

# 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

---

July 16, 2017

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

**RECEIVED**

JUL 19 2017

S.C. SUPREME COURT

Re: John Henry Smith 211679

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Horry 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

Thank you for your assistance.

Cc: Megan Jameson Esq. John Smith 211679

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

JUL 19 2017

APPEAL FROM HORRY COUNTY

S.C. SUPREME COURT

Court of Common Pleas

Honorable Roger E. Henderson, Circuit Judge

Case No.: 2015-CP-26-04022

John Henry Smith 211679.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner James Little appeals the Honorable Roger E. Henderson's June 26, 2017 Order of Dismissal. Undersigned counsel received notice of entry of the order on July 14, 2017. A copy of the order on appeal is attached hereto.



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

July 17, 2017

Megan Harrigan Jameson, Esq.  
Office of S.C. Attorney General  
PO Box 11549  
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

JUL 19 2017

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Honorable Roger E. Henderson, Circuit Judge

Case No.: 2015-CP-26-04022

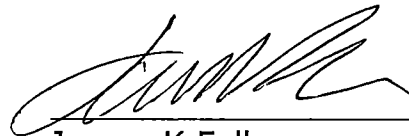
John Henry Smith 211679.....PETITIONER

V.

State of South Carolina.....RESPONDENT

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, Megan Harrigan Jameson, Esq. 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 July 17, 2017.



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

STATE OF SOUTH CAROLINA )  
 COUNTY OF HORRY )  
 )  
 John Henry Smith, SCDC No. 211679, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2015-CP-26-4022

**ORDER OF DISMISSAL**

JAMES N. ELLIS  
 CLERK OF COURT  
 HORRY COUNTY, SC

2017 JUN 10 PM 4:38

FILED  
 HORRY COUNTY

This matter comes before the Court by way of an application for post-conviction relief filed by John Henry Smith (Applicant) on June 2, 2015, alleging various claims of ineffective assistance of counsel. Respondent made its Return on February 1, 2016, requesting an evidentiary hearing be held. An evidentiary hearing was convened in the Horry County Court of Common Pleas on March 24, 2017, at the Horry County Courthouse. Applicant was present at the hearing and was represented by James Falk, Esquire. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. At the conclusion of the hearing, this Court denied the application from the bench. This order follows.

**PROCEDURAL HISTORY**

The records before this Court indicate the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. During its February 2012 term of court, the Horry County Grand Jury indicted Applicant for armed robbery (2012-GS-26-0469). Jonathan Eric Fox, Esquire, of the Horry County Public Defender Office represented Applicant. On April 17, 2013, Applicant proceeded to jury trial in the Horry County Court of General Sessions before the Honorable Larry B.



Hyman Jr., circuit court judge. On April 18, 2013, the jury convicted Applicant as indicted. Judge Hyman sentenced Applicant to twenty-five years' imprisonment.

Applicant filed a timely notice of appeal and an appeal was perfected on Applicant's behalf by Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense--Division of Appellate Defense. Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence in an unpublished summary opinion. State v. John Henry Smith, Op. No. 2015-UP-095 (Ct. App. filed Feb. 25, 2015). The Remittitur was returned to the circuit court on March 13, 2015.

### **ALLEGATIONS RAISED**

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following allegations of ineffective assistance of counsel:

1. Failure to adequately investigate the facts and circumstances surrounding the credibility of the State's witness Hilton Fryar;
2. Failure to seek an instruction stating that a burglary charge must set forth one specific crime intended upon entry and stating what the specific crime was in Applicant's case;
3. Failure to investigate and present mitigation evidence during sentencing;
4. Failure to emphasize Applicant had previously completed probation successfully; and
5. Failure to emphasize Applicant's prior probation did not include drug treatment program which would have acted as preventative measure.

