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February 17, 2018

RECEIVED

FEB 27 2018

S.C. SUPREME COURT

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

RE: Wilton Q. Greene v State of SC; Case #: 2015-CP-08-1964

Dear Mr. Shearhouse:

Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post-Conviction Relief (PCR) case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal on the Respondent;
- (2) The Order of Dismissal; and
- (5) A Request for Representation on Appeal.

The Applicant – Appellant was represented by me as indigent, pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR case. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

The Request for Representation on Appeal and the Affidavit in Support, thereof, are signed by me as attorney for the Applicant – Appellant. Should you need anything further, do not hesitate to contact me.

Thank you for your time and attention to this matter.

Sincerely,



Rodney D. Davis

South Carolina Bar #: 12396

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Charleston, SC 29405

(843) 323-4353

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✓ Enclosure(s). As stated above.
RDD/mmt

cc: Julie A. Coleman, Assistant Attorney General
Kimberly McCall, Appellate Division, SCCID

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

FEB 27 2018

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Michael G. Nettles

Case #: 2015-CP-08-1964

Wilton Q. Greene,

Appellant.

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Wilton Q. Greene appeals the denial of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable Michael G. Nettles, on December 4, 2017. Counsel for the Appellant received a copy of the filed Order of Dismissal on or about January 31, 2018.

February 9, 2018



Rodney D. Davis
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Attorney for Appellant

Other Counsel of Record:
Julie A. Coleman, Assistant Attorney General
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P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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FEB 27 2018

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Michael G. Nettles

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Wilton Q. Greene,

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v.

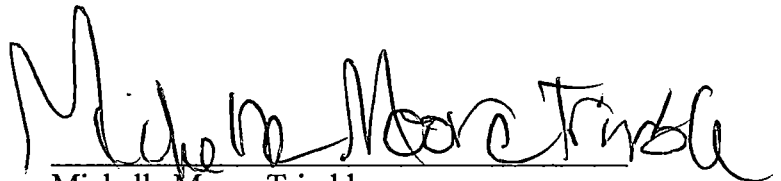
State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy, via US Mail, to the address of record, P.O. Box 11549, Columbia, South Carolina 29211-1549, on February 12, 2018.

February 12, 2018



Michelle Moore Trimble
Paralegal to Rodney D. Davis
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Attorney for Appellant

Other Counsel of Record:
Julie A. Coleman, Assistant Attorney General
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P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

STATE OF SOUTH CAROLINA)
 COUNTY OF BERKELEY)
)
 Wilton Q. Greene, #351286,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT

2015-CP-08-1964

ORDER OF DISMISSAL

2018 JAN 30 PM 2:08
 MARY P. BROWN
 CLERK OF COURT
 BERKELEY COUNTY, S.C.
 FILED

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on August 19, 2015. Respondent submitted its return on May 13, 2016. An evidentiary hearing into the matter was convened on December 4, 2017, at the Berkeley County Courthouse. Applicant was present at the hearing and was represented by Rodney Davis, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

Before this Court were the records of the Berkeley County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the record on appeal, the Court of Appeals direct appeal opinion, the State's Return, and the application. Based on these records and the testimony presented, the Court finds as follows:

I. PROCEDURAL HISTORY

The records before this Court indicate that Wilton Greene ("Applicant") is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. Applicant was indicted by the April 2013 term of the Charleston County Grand Jury for armed robbery and kidnapping (2013-GS-08-0755; -0756). Chad D. Shelton, Esquire, represented him on the charges. On May 23, 2013, Applicant

proceeded to a jury trial and was found guilty as indicted. The Honorable J.C. Nicholson, Jr. sentenced Applicant to confinement for twenty years for each charge. The sentences run concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to Anders v California, 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Greene Op. No. 2015-UP-086 (filed on February 25, 2015). The Remittitur was issued on March 18, 2015.

