

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
Honorable George C. James, Jr., Circuit Court Judge

Case No: 2012-CP-43-01090

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S.C. SUPREME COURT

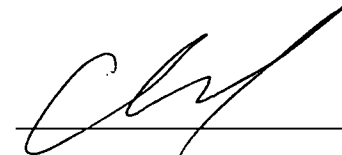
Mark McCoy.....Appellant
S.C.D.C. 210705

v.

The State.....Respondent

NOTICE OF APPEAL

Mark McCoy, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable George C. James, Jr., May 23, 2014, which I, Charles T. Brooks, III, received on June 5, 2014.



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Mark McCoy.....Appellant
S.C.D.C. 210705
v.
The State.....Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 9th day of June, 2014, I served the foregoing **Notice of Appeal, Order of Dismissal** , as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on June 9, 2014, addressed to the following as indicated below:


South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

South Carolina Office of Appellate Defense
1330 Lady Street, Suite 401
PO Box 11589
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Mark McCoy, 210705
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Dated: June 9, 2014



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STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

RECORDED

2014 JUN -3 PM 1:41

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

Mark McCoy, #210705,

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Case No. 2012-CP-43-01090

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

CERTIFIED TRUE COPY
OF ORIGINAL FILED

Sherry H. King
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on June 5, 2012. Respondent made its return on November 30, 2012. An evidentiary hearing into the matter was convened on February 27, 2014, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Charles T. Brooks, III, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Applicant was indicted at the September 2008 term of the Sumter County Grand Jury for murder and possession of firearm or knife during the commission of a violent crime (2005-GS-43-033). I.S. Levy Johnson, Esquire, represented him. On September 22-25, 2008, Applicant proceeded to a jury trial before the Honorable Howard P. King. On September 25, 2008, Applicant was found guilty on all counts. Judge King sentenced Applicant to life imprisonment for murder and five years imprisonment for possession of a firearm during the commission of a violent crime with all sentences to be served consecutively.

A timely Notice of Appeal was filed, and following the submission of an Anders brief, the South Carolina Court of Appeals dismissed the appeal. State v. McCoy, 2011-UP-278 (Ct. App. filed June 8, 2011). The Remittitur was sent on August 11, 2011.

ALLEGATIONS

1. Ineffective Assistance of Counsel.
 - a. "...failure to continue his objection to the false material evidence being used by the solicitor; that counsel previously had objected to."
 - b. "...failure to request trial judge to instruct the jury on the lesser included offense of voluntary manslaughter."
 - c. "...failure to object to trial judge's instruction to the judge to find applicant guilty of the charge."
2. Prosecutor's misconduct.
 - a. "Violation of Brady v. Maryland 373 US 83 (1963)."
 - b. "Material evidence suppressed by prosecution."
3. Due Process Violation.
 - a. "...when the Magistrate Judge issued arrest warrant based on information that never existed for probable cause."
 - b. "...as a result of prosecutorial misconduct by Solicitor Fant, Special Agent, and Police withholding crucial prosecution's witnesses statements of fact..."
 - c. "...violated by Solicitor Fant's misconduct making promise and favor (agreements) within the criminal justice system with crucial witness and not correcting her false information to the jurors (solicitors)."
 - d. "...as a result of the misconduct by the solicitor, in regard of suppressing evidence that was material, before and during applicant's trial thus the material evidence exposes solicitor deliberately allowing overlooking false testimony from crucial federal inmate witnesses along with solicitor misleading court and juror's with false information herself."
 - e. "...violated by the trial judge's erroneous instruction to find the applicant guilty, even if the evidence does not convince the jury."

