THE STATE OF SOUTH CAROLINA

In The Supreme Court

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MAY 23 2016

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Honorable Deadra L. Jefferson, Circuit Judge

Case No.: 2014-CP-10-5287

Joe Louis Brown 359475...PETITIONER

V.

State of South Carolina..RESPONDENT

NOTICE OF APPEAL

The Petitioner Joe Lewis Brown appeals the Honorable Deadra L. Jefferson's May 16, 2016, Order of Dismissal. Undersigned counsel received notice of entry of the order on May 21, 2016. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

May 21, 2016

J. Rutledge Johnson, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

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MAY 25 2016

SC SUPREME COURT

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PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, J. Rutledge Johnson, Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this May 21, 2016.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

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MAY 25 2016
SC SUPREME COURT

FALK LAW FIRM, LLC.

James K. Falk

(843) 606-6007
(843) 972-9005 Fax   Admitted to practice: KY(1984) S.C. (2010)   jfalklaw@gmail.com

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May 21, 2016

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED
MAY 23 2016
SC Court of Appeals

Re: Joe Louis Brown, 2014-CP-10-5287

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Charleston County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

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SC SUPREME COURT

Thank you for your assistance.

Cc: Rutledge Johnson, Esq.; Joe Lewis Brown 359475.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

Joe Louis Brown, #359475,) 2014-CP-10-5287

Applicant,)

v.) **ORDER OF DISMISSAL**

State of South Carolina,)

Respondent.)

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MAY 23 2016
SC Court of Appeals

2016 MAY 18 PM 2:2
JULIE J. ARMSTRONG
CLERK OF COURT
FILED

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	James K. Falk, Esquire
Respondent's Attorney:	J. Rutledge Johnson, Esquire
Trial Counsel:	Aaron C. Mayer, Esquire
Date of Hearing:	December 17, 2015
Court Reporter:	Karen Anderson

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed August 28, 2014. Respondent made its Return on May 29, 2015 and filed on June 1, 2015. An evidentiary hearing into the matter was convened on December 17, 2015 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by James K. Falk, Esquire, and J. Rutledge Johnson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

At the hearing, Applicant testified on his own behalf. Melvin Gathers, Aaron Mayer, Esquire and Burns Wetmore, Esquire also testified. This Court had before it a copy of the records of the Charleston County Clerk of Court, records from the South Carolina Department of Corrections, the Applicant's PCR application, the State's Return and the guilty plea transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the July 2012, term of the Charleston County Grand Jury for two (2) counts of Unlawful Carry of a Pistol[1] (2012-GS-10-4149; -4150). The Applicant was also indicted at the August 2012, term of the Charleston County Grand Jury for Armed Robbery[2] (2012-GS-10-4413), two (2) counts of Possession of a Firearm or Knife during Commission of a Violent Crime[3] (2012-GS-10-4414; -4417), Attempted Strong Arm Robbery[4] (2012-GS-10-4420), and Attempted Armed Robbery[5] (2012-GS-10-4416). Aaron Mayer, Esquire, represented the Applicant. On April 7, 2014, the Applicant appeared before the Honorable Benjamin H. Culbertson and entered a negotiated plea under Alford[6] to all charges in exchange for the State's agreement not to seek life without parole (LWOP) and to *nolle pros* a kidnapping charge in Berkeley County. The Honorable Benjamin H.

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[1] "It is unlawful for anyone to carry about the person any handgun, whether concealed or not, except as follows, unless otherwise specifically prohibited by law. . . ." S.C. CODE ANN. § 16-23-20 (2012). "A person violating the provisions of Section 16-23-20 is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both." S.C. CODE ANN. § 16-23-50(A)(2) (2012).

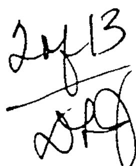
[2] Armed Robbery is a violent, most serious felony punishable by imprisonment for a "mandatory minimum term of not less than ten [(10)] years or more than thirty [(30)] years, no part of which may be suspended or probation granted. A person convicted under this subsection is not eligible for parole until the person has served at least seven [(7)] years of the sentence." See S.C. CODE ANN. § 16–11–330 (A) (2012); S.C. CODE ANN. § 16–1–60 (2012); S.C. CODE ANN. § 17–25–45 (2012).

[3] "If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five [(5)] years, in addition to the punishment provided for the principal crime. This five-year [(5)] sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime." Further, "[s]ervice of the five-year [(5)] sentence is mandatory unless a longer mandatory minimum term of imprisonment is provided by law for the violent crime. The court may impose this mandatory five-year [(5)] sentence to run consecutively or concurrently." S.C. CODE ANN. § 16–23–490 (2010).

[4] "The common law offense of robbery is a felony. Upon conviction, a person must be imprisoned not more than fifteen years." See S.C. CODE ANN. § 16–11–325 (2012).

