

ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

July 25, 2018

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED

AUG 31 2018


S.C. SUPREME COURT

Re: Furman E. Taylor v. State
2016-CP-23-5673

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,



Susannah Ross
Attorney at Law

enclosure

cc: Office of the Attorney General
Office of Appellate Defense
Greenville County Clerk of Court

330 E. COFFEE ST. • GREENVILLE/SC • 29601

PHONE: (864) 242-0029

E-MAIL: SUSANNAH@ROSSENDERLIN.COM

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

AUG 31 2018

Letitia H. Verdin, Circuit Court Judge

S.C. SUPREME COURT

2016-CP-23-5673

Furman E. Taylor, Appellant,

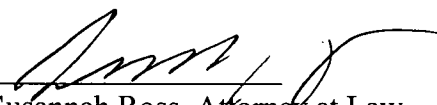
v.

The State, Respondent.

NOTICE OF APPEAL

Furman E. Taylor appeals the Honorable Letitia H. Verdin's Order of Dismissal filed July 31, 2018, and denial of the Applicant's Motion to Alter or Amend filed August 15, 2018.

This 29 day of August, 2018.


Susannah Ross, Attorney at Law
330 E. Coffee St.
Greenville, SC 29601
(864) 242-0029
Attorney for Appellant

Other Counsel of Record:
DeShawn Mitchell, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for Respondent

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IN THE SUPREME COURT AUG 31 2018

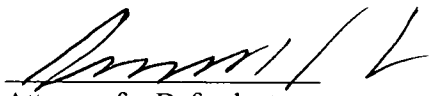
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 FURMAN E. TAYLOR,)
)
 APPELLANT,)
)
)
)
 VS.)
)
)
)
 THE STATE OF SOUTH CAROLINA,)
)
 RESPONDANT.)
)
 _____)

CERTIFICATE OF SERVICE BY MAIL

1. I am the attorney for the Applicant in the above-captioned matter.
2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Notice of Appeal** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

Mr. DeShawn Mitchell
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


 Attorney for Defendant

This 29 day of August, 2018

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP2305673

Furman E Taylor

South Carolina State Of

18 AUG 15 PM 3:17
Paul Wickensimer - COC GUL SC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: **Susannah Ross**

Attorney for: Plaintiff Defendant
 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: The Plaintiff's Motion to Alter or Amend the Judgment in this case is denied.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

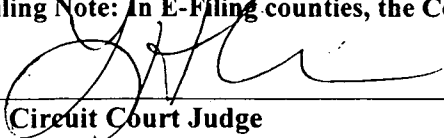
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

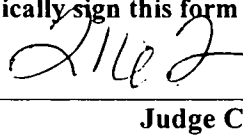
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

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.


Circuit Court Judge


Judge Code

8/14/2018
Date

For Clerk of Court Office Use Only

This judgment was entered on 8-15-18 and a copy mailed first class or placed in the appropriate attorney's box on 8-15-18, to attorneys of record or to parties (when appearing pro se) as follows:

Susannah Conyers Ross 330 East Coffee St. Greenville, SC
29601

Susannah Ross

ATTORNEY(S) FOR THE PLAINTIFF(S)

Deshawn Mitchell

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer

Paul B. Wickensimer Greenville County Clerk Of
Court - Clerk of Court

Court Reporter

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), SCRCP.

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 GREENVILLE)
))
Furman E. Taylor, #198161)
))
Applicant,)
))
v.)
))
State of South Carolina,)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

2016-CP-23-5673

PAID
WICKENSIMET COC GUL SC
18 JUL 31 AM 10:27

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief filed on October 3, 2016 by Furman E. Taylor (Applicant). Respondent made its Return on or about February 24, 2017. An evidentiary hearing into the matter was convened on October 27, 2017, at the Greenville County Courthouse in Greenville, South Carolina. Applicant was present and represented by Susannah C. Ross, Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General’s Office.