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. Additionally, Applicant called I.S. Levy Johnson (Counsel), Esquire, Kim Delay (Delay), and Catherine Fant (Assistant Solicitor Fant), Esquire. The State called Sergeant Irene Culick and Lieutenant Angela Rabon. This Court also had before it a copy of trial transcript, the Sumter County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, Appellate

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records, the PCR application, and the return. Applicant also introduced various exhibits, including Kimberly Delay's statement, a letter from Assistant Solicitor Fant to Federal Public Defender Catherine M. Leek, Esquire, and an affidavit of Assistant Solicitor Fant regarding Delay's testimony at Applicant's trial

During the evidentiary hearing, Applicant stated that he met with Counsel eight or nine times prior to his trial. Applicant stated that he reviewed all discovery material with Counsel prior to his trial. Applicant stated that Assistant Solicitor Fant committed a Brady violation in failing to turn over Delay's statement. Applicant stated Delay testified in the case and the statement should have been turned over in his discovery material. Applicant stated he became aware of the statement through the discovery process in his federal case. Applicant further stated Delay was promised that her charges were going to be dropped if she testified against Applicant. Applicant stated Assistant Solicitor Fant wrote an affidavit stating that Delay's testimony was crucial in convicting Applicant. Applicant stated Assistant Solicitor Fant failed to turn over the information regarding Delay's alleged deal. Applicant stated both he and Counsel were surprised when Delay took the stand and testified. Applicant stated Counsel should have moved for a mistrial because Counsel did not get an opportunity to speak to Delay prior to her testifying.

Applicant further alleged that Lattimore Holmes (Holmes) testified that he did not give a statement to the police during his trial. However, Applicant stated that Holmes gave a statement to the police and it was not turned over during the discovery process. Applicant stated Holmes testified that he had not been promised anything for his testimony. However, Applicant stated that he learned through personal investigation that Holmes' sentence was reduced because of his cooperation in Applicant's case.

Applicant further stated that James Pleasant's (Pleasant) statement was not turned over until the day of trial. Applicant stated Counsel was ineffective for not asking for a new trial because of Assistant Solicitor Fant's failure to turn over Pleasant's statement. Applicant asserted that Assistant Solicitor Fant's failure to turn over Pleasant's statement amounted to a Brady violation. Applicant stated Counsel did not have enough time to review the statement, investigate Pleasant, and determine if he was a necessary witness for Applicant's case. Applicant stated Pleasant did not testify at trial. Applicant stated that there were several inconsistencies between Pleasant's and Holmes' statements to police. Specifically, Applicant stated both Pleasant and Holmes viewed the shooter coming from opposite directions.

Applicant further stated Counsel had not spoken to any witness involved in the case. Applicant stated a witness, Joseph Sumter (Sumter), had a lot of information and Counsel failed to interview him. Applicant further stated Counsel was ineffective for failing to put up a defense. Applicant stated he had an alibi defense, but Counsel failed to properly investigate into this defense. Applicant stated the only witness Counsel met with was Ivan Sanders. Applicant stated that had Counsel investigated the various witnesses the outcome of the trial would have been different. Applicant recalled apologizing to the family of the victim.

Applicant further claimed that Counsel was ineffective for failing to object to the jury instruction. Specifically, Applicant stated that Counsel should have objected to the trial judge telling the jury to find him guilty "no matter what." Applicant stated he told Counsel to object to the jury instruction, but Counsel did not object in time. Applicant stated Counsel objected to the charge after the jury exited the courtroom. Applicant stated the judge asked the court reporter to play the tapes. Applicant stated the judge realized his mistake and recharged the jury.

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Following Applicant's testimony, I.S. Levy Johnson (Counsel) was called to testify. Counsel stated he had a great working relationship with Applicant. Counsel stated he has been practicing law for forty-five years and was retained in Applicant's case. Counsel stated that he met with Applicant on multiple occasions and Applicant was very involved in the case preparation. Counsel stated Applicant was provided a copy of everything. Counsel stated he gave "effective representation." Counsel explained he went to the scene, walked the area, went to the various houses, investigated, and did "everything a lawyer could do." Counsel stated that he filed a standard Brady motion. Counsel explained that Judge King reviewed all material in the case to determine what material would fall under Brady. Counsel stated Judge King ruled that the State had complied with the Brady motion. Counsel stated he adequately cross-examined Delay during the trial. Counsel stated that he interviewed her prior to trial and was surprised that she testified against Applicant. Counsel believed that Delay's testimony made a dramatic difference in the outcome of the trial.

