

MAC | VANCE ATTORNEYS, LLC

April 24, 2018

RECEIVED

APR 27 2018

S.C. SUPREME COURT

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

RE: Marquis J S Robinson, #266341 v. State of South Carolina
2016-CP-46-01144

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal along with the accompanying Order for the above-referenced matter. By way of this letter I am copying the Office of Appellate of Defense, as I was appointed to represent Mr. Robinson.

Best regards,

ASHLEY A. MCMAHAN
ATTORNEY AT LAW

AAM
Enclosure

cc: Marquis J S. Robinson
Justin J. Hunter, Asst. Attorney General
York County Clerk of Court
Office of Appellate Offense

RECEIVED

APR 27 2018

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

Case No. 2016-CP-46-01144

Marquis J S Robinson, #266341, Petitioner,

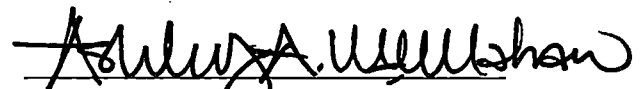
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant, Marquis J S Robinson, appeals the order of the Honorable J. Mark Hayes, II, filed April 12, 2018, and received by the undersigned on April 19, 2018.

Apr. 24th, 2018



ASHLEY A. MCMAHAN, ESQUIRE
MAC | VANCE ATTORNEYS, LLC
PO Box 5501
West Columbia, SC 29171
803-219-1110
ashley@macvance.com
SC Bar No. 71676
ATTORNEY FOR APPLICANT

Opposing Counsel:
Justin J. Hunter, Asst, Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APR 27 2018

S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

Case No. 2016-CP-46-01144

Marquis J S Robinson, #266341, Petitioner,

v.

State of South Carolina,.....Respondent.

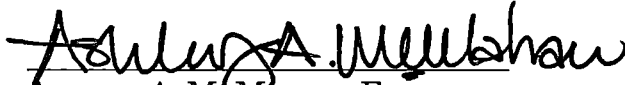
PROOF OF SERVICE

I, Ashley A. McMahan, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Justin J. Hunter, Asst, Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

I further certify that all parties required by Rule to be served have been served.

Apr. 24th, 2018


ASHLEY A. McMAHAN, ESQUIRE
MAC | VANCE ATTORNEYS, LLC
PO Box 5501
West Columbia, SC 29171
803-219-1110

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2016CP4601144

Marquis J S Robinson		South Carolina State Of	
----------------------	--	-------------------------	--

PLAINTIFF(S)	DEFENDANT(S)
Submitted by: The Court	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY**
- 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; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/J. Mark Hayes, II

2132


4/5/2018

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

 **RECEIVED**
 4/19/18
AKU

This judgment was entered on April 12, 2018, and a copy mailed first class or placed in the appropriate attorney's box on April 12, 2018, to attorneys of record or to parties (when appearing pro se) as follows:

Ashley A. McMahan PO Box 5501 West Columbia, SC
29169

Justin James Hunter PO Box 11549 Columbia, SC
29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRPC.

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

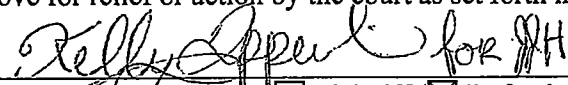
This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
)
)
MARQUIS ROBINSON, #266341)
) Plaintiff,)
)
) vs.)
)
)
)
STATE OF SOUTH CAROLINA)
) Defendant.)

IN THE COURT OF COMMON PLEAS
 SIXTEENTH JUDICIAL CIRCUIT

CASE NO.: 2016-CP-46-1144

**MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET**

Plaintiff's Attorney: Ashley A. McMahan, Bar No. _____ Address: Post Office Box 5501 West Columbia, South Carolina 29169 Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: Justin J. Hunter, Bar No. _____ Address: Post Office Box 11549 Columbia, South Carolina 29211 Phone: _____ Fax _____ E-mail: _____ Other: _____
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input checked="" type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
<div style="display: flex; justify-content: space-between; align-items: center;"> <div style="text-align: center;">  Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant </div> <div style="text-align: right;"> April 2, 2018 Date submitted </div> </div>	
SECTION III: Motion Fee	
<input type="checkbox"/> PAID – AMOUNT: \$ _____ <input type="checkbox"/> EXEMPT: (check reason)	
<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, S.C.R.C.P. & S.C. YOR. COUNTY V.S. SC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other: _____	
JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____ <input type="checkbox"/> CONTESTED – AMOUNT DUE: \$ _____	

