

The Supreme Court of South Carolina

Mark A. Brown Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable James R. Barber
Bamberg County
Trial Court Case No. 2010-CP-05-00061

ORDER

For good cause shown, the request for an extension until May 4, 2012 to serve and file the Petition for Writ of Certiorari and Appendix in this matter is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what measures are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Arenda J. Shealy*
Clerk

Columbia, South Carolina *Chief Deputy*

April 5, 2012

cc: Appellate Defender LaNelle C. DuRant
Assistant Attorney General Mary S. Williams

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Bamberg County

James R. Barber, III., Circuit Court Judge

MARK BROWN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR WRIT OF
CERTIORARI AND APPENDIX

Counsel for Mark Brown respectfully requests a **final extension of thirty (30) days until May 4, 2012** in which to file the petition for writ of certiorari and appendix in this case. This motion is made pursuant to the Order of the South Carolina Supreme Court dated March 18, 2009. This is a final request for an extension. In support of this request, counsel shows:

1. The petition for writ of certiorari and appendix is due to be served and filed with the Court today.
2. Counsel for Mr. Brown respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage his caseload, counsel hopes that no further extension requests will be required.

RECEIVED
APR - 4 2012
S.C. Supreme Court

(3)

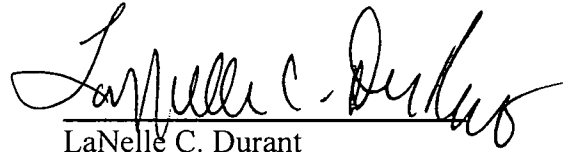
3. Counsel is preparing to file the brief of petitioner in the case of State v. Jeffery Evans, the petition for writ of certiorari and appendix in the case of Janice Clasby v. State and the petition for rehearing in the case of State v. Joel Robinson today, April 4, 2012. On March 28, 2012, counsel filed the petition for writ of certiorari, the Johnson petition for writ of certiorari pursuant to Austin v. State and appendix in the case of Donald Hulon v. State and the initial brief of appellant and designation of matter in the case of State v. Eric Spratt. On March 22, 2012, counsel filed the petition for rehearing in the case of State v. Shane Epting. On March 19, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Clarence Logan and the petition for writ of certiorari, the Johnson petition for writ of certiorari pursuant to Austin v. State and appendix in the case of Jerry Galbreath v. State. On March 14, 2012, counsel had an oral argument in the case of State v. Cameron Hammonds in the Court of Appeals. On March 13, 2012, counsel had an oral argument in the case of State v. Bennie Golston in the Court of Appeals. On March 8, 2012, counsel filed the petition for rehearing in the cases of State v. Andre Massey and State v. Jake Wilson. On March 7, 2012, counsel had an oral argument in the case of In the Matter of the Care and Treatment of Bobby Manigo in this Court. On March 6, 2012, counsel had an oral argument in the case of State v. Patrick Herb in this Court.

4. Counsel makes this request in good faith and not for purpose of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

5. Counsel for the Attorney General's office consents to this request as shown by signature below.

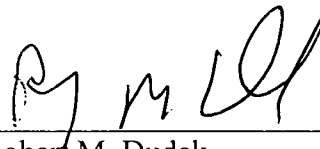
WHEREFORE, the undersigned counsel would respectfully request a **final thirty (30) day extension until May 4, 2012**, in which to file the petition for writ of certiorari and appendix in this case based upon the above exigent circumstances.

Respectfully submitted,



LaNelle C. Durant
Appellate Defender

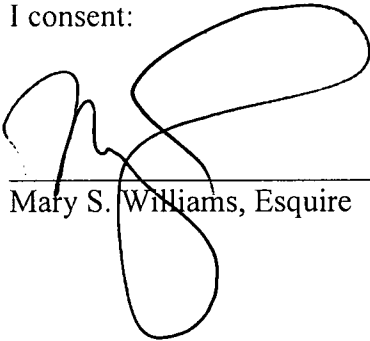
Attorney for Petitioner



Robert M. Dudek
Chief Appellate Defender

This 4th day of April, 2012

I consent:



