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ATTORNEYS AT LAW

*A PROFESSIONAL ASSOCIATION*

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December 27, 2017

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

**RECEIVED**

JAN 02 2018

Re: Brian Lee Davidson. v. State of South Carolina  
Case No: 2017-CP-11-0192

S.C. SUPREME COURT

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,

  
\_\_\_\_\_  
Rodney Richey

RWR/  
enclosures

cc: Valerie Garcia Giovanoli, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM CHEROKEE COUNTY  
Court of Common Pleas

HONORABLE G. THOMAS COOPER, JR.

2017-CP-11-0192

BRIAN LEE DAVIDSON. SCDC# 351872

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

**RECEIVED**

JAN 02 2018

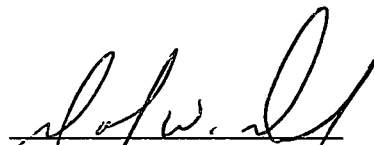
S.C. SUPREME COURT

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**NOTICE OF APPEAL**

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Brian Lee Davidson appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable, G. Thomas Cooper, Jr., Circuit Judge on November 16, 2017 an Order issued on December 5, 2017 and filed on December 8, 2017. The Appellant received notice of the judgment on December 10, 2017.



Rodney W. Richey, Esquire  
Attorney for the Appellant  
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Attorney for Applicant

Other Counsel of Record:  
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Office of Attorney General State of SC  
Post Office Box 11549  
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM CHEROKEE COUNTY  
Court of Common Pleas

HONORABLE G. THOMAS COOPER, JR.

2017-CP-11-0192

BRIAN LEE DAVIDSON. SCDC# 351872

APPELLANT,

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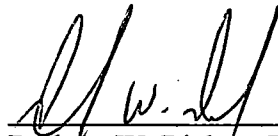
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**AFFIDAVIT OF SERVICE**

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I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on December 27, 2017, addressed to their attorney of record, Valerie Garcia Giovanoli, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: December 27, 2017



Rodney W. Richey, Esquire  
Attorney for the Appellant  
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(864) 467-0503  
Attorney for John C. Hayes, III

STATE OF SOUTH CAROLINA  
COUNTY OF CHEROKEE

Brian Lee Davidson, #351872

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT

2017-CP-11-0192

**ORDER OF DISMISSAL  
WITH PREJUDICE**

BRANDY W. MCBEE

2017 DEC -8 AM 11:34

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Brian Lee Davidson (Applicant) on March 3, 2017. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on November 16, 2017 at the Spartanburg County Courthouse. Applicant was present and represented by Rodney Richey, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. This Court had before it a copy of the Cherokee County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections ("SCDC"), the plea transcript, the PCR application, and Respondent's return.

### PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. In August 2014, the Cherokee County Grand Jury indicted Applicant for trafficking in methamphetamine (2014-GS-11-0750), possession of alprazolam, second or subsequent offense (2014-GS-11-0751), possession of clonazepam, second or subsequent offense (2014-GS-11-0752), and possession of marijuana,

second or subsequent offense (2014-GS-11-0753). William Rhoden, Esquire, represented Applicant. Assistant Solicitor Kimberly Leskanic prosecuted the case. On March 4, 2016, Applicant pleaded guilty to the lesser included offense of possession with intent to distribute methamphetamine (PWID), third offense, before the Honorable R. Keith Kelly. Applicant also pleaded guilty as indicted to the remaining possession charges. Pursuant to a negotiated sentence, Judge Kelly sentenced Applicant to imprisonment for concurrent terms of ten years for PWID methamphetamine and one year for each possession charge. Applicant did not appeal his conviction or sentence.

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

1. "Ineffective Assistance of Counsel"
  - a. "I was improperly advised when I signed my plea. I was told that I was signing a non-violent sentence eligible for parole, good time, work credit, and work release. All of this was correct until February of 2017. SCDC changed my sentence a year after my plea agreement."
  - b. "I did not have an issue with my sentence until SCDC changed my maxout and eligibility due to Bolin v. South Carolina."

#### **SUMMARY OF TESTIMONY AT PCR**

I. Applicant testified to the following:

Applicant testified he was advised by SCDC that he was not parole eligible and that his previous classification as a 65% offense was in error and based on their misinterpretation of Bolin v. State. Applicant testified he was only dissatisfied with the change in his classification with SCDC, not with his plea counsel.

#### **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 had the opportunity to observe the



witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency.

### **I. Ineffective Assistance of Counsel**

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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 (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. With respect to guilty plea counsel,



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, 88 L.Ed. 2d 203 (1985).

At the close of Applicant's case, Respondent moved for a directed verdict arguing that even taking the evidence presented in a light most favorable to Applicant, relief is not warranted and Applicant has not even framed a cognizable claim under the Post-Conviction Procedure Act ("PCR Act"). This Court agrees. Applicant only complains of his sentence classification and therefore has failed to state a claim cognizable under the PCR Act, S.C. Code Ann. §17-27-10 to -160. An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other write, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20.

Applicant's allegations do not support a cognizable claim for post-conviction relief under any of the statutory grounds. Post-conviction relief is only proper when the application collaterally attacks the validity of the conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). Claims that affect only the duration of the sentence or quality of the



inmate's confinement do not affect the validity of the conviction or sentence and therefore are considered non-collateral attacks on the conviction. Cooper v. State, 338 S.C. 202, 525 S.E.2d 886 (2000). As stated in Cooper, by challenging the duration of the sentence, the Applicant is in fact trying to enforce the sentence and this therefore not making a collateral attack on the conviction. Furthermore, "an ex post facto claim is considered a non-collateral matter" and must be brought through the Administrative Procedures Act. Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000).

### CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. This Court finds Applicant has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, Respondent's motion for directed verdict is granted and the application is denied and dismissed with prejudice.

This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.



**IT IS THEREFORE ORDERED THAT:**

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 5<sup>th</sup> day of December, 2017.

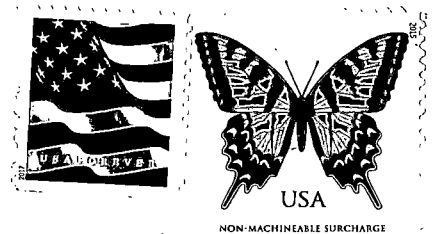


G. THOMAS COOPER, JR.  
Presiding Judge  
Seventh Judicial Circuit

Caused

, South Carolina

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The Honorable Daniel E. Shearouse  
Clerk of Court  
The Supreme Court of South Carolina  
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