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September 29, 2014

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: Philip Spears, 297965 v State of South Carolina
2011-CP-09-0197

RECEIVED

OCT 03 2014

S.C. SUPREME COURT

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: Megan E. Harrigan, Office of Attorney's General
South Carolina Office of Appellate Defense
Philip Spears, 297965

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas
Honorable Maite Murphy, Circuit Court Judge

Case No: 2011-CP-09-0197

Phillip Spears.....Appellant
S.C.D.C. 297965

v.

The State Respondent

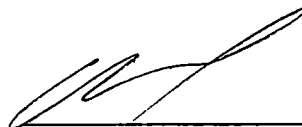
NOTICE OF APPEAL

Phillip Spears, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable Maite Murphy, September 9, 2014, which I, Charles T. Brooks, III, received on September 29, 2014.

RECEIVED

OCT 03 2014

S.C. SUPREME COURT



Charles T. Brooks, III
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Attorney for Appellant

Other Counsel on Record:
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas
Honorable Maite Murphy, Circuit Court Judge

Case No: 2011-CP-09-0197

Phillip Spears.....Appellant
S.C.D.C. 297965
v.
The State Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 30th day of September, 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 September 30, 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
Columbia, SC 29211-1589

Office of Attorney's General
Attn: Megan E. Harrigan, Esquire
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Phillip Spears, 297965
Perry Correctional Institution
430 Oaklawn Road
Pelzer, South Carolina, 29669

Dated: September 30, 2014



Charles T. Brooks, III
Attorney for the Appellant
309 Broad Street
Sumter, South Carolina 29150

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)
))
Phillip Lee Spears, #297965,)
))
Applicant,)
))
v.)
))
State of South Carolina,)
))
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2011-CP-09-00197

ORDER OF DISMISSAL

2011 SEP 23 P 3 5
FILED
BENNETT HASTY
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed October 6, 2011. The State made its Return on April 12, 2012, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on May 28, 2014, at the Dorchester County Courthouse. Applicant was present at the hearing and was represented by counsel, Charles T. Brooks, III, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. After reviewing all testimony and other evidence presented at the hearing, along with a review of all records provided to the Court, this Court finds that there are no constitutional deprivations or other grounds on which to grant relief and is denying and dismissing this application with prejudice.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Calhoun County Clerk of Court. Applicant was indicted by the Calhoun County Grand Jury during the June 2007 term for Armed Robbery (2007-GS-09-0148) and during the August 2007 term for Possession of

a Firearm or Knife during the Commission of a Violent Crime, and Kidnapping (2007-GS-09-0221). Charlie J. Johnson, Jr., Esquire, represented him. On October 1-10, 2007, Applicant proceeded to a jury trial before the Honorable Diane S. Goodstein, where he was convicted as indicted. Judge Goodstein sentenced Applicant to thirty years imprisonment for Armed Robbery, five years for Possession of a Firearm or Knife during the Commission of a Violent Crime, and thirty years for Kidnapping, with all sentences to be served concurrently.

A notice of appeal was filed and an appeal was perfected on Applicant's behalf by Appellate Defender M. Cecelia Robinson. Following briefing and argument, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Spears, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011). The Remittitur was sent on July 1, 2011.

ALLEGATIONS

In his application for post-conviction relief, Applicant alleged he was being held in custody unlawfully based on the following allegations:

1. Ineffective assistance of counsel.
 - a. "...not filing a motion to dismiss charges for lack of speedy trial within the time limitations of the Interstate Agreement on Detainers Act..."
 - b. "Failed to object to solicitor's closing argument statement stating everyone in the courtroom. Both attorneys believe James (the victim) wasn't lying even thou[gh] the applicant requested for counsel to object."
 - c. "Failed to object to co-defendants attorney closing argument statement stating she doesn't believe the victim "James" would not tell an untruth."
 - d. "Failed to request an in camera hearing regarding the reliability of the in-court identification by the victims Williams and Prezzie."
 - e. "Failed to object to curative instruction given to jury."
 - f. "Failed to object to the in chambers hearing with the jurors outside of the applicant's presence until the chambers hearing was over, depriving applicant of right to be present at all stages."
 - g. "Failed to inform applicant that one of the jurors was related to the victim and officer who testified at the trial."