Counsel further explained that all of Applicant's witnesses were friends or acquaintances. Counsel stated the witnesses all said favorable things during the course of trial preparation, but during the trial their testimony became less favorable. Counsel stated he could not recall receiving a statement from James Pleasant (Pleasant). Counsel stated he did not call Pleasant because he did not feel it would be beneficial to Applicant's case. Counsel stated he felt Pleasant may turn on Applicant and did not feel it was worth the risk. Counsel further reasoned that it was his trial strategy to not call any witnesses or introduce any evidence to preserve the last closing argument.

Counsel stated Applicant was found guilty due to the numerous eye witnesses and his relationship with the deceased. Counsel further stated Delay witnessed Applicant change into

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camouflage clothes and returned shortly thereafter. Counsel stated a witness saw the shooting take place and identified the shooter wearing camouflage clothes. Counsel stated that he did object to the jury charge and the court reporter reviewed the tapes. Counsel stated that he did not feel a mistrial was warranted as the judge gave a curative instruction to the jury. Counsel stated he felt the curative instruction was helpful to Applicant's case because it repeated the premise that if the jury had a reasonable doubt about Applicant's guilt, it must find the Applicant not guilty. Counsel further stated that he did not request a voluntary manslaughter because there was no fight going on at the time of the murder.

Following Counsel's testimony, Kimberly Delay (Delay), was called to testify. Delay stated that she had three separate interviews with police. Delay explained that she told the police that she did not know anything about the crime during her first and second interview. Delay stated during her third interview, she lied to police about the type of clothing the Applicant was wearing. Delay explained that she felt coerced because the police threatened to charge her with accessory after the fact and conspiracy to commit murder. Delay further stated she had federal charges pending at the time of her interview. Delay stated that her testimony during Applicant's trial was a lie. Delay stated that she did not know anything about the clothing and that everyone wore camouflage.

Following Delay's testimony, Catherine Fant (Assistant Solicitor Fant) was called to testify. Assistant Solicitor Fant stated she was the prosecutor for the Solicitor's office. Assistant Solicitor Fant stated that she turned over all exculpatory material. Assistant Solicitor Fant explained that Delay did not give a statement and she was not required to turn over their notes. Assistant Solicitor Fant further explained that she turned over Lattimore Holmes' statement. Assistant Solicitor Fant stated she turned over James Pleasant's statement prior to trial out of an

B/6

abundance of caution. Assistant Solicitor Fant stated prior to trial, Judge King personally reviewed all material in Applicant's case. Assistant Solicitor Fant stated that Judge King ruled that the State complied with the Brady motion. Assistant Solicitor Fant stated that she turned over all witness statements to Judge King at the beginning of the trial.

Assistant Solicitor Fant stated that Delay had no deal in this case because Delay never explained what happened. Assistant Solicitor Fant recalled that Arthur Wilder, Esquire, represented Delay on her two separate state charges and attempted to get Delay to cooperate with the State. Assistant Solicitor Fant stated she was notified by the Federal Government that Delay wanted to testify in Applicant's trial. As a result, Assistant Solicitor Fant stated Lieutenant Rabon and Sergeant Culick with Sumter County Sheriff Department met with Delay.

Assistant Solicitor Fant stated Delay's charges were not dismissed because of her testimony during Applicant's trial. Instead, Assistant Solicitor Fant stated one charge was *nolle prossed* and the second dismissed with leave to restore due to Delay's pending federal charges. Assistant Solicitor Fant restated that there was no deal given to Delay in regards to her cooperation with the state in Applicant's case. Assistant Solicitor Fant explained that she wrote a letter to Delay's Federal Public Defender Catherine M. Leek, Esquire, stating that Delay had testified truthfully during Applicant's trial because it was the right thing to do. Assistant Solicitor Fant stated that Delay was never charged with accessory after the fact or conspiracy to commit murder.

