
25 hold it? And that was pretty much what I tried to

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1 maintain and get across to the jury.

2 Other than that, having Roger Burns and Linda
3 Norris dispute what the other officers testified to as
4 to what, their approach to Mr. Belton that day.

5 Q. Do you feel you were able to sufficiently confer
6 with him in order to prepare for trial? Did you feel
7 prepared for trial?

8 A. Oh, I was prepared. You know, I knew what I needed
9 to do and where, what I felt where our hope lied
10 regarding in trying to present a defense. Herman didn't
11 want -- I don't think he really wanted to face what the
12 realities were. He continued to maintain it wasn't his.

13 And I said, you know, my response was, "I
14 understand that. But it's your word against theirs."
15 And that's, that was about the extent of it.

16 Q. And I know you had a motion for suppression. Did
17 you discuss the basis of that and what you were gonna
18 argue with Mr. Belton?

19 A. I discussed the motion to suppress because I told
20 him everything I learned was based on what he had told
21 me, what Linda and Roger had said, and, you know, just
22 supplied the facts that the officers had no real reason.
23 The fact that they had continually, in my words,
24 harassed him, because every time they would see him they
25 would stop him. It was a general practice.

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1 Q. And leading to trial, there was a plea offer, I
2 believe, or something about...

3 A. Well, we -- based on his history, they wouldn't
4 come off because of the weight, they wouldn't come off
5 the second offense trafficking; but they would agree to
6 the absolute minimum, which was seven years, and that
7 was discussed.

8 This wasn't my first time representing Herman. He
9 had been -- I represented him on trafficking back in '04
10 and was able to get that dismissed because of some
11 technicalities and stuff that had occurred regarding the
12 CI. So, I knew Herman, I dealt with him before. But he
13 just wouldn't listen. I didn't have a big enough
14 hammer, I guess.

15 Q. Did you all ever discuss pleading an Alford plea?

16 A. Yeah. We felt that the facts were sufficient
17 enough -- and my explanation is just, you don't have to
18 admit you had the drugs. All you got to admit is the
19 facts were sufficient enough that if you went to trial,
20 you would most likely be found guilty, and then you are
21 receiving a benefit of the recommendation for a minimum
22 sentence.

23 Q. And did he understand the discussion of what an
24 Alford plea was and what it meant?

25 A. I felt he did. I believed it.

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1 Q. What did he want to do in regards to that Alford
2 plea?

3 A. He wanted a trial from day one. He never, he
4 really never swayed from that. No matter what you tried
5 to talk, he never wanted it.

6 Q. The S.L.E.D. documents received in the discovery?

7 A. Let me, if I may, let me back up.

8 I've got two notes on the cover of my file. And
9 even up on to the last, the very last, just prior to
10 trial on February 5th, (reading):

11 Defendant wants trial. Defendant given all
12 discovery. Defendant again informed about offer and of
13 potential sentence if convicted.

14 And that my note reflects Defendant wanted trial.

15 Q. And I believe you addressed that on the record?

16 A. I absolutely did. I was covering my backside.

17 Q. As to the S.L.E.D. documents that you received in
18 discovery, can you address the four-page S.L.E.D. drug
19 report that I guess is allegedly ten pages in reality --

20 A. The --

21 Q. -- or that has been alleged is ten pages?

22 A. Okay. The main lab report dealt with four pages,
23 and I believe you have -- I have Applicant's 1, 2, and
24 3. Is that all there is up here?

25 MS. MAY: Your Honor, I'd like to enter into

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1 evidence the S.L.E.D. incident report.

2 THE COURT: Any objection?

3 MS. MAY: He filed it with his application.

4 (Counsel confer.)

5 By Ms. May:

6 Q. I'll have you identify this. Is this what you are
7 referring to, the S.L.E.D. incident report?

8 A: No. In actuality what you don't have is the cover
9 sheet, which is the actual lab report with the results
10 on it. That isn't marked as an exhibit.

11 Then you have 1, 2, and 3 here, but, the four-page
12 document actually included the results, okay? And then
13 so you have a test result, all right?

14 Then you have Form A, which is the signature right
15 off of the chemist. Then you have Form B and Form C.
16 You actually have two Form B's here marked as 1 and 2,
17 and then Form C is 3, okay?

18 So in actuality what I would have received was,
19 were the test results, which is the cover sheet showing
20 that there's 106.38 grams of cocaine base found; Form A,
21 which is the credentials of the chemist; Form B, and
22 then Form C. Those were the four pages, for
23 clarification.

24 MS. MAY: I do have those. I apologize.

25 Your Honor, I would like to enter these into

1 evidence --

2 THE COURT: Very well.

3 MS. MAY: -- unless Mr. Brown has an objection.

4 THE COURT: Any objection?

5 (There was no response.)

6 THE COURT: Mr. Brown, any objection?

7 MR. BROWN: No objection, Your Honor.

8 THE COURT: All right. Without objection, State's

9 Exhibits --

10 MS. MAY: State's Exhibits 1, 2, and 3.

11 THE COURT: All right. We'll go off the record

12 while the court reporter marks the exhibits.

13 (Marked for identification and received in evidence
14 was State's Exhibit 1, test results.)

15 (Marked for identification and received in evidence
16 was State's Exhibit 2, Form A, credentials of
17 chemist.)

18 (Marked for identification and received in evidence
19 was State's Exhibit 3, Incident Report.)

20 By Ms. May:

21 Q: And I believe you referenced the cover sheet and
22 the Form A?

23 A. Correct.

24 Q. With regards to Exhibit, State's Exhibit 3, which
25 is the incident report, could you read off the number

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1 that's at the top, and that's the case number?

2 A. 06-11213.

3 Q. And what is that?

4 A. That's the Anderson Police Department case number
5 assigned to this incident.

6 Q. And I believe Mr. Belton took issue with the fact
7 that it had '06 in it and some of the days had '05.
8 Again, did that, did that bother, didn't that concern
9 you?

10 A. It didn't concern me. This was a summary case that
11 was put together by Chris Lemons. That he, typically,
12 most of their officers put together. It was part of my
13 incident report that I have. And I note that Mr. Belton
14 got it from me because my copy is underlined the same as
15 his. Only it doesn't show the highlights that I have
16 went through. Some of mine is highlighted and his
17 isn't. But the underlying marks that he has, unknown
18 shiny object and other underlining parts aren't
19 reflected on my file copy. So, I know he gave -- this
20 is part of what he got from me, I believe, when I gave
21 him his discovery on January 30th.

22 Q. And from your understanding of what Mr. Belton is
23 claiming here today, was he concerned about you not
24 using these discrepancies as evidence, as possible
25 evidence at trial?

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1 A. It appears to me he is. But you got to pick your
2 battles. And if you try to attack the credibility of
3 the officers and get shot down, all that does is bolster
4 their credibility. My biggest -- our biggest argument
5 at the time based on showing the credibility or the
6 discrepancies between what the officers testified to and
7 what Mr. Burns and Ms. Norris had to say, that given in
8 conjunction with the fact that Herman's reputation --
9 and the officers testified to this, I believe -- and
10 even he testified to it, was that he was a crack addict,
11 he was a user. And for him to have that amount of drugs
12 in his possession was pretty much ludicrous because all
13 he lived for, he lived day-to-day, I think he testified,
14 you know, week-to-week, month-to-month, week-to-week,
15 day-to-day. That's, that's how he existed. He's
16 probably put on 34 -- I mean 35, 40 pounds since he's
17 gone to jail. He was an absolute wreck when he, when, a
18 couple years ago. And that's all he lived for.

19 Q. So not, not bringing out the discrepancy, was that
20 a matter developed as trial strategy?

21 A. Part of it was trial strategy. You try to pick
22 your battles. I want to focus on this. And I nailed
23 the officers as best I could with the discrepancies,
24 hoping that the Jury would rely on what two independent
25 witnesses who had no dog in the hunt would, would say.

1 And their testimony pretty much corroborated what
2 Mr. Belton had to say. Other than that, you know, I was
3 pitting Herman against the officers.

4 Q. And I believe you discussed this earlier, but you
5 had always gone the other way to attack the
6 discrepancies and were aware of the consequences for
7 that and...

8 A. Yes.

9 Q. I'm gonna ask you if you would please review just
10 the cover of the indictment.

11 A. Sure.

12 Q. And Mr. Belton a letter that's part of the record a
13 letter dated March 18th. He has printed out the terms
14 of Circuit and Family Court. And is the date that's
15 true-billed provided for as being in court?

16 A. The week of June 27, 2006, there was Common Pleas
17 court with Judge Nicholson and Common Pleas Court with,
18 and PCRs with Judge Maddox, and Donna Brady was the
19 actual court reporter on the 27th.

20 Q. Did you see any grounds at any time that challenges
21 the indictment?

22 A. To be quite honest with you, I review what he's
23 charged with and the basis of the indictment. Given
24 notice that he had more than a hundred grams, that was
25 consistent with what we had. I had no reason to doubt

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1 that the grand jury actually convened on the 27th, and
2 that it was true-billed. So, to be perfectly honest
3 with you, it is not something that I would have actually
4 checked for; but having been around this system long
5 enough; I didn't see how they would make a mistake like
6 that if there was, in fact, a mistake of that nature
7 made.

8 So, I might give that one to Mr. Belton. If there
9 was, in fact, no court that week, I would give it to
10 them. But it's not something I would have raised.

11 Q. Well, in fact, the Court was in recess.

12 I'm gonna ask you to go back to Rule 6 [sic]
13 please -- Form 6. I'm sorry.

14 A. Form?

15 Q. The testimony about the drug, the drug box --

16 A. Oh.

17 Q. -- being listed as a person. I received in person
18 from drug box. Is there an objection, is there an
19 objection to make about that, the drug box being used as
20 the name of a person?

21 A. No. Every law enforcement agency has an evidence
22 locker or a box or whatever that they keep evidence in
23 in which the evidence custodian retrieves it. The same
24 thing is done at S.L.E.D. If you go down to S.L.E.D.,
25 they put it in a designated den on a shelf in a locked

1 room. That's where the technicians retrieve it from.

2 That's where it is technically stored.

3 So, Mike retrieved this himself from the drug box
4 or the evidence locker at the Police Department and
5 that's when he took it and transported it to S.L.E.D. in
6 person. He made a -- he used to make a trip about every
7 other week to take evidence down to Columbia.

8 Q. And also, comparing the Form C and the Form B, in
9 regards to the description of rock-like substance and
10 off-white rock-like substance, did you see anything
11 objectionable based on that discrepancy?

12 A. You've got one officer's description as opposed to
13 another. And when you are dealing with rock-like
14 substance, I didn't consider that to be significant.

15 So, you know, one officer could call it yellow, one
16 could call it off-white. So, that to me doesn't -- I've
17 been doing this a long time, and it didn't appear to be
18 significant.

19 Q. Okay. And I believe there were claims involving
20 prosecutorial misconduct. Did you ever have any reason
21 to believe that you weren't handed all of the Brady
22 discovery? Or did you ever feel that you were missing
23 part of the discovery?

24 A. At that point in time the Solicitor's Office had an
25 open file policy, and I could go in and check anything I

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1 wanted to check. Between most of the assistant
2 solicitors, I'd been -- I was employed at this
3 particular office, familiar with most of these guys,
4 and, you know, based on what I've been through, I was a
5 cop for five years, been through all this stuff, and I
6 got a pretty good idea because I do primarily drugs, I
7 had a pretty good idea of what I'm dealing with. And if
8 I felt there was anything missing or that appeared to
9 be -- sometimes you can tell more by what's missing than
10 what you actually have. And it appeared to me I had all
11 the basics in what I had checked out, and there was
12 nothing insignificant that I found.

13 As I said, I did check the chain of custody that
14 Scott had to be able to verify who the individuals were
15 and that they were still employed by S.L.E.D., and
16 otherwise I would have made them appear to prove their
17 chain. But everybody was available. That's an exercise
18 in futility.

19 MS. MAY: Beg the Court's indulgence.

20 (There was a pause in the proceedings.)

21 By Ms. May:

22 Q. Before you went to trial, did you discuss with
23 Mr. Belton again the options available to him in regards
24 to pleading and what he faced at trial?

25 A. Yes. My notes reflect on the inside cover of my

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1 folder on 2-5-07 Defendant was again informed about
2 offer and potential sentence if convicted. Defendant
3 wants trial. Defendant given all discovery. I went
4 over everything.

5 I wished I had a bigger hammer because he would be
6 almost out by now.

7 Q. And during trial did he ever raise any concerns
8 about wanting to...

9 A. No. He was adamant the drugs weren't his.

10 Q. And I believe he testified at trial?

11 A. Yes, he did testify at trial.

12 Q. And did you advise him of his right to testify and
13 not testify and...

14 A. I did. And we had off-the-record discussions with
15 Judge Cooper regarding -- and I think he addresses it on
16 record -- regarding what Herman's prior record regarding
17 the drug conviction that he would have been convicted of
18 back in '98 or '99, and they only allowed him to be
19 impeached that he was subject to having a five-year
20 sentence rather than having a prior drug offense, to
21 eliminate, I think it was the Myrtle Beach case or a
22 Conway case that had come out, I think Reidberg
23 (phonetic) or whatever, that it would have been
24 prejudicial to him. So, the jury knew he had a prior
25 conviction that carried five years, that's it.

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1 Q. And he was aware that -- he understood that that
2 was going to come in when he testified?

3 A. Absolutely. And I raised it then and I was the one
4 who did it on direct.

5 Q. And it was -- his decision was to testify?

6 A. (Nodded head.) He had -- he really quite frankly
7 as part of the strategy, he had no choice. He had to.
8 Because I felt the jury had to hear and he felt he
9 wanted the jury to hear he didn't have those drugs.

10 MS. MAY: If I may have one moment, Your Honor.

11 (Whereupon, there was a pause in the proceedings.)

12 By Ms. May:

13 Q. And did you feel that there was anything else that
14 you could have investigated that would have changed the
15 outcome? Or anything that Herman asked you to check out
16 that you didn't investigate?