II. ALLEGATIONS

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

1. Ineffective Assistance of Trial Counsel

- a. "Trial counsel provided ineffective assistance when he failed to request a balancing test to be conducted pursuant to Rule 609(A), SCRE prior to introduction of an offense similar to offense Applicant was on trial for"
 - i. Applicant was on trial for armed robbery
 - ii. The State sought to impeach on a prior so-called "strong arm robbery" (no such offense exists in South Carolina) the correct offense would be common law robbery, which may have interjected confusion into jurors' minds.
 - iii. The trial judge at time Applicant was questioned about his right to testify told Applicant the State could ask him about that conviction
 - iv. Counsel asked Applicant if he had a prior conviction but Counsel failed to clarify the conviction was for common law robbery not strong arm robbery.
 - v. Counsel was ineffective for preemptively bringing this to the jury's attention without first requiring the Court to conduct an analysis under Rule 609(A), SCRE
 - vi. Based on the similarity of strong arm robbery to armed robbery, there is a "reasonable probability" that had counsel requested the court perform the analysis, the court would have either (A) excluded the conviction or (B) required state to state only that Applicant had been convicted on a felony to mitigate prejudice
 - vii. "The very last thing counsel did was make sure the jury knew he had a prior for strong arm robbery for a client on trial for armed robbery"
- b. Counsel compounded his error by not requesting a 609(A) balancing test

- by the failure to request a [limiting] instruction on the evidentiary value of the prior strong arm robbery conviction only to be used for impeachment
- i. Counsel should have requested the prior conviction only be considered by the jury to impeach the credibility of the accused not as substantive evidence of guilt – e.g. that Applicant was a robber by trade.
- c. Counsel was ineffective for failing to request the lesser included offense of common law robbery
- i. There was evidence in the record in which the jury could have found Applicant guilty of common law robbery as Applicant testified he did not use or brandish the weapon at victim, but victim testified he did and took his wallet.
 - ii. Jury could have believed a portion of each of their testimony, and thus based on the conflicting testimony, could have returned a verdict of a lesser charge had it been so instructed
 - iii. Jury could have found that he took the wallet but did not, as he testified use a weapon
 - iv. If jury would have convicted of common law robbery, the conviction/sentence for kidnapping would have been concurrent for a max of fifteen years or less so Applicant would be entitled to a new trial on both offenses or at least be resentenced on the kidnapping as well as a new trial on common law robbery being submitted to jury as a lesser included offense
- d. Counsel failed to introduce audio recording of the victim's statement he made on 5/22/12
- i. Victim testified "he didn't say he (Applicant) came out the gas station." However, in the audio of the interview the victim stated Applicant and he met inside the store and he proceeded to give Applicant a ride
 - ii. "What he said at the police station is true. With that being said, Victim's testimony was not the same as his audio recording he made at the police station;
 - iii. Victim testified the knife was a fold out knife but when questioned by trial counsel, Applicant said he didn't notice "if it's open or not but the knife is already to him";
 - iv. Officer Scarborough testified and said he pulled out his own fold out knife and victim was pretty sure it was a fold out and the audio could prove that
 - v. On the audio recording Victim stated that the Applicant always kept the knife to his stomach but at trial he said he told the policeman that the knife was just pointed at him
 - vi. This was a case that came down to the witnesses' credibility. Victim claims he was robbed and Applicant claims it was a drug deal, and the victim became paranoid after smoking the crack cocaine.
 - vii. If Counsel had introduced the audio recording, the jury could have

- compared the testimony and found it excessively inconsistent
- e. Counsel was ineffective for failing to introduce the transcript of the audio recording to the jury.
 - i. The jury sent a note during deliberation requesting to review the police report and the transcript of the audio review [sic]. The Court denied their request and told the jury that the police report is hearsay and they could not review the transcript because it was not admitted into evidence
 - f. Counsel failed to introduce evidence sheet that proves drug paraphernalia was found
 - i. Victim claimed he was robbed and Applicant claimed it was a drug deal. Prosecution didn't mention drug paraphernalia was found, the officers who testified didn't mention drug paraphernalia was found, and neither did trial counsel mention the fact.
 - ii. Applicant was the only one who states drugs were involved. Applicant went to court for possession of drug paraphernalia and was found not guilty. This fact was on record and trial counsel knew that Applicant was found not guilty.
 - iii. If it had been presented, it would have shown favor to Applicant's testimony when he testified it was a drug deal and Victim was smoking crack cocaine (crack pipe found)