At the hearing, Applicant testified on his own behalf. Applicant’s First Trial Counsel Robert Ianuario, Esquire (Counsel #1) testified as did Applicant’s Second Trial Counsel Alex Kornfeld, Esquire (Counsel #2). Applicant’s Appellate Counsel Robert Pachak, Esquire also testified via telephone. This Court had before it a copy of the records of the Greenville County Clerk of Court regarding the Applicant’s convictions, the transcript from Applicant’s trial, the PCR application, Respondent’s Return, Applicant’s records from the Department of Corrections and Applicant’s appellate records. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Greenville County. Applicant was indicted by the April 2013 term of the Grand Jury for Greenville County for one of Burglary – 1st degree (2012-GS-23-6511) and one of Petit Larceny – Sentencing pursuant to § 16-1-0057 (2012-GS-23-6513). Applicant was represented by Robert E. Ianuario, Esquire during a trial which occurred in February of 2014 which resulted in a mistrial due to a hung jury. On January 5, 2015, Applicant proceeded to a new trial represented by Alex Kornfeld, Esquire. On January 7, 2015, Applicant was convicted as indicted of Burglary – 1st degree (2012-GS-23-6511) and Petit Larceny – Sentencing pursuant to § 16-1-0057 (2012-GS-23-6513). Applicant was sentenced on January 7, 2015, by the Honorable D. Garrison Hill to life in prison for Burglary, 1st degree, pursuant to § 17-25-45, and thirty days for Petit Larceny, to be served concurrently.

Applicant filed a timely notice of appeal. Robert M. Pachak, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals dismissed Applicant's appeal after review pursuant to Anders v. California¹ on August 3, 2016. State v. Taylor, Op. No. 2016-UP-390 (S.C. Ct. App. 2016). The Remittitur was returned on August 19, 2016.

ALLEGATIONS

1. Newly Discovered Evidence
 - a. "Affidavit of alibi witness."
 - b. "Newly after [*sic*] discovered evidence that was discovered only after the notice of appeal was perfected and the appeals court, having exclusive control, would not grant leave for [Applicant] to have this evidence reviewed by the circuit court."

¹ 386 U.S. 738 (1967).

2. Ineffective Assistance of Trial Counsel (pertaining to counsel during 2014 mistrial)
 - a. "Failed to formally request motion for speedy trial."
 - b. Failed to obtain relevant evidence
 - c. Failed to make appropriate objections
3. Ineffective Assistance of Trial Counsel (pertaining to the trial resulting in Applicant's conviction in January of 2015)
 - a. "Failed to request a pre-trial evidentiary hearing discover admissible/inadmissible evidence."
 - b. Failed to make appropriate objections
4. Ineffective Assistance of Appellate Counsel
 - a. "Failed to designate the entire record on appeal."
 - b. "Failed to re-brief meritorious issues at the request of [Applicant]."
 - c. "Appellant counsel did not communicate in any meaningful manner with [Applicant]."

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Applicant's Testimony

Applicant testified he got rid of his first attorney because the attorney would not get the complete video from the pawn shop that he requested. He testified by the time his second attorney went to get the video from the pawnshops it had been destroyed or was no longer available and the State wanted his second attorney to rely on what already had been produced. Applicant testified the co-defendant in this case was Amanda Caldwell and that police had said they had video of her going into the pawn shop and leaving. He testified when he viewed the video it only showed Ms. Caldwell from the time she was standing at the counter until she left. Applicant testified Investigator Mashak, the officer working the case, testified at Applicant's second trial that he had Ms. Caldwell on video from the time she came in until the time they left.

Applicant testified the video that was shown to the jury did not show the entire event as testified to by Investigator Mashak. He testified the video was only from the time Ms. Caldwell was at the counter until the time she left because the individual with her who the police were describing was on the first part of that video and came there with her. Applicant testified he was there to jump-start his vehicle. Applicant testified he allowed Ms. Caldwell to borrow his vehicle because he went somewhere else and he had an alibi witness who he could never get in contact with but had tried on several occasions to contact them.

Applicant testified during the first trial, the video did not come in at all because it was never subpoenaed but Trial Counsel #2 subpoenaed the video for the second trial. He testified Trial Counsel #2 told him he had actually went and tried to get it from the pawnshop, and they never would respond to his subpoenas. Applicant testified Trial Counsel eventually received the video some thirty months after he was charged but that the video only had limited amounts of time. He testified Trial Counsel #2 went to talk to the investigator in the case and he told Investigator Mashak about the limited amounts of time on the video. Applicant testified prior to the first trial he did not have the video in discovery and he tried to get it several times from Counsel #1. Applicant testified the video came in during his second trial and that he sought out to get it because he knew it had exculpatory evidence in his favor on it. He testified during trial the chain of custody of the video was discussed. Applicant testified the investigator's testimony at trial was that he started off by going to the manager of the pawnshop and the pawnshop manager signed paperwork stating they gave the videos to the investigator and the investigator signed saying he obtained them. Applicant testified the investigator testified at trial that he then took the evidence to property and evidence and signed them in. Applicant testified the investigator was asked on pg. 209 of the trial transcript what he did with the videos and he