Mary S. Williams, Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Bamberg County

James R. Barber, III., Circuit Court Judge

RECEIVED

MAR 5 2012

S.C. Supreme Court

MARK BROWN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR WRIT OF
CERTIORARI AND APPENDIX

(2)

Counsel for Mark Brown respectfully requests an extension of thirty (30) days in which to file the petition for writ of certiorari and appendix in this case. This motion is made pursuant to the Order of the South Carolina Supreme Court dated March 18, 2009. This is a second request for an extension. In support of this request, counsel shows:

1. The petition for writ of certiorari and appendix is due to be served and filed with the Court today.
2. Counsel for Mr. Brown respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage his caseload, counsel hopes that no further extension requests will be required.

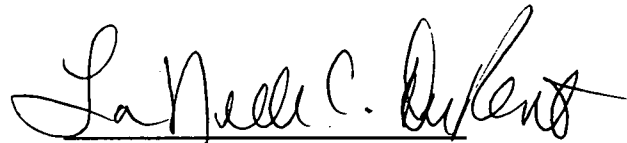
3. Counsel is preparing for oral arguments in the case of State v. Patrick Herb in this Court tomorrow, March 6, 2012 and in the case of In the Matter of the Care and Treatment of Bobby Manigo in this Court Wednesday, March 7, 2012. On February 23, 2012, counsel filed the petition for rehearing in the case of State v. James Nash. On February 21, 2012, counsel filed the initial reply brief of appellant in the case of State v. Brian Phillips and the return to petition for rehearing in the case of In the Matter of the Care and Treatment of Orlando Williams. On February 15, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Daniel Rogers. On February 14, 2012, counsel had an oral argument in the case of State v. Jaymes Wood in the Court of Appeals and filed the initial brief of appellant and designation of matter in the case of State v. Alonza Dennis. On February 13, 2012, counsel had an oral argument in the case of State v. Kevin Epting in the Court of Appeals. On February 10, 2012, counsel filed the petition for writ of certiorari and appendix in the case of Mario Hunter v. State and the return to petition for writ of certiorari to the Court of Appeals in the case of State v. Phillip Sawyer. On January 27, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Anthony Tilmon. On January 25, 2012, counsel filed the return to petition for writ of certiorari to the Court of Appeals in the case of In the Matter of the Care and Treatment of Vincent Way and the petition for writ of certiorari and appendix in the case of Andre Methelus v. State. On January 19, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Shawn Reaves and the petition for rehearing in the case of In the Matter of the Care and Treatment of Gilbert Gonzalez. On January 17, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Bobby Barton. On January 3, 2012, counsel filed the petition for writ of certiorari, the brief of appellant pursuant to White v. State and appendix in the case of Clarence Robinson v. State.

4. Counsel makes this request in good faith and not for purpose of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

5. Counsel for the Attorney General's office has been informed of this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension, in which to file the petition for writ of certiorari and appendix in this case based upon the above exigent circumstances.

Respectfully submitted,

A handwritten signature in black ink, reading "LaNelle C. Durant". The signature is written in a cursive style with a horizontal line underneath the name.

LaNelle C. Durant
Appellate Defender

Attorney for Petitioner

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Bamberg County

James R. Barber, III., Circuit Court Judge

MARK BROWN,

PETITIONER,

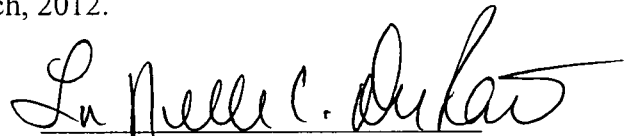
v.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

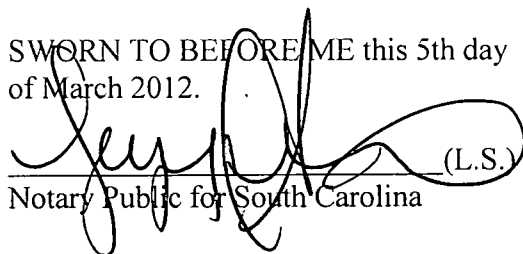
I certify that a true copy of the motion for an extension of time in which to file the petition for writ of certiorari and appendix in the above case has been served upon Mary S. Williams, Esquire, this 5th day of March, 2012.