[5] Attempted Armed Robbery is a violent, most serious felony punishable by twenty (20) years' imprisonment. See S.C. CODE ANN. § 16–11–330(B) (2012); S.C. CODE ANN. § 16–1–60 (2012); S.C. CODE ANN. § 17–25–45 (2012).

[6] North Carolina v. Alford, 400 U.S. 25 (1970).



Culbertson sentenced the Applicant to imprisonment for eighteen (18) years. Applicant did not appeal his conviction or sentence.

ALLEGATIONS

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

a. "Ineffective Assistance of Counsel"
   i. "[Counsel] told me to take the plea because rather [sic] I was innocent or not he couldn't beat it in trial"

2. Involuntary Guilty Plea

SUMMARY OF TESTIMONY

At the evidentiary hearing, Melvin Gathers testified via telephone from Lieber Correctional Institution. His testimony by telephone was with the consent of the parties. Public Defender Ashley Pennington consulted with Mr. Gathers prior to his testimony and was present via telephone during his testimony. Mr. Gathers stated he pled guilty to four (4) armed robberies and wrote a letter on Applicant's behalf. Mr. Gathers testified he did not meet with Applicant's Counsel but would have informed Counsel that Applicant had no involvement in these crimes. Mr. Gathers then stated he got the letter notarized at the prison sometime before Thanksgiving. Mr. Gathers further testified that he was never questioned about the incident and the Applicant had no knowledge of the robbery.

On cross-examination, Mr. Gathers admitted the letter was notarized in October of 2014. He testified that he is a gang member and "other affiliations" but denies that Applicant is a member of any gangs. He further testified that he wrote this letter after he pled guilty to four (4) armed robberies. He further testified that he and the Applicant are relatives and that "he is my family."

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Applicant testified another inmate introduced him to Counsel and that he retained Counsel in April 2014. Applicant claimed he thought he was only receiving ten (10) years for the plea, and he pled because Counsel was not prepared to go to trial. Applicant stated Counsel told him he did not think he could win a trial, even though he had no criminal record. Applicant testified that he reviewed discovery with Counsel from time to time and asked Counsel to conduct a more thorough investigation. Applicant said he reviewed two (2) videos with Counsel, but could not tell by the footage who was who. Applicant claimed Counsel stated to him that things have changed and that he was promised a ten (10) year plea; however, he admitted that Counsel stated the minimum on this plea would be ten (10) years. Applicant expressed that he was not responsible for these crimes and that he did not discuss the letter with his codefendant. However, he further testified that he has fathered a son with Melvin Gather's cousin.

Once again, Applicant testified that based on Counsel's advice, he thought there was a ten (10) year plea offer. Applicant testified that Counsel "guaranteed" he would receive a ten (10) year sentence. Applicant stated he learned from the assistant solicitor that there was not a ten (10) year plea offer on April 7, 2014. Applicant admitted counsel fully discussed with him his potential for a life without parole sentence and he knew that if convicted at trial there was a chance of LWOP. Applicant stated he was not prepared to serve eighteen (18) years but was prepared to serve ten (10) years in prison. Applicant claimed that Counsel told him not to "throw him under the bus" because Counsel promised him ten (10) years. Applicant testified Counsel did not discuss hiring a private investigator for his case. Applicant testified that he had no confidence in Counsel based on what Counsel had said. On page 11 line 14 of the transcript, Counsel stated he was ready to proceed to trial; however, Applicant wanted a continuance because he did not know the plea offer was for

eighteen (18) years. Applicant testified he was upset with counsel and felt trapped into pleading. Applicant told Counsel to speak with his codefendant, but this never occurred, and Counsel never explained why he did not speak to codefendant. Applicant then stated he did not discuss the sentencing sheets with Counsel and was taken out of the courtroom two (2) to three (3) times due to his disruptive behavior. During the last time he was taken out, Counsel explained a NC v. Alford[7] plea to him. Applicant finally admitted that he pled guilty because he is facing more time of trial; however, he claimed he did not participate in the armed robberies.

On cross-examination, Applicant admitted there were no threats or coercion to get him to plead guilty. Applicant also admitted that the plea judge explained to him his constitutional rights to a jury. He stated at the plea that he was satisfied with his attorney and said he was a "great lawyer." He testified that during the plea colloquy he denied any mental or emotional impairment. He further admitted that the Court clarified with him that it was a negotiated plea of eighteen (18) years. Applicant finally admitted he lied under oath in stating that he was satisfied with his attorney at the plea.

Counsel testified that he worked with Brian Burke, Esquire as Applicant had armed robbery charges in both Berkeley and Charleston Counties. Counsel attempted to wrap all the charges into one plea. Counsel stated he went through Rule 5 and discovery materials with Applicant. Counsel admitted he did not hire an independent investigator, but had the opportunity to question witnesses himself. Counsel then testified he discussed potential witnesses with Applicant, but does not recall specific conversations. Counsel stated this was a case in which Applicant's codefendant confessed,

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[7] 400 U.S. 25, 91 S.Ct. 160 (1970).

