

THE

**GIESE**

LAW FIRM, LLC

PCR

December 21, 2015

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

**RECEIVED**

DEC 29 2015

**SC SUPREME COURT**

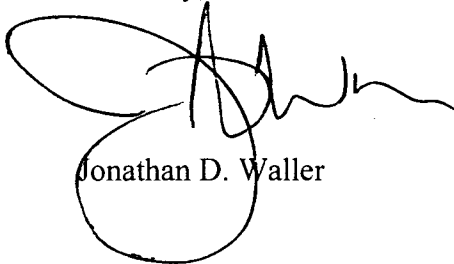
Re: Alvin L. Clark vs. State of South Carolina  
C/A No: 2013-CP-38-00308

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Clark in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-708-6767.

Sincerely,



Jonathan D. Waller

Cc: J. Clayton Mitchell, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM ORANGEBURG COUNTY  
Maité Murphy, Circuit Court Judge

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2013-CP-38-00308

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Alvin L. Clark, #285179,

Appellant,

v.

STATE OF SOUTH CAROLINA,

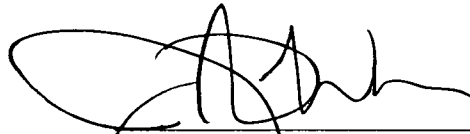
Respondent.

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NOTICE OF APPEAL

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Alvin L. Clark, #285179, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed August 26, 2015 and served on counsel by letter dated December 11, 2015, issued by the Honorable Maité Murphy, Presiding Judge, First Judicial Circuit.



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Jonathan D. Waller

Giese Law Firm  
SC Bar No.: 76290  
1315 Blanding Street  
Columbia, SC 29201  
803-708-6767 (phone)  
803-708-6769 (fax)  
jwaller@thegieselawfirm.com  
ATTORNEY FOR PETITIONER

This 22 day of December, 2015.

Other Counsel of Record:  
J. Clayton Mitchell, Assistant Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3319

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM ORANGEBURG COUNTY  
Maité Murphy, Circuit Court Judge

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2013-CP-38-00308

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Alvin L. Clark, #285179,

Appellant,

v.

STATE OF SOUTH CAROLINA,

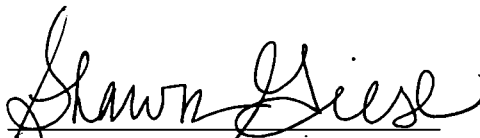
Respondent.

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, J. Clayton Mitchell, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 22 day of December 2015.

  
Shawn Giese

STATE OF SOUTH CAROLINA  
COUNTY OF ORANGEBURG

Alvin L. Clark, #285179,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL CIRCUIT

2013-CP-38-0308

ORDER OF DISMISSAL

FILED FOR RECORD  
WINNIFER B. CLARK  
CLERK OF COURT  
ORANGEBURG, SC  
2015 AUG 26 1 A 12: 02

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed March 31, 2014. Respondent made its Return on June 10, 2014, requesting an evidentiary hearing be convened. Jonathan D. Waller, Esquire was appointed by the Orangeburg County Clerk of Court. An evidentiary hearing was held on May 20, 2015, at the Dorchester County Courthouse. Applicant was present and represented by Counsel Waller. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's plea counsel, R. Douglas Mellard, Esquire. This Court had before it the Orangeburg County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, and the guilty plea transcript.

#### I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant was represented by R. Douglas Mellard, Esquire. On August 29, 2013, Applicant appeared before the Honorable Edgar W. Dickson, where he waived presentment to the Orangeburg County Grand Jury and pled guilty to Trafficking in Cocaine Base - Second Offense (10-28 grams) (2013-GS-38-01071).

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*Winnifera B. Clark*  
CLERK OF COURT  
ORANGEBURG COUNTY

Pursuant to negotiations with the State and Applicant, Judge Dickson sentenced Applicant to five (5) years' imprisonment. Applicant did not appeal his convictions or sentences.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel in failing to investigate the weight of the drugs.
2. Involuntary and unintelligent plea.

## II. SUMMARY AND EVIDENCE PRESENTED AT THE PCR HEARING

### Applicant's Testimony

Applicant testified he was charged with multiple charges including distribution of cocaine. The incident he pleaded guilty to revolves around a June 2013 arrest. He also had pending charges from February 2013. He explained that his house was raided and the drugs were found in his house. He testified he did not talk to Counsel until he went to court to plead guilty. He testified he never met with Counsel before. He alleged that Counsel should have challenged the weight of the drugs because he did not believe the amount met the threshold to be convicted of trafficking cocaine between 10-28 grams. He testified that he cooperated with investigators and that Calvin Kennedy claimed that the drugs stemming from the February charges were his and not Applicant's. He testified he never saw a drug analysis report and never received discovery. He also testified that he believed there to be around one (1) gram of cocaine which was "cut" with another non-narcotic substance. He explained that is how law enforcement came to conclude there was 36 grams of cocaine.