2. Prosecutorial Misconduct

- a. The State committed a Brady Violation when they failed to disclose evidence favorable to the accused, and material to guilt or innocence or impeaching to State witness.
 - i. The police who investigated this alleged robbery met with the store owner and was informed existence of a videotape upon review of video tape and Victim's statement it was known that video contradicted Victim's testimony that he met Applicant inside the store but rather met Applicant outside the store. This would have destroyed credibility of the victim.
 - ii. Officer Judy was being questioned by trial counsel was there any video surveillance. Officer Judy testified it was none all together which was a false statement.
 - iii. On cross-examination trial counsel asked Mr. Patel "Did you obtain any video or surveillance from the previous owner?" Well like I said he just only had four cameras in the store and he took that system with him when he left" With that being said video surveillance was in the inside
 - iv. The State withheld this evidence and acted to hide location of store owner on 5/22/12
- b. Solicitor knowingly allowed presentment of false testimony
 - i. Police testified that there was no video surveillance all together inside or out. This was false testimony. As of 5/22/12 there was inside surveillance. Police testified falsely, solicitor knew about it and help to conceal name/location of owner.

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented testimony from Chad D. Shelton, Esquire.

Applicant's testimony

Applicant testified that he met with Trial Counsel three times before his trial, and each meeting was about thirty minutes long. He stated they did not discuss trial strategy or potential defenses. Applicant testified there was a plea offer for a ten year sentence for strong armed robbery where the State would drop the kidnapping charge, but he rejected the offer. He stated he wanted a five year offer, and Trial Counsel relayed this to the State, but the Solicitor would not go lower than ten years. Applicant stated there were no discussions about him testifying at trial before the trial began, but they discussed it during the trial before the trial judge asked him questions about testifying. He stated Trial Counsel advised him not to testify, but he wanted to tell the jury his side of the story.

Applicant testified that he does not feel the process of his trial was handled appropriately. He stated the trial judge did not conduct a balancing test of prejudice and probativeness before he allowed the State to introduce his prior record, and Trial Counsel did not object. He stated there was no curative jury instruction regarding his prior record. Applicant testified that in the audio recording of the victim's statement from before trial, the victim testified Applicant was inside the store at the gas station before he got in his vehicle, but at trial he testified that Applicant walked from across the street before he got in the vehicle. He stated he wanted Trial Counsel to play the audio recording of his prior statement to impeach his credibility and show the jury the victim was lying.

Applicant testified Trial Counsel never cross-examined the victim about a drug deal, but he should have to support Applicant's testimony at trial that it was a drug deal gone wrong. He testified that Trial Counsel investigated the gas station where the crime occurred but said there were no video cameras inside the store to prove Applicant was not in the store. However, he stated the State's witnesses said there were cameras inside the store, but they did not have the tapes because the cameras were taken with the previous owner when he sold the store. Applicant stated he brought this up before trial to the trial court. Applicant testified Trial Counsel should have objected to the Allen charge being given during trial because the jury was hung on one of the charges.

Trial Counsel's testimony

Trial Counsel testified that he has been practicing law for ten years, and he was appointed to this case. He stated he met with Applicant for the first time on June 12, 2012, and he met with him four or five times prior to trial. He stated they wrote letters back and forth, and he wrote Applicant letters in July, August, September, October, November, and February before the trial in May of 2013. Trial Counsel testified the State was alleging that Applicant met the victim at a gas station and asked for a ride, and as the victim drove him down the street away from the gas station, Applicant held a knife to the victim's throat and robbed him. He stated the victim drove in front of a police car and stopped the car in the middle of the intersection, then Applicant got out of the car as the victim was yelling for help, and Applicant ran down the street while being chased by the police officer. He stated the police found a knife that Applicant had thrown during the chase, and he was tackled and apprehended in a nearby parking lot. He stated Applicant was arrested and had the victim's wallet in the pocket of his pants.

Trial Counsel stated he had Applicant transported in January to discuss the State's plea offer for ten years, and Applicant's uncle, D. Manigault, was there. He stated Applicant admitted to him that he was on drugs on the day of the crime and he robbed the victim. He stated that because Applicant confessed his guilt to him, he had an ethical obligation to direct examine Applicant in a narrative fashion when he testified at trial, and he could not cross-examine the victim on the alleged drug deal in Applicant's testimony. Trial Counsel testified that his trial strategy was to argue that this incident was a miscommunication because the victim was Chinese and spoke in broken English. He stated he wanted to minimize Applicant's story about selling drugs and advised Applicant not to testify about a drug deal because it would make him look like a bad person to the jury and the jury would not be favorable towards him.