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but Counsel did not have access to the codefendant as he was represented by another attorney. Counsel testified he spoke with codefendant's attorney about the case. Counsel stated he could not recall the exact trial strategy he had, nor could he recall if he subpoenaed any witnesses.

Counsel testified he first had plea discussions with then Assistant Solicitor Adam Young, but could not find any record of a ten (10) year plea offer. He testified it is entirely possible that he and Mr. Young discussed a ten (10) year plea offer but that would have been very early on in the case. He further testified that he could not say any discussions were ever a "solid or firm" offer. However, Counsel stated it was possible that he discussed a ten (10) year offer with Applicant. He further testified that Kelly Young, Assistant Solicitor, took over the case when Mr. Young left the office, and she took a more rigid position on the case; thus, Counsel could not recall a ten (10) year offer. Counsel stated he reviewed the videos with Applicant and was surprised that one could see a goatee on the video. Concerning the in chambers conference he had with the Judge and the Assistant Solicitor, he could not recall the details of the conference but knew that Applicant was not present for the conference. Counsel stated he knew about the eighteen (18) year offer prior to the plea date. Counsel stated his strategy was to try and avoid a life without parole sentence for Applicant and was surprised to hear that Applicant stated he felt ambushed. He testified he would have discussed any offers or negotiations with the Applicant well ahead of any court appearance. He further testified that he and Mr. Burke spent a fair amount of time analyzing respective theories and positions available to the Applicant to avoid LWOP. Counsel also stated Applicant was reluctant to plead guilty, but did not recall saying "Don't throw me under the bus" to Applicant. He testified this is not something he would say to a client as his position would be just the opposite.

SH

Counsel testified that he recalled having extensive conversations with Applicant about a plea, a trial, and the details of both. Counsel stated if there was a 10 year offer, he would have conveyed the offer to the Applicant before the plea. Counsel stated he tried to ~~get~~ negotiate the ten (10) year offer, but the State would not agree. Counsel stated he does not recall a conversation about not being ready for trial. Counsel also stated that if he told the Judge he was prepared for trial, then he was prepared for trial. Counsel testified he did not recall when he received the plea sheets. Counsel then stated with an eyewitness and a codefendant who confessed, combined with the evidence against Applicant, it would be a difficult case to beat. Counsel's main concern for Applicant was to avoid a life without parole sentence. Counsel admitted that the Applicant was apprehensive and had concerns about pleading guilty, because no one wants to serve eighteen (18) years in prison. Counsel then stated that he would have relayed the eighteen (18) year offer to Applicant prior to the plea.

Counsel then testified he did not recall the specific conversation in which he explained <u>North Carolina v. Alford</u> to Applicant; but that would have been brought up the day of the plea, after discussions with the Assistant Solicitor, and sometime after Mr. Burke arrived. Counsel stated it was his recommendation for Applicant to plead guilty and would be shocked if the first time he discussed the eighteen (18) year offer was on the day of the plea. Counsel stated he begged the Assistant Solicitor for a better offer, but the State would not offer anything less than eighteen (18) years. Counsel stated he did not recall if he is going to put up evidence on Applicant's behalf.

On cross-examination, Counsel stated that he would have relayed any offers to Applicant. Counsel testified it was Applicant's decision to accept or reject the offer. Counsel then stated it is possible that Assistant Solicitor Adam Young made a 10 year offer, but then left before the offer was accepted. His main concern was attempting to avoid a life without parole sentence for Applicant.

Assistant Solicitor Burns Wetmore testified he did not have any involvement with this case specifically. Mr. Wetmore stated he reviewed the four (4) files in their electronic system and did not find any notation or written offers for ten (10) years. Mr. Wetmore then explained that because ten (10) years was the minimum sentence, it was not typical of the Solicitor's Office to offer the minimum considering the number and nature of the Applicant's charges. On cross-examination, Mr. Wetmore stated that eighteen (18) years was only written on the sentencing sheet. He also stated that a better practice would be to put notations in the file. Mr. Wetmore then testified there were no written offers in the file but there were notations on the outside of the folder that Applicant had been on the February 17, 2014 plea docket and did not plea. He was then placed on trial dockets beginning with the April 7, 2014 term prior to him pleading guilty. He further testified that any offers coming from his office would have increased due to the case pleading from the trial docket.

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 (2003).

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2064).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. See Strickland at 690, 104 S. Ct. at 2066. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate 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. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

This Court finds the Applicant's and Mr. Gathers' testimony regarding Counsel's ineffectiveness is not credible while also finding Counsel's testimony is credible. The Court further finds Mr. Wetmore's testimony persuasive and credible.