- h. "Failed to contemporaneously object to in-court identification during direct testimony of 'James & Natasha.'"
- i. "Failed to object to SLED agent Donald K. Johnson testifying to non-existing evidence of a phone found near applicant when he was arrested that was never submitted as evidence."
- j. "Failed to object during victim's trial testimony regarding the appearance of the gun or its similarity to the gun supposedly found near applicant at the time of his arrest."
- k. "Failed to allow applicant to testify at the suppression hearing of the gun."
- l. "Failed to object to the solicitor's closing argument statement that applicant's defense is no defense."
- m. "Failed to object to the solicitor arguing flight in closing argument when the court did not charge flight."
- n. "Failed to move to suppress Sprint phone records."
- o. "Failed to move to suppress testimony about phone allegedly found in Charlotte near applicant during arrest."
- p. "Failed to object to the admissibility of the evidence obtained at co-defendant's house due to the fact that no witness identified any evidence obtained from co-defendant's house."
- q. "Failed to object to hearsay testimony of Tanesha which placed applicant's character in evidence."
- r. "Failed to challenge the arrest warrant as invalid."
- s. "Failed to investigate the case of evidence & documents."
- t. "Ineffective for withdrawing objection when solicitor pulled out 2 telephones out of his pocket in closing argument to show the jury."
- u. "Failed to object to agent Donald K. Johnson hearsay testimony about what Kimberly Cherry supposedly said about the gun & what the sheriff said about applicant trying to flee out a window."
- v. "Failed to object to Prezzie testifying about recovering a phone at the scene of the crime which was in evidence that he never identified in trial."
- w. "Never introduced to any of the states indictments until day of trial."
- x. "Never informed who all was testifying against applicant & who was gonna take the stand & allege that they could identify applicant until trial."
- y. "Never seen any discovery material or Brady material until October 2008, a year after the conviction, even though applicant requested it from counsel on numerous occasions prior to trial."
- z. "Failed to object to solicitors vouching for state's witnesses even thou[gh] applicant requested for him to object."
- aa. "Advised applicant not to testify even thou[gh] applicant wanted to testify. Counsel stated he would bring up applicant's prior conviction."
- bb. "The day of trial was the first time applicant was informed of the indictments of kidnapping & possession of a weapon during violent crime due to not being

- served with arrest warrants or indictments.”
- cc. “Failed to subpoena Captain Tim Stephenson prior testimony to the grand jury.”
 - dd. “Failed to move to sequester state witnesses.”
 - ee. “Failed to conduct a proper lineup upon applicant request.”
 - ff. “Failed to object to solicitors inflammatory comment during closing argument.”
 - gg. “Not informed until trial date that trial would be held with co-defendant.”
 - hh. “Failed to request further questioning of jurors Saxon, Gladden, & Buckman in regards to jury deliberations.”
 - ii. “Applicant was not informed of what all he was going to be tried for & what evidence to prepare for trial.”
 - jj. “Failed to object to prosecutor misconduct.”
 - kk. “Failed to object to juror misconduct.”
 - ll. “Failed to suppress testimony by Golden; Grove because there was not written statements or documents of the testimony given.”
 - mm. “Failed to object to solicitor misleading jury during closing argument.”
 - nn. “Failed to conduct preliminary hearing upon applicant’s request.”
 - oo. “Failed to file a Brady motion.”
 - pp. “Failed to object to the opinions of certain witnesses testimony as expert witness testimony.”
 - qq. “First day in general sessions court was applicants first day of trial.”
 - rr. “Failed to object to trial courts ruling on redacting the search warrant due to the fact that the jury saw the entire search warrant without it being redacted.”
 - ss. “Failed to call certain witnesses to the stand for the defense.”
 - tt. “Failed to render reasonably effective assistance under prevailing professional norms & the deficient performance prejudiced the applicant’s defense.”
2. Lack of subject matter jurisdiction.
 - a. “Applicant convicted under sham/faulty indictment.”
 - b. “Applicant did not receive requested preliminary hearing.”
 - c. “Grand jury indictment for possession of a weapon during commission of a violent crime is unconstitutional.”
 3. Violation of 4th, 5th, 6th, 14th Amendment.
 - a. “Illegally seized by unlawful arrest.”
 - b. “Prejudiced by double jeopardy of subsequent indictment.”
 - c. “Trial court judge was biased.”
 - d. “Right to confrontation was violated due to admittance of hearsay testimony.”
 - e. “Trial judge did not rule that James in-court identification was based off of out of court identification.”
 - f. “Trial court did not instruct the jury to disregard extraneous information disclosed to the jurors during deliberations.”
 - g. “Trial court did not ask applicant if it was his decision not to testify at trial.”
 - h. “Denied adequate appellate counsel at oral argument.”
 4. Presence of accused.

