

THE BOOZER LAW FIRM, LLC

Lance S. Boozer, Esq.*
*Also admitted in Florida

807 Gervais Street, Suite 203
Columbia, SC 29201

Telephone: 803-608-5543
Fax: 803-926-3463

Email: lsb@boozerlawfirm.com
Website: www.boozerlawfirm.com

November 17, 2016

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

NOV 21 2016

S.C. SUPREME COURT

The Honorable Liz Godard
Clerk of Court
P.O. Box 583
Aiken, SC 29802-0583

**RE: Albert Cave, Jr., #189002 v. State of South Carolina
2014-CP-02-0004**

Dear Mr. Shearouse and Ms. Godard:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Cave in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Cave in this appeal.

Yours very truly,



Lance S. Boozer

cc: Julie Coleman, AAG
Office of Appellate Defense
Albert Cave, Jr., #189002

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

NOV 21 2016

S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge

Case No. 2014-CP-02-0004

Albert Cave, Jr., #189002Petitioner,

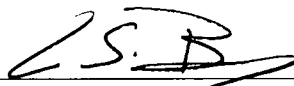
v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Robert E. Hood's Order dated November 10, 2016, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on November 16, 2016. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,


Lance S. Boozer
The Boozer Law Firm, LLC
807 Gervais Street, Suite 203
Columbia, SC 29201
Tele: 803-608-5543

November 17, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

NOV 21 2016

S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge

Case No. 2014-CP-02-0004

Albert Cave, Jr., #189002Petitioner,

v.

State of South Carolina,.....Respondent.

PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Julie Coleman, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 17th day of November, 2016.



Lance S. Boozer
The Boozer Law Firm, LLC
807 Gervais Street, Suite 203
Columbia, SC 29201
Tele: 803-608-5543

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS)
SECOND JUDICIAL CIRCUIT)

RECEIVED

Albert James Cave, Jr., #189002,)

2014-CP-02-0004)

NOV 21 2016

Applicant.)

S.C. SUPREME COURT

v.)

ORDER OF DISMISSAL

State of South Carolina,)

FILED 11-16 2016 12:50)
SP

Respondent.)

L. J. ...
S.C.C.P. & G.A.
Shodell Park
Deputy Clerk

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on January 2, 2014. Respondent submitted its return on July 29, 2014. An evidentiary hearing into the matter was convened on September 23, 2016, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Lance Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

I. PROCEDURAL HISTORY

The records before this Court indicate that Applicant was true bill indicted at the October 2011 term of the Aiken County Grand Jury for Burglary—First Degree (2011-GS-02-01388). Brian Katonak, Esquire, represented Applicant. On September 10, 2012, Applicant pled guilty under North Carolina v. Alford before the Honorable Doyet A. Early, III. Judge Early sentenced Applicant to a negotiated twenty-five year term of imprisonment to run concurrently to a prior sentence he was currently serving for 2011-GS-02-01031 and 2011-GS-02-01032.

A timely Notice of Appeal was filed on Applicant's behalf. By Order filed March 18, 2013, the South Carolina Court of Appeals dismissed Applicant's appeal pursuant to Rule 203 for failing to provide a sufficient reason for appealing a guilty plea. The Remittitur was issued on

March 25, 2013. On March 18, 2013, Applicant filed a motion to reconsider, which was construed as petition for rehearing. By Order dated July 15, 2013, the South Carolina Court of Appeals gave Applicant ten days to submit his explanation. Appellate failed to provide an explanation and the South Carolina Court of Appeals denied and dismissed Applicant's appeal by Order dated September 30, 2013. The Remittitur was issued November 13, 2013.

Applicant filed a timely application for post-conviction relief on this charge on January 2, 2014.

