

THE

GIESE

LAW FIRM, LLC

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DEC -5 2016

S.C. SUPREME COURT

December 2, 2016

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

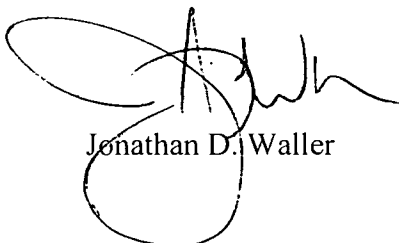
Re: John Henry Dial, Jr. vs. State of South Carolina
C/A No: 2015-CP-40-4284

Dear Mr. Shearouse:

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

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

Sincerely,



Jonathan D. Waller

Cc: Ruston W. Neely, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM RICHLAND COUNTY
Jocelyn Newman, Circuit Court Judge

DEC -5 2016
S.C. SUPREME COURT

2015-CP-40-4284

John Henry Dial, Jr.,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

John Henry Dial, Jr., appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed November 14, 2016 issued by the Honorable Jocelyn Newman, Presiding Judge, Fifth Judicial Circuit.



Jonathan D. Waller

Giese Law Firm

SC Bar No.: 76290

1315 Blanding Street

Columbia, SC 29201

803-708-6767 (phone)

803-708-6769 (fax)

jonathanwallerlaw@gmail.com

ATTORNEY FOR PETITIONER

This 1 day of December, 2016.

Other Counsel of Record:
Ruston W. Neely, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Jocelyn Newman, Circuit Court Judge

2015-CP-40-4284

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DEC -5 2016

S.C. SUPREME COURT

John Henry Dial, Jr.,

Appellant,

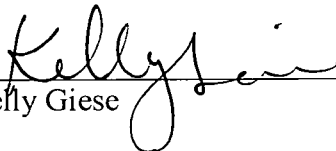
v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Ruston W. Neely, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 2nd day of December, 2016, to his office located at P.O. Box 11549, Columbia, SC 29211.



Kelly Giese

John Henry Dial, Jr., Applicant
 PLAINTIFF(S)

State of South Carolina, Respondent
 DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant
	or <input type="checkbox"/> 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. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41, SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- 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 JUDGMENT 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.

Joseph Heman
 Circuit Court Judge

2757
 Judge Code

11/09/16
 Date

2016 NOV 14 PM 3:34
 JEANETTE W. MOSELEY
 CLERK, C.P. & G.S.
 RICHLAND COUNTY
 FILED

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

John Henry Dial, Jr.,)

Case No.: 2015-CP-40-4284

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

RICHLAND COUNTY
FILED
2016 NOV 14 PM 3:34
JEANETTE M. MCBRIDE
C.C.P. & G.S.

This matter comes before the Court by way of an application for post-conviction relief filed July 16, 2015. Respondent made a timely Return on August 1, 2016. The Court convened an evidentiary hearing into the matter on August 31, 2016, at the Richland County Courthouse. Applicant was present at the hearing and represented by Jonathan Waller, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. The Court had before it a copy of the guilty plea transcript, the records of the Richland County clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

The Richland County Grand Jury indicted Applicant at the June 2014 term for manufacturing methamphetamine (2014-GS-40-3270). Megan Eigenbrot, Esquire, represented Applicant. Applicant entered a plea of guilty to the charge, as indicted, under N. Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (U.S. 1970.) On September 9, 2014, the

Honorable Robert E. Hood sentenced Applicant to seven (7) years imprisonment, suspended upon probation for two (2) years, credit for time served, substance abuse counseling, random alcohol and drug testing, and a \$500 fine to the Public Defender Fund. Prior charges of criminal domestic violence from August 2013 and harassment from December 2013 were dismissed in exchange for this plea. Applicant did not appeal his conviction.

II. ALLEGATIONS

In his application for post-conviction relief, Applicant alleges his plea and sentence were unconstitutional for the following reasons:

1. Involuntary Guilty Plea.
2. Ineffective Assistance of Counsel.
3. 14th Amendment Right to Due Process Was Violated by Judicial Participation

At the evidentiary hearing, Applicant proceeded on all three grounds.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe the witness who testified at the hearing, and closely assess his credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

A. 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, 23 L.Ed.2d 274 (1969). A 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)). “[T]he accuracy and truth of an accused's statements at a Rule 11 proceeding in which his guilty plea is accepted are “conclusively” established by that proceeding unless and until he makes some reasonable allegation why this should not be so.” Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975.)

