ALAN WILSON
ATTORNEY GENERAL

April 10, 2018

RECEIVED
APR 10 2018
S.C. SUPREME COURT

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

Re: **Titus L. Rouse, 287818, Respondent v. State of South Carolina, Petitioner**
Case No. 2015-CP-23-0995

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.

The transcript for the post-conviction relief hearing has already been received. Therefore, we have calendared our due date for the petition for writ of certiorari to be May 11, 2018.

Sincerely,

DeShawn H. Mitchell
Assistant Attorney General

DHM/jacc
Enclosures

cc: Tricia A. Blanchette, Esquire
South Carolina Department of Corrections
Greenville County Clerk of Court
Solicitor W. Walter Wilkins
Office of Appellate Defense
Trisha Allen, Director –Victim Advocacy Division

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Case No. 2015-CP-23-0995

Titus L. Rouse, 287818, ...Respondent,

v.

State of South Carolina, ...Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Perry H. Gravely's order dated March 28, 2018 and filed March 29, 2018 granting post-conviction relief to the Respondent. The State received notice of entry of the order on March 29, 2018. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

DESHAWN H. MITCHELL
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By: _____
Attorneys for the Petitioner

Columbia, South Carolina

April 10, 2018

Other counsel of record:

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Post Office Box 2147
Leesville, SC 29070

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PROOF OF SERVICE

I, DeShawn H. Mitchell, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Tricia A. Blanchette, Esquire
Post Office Box 2147
Leesville, SC 29070

I further certify that all parties required by Rule to be served have been served this 10th day of April, 2018.

DESHAWN H. MITCHELL
Office of Attorney General
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Columbia, SC 29211
(803) 734-3737
Attorney for the Petitioner

STATE OF SOUTH CAROLINA) COUNTY OF GREENVILLE)	IN THE COURT OF COMMON PLEAS DOCKET NO.: 2015-CP-23-0995
TITUS NICCOLA LEE ROUSE,) Applicant,) v.) STATE OF SOUTH CAROLINA,) Respondent,)	ORDER GRANTING APPLICATION FOR POST CONVICTION RELIEF

ENTERED COMPUTER

This matter comes before the Court by way of an Application for Post Conviction Relief filed on May 22, 2015. The State filed a Return on June 3, 2015. On February 18, 2016, Tricia A. Blanchette was substituted in as Applicant's counsel. On October 17, 2016, Applicant, through counsel, filed an Amendment to his Application, as follows:

1. Ineffective assistance of counsel for failure to properly prepare and investigate prior to trial, to include counsel's representation at the preliminary hearing, which induced an involuntary guilty plea.

2. Ineffective assistance of counsel for failure to effectively make all reasonable pre-trial motions and effectively represent Applicant on pre-trial motions made prior to the entry of Applicant's guilty plea.

3. Ineffective assistance of counsel for advising Applicant to forego trial and enter a guilty plea.

4. Ineffective assistance of counsel for failure to ensure that Applicant had a full understanding of the charge he was entering a plea to and failure to ensure that the oral pronouncement of the charge matched the sentencing sheet. Additionally, ineffective assistance of counsel for failure to ensure that Applicant's plea was being made to a proper lesser include offense.

5. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

On April 5, 2017, Applicant, through counsel, submitted an additional Amendment to his Application, as follows:

1. Ineffective assistance of counsel for failure to obtain a canine expert and/or fully investigate the canine evidence and prepare to move to suppress and/or move to suppress testimony and/or evidence derived from the deployment of canines. Ineffective assistance of counsel for errantly advising Applicant regarding testimony and evidence derived from the deployment of canines, which induced an involuntary guilty plea.

On April 21, 2017, an evidentiary hearing was conducted at the Greenville County Courthouse in front of the Honorable Perry H. Gravely. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by DeShawn Mitchell, Assistant Attorney General. Applicant proceeded on the allegations set forth above. Applicant called Michael Gould, Honorable Robert Simms, Edward Cooper, C. Rauch Wise, Esquire, Richard Warder, Esquire, and Titus Rouse. Respondent called John Redman. Applicant introduced fourteen exhibits and provided a Memorandum of Law to the Court addressing cases involving post conviction relief stemming from a guilty plea.

On December 1, 2017, an Order of Dismissal was signed and filed. Applicant, through counsel, received notice of entry of the Order on December 11, 2017. Thereafter, Applicant, through counsel submitted a Rule 59(a) and (e), Motion via mail to the Honorable Perry H. Gravely, the Greenville County Clerk of Court and Respondent on December 19, 2017. As acknowledged by the Greenville County Clerk of Court the Motion was erroneously returned to counsel, and it was resubmitted and filed on January 8, 2018.

After careful reconsideration of the Applicant's Motion, the record before this Court, to include the evidentiary hearing transcript, and the controlling case law, this

Court finds that the previously issued Order of Dismissal is rescinded and relief shall be granted as addressed below.

SUMMARY OF GENERAL SESSIONS PROCEEDINGS

On May 27, 2012, Applicant was arrested for trafficking in heroin, 28 grams or more, at a hotel located on McPrice Street in Greenville, South Carolina.[1] A preliminary hearing was conducted in front of the Honorable Robert Simms on July 12, 2012.[2] Applicant was present and he was represented by Richard H. Warder, Esquire. The State was represented by Brennan Townsend, Esquire, of the Thirteenth Judicial Circuit.