17 A. Nothing that is reflected in any of my notes or
18 those of Amanda Williams who was the investigator at the
19 time. I thought we covered everything. My notes
20 reflect my questioning of the officers, my outline of
21 what I was gonna cover, what I expected to cover, and
22 what I anticipated their testimony would be. I hit them
23 on no fingerprints on the aluminum foil and those kinds
24 of things, and I felt I covered all the bases that
25 needed to be covered.

1 Q. And you discussed trial, your trial strategy with
2 Mr. Belton?

3 A. To the extent that he wanted to understand it or
4 face what was gonna happen, yes.

5 MS. MAY: I have no more questions. Thank you.

6 THE COURT: Cross-Examination?

7 MR. BROWN: Just a few questions, Your Honor.

8 Cross-Examination by Mr. Brown:

9 Q. Mr. Tavernier, state counsel has gone over a lot of
10 things, clarifying at least your opinion of the lab
11 reports and clarifying some of the correction marks or
12 altered, altered marks or changes that were made, so I
13 appreciate you providing your opinion for the Court.

14 In regard to the witnesses, these probably will be
15 questions of clarification. Just other than the two
16 people that did testify, and there was a notation or a
17 mention of Chelsea Norris --

18 A. Correct.

19 Q. -- another relative of those witnesses, was there
20 anyone else to the best of your knowledge that could
21 have benefitted Mr. Belton's case?

22 A. Nothing that's reflected in any of my notes.

23 Q. Okay.

24 A. I've got from the first interview that Amanda had.
25 Linda. And actually she has it listed as Linda and

Belton v. State -- June 8, 2011 -- Kurt Tavernier/Cross

1 Robih (phonetic) Burns at 506 Hudgins. And then my
2 notes reflect my calling them at, they have 225-8110 was
3 their number. I spoke with them and found out what they
4 had to say. My notes reflect some of what I believed
5 they were gonna be able to testify to, so I knew they
6 were going to be helpful.

7 But as far as Chelsea is concerned, her name is
8 written, handwritten on the subpoena that was sent, so
9 she was kind of an afterthought, because I don't have
10 any notes reflecting what she's gonna say. And on the
11 other subpoenas their names are typed in. So, she came
12 in relatively late in the ball game. As a matter of
13 fact, she came in on February 5th is when her subpoena
14 is dated.

15 Q. And how many times again do you recall meeting with
16 Mr. Belton prior to the trial?

17 A. I've got three different occasions on my notes that
18 I reflect having met with him. I think there might have
19 been one more time, but I cannot be certain. But I've
20 got at least three different occasions having met with
21 him that I, that I can show from my, from my notes.

22 Q. Did you feel that the time that you spent with him
23 gave you and him adequate time to prepare for his trial?

24 A. I felt it did. I knew what I had. After meeting
25 with him and going over the documents, or the, what he

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1 had provided to Amanda in the first place, having gotten
2 the incident reports and then gone out and checked
3 things out, I felt I had everything that was pretty much
4 pertinent.

5 He didn't say anything on the stand that surprised
6 me or gave me any cause for concern that it was
7 something that we had that I possibly missed. And there
8 was nothing on the sketch when we went out to the road
9 and I went out and checked where it happened and all
10 that and then checked it with him just prior to trial,
11 that gave me any idea that I might have missed something
12 that would affect anything regarding the outcome.

13 Q. Okay. And I know you've referenced this document
14 specifically yourself.

15 A. Yes, sir.

16 Q. And if you could just clarify again for me -- it's
17 exhibit number -- State's Exhibit number 3 -- just the
18 difference between -- in your opinion the difference
19 between the case number at the top of the page and the
20 S.L.E.D. case number listed below.

21 A. I don't...

22 Q. Excuse me. I pointed to the wrong -- this case
23 number and this number referenced right here, along with
24 the 2005 date on that report.

25 A. All right. They've got a 2005 date. That's

Belton v. State -- June 8, 2011 -- Kurt Tavernier/Cross

1 scrivener -- I wrote that off as a clerical error.
2 Because the actual lab report number that I have from
3 the S.L.E.D. lab on the results when I received them,
4 S.L.E.D. lab number is L 0606901, and that corresponds
5 with what I have here. They have the case number
6 0611213, that corresponds with the case number on this
7 piece of paper that you showed me, as well as the
8 incident report, that's the main incident report that I
9 was given on this case. So, those numbers I was able to
10 correlate and, you know, so, the reflecting on these
11 5-11-2005 I write down just as a clerical error.

12 Q. Okay. And there's been mention of -- well, first
13 we have discussed the S.L.E.D. report that you received
14 as part of your discovery request from the State. And
15 on the discovery that was submitted by the State there
16 was a notation of a four-page S.L.E.D. report. Do you
17 recall receiving an additional report or supplemental
18 pages to that report prior to trial?

19 A. No. The additional six pages were not given until
20 later on -- well, they -- I never got them, okay? But
21 they were in Scott's file which reflected the chain of
22 custody. Typically you don't get that until a week or
23 two before trial because either drugs remain in storage
24 down at S.L.E.D. or they will be sent back up to the
25 particular agency, and all it reflected was the sign-in

1 sheets back and forth between whoever was the technician
2 down at S.L.E.D., the one lab tech, the storeroom tech,
3 the chemist, those, those were the types of documents
4 that were reflected in the additional cases that Scott
5 had.

6 THE COURT: Mr. Brown, the ten pages come from a
7 receipt, doesn't it?

8 MR. BROWN: I could check my records, Your Honor.

9 THE COURT: I mean, that's what you submitted.

10 MR. BROWN: Yes. There's a cover, I gave you the
11 cover letter.

12 THE COURT: It doesn't say when the pages were, but
13 it just says that they charged somebody 2.50 a page for
14 ten pages.

15 MR. BROWN: We took that, Your Honor, as Mr. Belton
16 had made a -- to the best of my knowledge, Mr. Belton
17 had made a request for a complete copy of the S.L.E.D.
18 report. S.L.E.D. had responded to his request by
19 indicating that there were ten pages, and he forwarded
20 them a check.

21 THE COURT: Well, there again, though, the first
22 four pages were done at one time, and then you had six
23 additional pages. So, by the time you had it on
24 September the 3rd, 2008, you had ten pages.

25 MR. BROWN: And my point of clarification to

Belton v. State -- June 8, 2011 -- Kurt Tavernier/Cross

1 Mr. Tavernier would just be that he did have access to
2 the complete S.L.E.D. report or all the information he
3 needed.

4 THE COURT: I know. But there's been discussion of
5 inaccuracies and improper submissions.

6 But apparently, as I'm following it now, that that
7 is a, like you say, a report, or not report, but a reply
8 to a request. (Reading):

9 The above records filed concerning your case has
10 been copied and reviewed. Please find a list of all
11 breakdown of the charges associated with your request.

12 So it had ten pages at 25 cents per page for a
13 total of 2.50.

14 MR. BROWN: I have no further questions about the
15 report, Your Honor.

16 THE COURT: Also, as far as General Sessions Court,
17 a grand jury is a continuing body, and they meet for a
18 whole year. In fact, six of them meet for two years.
19 So, I mean, they're held over. So, they meet whenever
20 they are scheduled to meet. It doesn't have to be a
21 General Sessions term. Sometimes you have judges who
22 are presiding in Common Pleas signing a General
23 Sessions, a grand jury report. I think you probably
24 have an expert on that in the courtroom today.

25 So, let's see if we can find something of

1 substance.

2 MR. BROWN: Okay. I'll try to move on with my
3 questions.

4 By Mr. Brown:

5 Q. Your statement, if I understood it correctly,
6 Mr. Tavernier, the focus of your defense was, did Herman
7 have the drugs in his possession? Or that was the crux
8 of the case?

9 A. Correct.

10 Q. Would you agree with that statement?

11 A. That was the whole dispute. It wasn't whether the
12 drugs, whether the crack was actually crack or whatever.
13 It was whether he had them or whether the officers found
14 them in the vicinity and are attributing them to him.
15 And they said he had a shiny object in his hand going
16 down the road. We disputed that. So...

17 Q. So, presumably, if they weren't Herman Belton's; if
18 they weren't in his possession and they weren't his,
19 then they were someone's, they were someone else's?

20 A. Somebody else dropped them or whatever. The
21 argument was they were wet, and...

22 Q. Was there any investigation of the surrounding
23 area? There was a mention of a cookout, presumably
24 people at that cookout in the vicinity. Was there any
25 investigation or information discovered that could have

Belton v. State -- June 8, 2011 -- Kurt Tavernier/Cross

1 led to them being someone else's, someone else being in
2 the vicinity?

3 A. Mr. Brown, I have no notes reflecting anything
4 about a cookout or that being discussed. The whole
5 entire area is known, I think it's reflected as a drug
6 area. There are guys up and down the streets who, the
7 corners or whatever, who loiter in that area to sell, to
8 sell rocks of crack. I mean, you can go down any street
9 today and pick it up if you want it. And, you know, you
10 drop ten, 20, 50 bucks and you can walk away. You might
11 get stopped by the Police Department for not turning
12 your turn signal on for making a right-hand turn after
13 you leave the area, but that's gonna happen. And
14 Herman, his reputation, he was known to be a runner. He
15 dealt with it before. He was an addict. And he had
16 some. And that's what they testified to, that was his
17 reputation. That didn't come out in court. Only the
18 fact that he was an addict came out in court.

19 But that was why they stopped him. I mean, he was
20 stopped. And by their own admission they stopped him
21 every time they saw him. He testified to that and that
22 went unrefuted that he knew he was gonna be stopped.

23 MR. BROWN: Can I have just one second?

24 (The Applicant conferred with his attorney off the
25 record.)

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1 By Mr. Brown:

2 Q. Just one question on behalf of Mr. Belton.

3 A. Sure.

4 Q. There was no testimony at trial that Mr. Belton was
5 a runner *per se*?

6 A. No, that did not come out. That's what I was told
7 by the officers. That's why they would harass him.
8 They caught him a time or two with a crack pipe and
9 stuff, but they never arrested him. He had been
10 arrested before once or twice for loitering in a drug
11 area, that kind of thing, and we knew it, and, I mean,
12 that's on his record. But he was known as a crack
13 addict, and they would, they just harassed everybody and
14 they did it and they acknowledged it. And he, I think
15 he acknowledged he knew he was gonna get stopped every
16 time they saw him. He knew who they were by sight.

17 MR. BROWN: I have no further questions for you,
18 Mr. Tavernier. Thank you.

19 THE COURT: Re-exam?

20 MS. MAY: I have no further questions.

21 THE COURT: Very good.

22 You may step down.

23 (Whereupon, the witness was excused.)

24 THE COURT: You may call your next witness.

25 MS. MAY: The State has no more witnesses.

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1 THE COURT: Any Reply?

2 MR. BROWN: No Reply, Your Honor.

3 THE COURT: Argument?

4 MR. BROWN: Your Honor, the Plaintiff, on behalf of
5 Plaintiff we would say based on the Strickland test and
6 the two-prong test that he must prove in terms of there
7 being performance that was deficient, I think we have
8 brought to light a number of specific situations,
9 documentation as well as specific points during the
10 trial itself where certain objections could have been
11 made, certain evidence could have been presented that
12 could have helped collectively presented more of a
13 reasonable doubt in terms of the guilt of Mr. Belton at
14 the time of trial. And I think there is a direct --
15 that as a direct result of those deficiencies in the
16 preparation and the presentation of his defense at trial
17 and ultimately the outcome, which was his conviction and
18 incarceration at this time.

19 THE COURT: All right. What does the State say?

20 MS. MAY: Your Honor, the State would submit that
21 with regards to the indictments that there not being a
22 grand jury that met, that such indictments would be, I
23 believe we covered that.

24 THE COURT: Well, as I say, one, the grand juries
25 don't meet just in General Sessions terms. In fact,

1 they are instructed to meet prior to terms of General
2 Sessions Court. And also, any Circuit Judge may receive
3 a grand jury report.

4 Also, as I understand, I think it's the State
5 versus Gentry that says that you can proceed to trial on
6 an indictment you waive your test. Unless it's
7 jurisdictional. Obviously, trafficking is in General
8 Sessions jurisdiction.

9 All right. And what else?

10 MS. MAY: With regards to that counsel refused to
11 properly investigate, Mr. Tavernier has testified that
12 he received the Brady discovery information. There is
13 an open file policy that he had no reason to think that
14 he did not receive everything or anything was withheld.

15 He reviewed that with Mr. Belton. He called a few
16 witnesses that Mr. Belton asked him to, I believe Linda
17 Norris and the other, Roger Burns. With regards to
18 Chelsea Norris, she hasn't been presented here at the
19 PCR hearing. So, Mr. Belton has failed to meet his
20 burden of proof on her not being at trial, testifying
21 for him at trial.

22 Mr. Tavernier was thoroughly prepared. He
23 investigated the case. He sufficiently advised
24 Mr. Belton of his rights of what he was facing at trial.
25 He has an explanation as to the scrivener's errors, the

Belton v. State -- June 8, 2011

1 dates. That was part of trial strategy and there was
2 never an issue of the evidence being contaminated or the
3 chain of custody being broken.

4 And I think that would cover all the relevant
5 claims. I would address that he's failed to meet his
6 burden of proof.

7 THE COURT: All right.

8 Reply?

9 MR. BROWN: No Reply, Your Honor.

10 THE COURT: All right.

11 As we know, Post-Conviction Relief is a civil
12 action, and as such, the burden of proof is less than
13 beyond a reasonable doubt; but also the burden is upon
14 the Applicant to establish the grounds for the granting
15 of an application.

16 And although I might be able to understand how
17 there would be some confusion when you have strike-outs,
18 I notice that in each instance there was some
19 modification done to one of the reports. Somebody put
20 their initials on it so it was not as if it was done in
21 an inappropriate way.

22 So, I'm going to, as far as -- and also, as I say,
23 I can understand how you can have a ten-page report of
24 the entire file which would include the four-page report
25 as well as the other items contained there in the file.

1 And, as I say, as far as the indictment, I don't
2 find -- I reviewed the indictment and it seems to be
3 appropriate in form and substance, so I find that that's
4 not grounds.

5 Although I understand the totality of all the
6 errors, if there had been any, could affect due process
7 and equal protection, but in this particular case I
8 don't think it rises to that. I feel that the Applicant
9 has failed to sustain his burden of proof, and that the
10 application should be dismissed with prejudice.