At the evidentiary hearing, Applicant proceeded forward on the two additional allegations of ineffective assistance of counsel: failure to properly advise Applicant regarding a fifteen year plea offer from the State and failure to object to leading questions to the victim. In support of his application, Applicant testified on his own behalf and presented testimony from trial counsel Jonathan Eric Fox (trial counsel).

### SUMMARY OF EVIDENCE ADDUCED AT TRIAL

A little after two o'clock in the morning on December 12, 2011, Hilton Fryar was working the cash register at Walgreen's when a man entered the store, got a box of Ziploc bags from a shelf, brought it to the counter, and asked Fryar for the price.<sup>1</sup> Fryar was able to identify Applicant as the man who entered the store. Applicant then ordered Fryar to give him the money from the cash register and told Fryar not to make any noise because he had a gun. One of Applicant's hands was in his pocket. Fryar opened the register and started removing money when Applicant suddenly snatched approximately sixty-dollars from Fryar's hand and ran out the door. The incident was captured by the store's video surveillance camera and that video recording was introduced into evidence over Applicant's objection. After it was published, two still shots from that video were also introduced. Fryar repeated his testimony that during the robbery Applicant claimed to have a gun and had his hand in his pocket as if he may have had a gun. (Tr.p.62, line 1-p.74, line 24). On cross-examination Fryar acknowledged he never actually saw a weapon. (Tr.p.77, lines 16-20). On re-direct examination, Fryar testified he was in fear for his safety and backed away from the register after Applicant claimed to have a gun. (Tr.p.82, lines 7-25).

Police officers responded to the Walgreen's shortly after the robbery. Based on Fryar's description of the perpetrator and a subsequent search of the surrounding area, Applicant was located on foot, chased, and ultimately apprehended. The police officers who chased and caught Applicant after the incident, placed him under arrest, and booked him into the detention center did not see Applicant with a weapon, did not see him throw anything to the ground during the

---

<sup>1</sup> Applicant's theory of the case was an acknowledgment he committed the robbery, but a claim that he was not armed. (Tr.p.57, line 20-p.60, line 23).

pursuit, and did not discover a weapon in his possession. (Tr.p.88, lines 18-24; p.89, lines 21-24; p.95, line 7-p.96, line 13; p.100, lines 2-17; p.106, line 4-p.107, line 2; p.115, lines 11-22).

At the close of the State's case, Applicant moved for a directed verdict. He argued the State failed to produce evidence of any actual weapon and, relying on our supreme court's opinion in State v. Muldrow,<sup>2</sup> argued his words alone were insufficient to allow the case to go forward. The solicitor argued evidence of more than mere words existed to support the armed robbery charge and that Applicant made an actual representation of a weapon by having his hand in his pocket and claiming he had a gun. The trial court agreed, found the evidence against Applicant went beyond the evidence in Muldrow, and denied the motion. (Tr.p.116, line 9-p.119, line 15).

The trial court subsequently granted Applicant's request for jury charges on the lesser-included offenses of strong-arm robbery and larceny. (Tr.p.123, line 20-p.126, line 15). During closing arguments, the solicitor argued Applicant's claim he had a gun combined with having his hand in his pocket constituted a representation of a deadly weapon and argued it was reasonable for Fryar to think Applicant had a gun. (Tr.p.131, lines 2-23). Applicant argued these actions were insufficient to carry the State's burden of proof. (Tr.p.142, line 8-p.144, line 4). The trial court gave standard jury charges on the respective roles of the judge and jury, the State's burden of proof, the presumption of innocence, reasonable doubt, direct and circumstantial evidence, credibility of witnesses, and the elements of armed robbery. (Tr.p.145, line 5-p.158, line 22). In regard to the State's burden of proving Applicant was either armed with a deadly weapon or alleged he was armed while using a representation of a deadly weapon, the court charged in part:

However, words alone are not sufficient to establish the defendant was armed with a deadly weapon. The State must show evidence corroborating the allegation of being armed, for example, the use

---

<sup>2</sup> 348 S.C. 264, 559 S.E.2d 847 (2002).



of a physical representation of a deadly weapon, to establish an armed robbery. (Tr.p.153, line 23-p.154, line 4). The jury deliberated for approximately forty-five minutes and returned a verdict of guilty of armed robbery. (Tr.p.161, lines 1-19).