Deputy Michael Giovanni was the sole witness for the State. Deputy Giovanni offered testimony regarding the tip that was received and the surveillance conducted on May 27, 2012. Preliminary Hearing pp. 5-6. He saw a white Mercedes pull into the hotel location, decided to check the tag, circled back around the parking lot and found the car had been abandoned. Preliminary Hearing pp. 7-8. He requested additional officers and a canine unit to respond to the scene. Preliminary Hearing p. 8.

Thereafter, additional officers arrived, including a canine unit that began a track. Preliminary Hearing p. 8. He explained that he did not see Applicant jump out of the car. Preliminary Hearing p. 8. About fifteen minutes into the track, he saw Applicant with a towel around his neck head into the hotel office area. Preliminary Hearing p. 9. He recalled the canine officer speaking with Applicant during the track near the pool area. Preliminary Hearing p. 17, lns. 14-21.

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[1] Applicant was also issued tickets for the offenses of habitual traffic offender and driving under suspension, which were not subject of the present PCR Application.

[2] At the evidentiary hearing, the preliminary hearing transcript was admitted as Applicant's Exhibit 1.

He later stated that it was about fifteen minutes into the track that the drugs were found. Preliminary Hearing p. 16. He explained where the drugs were found and that "the narcotics were left there in a bag, and his slippers were also there." Preliminary Hearing p. 11, ln. 17- p. 12, ln. 12. He detailed his conversation with Applicant and decision to detain him.

When cross-examined about his testimony on direct that Applicant claimed ownership of the slippers, he testified: "He did not admit possession of those particular slippers. He said that he had run out of his slippers, and, of course, he denied having any association with narcotics directly to me. Now what he told the narcotics investigator or anybody else, I don't know." Preliminary Hearing pp. 17, lns. 4-11. He also testified that he did not show the slippers to Applicant. Preliminary Hearing p. 16, ln. 20 – p. 17, ln. 1.

He obtained a search warrant for Applicant's hotel room. Preliminary Hearing p. 11. No evidence was found in Applicant's hotel room. Preliminary Hearing p. 11, lns. 9-13.

At the conclusion of the hearing, Judge Sims found probable cause to bind the case over. Preliminary Hearing p. 23.

Subsequently, Applicant was indicted for the offense of trafficking heroin by the Greenville County Grand Jury (Indictment No. 2012-GS-23-06017). On August 6, 2014, Applicant was called to trial in Greenville County in front of the Honorable Edward W. Miller and a jury. Applicant was represented by Richard H. Warder, Esquire, and C. Rauch Wise, Esquire. The State was represented by Joyce K. Monts, Assistant Solicitor.

After the jury was selected and sworn, a Jackson v. Denno hearing was conducted. Transcript p. 27. During the Jackson v. Denno hearing, the State called

Michael Giovanni, John White, and John Cannon to the stand. The hearing concluded with the following discussion:

Court:	Well, anything you want to tell me? What is it you want to suppress?
Mr. Wise:	The statement we, originally, thought that was in custody we thought was originally more damming than what they testified to.
The Court:	I didn't really hear a confession.
Mr. Wise:	Well, I don't think it necessarily has to be a confession. But it just was not as we originally thought it was.
The Court:	So, you don't have any objection?
Mr. Wise:	No.

Transcript p. 53, ln. 21 – p. 54, ln. 7.

Following the Jackson v. Denno hearing, the State agreed to exclude character evidence and a discussion was put on the record regarding "the tip." Transcript pp. 54-56. A bench conference was conducted, and the record reflects that counsel requested the opportunity to speak with the Solicitor and to speak with Applicant. Transcript p. 57. Upon return to the courtroom, Judge Miller provided Applicant with his opinion of when a defendant should proceed to trial, after which the guilty plea proceeding began. Transcript pp. 58-9.

During the plea proceeding, the Assistant Solicitor stated

> Officers did run a K9 around the car, which alerted, but they didn't find anything inside the car. The tracking dog did follow the Defendant's trail around the apartment -- hotel complex, and did end up where the cocaine – excuse me, heroin and slippers were.

p 10

Transcript p. 62, lns. 15-19. The plea was accepted, and Applicant was sentenced to a term of twelve years. Transcript p. 67. A direct appeal was not filed on Applicant's behalf.

SUMMARY OF THE EVIDENTIARY HEARING TESTIMONY

At the evidentiary hearing, Applicant testified, and Applicant, through counsel, called the following witnesses: Michael Gould, Robert Sims, Edward Cooper, C. Rauch Wise, Esquire, and Richard Warder Esquire. Respondent called John Redman. Below is s summary of the evidentiary hearing transcript, which is reflected in complete detail in the transcript of the evidentiary hearing that was considered by this Court in rendering this Order.

