

R. MILLS ARIAIL, JR.  
ATTORNEY AT LAW

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PHONE 864.232.9390 • FAX 864.232.9392 • E-MAIL MILLS@RMALAWOFFICE.COM

January 11, 2017

**RECEIVED**

**JAN 17 2017**

**S.C. SUPREME COURT**

**Via US Mail**

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

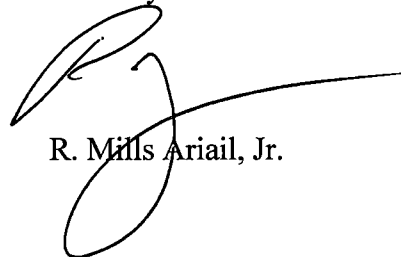
***Re: Notice of Intent to Appeal from Kevin Jerome Gilliard vs. State of South Carolina C.A. No.: 2015-CP-04-2068***

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable Letitia H. Verdin's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Anderson County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,  
LAW OFFICE OF R. MILLS ARIAIL, JR.  
Attorney at Law



R. Mills Ariail, Jr.

RMAjr/dl  
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

JAN 17 2017

APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Letitia H. Verdin, Circuit Court Judge

Case No. 2015-CP-04-2068

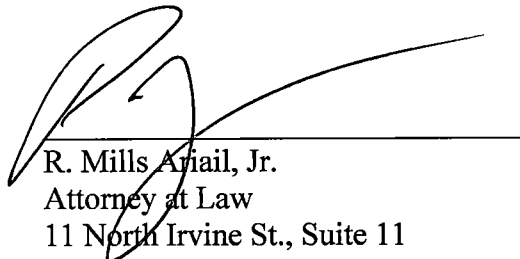
Kevin Jerome Gilliard,..... Appellant,

v.

State of South Carolina ..... Respondent.

**NOTICE OF APPEAL**

Appellant appeals the Honorable Letitia H. Verdin's Order of Dismissal dismissing Appellant's application for post-conviction relief. On December 28, 2016, the Honorable Letitia H. Verdin signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on January 9, 2017. A copy of the Honorable Letitia H. Verdin's Order of Dismissal is attached.

  
\_\_\_\_\_  
R. Mills Ariail, Jr.  
Attorney at Law  
11 North Irvine St., Suite 11  
Greenville, SC 29601  
Telephone (864) 232-9390  
Facsimile (864) 232-9392  
Attorney for Kevin Gilliard

Greenville, South Carolina  
January 11, 2017

**RECEIVED**

**JAN 17 2017**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**S.C. SUPREME COURT**

APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No.2015-CP-04-2068

Kevin Jerome Gillard,..... Appellant,

v.

State of South Carolina ..... Respondent.

**CERTIFICATE OF SERVICE**

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this January 11, 2017, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

**Johanna Valenzuela, Esq.**  
**Assistant Attorney General**  
**PO Box 11549**  
**Columbia, SC 29211**  
**Attorney for the State of South Carolina**

**Anderson County Clerk's Office**  
**Anderson County Courthouse**  
**PO Box 8002**  
**Anderson, SC 29622**

**Kevin Gilliard SCDC# 275357**  
**Lee Correctional Institution**  
**990 Wisacky Highway**  
**Bishopville, SC 29010**

**SC Commission of Indigent Defense**  
**Division of Appellate Defense**  
**PO Box 11433**  
**Columbia, SC 29211-1433**

*Denise Tanner LaBeck*  
Denise Tanner LaBeck

January 11, 2017

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

JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2015CP0402068



Kevin Jerome Gilliard South Carolina State Of

PLAINTIFF(S) DEFENDANT(S)  
Submitted by: 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.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: 41(b)
- ACTION STRICKEN (CHECK REASON):  Rule 40(j) SCRPC;  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:

A TRUE COPY  
JAN - 4 2017  
Richard H. Hines  
CLERK OF COURT

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.