11 And I'm gonna ask the Attorney General to prepare a
12 proposed order.

13 Of course, you will send a copy to Mr. Brown.

14 Also, I hadn't mentioned that today, but my policy
15 is to wait five days after I receive a proposed order,
16 which gives the parties the opportunity to do something
17 that needs to be corrected as far as just a scrivener's
18 error or something else that doesn't go to the substance
19 of the order. That way you don't have to file a Rule
20 59. Although I understand you want a 59 if it is
21 necessary. So, it will spare you the 59. So, if you
22 see something in it when she submits it to you that
23 needs to be, feel free to do that.

24 All right. Very good. So, I thank you.

25 Mr. Belton, good luck to you. I wish I could say

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1 that justice was perfect, but as it is, sometimes it can
2 be hard. I wish you well. But I am going to dismiss
3 your application. All right. Very good.

4 (Whereupon, the Post-Conviction Relief hearing was
5 concluded at approximately 6:00 p.m.)

6 ** End of Requested Certified Transcript of Record. **

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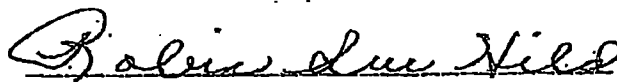
Belton v. State -- June 8, 2011

Certificate of Court Reporter

I, the undersigned, Robin Sue Hild, FCRR, RPR, Official Court Reporter for the Tenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Anderson County, South Carolina, on the 8th day of June, 2011.

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

March 4, 2012



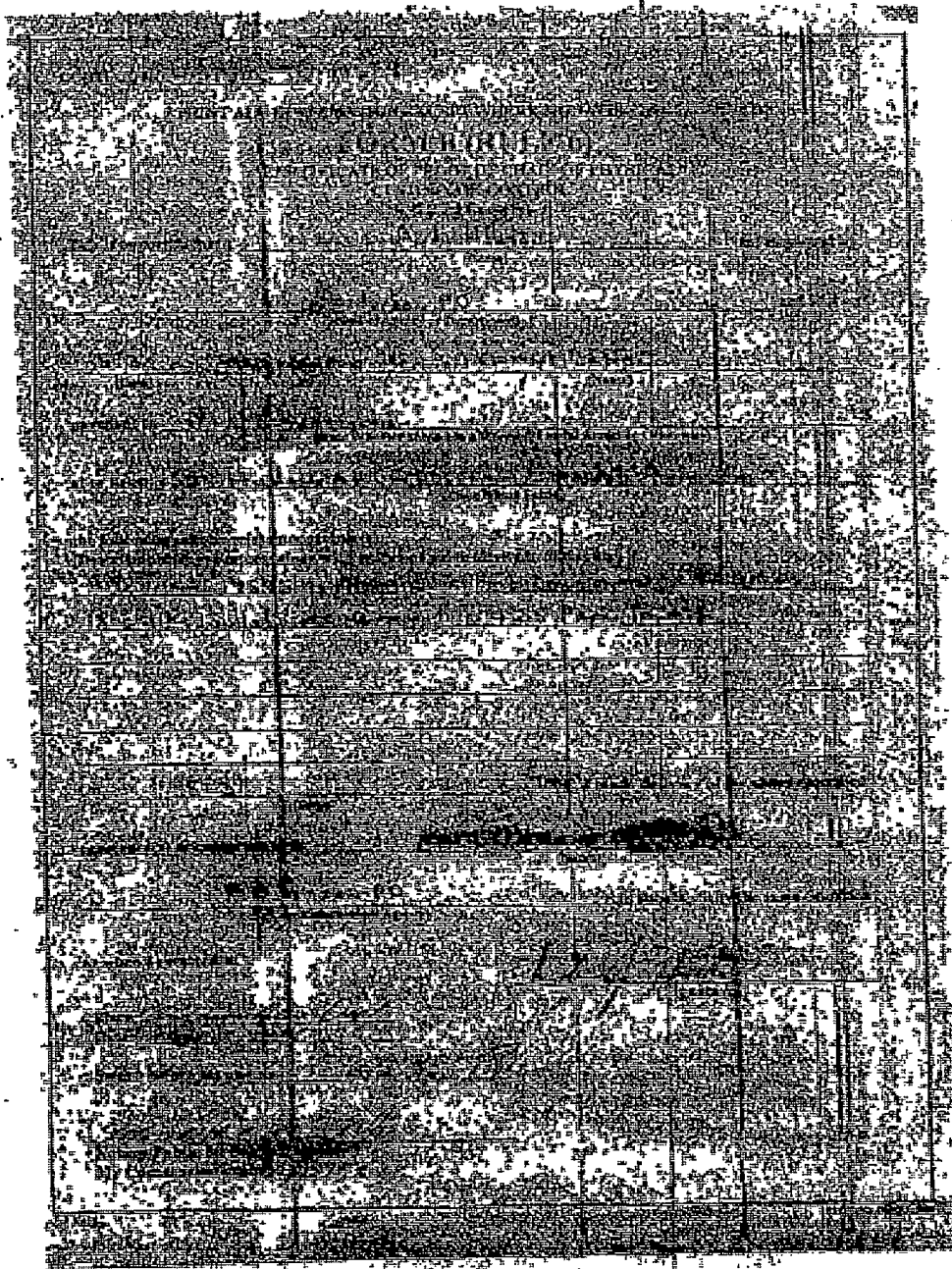
Robin Sue Hild, FCRR, RPR
Circuit Court Reporter

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328

L-02-2012 15:50 FROM: AND CLERK OF COURT 8642604715

TO: 803 734 1397

P.3/7



Applicant
EXHIBIT NO. 2
6-8-11
Robin Hild

CONTROL NO. 817578

PRINT ALL INFORMATION EXCEPT WHERE SIGNATURE IS REQUIRED

FORM C (RULE 6)CERTIFICATE OF PROOF OF CHAIN OF PHYSICAL
CUSTODY OR CONTROL
(Subsequent Change of Custody)This is to certify that I Mike Backin am employed by

(Name)

Anderson PD as Evidence Officer and that on

(Name of Agency or Department)

(Capacity of Employment)

On 5-4 2006, I received in Person

(Date)

(Specify Whether by Mail or in Person)

from Doug Bay of Anderson PD

(Name of Person)

(Law Enforcement Agency)

the following substance(s) or container(s) which were originally seized by

Andy Heaton

(Name of Person Making Original Seizure)

(Describe the substance of container with sufficient particularity to distinguish it.)

APD Item # 14595-1, ALUMINUM FOIL CONTAINING ROCK LIKE SUBSTANCE
WRAPPED IN TWO PAPER TOWELSOn 5-12 2006, I made delivery of the above described

(Date)

substance(s) or container(s) to Ferrante Williams of

(Name)

SLEP in substance(s) in the same condition

(Law Enforcement Agency)

as when I received it.

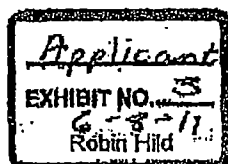
Place: SLEPDate: 5-12-2006Sworn before me on this 4th day of April, 2006Amey W. Lert

Notary Public for South Carolina

My Commission expires: 7-2007

(Signature)

REVISED PRINT 3/05



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L-02-2012 15:51 FROM: AND CLERK OF COURT
JUL-7-2011 16:19 FROM: TAUERNIER, LAM8642604715
1864222116TO: 803.734.1397
10:100313-4213P.57
C.12.0**SOUTH CAROLINA LAW ENFORCEMENT DIVISION**
FORENSIC SERVICES LABORATORY REPORTAPC
MARK SANFORD
GovernorROBERT M. STEWART
ChiefMichael Baskin
Anderson Police Department
401 S. Main Street
Anderson, SC 29624DRUG ANALYSIS
October 23, 2006
SLED LAB: L06-06901
Your Case No: 06-11213
Incident Date: 5/3/2006
[S] Herman Belton

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division**ITEMS OF EVIDENCE:**

Sub # 1 On May 12, 2006, items were received in B177528 from Michael Baskin of the Anderson Police Department.

Item: 1 Sealed paper evidence bag containing foil containing paper towel containing rock substance

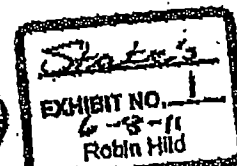
RESULTS:

Cocaine Base (Crack) found, 106.38 grams (1641.65 grains), C-II.

Chemical Analyst

Jason P. Walckirech

cc: Anderson County Solicitor's Office



P.O. Box 21398, Columbia, South Carolina 29221-1398 Phone (803) 896-7300 Fax (803) 896-7351

FORM A
REPORT OF ANALYSIS FOR
CONTROLLED DANGEROUS SUBSTANCES
(Substance Found)

I, Jason P. Waldkirch, am a Chemical Analyst employed by the South Carolina State Law Enforcement Division (SLED), certified by SLED as a chemist or analyst qualified to perform testing and analysis for controlled dangerous substances prohibited by law in this State by Title 44, Chapter 53 of the Code of Laws and Rule 61-4 of the Department of Health and Environmental Control.

I have 1 years and 11 months experience as a Chemical Analyst. During that period, I have been qualified as an expert witness and testified in court no less than 0 times. I have received the following training as a chemical analyst.

B.S. Chemistry, University of Wisconsin-Stevens Point, Stevens Point, WI, 1994
Training in Forensic Drug Analysis, South Carolina Law Enforcement Division, 2005
Clandestine Laboratory Certification, Drug Enforcement Administration, 2005
Basic Law Enforcement Training, South Carolina Criminal Justice Academy, 2005
Graduate School Training in Organic Chemistry, The Pennsylvania State Univ., PA, 1998-2004
Production Chemist, Aldrich Chemical Company, Sheboygan, WI, 1994-1998

Sub # 1 - On May 12, 2006, items were received in B177528 from Michael Raskin of the Anderson Police Department.

I tested the above item(s) using the following legally reliable forensic laboratory procedures approved by SLED:

☒ Chemical Test
☐ Microscopic Exam
☒ Infrared Spectroscopy
☐ Ultraviolet Spectroscopy

☐ Gas Chromatography
☐ Mass Spectroscopy
☐ Liquid Chromatography
☐ Physical Test
☐ Published Literature

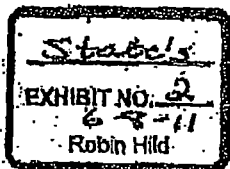
See Drug Analysis Report L06-06901 for Results.

Chemical Analyst

J. P. Waldkirch

Jason P. Waldkirch

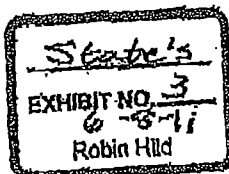
Date: October 23, 2006



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Case Number 06-11213

Evidence List



COLLECTED 5/3/2006 11:39 HOURS FROM IN THE WOODS ACROSS FROM HUDGENS ST BY ANDY HEATON, ANDY HEATON TO DRUG BOX 5/3/2006, MIKE BASKIN SECURES IN BEST KIT B177556 IN EVIDENCE ROOM TO GO TO SLED, DRUGS ARE WET, MIKE BASKIN CALLS SLED 5/4/2006 REFERENCE WET DRUGS, BEST KIT & PLASTIC EVIDENCE BAG WILL HAVE TO BE OPENED IN FRONT OF ANDY HEATON, DRUGS PUT IN PAPER EVIDENCE BAG AND DRIED BEFORE PUTTING INTO ANOTHER BEST KIT & SENT TO SLED, MIKE BASKIN LOGS IN AT SLE & RELEASES TO KARONDA WILLIAMS 5/4/172003:146306907

Case Log

Narrative/Notes

CASE NOTES ON HERMAN BELTON SR 06-11213

May 3, 2006 RO was on patrol with Cpl. Andy Heaton working extra duty in a high crime area of the city. Officers were checking on a suspected drug house at the corner of Hudgens St. and Bailey St. As officers rode by the location, officers observed a very unique bicycle parked at the back door of the residence. The bicycle belongs to Herman Belton who is known to officers as a known drug user and transporter. Two vehicles were also parked in the back yard of the residence.

Officers circled the block in order to attempt to get the tag numbers of the vehicles in the back yard. As officers turned onto Hudgens St. officers saw Mr. Belton riding east on Hudgens St. back towards his home. Officers did identify themselves and attempted to make contact with Mr. Belton at that time. Mr. Belton was holding an unknown shiny object in his left hand while still riding his bicycle. Mr. Belton is known to run or fight if he is holding drugs on his person because he did last time we arrested him. Mr. Belton did not stop after officer attempted to contact him about his presence at the suspected drug house. Officers asked Mr. Belton to stop several times. Mr. Belton instead attempted to flee from officers on his bicycle. Officer used the unmarked police vehicle to pass Mr. Belton and attempt to stop him. Mr. Belton then jumped off the bicycle and pushed it towards the vehicle. Mr. Belton then ran into a wooded lot at the side of the road. Mr. Belton still had the item in his hand as he ran into the wooded lot. Officers chased Mr. Belton into the woods on foot. Mr. Belton ran about 30 feet when he ran into some very large thorn vines and was stopped and gave up to officers. Mr. Belton was still carrying the shiny item when he ran into the woods. Mr. Belton did have a glass pipe, and set of digital scales in his left front pants pocket. In his right front pants pocket was cell phone.

RO took Mr. Belton into custody and walked him back up to the patrol vehicle. Cpl. Heaton who had his flashlight stayed in the woods to search for the item Mr. Belton had in his hand. Cpl. Heaton found the item about 5 feet from where officers took Mr. Belton into custody. The item was a piece of aluminum foil in the shape and size of a taco. Cpl. Heaton opened the item and RO heard him exclaim "Oh My God!" RO asked him if he had found any drugs Cpl. Heaton again repeated "Oh My God!". Cpl. Heaton walked over to the vehicle and placed the item onto the hood of the vehicle. The item was a very large amount of an off white rock like substance believed to be Crack Cocaine. RO called Capt. Kevin Marston to the scene to examine the suspected drugs. I am certified to conduct field test of suspected narcotics. I did field test the suspected item and it did test positive for Cocaine Content. Mr. Belton was transported to the city jail where he later requested an attorney.