At the start of the evidentiary hearing, Michael Gould of New York was called to the stand via SKYPE, pursuant to prior order of the PCR court. PCR p. 12. Mr. Gould was properly sworn and qualified as an expert in the area of canine procedure and deployment.[3] PCR p. 20. Mr. Gould identified the materials he had been provided and addressed the photographs, which were admitted into evidence. PCR pp. 21-24. Mr. Gould acknowledged that he reviewed all law enforcement reports from the case, and he provided his initial general opinion, as follows:

> So, I saw a very contaminated scene. Not only was it contaminated by humans, but another dog. And, frankly, one thing I want to say, I don't think that anything that I have read, including a training record, I don't think anybody intentionally did anything wrong, but I see a crime scene, as I said, that was chaotic and confused. And things should have been slowed down a little bit.

[3] Mr. Gold was qualified over the State's objection. PCR pp. 19-20.

PCR p. 25, lns. 6-12. He also provided further explanation regarding his concerns with the contamination of the scene. PCR pp. 26, 30, 32, 36. He stated: "So dogs can be confused just like humans can be confused." PCR p. 36, lns. 24-25.

Mr. Gould addressed the two dogs utilized (Nero and Duke), and explained that Nero was a utility or multi-purpose dog and Duke was a single purpose human scent detection dog. PCR p. 25. He expressed concerns with the presence of two canines at the scene, the handling of the canines and the reports generated from the scene. PCR p. 28-30, 33, 42, 43. He explained how a canine is truly a scientific instrument and even though the canines are capable of "amazing things" they have "definite limitations." PCR p. 27. He further explained that a canine's value is really tapped into in a nighttime scene. PCR pp. 27-28.

Throughout his testimony, Mr. Gould opined that he did not understand completely why the canines were utilized and he found no connection or nexus between the canine, the Applicant, and the drugs that were located by the officer. PCR pp. 28, 40-41. He addressed the drop scent procedure that was utilized and the dogs trail; he opined that he could not determine what the dog was trailing. PCR p. 35-39. He noted that the drugs were found in a natural path and he found nothing in Officer Redman's report that the dog's behavior changed or he alerted. PCR p. 38, 40. He opined that the track was not reliable. PCR p. 41. In sum, he found no value the canines brought to the scene, he stated: "My overall conclusion that the K-9 teams, both K-9 teams, didn't add value or scientific evidence to the entire scene." PCR pp. 44, 45, lns. 15-18.

He agreed that he would have been willing to provide his services to counsel if contacted prior to Applicant's trial, and he would have rendered the same opinions. PCR

p. 44. He further agreed that he would have been willing to testify at trial, if needed. PCR pp. 44-45. When asked about the Assistant Solicitor's statement regarding the utilization of the canines during the plea proceeding, and, specifically, if he agreed that the canine tracked from Applicant to the drugs, he simply stated: "No." PCR p. 47, lns. 11-19.

When the Honorable Robert F. Sims, Greenville County Magistrate Judge, was called to the stand, he acknowledged that he vaguely remembered handling Applicant's preliminary hearing. PCR p. 49. He recalled Applicant contacting him via letter in 2016, and the written communication exchanged with Applicant was addressed and entered into evidence. PCR pp. 49-50. He read what he contemporaneously had written regarding his findings from the preliminary hearing. PCR pp. 50-1.

Edward Cooper, of Upstate Private Investigators, took the stand, and he identified his Affidavit dated March 10, 2015 regarding his work on behalf of Applicant. PCR pp. 53-54. He explained that he went to the hotel location at issue, did a visual inspection, spoke with the manager on duty and confirmed that the property is considered a private property. PCR p. 55.

C. Rauch Wise, Esquire took the stand, and he recalled being hired by Applicant well in advance of trial to join Mr. Warder in his representation of Applicant. PCR p. 79. He identified a letter he wrote Mr. Warder, which included a brief he had written in a case involving circumstantial evidence that was not sufficient to convict. PCR pp. 79-80. He explained that he sent Mr. Warder the brief because he found it analogous to the slipper evidence in the instant case. PCR p. 81.

He indicated that he now is aware that he only received a portion of the discovery from Mr. Warder, but he was aware that no matches to Applicant's prints were found on

the drugs and no DNA on the slippers. PCR pp. 83, 102, 112-113. In particular, he explained that the lack of matching prints on the drugs was similar to the case brief he provided Mr. Warder. PCR p. 83.

When asked, he responded that most of his cases go to trial, and it was his understanding that he was brought on to get the case ready for trial and "appeal if necessary too." PCR p. 83, lns. 7-13. He stated that they were preparing the case for trial. PCR p. 83, lns. 5-6. He recalled a plea was never seriously discussed until the day Applicant entered a guilty plea. PCR p. 83.

He recalled having a statement from a witness at the hotel, but he noted that Mr. Warder looked into it. PCR p. 85. He recalled going to the scene, but he conceded that they did not look into the issue of it being private property. PCR pp. 96-7. He could not recall looking into the basis of Applicant's detention, and he agreed that it may be an interesting issue if he was detained on private property for a traffic violation. PCR pp. 97-8.

He recounted meeting with Applicant for several hours in Edgefield prior to trial, and he remembered that the canine evidence was not discussed. PCR pp. 85-6. The first time he heard about the canine evidence was the day of trial when the Assistant Solicitor told him "that the drug dog had tracked from the car to where the drugs were. PCR p. 86, lns. 8-14. He explained that from his viewpoint the Solicitor's statement was a game changer. PCR p. 86, lns. 21-25. Simply put, he thought the jury would believe that Applicant had the drugs. PCR p. 86, lns. 21-25.

