SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

March 6, 2012

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

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.

Herman Belton v. State of South Carolina	3/6/2012

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,

Lorene French

Lorene French
Legal Services Coordinator

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

January 12, 2012

Ms. Robin S. Hild
Circuit Court Reporter
P O Box 9
Walhalla, SC 29691

Dear Ms. Hild:

Please provide us with the following transcript:

Herman Belton v. State of South Carolina Case #: 10-CP-04-00678

County: Anderson Date of Trial: June 8, 2011

Presiding Judge: Alexander S. Macaulay

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,

Lorene French

Lorene French
Legal Services Coordinator

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

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Lorene French
Legal Services Coordinator

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

BABB & BROWN, P.C.
ATTORNEYS AT LAW

ATTORNEYS
EVERETTE H. BABB
J. CHRIS BROWN*
H. STEWART JAMES
*ALSO LICENCED IN GEORGIA

December 7, 2011

Ms. Janet Johnson
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29202

RE: Herman Belton, #256396 v. State of South Carolina
Case No. 2010-CP-04-00678

Dear Ms. Johnson:

I have enclosed a copy of Notice of Appeal, Proof of Service, and Acceptance of Service for the Notice of Appeal, and correspondence for the above-captioned matter which were mailed to Attorney General Alan Wilson on December 7, 2011. I have also enclosed a copy of the Order of Dismissal dated November 10, 2011 which is being appealed by my client, Herman Belton. I was appointed by the Court to represent Mr. Belton in regards to his Post Conviction Relief Application on February 24, 2010. Therefore, I am requesting Mr. Belton's appeal be referred to the Division of Appellate Defense and other counsel be appointed to represent his interest in the appeal. If you have any questions, please contact my office at your convenience.

Yours very truly,

J. Chris Brown
Attorney at Law

JCB:ah

Enclosures

505 WEST BUTLER RD. • GREENVILLE, SC 29607 • 864 / 422-0022 • FAX: 277-4007

www.babbandbrown.com

BABB & BROWN, P.C.
ATTORNEYS AT LAW

ATTORNEYS
EVERETTE H. BABB
J. CHRIS BROWN*
H. STEWART JAMES
*ALSO LICENCED IN GEORGIA

December 7, 2011

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Alan M. Wilson
Attorney General for South Carolina
PO Box 11549
Columbia, SC 29211-1549

RE: Herman Belton, #256396 v. State of South Carolina
Case No. 2010-CP-04-00678

Dear Mr. Wilson:

I have enclosed a Notice of Appeal, Proof of Service, and Acceptance of Service for the Notice of Appeal for the above-captioned matter. Please sign and return the Acceptance of Service in the stamped, self-addressed envelope provided. If you have any questions, please contact my office at your convenience.

Yours very truly,

J. Chris Brown
Attorney at Law

JCB:ah

Enclosures

505 WEST BUTLER RD. • GREENVILLE, SC 29607 • 864 / 422-0022 • FAX: 277-4007

www.babbandbrown.com

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay

Case No. 2010-CP-04-00678

Herman Belton, #256396.....Appellant,

v.

State of South Carolina.....Defendant.

NOTICE OF APPEAL

Herman Belton appeals the Order of Dismissal of the Honorable Judge Alexander S. Macaulay dated November 10, 2011. Appellant received written notice of entry of this order on or about November 12, 2011.

December 7, 2011

J. Chris Brown
505 W. Butler Road
Greenville, SC 29607
(864) 422-0022
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay

Case No. 2010-CP-04-00678

Herman Belton, #256396.....Appellant,

v.

State of South Carolina.....Defendant.

PROOF OF SERVICE

I certify that I have served one (1) copy of the Notice of Appeal of Appellant on Mr. Alan M. Wilson, Attorney General for South Carolina by depositing copies of same, certified mail, return receipt requested, in the United States Mail on the 7th day of December, 2011, addressed to Mr. Alan M. Wilson, PO Box 11549, Columbia, SC 29211-1549.

December 7, 2011

J. Chris Brown
505 W. Butler Road
Greenville, SC 29607
(864) 422-0022
Attorney for Appellant

SWORN to before me this 7th
Day of December, 2011

Ann B. Hutsell
Notary Public for South Carolina
My Commission Expires: 9/17/18

STATE OF SOUTH CAROLINA)	IN THE SUPREME COURT
)	
COUNTY OF ANDERSON)	Case No. 2010-CP-04-00678
Herman Belton, #256396)	
)	
Appellant,)	
)	**ACCEPTANCE OF SERVICE**
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	
)	
)	

The undersigned hereby accepts service of the Notice of Appeal in the above-captioned matter.

December _____, 2011

_____
Alan M. Wilson, SC Attorney General
P. O. Box 11549
Columbia, SC 29211-1549

SWORN to before me this ____
Day of _____, 2011

_____
Notary Public for South Carolina
My Commission Expires: _____

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON) TENTH JUDICIAL CIRCUIT
)
Herman Belton, #256396,) 2010-CP-04-0678
Applicant,)
) **ORDER OF DISMISSAL**
v.)
)
State of South Carolina,)
Respondent.)

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

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

I. PROCEDURAL HISTORY

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

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

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

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

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

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

Applicant's Testimony

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

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

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

Mr. Tavernier's Testimony

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

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

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

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

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

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

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

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

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

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

III. APPLICABLE LAW

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

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

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

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

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

1. Ineffective Assistance of Counsel

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

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

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

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

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

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

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

2. Prosecutorial Misconduct

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

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

The Applicant provided no evidence or testimony showing that the state withheld any evidence from the defense in this case at the PCR hearing. In evaluating post-trial Brady claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268. Accordingly, the Applicant has failed to meet his burden of proof; therefore these allegations are denied and dismissed.

3. Violation of Due Process and Equal Protection Clause

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

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

V. CONCLUSION

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

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

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 8th day of November, 2011.

Alexander S. Macaulay
Presiding Judge
Tenth Judicial Circuit

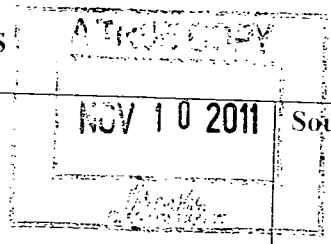
Anderson, South Carolina

FILED-CLERK'S OFFICE
ANDERSON SC
2011 NOV -9 A 8:56
COMMON PLEAS AND
GENERAL SESSIONS

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP0400678



Herman Belton	South Carolina State Of
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: Kaelon E. May

Attorney for: ☐ Plaintiff ☒ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☒ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☒ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Other: _____

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order: (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

_____

_____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge **Judge Code** 11/10/2011 **Date**

For Clerk of Court Office Use Only

This judgment was entered on **November 9, 2011**, and a copy mailed first class or placed in the appropriate attorney's box on **November 10, 2011**, to attorneys of record or to parties (when appearing pro se) as follows:

Herman Belton Perry Correctional Institution Q2A 114 430 Oaklawn Rd Pelzer, SC 29669
J. Chris Brown Babb & Brown, PC 505 W. Butler Rd. Greenville, SC 29607

ATTORNEY(S) FOR THE PLAINTIFF(S)

West Lee Assistant Attorney General Po Box 11549 Columbia, SC 292111549

ATTORNEY(S) FOR THE DEFENDANT(S)

Richard A. Shirley

Richard A. Shirley - Clerk of Court

Court Reporter

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Attorneys at Law
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Greenville, SC 29607

Herman Belton

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