- a. "Applicant's right to confrontation at grand jury hearing was violated."
 - b. "Applicant was not allowed to be present when evidence was being submitted against him."
 - c. "Applicant had a right to testify at grand jury."
 - d. "Grand jury evidence was based on hearsay evidence when sole witness was the police officer."
 - e. "Grand jury violates due process when proceedings had not been recorded."
 - f. "Grand jury proceedings unconstitutional in duties."
5. Prosecutor misconduct.
- a. "Vouching for state witnesses."
 - b. "Misleading jury during closing argument."
 - c. "Inflammatory statements."
 - d. "Commenting on applicant's right to remain silent shifting the burden of proof to applicant."
6. Ineffective assistance of appellate counsel.
- a. "Failed to organize the brief on direct appeal which resulted in a confusing presentation to the appellate court."
 - b. "Failed to file a reply brief to the state's brief."
 - c. "Failed to cite legal authority in support of argument that was highly meritorious."
 - d. "Failed to argue specific prejudices to the defendant in the context of the assigned errors in light of the evidence & events that occurred at trial."
 - e. "The omission of certain portions of the events at trial from the record on appeal, in particular, jury voir dire."
 - f. "Failed to submit a record & brief adequate to give the court a full understanding of the significance of the errors assigned."
 - g. "Failed to argue in brief trial court erred in allowing Elliot Grove to vouch for the authority of the Sprint phone records when he was not a custodian of records."
7. Juror misconduct.
- a. "Juror Gladden was exposed to extrinsic information about other bad acts by the applicant before deliberations & he never informed the courts until he brought it to the attention of the remaining jurors during deliberations."
 - b. "Juror Saxon disobeyed the courts instruction along with the remaining jurors by deliberating while all jurors weren't present."

This Court finds that the allegations listed in 2, 3, 4, 5, and 7 are direct appeal issues that cannot be raised in a post-conviction relief action, and therefore, this Court is summarily dismissing these allegations. S.C. Code Ann. § 17-27-20(b) (1985); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974) (Post-conviction relief is not a substitute for a direct appeal); Ashley v. State,

260 S.C. 436, 196 S.E.2d 501 (1973) (A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal.) Below, this Court will address the remaining allegations based on how the issues were presented to this Court during the evidentiary hearing.

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. This Court finds that Counsel's testimony is credible and should be afforded great weight; conversely, this Court finds that Applicant's testimony lacks credibility. 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).

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; 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.

The proper measure of performance is whether an 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. The 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.

After careful review based on the standard discussed above, including a review of the testimony of the witnesses presented at the evidentiary hearing, this Court denies this application on the basis that Counsel's performance did not fall below the standard required and there was no resulting prejudice to Applicant from these alleged deficiencies. Below are the specific findings as to Applicant's allegations of ineffective assistance of counsel:

Allegation that counsel was ineffective for failing to file a motion to dismiss the charges for lack of a speedy trial within the Interstate Agreement on Detainers Act

Applicant alleges that Counsel was ineffective for failing to move for dismissal for lack of a speedy trial. See Allegation 1(a). Specifically, Applicant asserts that because he was arrested in North Carolina, the Interstate Agreement on Detainers (hereafter "IAD") applied and Counsel should have filed a motion for a speedy trial under IAD. Counsel testified that Applicant was indicted for two of his three charges during the August 27, 2007 term of the Calhoun County

Grand Jury and tried on October 1, 2007. Counsel testified that the thirty-six day time span between the final indictments and the trial was incredibly speedy and such a motion was not necessary.