Following Assistant Solicitor Fant's testimony, Sergeant Irene Culick testified. Sergeant Culick stated that she has been an officer for fifteen years. Sergeant Culick stated that she assisted with the case. Sergeant Culick stated she was contacted by Agent Richard Brown of the Alcohol, Tobacco, Firearms, and Explosives Bureau regarding Delay's willingness to speak to

police. Sergeant Culick stated that she, along with ATF Agent Brown and Lieutenant Rabon, interviewed Delay out of state. Sergeant Culick and her fellow interviewers were able to corroborate the validity of the information given by Delay in the interview with information in recorded conversations between Delay and the Applicant provided by the jail. Specifically, Delay spoke in the interview about her discussion with the Applicant about a potential alibi involving micro-braiding and their dog named Brick. Sergeant Culick stated they had no reason to doubt Delay's information.

Following Sergeant Culick testimony, Lieutenant Rabon was called to testify. Lieutenant Rabon stated that she has been with the police department since 1997. Lieutenant Rabon stated she investigated Delay and did not threaten or coerce her during their interviews. Lieutenant Rabon stated she went with Sergeant Culick and ATF Agent Brown to Georgia and interviewed Delay. Lieutenant Rabon stated she was shocked by Delay's cooperation due to her close relationship with Applicant. Lieutenant Rabon stated they were able to corroborate Delay's statements in the interview with various statements in conversations between Delay and the Applicant recorded by the jail. Lieutenant Rabon stated Delay was ordered by Applicant to take letters to witnesses who planned to testify at his trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

71 8

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, (1984); Butler, 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. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

INEFFECTIVE ASSISTANCE OF COUNSEL

Trial Counsel ineffective for failing to call James Pleasant as a witness.

This Court finds Applicant's allegation that Counsel was ineffective for failing to call Pleasant as a witness meritless. Our courts are understandably wary of second-guessing defense

counsel's trial tactics. 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 he did not call Pleasant for two reasons. First, that he wanted to preserve the last argument. Secondly, that there was a substantial risk in calling Pleasant to testify because Pleasant could have easily turned on the applicant in his testimony. Pleasant's statement to the police includes his account of the shooting. He identified the shooter as a 5'4" male wearing a camo jacket with his face wrapped in camo cloth. It should be noted that the applicant is around 5'4". That, along with Delay's testimony that she saw the applicant wearing camo immediately after the shooting, would certainly not have been helpful to the Applicant's case. This Court finds that the decision by trial counsel to absent Pleasant's testimony was a valid strategic decision. In addition, because Pleasant did not testify at the PCR hearing, there is no evidence that Pleasant's testimony would have included anything favorable to the Applicant's case. An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). This Court finds that Applicant has failed to meet his burden of proof in regards to this allegation, and accordingly this allegation must be denied and dismissed with prejudice.

James Pleasant statement contradicts State theory of case.

Applicant alleges that Pleasant's statement contradicted the State's theory of the case. This Court notes that the State is not required to tailor its presentation of evidence to the account given by any witness. Furthermore, this Court finds that this is not a valid ground for post-

conviction relief. Aside from two matters specifically mentioned in the statute, post-conviction relief is a proper avenue of relief only when the Applicant mounts a collateral attack challenging the validity of his conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). Therefore, this claim is denied and dismissed with prejudice.

Trial counsel should have requested a continuance because he had not spoken to anyone other than Joe Sumter.

This Court finds the Applicant's claim that Counsel was ineffective for failing to request a continuance because he had only spoken with one witness, Joe Sumter, meritless. Counsel stated he gave "effective representation." Counsel went to the scene, walked the area, went to the various houses, investigated, and did "everything a lawyer could do." This Court finds that there would have been no good cause for a continuance.

Furthermore, the Applicant claims Counsel should have asked the judge for the opportunity to talk to Delay when she took the stand. Counsel testified that he had been in communication with Delay prior to trial. The transcript reveals Counsel was able to effectively cross-examine Delay and that additional time would not have made a difference. This Court finds that Applicant has failed to meet his burden of proof in regards to this allegation, and accordingly this allegation must be denied and dismissed with prejudice.