II. ALLEGATIONS

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

1. Involuntary guilty plea.
 - a. Forced to enter guilty plea when "Court abused its discretion when the Court denide (sic) my motion to suppress evidence with its decision..."
 - b. "I had no other alternative but to take plea against my will, then to go to trial and receive life which the prosecution intended to seek after I refused their deal."
2. Ineffective Assistance of Counsel
 - a. Failed to obtain and review discovery material that he knew the prosecution would rely on at court.
 - b. Counsel was ineffective for not filing the proper suppression motion, i.e., motion to suppress the finger print card.
 - c. "Counsel was ineffective by advising me to take a plea stating that my only chance in this case was to plea and he would handle my appeal against the courts decision which he failed to properly do he advised me that if I didn't plea then I would surely receive life in prison."
3. Prosecutorial Misconduct/Brady Violation
 - a. "prosecution violated constitution rights by...holding and using evidence from a charge which I was found not guilty."
 - b. Prosecution withheld material evidence.
 - c. "Prosecution showed misconduct by obtaining a warrant for my arrest without establishing a probable cause to do so not only did they not establish a sufficient reason of probable cause backed up by evidence presented, but they also used illegal evidence to establish probable cause."

Pat

- d. "Prosecution showed misconduct by using illegal evidence to charge arrest, indict and convict me the defendant. The prosecution used evidence from a charge which I was found not guilty to. The S.C. Code of laws demands the destruction of all evidence of the record from that charge. Prosecution use evidence form that record to charge, arrest, and indict me disregarding the statute 17-1-40 of the S.C. Code of laws. The prosecution broke the law of S.C. and violated my constitutional rights."

Applicant filed an amendment on March 16, 2015, adding an additional allegation of ineffective assistance of counsel for failure to move to recuse Solicitor.

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

The evidentiary hearing was held before this Court on September 23, 2016. Due to unusual circumstances, the hearing was combined with the hearing for another PCR application that Applicant filed on different convictions stemming from similar events. The following is a summary of testimony from the hearing that is relevant to the convictions in this application.

At the PCR hearing, Applicant testified on his own behalf. Respondent presented testimony from Deputy Solicitor David Miller (hereinafter "Solicitor"), and Plea Counsel Brian Katonak ("hereinafter Plea Counsel").

Applicant

Applicant testified that he had been arrested several times for burglary and forgery. He stated that in 2008 he was charged with burglary first degree and grand larceny. He stated that he went to trial on these charges and was acquitted, and the South Carolina Attorney General's Office prosecuted the case because the victim was a member of the Second Circuit Solicitor's Office and they were recused from the action. Applicant entered into evidence Applicant's Exhibit #1, "Order Recusing the Second Circuit Solicitor's Office from Prosecuting Defendant."

BA

Applicant testified that this Order read that the Second Circuit Solicitor's Office was recused from prosecuting his 2008 offense, "or any charges or indictments stemming from the same incidents or incidents alleges to *be related or part of a pattern of criminal activity including*" the 2008 charge. App. Ex. #1 (emphasis added). He opined that the 2011 charge listed in this PCR application for which he was currently serving time was part of a pattern of criminal activity related to his 2008 charges, and therefore under this Order the Second Circuit Solicitor's Office should have been recused from this case, as well.

Applicant testified that he did not ask Plea Counsel to move to have Solicitor recused based on this order. He stated that he never discussed the order of recusal with Plea Counsel.

Applicant stated that he met with Plea Counsel when he came to see him and that they spoke on the phone a few times prior to his guilty plea. He stated that he did not give Plea Counsel any leads or witnesses to investigate. He stated that the victim of this crime was a police officer in Aiken County. He stated that he felt forced to take a guilty plea because the trial court denied his motion to suppress his fingerprint card. Applicant testified that he recalled telling the plea judge that he understood that a North Carolina v. Alford plea is treated just like a guilty plea, and he wished to plead guilty under Alford. He stated that he took the Alford plea because he was facing Life Without Parole.

Applicant stated that law enforcement had no probable cause to arrest him for these crimes because the warrant was based on a match from the fingerprints from his previous charges on which he was acquitted, and that fingerprint card should have been destroyed. However, he was told that because he had not applied to have his previous charges expunged, the card had not been destroyed. Applicant stated that his fingerprints were not matched to the fingerprint card until two months after he was arrested.