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FILED-CLERK'S OFFICE
ANDERSON SC)
STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)
2011 NOV -9 A 8 55)

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

COMMON PLEAS AND
GENERAL SESSIONS

2010-CP-04-0678

Herman Belton, #256396,

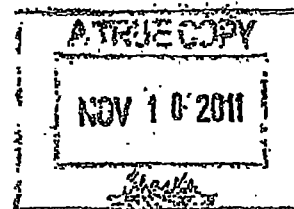
Applicant,

ORDER OF DISMISSAL.

v.

State of South Carolina,

Respondent.



This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed February 24, 2010. Respondent made its Return on June 30, 2010. An evidentiary hearing into the matter was convened on June 8, 2011 at the Anderson County Courthouse. The Applicant was present at the hearing and was represented by J. Chris Brown, Esquire. The Respondent was represented by Kaelon E. May of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. The State offered the testimony of Kurt Tavernier, Esquire, (Mr. Tavernier) Applicant's trial counsel. This Court also had before it the records of the Anderson County Clerk of Court, the transcript of the proceedings against the Applicant, the Applicant's records from the South Carolina Department of Corrections, and the records from Applicant's prior appeal proceeding.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. The Applicant was indicted at the June 2006 term of the Anderson County Grand Jury for Trafficking Crack Cocaine

(2006-GS-04-1844). He was represented by Kurt Tavernier, Esquire. On February 5, 2007, the Applicant underwent trial pursuant to which he was found guilty as charged. He was sentenced by the Honorable Thomas W. Cooper to confinement for a period of twenty-five (25) years.

A timely notice of appeal was filed on the Applicant's behalf. The South Carolina Court of Appeals subsequent dismissed the Applicant's appeal by unpublished opinion dated November 19, 2009. (2009-UP-526).

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

1. Ineffective assistance of counsel;
 - a. "Trial counsel refused to properly investigate, present evidence, cross-examine, and make motions to suppress the evidence."
 - b. Failure to challenge indictment
 - c. Fowler case was not presented properly at trial
2. Prosecutorial Misconduct
 - a. "Prosecutor has a duty to disclose exculpatory evidence in its possession or control when the evidence may be material to the outcome of the case."
 - b. Manufactured evidence
 - c. Perjured testimony
 - d. Failure to provide 4 pages of the 10 page SLED report
3. Violation of Due Process and Equal Protection Clause

II. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR
EVIDENTIARY HEARING

Applicant's Testimony

At the PCR hearing Applicant testified that he was arrested on May 3, 2006 and that he was charged with trafficking crack cocaine between 100-200 grams. Applicant testified that he questioned the validity of the indictment because the grand jury met on June 27, 2006 and research showed that the grand jury did not convene that week. Applicant testified that the exact amount of drugs was not stated in the indictment. Applicant testified that documents were altered with different case numbers and that these documents were not entered at trial. Applicant testified that a document titled 'Form B,' which Applicant entered into evidence as Applicant's exhibit #2, was not admitted at trial and Applicant's counsel did not object to it. Applicant testified that a 'Rule 6 Form' in his case had "drug box" rather than the person's name and that the date on the notary line was April 4, 2006, which was weeks before Applicant's arrest and when SLED received the drugs into evidence. Applicant testified that the drugs were described as an 'off-white/rock-like substance' and that on the 'Form C' the 'off-white' description is left off and the form only says 'rock-like substance.' Applicant testified that this discrepancy was not presented at trial.

Applicant testified that the discovery provided from SLED was 4 pages. Applicant testified that on September 30, 2008 he received a letter from SLED stating that the SLED documents were 10 pages in length. Applicant testified that the letter from SLED stated there were errors and mistakes made, and that this was not presented at trial. Applicant testified that the Fowler case was just like his case because the drugs were suppressed because there was no probable cause for the stop by police officers. Applicant testified that in his case the officers only saw Applicant's bike and that

the drugs were not suppressed, and no objection was made. Applicant testified that his counsel was court appointed and that he offered the names of Vernon, Doris, and their daughter to counsel as people who would testify for Applicant at trial; however counsel did not call those people to testify. Applicant testified those were the people who lived next door to Applicant and were having a cookout the day Applicant was arrested, but that counsel said to trust him. Applicant testified that he met with his counsel about three times. Applicant testified that he did not correspond with counsel by letter, that Applicant did not receive letters or calls from counsel, and that Applicant did not attempt to call counsel. Applicant testified that ten days prior to trial counsel presented Applicant with an eleven-year offer, that Applicant rejected the offer because Applicant was not guilty. Applicant testified that counsel explained to him the consequences of trial, that counsel did not explain what an Alford plea was, and that counsel told Applicant he would get seven years at 85% for a plea and a possible twenty-five years if he went to trial. Applicant testified that he understood the possibility of a twenty-five year sentence if he proceeded to trial on the day of trial. Applicant testified that it is the prosecutor's duty to disclose evidence. Applicant testified that his due process and equal protection rights were violated by the fraudulent acts and that this resulting in Applicant's wrongful conviction.

Mr. Tavernier's Testimony

Counsel testified that he has been practicing law since 1989 and that all of his practice has been in criminal law. Counsel testified that with regard to the Fowler issue, counsel filed a motion to suppress based upon lack of probable cause for the stop, but that Judge Cooper addressed the issue and ruled the evidence admissible. Counsel testified that he did not have much information on the daughter (C. Norris) who Applicant wanted to testify, that Applicant gave counsel her name at the last moment, and that Norris and Roger Burns were interviewed. Counsel testified that Norris and

Burns would dispute the officer's testimony about Applicant's location, and that they did not see anything in Applicant's hands. Counsel testified that he did not remember telling Applicant that they did not need the "cook out" testimony as there was nothing in counsel's notes on that point. Counsel testified that if it had been beneficial counsel would have used the cookout information and the information from Norris and Burns at trial. Counsel testified that Applicant's case was more of a factual contest, that the question was whether the Applicant had drugs. Counsel testified that he used a private investigator, Amanda Williams, that counsel conducted initial interviews, that counsel had the state's discovery, and that counsel spoke with both of the arresting officers who testified at trial. Counsel testified that he was aware from prior cases that there was a problem with the notarization on the custody forms, that counsel discovered the discrepancy on the forms regarding the case numbers, and that counsel investigated both instances and found no wrong doing. Counsel testified that Applicant's exhibit number three originally had the numbers B117556 but that this was crossed out and changed to B177528, and that these are the Best Kit numbers. Counsel testified that the officer had taken the 'crack rocks', put them in the 'best bag' but that it was wet which is not proper for the packaging of evidence, that the Officer had to repack the drugs and put the drugs in another Best Kit, which resulted in the crossing out of the numbers.

Counsel testified that there were three issues regarding the chain of custody: that everyone in the chain was available to testify at trial so there would be no chain problems at trial; that there was no irregularity in the chain except for in the early part of 2006 SLED did not notarize the delivery forms of the evidence. Counsel testified, further explaining, that a couple cases brought this SLED pre-notarization of forms claim and that in every case it was held that the evidence was not tainted, that due to the ruling in these cases and this practice by SLED this was not a big issue in the

Applicant's case. Counsel testified that he aware of two prior cases where the jury heard about the SLED paperwork problems and still convicted the defendant. Counsel testified that he checked out the evidence in Applicant's case, whether it had been sealed, opened, or resealed. Counsel testified that his trial strategy was to highlight the discrepancies in certain way because first, that officers had been challenged on these discrepancies in previous cases and a juror informed counsel that the jurors did not like counsel challenging the officers when the evidence was not tampered with, and second, that counsel tried this strategy previously and counsel was not successful. Counsel testified that highlighting the discrepancies would not do any good on the issue of whether Applicant had the drugs in his possession.

Counsel testified that he met with Applicant three to four times prior to trial, with the last time being the day before trial. Counsel testified that he gave Applicant a copy of his file and the discovery. Counsel testified that he had represented the Applicant previously in 2007 on a trafficking charge, that Applicant was stubborn and did not listen to reason. Counsel testified that he informed Applicant what the officers were going to testify to at trial after interviewing the officers. Counsel testified that he had a sufficient amount of time to prepare for trial, that counsel was prepared, and that he knew what he needed to do. Counsel testified that the state offered the Applicant a seven-year plea deal, that counsel discussed this with the Applicant, that counsel discussed an Alford plea with the Applicant, and that Applicant understood these discussions and rejected the plea offer because Applicant wanted to go to trial. Counsel testified that at trial counsel put on the record the offered plea deal, that Applicant rejected the deal and wanted to go to trial.

Counsel testified that he received the SLED documents in discovery, that the main lab report was 4 pages but that there is also a cover sheet with the lab report and then the test results, Form A,

Form B, and Form C. Counsel testified that he had the test results, which were on the cover sheet, Form A provided the chemist's credentials, and that he had Form B and Form C. Counsel testified that in regards to the Incident Report, Respondent's exhibit number three, the notation 06-11213 is the number that the Anderson Police Department assigned to the incident. Counsel testified that the discrepancies in the dates did not concern him, that the summary of Officer Lemmons was part of the incident report, that the Applicant got this from counsel because counsel had underlined the same in his copy. Counsel testified that as a defense counsel you have to pick your battles; that counsel did not use this discrepancy to attack the Officer, and that counsel's defense was that Burns and Norris would testify that Applicant was a crackhead and a user, and that Applicant did not have the amount of drugs he was charged with in his possession. Counsel testified that a crackhead uses all the drugs they have right away and that this was part of his strategy to show that Applicant was not a trafficker, that Applicant used drugs not sold them.

Counsel testified that there was a term of court the week the grand jury met and that the grand jury returned an indictment against the Applicant. Counsel testified that there were no grounds to challenge the indictment. Counsel testified that with regard to the notation "received from 'drug box'" on the evidence form that it is not really challengeable because that is how every law enforcement agency completes these forms and that SLED uses drug boxes. Counsel testified that he did not object to Forms C and B or make a motion due to "white rock" versus "rock like" because this was one Officer's description over another Officers'. Counsel testified that he has experience with drug trafficking cases and this discrepancy was not significant. Counsel testified that he had no reason to believe he was not provided with all the discovery from the state and that counsel regularly

handles drugs cases and it appeared counsel had all the discovery. Counsel testified that he checked the chain of custody to verify its validity.

Counsel testified that he advised the Applicant of his right to testify or not testify and Applicant's prior record and discussed this with the trial judge. Counsel testified that the Applicant chose to testify, that counsel kept a similar type of prior conviction out, and that the jury was only informed that Applicant had a prior conviction that carried a 5 year penalty. Counsel testified that he and the Applicant discussed trial strategy, that counsel called both Norris and Burns to testify at trial, and that the focus of the defense was whether Applicant had drugs in his possession or he just found the drugs in the area and not whether it was actually crack. Counsel testified that there was no testimony presented at trial that Applicant ran from the police, even though the Officers counsel interviewed told counsel such, but that this did not come out a trial.

III. APPLICABLE LAW

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, the exhibits introduced into evidence at the hearing, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

1. Ineffective Assistance of Counsel

The Applicant asserts that trial counsel was ineffective for failing to properly investigate, present evidence, cross-examine, and make motions to suppress the evidence; for failing to challenge the indictment; and for failing to present the Fowler case properly at trial. This Court finds these

allegations are without merit. Counsel testified that he found, interviewed, and presented at trial two of three witnesses Applicant informed counsel of. Counsel utilized the services of a private investigator, conducted initial interviews, motioned for and received all of the state's discovery, and interviewed both of the arresting officers who subsequently testified at trial. To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from counsel's alleged lack of time to prepare. United States v. Cronie, 466 U.S. 648 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). This Court finds that the Applicant offered no evidence at the PCR hearing that counsel could have found or did not find in his own investigation that would have been likely to have any outcome more favorable to the Applicant. The Applicant did not produce any witnesses or offer any other evidence from which this Court could conclude that the outcome of the case would likely have been different, had that evidence been developed. Therefore, this Court finds that this allegation is denied and dismissed.

Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Counsel testified that the SLED notarization issue had in previous cases not swayed the jury into believing there was tampering with the evidence. Counsel

explained that he did not challenge the officer's discrepancies based on unsuccessful attempts in the past and based on information from previous jurors. A review of the record indicates counsel did highlight the notarization discrepancy, but not by challenging the police officers. Counsel explained that the trial strategy was whether the Applicant had the drugs in his possession not whether the substance was crack. Applicant's trial counsel articulated valid strategic reasons for presenting the evidence the way he did and for his method of cross-examination, thus this Court finds that Applicant has not shown that counsel was deficient in that choice of tactics. This Court, further, finds that Applicant has failed to show that he was prejudiced. Therefore, these allegations are denied and dismissed.

With regards to Applicant's allegations that trial counsel was ineffective for failing to make motions to suppress the evidence and not properly presenting the Fowler case to the court, this Court finds that the Applicant has failed to meet his burden of proof. The record reflects counsel's argument concerning Fowler was proper and although Judge Cooper ruled against counsel this does not make counsel's argument incorrect. Moreover, counsel's argument based on Fowler was in the context of a motion to suppress, therefore Applicant's allegation that counsel failed to make a motion to suppress the evidence fails. Counsel testified that in his review of the chain of custody there was nothing to base an objection or motion to suppress on. Applicant fails to show counsel's argument using Fowler was incorrect or what counsel should have argued instead. This Court finds that Applicant has failed to show that counsel's performance was deficient and that Applicant was prejudiced by any alleged deficiency; therefore, this Court finds these allegations are denied and dismissed.

As to Applicant's allegation counsel was ineffective for failing to challenge the indictment,

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344 129

this Court finds this allegation is without merit. Counsel testified that in his review of the indictment, he saw nothing to base an objection or challenge on. This Court noted at the PCR hearing that the grand jury is a continuing body that meets all year and does not necessarily have to meet during a general sessions term. Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). See also S.C. Code § 17-19-20 (2003). Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. See Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994). An Applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Gentry, 363 S.C. 93, 610 S.E.2d 494, 499 (2005); See also S.C. Const. Art. V, §7. Thus, the Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. The Applicant's conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction. Therefore, this Court finds that this allegation is denied and dismissed.