### Counsel R. Douglas Mellard's Testimony

Counsel Mellard testified he has been with the Orangeburg County Public Defender's Office since 2005. He testified he represented Applicant on both the February and June charges.

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ORANGEBURG

He testified he reviewed the charges, elements, potential sentencing ranges, and the discovery materials provided by the solicitor's office on all charges. He testified he met with Applicant on July 10, 2013, where he said Calvin Kennedy was going to claim that all of the drugs stemming from the February charges were his and not Applicant's. He testified he talked to the prosecuting solicitor on August 26, 2013, in an attempt to work out a deal. Counsel noted that seven (7) other charges were *nolle prossed* in exchange for his guilty plea. He testified he did not recall any issues with the weight of the drugs.

### III. APPLICABLE LAW

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order 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. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any

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deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show 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. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

#### IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds counsel's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

##### **Failure to Investigate/Challenge Drug Weight**

Applicant alleges Counsel was ineffective for failing to challenge the weight of the drugs seized from his home. Specifically, he alleges that there was only around one (1) gram of cocaine mixed, or "cut," with a non-narcotic substance. This Court finds Applicant failed to meet his burden to prove that counsel's performance was either deficient or ineffective for failing to

ATTEST: *Winnifred B. Clark*

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investigate Applicant's claim that the amount seized was less than the requisite amount to support a conviction of trafficking between 10-28 grams.

"Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citations omitted). Essentially, Applicant argues that only the pure form of the drug should be considered when weighing the drugs. This is contrary to this State's law. See State v. Kerr, 299 S.C. 108, 109, 382 S.E.2d 895, 896 (1989) ("The Statute, by its clear and unambiguous terms, applies to the aggregate weight of any *mixture* containing cocaine, not merely the weight of cocaine in its pure form."). This Court finds Applicant does not dispute the aggregate weight of the drugs, just that the non-narcotic substances used to "cut" or mix the pure form of the drug should not be included in the calculation. This Court finds Counsel acted reasonably in not pursuing any challenge the weight of the drugs as it is clear that the 36 grams of a cocaine mixture meet the requisite quantity for a trafficking between 10-28 grams conviction.

Regardless, the allegation rests entirely on speculation. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) ("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."). Applicant failed to produce any evidence to support his claim that the drug weight was not accurate.

Additionally, the record reflects Applicant fully admitted his guilt to the plea court. "A guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 129 (2014) (citing

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Winnifred B. Clark

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ORANGE COUNTY

State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013); Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Notably the South Carolina Supreme Court has held “[a] guilty plea represents a break in the chain of events which has preceded it in the criminal process.” Id (citations omitted). “When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” Id (citing Rice, 401 S.C. at 332, 737 S.E.2d at 486). Thus, this allegation is readily denied and dismissed.

### **Involuntary and Unintelligent Guilty Plea**

Applicant alleges he did not plead guilty knowingly and voluntarily. This Court finds otherwise and concludes that Applicant’s guilty plea was entered freely and voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). Defendant’s knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and “may be accomplished by colloquy between court and defendant, between court and defendant’s counsel, or both.” Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate’s right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should

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be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

Applicant claims he did not plead guilty voluntarily because he did not have a full understanding of the nature and consequences of pleading guilty. This Court finds this contention meritless. This Court finds the record reflects Applicant was fully advised that he was pleading guilty and waived all challenges to the evidence against him. The plea court's thorough colloquy with Applicant demonstrates that he understood the consequences of pleading guilty. This Court finds Applicant's testimony not credible. Applicant presented no credible evidence as to why he should be able to depart from his statements at the plea hearing. This Court finds very credible Counsel's testimony regarding his preparation and advice concerning the case. The record reflects Applicant fully admitted his guilt to the plea court. Therefore, this Court finds the plea judge correctly found Applicant's plea was freely, voluntary, and intelligently made.

#### **All Other Allegations**

As to any and all allegations that were raised in the application not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

#### **V. CONCLUSION**

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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*Winnifia B. Clark*

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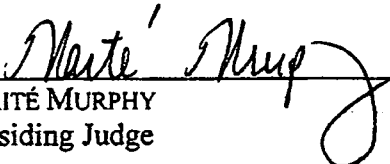
ORANGE COUNTY, FLORIDA

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

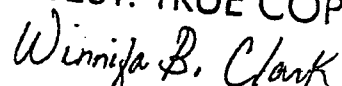
**IT IS THEREFORE ORDERED THAT:**

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 18 day of Aug., 2015.

  
MAITÉ MURPHY  
Presiding Judge

St. George, South Carolina

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ORGANIZATION

**THE  
GIESE**

**LAW FIRM, LLC**

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