responded he brought them to his office, viewed them, basically, burned a copy of them and then placed them in property and evidence. Applicant testified the investigator had an opportunity to distort the videos. He testified he did not understand why the videos were allowed into evidence after the chain of custody was broken by the investigator's own testimony. He testified the investigator probably had the videos in his possession during the first trial but did not produce them. Applicant testified he felt the delay in getting the video prejudiced him tremendously because it would have exonerated him if he showed a second suspect dressed exactly like him. He testified Counsel #2 tried to subpoena the video but by that time it was too late. Applicant testified Counsel #2 did try and exclude the video under Kyles v. Whitley². He testified Counsel #2 argued the motion to exclude on his behalf but it was overruled. Applicant testified one of the complaints he had was there was never an original video from the beginning only a copy and Counsel #2 also argued that. Applicant testified the prosecution argued it was the original however when Counsel #2 was asked by the trial judge what his objection was regarding the video he said relevance which was an improper contemporaneous objection when previously he had made the proper argument concerning the video. He testified Counsel #2 did not ask for a jury instruction regarding the video or its destruction but he did ask for an instruction on prior bad acts. Applicant testified the video was extremely unduly and unfairly prejudicial to him in his defense and more of an objection should have been made to the chain of custody. Applicant testified he did not understand why Kara Bennick could testify to the authenticity of the video when she had never seen or had firsthand knowledge about it. He testified Ms. Bennick was the property and evidence witness and she testified whether she received the video or not.

Applicant testified he was charged with burglary first and that Counsel #2 moved to exclude the prior bad acts. He testified when Counsel #2 originally brought up that he wanted to

² Kyles v. Whitley, 514 U.S. 419 (1995)

make a Rule 404(b) motion to exclude prior bad acts, and knowing his priors were an element of the crime, Counsel #2 should have made an interlocutory stipulation under Hamilton vs. State or even Old Chief and it would have triggered an obligation of the Court to eliminate the name and nature from the prior charges. Applicant testified Counsel #2 did not stipulate that there was a gun involved or that the crime occurred at night. He testified the trial judge did not weigh factors of probative value versus prejudice under Rule 403 and Counsel #2 did not make any constitutional arguments against the statute itself and this prejudiced him. Applicant testified he believed the outcome of his trial would have been different if the jury had not heard about two prior burglary firsts when he was on trial.

Applicant testified Counsel #2 failed to properly impeach witnesses from his first trial in his second trial. He testified the investigator in the case had made statements at the first trial that David Perry, a witness, had never seen a male suspect at all and had been advised and testified to that at trial. Applicant testified at the second trial, the investigator said that he had showed Mr. Perry a photo lineup to see if he could identify the person who committed the burglary, insinuating that Mr. Perry did, in fact, see a male. Applicant testified Mr. Perry was then put on the stand to testify to something he had said he had not seen. Applicant testified it was improper of the State to not correct or allow the testimony they knew was contrary to prior testimony given and statements of witnesses. He testified Mr. Perry was a witness who kind of came onto the scene and could not point to or identify him. Applicant testified his co-defendant Ms. Caldwell should have also been impeached because she made a lot of different statements and there were a lot of discrepancies in her testimony. He testified his name came up in the case because the Ms. Caldwell told the investigator a man named Tyler Whitman had given her the items stolen and the investigator told her she was lying and that Applicant had given her the

items and then Ms. Caldwell said that was the truth. He testified Ms. Caldwell never brought his name up first and it was only brought up by the investigator. Applicant testified Counsel #2 cross-examined Ms. Caldwell about this. Applicant testified Counsel #2 elicited reference to another case about him and the jury go to hear about it and it was improper.

Applicant testified Counsel #1 should have requested a speedy trial because it took over twenty months to get to his first trial and almost thirty months before his second trial. He testified by that time so much evidence had been lost and witnesses' memories had been so jaded and changed there was no way he could have built a defense at that point which prejudiced because of the delay. He testified he felt there should have been some clarification that Investigator Mashak was the one who brought his name into the whole crime and not his co-defendant Ms. Caldwell. He testified he thought there should have been a motion for prosecutorial misconduct and a mistrial for putting up David Perry as a witness.