2. Prosecutorial Misconduct

The Applicant alleges the prosecution committed a Brady violation, manufactured evidence, presented perjured testimony, and failed to provide 6 pages of the 10 page SLED report. It is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109

S. Ct. 2201 (1989). This Court finds that Applicant presented no evidence of manufactured evidence. This Court notes that each of the changes made to the documents entered into evidence by Applicant contain initials next to each modification of the report. Counsel testified and adequately explained the meaning of the modifications and this Court finds no evidence of the manufacturing of evidence. Counsel also testified that while he only received the first 4 pages of the SLED at first, he later was provided with the remaining 6 pages. Counsel testified that he had all of the state's discovery and no reason to believe otherwise. This Court finds that the Applicant has not presented any evidence that was not in counsel's possession prior to or during trial. This Court further finds that the Applicant has failed to prove the existence of any perjured testimony.

The Applicant provided no evidence or testimony showing that the state withheld any evidence from the defense in this case at the PCR hearing. 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. Accordingly, the Applicant has failed to meet his burden of proof; therefore these allegations are denied and dismissed.

3. Violation of Due Process and Equal Protection Clause

The Applicant alleges that because so much evidence was left out at trial, this resulted in Applicant's trial being unfair and in violation of his due process and equal protection rights. This

Court has already found no evidence of prosecutorial misconduct and that there was no Brady violation committed. The Applicant was given the option of a seven-year plea deal and rejected it. Counsel extensively advised Applicant of the consequences of proceeding to trial based on the evidence against the Applicant. Moreover, counsel reviewed the discovery with the Applicant, informed Applicant of what the officer's testimony would be at trial, and explained the potential sentences Applicant faced. This Court also found that trial counsel was not ineffective in his representation of the Applicant. The Applicant received a fair trial and Applicant's equal protection rights were in no way violated. Therefore, this Court finds that this allegation is denied and dismissed.

V. CONCLUSION

Based on all the forgoing, 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 for post conviction relief. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

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IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 25 day of November, 2011.

Alexander S. Macaulay
Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina

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COMMON PLEAS AND
GENERAL SESSIONS

WITNESSES

APD, C. LEMMONS

ARREST WARRANT NO. T-714654

ACTION OF GRAND JURY

TRUE BILL

JUN 27 2006

Foreman of Grand Jury

Foreperson

VERDICT

nan of Petit Jury

Date:

The State of South Carolina,

County of ANDERSON

COURT OF GENERAL SESSIONS

JUN 27 2006 TERM

THE STATE

RAM

vs.

HERMAN BELTON

Indictment for

TRAFFICKING CRACK COCAINE
44-53-0375(C)(3) [0368]

A TRUE COPY

FEB 24 2010

COMMITMENT

2-6-07/cmp

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Anderson County
Alexander S. Macaulay, Circuit Court Judge

HERMAN BELTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2011-204374

PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

1. Did the PCR court err in failing to find trial counsel ineffective for prohibiting an appellate review of Belton's case which was procedurally barred because trial counsel did not make a contemporaneous objection to the admission of the drugs after he made a pretrial motion to suppress the drugs because the police lacked probable cause to stop Belton?
2. Did the PCR court err in failing to find trial counsel ineffective for not objecting to the indictment which was not true billed during a term of General Sessions Court as required pursuant to S.C. Code Section. 14-9-210?

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STATEMENT

In June 2006, the Anderson County Grand Jury indicted Herman Belton on the charge of trafficking crack cocaine between 100 – 200 grams. On February 5, 2007, Belton proceeded to trial before the Honorable Thomas W. Cooper and jury. Belton was represented by Kurt Tavernier, and the state was represented by Scott McElhannon. The jury returned a verdict of guilty as indicted. Belton's attorney filed a notice of appeal. An appeal was perfected by the Office of Appellate Defense through the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal. State v. Belton, Op. No 2009-UP-526 (Ct. App. filed November 19, 2009).

On February 24, 2010, Belton filed an application for post-conviction relief (PCR). The state filed a return on June 30, 2010. An evidentiary hearing was held on June 8, 2011 before the Honorable Alexander S. Macaulay. Belton was represented by J. Chris Brown, and the state was represented by Kaelon E. May. On November 8, 2011, Judge Macaulay issued an order denying Belton's PCR application, and dismissing it with prejudice. Belton's attorney filed a notice of appeal. This petition follows.

ARGUMENT I

✓ The PCR court erred in failing to find trial counsel ineffective for prohibiting an appellate review of Belton's case which was procedurally barred because trial counsel did not make a contemporaneous objection to the admission of the drugs after he made a pretrial motion to suppress the drugs because the police lacked probable cause to stop Belton.

Herman Belton was arrested for trafficking crack cocaine over 100 grams. His attorney made a pretrial motion to suppress the drugs because he said that the police had no reason to stop Belton that night. App.25, lines 23 -25; App.26, lines 1 - 3. The judge held a hearing.

At the hearing, Officer Christopher Lemmons testified that on May 3, 2006, two police officers were conducting a street sweep looking for drug activity of an area from which they had received complaints of suspected drug activity. App. 28, line 6 - 25; App. 29, lines 1 - 5. They observed Belton's bicycle sitting up against a fence in front of a residence at Hudgins Street. This was a location where the officers had received complaints about drug activity. App. 29, lines 6 - 21. Officer Heaton testified that he knew this was Belton's bike because he had arrested Belton previously for possession of crack and knew that Belton was out on bond on that charge. App.44, lines 13 - 29; App. 29, lines 23 - 25.

The officers rode around for a while and then saw Belton coming down the street on his bike and stop at a stop sign. The officers called out to Belton and told him that they wanted to talk to him. The officers testified that Belton had something in his hand that looked like a piece of aluminum foil. App. 31, lines 1- 25. Belton then took off on his bike away from the police with the police following him. He stopped his bike and

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went into a wooded area where he ran into large thorn vines which threw him to the ground. App.32, lines 1 – 19. Officer Lemmons testified that he then “took control” of Belton and placed him in “detention custody” because Belton fled on foot. The officer said that he did not tell Belton he was under arrest. The officers then checked him for weapons and found a set of digital scales and a lighter. App. 33, lines 4 – 16.

Officer Lemmons testified that Belton did not have the piece of aluminum so Officer Heaton took the flashlight and searched the area where Belton fell in the woods. Officer Lemmons said that Officer Heaton found the foil which contained 4.3 ounces or over 100 grams of crack cocaine. App. 34, lines 1 – 25; App.84, lines 9 – 16.

Officer Lemmons admitted on cross examination that Belton had broken no law when the officer stopped him but that the stop was an investigatory stop. He admitted that he had received no complaints about Belton. App.35, lines 21 – 25; App.36, lines 15. Officer Heaton admitted on cross examination that Belton had not broken any rules when he was stopped. Officer Heaton stated that the reason he stopped Belton was because he had suspicion that Belton had been at the residence which they were checking because his bicycle was in front. Then the officer admitted that he had not made any drug arrests at that house and did not know of any arrests made at that house. App.50, lines 2 – 25.

The judge denied the motion to suppress the drugs but granted the motion to suppress the scales and anything else found on Belton’s person. App. 54, lines 2 – 25; App. 55, lines 1 – 25; App. 56, lines 1 – 25; App. 57, lines 1 – 16.

When the state introduced the drugs into evidence, trial counsel did not object, but clearly stated: “No objection.” App. 132, ll. 1 – 13.

At the PCR hearing, Belton testified that his trial attorney did not make an objection when the drugs were admitted, and therefore the drugs were not suppressed. Belton testified at the PCR hearing that his case was similar to the case of Fowler¹ except the trial court did suppress the drugs in Fowler's case. App.280, 30, ll. 1 - 25. Belton said his trial attorney was ineffective. App. 269, ll. 4 - 13.

Belton's PCR attorney told the court at the beginning of the hearing that Belton was alleging ineffective assistance of counsel because his trial attorney did not challenge or suppress evidence. App.258, ll. 17 - 25; App. 259, ll. 1 - 9. Counsel argued to the PCR court that the trial attorney discussed the issue in the Fowler case at trial, and Belton wanted that issue preserved for his PCR appeal as he believed the trial attorney did not handle the issue properly. Counsel explained that that issue was presented on appeal in an Anders² brief. However, he explained that the issue was not properly preserved at trial so it was not considered on appeal. App. 259, ll. 3 - 25; App. 260, ll. 1 - 3. The PCR judge responded:

That sounds like more of an appellate defect.

App. 260, ll. 4 - 5.

Trial counsel testified at the PCR hearing that he filed a pretrial motion to suppress the evidence based on a lack of probable cause for the stop which was heard by the trial court. App. 288, ll. 1 - 23; App. 289, ll. 1 - 12; App. 25, ll. 22 - App. 57, ll. 16. Trial counsel said the issue was preserved for appeal. App. 288, ll. 22 - 25.

The PCR judge ruled that Belton did not meet his burden of proof that trial counsel was ineffective for not properly presenting the Fowler case to the trial court. The

¹ State v. Fowler, 322 S.C. 263, 471 S.E.2d 706 (Ct. App. 1996).

judge wrote in his order that trial counsel's argument based on Fowler was in the form of a motion to suppress and was properly presented. App. 343.

The Court of Appeals wrote in their opinion in State v. Belton, Op. No. 2009-UP-526 (Ct. App. filed November 19, 2009) that after a thorough review of the record and briefs, the court was dismissing the appeal. App. 352.

The Supreme Court held in State v. Wiles, 383 S.C. 151, 679 S.E.2d 172 (2009), that generally a motion in limine is not a final determination for purposes of error preservation; a contemporaneous objection must be made when the evidence in question is introduced.

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 (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. Strickland v. Washington, *supra*; Butler v. State, *supra*.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

² Anders v. California, 386 U.S. 738 (1967).

In State v. Fowler, 322 S.C. 263, 471 S.E.2d 706(Ct. App. 1996), the court of Appeals ruled that the police had no reasonable suspicion to stop the defendant. In Fowler the police saw the defendant come from the front yard of suspected drug house, even though they knew he had previous conviction for drug offense, and even though officers testified that defendant walked in suspicious manner and acted scared and acted as if he were trying to elude police; officers did not see drug transaction and did not see the defendant throw anything down, and officers made broad generalizations about his demeanor as they saw him leave the house.

The case of Fowler is similar to Belton's but the police had even more probable cause in Fowler to stop the defendant than they did in Belton's case. The police did not see Belton enter or leave the house but only saw his bike parked in the front. The police did not see Belton throw anything down and they did not see him acting in a strange manner. He did leave the scene but he was not under arrest as the officer testified. The officers stopped Belton because they knew he had a prior arrest for crack.

The totality of the circumstances do not support reasonable suspicion to stop Belton. The house was suspect but no arrest had been made from that house. Belton had only one prior arrest for crack. The police had no reasonable suspicion to stop Belton. Therefore, the drugs should have been suppressed. Trial counsel should have objected contemporaneously to the admission of the drugs in order to preserve the issue for appellate review, as the rules clearly require during the trial.

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ARGUMENT II

The PCR court erred in failing to find trial counsel ineffective for not objecting to the indictment which was not true billed during a term of General Sessions Court as required pursuant to S.C. Code Section. 14-9-210.

Herman Belton was arrested for trafficking crack cocaine over 100 grams and sentenced to twenty-five years. During his PCR hearing, Belton's PCR attorney told the court that one ground for ineffective assistance of counsel was that Belton's trial counsel failed to challenge the validity of the indictment. The PCR judge said that since Belton went to trial on that indictment, he waived any defect. App. 258, ll. 1 – 25; App. 259, ll. 1 – 5.

Belton testified that he questioned the validity of the indictment because the indictment stated plainly that a Court of General Sessions convened in Anderson County on June 27, 2006 when his case was indicted. Research of the S.C. Judicial Department calendar showed there was no General Sessions during the week of June 26, 2006. That was the basis of his issue. His trial attorney did not object to the indictment at trial. App. 266, ll. 1 – 25; App. 267, ll. 1 – 25.

Trial counsel testified that he did not challenge the indictment because he had no reason to doubt that the grand jury actually convened on the 27th. The attorney general showed him the document Belton submitted indicating the terms of court obtained from the Judicial Department for the week of June 27, 2006. Trial counsel admitted that the calendar indicated that only Common Pleas Court met that week of June 27, 2006. He said he would have to "give that one to Mr. Belton." The attorney general responded that the court was in recess that week. App. 306, ll. 9 – 25; App. 307, ll. 1 – 11.

The PCR judge ruled that Belton's allegation that trial counsel was ineffective for not challenging the indictment was without merit. The judge wrote that counsel testified he saw nothing

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on which to base an objection. The judge also wrote that the grand jury was a continuing body that met all year and did not have to meet during a general sessions term App. 343-344..

S.C. Code Section 14-9-210 provides that:

The county solicitor shall prepare and, through the presiding judge of the court of general sessions, submit to the grand jury, while in attendance upon the court of general sessions, bills of indictment in all cases pending in the county court in which the punishment may exceed a fine of one hundred dollars or imprisonment for thirty days, when such cases have not been previously acted on by the grand jury. The grand jury shall act thereon and report its action to the presiding judge of the court of general sessions and said judge shall direct the clerk of the court of general sessions to report the same to the presiding judge of the county court at its next ensuing term. All cases in which bills of indictment are so found shall stand for trial by the county court as though found by the grand jury while in attendance upon the county court.

S.C. Code Section 17-19-90 provides:

Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards.

In State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), the Supreme Court held that if an indictment is challenged as insufficient or defective, a defendant must raise that issue before the jury is sworn and not afterwards.

In State v. Evans, 363 S. C. 495, 611 S.E.2d 510 (2005), the Supreme Court held that a defendant's challenge to the sufficiency of a grand jury indictment does not implicate the subject matter jurisdiction of the trial court. The Court also held that challenges to the legality and sufficiency of the process of a county grand jury must be made before the jury renders a verdict in order to preserve the error for direct appellate review.

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,

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104 S. Ct. 2052 (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. Strickland v. Washington, *supra*; Butler v. State, *supra*.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

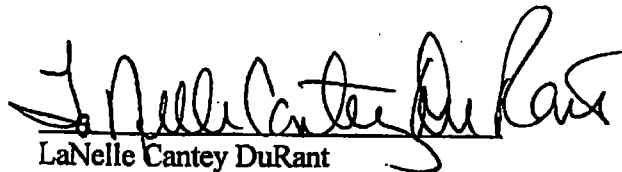
The indictment in Belton's case was not legal as the case was not indicted according to the statute. Belton's trial attorney was ineffective for not objecting to the indictment, and for not objecting to the case going forward on that indictment.