The Interstate Agreement on Detainers, codified as S.C. Code Ann. § 17-11-10 (1976), encourages "the expeditious and orderly disposition" of charges that an out-of-state inmate faces within another jurisdiction. Under Article III of the IAD, which is applicable when a prisoner initiates the IAD request for disposition, the State has 180 days to dispose of any related charges. S.C. Code Ann. § 17-11-10 Art. III (a). However, under Article IV of the IAD, applicable when the State is the invoking entity, the State has 120 days to bring the prisoner to trial. S.C. Code Ann. § 17-11-10 Art.

This Court finds that such a motion was not necessary, as Applicant was tried expeditiously without any such motion being filed. Counsel's performance in not filing a motion for a speedy trial or a motion pursuant to the IAD was reasonable, especially in light of the speed in which he was brought to trial. Therefore, Counsel's performance was not deficient and this allegation must be denied and dismissed with prejudice. Furthermore, this Court finds that Applicant cannot establish any resulting prejudice from Counsel's failure to file such motions. As shown above, once invoked, the IAD requires a disposition of charges within either 120 or 180 days. In the present case, Applicant's trial began within thirty-six days of his final indictment. Had Counsel made such a motion, the result would have been the same. Therefore, this Court finds that this allegation is without merit and must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to object to closing argument of co-defendant regarding the victim telling the truth

Applicant alleges that Counsel was ineffective for failing to object to the closing argument made by co-defendant's counsel regarding one of the victims telling the truth. See Allegation 1(b),(c); Tr. p. 982 lines 6-7. Counsel testified that during the closing argument, he did not find anything to be objectionable. Additionally, Counsel testified that he has since reviewed the closing argument, including the portion specific to this allegation. Counsel testified that he generally tries to avoid objecting during closing arguments unless the comment is egregious and harmful to his client, as otherwise it draws attention to the comment and can have a negative impact with juries. This Court has reviewed the portion in question and finds that Counsel's performance was reasonable according to professional standards and that he was not deficient in this regard. Additionally, this Court finds that Applicant has failed to establish the requisite prejudice required for relief, as there is no reasonable likelihood that the result of the proceeding would have been different – i.e., that the jury would have acquitted Applicant – but for Counsel's alleged failure. Specifically, this Court notes that there is overwhelming evidence of Applicant's guilt, as highlighted in the Court of Appeals decision. Spears, supra. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), *cert. denied*, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); *cf.* Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent

failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt). Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to request an in-camera hearing regarding the in-court identification of victims Williams and Prezzie

Applicant alleges that Counsel was ineffective for failing to request an in-camera hearing regarding the in-court identifications made by two of the victims, Cleveland Williams and Iskier Prezzie. See Allegation 1(d). The record reveals that Neil v. Biggers hearings were held on the reliability of the identification from two witnesses, Natasha Rivers and J.K. Bourgeois. Rivers identified both Applicant and his co-defendant from "six-pack" lineups created by law enforcement. Bourgeois identified both from various court proceedings. The trial court allowed both identifications following the pre-trial hearings. Counsel testified, and the record reveals, that pre-trial hearings on the identification of the other witnesses, including Williams and Prezzie, were not necessary, as they could not make identifications of the suspects and were not shown photo line-ups. The record reveals that both Williams and Prezzie testified accordingly and did not make in-court identifications of Applicant, but rather, gave general physical descriptions of the suspect. This Court finds that Counsel's performance was reasonable according to professional standards and that Counsel's performance was not deficient.

Additionally, this Court finds that Applicant has failed to establish the requisite prejudice required for relief, as there is no reasonable likelihood that the result of the proceeding would have been different – i.e., that the jury would have acquitted Applicant – but for Counsel's

alleged failure. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to contemporaneously object to the in-court identification of James Bourgeois and Natasha Rivers

Applicant alleges that Counsel was ineffective for failing to contemporaneously object to the in-court identifications of Bourgeois and Rivers. See Allegation 1(h). As discussed above, the record reveals that Neil v. Biggers hearings were held on both Rivers and Bourgeois' identifications, after which the trial court ruled both were admissible. This Court finds that Applicant is unable to establish any requisite prejudice from this allegation, as there is no reasonable likelihood that the proceeding would have been different but for Counsel's error. As noted in the Court of Appeals decision, there is no substantial likelihood of misidentification based on the factors surrounding the victims' viewing of Applicant. Spears, supra. Had Counsel contemporaneously objected and the issues were preserved for appellate review, the result would still have been the same – the convictions and sentence would have been affirmed. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to object during the victim's trial testimony regarding the appearance of the gun or its similarity to the gun found near Applicant at the time of his arrest