Applicant testified he also had an allegation of ineffective assistance of appellate counsel. He testified Appellate Counsel never made contact with him in any kind of way. He testified Appellate Counsel told him it was Appellate Counsel's decision to make regarding briefing his case and too basically just sit tight. Applicant testified he should have had the ability to have input into the appeal. Applicant testified an objection should have been made when a witness brought up a recent mugshot photo of his during trial which led the jury to believe he had a criminal background. Applicant testified there were meritorious issues that Appellate Counsel did not brief. He testified there were several issues where Trial Counsel objected that should have been briefed. Applicant testified Appellate Counsel did an Anders brief and said there was no merit. He testified he filed his own brief to the court. Applicant testified he felt like there was a due process violation because of the State's failure to produce the video in the first place. He

testified he was never served with life without parole notice before his second trial.

On cross-examination, Applicant testified he met with Counsel #2 maybe three times before going to trial. He testified he met with Counsel #1 three or four times prior to going to trial as well. He testified Counsel #1 did not go over the video with him and he had to wait until the day of court to even get a glimpse of the video. He testified he gave his attorney leads and witnesses to go out and talk to but he did not do so. Applicant testified Counsel #1 discussed with him about testifying. He testified he asked Counsel #1 to file a motion for a speedy trial. Applicant testified Counsel #2 asked him certain questions about witnesses and things he could get. He testified Counsel #2 had a defense strategy for his case. Applicant testified Trial Counsel #2 cross-examined several witnesses during his second trial.

First Trial Counsel's Testimony

Robert Ianuario testified he was appointed to be Applicant's original Trial Counsel (Counsel #1). He testified he had been practicing law in South Carolina since 2008 and all of that time had been devoted to criminal law. Counsel #1 testified about the facts of the case and that Applicant's case involved a burglary of a home. He testified some neighbors stopped by to take out the homeowner's trash while she was out of town and they noticed a strange vehicle in the driveway. Counsel #1 testified the neighbors called the homeowner and asked if there was supposed to be somebody else there and she said no. He testified during that point in time, a male and female suspect walked out, got in a van and pulled off. Counsel #1 testified some of the stolen property turned up at a pawnshop and the homeowner did identify those as the items that were stolen. He testified since it had been almost five years since he had Applicant's case his memory was a little fuzzy but he recalled the police made an arrest of Applicant's co-defendant when she was with Applicant. Counsel #1 testified police arrested her at that point in time and

they let Applicant go on his way but they did note the type of vehicle Applicant was driving determining it was similar to the vehicle that was used in the burglary. He testified the Applicant's original trial at which he represented Applicant resulted in a hung jury. Counsel #1 testified he did not recall Applicant ever asking him to file a motion for a speedy trial. He testified that with the speed with which Applicant's case moved from the initial appointment to the trial in about twenty months, even had Applicant asked for one, he probably would have said not enough time had gone by to file a motion for a speedy trial. Counsel #1 testified overall twenty months was slow but for the legal system it was moving pretty productively. He testified he did not issue a subpoena for videos from the pawnshops in Applicant's case. Counsel #1 testified he went back and looked at the records he had from Applicant's file and he received the appointment to represent Applicant on June 8, 2012. He testified he received the initial discovery on July 17, 2012 and that the initial discovery did not include any videos or anything. Counsel #1 testified he then met with the Applicant and reviewed the discovery with him on July 19, 2012. He testified his notes from the file indicated that on September 17, 2012 he talked with Cash Pawn and they indicated to him the video did not go back that far so he sent a letter to the Solicitor. He testified he actually received the videos from the store through the Solicitor's Office on November 13, 2012 and December 19, 2012. Counsel #1 testified he made initial inquiries into the video prior to the Solicitor's Office doing so. He further testified he received a life without parole notice (LWOP) for Applicant which was dated July 15, 2013.

On cross-examination, Counsel #1 testified the LWOP notice was served on him and was still in his file but that he provided Applicant's second trial counsel with an electronic copy of his file which included the LWOP notice. He testified he received the videos from the pawnshops some thirteen months before Applicant's first trial but the videos were not introduced

into evidence at Applicant's first trial.