Following the jury's conviction of Applicant, the solicitor presented Applicant's lengthy prior record to the trial court, including convictions for four prior armed robberies and numerous fraudulent check, forgery, and criminal conspiracy charges. (Tr. 163-64). The solicitor also informed the trial court it had previously served Applicant with notice of its intention to seek life without parole pursuant to S.C. Code Ann. § 17-25-45 based on Applicant's four prior burglary convictions. (Tr. 163-64). In mitigation, trial counsel noted Applicant was forty-five years old, had not been in any serious trouble in the past decade, and was a peaceful man other than his drug addiction. (Tr. 164-65). Trial counsel also stressed Applicant denied ever having a weapon and that Applicant had previously completed probation successfully. (Tr. 164-65). Applicant then addressed the court, noting he had effectively finished probation previously, had been employed for more than fourteen years, and only relapsed with addiction after losing his job. (Tr. 165-66). The trial court asked both parties to approach the bench, and thereafter, the State withdrew its notice of intention to seek life without parole. (Tr.167). The trial court then sentenced Applicant to twenty-five years imprisonment. (Tr. 168).

#### **SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING**

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from trial counsel. Applicant testified first and stated he met with trial counsel twice prior to his trial. He testified trial counsel was the second attorney who represented him on this charge. He recalled reviewing the discovery with trial counsel, including surveillance footage from the Walgreen's that showed the robbery from several different angles. Applicant acknowledged he



robbed the Walgreen's, but asserted he did not have a weapon and therefore should have been convicted of strong arm robbery. He admitted to having his hand in his pocket, but stressed he made no gesture or movement to indicate he had a gun. He agreed the video surveillance shows him with his hand in his pocket. Applicant denied telling the store clerk he had a gun and claimed he only stated, "Give me the money, this is a robbery." He testified he wanted trial counsel to attack the credibility of the victim because he did not tell the clerk he had a weapon. He testified trial counsel explained to him that under South Carolina case law, the physical representation element of armed robbery could be met based on his hand in his pocket.

Applicant testified he wanted a plea offer of ten to fifteen years imprisonment and is displeased with his twenty-five year sentence. He acknowledged he had four prior armed robbery convictions and knew the State was seeking a life without parole sentence, although he denied being served with written notice from the State. He testified he recalled the State withdrawing its life without parole notice after trial counsel's mitigation. Applicant admitted he was aware of a fifteen year plea offer from the State and he rejected the offer because he wanted a better offer of a ten year sentence. He acknowledges trial counsel advised him he would not be eligible for a probationary sentence and that the mandatory minimum sentence for armed robbery was ten years of imprisonment.

Trial counsel took the stand next and testified he had been practicing criminal defense for more than twenty years. He testified he took this case over from a fellow public defender a year prior to trial. He testified he met with Applicant four times prior to his trial. Trial counsel testified he reviewed all discovery materials with him, including the surveillance footage from the store. He testified the videos clearly showed Applicant had his hand in his pocket during the robbery. He testified the video did not have clear sound and therefore was unable to corroborate

the store clerk's assertion Applicant said he had a gun. However, he acknowledged the uncontroverted testimony presented at trial was that Applicant told the clerk he had a gun and was in fear for his life. Trial counsel testified Applicant did not take the stand at trial to refute the clerk's claims because of his four prior armed robbery convictions. However, he testified the store clerk did not have any credibility issues or any impeachable offenses that could be used to attack his veracity.