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CONCLUSION

Based on the above, certiorari should be granted, the conviction and sentence reversed, and the case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of August, 2012.

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Anderson County
Alexander S. Macaulay, Circuit Court Judge

HERMAN BELTON,

PETITIONER,

V.

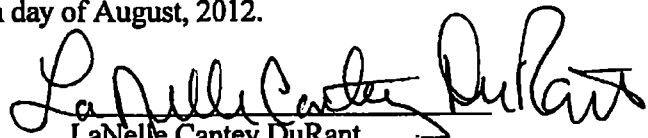
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2011-204374

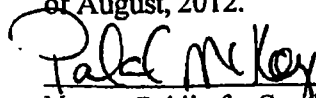
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Kaelon E. May, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of August, 2012.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day
of August, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay, Circuit Court judge

Appellate Case No. 2011-204374

Herman Belton, ...Petitioner,

v.

State of South Carolina, ...Respondent.

RETURN TO PETITION FOR
WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOHN W. WHITMIRE
Assistant Attorney General
S.C. Bar # 100793

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

*

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021

QUESTION PRESENTED

1. Did Petitioner properly preserve the issue of whether counsel was ineffective for not renewing an admissibility objection during trial? Furthermore was counsel ineffective for not renewing an admissibility objection for an alleged illegal seizure?
2. Did the PCR judge err in finding counsel was not ineffective for failing to move to quash the alleged invalid indictment?

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STATEMENT OF THE CASE

For the purposes of this Return, Respondent adopts Petitioner's statement of the case.

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STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT I

Petitioner failed to properly preserve the issue of whether counsel was ineffective for not renewing an admissibility objection during trial because the PCR judge did not rule on the allegation. Furthermore, counsel was not ineffective for failing to renew a meritless admissibility objection for an alleged illegal seizure.

Petitioner alleges counsel was ineffective for not renewing an objection to the State's admission of the narcotics at trial as fruits of an illegal seizure. Petitioner also alleges the trial judge erred in denying counsel's pre-trial suppression motion.

First, Respondent submits this issue is not preserved for appeal. The PCR judge only addressed the adequacy of counsel's pre-trial motion in-limine.

At the PCR hearing, Petitioner argued counsel was ineffective for failing to correct the trial judge's alleged faulty ruling on the admissibility of the narcotics. (App.p.280). The PCR court dismissed this claim finding Petitioner failed to meet his burden to prove counsel was ineffective for making a deficient suppression argument at the pre-trial hearing. (App.p.343).

This issue is procedurally without merit. The PCR judge did not make a ruling on the allegation now before this Court regarding whether counsel was ineffective for failing to renew his objection to the admissibility of the narcotics during trial. "Pursuant to S.C. Code Ann. § 17-27-80 (2003), the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. The failure to specifically rule on the issues precludes appellate review of the issues. Marlar v. State, 375 S.C. 407, 408, 653 S.E.2d 266 (2007). Petitioner simply failed to make a Rule 59(e), SCRPC, motion to alter or amend the PCR judge's order of dismissal. "A Rule 59(e)

RUFF V. S.C. Dept. Prob. Parole, Pardon 2015 WL 3885638

BECAUSE THE ALC INTENTED TO MAKE A FINDING THAT SUCH AN ASSESSMENT TOOL WAS USED, IF ORDER IS AFFECTED BY AN ERROR OF LAW THE COURT OF APPEALS MAY REVERSE OR MODIFY THE DECISION IF THE SUBSTANTIVE RIGHTS OF THE PETITIONER HAVE BEEN PREJUDICED BECAUSE THE FINDING, CONCLUSIONS, OR DECISION IS AFFECTED BY OTHER ERROR OF LAW.

JAMES V. S.C. Dept. P.P.S.

RESPONDENTS ARGUE THAT PETITIONERS WOULD BE HAVING 2 PANEL HEARINGS
IN 2 MONTHS FIRST THE FIRST HEARING WAS 1/15/15
THE COURT DECISION WAS 4/15/15~~16~~ MONTHS NOT
2. SECOND PETITIONERS HAS A STATE CREDITED CONSTITUTION
RIGHT TO HAVE STATUTORIAL CORRECT PANEL HEARING
IN 2012, AND AS WITH BASKLEY THE COURT DID
NOT ORDER THE BOARD NOT TO CONSIDER THE 2012
HEARING AND THEY NEVER STATED THEY DID NOT

motion must be filed if issues are not adequately addressed in order to preserve the issues for appellate review." Id., at 410, 653 S.E.2d at 267.

Second, Respondent submits counsel was not ineffective for failing to renew an objection to the admissibility of the narcotics at trial. Because the Fourth Amendment is not implicated in an admissibility analysis of the narcotics, a renewed objection lacked merit. First, Petitioner was seen running into a heavily forested area with the cloaked narcotics in hand. At the moment Petitioner was first physically apprehended, the narcotics were no longer in his possession. Second, a default submission analysis of Petitioner's encounter with the Officers is inapposite. Flight is the antithesis of submission's most essential component, physical restraint. Therefore, any further inquiry is unnecessary. Notwithstanding the preservation issue, counsel's failure to renew meritless motion did not constitute ineffective assistance of counsel.

At the pre-trial suppression hearing, counsel argued the narcotics obtained near Petitioner's vicinity were the fruits of an illegal seizure because the Officers lacked reasonable suspicion to stop Petitioner. (App.p.29). The Officers were responding to community complaints of suspected drug activity at a residence. (App.p.29). The Officers approached Petitioner, who was traveling on his bicycle, in an unmarked vehicle to inquire about his presence at the residence of interest. Officer Lemons requested Petitioner to stop peddling so that they could question Petitioner about his knowledge of the residence where Petitioner's bicycle was observed. (App.p.31). The Officers immediately noticed Petitioner holding a suspicious "taco shaped" object wrapped in aluminum foil in his left hand. (App.p.34).

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When the Officers approached the Petitioner, he jumped off the bicycle and fled into the adjacent woods. Officer Lemons pursued Petitioner and detained him thirty feet from his bicycle where he lost his footing. (App.p.33). Officer Heaton searched the immediate area where Petitioner fell and located the "taco shaped" object and discovered that it contained crack cocaine. (App.pp.48-9). The narcotics were located several minutes after Officer Lemons detained Petitioner pursuant to an investigatory detention. (App.p.48).

The trial judge denied Petitioner's suppression motion. (App.pp.54-7). The trial judge distinguished State v. Fowler because Petitioner fled the encounter and was not detained nor searched.¹ Because the crack cocaine was timely discovered abandoned on the ground where Petitioner had no reasonable expectation of privacy, the trial judge found the narcotics constituted admissible evidence. (App.p.56). Subsequently at trial, counsel did not object to the State's introduction of the crack cocaine at trial. (App.p.132).

At the PCR hearing, Petitioner alleged the trial judge erred in failing to grant counsel's pre-trial suppression motion. (App.p.279). Petitioner stated counsel failed to renew the admissibility objection at trial. (App.p.280).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, Petitioner must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S.

¹ State v. Fowler, 322 S.C. 263, 471 S.E.2d 706 (Ct. App. 1996) (The court held the police officers lacked the reasonable suspicion to seize the defendant. The defendant was stopped and subsequently searched. The

Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 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 v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

Fourth Amendment protections only apply to unreasonable searches and seizures. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977) (citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1880 (1968)). The first step in a seizure analysis is to determine whether a police encounter constitutes a Fourth Amendment seizure. "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." Terry, 392 U.S. at 22, 88 S.Ct. 1880. Thus, police officers do not seize someone merely by approaching the person in a public place, by asking if the person is willing to answer questions, and by then questioning the person. Florida v. Rover, 460 U.S. 491, 497 (1983). A brief investigatory stop by police does not rise to the level of a seizure until the Officer, by means of physical force or a show of authority, in some way restrains the freedom and liberty of an individual. Foster, 269 S.C. at 379, 237 S.E.2d at 591 (1977). Only when the Officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has

court ruled the narcotics were fruits of an unlawful seizure.).

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occurred.” Id., at 377, 237 S.E.2d at 592; State v. Jones, 364 S.C. 51, 610 S.E.2d 846, 848 (Ct. App. 2005).

California v. Hodari D. is instructive. In Hodari D., defendant noticed an officer approaching and immediately fled. California v. Hodari D., 499 U.S. 621, 111 S. Ct. 1547 (1991) The Defendant tossed the narcotics to the street before the police officer apprehended him. Only after the defendant had been detained were the abandoned narcotics discovered. The defendant argued he was illegally seized when the police officer made a show of authority by running after him. Hodari D., 499 U.S. at 622-24, 111 S.Ct. 1547. The United States Supreme Court declined to apply the defendant’s expansive view of seizure. Justice Scalia authoring the majority opinion stated,

“The word “seizure” readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. (“She seized the purse-snatcher, but he broke out of her grasp.”) It does not remotely apply, however, to the prospect of a policeman yelling “Stop, in the name of the law!” at a fleeing form that continues to flee. That is no seizure.

Hodari D., 499 U.S. at 626, 111 S. Ct. 1547. Thus, because the defendant’s flight negated any possible evidence of submission, the Court ruled the defendant was not seized within the rubric of the Fourth Amendment. Therefore, the narcotics abandoned prior to the police officer making contact with defendant and detaining him were not the fruit of a seizure. Hodari D., 499 U.S. at 629, 111 S.Ct. 1547. The South Carolina Supreme Court recognized Hodari D.’s continued viability and application confined to a Fourth Amendment seizure analysis in State v. Brannon. See State v. Brannon, 388 S.C. 498, 503, 697 S.E.2d 593, 596 (2010) (citing Hodari D., *supra*)

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Hodari D., is directly on point to the present case. The Officers neither made physical contact with Petitioner nor restrained his movements before Petitioner discarded the narcotics. Petitioner was not seized when he abandoned the narcotics in flight. Therefore the Fourth Amendment was simply not implicated in an admissibility analysis of the narcotics. The issue on appeal is without merit because counsel had no legal basis to renew an admissibility objection at trial. See Brown v. State, 375 S.C. 464, 485, 652 S.E.2d 765, 776 (Ct. App. 2007) (The court denied Appellant's ineffective assistance of counsel claim for failure to object to a Doyle violation where there was no legal or factual basis for the objection.).

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

As Petitioner failed to meet this burden of proving ineffective assistance of counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

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ARGUMENT II.

The PCR judge correctly ruled that counsel was not ineffective for failing to move to quash the alleged irregularity in the indictment that was accounted for and that did not negate the indictment's function as a notice document.

Petitioner alleges counsel was ineffective for failing to move to quash a defective indictment. Petitioner argues the indictment was defective because the grand jury could not have convened on a week that General Sessions did not convene and that the grand jury did not comport with requirements of S.C. Code Section 14-9-210. Furthermore, Petitioner alleges counsel committed prejudicial error in allowing his case to move forward on the defective indictment.

Respondent submits this issue on appeal is without merit. Petitioner's allegation did not implicate the subject matter jurisdiction of the trial court. Furthermore, the indictment properly served its function as a notice document.

At the PCR hearing, Petitioner stated the indictment was rubber stamped to show that Petitioner was true-billed on June 27, 2006 during a term of General Sessions Court in Anderson County. (App.p.267). Petitioner stated that because there was no General Sessions Court that week in Anderson County, counsel was ineffective in moving quashing the defective and invalid indictment. (App.p.268).

Counsel testified that he saw no reason to challenge the sufficiency of the indictment. (App.p.306). Counsel further testified that the substance of the indictment was consistent with the facts surrounding Petitioner's arrest. (App.p.306). In counsel's opinion, there was no reason to doubt that the grand jury convened and properly true-

billed Petitioner. (App.pp.306-07). Therefore, counsel believed that he had no reasonable basis to investigate and challenge the sufficiency of the indictment. (App.p.307).

At the close of the hearing, the PCR judge, who was a resident judge in the Tenth Circuit, noted that the alleged defect in the indictment was neither uncommon nor problematic. (App.pp.331-32). The PCR judge stated, "Well, as I say, one, the grand juries don't meet just in General Sessions terms. In fact, [grand juries] are instructed to meet prior to terms of General Sessions Court. And also, any Circuit judge may receive a grand jury report." (App.p.332, line 24—App.p.333, line 3). The PCR judge subsequently denied and dismissed the claim. The PCR judge ruled that Petitioner's allegation did not affect the subject matter jurisdiction of the court. (App.p.344). Additionally, the PCR judge further found counsel reviewed the document and found no reasonable basis to bring a motion to quash the indictment. (App.p.344).

The PCR judge did not err in denying Petitioner's ineffective assistance of counsel claim for failure to quash the indictment. This Court has held indictments are not jurisdictional in nature, but are merely notice documents. See State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005).

Petitioner fails to meet his burden to prove the indictment itself was insufficient to put him on notice that he was facing sentencing under § 44-53-0375(C)(3). An indictment is satisfactory if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce and the defendant to know what he is called upon to answer. Browning v. State, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995) *overruled to the extent that it combines the concept of sufficiency of an indictment and*

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subject matter jurisdiction by Gentry, 363 S.C. at 93, 610 S.E.2d at 494 (2005). Further, the true test of the sufficiency of an indictment is whether it contains the necessary elements of the offense. Id. An indictment passes legal muster if it "charges the crime substantially in the language of the...statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood..." Reddick v. State, 348 S.C. 631, 560 S.E.2d 441 (Ct. App. 2002). In determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances. Gentry, *supra*. Moreover, whether the indictment could be more definite or certain is irrelevant. Id.

Petitioner did not dispute that the indictment properly placed him on notice of the necessary facts supporting the elements of the charge of Trafficking. The indictment reads as follows:

That Herman Belton did in Anderson County, within the city limits of Anderson, South South Carolina, on or about May 3, 2006, knowingly and unlawfully have in his possession more than 100 grams but less than 200 grams of crack cocaine.

Therefore the indictment served its function to put Petitioner on notice of the facts and elements of the offense charged.