Trial Counsel testified that he investigated the videos at the gas station, but he discovered that no video was available after thirty days. He stated he spoke with the officers, Applicant's mother, and Applicant's uncle, who he had testify at trial. He stated the evidence against Applicant was very strong, and included the testimony of the victim, the testimony of the police officer who chased Applicant and arrested him, the knife that was found on Applicant when he was arrested, and the victim's wallet, which was found in Applicant's front pocket when he was arrested.

Trial Counsel testified the victim's audio taped statement was a minor issue because he cross-examined the victim on whether Applicant approached him from inside the store or across the street, and the victim admitted that he let Applicant into his car to give him a ride. He stated he used the transcript of the victim's statement at trial to cross-examine the victim on the differences in his testimony. Trial Counsel testified that he has argued to keep prior convictions out at other trials, and he cannot recall why he did not do so here, but he did not believe there

was any reason to object at the time. He stated he asked Applicant about his prior record on the stand to minimize it before the Solicitor brought it up on cross-examination. He stated he wanted to be forthright with the jury and not appear to be hiding anything. He stated Applicant's prior conviction was five months before the trial, so it was within the ten year period allowed by the rule.

Trial Counsel testified that he believed Applicant's drug deal story was a fabrication. He stated there was no legitimate objection for him to make to the Allen charge because there was nothing improper or coercive about the language, and it was only given once. He stated he had no objection to the admission of the knife into evidence, even though it was not a folding knife. He stated he did not request the lesser included offense because there was a knife present on Applicant when he was arrested, and because he did not want to give the jury another option to convict him when Applicant may instead be acquitted if they did not believe the State's allegations. Trial Counsel stated he did not use the drug paraphernalia found in the vehicle at trial to support the drug deal story because he wanted to downplay the drug sale testimony and emphasize instead that the situation was only a miscommunication.

IV. APPLICABLE LAW

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant alleges Trial Counsel was ineffective in his representation surrounding his trial. This Court finds Trial Counsel was not ineffective in any regard. It is clear from the record before the court and the testimony presented at the evidentiary hearing that Trial Counsel filed

Brady and Rule 5 motions and reviewed the discovery materials with Applicant. Trial Counsel thoroughly investigated the case and the results of his investigation showed he could not get any videotapes from inside the gas station store because they were destroyed after thirty days. Trial Counsel explained the elements of the crime to Applicant, who understood this discussion. The testimony shows Applicant admitted to Trial Counsel that he did engage in an armed robbery. Accordingly, Trial Counsel was ethically obligated to proceed in narrative fashion, and any other strategy would have been a grievable offense. This Court finds this was reasonable under the circumstances.

This Court further finds Trial Counsel's decision not to object to the giving of the Allen charge was reasonable under the circumstances. Allen charges are mandated by the Supreme Court, and they are given in the discretion of the trial judge. This Court finds the Allen charge here was appropriate under the circumstances, and there was nothing objectionable about the language used. Accordingly, Trial Counsel was not deficient for failing to object to the charge. All other specific allegations are addressed as follows:

*Failure to request a Rule 609(A) balancing test for prior conviction
or request curative jury instruction*

Applicant's allegation that Trial Counsel was ineffective for failing to request a Rule 690(A), SCRE, balancing test for his prior conviction for his prior conviction for strong armed robbery is meritless. Applicant's prior conviction was within the ten year period allowed under the rules of evidence, and its introduction at trial was not objectionable in any manner other than its potential prejudice as a similar offense with little probative value. However, this Court finds Trial Counsel was not deficient, and there can be no resulting prejudice from any alleged deficiency based on the overwhelming evidence against Applicant.

Under Rule 609(a)(1), SCRE, prior convictions punishable by more than one year imprisonment are admissible for impeaching the credibility of a defendant who testifies when “the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.” Our Supreme Court has adopted a five-factor analysis for weighing the probative value for impeachment of prior convictions against the prejudice to the accused. State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000). The following factors, along with any other relevant factors, should be considered by the trial court: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. Id.