This Court finds Counsel provided effective assistance of counsel in this case. Applicant testified he pled because Counsel was not ready to proceed to trial; this Court does not find this credible as Applicant certainly could have pursued a trial and had Counsel challenged the State's evidence. Counsel was prepared to go forward to trial. (Tr. 11: 11-15; 14: 3-16). The Applicant's request for a continuance was denied and the Court entered a plea of not guilty for the Applicant, although the Court granted Counsel's request to continue after a lunch break. (Tr. 12: 1-17; 14: 13-25; 15: 1-2). After the lunch recess the Applicant had decided to go forward with the negotiated plea agreement under Alford for eighteen (18) years for all of his charges pending in Berkeley and Charleston County, including *nolle prossing* a kidnapping charge in relation to the Berkeley armed robbery. (Tr. 18: 5-16).

Aaron Mayer, Esquire was present to represent the Applicant on Charleston charges and Brian Burke, Esquire was present to represent the Applicant on the Berkeley charges. (Tr. 23: 10-25). This Court finds that both Mr. Mayer and Mr. Burke advised the Applicant of all of the charges, his rights, and the sentences the charges carried (Tr. 24: 1-14; 36: 14-25; 37:11). Furthermore, both Mr. Mayer and Mr. Burke agreed with the Applicant's decision to plead guilty, and believed the State could prove the Applicant's guilt beyond a reasonable doubt. (Tr. 24: 24-25; 25: 10). This Court further finds Counsel made a strategic decision to negotiate the Berkeley and Charleston cases together to avoid a life without parole sentence (Tr. 47: 19-25; 48: 1-9).

This Court finds it was the Applicant's desire to plead guilty and not risk a trial. (Tr. 26: 7-25; 47: 12-25; 48: 1-9). This Court also finds the Applicant was not threatened, forced or coerced in any way to plead guilty. (Tr. 28 1-25; 29-32; 39: 14-25; 40-47; 48: 1-9). This Court is not convinced

that a ten (10) year plea offer was ever extended to Applicant and the Applicant understood the State was under no obligation to give him a lesser offer. (Tr. 4: 12-25; 5-9; 10: 1-144). This Court finds the Applicant was satisfied with the services of his lawyer. (Tr. 47: 9-11). This Court finds the Applicant understood his right to a jury trial and waived his constitutional rights in order to proceed with the plea. (Tr. 40: 2-22). The Applicant was informed there is no legal distinction between an Alford plea and an admission of guilt. (Tr. 40: 23-25; 41: 1-25; 42: 1-6). The Applicant was also informed that the Court could only accept or reject the negotiated plea, and if he did not accept it the Applicant could withdraw his plea. (Tr. 42: 7-16). This Court finds the Applicant knew of the potential charges and penalties if he were to go to trial. (Tr. 42: 17-25; 43: 1-25).The Applicant wished to plead guilty to the charges. (Tr. 46: 7-23). The Applicant allocuted to the facts of the offenses as they were presented by the Assistant Solicitor. (Tr. 53: 23-25; 54:1-8). Furthermore, the Applicant was informed of the violent and most serious nature of his offenses and that those offenses would count as strikes. (Tr. 44: 1-23). Additionally, this Court finds Applicant made this decision freely and voluntarily without any threats or promises from anyone else (Tr. 46: 24-25; 47: 1-8).

This Court notes that Applicant pled under N.C. v. Alford which states that while Applicant does not necessarily admit his guilt, he was willing to accept the State's offer in lieu of a trial. Therefore, the letter from Mr. Gathers has no bearing on this Court's decision. Furthermore, this Court finds that it was ultimately the Applicant's decision to plead guilty.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing

professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, these allegations are denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice. This Court also finds as to all other allegations that Applicant failed to present evidence of such claims and thus, this Court deems them abandoned.

This Court notifies the 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, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, 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.

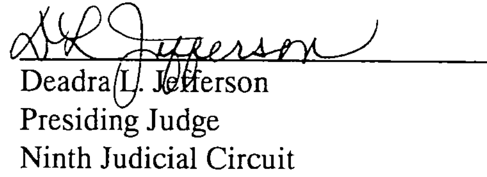
IT IS THEREFORE ORDERED:

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!



Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

May 16, 2016
Charleston, South Carolina

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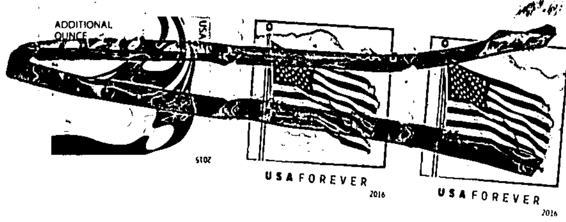
FALK LAW FIRM
PO Box 1058
Charleston, SC 29402



Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211