Applicant alleges that Counsel was ineffective for failing to object to the victim's trial testimony regarding similarities between the gun found near him during his arrest and the suspect's gun. See Allegation 1(j). The record shows that Counsel made a pre-trial motion to suppress the gun, which was denied. Counsel then made a contemporaneous objection to the admission of the gun, which was also denied. Counsel did not object to the testimony regarding

similarities between gun found and the suspect's gun; however, as noted in the Court of Appeals decision, Counsel did "extensively" cross-examine Bourgeois regarding the discrepancy of his description and the actual gun recovered during Applicant's arrest. This Court finds that Applicant cannot establish that he was prejudiced by Counsel's performance. While Counsel did not contemporaneously object to the testimony in question, he was able to vigorously attack the witnesses' credibility regarding to the weapon. This Court is convinced that the result of the proceeding would not have been different if Counsel had objected, as the testimony would have been allowed at trial and affirmed on appeal. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to allow him to testify at the pre-trial suppression hearing regarding the gun found near him during his arrest

Applicant alleges that Counsel rendered ineffective assistance by failing to allow him to testify at the pre-trial suppression hearing to determine the admissibility of the weapon found near him during his arrest. See Allegation 1(k). Applicant testified that he wanted to testify at this pre-trial hearing to explain that he did not possess the gun when arrested, but that Counsel did not allow him. Counsel testified that he explained to Applicant that he could testify at any point, both during the trial and pre-trial, and that it was Applicant's own decision not to testify. This Court finds that this allegation must be denied and dismissed with prejudice. Counsel's credible testimony reveals that he advised Applicant that he could testify and Applicant made the decision not to take the stand. This Court finds that Counsel's performance was reasonable according to professional standards and was not deficient. Furthermore, this Court finds that Applicant cannot establish any resulting prejudice, as the desired information regarding

Applicant's location in reference to the weapon was elicited during the cross-examination of other witnesses. Furthermore, this Court finds that the result of the proceeding would have been the same if Applicant had testified. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to object to the admissibility of evidence obtained at co-defendant's house

Applicant alleges that Counsel was ineffective for failing to object to the admissibility of the evidence found at his co-defendant's house "due to the fact that no witness identified any evidence obtained from the co-defendant's house." See Allegation 1(p). The evidence obtained from the residence where the co-defendant was located included boots and pants similar to the suspect's clothing, several packs of Newport cigarettes, \$260 in twenty dollar bills, and a "Coinstar" receipt showing that \$3000 in coins had been exchanged shortly after the robbery, all matching the items reported stolen during the robbery. Applicant and his co-defendant both moved to suppress these items based on a lack of consent and probable cause. Following a hearing in which the responding officers who entered the residence and executed the eventual search warrant, the court ruled that the items were admissible. Applicant is now contending that Counsel was ineffective for failing to object to these items based on a lack of witness testimony identifying the objects found. This Court finds that this allegation is without merit and must be denied and dismissed with prejudice. The record reveals that Christopher Golden, formerly Captain of Calhoun County Sheriff's Department, testified regarding his entry into the co-defendant's residence and described the items seized. Therefore, there was no need for Counsel to object based on this ground. This Court finds that Counsel's performance was reasonable, as

there was no valid objection to be made based on this allegation. Additionally, as such testimony was elicited, there can be no resulting prejudice. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to investigate the case

Applicant alleges that Counsel was ineffective for failing to investigate the case fully. See Allegation 1(s). Specifically, Applicant alleges that Counsel “failed to investigate the case of evidence and documents.” This allegation is sharply refuted by Counsel, who testified that he employed a private investigator who fully investigated the case and met with Applicant several times. Counsel elaborated that he hired private investigator Amos Jones, whom he specifically selected for this case due to his highly respected reputation for thorough and skilled work. This Court finds that Counsel’s credible testimony reveals that an exhaustive investigation was completed by a competent investigator prior to Applicant’s trial. Furthermore, Applicant failed to present any evidence or testimony to show what any additional investigation might have yielded or how it could have been beneficial to Applicant’s case. “Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.” Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). Therefore, this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to object to the testimony of Prezzie regarding a phone that was never identified at trial