Although the trial judge in the case at hand did not explicitly place this balancing test on the record at trial, Applicant has not met his burden of showing that the trial judge failed to conduct the balancing test. It is possible that the trial judge conducted the balancing test but did not specifically explain each factor of the test for the record. Trial Counsel credibly testified he saw no reason to object to the admission of the prior conviction at the time of trial. Although he was unsure at the evidentiary hearing why he did not make that argument, he did not believe at the time of trial that an objection was necessary. “[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” Yarborough v. Gentry, 540 U.S. 1, 6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). This Court finds Trial Counsel’s failure to object to request curative instruction was not deficient.

More importantly, even if Trial Counsel were deficient in failing to object or request the balancing test, Applicant can show no prejudice that would entitle him to a new trial. “To

warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice.” State v. Howard, 396 S.C. 173, 178, 720 S.E.2d 511, 514 (Ct. App. 2011) (citing Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005)). The evidence against Applicant was overwhelming (see ruling below on overwhelming evidence of guilt). At trial, the victim testified about the entire encounter. The police officer, who met the victim and Applicant at the scene of the crime while it was happening and chased Applicant down the street until he tackled and arrested him, also testified. The State introduced the knife, which Applicant threw away from him as he was being chased, right before he was apprehended. Finally, the victim’s wallet with his identification card was found in Applicant’s front pocket as he was arrested and was introduced at trial. Accordingly, this Court finds any error in admitting this prior conviction had no prejudicial effect on the outcome of the trial, and Applicant cannot meet the second prong of the Strickland test. Accordingly, this allegation is denied and dismissed with prejudice.

Failure to request the lesser included offense of common law robbery

Applicant’s allegation that Trial Counsel is ineffective for failing to request the lesser included offense is meritless. Trial Counsel credibly testified that he did not request the lesser included offense of common law robbery here because he was apprehended and arrested with a knife, and the undisputed evidence shows Applicant had a knife on him during the crime. He further explained that he wanted his client to be acquitted if the jury did not believe the State’s allegations rather than facing a conviction under a lesser included offense. This Court finds it was appropriate and reasonable not to request a lesser included offense. Applicant has failed to prove deficiency or any resulting prejudice under the Strickland test. Accordingly, this allegation is denied and dismissed with prejudice.

Failure to introduce audio recording or transcript of victim's statement

Applicant's allegation that Trial Counsel was ineffective for failing to introduce the transcript or the audio recording of the victim's statement is meritless. The record shows Trial Counsel did effectively cross-examine the victim with the transcript of his prior statement. The issue that Applicant raises has no prejudicial effect whatsoever on the outcome of the trial. Applicant contends that victim's inconsistent statement about whether he saw Applicant come out of the store rather than from across the street does not affect the testimony that the victim agreed to give Applicant a ride, gave him permission to get in his car, and drove him some distance down the street until Applicant robbed him at knifepoint. The victim's prior statement matched the narrative of these events that he gave at trial. This Court finds no deficiency or prejudice under Strickland, and this allegation is denied and dismissed with prejudice.

Failure to introduce drug paraphernalia found in victim's vehicle

Applicant's allegation that Trial Counsel was ineffective for failing to introduce evidence of the drug paraphernalia found in the victim's vehicle to support his drug deal story is meritless. Trial Counsel credibly testified his trial strategy was to downplay the evidence of Applicant's drug usage or his alleged drug deal because the jury would not look favorably on a drug dealer. This Court finds this was a legitimate and reasonable trial strategy under the circumstances. The Court also notes that Trial Counsel had an ethical obligation not to argue what he believed to be Applicant's fabricated version of events to the jury because Applicant admitted his guilt to him. The introduction of this evidence did not support Trial Counsel's trial strategy, and this Court finds his decision not to use it reasonable. This Court finds no deficiency or resulting prejudice from this decision, and this allegation is denied and dismissed with prejudice.