Trial counsel testified the State served Applicant with notice of intention to seek a sentence of life without parole, which was introduced by Respondent as Respondent's Ex. No. 1. He testified the State had previously made an offer of fifteen years imprisonment and Applicant rejected this plea offer because he wanted a better plea offer to the lesser included offense of strong armed robbery. He testified Applicant was arraigned before Judge Hyman and during the arraignment, he was questioned regarding the State's fifteen year plea offer. He testified these arraignment findings were memorialized in a written order signed June 8, 2012 and filed June 25, 2012, which was introduced as Respondent's Ex. No. 2. Trial counsel testified the State ultimately withdrew its notice of intent to seek life without parole after his mitigation and testified the trial court indicated it would sentenced Applicant to twenty-five years of imprisonment if the State rescinded its notice.

He testified his trial strategy was to attack the State's case, including the credibility of the store clerk victim, who was the State's chief witness. He again acknowledged the clear and uncontroverted testimony presented at trial was that Applicant had a gun and was in fear for his life. When questioned about his failure to object to the State's allegedly leading questioning of the clerk regarding whether he was in fear, trial counsel testified he believes it is common sense that someone being threatened with a gun would be in fear for his or her life and that the State



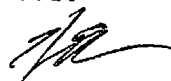
could have, and likely would have, rephrased its question if he had objected to such questioning. (Tr. P. 63, 65, 82).

### 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 hearings. 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).

#### *Ineffective Assistance of Counsel*

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume 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. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was



unreasonable. Strickland, 466 U.S. at 689. “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

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. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668

After careful review of the entire record, including the testimony and exhibits presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action. Below are this Court’s rulings in regards to each of Applicant’s specific allegations of ineffective assistance of counsel:



*Allegation No. 1: Trial counsel was ineffective for failing to adequately investigate the credibility of the victim*

Applicant alleges trial counsel was ineffective for failing adequately investigate the credibility of State's witness Hilton Fryar, the Walgreen's store clerk who Applicant robbed. Specifically, Applicant alleges trial counsel was ineffective for failing to attack the credibility of Fryar regarding Fryar's assertions Applicant stated he had a gun. Applicant presented no evidence to impugn Fryar's credibility and or otherwise support this allegation. Additionally, trial counsel testified Fryar did not have any credibility issues or any impeachable offenses that could be used to attack his veracity.

A review of the record reveals trial counsel vigorously cross-examined Fryar and was able to elicit from Fryar that he never saw Applicant with a weapon. (Tr. 77). Additionally, during his closing argument, trial counsel highlighted to the jury, "no question there is no weapon, no one ever testified to you they saw a weapon, no one ever testified to you they found a weapon." (Tr. 141). Moreover, trial counsel argued to the jury, "[n]ow, you heard the testimony of Mr. Fryar. The judge will tell you you can believe everything a witness tells you, none of what a witness tells you, some of it. You have a video. What you don't have is audio, you cannot hear what is being said to verify that but words alone are not sufficient, so do you have, this whole things comes down to do you have a representation of a gun." (Tr. 142).

This Court finds Applicant has failed to carry his burden as to this allegation, which must be denied and dismissed with prejudice. This Court finds trial counsel's performance was not deficient and was well within the professional standards required for a criminal defense attorney. Specifically, trial counsel elicited from Fryar that he never saw a weapon, and then highlighted this to the jury on cross-examination, as well as emphasizing the video recording did not have



audio and there was nothing to corroborate Fryar's testimony that Applicant said he had a gun. Furthermore, Applicant cannot show any prejudice, as he failed to present any evidence as to any additional information trial counsel could have used to impeach or otherwise attack Fryar's credibility. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

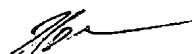
*Allegation No. 2: Trial counsel was ineffective for failing to seek an instruction stating that a burglary charge must set forth one specific crime intended upon entry and stating what the specific crime was in Applicant's case*

Applicant alleges trial counsel was ineffective for failing to seek an instruction stating that a burglary charge must set forth one specific crime intended upon entry and stating what the specific crime was in Applicant's case. However, Applicant was not indicted or convicted of burglary. This allegation is wholly without merit and must be denied and dismissed with prejudice.