LaNelle C. Durant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day
of March 2012.



(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

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

February 3, 2012

RECEIVED

FEB - 3 2012

S.C. Supreme Court

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

Re: Mark Brown v. The State

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix in this case are due to be served and filed with the Court February 3, 2012. However, because of my heavy workload at this time, I am requesting an extension for 30 days, in which to serve and file the petition.

By copy of this letter, I am informing Mary S. Williams, of the Attorney General's Office, of my request.

Sincerely,

LaNelle C. Durant
Appellate Defender

LCD/pds

cc: Mary S. Williams, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

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

December 5, 2011

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

RECEIVED

DEC 5 2011

S.C. Supreme Court

Dear Mr. Shearouse:

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

Mark A. Brown, Jr. v. State of South Carolina

12/5/2011

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

Thank you for your assistance in this matter.

Sincerely,

Lorlene French
Legal Services Coordinator



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

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

October 25, 2011

RECEIVED

OCT 25 2011

S.C. Supreme Court

Ms. Cheri L. Young
Circuit Court Reporter
P O Box 1154
Aiken, SC 29802

Dear Ms. Young:

Please provide us with the following transcript:

Mark A. Brown, Jr. v. State of South Carolina Case #: 10-CP-05-00061.

County: Bamberg Date of Trial: July 11, 2011

Presiding Judge: James R. Barber, III

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,


Loriene French
Legal Services Coordinator

cc: S.C. Supreme Court
Attorney General's Office



Wilson, **L**uginbill & **K**irkland, LLC

J. Christopher Wilson
Daniel W. Luginbill
Kent C. Kirkland
D. Kelsey Y. Kirkland

Reply to:
Post Office Box 1122
Barnwell, SC 29812

September 19, 2011

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

RE: Mark A. Brown, Jr. #334066 vs. State of South Carolina
Case No.: 2010-CP-05-0061

Dear Mr. Shearouse:

Enclosed for filing is an original Notice of Appeal in the above referenced case. Also included are the following:

- (1) Proof of Service of the Notice of Appeal on the Respondent; and
- (2) Order of Dismissal from Mr. Brown's PCR (Exhibit 1).

Mr. Brown is an indigent party, and Appellate Defense has been notified and will assume responsibility for his case.

Respectfully Submitted,

D. Kelsey Y. Kirkland

Enclosures

cc: Mark A. Brown, Jr., 334066

RECEIVED
SEP 22 2011
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 2010-CP-05-0061

Mark A. Brown, Jr.Appellant,

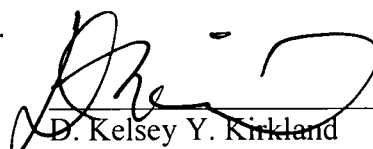
v.

State of South Carolina.....Respondent.

NOTICE OF APPEAL

Appellant Mark A. Brown, Jr. appeals the Order of the Honorable James R. Barber, III, dated August 2, 2011, which dismissed Appellant's Application for Post-Conviction Relief. Appellant received written notice of the entry of the Order on September 8, 2011, attached as Exhibit 1.

September 19, 2011



D. Kelsey Y. Kirkland
Wilson, Luginbill & Kirkland, LLC
95 Allen Street Post Office Box 1122
Barnwell, South Carolina 29812
(803) 259-4455
Kelsey@wlklawfirm.com

Other Counsel of Record:

Robert D. Corney, Esq.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549

RECEIVED

SEP 22 2011

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas
James R. Barber, III, Circuit Court Judge

Case No. 2010-CP-05-0061

Mark A. Brown, Jr.....Appellant,

v.