Petitioner failed to prove the first prong of the Strickland test - that counsel failed to render reasonably effective assistance under prevailing professional norms. Counsel's opinion of the sufficiency of the indictment was reasonable. Petitioner failed to articulate what benefit would have been gained from a successful motion to quash the indictment.

Petitioner also failed to prove the second prong of Strickland - that he was

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prejudiced by counsel's performance. Petitioner fails to provide evidence that State would have been precluded from re-indicting Petitioner.

As Petitioner failed to meet this burden of proving ineffective assistance of counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier, 351 S.C. at 389, 570 S.E.2d at 174.

CONCLUSION

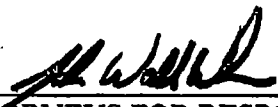
For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues presented.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. WHITMIRE
Assistant Attorney General
S.C. Bar # 100793

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(803) 734-3737

By: 
ATTORNEYS FOR RESPONDENT

December 21st, 2012

162

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Anderson County

The Honorable Alexander S. Macaulay, Circuit Court Judge

HERMAN BELTON,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

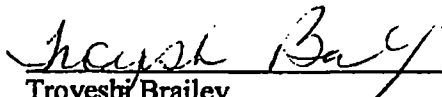
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

LaNelle C. Durant, Esq.
1330 Lady St.
Columbia, SC 29201

This 21th day of December, 2012


Troyesh Brailey
LEGAL ASSISTANT for the Respondent

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSONHERMAN BELTON #256396

Plaintiff,

vs.

State of South Carolina

Defendant.

IN THE COURT OF COMMON PLEAS

10th JUDICIAL CIRCUITCASE NO.: 2010-CP-04-00678MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

A TRUE COPY

FEB - 5 2019

Richard X. Kinty
CLERK OF COURT

Plaintiff's Attorney:

_____, Bar No. _____

Address: _____

Phone: _____ Fax _____

E-mail: _____ Other: _____

Defendant's Attorney:

_____, Bar No. _____

Address: _____

Phone: _____ Fax _____

E-mail: _____ Other: _____

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: 60(B)(4)-(5)

Estimated Time Needed: _____

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Herman Belton pro se 1-31-2019
Signature of Attorney for ☐ Plaintiff / ☒ Defendant Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT: \$ _____☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☒ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____☐ CONTESTED - AMOUNT DUE: \$ _____

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State of South Carolina
County of Anderson

) In The Court of Common Pleas
) Tenth Judicial Circuit
) C/A: 2010-CP-04-00678
)

Herman Belton, 256396

Applicant,

vs

The State of South Carolina,

Respondent,

) Motion To Be Relieved
) From A Void Judgement
) S.C.R. civ. P. 60(B)
) (4)-(5)
)

A TRUE COPY

FEB - 5-2019

Applicant Herman Belton, moves this court for an order relieving him from a judgement signed by the Honorable Alexander S. Macaulay presiding judge, Tenth Judicial Circuit, on November 8, 2011 in Anderson County. As a matter of law this order is void in that it does not comply with S.C. code ann. 17-27-80 and S.C. code ann. 17-27-100.

State vs. Dunbar, 587 S.E., 2d 691, "A party need not use the exact name of a legal doctrine in order to preserve it, but must be clear that the argument has been presented on that ground."

Applicant moves this court for an order scheduling a hearing twenty days (20) after receiving this motion or as soon as possible, to determine the merits of this motion.

Respectfully,

Herman Belton, pro se

Herman Belton, pro, se

Allendale Corr. Inst.

P.O. Box 1151

Fairfax, S.C., 29827

15 FEB 4 AM 11:22:48
Anderson, SC DOJ, CP/BS

Dated: 1-31-2019

cc:file

Standard of Review

An order denying a defendant's request for a post conviction relief would be remanded for rehearing where it failed to directly address the defendant's claim. Not only does such failure deprive the parties of ruling on the issue raised, but it makes review by the Appellate Court more difficult. See *Pruitt vs. State* 423 s.e. 2d.

In the specific context of post conviction relief the South Carolina Supreme Court has consistently vacated and remanded post conviction relief (PCR) judgements that do not contain finding on issues presented, notwithstanding a PCR, petitioner's failure to preserve an issue by filing a motion to amend, *Pearson v. Harrison* 2001 wl 427933.

Statement of the Case

The applicant was indicted at the June 2006 term of Anderson County Grand Jury for Trafficking Crack Cocaine, (2006-gs-04-1844) on February 5 & 6, 2007, the applicant went to trial and was found guilty as charged. The Honorable Thomas W. Cooper sentenced applicant to twenty five (25) years.

A timely notice of appeal was filed on the applicant's behalf, on November 19, 2009. The S.C. Court of Appeals dismissed applicant's appeal in an unpublished opinion (2009-up-526).

On February 24, 2010 applicant filed an application for post conviction relief. The state filed a return on June 30, 2010, an evidentiary hearing was held on June 8, 2011 before the Honorable Alexander S. Macaulay. On November 8, 2011, judge Macaulay denied applicant's PCR application.

On August 6, 2012 a petition for writ of certiorri was filed with the S.C. Supreme Court on behalf of the applicant. Petition was denied.

Discussion

Is an order in the applicant's relief application, that does not address all the issues raised, a final order according to S.C. statute?

An order in a post conviction relief matter which does not include specific finding of fact and conclusion of law relating to each issue presented, does not constitute a final order or judgement and therefore is not reviewable by writ of certiorari, Garner vs. State 636 s.e. 2d 860.

A post conviction relief court's general denial of all claims not specifically addressed in the court's order does not constitute a sufficient ruling on any issue since it does not set forth specific finding of fact and conclusions of law, Simmons vs. State 788 s.e. 2d 220.

The applicant in his application for post conviction relief ("memorandum") ineffective assistance of counsel. The following issues were raised: trial counsel refused to properly investigate, present evidence, cross examine, and make motions to suppress the evidence.

Note: At this point, I am alleging "Fraud on the Court" also obstruction of justice and/or "Tampering with Evidence" (on the State) will explain in open court. (Possible 3rd party guilt).

The PCR court in its order, pages 9 and 10 states the following concerning applicant claim of ineffective assistance of counsel, "The applicant asserts that the trial counsel was ineffective for failing to properly investigate, present evidence, cross examine, and make motions to suppress evidence; for failing to challenge the indictment; and for failing to present the Fowler case at trial. This court finds these allegations are without merit. The court failed to address the fraud on the court, obstruction of justice, tampering with the evidence.

At the Evidentiary Hearing (court order page 3 and 4) The applicant discusses those allegations before the PCR court. These claims are properly before the court. However the court failed to address these allegations in the order Odom v. State 523 s.e. 2d 523 s.e. 2d 753, under the post conviction relief rules, an applicant is entitled to a full adjudication on the merits of the original petition, or "One bite of the apple" see also Aice v. State ³⁰⁵ ~~323~~ S.C. ⁴⁴⁸ ~~45~~, ⁴⁶⁹ ~~623~~ s.e. 2d ³⁹² ~~422~~. Applicant expressed on the record his desire that all issues raised be addressed by the court. However, the court failed to address all the issues. See appellate case no. 2011-204374, page 287 line 13 and 14. Applicant was denied his full and fair bite at the apple by the PCR court's failure to make a final order. The order filed by the PCR court was not a final order in this PCR matter. See S.C. code ann. 17-27-80 (2014)-("This court shall make specific findings of fact and state expressly its conclusions of law relating to each issue presented. This is a final judgement. S.C. code ann. 17-27-100 (2014) (A final judgement entered under this chapter may be reviewed by writ of certiorari as provided by the S.C. Appellate Court Rules") Rule 243 (A), rule 71./(g) SCRPC Lewis v. State 368 S.C. 630 s.e. 2d 464 (2006), See also Garner v. State 636 s.e. 2d 860.

Extraordinary action of the remanding the applicant's application for PCR is warranted where even though applicant's PCR counsel failed when requested to file a 59 (e), to preserve for appeal the issues that the PCR court's failure to make specific findings of fact and conclusion of law on all issues raised. See Simmons v. State 788 s.e. 2d 220. ^(4B)

Conclusion

The applicant's statutory and procedural due process right to a full and fair bite of the apple was denied by the PCR court's failure to make a final order that was statutorily correct. This PCR application must be remanded back to the court for an order that is consistent with the law.

Respectfully,

Herman Belton, pro se

Herman Belton, pro se

Allendale Corr. Inst.

P.O. Box 1151

Fairfax, S.C., 29827

Dated: 1-31-2019

cc. File

State of South Carolina
County of Anderson

) In The Court of Common Pleas
) Tenth Judicial Circuit
) C/A: 2010-CP-04-00678
)

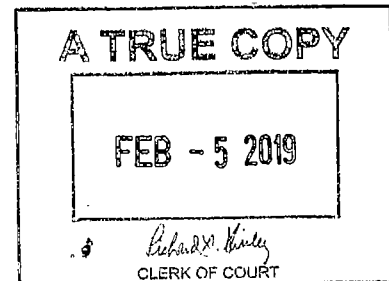
Herman Belton, 256396
Applicant,

) Certificate of Service
)

vs

The State of South Carolina,
Respondent,

)
)
)
)
)
)



Applicant declares under penalty of perjury that he mailed a copy of his motion to be relieved of a void judgement and memorandum in support of motion to be relieve. By placing them in the U.S. mail, clearly addressed as below. Please return one stamp file copy.

Clerk of Court
Anderson County
P.O. Box 8002
Anderson, S.C., 29622

Respectfully,

Herman Belton #256396, pro se
Herman Belton, 256396, pro se
Allendale Corr. Inst.
P.O. Box 1151
Fairfax, S.C., 29827

Office of The Attorney General
P.O. Box 11549
Columbia, S.C., 29201

Dated: 1-31-2019

cc: file

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STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Herman Belton, #256396,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Case No.: 2010-CP-04-0678

**RETURN TO RULE 60(b) MOTION FOR
RELIEF FROM ORDER OF DISMISSAL**

On February 5, 2019, Herman Belton (Applicant) filed a "Motion To Be Relieved From A Void Judgement S.C.R. civ. P. 60(B)(4)-(5)", which Respondent interprets as a Motion for Relief from Judgement or Order under Rule 60(b), SCRCF. In response to the Motion, Respondent would show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted during the June of 2006 term of the Anderson County Grand Jury for trafficking in crack cocaine (2006-GS-04-1844). Applicant was represented in the case by Kurt Tavernier, Esquire. On February 5, 2007, Applicant proceeded to a jury trial, with the Honorable Thomas W. Cooper, presiding. After being found guilty, Applicant was sentenced by Judge Cooper to imprisonment for twenty-five years.

A timely notice of appeal was filed on Applicant's behalf. Appellate Defense filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal. State v. Belton, Op. No. 2009-UP-526 (Ct. App. filed November 19, 2009).

Applicant then filed an Application for Post-Conviction Relief on February 24, 2010. Respondent made its Return on or around June 30, 2010. J. Chris Brown, Esquire, represented Applicant in the PCR action. On or around May 31, 2011, Applicant amended the PCR application. An evidentiary hearing was convened in the matter before the Honorable Alexander S. Macaulay on or around June 8, 2011. Judge Macaulay issued an Order of Dismissal on November 8, 2011, in which Applicant's Application for Post-Conviction Relief was denied and dismissed with prejudice.

A timely notice of appeal was filed on Applicant's behalf. Lanelle Cantey Durant filed a Petition for Writ of Certiorari on August 6, 2012. Assistant Attorney General John W. Whitmire filed a Return to Petition for Writ of Certiorari on December 21, 2012. The Supreme Court of South Carolina transferred the case to the South Carolina Court of Appeals pursuant to Rule 243, SCACR, in Order issued on July 29, 2013. The Court of Appeals denied Applicant's petition in Order issued on July 3, 2014. The Remittitur was issued on July 23, 2014.

Applicant's Motion for Relief from Judgement or Order under Rule 60(b), SCRCP, was filed on February 4, 2019.

II.

Rule 60(b), SCRCP, provides that:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud, misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

In a motion seeking relief pursuant to Rule 60(b), SCRCP, the movant has the burden of presenting evidence, usually provided by affidavits, proving the facts essential to entitle him to relief. Bowers v. Bowers, 304 S.C. 65, 67-68, 403 S.E.2d 127, 129 (Ct. App. 1991). "Mere allegations, denied by the other party, are not evidence." Id. at 68, 403 S.E.2d at 129 (citing Griffin v. Van Norman, 302 S.C. 520, 397 S.E.2d 378 (Ct. App. 1990)).

III.

As a threshold matter, Applicant alleges in his Motion that he is entitled to relief under Rule 60(b), SCRCP, because there has occurred "Fraud on the Court also obstruction of justice and/or Tampering with Evidence (on the State)" (internal quotation marks omitted). Respondent interprets these allegations as falling within Rule 60(b)(3), SCRCP. The other ground for relief presented by Applicant in the Motion is that the Order of Dismissal issued by Judge Macaulay on November 8, 2011, and filed on November 9, 2011, is void as a matter of law because the Order of Dismissal did not include specific findings of fact and conclusions of law on each issue presented in the PCR action by Applicant, as required by S.C. Code Ann. § 17-27-80. Respondent interprets this allegation as falling within Rule 60(b)(4), SCRCP.

Respondent submits that Applicant's Motion has not been timely filed as required by Rule 60(b). A motion under this Rule "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." Rule 60(b), SCRCP. As to those grounds raised under Rule 60(b)(3), they were not raised within a reasonable time or within one year of entry of judgment. The Motion was filed *more than seven years* after Judge Macaulay's Order of Dismissal was issued. As to Applicant's ground raised under Rule 60(b)(4), Applicant has failed to file the Motion within a reasonable period of time as

required by Rule 60(b), SCRCP. In order to further highlight the unreasonableness of Applicant's delay in filing this Motion, Respondent would note that Remittitur was issued in Applicant's appeal from the denial of his PCR application approximately *four-and-a-half years* before Applicant filed the Motion. As such, Applicant's motion is untimely and should be denied and dismissed.

IV.