*Allegation No. 3: Trial counsel was ineffective for failing to investigate and present mitigation evidence during sentencing*

Applicant alleges trial counsel was ineffective for failing to investigate and present mitigation evidence during sentencing. At the post-conviction relief hearing, Applicant could not articulate and failed to present evidence of any specific information he wanted trial counsel to present in mitigation. Additionally, the record refutes this allegation. Prior to trial, the State had served Applicant with its notice of intention to seek life without parole. During sentencing, trial counsel argued the following in mitigation on Applicant's behalf:

Your Honor, Mr. Smith, John Henry is 45 years old, lives here in town. Your Honor has heard his prior record. I would point out that the things that make him eligible for a life sentence happened twenty years ago, he was much younger, a much different man. He did about seven years on that charge, released around 2002. For the last ten years the only General Sessions charge was a breach of



trust, nothing violent, nothing remotely like this, but that does make him eligible under the statute for a life sentence.

I think Mr. Smith, and one of the court officers relayed to me that they know Mr. Smith, he is a very good and gentle man, drugs being the problem. It is not an excuse for what he has done but what he has always told me about this situation was there was no form of plan in his mind, he certainly did not wish to harm anybody. He is adamant he did not have a weapon and as I argued to the jury that it was a robbery, not an armed robbery but we're not taking issue with that because certainly the elements, there was evidence to support the jurors' verdict in terms of representation of a weapon, but we ask Your Honor to keep all those things in mind in your sentence, Your Honor.

(Tr. 164-65). Shortly thereafter, the trial court asked the State and trial counsel to approach the bench, and as a result, the State withdrew its notice of intention to seek life without parole and the trial court sentenced Applicant to twenty-five years' imprisonment.

This Court finds Applicant has failed to carry his burden as to this allegation, which must be denied and dismissed with prejudice. This Court finds trial counsel's performance was not deficient and was well within the professional standards required for a criminal defense attorney. Specifically, trial counsel successfully presented mitigation on Applicant's behalf during the sentencing proceeding which resulted in the State withdrawing its notice of intention to seek life without parole. Furthermore, Applicant cannot show any prejudice, as he failed to present any evidence as to any additional information trial counsel could have used during mitigation. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

*Allegation No. 4: Trial counsel was ineffective for failing to emphasize Applicant had previously completed probation successfully*

Applicant alleges trial counsel was ineffective for failing to emphasize Applicant had previously completed probation successfully. However, Applicant was convicted of armed robbery, an offense which requires a mandatory minimum sentence of ten years of



imprisonment. See S.C. Code Ann. §16-11-330(A) (“Robbery and attempted robbery while armed with deadly weapon. A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony and, upon conviction, **must be imprisoned for a mandatory minimum term of not less than ten years or more than thirty 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 years of the sentence.”) (emphasis added). Therefore, this allegation is wholly without merit and must be denied and dismissed with prejudice.

*Allegation No. 5: Trial counsel was ineffective for failing to emphasize Applicant’s prior probation did not include drug treatment program which would have acted as preventative measure*

Applicant alleges trial counsel was ineffective for failing to emphasize Applicant’s prior probation did not include a drug treatment program which would have acted as a preventative measure. However, as discussed above, Applicant was not eligible for probation, drug treatment programs, or any other alternative form of incarceration. This allegation is without merit and must be denied and dismissed with prejudice.