Trial counsel should have asked for a mistrial based on the trial judge's jury charge that stated the jury must find the applicant guilty if the jury determined there was reasonable doubt.

This Court finds the Applicant's allegation that Counsel should have asked for a mistrial based on the trial judge's jury charge, stating the jury must find the applicant guilty if a reasonable doubt is determined, is without merit. Counsel properly pointed out this misstatement to the trial judge and the judge properly recharged the jury. A mistrial would not have been granted in any event, in light of the curative charge. In addition, this court agrees with trial

counsel's testimony that the recharge was actually helpful, as it repeated the premise that if the jury had a reasonable doubt about the defendant's guilt, it must find the defendant not guilty. This Court finds that Applicant has failed to meet his burden of proof in regards to this allegation, and accordingly this allegation must be denied and dismissed with prejudice.

Trial counsel should have pursued a voluntary manslaughter option on the verdict form.

This Court finds the Applicant's allegation that Counsel was ineffective for failing to request a voluntary manslaughter option on the verdict to be without merit. This Court notes Applicant's trial theory was that he was not present at the scene and had no part in the crime at all. Applicant reasserted this argument during the PCR evidentiary hearing. Requesting a voluntary manslaughter option would be in direct contradiction to Applicant's purported trial strategy. This Court finds Counsel's strategic decision in not requesting a voluntary manslaughter option proper. Therefore, this Court finds that Applicant has failed to meet his burden of proof in regards to this allegation, and accordingly this allegation must be denied and dismissed with prejudice.

PROSECUTORIAL MISCONDUCT

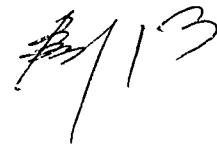
Solicitor failed to turn over statement by Kim Delay

This Court finds Applicant's allegation that the Solicitor failed to turn over any required evidence is without merit. An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). 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

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only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268. This Court finds both Assistant Solicitor Fant's testimony and Counsel's testimony credible. Furthermore, this Court finds both Applicant's and Kim Delay's testimony not credible.

During the evidentiary hearing, Applicant alleged Assistant Solicitor Fant committed a Brady violation because she failed to turn over Delay's alleged statement. During the trial, Delay testified that the Applicant had come to her house and changed clothes on the day of the murder. She testified he changed into camouflage clothes before leaving, and when he came back 3-5 minutes later, he was out of breath. Delay further testified that the Applicant changed clothes again after returning and said to her "Come on, baby, let's go." Delay had given a prior statement to law enforcement that she did not know anything about the murder. The Applicant claims this statement was inconsistent with the one Delay gave at trial and that the State should have disclosed it as Brady material. However, this Court finds that it is clear from the hearing transcript and PCR hearing testimony of both Counsel and Assistant Solicitor Fant that the trial judge, Judge King, reviewed *in camera* the Assistant Solicitor's entire file prior to trial. This review was pursuant to Counsel's June 3, 2008 motion for *in camera* inspection. Judge King concluded that the State met its discovery obligations. In addition, it clear from the transcript that Counsel was able to effectively cross Delay without the statement. Ms. Delay's testimony at the PCR hearing that her trial testimony was not true does not establish any PCR ground. She claims she was pressured with more prison time if she gave certain testimony, but I find this PCR testimony to be not credible. There is no credible evidence that her testimony was procured unlawfully. Therefore, this Court finds this allegation should be denied and dismissed with prejudice.

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Brady violation arising from a promise made by the State to Delay that all her charges would be dismissed in exchange for her testimony.

This Court finds Applicant's allegation that the Solicitor committed a Brady violation by failing to disclose an alleged deal with Delay regarding her testimony is without merit. An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268. This Court finds Assistant Solicitor Fant's testimony credible. Furthermore, this Court finds both Applicant's and Kim Delay's testimony not credible.