Second Trial Counsel's Testimony

Alexander Kornfeld testified he was Applicant's second Trial Counsel (Counsel #2). He testified he had practiced law in South Carolina since 2009 and about sixty-five percent of that time had been devoted to criminal law. Counsel #2 testified he agreed with the facts of the case as testified to by Counsel #1. He testified Applicant was very well informed about the law for someone that was not a lawyer but that he and Applicant talked about Applicant's charges in depth. Counsel #2 testified Applicant actually had another pending burglary as well as the petit larceny with that charge and Applicant was very clear that he was not going to plea to the charges because he was not guilty of them. He testified Applicant knew what was going on with his case and knew the charges against him. Counsel #2 testified Applicant more so than most clients was more active in his case and would want to know about the case law. He testified Applicant was very aware about speedy trials and rules to request. Counsel #2 testified that although rules for not indicting a case were deemed administrative he told Applicant he would make a motion to have his charges dismissed because of the delay in having his case indicted but that the motion would probably be unsuccessful. He testified he made the motion, and brought up the fact that State v. Langford³ may have changed the analysis that a court may look at concerning any delay of indicting or bringing a case to trial but unfortunately his motion was denied. Counsel #2 testified he made a motion to dismiss the indictment for the petit larceny, a motion to exclude Applicant's prior bad acts, and a motion to exclude the video coming into Applicant's trial. He testified one of the reasons for making a motion to exclude the video was because Applicant was adamant that if that video would have been a complete version it would have showed and exonerated him but Counsel #2 was concerned about how long had gone by

³ State v. Langford 400 S.C. 421 (2012)

with regard to when the video footage was first requested. He testified he did not necessarily think the video helped Applicant and that it would be better if they did not have the video but he subpoenaed Cash Pawn anyway. Counsel #2 testified the pawnshops went quite some time without responding, but that he did get ahold of them and they both sent him a letter. He testified he believed he talked to somebody at Cash Pawn that said they did not have that video anymore. Counsel #2 testified in his motion to exclude the video before the Court, he asked that the video be suppressed or in the alternative for a spoliation charge and that was denied. He testified he believed the analysis by the trial court was that he could not show any prejudice. Counsel #2 testified in terms of his motion to exclude prior bad acts he tried to narrow the issue on how the State was going to charge Applicant with burglary first. He testified the way the indictment was written the charge could have been because it happened at night, a weapon was used, or because of the two previous burglaries Applicant had. Counsel #2 testified the State went forward on the two previous burglaries and his argument then was that it was an element of the offense of burglary first. He testified because of the fact that it was an element of the offense it kept the court from doing an analysis they would normally do under Rule 608 or Rule 403 of the rules of evidence to see if the mention of prior burglaries were unduly prejudicial. He testified he argued against them being introduced citing case law which said if there are previous robberies, do not bring those robberies in because it would be unduly prejudicial. Counsel #2 testified in Applicant's case the judge had to follow the statute. He testified he thought the Applicant's previous burglaries being introduced would be an issue for appeal where the Court of Appeals could say you cannot legislate prejudicial prior bad acts into a law and force the judge to follow it or otherwise handcuff the judge. Counsel #2 testified in terms of investigation Applicant wanted him to find several witnesses. He testified he found Katherine Sasser and he subpoenaed

her but after talking with Applicant and how the case was going during trial, it did not make sense to call her to testify. Counsel #2 testified he could not remember all the other witnesses but that the trial strategy was that Amanda Caldwell, Applicant's co-defendant, was not being truthful and that Tyler Whitman, who she originally stated was with her, was the actual one that did the crime. He testified besides Applicant's co-defendant testifying against him, the most damning piece of evidence was the video. He testified without the video there was nobody other than Applicant's co-defendant that positively identified Applicant as being with the co-defendant during the crime. Counsel #2 testified he cross-examined the co-defendant extensively, and she admitted that she had changed her story in the past. He testified he did not think the co-defendant seemed to be credible in his opinion but that ultimately the video was too damning to their case. He testified he had the opportunity to cross-examination several other witnesses in the case as well. Counsel #2 testified he discussed with Applicant about testifying but that ultimately it was Applicant's decision to not testify. He further testified he thought last argument was more important than Applicant testifying as well as the fact Applicant had a prior record that could possibly come in. He testified he had a LWOP notice in his file from Counsel #1 but that he made a motion that he was not specifically of his client did not specifically get served with an LWOP notice for his second trial. He testified his argument in defense of Applicant was if the State was going to put Applicant away for life they needed to serve him before every trial so that he knew the gravity of it. He testified he did not get the videos of the pawnshop until around December 30th and the trial was January 5th. He testified the discovery policy was that he go up to get them at the Solicitor's Office and he did not get them until the week of trial or possibly the Friday before. He testified however, he believed that keeping the videos out would have been more beneficial for his client especially after he could not get a spoliation charge. He testified he

could not prove the police intentionally or wrongfully disclosed the video.