FILED-RECEIVED
 2018 APR 12 PM 2:11
 DAVID HAMILTON
 C.C.C.P. & S.C.
 YORK COUNTY V.S. SC

STATE OF SOUTH CAROLINA)
 COUNTY OF YORK)
)
 Marquis Robinson,)
 S.C.D.C. No. 266341,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 OF THE SIXTEENTH JUDICIAL CIRCUIT

2016-CP-46-1144

ORDER OF DISMISSAL

FILED-RECEIVED
 2018 APR 12 PM 2:15
 DAVID HAMILTON
 C.C.C.P. & GS
 YORK COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed April 13, 2016. An evidentiary hearing into the matter was convened on January 29, 2018, at the Moss Justice Center in York, South Carolina. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General’s Office represented Respondent. At the hearing, Applicant testified on his own behalf. Applicant’s trial counsel, Twana Burris, Esquire, and Applicant’s former girlfriend Kayla Higgs also testified. This Court had before it a copy of Applicant’s records from the York County Clerk of Court, Applicant’s records from the South Carolina Department of Corrections, the trial transcript, Applicant’s PCR Application, and Respondent’s Return.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the September 2011 term of the York County Grand Jury for armed robbery (2011-GS-46-2905); attempted murder (2011-GS-46-2906); criminal conspiracy (2011-GS-46-2907); kidnapping (2011-GS-46-2908); and possession of a firearm during the commission of a violent crime (2011-GS-46-2909). Applicant was represented by Twana Burris, Esquire. On July 25, 2013,

Applicant underwent a jury trial before the Honorable John C. Hayes, III. Applicant was found guilty of armed robbery as indicted, second degree assault and battery as a lesser included offense of attempted murder, criminal conspiracy as indicted, kidnapping as indicted, as possession of a firearm during the commission of a violent crime as indicted. Applicant was sentenced to thirty years imprisonment for armed robbery, three years for second degree assault and battery, five years for criminal conspiracy, thirty years for kidnapping, and five years for possession of a firearm during the commission of a violent crime. All sentences were to run concurrently.

Applicant filed a notice of appeal was an appeal was perfected by Appellate Defender Katherine Hudgins. In an unpublished opinion, South Carolina Court of Appeals dismissed Applicant's appeal on October 14, 2015. State v. Robinson, Op. No. 2016-UP-486 (S.C. Ct. App. filed October 14, 2015). The Remittitur was sent November 4, 2015.

PCR Application

In his application for post-conviction relief, Applicant alleges he is being held unlawfully for the following reasons:

1. "4th, 5th, 6th, 8th, 13th, 14th Amendment and violation of due process."
2. "Violation and fraud upon the court and subject matter jurisdiction."
3. "Ineffective Assistance of Counsel and violation of Brady law."

Applicant filed an amendment on or about January 15, 2018, alleging the following grounds for relief:

1. Ineffective Assistance of Counsel as to Twana N. Burris-Alcide, Esquire:
 - a. Failed to call Kayla Higgs as an alibi witness.
 - b. Failed to properly cross-examine Ernest Jordan regarding statements made. Had Mr. Jordan been properly cross examined he

would have lost all credibility and the Applicant would have been exonerated at trial.

2. Trial Judge abused discretion when he punished the Applicant for exercising his right to trial by giving Applicant an excessive sentence. See Castro v. State, 417 S.C. 77, 789 S.E.2d 44 (2016).
3. Juror Tamara N. Gary knew trial counsel and failed to disclose that information in voir dire. See State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001), “[w]here a juror, without justification, fails to disclose a relationship to a party, it may be inferred, nothing to the contrary appearing, that the juror is not impartial.

II. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order 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. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel’s performance was deficient. Id. Under this prong, courts measure an attorney’s performance by its “reasonableness under prevailing professional norms.” Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 386 S.E.2d at 625.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

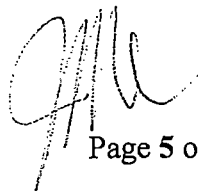
Failure to Call Kayla Higgs as an Alibi Witness

Applicant alleged Counsel was ineffective for failing to call Kayla Higgs as an alibi witness at Applicant's trial. Applicant testified Ms. Higgs was supposed to testify at the trial. Ms. Higgs testified at the PCR hearing. She testified she has children with Applicant and they were together as a couple at the time of the incident. She testified that on the night of the incident, Applicant picked her up from work at 6:00PM, the two went to their home, and they went to bed at 10:30PM. She testified Applicant worked during the day. Ms. Higgs testified she would have heard if Applicant got up in the middle of the night to leave their house. She testified she told Counsel her version of events during the night in question. She testified she was not called as a witness at Applicant's trial or his prior trial that ended in a mistrial. Ms. Higgs testified Counsel told her she did not need to be called as a witness. She further testified Counsel discussed the alibi but said she would not use it.

Counsel testified Ms. Higgs came to her office many times. She testified neither Applicant nor Ms. Higgs told her Ms. Higgs was an alibi witness. Counsel testified there was no mention of an alibi and if she had been informed of a possible alibi, she would have an obligation to investigate it and turn it over to the State. She testified she always includes more witnesses on her possible witness list because she would not be able to call someone who is not listed. She testified Ms. Higgs never asked to be a witness and never told her Applicant was at their house the night of the incident. Counsel said Ms. Higgs told her in general that she and Applicant have a small child together but Ms. Higgs never told her Applicant was at home during the incident.

This Court finds Applicant has failed to meet his burden of proving Counsel was ineffective for failing to call Ms. Higgs as a witness at the trial. Although Ms. Higgs' appeared credible at the PCR hearing, this Court finds Counsel's testimony is also credible and more believable than Ms. Higgs' testimony. This Court finds Counsel provided credible testimony that she met with Ms. Higgs often, and was never told of a possible alibi defense involving Ms. Higgs. This Court also finds Counsel provided credible testimony she was never told of a possible alibi because she would have an obligation to investigate and turn over the alibi. Applicant has failed to meet his burden of proving Counsel acted unreasonably or that she failed to investigate something known to her at the time. This Court finds Counsel was not deficient where she never had any indication from Applicant or Ms. Higgs that Ms. Higgs could provide alibi testimony for Applicant.

Furthermore, this Court finds Applicant has failed to meet his burden of proving the outcome of his trial would have been different had Ms. Higgs been called to testify. A review of the trial transcript indicates that even if the alibi witness had been called at trial, a strong

A handwritten signature in black ink, appearing to be the initials 'JMC' or similar, written in a cursive style.

likelihood exists that the alibi witness may not have been believed. The t-shirt which was pulled up over Applicant's face fell down during the robbery, uncovering the face. The victim even smiled when the robbery started as he thought the applicant was "playing." Thus, even if Counsel was deficient, Applicant has failed to meet his burden of proving the outcome of his trial would have been different. Accordingly, this allegation must be dismissed.

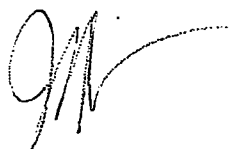
Failed to properly cross-examine Ernest Jordan regarding statements made

Applicant alleged Counsel was ineffective for failing to properly cross-examine victim Ernest Jordan regarding his statements. At the PCR hearing, Counsel testified she interviewed Mr. Jordan twice prior to trial and went to see him. She testified she had an extensive conversation for two hours with Mr. Jordan about his trial testimony and relayed all information to Applicant. Counsel testified Applicant's main defense was mistaken identity, but Mr. Jordan told her he knew Applicant was the assailant because he knew Applicant. She testified it was obvious Mr. Jordan knew defendant, and he saw Applicant's face during the incident when Applicant's shirt fell off his face. Counsel testified she questioned the dollar amounts Jordan said were stolen and also questioned his inconsistent statements.