Circuit Court Judge

2162

Judge Code

10/25/2016

COMMON PLEAS AND  
GENERAL SESSIONS

2017 JAN - 3 PM 3: 28

FILED-CLERKS OFFICE  
ANDERSON SC

For Clerk of Court Office Use Only

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

Kevin Jerome Gilliard Lee Correctional Inst. F-4-A-2124  
990 Wisacky Highway Bishopville, SC 29010  
R. Mills Ariail Jr. 11 North Irvine Street, Suite 11  
Greenville, SC 29601

Johanna Catalina Valenzuela PO Box 11549 Columbia, SC  
29211-1549



\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

*Richard A. Shirley*

Court Reporter: Teresa B. Johnson

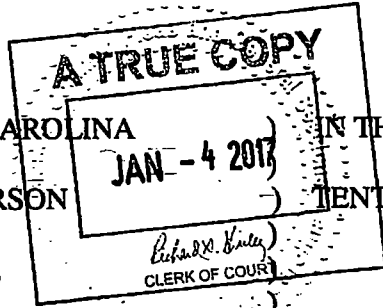
Richard A. Shirley - Clerk of Court

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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\_\_\_\_\_  
\_\_\_\_\_  
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ANDERSON SC  
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COMMON PLEAS AND  
GENERAL SESSIONS



STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF ANDERSON ) TENTH JUDICIAL CIRCUIT

Kevin Jerome Gilliard,  
S.C.D.C. No. 275357,

C.A. No. 2015-CP-04-2068

Applicant,

**ORDER OF DISMISSAL**

v.

State of South Carolina,

Respondent.

COMMON PLEAS AND  
GENERAL SESSIONS

2017 JAN - 3 PM 3: 28

FILED-CLERK'S OFFICE  
ANDERSON SC

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 1, 2015. Respondent filed a Return and Motion to Dismiss or, in the Alternative, a Motion for a More Definite Statement on or about May 23, 2016. An evidentiary hearing into the matter was convened on October 24, 2016, at the Anderson County Courthouse. Applicant was present and represented by R. Mills Ariail, Jr., Esquire. Respondent was represented by Senior Assistant Deputy Attorney General Johanna C. Valenzuela.

Applicant and Applicant's trial counsel, Andrew Potter, Esquire, testified at the hearing. This Court also had before it all relevant pleadings and documents, the Clerk of Court records for Anderson County, the South Carolina Department of Corrections' records, the transcript of Applicant's trial, and Applicant's appellate records.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. Applicant was indicted at the July 2009 term of trafficking cocaine, 28-100 grams (2009-GS-04-1737). Applicant was represented by Andrew Potter, Esquire. Applicant proceeded to trial from December 7-9, 2009,

after which a jury convicted him as indicted. The Honorable J. Cordell Maddox, Jr., sentenced him to twenty-five (25) year imprisonment.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Tristan Shaffer, Esquire. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Gilliard, No. 2012-UP-351 (filed June 13, 2012). The Remittitur was issued on March 4, 2014.

Applicant filed a petition for writ of certiorari to the Supreme Court of South Carolina. The Supreme Court granted certiorari. On July 15, 2015, the Supreme Court dismissed certiorari as improvidently granted. State v. Gilliard, No. 2015-MO-041. The Remittitur was issued on July 15, 2015.

#### SUMMARY OF TESTIMONY

Prior to Applicant submitting his allegations to the Court the day of the hearing, Respondent moved to dismiss the case due to Applicant's failure to provide any allegations prior to the hearing. At the hearing, Applicant presented a list of allegations for the first time. Respondent's counsel withdrew the objection except as to any allegations that reached Kurt Tavernier, Esquire, as Respondent would be prejudiced due to the lack of notice and Mr. Tavernier not being present as a witness. This Court held the allegations were limited to Mr. Potter and would not consider any allegations as to Mr. Tavernier.

Applicant testified he was innocent of everything and claimed his trial counsel was deficient for failing to object to the lack of a preliminary hearing; failing to object to statements provided to the Grand Jury; and failing to present defense witnesses, such as Officer Wilkerson, Applicant's then-girlfriend, and Applicant's co-defendant. Applicant also claimed trial counsel was deficient for failing to produce the video from the booking area and for failing to make a

Franks<sup>1</sup> motion. Further, Applicant argued the testimony on the marijuana found in Applicant's pocket should have been excluded because it was prejudicial. Finally, Applicant argued the cocaine sentence enhancement charge was in error.

On cross-examination, Applicant agreed that prior to the start of his trial his co-defendant claimed responsibility for all the drugs and the weapon found inside the vehicle at the traffic stop, which resulted in the State dismissing the charges of Possessions with Intent to Distribute and Possession of a Weapon During the Commission of a Crime. Applicant agreed he proceeded to trial solely on the charge related to the crack cocaine the State alleged was found on him in the booking area, following his arrest at the traffic stop. Applicant testified he remembered his trial counsel addressing the missing booking area video at trial.