He recalled seeing Officer Redman's report regarding the canine track for the first time the day of trial. PCR p. 87, 112-113. He further recalled reviewing it in conjunction

with a map in his office with PCR counsel and determining that the track was not a direct route from the car to the drugs in contrast to what he believed on the day of the plea. PCR pp. 87-88. He explained that he would have raised the issue to co-counsel if he had reviewed the report prior to trial and looked into getting a canine expert. PCR p. 89. He was present for Mr. Gould's testimony and stated that he would have utilized him as an expert at trial. In explanation, he addressed his current concern that the canine possibly was not even tracking Applicant's scent and that he did not get a clear impression from hearing Mr. Redman's testimony that the dog tracked to the drugs. PCR p. 89, ln. 24 – p. 90, ln. 16.

After being provided a copy of a letter he wrote Applicant shortly after his plea, he explained that he letter reiterated the information he was provided by the Solicitor and his belief that due to the canine evidence, as he understood it on the day of trial, Applicant was likely to be convicted. PCR pp. 91-93. Then, he explained that based upon the expert testimony and his current understanding of the canine evidence, the case was much more "defensible" and he could "easily defend his (Applicant's) decision to go to trial." p. 93, ln. 4 to 94, ln. 18.

In sum, he stated the canine evidence was the "key thing in the whole thing." PCR P. 96, lns. 2-3. When asked about essentially abandoning the Jackson v. Denno hearing, he explained that he was not aware of that canine evidence at that juncture or he would not have abandoned it. He further explained his interpretation of the importance of the slipper and canine evidence, as follows:

> It was a combination of the testimony that the tracking dog went to the drugs and the admission of the slippers were his, those two factors together clearly, I think, gets it to the jury and makes it a very difficult case to win. Eliminate the dog, the slippers are just not that important.

PCR p. 107, lns. 18-22.

On cross-examination, Mr. Wise was asked if he would have advised Applicant differently, and he responded: "I would probably advise him differently." PCR p. 115, lns. 13-16. He explained that the dog tracking "is not as strong as I was led to believe." PCR p. 115, lns. 17-19. He also reiterated his prior testimony regarding the weakness of the slipper evidence standing alone, he explained: "I can deal with the slippers. I am not worried about that – Slippers coupled with dog tracking does concern me." PCR p. 115, lns. 20-25. He also explained that he was confident the tip was not going to come in as evidence. PCR p. 116. On redirect, he conceded that he was not prepared on the day of trial to defend against the purported canine evidence. PCR p. 117.

When asked about the offense pled to and reported on the sentencing sheet, he indicated that he understood Applicant was pleading to 4-14 grams. PCR p. 108. He reviewed his letter to Applicant following his plea regarding parole eligibility, and he explained that the letter was written in response to an inquiry from Applicant and not due to confusion on his part. PCR pp. 109-110.

Following Mr. Wise, Richard Warder, Esquire, was called to the stand. PCR p. 118. After being asked about his retainer by Applicant, he answered that he remembered that Applicant came to him. PCR p. 119, lns. 2-7. He explained that he began discussing pursuing a plea with Applicant, and Applicant wanted to go to trial. PCR p. 119-120. At that juncture, Applicant wanted a second opinion, and Mr. Warder recommended Mr. Wise. PCR pp. 119-120. He recalled having a meeting with Applicant and Mr. Wise, and he stated that he thought they went over "everything we had." PCR p. 120, lns. 17-22.

When asked about the preliminary hearing, he indicated that must have handled it from what he had heard. PCR pp. 120-121. Specifically, when asked about questions he posed at the preliminary hearing, he stated that he likely did not have complete discovery and he may have been fishing. PCR p. 121-122. He could not recall what he did to look into obtaining the video referenced at the preliminary hearing that was destroyed prior to trial. PCR pp. 121-123.

Mr. Warder recalled going to the scene with Mr. Wise, but not looking into the matter of private property. PCR p. 123. He explained his understanding for the reason Applicant was detained, yet he admitted that he had not paid particular attention to the details regarding it in the police reports. PCR pp. 123-4.

Regarding the Jackson v. Denno hearing, he indicated that he could not remember why they chose to not make an objection. PCR pp. 127-8. He followed up by explaining he had a "standard seventy three year old memory." PCR p. 128, lns. 3-8.

He explained that the trial strategy was to "get a directed verdict because of the lack of direct evidence and it was a circumstantial case." PCR p. 124, lns. 9-11. Based upon his memory, he believed the case turned in the direction of a plea following a bench conference where the Judge recommended that they speak with the Solicitor. PCR p. 12.

After that conference, he advised Applicant it was "time to fold them" and take a plea.[4] PCR p. 125, lns. 7-11. He outlined the evidence that was not favorable and said he had not given much "weight on the day" since he assumed the dog track had not produced anything. PCR p. 126. But, he explained the day of the trial the Solicitor told him "that her officer that day was going to say that he trailed – the dog trailed him right

[4] On cross-examination, he testified that he thinks he would advise Applicant to take the plea "today." PCR p. 132, lns. 8-19.

to my client." PCR p. 126, lns. 13-15. He conceded that he had not obtained the dog records nor prepared to cross-examine the officer. PCR pp. 126-127.