On cross-examination, Counsel #2 testified he was appointed to represent Applicant. He testified after Applicant's initial trial he and Applicant talked about maybe a plea of fifteen year but that Applicant was not going to plea in this case. Counsel #2 testified that Applicant was not going to plead guilty regardless of if the State was willing to take LWOP off the table. He testified he tried to get the solicitor to take LWOP off the table. Counsel #2 testified he thought he used the testimony of witnesses from Applicant's first trial to impeach them during the second trial. He testified he independently researched Applicant's prior record to see if he qualified for LWOP. Counsel # 2 testified he believed he told the judge concerning the videos that he got them at a very late notice or just before trial and that he could not get the full video. He testified he asked the trial judge for a spoliation charge by not specifically for a jury instruction on any kind of inference about losing parts of a video. Counsel #2 testified he believed he properly showed that Applicant's co-defendant gave previous inconsistent statements.

Appellate Counsel's Testimony

Appellate Counsel testified via telephone. He testified he had been an appellate attorney for twenty-eight years and before that he was in a family business for ten years as a lawyer. Appellate Counsel testified he was currently an appellate attorney at appellate defense and he kept abreast of current issues in criminal law by reading cases when they come out from the appellate courts. He testified when a new appeal is received in his office he goes through the file to see if he has everything which usually means the indictments and the full trial transcript. He testified he then reads the trial transcript to try to find out what good issues there may be to raise for the appeal and then once he makes that decision he would write a brief. Appellate Counsel testified in Applicant's case regarding appellate strategy, after reading the trial transcript he

decided the case did not have that much merit as far as issues went so he did an Anders brief. He testified with regards to his work everything he went by was in the transcript and that he really did not need to talk to his clients unless it is absolutely necessary because he could not bring things up that were not in the transcript. Appellate Counsel testified if there were some objections that were raised and he did not brief them it was because he did not believe they had merit on appeal.

On cross-examination, Appellate Counsel testified regarding the trial judge letting in Applicant's prior convictions. He testified that the State was allowed to bring in prior burglaries to enhance the current charge so he did not brief that issue. He testified he assumed he did not brief the issue of a complete version of the video not being introduced at trial because he did not see any strength in it. Appellate Counsel testified if he thinks there is some serious merit in correspondence from clients he tries to respond to them and that he had spent most of his morning before testifying at this PCR hearing writing to his clients.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442; 334 S.E.2d 813, 814 (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 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. 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. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel’s performance was deficient. Id. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Id. (quoting Strickland v. Washington, 466 at 688). 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.

Ineffective Assistance of Counsel

Trial Counsel from 2014 Trial

Applicant alleges ineffective assistance by Trial Counsel #1 who represented him during his 2014 mistrial. The mistrial was a result of a hung jury. This Court finds this allegation should be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160.

An Applicant may commence a post-conviction relief action on the following grounds:

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

S.C. Code Ann. § 17-27-20.

This Court finds ineffective assistance of counsel during a preceding mistrial is not a claim cognizable under the act. Applicant is not collaterally attacking his conviction or sentence, but rather the result of a trial which resulted in neither conviction nor sentence. Even if the facts alleged by Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. Therefore, this Court dismisses this allegation pursuant to S.C. Code Ann. § 17-27-70(c) (2003).