Applicant also admitted that during the traffic stop he was a passenger, he was observed to have marijuana in his hand, and testimony presented at the hearing was that he was found to have crack cocaine in his possession that was found in the booking area.

Trial counsel testified prior to trial he had discovery and was prepared for the trial. Trial counsel explained he had investigated and discussed with Applicant that there was no standing to object to the traffic stop because Applicant had been the passenger and not the driver of the vehicle when the traffic stop was initiated. Trial counsel also testified there was no evidence the video of the booking area had been destroyed in bad faith. The video had been lost through negligence because it was deleted as part of the regular deletion schedule and not preserved. Trial counsel testified it was beneficial to allow testimony about how the State's witnesses did a good enough pat down of Applicant at the traffic stop to find marijuana in order to highlight how that same officer failed to find the crack cocaine on Applicant until he got to booking. Trial

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<sup>1</sup> Franks v. Delaware, 438 U.S. 154, 170, 98 S. Ct. 2674, 2684, 57 L. Ed. 2d 667 (1978).

counsel also explained the issue related to the preliminary hearing was moot because by the time he took over the case the Grand Jury had true billed Applicant's indictment. Trial counsel did not believe there was any basis for a successful motion to quash the indictment. Trial counsel testified he did discuss a Franks motion with Applicant and explained there was no legal basis to pursue that motion because of the true billed indictment. Finally, trial counsel explained Applicant had five prior convictions, and there was no basis to challenge the conviction as an improper enhancement.

### **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. Furthermore, this Court has had the opportunity to observe the witnesses presented at the hearing, and closely pass upon all witnesses' 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), SCRPC). 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, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 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. at 441, 334 S.E.2d at 813. Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, 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, 466 U.S. at 668, 104 S.Ct. at 2064). Second, counsel's 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

***Failure to object to preliminary hearing***

Applicant argues trial counsel was ineffective for not challenging the failure to give him a preliminary hearing. "South Carolina statutory law specifically provides that an accused may be brought to trial under indictment by a grand jury without a preliminary hearing in some cases." State v. McClure, 277 S.C. 432, 434, 289 S.E.2d 158, 160 (1982) (citing State v. Nesmith, 213 S.C. 60, 48 S.E.2d 595 (1948)). "The indictment itself constitutes a finding of probable cause and thus avoids the need for a preliminary hearing." Id. (citing U. S. v. Werbrouck, 589 F.2d 273 (7th Cir. 1978), cert. den. 440 U.S. 962, 99 S.Ct. 1507, 59 L.Ed.2d 776). However, "[o]nce the accused properly requests a preliminary hearing, the magistrate's court retains jurisdiction and the Court of General Sessions is deprived of jurisdiction until such hearing is held." Id. (citing State v. Porcher, 273 S.C. 507, 257 S.E.2d 505 (1979)).

Trial counsel took over this case after the indictment was true billed by the grand jury. Applicant presented no evidence he requested a preliminary hearing and was denied one or that he was prejudiced by the lack of a preliminary hearing. This Court finds Applicant has failed to carry his burden of proving trial counsel was ineffective for failing to challenge the lack of a preliminary hearing or of proving there was any resulting prejudice. Thus, this allegation is denied.

*Failure to call witnesses*

Applicant alleges trial counsel failed to call certain witnesses at trial.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Applicant claims trial counsel failed to call witnesses at trial who would have testified on his behalf. However, Applicant failed to present any of these witnesses at the PCR hearing; therefore, no prejudice can be shown pursuant to Underwood. This Court finds Applicant has failed to carry his burden of proving trial counsel was ineffective for failing to call witnesses on Applicant's behalf at trial or any resulting prejudice. Thus, this allegation is denied.

*Franks Motion*

Applicant claims trial counsel was ineffective for not making a Franks motion. "To be entitled to a Franks hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge." State v. Missouri, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999). Further, "[t]here will be no Franks violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause." Id.

Applicant has presented no evidence of information recklessly or intentionally omitted from the warrant. At trial, counsel challenged the inaccurate references in the warrant and incident report that suggested the crack was found on Applicant while they were still by the vehicle instead of in the booking area. (Tr. pp. 83-87.) Two of the State's witnesses testified they observed crack fall out of Applicant's pant leg onto the floor in the booking area. (Tr. pp. 75, 97-100.) Deputy Surrat testified he mistakenly misidentified where Applicant was when the crack cocaine was found in his possession. (Tr. p. 87.)