The final witness called to the stand was Applicant. Applicant recalled retaining Mr. Warder and his limited interactions with him prior to the retainer of Mr. Wise. PCR pp. 136-137. He recalled reviewing some discovery items during a joint meeting with both attorneys. PCR p. 137. He recalled Mr. Wise doing most of the talking during their meeting. PCR p. 137.

He made it clear that his attorneys were well aware that he wanted a trial, and he explained that would not have hired two attorneys known for handling trials if he wanted to pursue a guilty plea. PCR pp. 137-138, 156. He confirmed that he intended to go forward with a trial on August 6, 2014. PCR p. 138. He explained that he had just turned down a plea and the plea really came out of the blue. PCR p. 156, lns. 1-14. He further explained that he entered the plea solely on the advice of counsel. PCR p. 156, lns. 10-14.

Regarding the discovery he had reviewed on his own and/or with counsel prior to trial, he explained that counsel did not review the preliminary hearing transcript with him nor was he aware of the canine evidence. PCR pp. 138-139. As was stated by Mr. Wise, he affirmed that any matters involving canines were not discussed with him prior to his trial. PCR pp. 138-139. He remembered seeing the canine while at the pool, but he was never approached by the canine. PCR p. 154-155.

Turning to the destruction of the in car video mentioned at the preliminary hearing, he explained that he asked about the in car video that he believed would show he did not confess to anything. PCR p. 140. He recalled Mr. Warder telling him it did not exist. PCR p. 140. He explained that Mr. Warder had knowledge of the video during the

90 day period prior to destruction, but he was unaware of him trying to obtain it. PCR pp. 139-143. He also explained his written communication with Judge Sims regarding the preliminary hearing and the importance of the alleged slipper confession. PCR pp. 141-142.

In addressing his allegation regarding the location being private property, he explained that he retained a private investigator to look into the matter prior to his PCR hearing. PCR p. 143. He alleged that counsel should have raised the mater in conjunction with an argument regarding his detention and arrest. PCR pp. 143-144, 146-147.

As to trial strategy, he could not recall being aware of the trial strategy, but he recalled knowing that he was ready to go trial. PCR p. 145. He stated that his attorneys did not prepare him to testify or be involved in the trial. PCR p. 145.

When asked about the factors outlined by Mr. Warder regarding his reasons for advising Applicant to enter a guilty plea, Applicant responded that the first he heard of those factors was in the courtroom today. PCR pp. 148-149. He recalled the only explanation given him on the day of the trial was "we can't win." PCR p. 149, lns. 9-13.

Applicant confirmed that he would have provided funds for a canine expert if his counsel would have told him one was needed to prepare for trial. PCR p. 151-152. He also confirmed that he would have wanted an expert utilized as was done for his PCR. PCR p. 152.

Regarding the oral pronouncement of the charge in contrast to the sentencing sheet, Applicant noted that the charge announced by the clerk at the outset of the plea was different than what was reflected on the sentencing sheet. Transcript p. 58, PCR p. 157. He indicated that he had confusion regarding whether the charge was non-violent

and referenced the letter he received from Mr. Wise regarding the statute and parole eligibility. PCR pp. 157-158.

Applicant was directed to his comments during the plea, and he explained that he was trying to deny ownership of the slippers and "everything revolving around the case." PCR pp. 152, 153, lns. 15-18. He explained that he admitted to ownership of the drugs since counsel told him "you have to own up to this stuff or you not going to get your plea." PCR p. 153, lns. 15-16.

At the conclusion of his direct testimony, he reiterated that he did not want to plead guilty and he wanted to proceed to trial. PCR pp. 158-159. He also remembered his attorneys' outlook on trial being changed due to what was communicated by the Solicitor regarding the dog evidence and entering the plea due to the advice of his attorneys. PCR pp. 158-159.

Respondent called John Redman to the stand. He explained his certification and training, along with his involvement in Applicant's case. PCR pp. 56-58. He stated that he did not have his report, so he qualified his recollection as "vague." PCR p. 58. He briefly recalled a second canine officer being at the scene, that the car was running and a tip had come into the front desk. PCR pp. 58-9.

On cross-examination, he responded that he did not review the canine records provided in discovery prior to the hearing. PCR p. 60. He identified his report, which was admitted into evidence. PCR p. 61. When asked whether or not the canine alerted, he provided a lengthy response, which he concluded by saying: "There was no way he could alert to him because he wasn't there anymore." PCR p. 62. He explained that his dog's "true alert" would be to "either jump on the person or sit next to the person." PCR p. 64,

lns. 18-24. Specifically, he stated: "He never alerted. He didn't have the opportunity to alert. There was nothing for him to alert to." PCR p. 77, lns. 6-7.