Applicant alleges that Counsel was ineffective for failing to object to the testimony of one of the victims, Iskier Prezzie, regarding a cell phone he recovered from one of the suspects

during the robbery. See Allegation 1(v). During Mr. Prezzie's testimony, he describes how he recovered and concealed a cell phone dropped by one of the assailants during the robbery. See Tr. p. 681-85. The cell phone, marked for identification only at that time, was not moved into evidence until the testimony of Tim Stephenson, who recovered the phone at the incident location and took it into evidence. See State's Ex. No. 14 from trial. This Court finds that this allegation must be denied and dismissed with prejudice. Testimony was presented from two different witnesses, Prezzie and Stephenson, who both described how they came into contact with the phone. This Court finds that the phone was properly admitted into evidence, and therefore, any challenge based on this allegation would not have been successful. Furthermore, this Court finds that there is no likelihood that the result of the proceeding would have been different based on overwhelming evidence of guilt. See Spears, supra; Franklin, supra; Geter, supra. Therefore, Applicant cannot establish any deficiency or resulting prejudice. This allegation is denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to suppress the testimony pertaining to the cell phone records

Applicant alleges that Counsel was ineffective for failing to object to the testimony pertaining to the cell phone records for the phone found at the incident location. See Allegation 1(II). However, the record reveals that Counsel did object to the cell phone records being admitted into evidence, and any testimony pertaining to those records, which was denied by the trial court once proper authentication was established. Therefore, this Court finds that Counsel's performance was not deficient in regards to this allegation. Furthermore, this Court finds that Applicant cannot establish prejudice because there is no likelihood that the result of the

proceeding would have been different – i.e., Applicant would have been acquitted – absent the cell phone records and accompanying testimony. The records and testimony were not crucial to the State’s case and there was much more overwhelming evidence of Applicant’s guilt, as highlighted in the Court of Appeals decision. Spears, supra. Franklin, supra; Geter, supra. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to object to the solicitor’s closing argument

Applicant alleges that Counsel was ineffective for failing to object to solicitor’s closing arguments that mislead the jury. See Allegation 1(mm). Counsel testified that he did not find any portion of the State’s closing argument to be objectionable. He elaborated that parties are given leeway during closing arguments and are allowed to comment on reasonable inferences from facts in the record. He testified that if the solicitor’s argument had been objectionable, he would have posed the necessary objection.

“A solicitor’s closing argument must be carefully tailored so as not to appeal to the persona biases of the jury.” Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). “The argument must not be calculated to arouse the jurors’ passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom.” Id. at 609–10, 602 S.E.2d at 744. “On appeal, the appellate court will view the alleged impropriety of the solicitor’s argument in the context of the entire record, including whether the trial judge’s instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant’s guilt.” Brown v. State, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009) (quoting Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). “Improper

comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.” Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). “The relevant question is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Id.; see State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) (“A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.”).

Based on this standard, this Court has reviewed the State’s closing argument and concludes that Counsel’s performance was reasonable, as the closing arguments were not tailored to appeal to the personal biases of the jury and stayed within the record and reasonable inferences. Additionally, this Court finds that Applicant cannot establish requisite prejudice stemming from this allegation, as the closing arguments do not “so infect[] the trial with unfairness.” Therefore, this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to request a preliminary hearing

Applicant alleges that Counsel was ineffective for failing to request a preliminary hearing on his behalf. See Allegation 1(nn). Counsel testified that Applicant never requested a preliminary hearing before he was indicted by the Calhoun County Grand Jury and that he did not move for a preliminary hearing because the trial was fast approaching and he was devoting his time and resources to preparing for trial. Counsel also testified that he did not think a preliminary hearing was necessary, as he knew what evidence was going to be introduced against Applicant and did not think that a preliminary hearing would have resulted in the dismissal of the

charges. Additionally, he testified that Applicant was indicted fairly quickly after the incident and then tried quickly thereafter.