Red

Additionally, Applicant testified that he pled guilty to possession of marijuana second degree on March 18, 2010. He stated that this was one of the charges he was arrested for in January, 2008, along with the charges on which he was later acquitted at trial.

Solicitor

Deputy Solicitor David Miller testified that he has been employed at the Second Circuit Solicitor's Office since January of 2009, and he was the solicitor who prosecuted this case against Applicant.

Solicitor testified that law enforcement was able to match Applicant to the crime because of latent fingerprints found at the scene of the burglary that matched up to his prints in their database. He stated that Applicant's fingerprints were in their possession because he was arrested on January 14, 2008 for several different charges, including possession of marijuana, resisting arrest, and about twelve other charges. Solicitor stated that Applicant had a trial on some of the charges from the January 2008 arrest and was acquitted, but remained in custody until March 18, 2010, when he pled guilty to possession of marijuana and resisting arrest.

Solicitor testified that, because Applicant pled guilty to possession of marijuana and resisting arrest, the fingerprint card from his January 2008 arrest, which was used to match the prints from the crimes address in this PCR application, could not be destroyed. Solicitor testified that Applicant was entitled to have the charges he was acquitted on expunged from his record, but he was not entitled to have his fingerprint card destroyed because of the charges he pled guilty to.

Solicitor further testified that Plea Counsel filed a motion to suppress the fingerprints, and a hearing was held. He stated that Judge Early ruled that he would allow the prints into evidence because Applicant was not entitled to have the card destroyed and because he had

FBT

fifteen prior arrests and twelve prior convictions in South Carolina and several other fingerprint cards. He stated that Judge Early allowed these prints because of their inevitable discovery. The Order denying this motion was entered into evidence at the evidentiary hearing.

Solicitor testified that he did not know that the Order of Recusal existed until it came up in the allegation in this PCR action. He stated that it was completely unrelated to the charges and victims in this case, and it did not make sense to recuse the Second Circuit Solicitor's Office from this case. He stated that he saw no reason to recuse himself from this case.

Solicitor testified that there were plea negotiations in this case because Applicant faced a sentence of Life Without Parole if convicted at trial. He stated that he gave a plea offer and left the offer open until after Plea Counsel moved to suppress the fingerprints months before the guilty plea. Solicitor testified that he had an officer go over to the jail a week before the plea to roll new fingerprints from Applicant to compare to the latent prints found at the scene of the crime. He noted that fingerprints do not change, and Applicant's prints matched both the 2008 fingerprint card and the crime scene prints.

Plea Counsel

Plea Counsel testified that he had been practicing law since 1992 and he was appointed to represent Applicant in this case after Applicant's previous counsel had been relieved. He stated that he and Applicant had a lengthy meeting at the jail in April, and they spoke on the phone multiple times. He stated that he reviewed discovery with Applicant, and Applicant had already reviewed the discovery with his previous attorney. Plea Counsel did not recall discussing any defenses with Applicant.

Plea Counsel testified that he made a motion to suppress the fingerprint card from the 2008 charges, but it was denied. He stated that he explained to Applicant what a North Carolina

BA

v. Alford plea was and he reviewed his constitutional rights, and Applicant never told him that he did not understand anything. He stated that it was Applicant's decision to plead guilty, and he agreed that it was in Applicant's best interest to plead. Plea Counsel opined that, knowing that the State was going to use Applicant's fingerprints and that he was facing Life Without Parole, it was within Applicant's best interests to plead guilty.

Plea Counsel testified that he did not know about the Order of Recusal until this PCR action. He stated that, if he had known about this Order, he probably would not have used it anyway, because if his motion to recuse the Solicitor's Office had been successful, it only would have changed who prosecuted the case, not the evidence, and the outcome of the case would have been the same.

APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (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 pleas, 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).