When asked if he was confident that his dog was trailing Applicant, he explained that his dog was trailing the scent from the gauze pad taken from the steering wheel of the car. PCR pp. 65-66, 68. In response to why he did not obtain a scent directly from Applicant, he responded that he did not know that Applicant was on the scene. PCR pp. 65-66. He was asked about his interactions with the Solicitor's Office prior to the trial, and he stated that he was unsure if he would have stated that his dog was "able to track from the Defendant to the drugs." PCR p. 67, lns. 8-20. He explained that he stopped the track upon location of the drugs and the dog did not trail to Applicant's location on the scene. PCR p. 68, 76. He later stated, "We went to the location where the Defendant was." PCR p. 69, lns. 12-15. When asked when that occurred, he responded: "When we stopped." PCR p. 69, lns. 15-16.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Even though this Court finds the testimony of Officer Redman credible, this Court makes its findings with the following facts in mind. Officer Redman admitted he had not reviewed anything pertaining to the case prior to his testimony, and the State failed to qualify Officer Redman as an expert pursuant to State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) or establish any of the White factors for the admissibility of the canine evidence he addressed.[5] As a result, Officer Redman's testimony provides limited value as to the core issue in this matter.

[5] In State v. White, 382 S.C. 265, 272, 676 S.E.2d 684, 687 (2009), the South Carolina Supreme Court held, as follows:

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In a PCR stemming from a guilty plea, an applicant alleging a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). Therefore, an applicant that entered a plea on the advice of counsel may only attack the voluntary nature of that plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, applicant would not have pled guilty and insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985), Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000). In Hill, the Supreme Court of the United States made it clear that the "voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." 474 U.S. at 57, 106 S.Ct. at 369.

In Hill and Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473 (2010), the Supreme Court of the United States examined the role of advising a client about a plea offer and ensuing guilty plea as was discussed in Missouri v. Frye, 132 S. Ct. 1399, 1405-06 (2012)(emphasis added), as follows:

> Hill established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in Strickland.

To provide uniformity, we think it advisable to adopt the following evidentiary framework to guide our bench and bar concerning dog tracking evidence. By extrapolating from our case law and other authorities, we conclude a sufficient foundation for the admission of dog tracking evidence is established if (1) the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702; (2) the evidence shows the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) by experience the dog is found to be reliable; (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and (6) the trail was not otherwise contaminated. See State v. Childs, 299 S.C. at 476-77, 385 S.E.2d at 842-43; State v. Brown, 103 S.C. at 443-45, 88 S.E. at 22-23; see also State v. Taylor, 337 N.C. 597, 447 S.E.2d 360, 368-69 (1994); Jay M. Zitter, Annotation, Evidence of Trailing by Dogs in Criminal Cases, 81 A.L.R. 5th 563 (2000).

See Hill,supra, at 57, 106 S. Ct. 366, 88 L. Ed. 2d 203. As noted above, in Frye's case, the Missouri Court of Appeals, applying the two part test of Strickland, determined first that defense counsel had been ineffective and second that there was resulting prejudice.

In Hill, the decision turned on the second part of the test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for parole. But the defendant had not alleged that, even if adequate advice and assistance had been given, he would have elected to plead not guilty and proceed to trial. Thus, the Court found that no prejudice from the inadequate advice had been shown or alleged. Hill, supra, at 60, 106 S. Ct. 366, 88 L. Ed. 2d 203.
In Padilla, the Court again discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea. Padilla held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of the conviction. The Court made clear that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." 559 U.S., at ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284, 298. It also rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel. Cf. Brief for Respondent in Padilla v. Kentucky, O. T. 2009, No. 08-651, p. 27 (arguing Sixth Amendment's assurance of effective assistance "does not extend to collateral aspects of the prosecution" because "knowledge of the consequences that are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea").

Here, Applicant's allegations are best addressed in a three part discussion, as follows: 1) Whether counsel was ineffective for his failure to investigate and handle pre-trial / trial matters, not including the canine evidence; 2) Whether counsel was ineffective for failure to ensure that Applicant had a full understanding of the charge he was pleading to and failure to ensure that the oral pronouncement of such matched the sentencing sheet; and 3) Whether counsel was ineffective for advising Applicant to enter a guilty plea due to the canine evidence when counsel did not have a full understanding nor had prepared to defend against the canine evidence prior to trial.

1. Counsel was not ineffective for failure to investigate and handle pre-trial / trial matters (not including the canine evidence).

By way of his Amendment and at the evidentiary hearing, Applicant alleged that counsel was ineffective in his representation at the preliminary hearing and in the handling of pre-trial investigation and matters including the destruction of evidence, the legality of his arrest, the tip, and alleged confession. This Court will address these matters in total, but all findings regarding the pre-trial handling of matters involving the canine evidence will be addressed below.

As summarized above and reflected in the evidentiary hearing transcript, Applicant testified that Mr. Warder handled the preliminary hearing. Applicant explained that counsel failed to look into obtaining the in car video and failed to investigate the basis for his detention and arrest provided at the preliminary hearing. At the time of trial, testimony was offered that the video was purged (destroyed) 90 days after Applicant's arrest. Transcript pp. 51-53.

Additionally, Applicant explained that he did not claim ownership of the slippers in question nor make a confession. He noted and counsel was asked about the portions of the preliminary hearing transcript addressing the slippers, whereby Deputy Giovanni conceded that Applicant did not admit possession of the particular slippers to him. Applicant was not aware of the reason why his attorneys did not make an argument at the end of the Jackson v. Denno hearing.

Applicant retained a private investigator to determine if the property was considered private property. At the evidentiary hearing, Edward Cooper testified that he went to the property and confirmed with management that it was private property. PCR p. 55.