This Court finds Applicant has failed to meet his burden of proving Counsel's actions were deficient in her cross-examination of Mr. Jordan. Cross-examination is a matter of trial strategy, and as such, this Court must presume that Counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. The record reflects

Counsel cross-examined Mr. Jordan concerning his statements. She elicited testimony that Mr. Jordan could not remember what he told the 911 dispatcher the night in question. Tr. 275. She also elicited testimony that Mr. Jordan told the initial responding officers there were three suspects. Tr. 277. Counsel also went over Mr. Jordan's statement he gave Detective Stokes that outlined the incident. Tr. 293-295. She elicited testimony that Mr. Jordan offered to give Applicant and his codefendant \$10,000 from his truck. Tr. 295. She questioned Mr. Jordan about how much money he actually had on him and inside his truck that night, and how this differed from his prior testimony where he testified to only having \$7,000. Tr. 297, 299. Counsel was able to get Mr. Jordan to admit his prior testimony was inconsistent. Tr. 300-301.

This Court finds Counsel was not deficient in her cross-examination of Mr. Jordan as she thoroughly went through his prior testimony and cross-examined him on inconsistencies with his statements. This Court finds Counsel effectively called Mr. Jordan's credibility into question by pointing out the inconsistencies. Any inconsistent testimony was an issue of credibility to be resolved by the finder of fact. See e.g., State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 830 (2001) (witness's credibility an issue for the jury's consideration). This Court finds Applicant has failed to show exactly how Counsel's cross-examination was deficient and how it fell below the reasonable standard for attorneys. Furthermore, this Court finds Applicant has failed to meet his burden of proving the outcome of Applicant's trial would have been different had Counsel employed different cross-examination. This Court finds Applicant has failed to show exactly how different cross-examination would have changed the outcome of his case and this Court will not speculate whether a "better" cross-examination would have helped Applicant. See Skeen v. State, 325 S.C. 210, 216-17, 481 S.E.2d 129, 133 (1997). Accordingly, this allegation must be dismissed.



Page 7 of 11

Trial Judge abused discretion when he punished the Applicant for exercising his right to trial by giving Applicant an excessive sentence

Applicant alleged the trial judge abused his discretion by punishing Applicant for exercising his right to a trial by giving him an excessive sentence. Our Courts have held “[w]hen a trial judge considers the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant, it is an abuse of discretion.” Castro v. State, 417 S.C. 77, 83, 789 S.E.2d 44, 47 (2016). In Castro, the Supreme Court held it did not matter if the trial judge also considered other factors, the fact that judge considered the defendant exercising his right to trial as a factor in sentencing was an abuse of discretion. This Court finds this allegation is without merit. This Court finds there is nothing in the record to support Applicant’s claim. The transcript reflects the trial judge did not make any comments concerning Applicant during sentencing and only issued the sentence. Applicant has failed to provide any evidence to support his allegation. This Court finds Applicant has failed to meet his burden of proving the trial judge abused his discretion, or that Counsel should have objected to the sentence, and this allegation must be dismissed.

Juror Tamara N. Gary failed to disclose she knew Counsel

Applicant alleged Juror Tamara Gary knew Counsel and failed to disclose this fact to the trial court. Applicant testified Counsel said she knew Ms. Gary. Counsel testified she does not know Ms. Gary, has never heard of her before, and never told Applicant that she knew Ms. Gary.

This Court finds Applicant has failed to meet his burden of proving Counsel was deficient. This Court finds Counsel’s testimony to be credible that he had never heard of Ms. Gary and did not know her. This Court finds Counsel was not deficient for failing to object to this juror being seated on the jury as no impartiality existed. Furthermore, this Court finds Applicant has failed to meet his burden of proving the outcome of his trial would have been

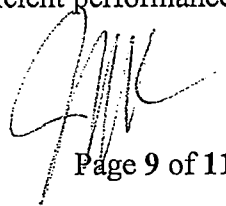
different had this juror been excluded from the jury. Accordingly, this allegation must be dismissed.