Trial Counsel from January 2015 Trial

Applicant alleges ineffective assistance by Trial Counsel #2 who represented him during his 2015 trial. First, Applicant alleged Trial Counsel #2 did not exclude his prior bad acts. Counsel #2 testified he made a motion to exclude Applicant's prior bad acts. He testified in terms of his motion to exclude Applicant's prior bad acts, he tried to narrow the issue on how the State was going to charge Applicant with burglary first. Counsel #2 testified the way the indictment was written the charge could have been because it happened at night, a weapon was

involved, or because of the two previous burglaries Applicant had. Counsel #2 testified the State went forward on the two previous burglaries and his argument then was that it was an element of the offense of burglary first. He testified because of the fact that it was an element of the offense it kept the court from doing an analysis they would normally do under Rule 608 or Rule 403 of the rules of evidence to see if the mention of prior burglaries were unduly prejudicial. He testified he argued against them being introduced if there were previous robberies and that they should not be brought in because it would be unduly prejudicial. Counsel #2 testified in Applicant's case the judge had to follow the statute. He testified he thought the Applicant's previous burglaries being introduced would be an issue for appeal where the Court of Appeals could say you cannot legislate prejudicial prior bad acts into a law and force the judge to follow it or otherwise handcuff the judge. After a review of the record, this Court finds Counsel #2 was not ineffective. This Court finds while ultimately unsuccessful, Counsel #2 made a motion to exclude Applicant's prior bad acts and diligently sought to protect Applicant's rights. (Trial Tr. pg. 9-12) (pg.109-115). Ultimately, the trial court found that the prior burglaries were elements of the crime that Applicant was charged with. This Court sees no argument Counsel #2 could have advanced that would have circumvented this. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in her representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. This allegation is denied and dismissed.

Second, Applicant alleged Trial Counsel #2 failed to effectively move to exclude the video from the pawnshop. Counsel #2 testified he made a motion to exclude the video coming into Applicant's trial. He testified one of the reasons for making a motion to exclude the video was because Applicant was adamant that if the video had been a complete video, it would have showed and exonerated him but Counsel #2 was concerned about how long had gone by since the incident occurred. He testified he did not necessarily think the video helped Applicant and that it would be better if they did not have the video but he subpoenaed Cash Pawn anyway. Counsel #2 testified in his motion to exclude the video before the Court, he asked that the video be suppressed or in the alternative for a spoliation charge and that was denied. He testified he believed the analysis by the trial court was that he could not show any prejudice. After a review of the record, this Court finds Counsel #2 was not ineffective. This Court finds while ultimately unsuccessful, Counsel #2 made a motion to exclude the video from the pawnshop and diligently sought to protect Applicant's rights. (Trial Tr. pg. 39-45). Here, Counsel #2 argued to the trial court that Applicant felt as through the extended version of the video would be beneficial to Applicant. Moreover, the trial court found that there was no proof that the State had evidence that was not available due to some bad faith on their part or other improper conduct or that they ever had the longer version of the video. (Trial Tr. pg. 44-45). Furthermore, Applicant presented no evidence an extended version of the video existed. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in her representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of

proving Counsel failed to render reasonably effective assistance. This allegation is denied and dismissed.

Third, Applicant alleged Trial Counsel #2 failed to properly impeach witnesses at trial. Counsel #2 testified he cross-examined Applicant's co-defendant extensively, and she admitted that she had changed her story in the past. He testified he did not think the co-defendant seemed to be credible in his opinion but that ultimately the video was too damning to their case. He testified he had the opportunity to cross-examine several other witnesses in the case as well. Counsel #2 testified he thought he used the testimony of witnesses from Applicant's first trial to impeach them during the second trial. After a review of the record, this Court finds Counsel #2 was not ineffective. This Court finds Counsel #2 extensively cross-examined the State's witnesses, especially Applicant's co-defendant, Amanda Caldwell, and Investigator Mashak (Trial Tr. pg. 172-190)(pg. 219-227). Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in her representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. This allegation is denied and dismissed.

Fourth, Applicant alleged Trial Counsel #2 failed to attack the chain of custody of the video from the pawnshop. Applicant testified Investigator Mashak had an opportunity to distort the videos from the pawnshop. He testified he did not understand why the videos were allowed into evidence after the chain of custody was broken by the investigator's own testimony. Applicant testified the video was extremely unduly and unfairly prejudicial to him in his defense

and more of an objection should have been made to the chain of custody. After a review of the record, this Court finds Counsel #2 was not ineffective for failing to attack the chain of custody. During the trial testimony of Investigator Mashak, he testified after he received the video surveillance from the pawnshops he viewed them, burned a copy and placed them into property and evidence. (Trial Tr. pg. 209-210). Investigator Mashak went on to testify once he placed the videos into property and evidence the next time he took them out was for use in the Applicant's trial and that no one else to his knowledge had checked them out. (Trial Tr. pg. 210-211). Notwithstanding the testimony given by Investigator Mashak at trial, Applicant has failed to present any evidence to demonstrate why Counsel #2 should have attacked the chain of custody other than his belief Investigator Mashak altered the video which he has no prove of. Additionally, this Court finds any motions attacking the chain of custody would have been unsuccessful. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in her representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. This allegation is denied and dismissed.