Applicant claims that Delay was offered a plea deal in exchange for her testimony against him. Applicant claims this information was withheld from him. The evidence at the hearing establishes that the State never gave Delay a deal on her charges. Assistant Solicitor Fant testified Delay said from the beginning that she knew nothing about the murder and stuck with that assertion up to trial. Assistant Solicitor Fant got word Delay wanted to cooperate and then Delay told law enforcement (Sergeant Culick and Lieutenant Rabon) the substance of what she testified to at trial, i.e., that the Applicant came to her house out of breath, changed from camo to other clothes, and said "Come on, baby, let's go." Assistant Solicitor Fant testified that one charge of Delay's was *not proessed* because Delay was getting prosecuted federally on that set of



facts. Another charge (unindicted) was dismissed without prejudice in 2010 (this trial was in 2008). Therefore, this Court finds this allegation should be denied and dismissed with prejudice.

Brady Violation for failing to turnover statement by Lattimore Holmes.

This Court finds Applicant's allegation that the state committed a Brady violation for failing to turnover Lattimore Holmes' statement meritless. An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268. This Court finds Assistant Solicitor Fant's testimony credible. Furthermore, this Court finds Applicant's testimony not credible.

Applicant claims that he should have been given a statement given by Lattimore Holmes to law enforcement prior to trial. This statement, if in writing or otherwise summarized, would have been in Judge King's possession during his *in camera* review, so it is clear there was no Brady violation for the State failing to turn it over. Further, the trial transcript reveals that trial counsel was aware of a statement Holmes gave in January 2008, as counsel cross-examined Holmes about the statement (see page 232 ROA). The Applicant also seems to claim prosecutorial misconduct arising from Holmes' early release from a five year federal sentence within two months after the applicant's trial. It is true that Holmes did receive a downward departure because of his cooperation in the Applicant's case; however, there is no evidence that

the State sponsored that downward departure. Therefore, this Court finds this allegation should be denied and dismissed with prejudice.

Brady violation for the State's failure to turn over a statement given by James Pleasant.

This Court finds Applicant's allegation that the State committed a Brady violation for failing to turnover James Pleasant's statement is without merit. An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). 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. Additionally, this Court finds Assistant Solicitor Fant's and Counsel's testimony credible, while finding Applicant's testimony not credible.

This Court notes, Pleasant did not testify during trial. Assistant Solicitor Fant stated the statement was given to Counsel prior to trial. Furthermore, this statement was evidently part of Judge King's review. In addition, trial counsel moved for a mistrial on the basis of a Brady violation concerning Pleasant's statement. The motion was denied. Judge King ruled there was no Brady or Rule 5 violation. Based on the foregoing, this Court finds this allegation should be denied and dismissed with prejudice.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present

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sufficient evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

CONCLUSION

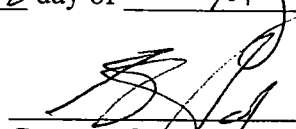
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

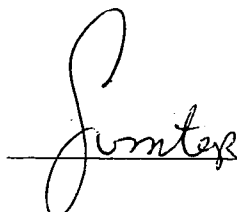
IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 23 day of May, 2014.



GEORGE C. JAMES, JR.
Presiding Judge
Third Judicial Circuit


_____, South Carolina

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RECEIVED

June 9, 2014

JUN 11 2014

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

S.C. SUPREME COURT

RE: Mark McCoy, 210705 v State of South Carolina
2012-CP-43-01090

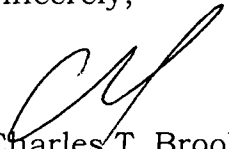
Dear Sir or Madam:

Enclosed herewith you will find the **Notice of Appeal, Order of Dismissal**, along with a **Proof of Service** in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,



Charles T. Brooks, III
CTB/srw

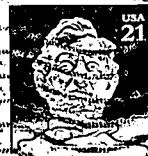
Enclosed as stated

cc: Daniel Gourley, Office of Attorney's General
South Carolina Office of Appellate Defense
Mark McCoy, 210705

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COLUMBIA SC

09 JUN 2014



**South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211**

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