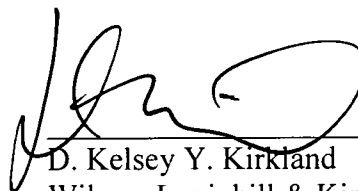
State of South Carolina.....Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Robert D. Corney, Esquire, by depositing a copy of the same in the United States Mail, postage prepaid, on September 19, 2011, addressed to the attorney of record at the address indicated below:

Robert D. Corney, Esq.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549

September 19, 2011



D. Kelsey Y. Kirkland
Wilson, Luginbill & Kirkland, LLC
95 Allen Street Post Office Box 1122
Barnwell, South Carolina 29812
(803) 259-4455
Kelsey@wlklawfirm.com

STATE OF SOUTH CAROLINA

COUNTY OF BAMBERG

Mark A. Brown, Jr., 334066
 Plaintiff

v.

State Of South Carolina
 Defendant.

FILED
BAMBERG COUNTY

2011 AUG 31 AM 9:20

JAMES B. WHER
CLERK OF COURT
BAMBERG, SC

IN THE COURT OF COMMON PLEAS

CASE NO.
2010-CP-05-0061

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Kelsey Kirkland, Bar No.
Address:
Post Office Box 1122 Barnwell SC 29812
phone: fax:
e-mail: other:

Defendant's Attorney:
Robert Corney, Bar No.
Address:
Post Office Box 11549 Columbia SC 29211-1549
phone: (803) 734-3737 fax: (803) 734-4113
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

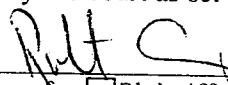
Nature of Motion:

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.


Signature of Attorney for Plaintiff / Defendant

July 27, 2011
Date submitted

SECTION III: Motion Fee

- PAID - AMOUNT:
- EXEMPT:
 - Rule to Show Cause in Child or Spousal Support (check reason)
 - 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: _____

STATE OF SOUTH CAROLINA
COUNTY OF BAMBERG

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

2010-CP-05-0061

FILED
BAMBERG COUNTY
2011 MAR 27 AM 9:21
JAMES B. HIERS
CLERK OF COURT
BAMBERG, SC

Mark A. Brown, Jr., # 334066,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 12, 2010. The Respondent made its Return on August 9, 2010. An evidentiary hearing into the matter was convened on Monday, July 11, 2011, at the Aiken County Courthouse. The Applicant was present at the hearing and was represented by Kelsey Kirkland, Esquire. The Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying was Applicant's trial counsel, Grant Gibbons, Esquire ("counsel"). This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Bamberg County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Bamberg County Clerk of Court. On April 8, 2009, Applicant waived presentment to the grand jury and pled guilty to Murder (2009-GS-05-0144) before the Honorable Doyet A. Early, III. De Grant

Gibbons, Esquire, represented the Applicant. Judge Early sentenced Applicant to the recommended term of forty (40) years. The Applicant did not appeal his conviction or sentence.

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

1. Ineffective assistance of counsel for failure to investigate.
2. Involuntary Guilty Plea.
3. Newly discovered evidence.

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).

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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (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). 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.

With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be

allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

Ineffective Assistance of Counsel

At the PCR hearing, Applicant alleged counsel was ineffective for failing to object to the entry of his plea because there was a preliminary hearing pending at the time he entered the plea. Our state's Supreme Court has held "[a] defendant's right to request a preliminary hearing is provided solely by state statute. It is not required by either the State or Federal Constitution..." State v. McClure, 277 S.C. 432, 434, 289 S.E.2d 158, 160 (S.C. 1982). Further, in Bonnette v. State, 277 S.C. 17, 282 S.E.2d 597 (S.C. 1981), the Court held that acts by an accused inconsistent with the continued assertion of his right to a preliminary hearing, such as entering a plea, may constitute waiver of his right to the preliminary hearing.

Counsel testified that during his meetings with Applicant, they did discuss the pending preliminary hearing and whether to pursue it, but in the end, Applicant and counsel agreed there was little to be gained through the preliminary hearing and it would be more detrimental to Applicant's case to have the incident replayed in the news. Additionally, by waiving presentment of the charges to the grand jury and entering this guilty plea, Applicant certainly acted inconsistently with the conduct expected from someone continuing to assert his desire for a preliminary hearing. Therefore, I find Applicant waived his right to pursue the pending preliminary hearing. Additionally, the fact that the preliminary hearing was pending at the time Applicant entered his plea does not render counsel's performance defective in any way. Therefore, Applicant has failed to prove by a preponderance of the evidence that counsel was ineffective in this regard.