IV. 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).

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Plea Counsel's testimony to be credible and persuasive. This Court further finds Solicitor's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

INVOLUNTARY GUILTY PLEA

Applicant argues his plea was not given freely and voluntarily. This Court finds otherwise and concludes that Applicant's 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 (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 be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

Applicant claims his plea was given involuntarily because his motion to suppress the fingerprint card was denied and he knew he would get Life Without Parole if he was convicted at trial. This Court agrees that the motion to suppress was properly denied and finds that the trial judge was within his discretion in denying the motion. Furthermore, this Court finds that the potential sentence of Life Without Parole was properly noticed and the Solicitor's Office was within their authority under South Carolina law to notice him of their intent to seek Life Without Parole.

Applicant cannot claim that he was coerced into pleading guilty simply because he faced a life sentence if he went to trial. South Carolina courts have held that this does not amount to an involuntary guilty plea. "Thus, counsel advised respondent to plead guilty based, at least in part,

on the likelihood of what counsel believed the sentence would be. We find that this is not an inappropriate concern for counsel to communicate to his client." Bennett v. State, 371 S.C. 198, 204-05, 638 S.E.2d 673, 676 (2006) (citing Wade v. State, 698 S.W.2d 621, 623 (Mo.Ct.App.1985) (where appellant claimed his guilty plea was not voluntary because counsel told him he would receive a life sentence if he went to trial, the court rejected the claim, stating that "[c]ounsel should discuss with clients the potential results of trial, and life imprisonment was a possible sentence on both charges" against appellant)). Plea Counsel credibly testified that he believed it was in Applicant's best interest to accept the plea offer rather than face a life sentence at a trial where the State had Applicant's fingerprints that matched to the crime scene. He credibly testified that it was Applicant's decision to plead guilty, and he believed that Applicant fully understood what he was doing and the rights that he was giving up.

This Court finds that the record reflects that Applicant was fully advised of the rights he was giving up by pleading guilty. 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 Plea Counsel's testimony that he advised Applicant of all facts and risks of pleading guilty, and that Applicant fully understood what it meant to plead under North Carolina v. Alford.

Alford pleas are treated exactly the same as a standard guilty plea, and Applicant indicated that he understood this both at the plea and at the evidentiary hearing. "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 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

Ret

omitted). Applicant admitted at the plea that he believed the State had enough evidence to prove beyond a reasonable doubt that he was guilty of committing a burglary. "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). Therefore, this Court finds the plea judge correctly found Applicant's plea was freely, voluntary, and intelligently made. Accordingly, this allegation must be denied and dismissed with prejudice.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant has asserted several allegations of ineffective assistance of counsel. This Court finds these claims to be meritless and they are denied and dismissed with prejudice.

Applicant's allegation that Plea Counsel failed to properly move to suppress the fingerprint card is meritless. This Court finds that there was no legal reason to move to suppress these fingerprints as any motion to suppress would not have been successful. Plea Counsel did in fact make a motion to suppress these fingerprints and the motion was denied.

Solicitor credibly testified that Applicant's fingerprint card is not eligible to be destroyed after his 2008 acquittal because it was taken after the same arrest as two charges to which Applicant pled guilty. Furthermore, even if the card had been destroyed, law enforcement could have collected more fingerprints from Applicant to compare to the crime scene based on his other charges and arrests; as Solicitor noted, fingerprints do not change. Finally, as noted by Solicitor, Applicant did have a hearing over a motion to suppress these fingerprints, and the motion was denied based on inevitable discovery. Applicant had 15 prior arrests and 12 convictions, and there were multiple other sets of his fingerprints through the state of South

Bob

Carolina with which to compare to the prints at the crime scene. Any motion to suppress the fingerprints clearly would not have been successful.

Applicant has further failed to meet his burden in proving any prejudice. Even if Plea Counsel had managed to successfully suppress the fingerprint card from 2008, law enforcement could have pulled any other fingerprint card from Applicant's prior arrests and convictions throughout the state. Applicant's fingerprints would have been matched to the crime scene even without this specific fingerprint card from 2008. Thus, any failure to move to suppress this card would not have changed the outcome of the trial.