Every criminal defendant is entitled to notice of his right to a preliminary hearing "to determine whether sufficient evidence exists to warrant [his] detention and trial." Rule 2(a), SCRCrimP. If a defendant makes a timely request for a hearing, one should be held within ten days. Rule 2(a)-(b), SCRCrimP. However, the hearing "shall not be held. . . if the defendant is indicted by a grand jury . . . before the preliminary hearing is held." Rule 2(b), SCRCrimP; see also State v. Hawkins, 310 S.C. 50, 54-55, 425 S.E.2d 50, 53 (Ct.App.1992) (holding trial court did not err in refusing to quash defendant's indictments because he did not receive a requested preliminary hearing because he was indicted before a preliminary hearing was held). Furthermore, a defendant has no constitutional right to a preliminary hearing. State v. Keenan, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982). Thus, although the Applicant could have timely requested a preliminary hearing, his right to have the hearing ended with the grand jury's indictment.

This Court finds that Counsel's performance was reasonable according to professional standards, as his credible testimony reveals that Applicant never requested a hearing and that Counsel did not think it was necessary. Furthermore, this Court finds that Applicant cannot establish any resulting prejudice, as a preliminary hearing would not have resulted in dismissal of the charges, and therefore, there is no likelihood that the result of the proceeding would have been different. This Court finds that this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to call certain witnesses

Applicant alleges that Counsel was ineffective for failing to call certain witnesses to the stand on his behalf. See Allegation 1(ss). At the evidentiary hearing, Applicant testified that the witnesses he wanted Counsel to call were an inmate that was transferred from North Carolina with him and a family member, Tonya Johnson. He testified that Johnson was subpoenaed but did not testify during his trial. He acknowledged that neither was present at the evidentiary hearing.

An applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the post-conviction relief hearing or otherwise offer testimony within the rules of evidence. Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)). Therefore, because Applicant failed to offer any testimony or other evidence regarding these two witnesses, this allegation must be denied and dismissed with prejudice.

Ineffective Assistance of Appellate Counsel

Applicant alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments

and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy..." Jones, 463 U.S. at 754.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, a court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Therefore, to succeed on a claim of ineffective assistance of appellate counsel, Applicant must establish that appellate counsel's performance was deficient and that he was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, an applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Additionally, there is no right to effective assistance of counsel when seeking discretionary review. Douglas v. State, 369 S.C. 213, 631 S.E.2d 542.

Applicant alleges that he received ineffective assistance of appellate counsel. Specifically, Applicant alleges that appellate counsel failed to include all pertinent parts of the transcript in the record, failed to properly organize the brief, failed to brief all meritorious issues, failed to cite appropriate legal authority, failed to file a reply to the State's brief, and failed to petition the South Carolina Supreme Court for certiorari. One of Applicant's appellate defenders, M. Cecelia Robinson, Esquire, testified that she handled Applicant's appeal until she left the office shortly after filing Applicant's brief. She testified that she was at the Office of Appellate Defense for three years, but also had previous appellate experience. She testified that she would have petitioned for certiorari to the South Carolina Supreme Court, but was no longer

handling Applicant's case at the appropriate time. She also testified that she neglected to include appropriate authority for one issue raised in Applicant's appeal. She testified that she explained to Applicant that she could not file a reply brief to State's brief, as well as explained harmless versus reversible error and the small likelihood of reversal on appeal.

This Court finds that this allegation must be denied and dismissed, as Applicant cannot establish that he would have been successful on appeal absent counsel's allegedly unprofessional errors. Specifically, this Court notes that there was overwhelming evidence of Applicant's guilt, which was highlighted by the Court of Appeals in its opinion, and that there is no reasonable likelihood that Applicant would have been successful on appeal. Spears, supra. Therefore, this allegation must be denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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.

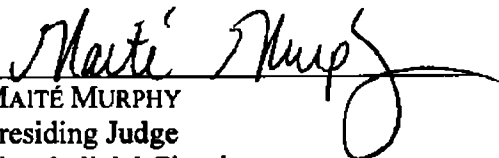
This Court notes that Applicant must file and serve a Notice of Appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an 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 an applicant's

behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

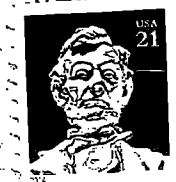
IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 9 day of Sept., 2014.


MAITÉ MURPHY
Presiding Judge
First Judicial Circuit

St. Paul, South Carolina.



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