At the PCR hearing, Applicant also alleged counsel was ineffective because counsel allegedly told Applicant he did not have a chance of being acquitted at trial and therefore Applicant believed counsel would not properly work his case for trial, which is why he entered this plea. Further, Applicant alleged counsel failed to have a mental evaluation done on Applicant even after Applicant's parents requested one.

Applicant testified that although he told the plea judge during the plea hearing that he was satisfied with counsel's representation and believed counsel had enough time to properly investigate his case, he only said so to take advantage of the plea deal to avoid a life without parole sentence. Applicant additionally alleged counsel coached him into agreeing with everything said at the plea hearing so he could enter this plea. Finally, Applicant went on to allege that he is not guilty of the crime he pled to but conceded that he did tell the plea judge he was guilty under oath at the plea hearing.

Counsel testified he met with Applicant almost immediately after being appointed to represent him. Counsel went on to say that during the initial meeting, he learned that Applicant had already spoken with Police and given a statement; additionally, Applicant admitted his guilt to counsel saying during the robbery of the store, he believed the victim was reaching for a gun so he shot him in the back. Counsel testified that after receiving and reviewing the discovery, he had an investigator speak with the witnesses involved, each of which confirmed Applicant's guilt and the facts as set forth in Applicant's statement. Counsel went on to testify that he met with Applicant a total of seven or eight times, plus two or three more times with the investigator present, and based on those meetings and a review of the evidence, he believed there was an overwhelming case against Applicant. Counsel stated Applicant was settled on entering a plea rather than going to trial, and asked counsel to negotiate the best deal possible for him. Counsel

entered into plea negotiations with the state, who initially only offered a life sentence, but ultimately agreed to a forty year sentence. Counsel stated he discussed all plea offers with Applicant. Finally, counsel testified he did not detect any mental health issues in his discussions with Applicant, but after speaking with Applicant's family did review an evaluation that had been done on Applicant which showed only Attention Deficit Hyperactivity Disorder ("ADHD").

Based on the testimony given at the hearing and a review of the records involved, I find no deficiency in Counsel's representation of Applicant. Counsel advised Applicant of all relevant issues regarding the charges he was facing, including his constitutional rights, the indictments, the elements of the offenses, the potential sentences he was facing, and the possibility of pursuing a preliminary hearing. Additionally, counsel reviewed all available discovery and evidence with Applicant after thorough investigation, and gave Applicant the information and advice to make an intelligent decision for himself on whether to enter this plea. Counsel sufficiently investigated Applicant's mental competency and mental health history to determine that Applicant did not suffer from any mental issues that would affect these charges or this plea. Based on the facts above, I find that Applicant did not prove by a preponderance of the evidence that counsel was ineffective. Further, Applicant has failed to prove prejudice from any alleged deficiency in counsel's representation.

Finally, I find that Applicant's guilty plea was entered knowingly and voluntarily after being fully and adequately advised by competent counsel acting within the range of competence demanded of attorneys in criminal cases.

As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed in its entirety.

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.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

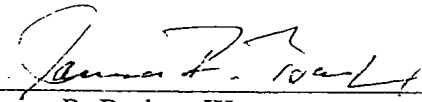
This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a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

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

IT IS THEREFORE ORDERED:

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 2 day of August, 2011.



James R. Barber, III
Presiding Judge
Second Judicial Circuit

Columbia, South Carolina.

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

MARK A. BROWN, JR., 334066,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

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

**Kelsey Kirkland, Esquire
Wilson, Luginbill and Kirkland, LLC
Post Office Box 1122
Barnwell, SC 29812**

This 7th day of September, 2011.

Lauren Meara
Lauren Meara, Legal Assistant
For Respondent

SWORN to before me this 7th day of September, 2011.

[Signature]
Notary Public for South Carolina

My Commission Expires: 9/28/2014

Wilson, Luginbill & Kirkland, LLC
Post Office Box 1122
Barnwell, South Carolina 29812

*Mark A.
Brown*



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

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