OVERWHELMING EVIDENCE

Applicant cannot meet his burden to show that he was prejudiced by any alleged deficiencies because there is overwhelming evidence of his guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), cert. denied, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of the defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt):

At trial, the victim testified about the entire encounter. The police officer, who met the victim and Applicant at the scene of the crime while it was happening and chased Applicant down the street until he tackled and arrested him, also testified. The State introduced the knife, which Applicant threw away from him as he was being chased, right before he was apprehended. Finally, the victim's wallet with his identification card was found in Applicant's front pocket as he was arrested and was introduced at trial.

The testimony at the PCR hearing reflected the exact evidence used at trial was correct. Applicant did not dispute the evidence against him. This is clearly overwhelming evidence of Applicant's guilt. As a result, Applicant can show no prejudice from any of the allegations raised in his PCR application as no deficiency on behalf of trial counsel could have reasonably changed the outcome of trial, and these allegations are denied and dismissed with prejudice.

PROSECUTORIAL MISCONDUCT

Applicant alleges prosecutorial misconduct for the State's failure to turn over Brady material and their knowing use of false testimony at trial based on the alleged videotapes from inside the gas station that would impeach the victim's credibility. It is Applicant's burden to prove actual prosecutorial misconduct. *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201 (1989). Applicant has failed to meet his burden, and this allegation is denied.

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

The issue of the alleged gas station videotapes was raised before the trial began, and Applicant expressed his concern over these videos to the trial judge. The record and the testimony presented at the evidentiary hearing shows that there were no videotapes available from inside the gas station on the day in question. Accordingly, Applicant cannot prove a Brady violation because the State was not in possession and did not know about any actual videotapes that would prove Applicant was not inside the gas station as the victim said he was before the crime. Furthermore, this nonexistent evidence is not material in any way to the issue of guilt or

innocence. If the tapes did exist, Applicant contends that they would only show that he was not inside the gas station—in other words, it would be a tape of the inside of the gas station that did not show the victim, Applicant, the crime, or anything relevant to the crime. The armed robbery occurred in the victim's vehicle down the road, away from the gas station. Applicant testified and admitted to being inside the car. The crime did not occur in the gas station, and no evidence from inside the gas station would prove or disprove the allegation that Applicant robbed the victim at knifepoint in his vehicle down the road. This Court finds Applicant has failed to prove a Brady violation under these factors.

Furthermore, this Court finds that, even if there were a Brady violation and these videotapes could have been turned over to Applicant, there is no reasonable probability that the result of the trial would have been different. Finally, the Court finds the State did not present false testimony by the investigating officer regarding these videotapes. Accordingly, these allegations are denied and dismissed with prejudice.

VI. 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.

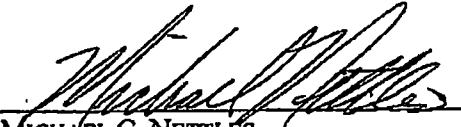
This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an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

review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 23 day of Jan., 2018.


MICHAEL G. NETTLES
Presiding Judge
Ninth Judicial Circuit

Florence, South Carolina

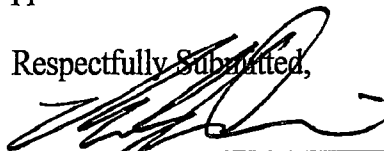
STATE OF SOUTH CAROLINA)	IN THE SUPREME COURT OF SOUTH CAROLINA
)	
COUNTY OF BERKELEY)	CASE #: 2015-CP-08-1964
)	
WILTON Q. GREENE)	
)	
Applicant.)	
-versus-)	REQUEST FOR REPRESENTATION ON APPEAL
)	
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	

On behalf of the request of the above-named Applicant, to be represented by the South Carolina Commission of Indigent Defense, Appellate Division (SCCID), the undersigned attorney would show unto this Honorable Court that:

1. He is the attorney for the Applicant-Appellant in the above captioned case. The Applicant-Appellant was in custody during and taken into custody immediately following the Post Conviction Relief (PCR) hearing and was not available to personally sign this request;
2. The Applicant-Appellant was represented by the undersigned attorney as an indigent, pursuant to a contract with the SCCID;
3. The Applicant-Appellant has been informed that he may request assistance from the SCCID Appellate Division in perfecting his appeal;
4. A timely Notice of Intent to Appeal has been filed on the Applicant-Appellant's behalf;
5. The Applicant-Appellant has been informed that nothing requires SCCID Appellate Division to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

At this time, the Applicant-Appellant requests the aid of the SCCID Appellate Division in perfecting his appeal to the South Carolina Court of Appeals.