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At the evidentiary hearing, the attorneys explained the trial strategy revolved around the insufficiency of the evidence and the aim was to obtain a directed verdict. Counsel conceded that they did not look into any legal arguments regarding private property, but they did go to the scene together. Regarding the Jackson v. Denno hearing, Mr. Wise, specifically testified, that he would not have chosen to abandon the challenge to the alleged slipper confession if he had been aware of the canine evidence at that juncture. Mr. Wise also explained that the tip was not coming in at trial.

This Court is not convinced that Applicant has shown that counsel was deficient in his representation at the preliminary hearing. Counsel thoroughly cross examined the officer at the hearing, which resulted in favorable information being obtained for trial preparation.

This Court is also not convinced that counsel was ineffective for failing to obtain the video or investigate the matter of private property prior to trial. During the Jackson v. Denno hearing, it was addressed that the video had been purged by law enforcement, and counsel even got the officer to admit that the destruction could have been his fault. Transcript pp. 51-52. Counsel did admit that the private property matter may be an interesting issue, but this Court finds that Applicant has failed to establish how counsel's failure to explore this issue was deficient and rendered his guilty plea involuntary.

Finally, this Court finds that counsel was prepared to address the admission of the tip at trial, and the abandonment of the Jackson v. Denno hearing was tainted by counsel's failure to understand and prepare to defend against the canine evidence at trial,

which is discussed below. Therefore, standing alone, this Court cannot find that counsel was deficient in the handling of the tip or alleged confession at trial.[6]

As a result, this Court finds that Applicant's claims regarding the preliminary hearing and pre-trial matters, excluding the canine evidence, fail in that Applicant has failed to show that counsel was ineffective and but for such ineffective assistance he would not have pled guilty and would have continued with trial.

2. Counsel was not ineffective for failure to ensure that Applicant had a full understanding of the charge he was pleading to and failure to ensure that the oral pronouncement of such matched the sentencing sheet.

After the trial turned into a plea proceeding, the Clerk read the charge, as follows: "Your Honor, in the case of 2012-GS-23-6017, the State v. Titus Rouse indicted for trafficking heroin, he's pleading to trafficking heroin less than four grams." Transcript p. 58, lns. 9-12. Thereafter, the Court informed the Applicant as follows:

> You're up here on three indictments. The first one is 2012-6017. It alleges you did in Greenville County on May 27, 2012, knowingly sell, manufacture, deliver or bring into South Carolina, or provide some other assistance to do that, or you were in actual or constructive possession of more than 14 grams of heroin. You pleading to trafficking in heroin greater than 4 grams.

Transcript p. 59, lns. 7-14. The sentencing sheet reflected "Drugs / Trafficking in Heroin > 4 grams."

At the evidentiary hearing, Applicant testified that he was confused by the difference between what the Clerk announced and what was reflected on the sentencing sheet. He further testified that he asked his attorneys during the plea proceeding whether it was a non-violent offense, and Mr. Wise wrote him to clarify after his plea.

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[6] This Court finds persuasive the admission by Mr. Wise that he did not understand the importance of the alleged slipper confession since he did not have a proper understanding of the State's interpretation of the canine evidence nor the canine evidence in general at the time of trial. This factor is part of the Court's reasoning in finding counsel deficient in regards to the canine evidence and plea advice as discussed below.

While on the stand, both defense attorneys did not seem to recall any confusion regarding the charge being pled to and the direct or collateral consequences of the charge. Mr. Wise acknowledged writing the letter to the Solicitor discussing parole eligibility dated August 8, 2014 and the letter to Applicant regarding the statue and collateral consequences on August 7, 2014, but he recalled doing so in response to Applicant's inquiry not due to confusion on his part.

In South Carolina, a substantial number of cases have developed a body of case law that establish which consequences must be explained to a defendant by counsel prior to a plea. Generally speaking, a defense attorney must only inform a defendant of the direct consequences of his plea, and counsel has no obligation to inform his client of the collateral consequences of his plea. See Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983), Frasier v. State, 351 S.C. 395, 570 S.E.2d 172 (2002) (Finding that a defendant need not be informed of the collateral consequences of his sentence such as parole eligibility; however if an attorney undertakes to advise a defendant of the collateral consequences of his sentences, then the advice must be accurate).

Direct consequences have a "definite, immediate, and largely automatic effect on the range of the defendant's punishment." Cuthrell v. Director, Paxtuent Institution, 475 F.2d 1364, 1366 (4th Cir. 1973). If a criminal defendant does not properly understand the direct consequences of his plea, then the plea is invalid. State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980). A defense counsel's failure to advise a client of the direct consequences of a guilty plea constitutes ineffective assistance counsel. Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999).

Based upon the record and testimony offered, this Court finds that Applicant has failed to show any deficiency on the part of counsel for failing to properly advise him regarding the direct consequences or advising him incorrectly regarding the collateral consequences of his plea. Furthermore, this Court finds that the plea court did properly inform Applicant of the charge during the plea proceeding, as was also reflected on the sentencing sheet. As a result, this claim must fail for failure to establish ineffective assistance.

3. Counsel was ineffective for advising Applicant to enter a guilty plea due to the canine evidence when counsel did not have a full understanding nor had prepared to defend against the canine evidence prior to trial.

"Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)). "[T]he defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" Lee v. United States, 137 S. Ct. 1958, 1965 (2017) (quoting Hill, 474 U.S. at 59).

As was testified to at the evidentiary hearing and set forth in the letter written by Mr. Wise shortly after the entry of the plea, Applicant entered his guilty plea as a result of counsel's advice to forego the trial due to the strength of the evidence, specifically the canine evidence. The advice to forego trial was in complete contrast to counsel's pre-trial strategy to obtain a directed verdict due to the insufficiency of the evidence. This Court

finds as a result of thorough review of the record, testimony and evidence offered that this advice was deficient and amounts to ineffective assistance of counsel.

The record supports a finding that counsel was ineffective due to counsel's failure to review and discuss the canine evidence, lack of understanding regarding the canine evidence, failure to utilize a canine expert, and advice to forego trial due to the canine evidence.[7] At the evidentiary hearing, Mr. Wise testified that he was unaware of the canine evidence until he was told about it by the Solicitor at trial, that he would have used the canine expert called, and he would not have advised Applicant to forego trial now that he had a proper understanding of the canine evidence and the case as a whole.[8] PCR pp. 86-94, 99-100, 106-107, 113-117. Constitutionally defective performance is found when defense counsel offers erroneous advice concerning an issue that is central to the defendant's decision to plead guilty. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). This Court cannot ignore the admitted erroneous advice that caused Applicant to abandon trial and enter a guilty plea. Plea counsel's advice, which was not based upon a proper review of the discovery or utilization of an expert but solely upon the Solicitor's view of the evidence, was not "within the range of competence demanded

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[7] As summarized above and reflected in the evidentiary hearing transcript, Applicant called Michael Gould, and he was qualified as an expert in the area of canine procedure and deployment. PCR p. 20. Based upon the opinions and testimony offered by Mr. Gould, this Court is persuaded that counsel's advice was deficient and that counsel was ineffective for failing to utilize Mr. Gould to prepare to defend against the canine evidence. See Reeves v. State, 415 S.C. 366, 782 S.E.2 747 (Ct. App. 2015) (Reversing the denial of post conviction relief reasoning that trial counsel was deficient for failing to discuss with Reeves hiring a medical expert to more thoroughly challenge the State's medical evidence presented at trial and finding that trial counsel did not present a legitimate trial strategy for failing to consult with an expert before trial or call an expert at trial.). Here, counsel did not provide a trial strategy for failure to utilize an expert. On the other hand, counsel admitted that an expert should have been utilized and stated that he would have utilized Mr. Gould.

[8] As detailed above, Mr. Warder testified that he thought they went over all the discovery during the joint meeting with Applicant, but both Applicant and Mr. Wise recalled the canine evidence and reports were not discussed. Mr. Warder also explained that the Solicitor's comments about the canine evidence were different than the weight he had given the evidence, and he had not prepared to cross-examine the officers about the canine evidence. PCR pp. 120, 125-127.

of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

Turning to the prejudice prong, it is clear that Applicant wanted to proceed to trial and only chose to forego trial based upon the advice of counsel. This finding is supported by the following evidence in the record before this Court. As testified to at the evidentiary hearing, Applicant hired a second attorney (Mr. Wise) who stated that he was brought on board with the belief that the case was proceeding to trial. The case did proceed to trial, with the jury being sworn and pre-trial motions being made. The trial turned into a guilty plea only after Applicant met with his attorneys and received the advice discussed above. Most importantly, Mr. Wise, Mr. Warder and Applicant testified that Applicant wanted to proceed to trial and only chose to enter a guilty plea after their meeting regarding their discussion with the Solicitor about the canine evidence. At the evidentiary hearing, Applicant repeatedly stated that but for the advice of counsel he would have proceeded to trial and wants the opportunity to proceed to trial. PCR pp. 137-8, 156, 159. This Court finds this testimony to not be merely self-serving, but it is supported by the testimony of both attorneys and the record before this Court. Therefore, this Court finds that prejudice has sufficiently been established.

As a result of these findings, this Court finds a new trial must be granted.

CONCLUSION

Based upon the foregoing, this Court orders that the Application for Post Conviction Relief is hereby granted. This Court further finds that no other allegations were raised at the PCR hearing. Therefore, any additional allegations are deemed waived because no evidence was presented.

IT IS THERFORE ORDERED:

1. That Applicant has met his burden of proof as to his specific allegation of ineffective assistance of trial counsel as detailed above, but has failed to meet his burden of proof as to all other allegations of ineffective assistance of trial counsel as detailed above;

2. That the Application for Post Conviction Relief be granted and the Applicant's convictions be vacated and he be granted a new trial;

3. That Applicant be transferred from the custody of South Carolina Department of Corrections to the custody of Greenville County pending the disposition of his criminal case, with normal bond proceedings.

AND IT IS SO ORDRED this 28th day of March, 2018.

Honorable Perry H. Gravely
Circuit Court Judge

Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2015CP2300995

Titus Lee Rouse *vs.* South Carolina State Of

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.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

NOTICE
Order Granting Application For Post Conviction Relief.

Dated at Greenville, South Carolina, this 29th day of March, 2018.

Court Reporter:

_____
PRESIDING JUDGE -

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s/ Paul B. Wickensimer

Paul B. Wickensimer Greenville County Clerk Of Court