This Court finds, and the record reflects, Applicant was fully advised that he was pleading guilty and, therefore, waived any challenges to the evidence against him. The plea court's thorough colloquy with Applicant demonstrates that he understood the consequences of pleading guilty. Applicant presented no credible evidence as to why he should be able to depart from his statements made at the plea hearing. The record reflects Applicant fully admitted his guilt to the plea court. "A guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 129 (2014) (citing State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013); Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Notably the South Carolina Supreme Court



has held "[a] guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Id.* (citations omitted). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Id.* After a full review of the record, this Court finds the plea judge correctly found Applicant's plea was freely, voluntary, and intelligently made, and this allegation must be dismissed.

B. Ineffective Assistance of Plea Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing *Griffin v. Martin*, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, Applicant must prove trial 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." *Id.* at 442, 334 S.E.2d at 814 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. *Id.* (citing *Strickland*, 466 U.S. at 687; *Turner v. Bass*, 753 F.2d 342 (4th Cir. 1985); *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* (citing *Strickland*, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. *Id.* at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel's performance was deficient. *Id.* Under this prong, the Court measures trial counsel's performance by its "reasonableness under prevailing professional norms." *Id.* (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-18, 386 S.E.2d at 625.

The Court finds Applicant failed to meet his burden to show that trial counsel was ineffective. There was no testimony presented that plea counsel failed to advise Applicant on any of the collateral consequences of his plea. Applicant testified that he met with plea counsel many times and understood all his rights before pleading guilty. Applicant testified that plea counsel was ready for trial and had done everything he asked of plea counsel. Applicant testified that plea counsel's representation was satisfactory and he thought she put forth "a valiant attempt." After a full review of the record, this Court finds that plea counsel's representation sufficient and reasonable. Therefore, this allegation must be dismissed.

C. Applicant's 14th Amendment Right to Due Process Was Violated by Judicial Participation

The Court finds Applicant failed to meet his burden to show trial counsel was ineffective by failing to object to the plea judge's involvement. The Court finds that the plea judge did not infuse himself into the plea negotiation. No testimony was elicited that indicated the plea judge behaved in an objectionable manner. The plea judge told plea counsel what sentence he would be inclined to give if Applicant pleaded guilty. "A trial judge may participate in the plea bargaining process if he follows guidelines to minimize the fear of coercion." Medlin v. State, 276 S.C. 540,

541, 280 S.E.2d 648, 648 (1981.) The federal case cited by Applicant in his application, United States v. Gilligan, 256 F.Supp. 244 (1966), was raised by the dissent in Medlin, but the South Carolina Supreme Court chose not to adopt that standard.

After a full review of the record, this Court finds the trial judge took steps to minimize the fear of coercion and Applicant could not reasonably have felt coerced by the participation of the trial judge in the guilty plea. Further, there was no evidence that Applicant was prejudiced by the participation of the plea judge. Therefore, this allegation must be dismissed.

D. 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, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

After the completion of Applicant's case, this Court finds that the Applicant's case at the evidentiary hearing presented the Applicant no right to relief. This Court finds, and the Applicant's testimony at the evidentiary hearing echoes, plea counsel did an admirable job of representing the Applicant. Applicant's manner and testimony at the evidentiary hearing indicated that his decision to take the plea deal was due to his fear of a higher penalty at trial, which is a valid consideration and not a ground for relief.

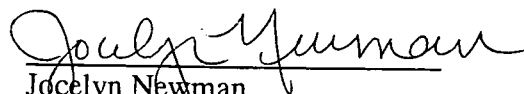
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, the State's Rule 41(b) motion at the end of Applicant's presentation of evidence must

be granted. This application for post-conviction relief must be denied and summarily dismissed under Rule 41(b) with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and summarily dismissed with prejudice.


Jocelyn Newman
Presiding Judge, 5th Judicial Circuit

AND IT IS SO ORDERED THIS 9th DAY OF November, 2016.