Respectfully Submitted,



Rodney D. Davis
South Carolina Bar #: 12396

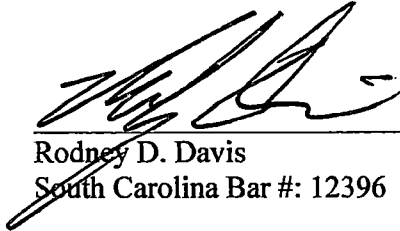
Charleston, South Carolina
February 12th, 2018

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)
)

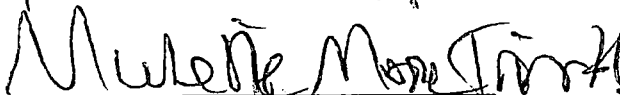
CASE #: 2015-CP-08-1964

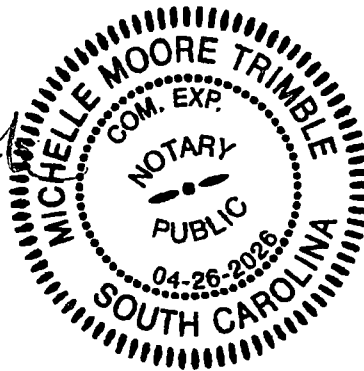
VERIFICATION

PERSONALLY appeared before me, Rodney D. Davis, being first duly sworn,
deposes and says that he has read the foregoing *Request for Representation on Appeal* to be
filed on behalf of the Applicant-Appellant, **Wilton Q. Greene**, and the same is true of his
knowledge except those matters alleged on information and belief, and as to those matters, he
believes them to be true.


Rodney D. Davis
South Carolina Bar #: 12396

SWORN to and subscribed to me this
12th day of February 2018.


Notary Public for South Carolina
My Commission expires 4/26/2026



THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles

Case #: 2015-CP-08-1964

Wilton Q. Greene,

Appellant.

v.

State of South Carolina,

Respondent.

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY S.C.


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FILED
MCG

NOTICE OF APPEAL

Wilton Q. Greene appeals the denial of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable Michael G. Nettles, on December 4, 2017. Counsel for the Appellant received a copy of the filed Order of Dismissal on or about January 31, 2018.

February 9, 2018


Rodney D. Davis
400 Faber Place Drive, Suite 300
Charleston, SC 29405
(843) 323-4353
Davis@LowcountryLawOffice.com
Attorney for Appellant

Other Counsel of Record:
Julie A. Coleman, Assistant Attorney General
Office of the Attorney General, State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles

Case #: 2015-CP-08-1964

Wilton Q. Greene,

Appellant.

v.

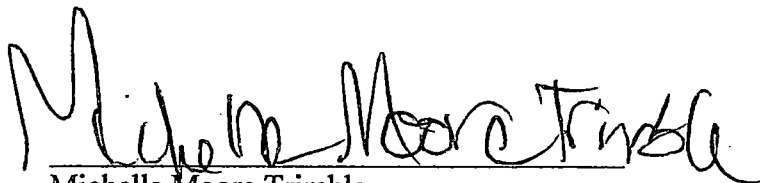
State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy, via US Mail, to the address of record, P.O. Box 11549, Columbia, South Carolina 29211-1549, on February 12, 2018.

February 12, 2018



Michelle Moore Trimble
Paralegal to Rodney D. Davis
4000 Faber Place Drive, Suite 300
Charleston, SC 29405
(843) 323-4353
Davis@LowcountryLawOffice.com
Attorney for Appellant

Other Counsel of Record:
Julie A. Coleman, Assistant Attorney General
Office of the Attorney General, State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

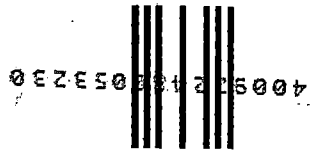
HARRY P. BROWN
CLERK OF COURT
BERKELEY COUNTY S.C.

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RD

Lowcountry Law Office
Rodney D. Davis
4000 Faber Place Drive, Suite 300
Charleston, SC 29405



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Daniel E. Shearhouse
Clerk, Supreme Court of SC
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