Having reviewed the transcript and considered the testimony, this Court finds Applicant has not met his burden of establishing trial counsel was ineffective or that Applicant was prejudiced thereby. There was sufficient information to establish probable cause despite the mistaken identification of Applicant's location when he was observed in possession of the crack cocaine.

*Video from the booking area*

Applicant argues his trial counsel was ineffective for failing to produce or challenge the missing booking area video. Trial counsel did challenge the video and did ask that an inference

instruction be given to the jury that the video contained exculpatory information or evidence that could have been found had the State not failed to preserve the video. (Tr. pp. 39-43.) The trial court denied the request for the instruction but allowed counsel to cross-examine State's witnesses on the failure to preserve the video, which counsel did. (Tr. p. 106.) Trial counsel also objected again prior to closing charges. (Tr. p. 136.) At the PCR hearing, trial counsel testified he had no good faith basis to assert the destruction of the video was done in bad faith.

This Court finds Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby and, accordingly, finds this allegation is denied.

***Testimony about Marijuana found in Applicant's pocket***

Applicant alleges trial counsel was deficient for failing to exclude testimony about the marijuana found in Applicant's pocket at the traffic stop. However, trial counsel testified to a valid trial strategy in addressing and using this testimony to benefit his client.

Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d, 529 (1992).

Further, a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. State v. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985) (citing Strickland v. Washington, 104 S.Ct. 2052, 890 L.E.2d 674 (1984)). Because of the difficulties inherent in making the evaluation, a court

must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. Id.

Applicant acknowledged that immediately prior to his trial the State dismissed the Possession with Intent to Distribute and Possession of a Weapon charges after his co-defendant confessed all the drugs and the weapon found in the car were his and not Applicant's. The State proceeded to trial solely on the crack cocaine found in Applicant's possession in the booking room. The State presented two witnesses who observed the crack cocaine fall by Applicant's foot in the booking room. (Tr. pp. 74, 96-100.) At the PCR hearing, trial counsel agreed part of his strategy was to highlight the search done of Applicant at the traffic stop and the marijuana officers had found on Applicant during that pat down in order to challenge the later discovery of the crack cocaine on Applicant in the booking room.

This Court finds trial counsel has outlined a valid trial strategy. Therefore, this Court finds Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby and, accordingly, finds this allegation is denied.

#### ***Sentence enhancement***

Applicant claims his sentence enhancement was in error. He produced no evidence to support this allegation. Trial counsel testified Applicant had sufficient prior convictions, and he was aware of no reason to object to the sentencing enhancement. Therefore, this Court finds Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby and, accordingly, finds this allegation is denied.

#### **No Evidence Presented**

At the start of the hearing, Applicant presented a written list of allegations; however, this Court finds Applicant presented no testimony on the following allegations:

- Conflict of interest
- For allowing Applicant to be tried and convicted on indictment other than indictment found by Grand Jury
- Prosecutorial misconduct
  - Solicitor's evidence during pretrial
  - Solicitor's prejudicial opening remarks and closing arguments
  - Unethical tactics in maintaining convictions
- Judicial misconduct

### CONCLUSION

Based on all the foregoing, this Court finds and concludes 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 notifies 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 (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 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. Applicant must be remanded to the custody of the Respondent.

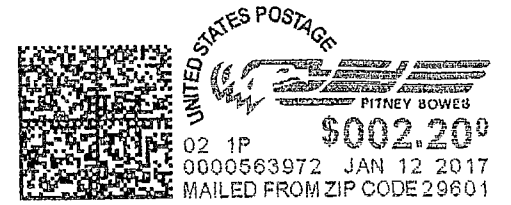
**IT IS SO ORDERED.**



LETITIA H. VERDIN  
Presiding Judge  
Tenth Judicial Circuit

12/28/11 (date)  
Greenville, South Carolina

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ANDERSON SC  
2017 JAN -3 PM 3: 28  
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GENERAL SESSIONS



[REDACTED]

MILLS ARIAIL, JR.

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NORTH IRVINE STREET, SUITE 11  
GREENVILLE, SC 29601

Daniel Shearouse  
Clerk of Court  
South Carolina Supreme Court  
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