Failure to convey plea offer

Applicant alleged during the PCR hearing that Counsel was ineffective for failing to convey a plea offer. Applicant testified he was offered a ten year plea at the start of trial. He testified the solicitor said at the start of trial that there was a fifteen year plea, but this plea was not relayed to him. He testified that the Friday or Saturday before trial he wanted the ten year plea deal and Counsel told him she would notify the solicitor. He testified Counsel never told him the plea offer was fifteen years and not ten years. Applicant testified he would have taken the fifteen year plea had he known about it.

Counsel testified the initial plea offer was for twenty or twenty-five years, and she communicated this to Applicant. She testified he never expressed interest in taking the plea offer. Counsel testified the offer was for fifteen years, but asked the solicitor if she would offer a ten year plea and the solicitor declined. Counsel testified she made it clear to Applicant that the offer was fifteen and would not change. She testified Applicant told her he had a lot of pride. Counsel testified a week before trial she relayed the fifteen year offer again and went over everything concerning the trial. She testified Applicant ultimately did not accept the fifteen year offer. Counsel further testified Applicant maintained his innocence was adamant about proceeding to trial.

This Court finds Applicant failed to prove Counsel was ineffective in this regard. To be successful on an allegation of an un conveyed plea offer, Applicant must prove: (1) trial counsel's failure to communicate the State's initial plea offer constituted deficient performance, and (2) Petitioner was prejudiced by the deficient performance, or there was a reasonable probability that



Page 9 of 11

but for this deficient performance, he would have accepted he original plea offer. Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009). Generally, failure to convey a plea offer constitutes deficient performance, although the existence of prejudice needs to be evaluated on a case-by-case basis. Id. at 613, 675 S.E.2d at 422. To show prejudice from a failure to convey a plea offer, Applicant must:

demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time

Missouri v. Frye, 566 U.S. 134, 147, 132 S. Ct. 1399, 1409 (2012).

This Court finds Counsel provided credible testimony that she conveyed the State's fifteen year plea offer to Applicant several times prior to trial, after discussions about the facts of the case. This Court finds Counsel made it clear to Applicant the offer was for fifteen years and not ten years, and Applicant ultimately rejected the offer. This Court finds Counsel was not deficient in relaying the plea offer. This Court further finds Applicant has failed to meet his burden of proving he was prejudiced, as he has failed to show he would have accepted the plea offer but for Counsel's performance. This Court finds Counsel provided credible testimony that Applicant rejected the plea offer and was adamant about proceeding to trial. As Applicant has failed to meet his burden of proving Counsel's actions were ineffective in this regard, this allegation must be dismissed.

IV. CONCLUSION

Based on the foregoing facts, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his

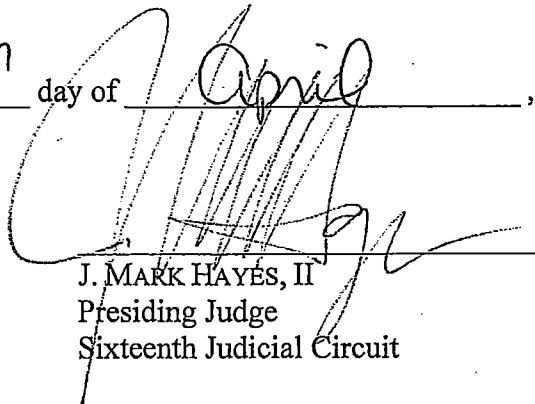
application for post-conviction relief. Applicant failed to demonstrate that Counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

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

AND IT IS SO ORDERED this 5th day of April, 2018.


J. MARK HAYES, II
Presiding Judge
Sixteenth Judicial Circuit

York, South Carolina

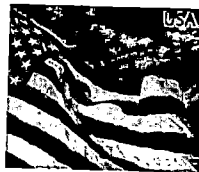


MAC | VANCE ATTORNEYS, LLC
PO Box 5501
West Columbia, SC
29171



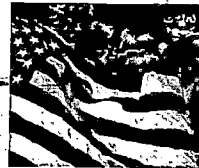
B 17480402 190736

FOREVER

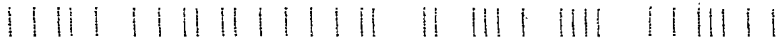


B 17480402 190736

FOREVER



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



COLUMBIA

SC 290

25 APR '18

PM 2 L

NS211-100000