In regards to the Order of Recusal, this Court finds that Plea Counsel was not ineffective for failing to move to have the solicitor recused from Applicant's case. The Order of Recusal introduced by Applicant is meant to apply only to the charges from the trial in which it was ordered. The charges in the case at issue are completely separate and unrelated from Applicant's prior trial and cannot be viewed as a "pattern of criminal activity" stemming from his prior charges. The Order was clearly written only for the purpose of recusing an office that might be swayed because of the victim in the prior case. The victims in the case at hand have no relation to the previous case, and there is no reason why this Order would apply to different charges. This Court finds that this allegation is meritless and that there was no reason for the Second Circuit Solicitor's Office to be recused from this case. Therefore, Trial Counsel cannot be ineffective for failing to move to have Solicitor recused. Thus, this allegation is denied and dismissed.

Finally, Applicant has failed to prove that there was any discovery material that Plea Counsel did not obtain that he should have, or that it was prejudicial in any way. Thus, this allegation is meritless.

RBH

Applicant has also failed to prove any prejudice under the second prong of the Strickland test for any of these allegations. None of these alleged deficiencies would have made Applicant choose to go to trial and risk a sentence of Life Without Parole rather than pleading guilty and accepting the negotiated sentence of twenty-five years. Therefore, Applicant can show no prejudice.

This Court finds that Applicant has failed to meet his burden of proving that Plea Counsel was ineffective in any regard or that he was prejudiced by any of his actions, and these allegations are denied and dismissed with prejudice.

PROSECUTORIAL MISCONDUCT

This Court finds that Applicants claims of prosecutorial misconduct are meritless and must be denied and dismissed with prejudice.

Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(B) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief.

Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). The Respondent submits the Applicant has not carried his burden of proving actual prosecutorial misconduct, therefore, this allegation should be summarily dismissed. As addressed above, the Order of Recusal introduced by Applicant clearly does not apply to the convictions at hand, and there was no reason for the Second Circuit

Solicitor's Office to be recused from this case. Furthermore, Applicant has failed to meet his burden in proving that Solicitor used the "threat" of a sentence of Life Without Parole to force Applicant to go to trial. Applicant has not shown in manner in which Solicitor acted improperly or outside the bounds of what is allowed under South Carolina law. Therefore, these allegations are denied and dismissed with prejudice.

BRADY VIOLATION

This Court finds that Applicant has failed to present any credible evidence on his allegation of a Brady violation.

Brady v. Maryland, 373 U.S. 83 (1963), requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). 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. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing U.S. v. Bagley, 473 U.S. 667 (1985)).

Applicant has shown no specific evidence that the State failed to release to Applicant or to Plea Counsel regarding this charge. Plea Counsel credibly testified that he reviewed all discovery material with Applicant, and that Applicant had already reviewed all discovery material with his previous counsel. Applicant has failed to meet his burden of proof, and this allegation is denied and dismissed with prejudice.

Ret

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

V. 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 notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

Pett

AND IT IS SO ORDERED this 10 day of NOV, 2016.

R Hood

ROBERT E. HOOD
Presiding Judge
Second Judicial Circuit

Cowan, South Carolina

THE BOOZALLEN LAW FIRM, LLC
807 Gervais Street, Suite 203
Columbia, SC 29201

BINB THU

45TL48D0EE2H22TTH4EE2BCEB2



COLUMBIA P&D DC

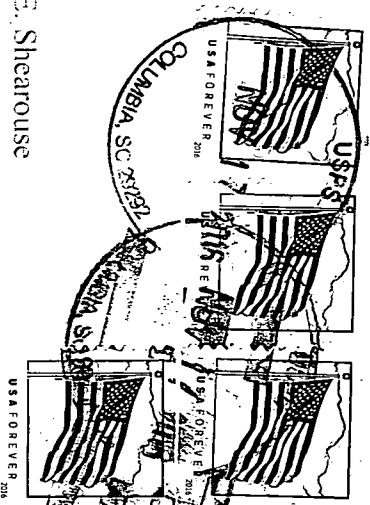
FCMFLTS 5D VCODE

COLUMBIA SC

24 188-801W5AV 96Z7JF41 98;69 91/91/11

262

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211



RECEIVED

NOV 21 2016

S.C. SUPREME COURT