Applicant has further failed to meet his burden of presenting evidence that proves the facts essential to entitle him to relief. The movant in a motion under Rule 60(b), SCRCP, has the burden of presenting evidence, usually provided by affidavits, proving the facts essential to entitle him to relief. Bowers, 304 S.C. at 67-68, 403 S.E.2d at 129. Applicant alleges in his motion that Judge Macaulay's Order of Dismissal is void as a matter of law under Rule 60(b)(4), SCRCP, because it lacked findings of fact and conclusions of law on issues raised by Applicant during the evidentiary hearing. Specifically, Applicant alleges that he raised the issues of "fraud on the court, obstruction of justice, [and] tampering with evidence", but that Judge Macaulay did not address them in the Order of Dismissal.

Applicant's allegation is without merit. In his Order of Dismissal, Judge Macaulay notes that Applicant testified at the evidentiary hearing that, in his underlying criminal case, the State had "committed a Brady violation, manufactured evidence, presented perjury testimony, and failed to provide" to the defense some pages of a SLED report in discovery. App. 344. The Order summarizes Applicant's testimony by saying that Applicant questioned the validity of the indictments, believed that there were chain of custody issues in his case that were not addressed by Counsel at trial, and had discovered that the State had committed errors in its SLED report.

App. 285-87, 335. Judge Macaulay also noted that Counsel's testimony was that he believed that he had received all discoverable materials from the State, that his investigation had revealed that there was "no wrong doing" on the part of the officers working on Applicant's case, that he made the strategic decision not to use un concerning discrepancies in the officer's case number notations, and that the indictments against Applicant were valid. App. 337, 339-40. In light of Applicant's failure to present evidence to support his claims at the evidentiary hearing and Counsel's testimony, the PCR court found that Applicant had failed to meet his burden of proof with regard to his allegations of prosecutorial misconduct. Despite Applicant's assertion that Judge Macaulay's Order of Dismissal failed to contain findings and conclusions as required by SC Code Ann. § 17-27-80, it is clear that the PCR did take into consideration the evidence presented at the evidentiary hearing and addressed the raised issues in the Order.

Applicant further alleges in his Motion that there exists "fraud on the court, obstruction of justice, [and] tampering with evidence", which Respondent interprets as allegations made under Rule 60(b)(3), SCRPC. Notably, Applicant presents no independent support for these allegations, so Respondent must assume that there are no supporting facts or that the same information presented in support of his claim under Rule 60(b)(4) is also meant to apply here. With these allegations, Applicant is merely restating the unsupported allegations he made during his evidentiary hearing, which were then addressed by Judge Macaulay in the Order of Dismissal, mostly under the umbrella of "prosecutorial misconduct". App. 285-87, 344-46. As such, Applicant's claims under Rule 60(b)(3) are not supported in any manner whatsoever in his Motion, and were addressed by Judge Macaulay in the Order of Dismissal.

The allegations presented by Applicant in his Motion are either entirely unsupported or flatly contradicted by a review of the transcript from the evidentiary hearing and resulting Order of Dismissal. The Motion should therefore be denied.

V.

Respondent further submits to the Court that Applicant could have moved to alter or amend the Order of Dismissal pursuant to Rule 59, SCRCP, if he felt at the time that the Order did not adequately addresses all of his PCR issues. Since he did not do so, he should not now, more than seven years after the Order of Dismissal was issued, be allowed to attack the Order in this way. Although the Motion does not contain the specific allegation that Applicant requested that his PCR counsel move to alter or amend the Order of Dismissal and that PCR counsel failed to do so, Applicant does cite case law allegedly concerning PCR Counsel's failure to move to alter or amend Respondent submits that this may be Applicant's attempt to raise a claim of the ineffective assistance of PCR counsel, which is not an allegation that can be properly raised in his Motion. See Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013) (holding that a federal court case recognizing a claim of ineffective assistance of PCR counsel is limited to federal habeas corpus review, and is not applicable in state PCR actions). To the extent that Applicant's Motion is a disguised claim of ineffective assistance of PCR counsel, it should be denied.

VI.

WHEREFORE, having made its Return to the Motion, Respondent requests the relief requested in the Motion be denied.

Respectfully submitted,

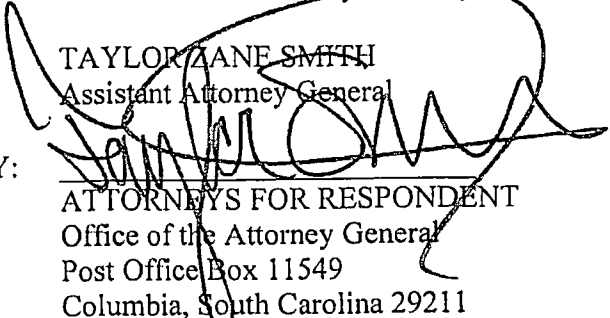
ALAN WILSON
Attorney General

W. JEFFRETY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General

BY:


ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

September 3, 2019

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

Herman Belton, #256396,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Case No. 2010-CP-04-0678

**ORDER DENYING APPLICANT'S
MOTION FOR RELIEF FROM
JUDGMENT**

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Richard D. Kiley
CLERK OF COURT

This matter comes before this Court by way of a motion for relief from judgment, pursuant to Rule 60(b), SCRCP, filed by Herman Belton ("Applicant") on February 5, 2019. The State ("Respondent") filed its return to the motion on September 5, 2019. A hearing on the motion was held before the undersigned over Webex on October 21, 2020. Applicant was present as a pro se litigant, and Assistant Attorney General Taylor Zane Smith of the South Carolina Attorney General's Office represented Respondent. For the reasons set forth below, this Court denies Applicant's motion.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. During its June of 2006 term, the Anderson County Grand Jury indicted Applicant for trafficking in crack cocaine (2006-GS-04-1844). Applicant was represented in the case by Kurt Tavernier, Esquire, and then-Assistant Solicitor Michael Scott McElhannon of the Tenth Circuit Solicitor's Office prosecuted the case. On February 5, 2007, Applicant proceeded to a jury trial, with the Honorable Thomas W. Cooper presiding. The jury found Applicant guilty as indicted, and Judge Cooper sentenced Applicant to imprisonment for twenty-five years.

Tavernier filed a timely notice of appeal. Appellate Defender LaNelle Cantey Durant of the South Carolina Commission on Indigent Defense represented Applicant on appeal. Durant filed a motion to be relieved as counsel and a brief pursuant to Anders v. California, 386 U.S. 738 (1967), arguing Judge Cooper erred in denying Tavernier's motion to suppress the crack cocaine admitted into evidence at trial. The South Carolina Court of Appeals granted Durant's motion to be relieved and dismissed the appeal. State v. Belton, Op. No. 2009-UP-526 (Ct. App. filed November 19, 2009) (per curiam).

Applicant filed an application for post-conviction relief on February 24, 2010. Respondent made its return on or around June 30, 2010. J. Chris Brown, Esquire, represented Applicant in the PCR action. On or around June 8, 2011, the parties appeared before the Honorable Alexander S. Macaulay for an evidentiary hearing. Applicant was personally present at that hearing and represented by J. Chris Brown, Esquire. Respondent was represented by Assistant Deputy Attorney General Salley W. Elliot and Assistant Attorney General Kaelon Elizabeth May, both of the South Carolina Attorney General's Office. On November 7, 2011, Judge Macaulay issued an order of dismissal, denying Applicant's application for post-conviction relief and dismissing it with prejudice.

Brown filed a timely notice of appeal. Durant again represented Applicant on appeal, and filed a petition for a writ of certiorari arguing Judge Macaulay erred in finding Tavernier was not constitutionally ineffective for not making a contemporaneous objection to the admission of the crack cocaine at trial and in finding Tavernier was not constitutionally ineffective for not objecting to the indictment on the basis that it was true-billed when there was no General Sessions term of court. Assistant Attorney General John W. Whitmire of the South Carolina Attorney General's Office represented Respondent on appeal. The South Carolina Supreme Court transferred the

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appeal to the South Carolina Court of Appeals, which then denied Applicant's petition for a writ of certiorari. Belton v. State, S.C. Ct. App. Order filed July 3, 2014. The remittitur was issued on July 23, 2014. Applicant then filed his pro se motion for relief from judgment on February 4, 2019.

II. FINDINGS OF FACT & CONCLUSIONS OF LAW

Before this Court is the record in its entirety, including the records of the Anderson County Clerk of Court regarding Applicant's indictment and conviction; the transcript from Applicant's trial; the records from Applicant's direct appeal; the records from this present action, including the pleadings, motions and returns thereto; and the records from Applicant's PCR appeal, including the petition and appendix, the return to the petition, the dispositive opinion, and the remittitur. This Court's findings of fact and conclusions of law are set forth as follows.

Applicant makes his motion pursuant to Rule 60(b), SCRPC, alleging this Court should grant relief to Applicant from Judge Macaulay's order denying his Application for post-conviction relief. At the hearing before this Court, Applicant clarified that he was moving for relief under Rule 60(b)(4) and (5). Applicant argued Judge Macaulay failed to make findings of fact and conclusions of law addressing all claims for relief presented in the application for post-conviction relief and argued Brown was ineffective for not ensuring that the claims were preserved for appellate review by moving to alter or amend Judge Macaulay's order, pursuant to Rule 59(e), SCRPC, when Judge Macaulay's order failed to address all of Applicant's claims.

Rule 60(b), SCRPC, provides that:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud, misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;

- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

In a motion seeking relief pursuant to Rule 60(b), SCRCP, the movant has the burden of presenting evidence, usually provided by affidavits, proving the facts essential to entitle him to relief. Bowers v. Bowers, 304 S.C. 65, 67-68, 403 S.E.2d 127, 129 (S.C. Ct. App. 1991). "Mere allegations, denied by the other party, are not evidence." Id. at 68, 403 S.E.2d at 129 (citing Griffin v. Van Norman, 302 S.C. 520, 397 S.E.2d 378 (S.C. Ct. App. 1990)).

In Hendricks v. State, 337 S.C. 221, 221, 692 S.E.2d 892, 893 (2010), the South Carolina Supreme Court addressed for the first time the "interplay" between the Uniform Post-Conviction Procedure Act and Rule 60(b), SCRCP. Hendricks moved for relief from the final order in his post-conviction relief action, pursuant to Rule 60(b), arguing a particular decision the Supreme Court of the United States established a new substantive constitutional standard that should have been applied retroactively so as to change the outcome of his PCR action. Id. The Supreme Court held Hendricks was not entitled to seek such relief by filing a motion under Rule 60(b) because:

Where, as here, the General Assembly has provided a specific procedure to be followed in PCR cases, and that method is inconsistent with the more general procedure of the [South Carolina Rules of Civil Procedure], the statutory procedure must be followed.

Id. at 223, 692 S.E.2d at 893. The Supreme Court remanded the case to the circuit court and instruction the circuit court, essentially, to consider Hendricks' motion a successive application for post-conviction relief. Id.

Applicant made it clear at the hearing before this Court that he feels he had meritorious post-conviction relief claims for which Judge Macaulay did not make findings of fact and conclusions of law in the order issued on November 7, 2011. Applicant stated he explicitly asked his attorney at the time to file a motion to alter or amend the judgment if those claims were not

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addressed in Judge Macaulay's order to ensure that the claims were preserved for appellate review. Implicit in Applicant's argument is a claim that his PCR attorney was ineffective for not preserving all claims for appellate review. That claim is one that was not presented during the pendency of this litigation; indeed, it is one that could not have arisen until the PCR action concluded. By making the arguments Applicant has through a Rule 60(b) motion, Applicant is trying to have a two-for-one PCR action in which he rehashes trial issues, PCR issues he believes should have been addressed by Judge Macaulay and the appellate courts, and a new, overarching PCR issue that concerns his PCR attorney's performance.

The Uniform Post-Conviction Procedure Act ("the Act") requires that an applicant for post-conviction relief file his application within one year of the entry of judgment against him or the conclusion of his direct appeal. S.C. Code Ann. § 17-27-45(A). If an applicant alleges there is evidence of some material fact not previously presented and heard that requires his conviction or sentence be vacated, the applicant must file his application within one year of the date of his actual discovery of that evidence or after the date when he could have ascertained the fact through the exercise of reasonable diligence. S.C. Code Ann. § 17-27-45(B). A motion under Rule 60(b), on the other hand, must be filed "within a reasonable time. There is a conflict between the time requirement for filing a successive application and the time requirement for filing a Rule 60(b) motion. Hendricks therefore requires this Court to view Applicant's motion as if it were a successive application.

However, the use of Rule 60(b) to advance the arguments Applicant put forth in his motion and before this Court are inconsistent with the Act. The Act requires an applicant to raise all grounds for relief in an application, an amended application, or a supplemental application, lest the applicant waive his ability to raise in a subsequent application any ground not finally



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adjudicated or raised in the first PCR action. S.C. Code Ann. § 17-27-90. As already mentioned, the Act sets forth requirement that an applicant file his application within a certain period of time. Respondent typically moves for the dismissal of successive applications for post-conviction relief, and applications filed more than one year after applicants are convicted and sentenced or the remittitur is issued in their direct appeals. To entertain Applicant's motion now, even if it is viewing it as a quasi-successive application, would be to deprive Respondent of the ability to make the aforementioned arguments, which potentially could prove dispositive if raised in the context of a successive application. Therefore, this Court denies Applicant's motion. If Applicant desires to rehash the events of his trial before Judge Cooper and his PCR hearing before Judge Macaulay and advance new claims regarding his PCR attorney, he must do so by filing another application for post-conviction relief. Of course, Respondent may move to dismiss such an application based upon the successiveness and timing of the application, but that is a more appropriate avenue for Applicant to raise those claims than is Rule 60(b).

If Applicant chooses to file a successive application for post-conviction relief in order to litigate the claims he has identified, the Anderson County Clerk of Court shall appoint an attorney to represent him so that he may make use of counsel's aid in presenting his arguments there.

IT IS THEREFORE ORDERED that Applicant's motion, pursuant to Rule 60(b), SCRPC, for relief from Judge Macaulay's order denying Applicant's application for post-conviction relief is denied; if Applicant chooses to file a successive application for post-conviction relief challenging the underlying conviction, the Anderson County Clerk of Court shall appoint an

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attorney to represent Applicant.

AND IT IS SO ORDERED this 26th day of October, 2020.


Eugene C. Griffith, Jr.
Residing Judge

Newberry, South Carolina

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