*Allegation No. 6: Trial counsel was ineffective for failing to properly advise Applicant regarding a fifteen year plea offer*

Applicant alleges trial counsel was ineffective for failing to properly advise him regarding a plea offer from the State that would have allowed him to plead guilty to armed robbery in exchange for a negotiated sentence of fifteen years imprisonment. The uncontroverted

evidence before this Court clearly demonstrates Applicant was aware of the State's fifteen year plea offer and rejected this offer. Applicant admitted he was aware of a fifteen year plea offer from the State and he rejected the offer because he wanted a better offer of a ten year sentence. He acknowledges trial counsel advised him he would not be eligible for a probationary sentence and that the mandatory minimum sentence for armed robbery was ten years of imprisonment. He also acknowledged he had four prior armed robbery convictions and knew the State was seeking a life without parole sentence. Trial counsel testified the State made an offer of fifteen years' imprisonment prior to Applicant's trial and Applicant rejected this plea offer because he wanted a better plea offer to the lesser included offense of strong armed robbery. He testified Applicant was arraigned before Judge Hyman and during the arraignment, he was questioned regarding the State's fifteen year plea offer. He testified these arraignment findings were memorialized in a written order signed June 8, 2012 and filed June 25, 2012, which was introduced as Respondent's Ex. No. 2.

This Court finds Applicant has failed to carry his burden as to this allegation, which must be denied and dismissed with prejudice. This Court finds trial counsel's performance was not deficient and was well within the professional standards required for a criminal defense attorney. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

*Allegation No. 7: Trial counsel was ineffective for failing to object to leading questions to the victim*

Applicant alleges trial counsel was ineffective for failing to object to the leading questions of State's witness Fryar. Specifically, Applicant complains the following lines of questioning were improper:

Q. At that time did you fear he had a gun like he said?

A. Uh-huh.

...

Q. At that point[,] were you in some fear for your safety?

A. Yes, sir.

(Tr. 65 lines 9-11; 82 lines 23-25). Applicant contends these questions were leading and improperly allowed the State to elicit Fryar as being in fear for his life. In response to this allegation, trial counsel testified he believes it is common sense that someone being threatened with a gun would be in fear for his or her life and that the State could have, and likely would have, rephrased its question if he had objected to such questioning.

This Court finds this allegation is without merit and must be denied and dismissed. As trial counsel testified, Fryar testified earlier that Applicant told him he had a gun and his hands were in his pocket. See Tr. 63. Therefore, Applicant is unable to glean any possible prejudice from these allegedly improper questions. This Court also finds trial counsel responded in accordance with professional standards required of a criminal defense attorney when he elected not to object, as such an objection would not likely have been sustained or the State would have rephrased its question to Fryar. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

### 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.

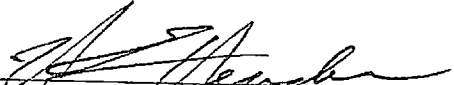



This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides 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.

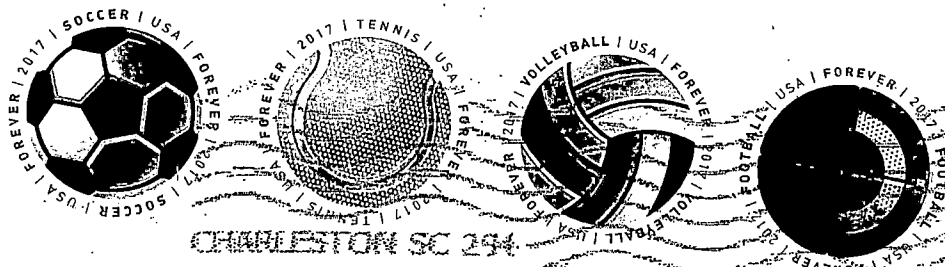
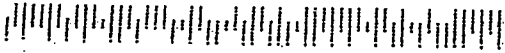
**IT IS THEREFORE ORDERED:**

1. This application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 26<sup>th</sup> day of June, 2017.

  
\_\_\_\_\_  
ROGER E. HENDERSON  
Presiding Judge  
Fifteenth Judicial Circuit

, South Carolina



CHARLESTON SC 294

MON 17 JUL 2017 PM



**DLK LAW FIRM**  
Box 1058  
Charleston, SC 29402

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