Lastly, Applicant alleged Trial Counsel #2 was not served with or notified about the LWOP notice. Counsel #1 testified he received a life without parole notice (LWOP) for Applicant which was dated July 15, 2013. Counsel #1 testified the LWOP notice was served on him and still in his file but that he provided Applicant's second trial counsel an electronic copy of his file which included the LWOP notice. Counsel #2 testified he had a LWOP notice in his

file from Counsel #1 but that he made a motion that he was not specifically or his client did not specifically get served with an LWOP notice for the second trial. He testified his argument in defense of Applicant was if the State was going to put Applicant away for life they needed to serve him before every trial so that he knew the gravity of it. Counsel #2 testified he independently researched Applicant's prior record to see if he qualified for LWOP. This Court would note under South Carolina Law, a defendant can be sentenced to life without parole for certain crimes. S.C. Code Ann. §17-25-45. Furthermore, where the solicitor is required to seek or determines to seek sentencing of a defendant under this section, written notice must be given by the solicitor to the defendant and defendant's counsel not less than ten days before trial. S.C. Code Ann. §17-25-45 (H). Here, this Court finds Applicant was properly served with written notice of the State's intent to seek life without parole. This Court finds Counsel #1 was sufficiently notified per the statute and Counsel #2 was aware of this fact as well as he had a copy of Counsel #1's file. This Court can think of no authority which requires a second notice of the State's intent to seek life without parole. Notwithstanding, this Court notes that Counsel #2 informed the trial court during sentencing he received additional discovery which included the notice of intent to seek life without parole. (Trial Tr. pg. 316). Accordingly, this Court finds this allegation lacks merit. Therefore, this allegation is denied and dismissed with prejudice.

Ineffective Assistance of Appellate Counsel

Applicant alleges ineffective assistance of appellate counsel in his application. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose

among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Here Appellate Counsel filed an Anders' brief. Appellate Counsel testified regarding the trial judge letting in Applicant's prior convictions. He testified that the State was allowed to bring in prior burglaries to enhance the current charge so he did not brief that issue. He testified he assumed he did not brief the issue of a complete version of the video not being introduced at trial because he did not see any strength in it. Appellate Counsel testified if he thinks there is some serious merit in correspondence from clients he tries to respond to them. After a review of the record, this Court finds Applicant has failed to establish the requisite deficiency of appellate counsel or prejudice entitling him to relief. First, this Court finds Applicant has failed to show that appellate counsel's performance was deficient, where there is no standard requiring appellate counsel to brief every possible meritorious issue and Appellate counsel testified to his reasoning on why he did not brief the issues Applicant argues about. Second, this Court finds

Applicant has failed to establish prejudice, as there is no reasonable likelihood that he would have prevailed on appeal. Further, this Court finds no significant and obvious issues that should have been raised on appeal. This Court concludes Applicant has not met his burden of proving Appellate Counsel failed to render reasonably effective assistance. This allegation is denied and dismissed.

Newly Discovered Evidence

Applicant seeks relief on the basis of newly discovered evidence. A party making a motion for a new trial or for relief from judgment based on newly-discovered evidence must show that the evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching. Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456 (S.C. App. 2005). Before the Court will hold an evidentiary hearing, the Applicant must make a prima facie showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). While under S.C. Code § 17-27-45(c), a newly-discovered evidence claim can be timely raised within one year of actual discovery or within one year of when, by the exercise of due diligence, such evidence could have been ascertained, Applicant has failed to present any evidence to this Court regarding newly discovered evidence by way of an alibi witness or their affidavit. This Court finds, as to Applicant's allegation, Applicant has failed to present any evidence regarding newly discovered evidence. This allegation is denied and dismissed.

Brady Violation

Applicant presented testimony concerning a Brady violation in that a complete video was not turned over or may have been tampered with. Brady 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). 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). Under this requirement, "favorable" evidence includes both exculpatory evidence and impeachment evidence. State v. Kennerly, 331 S.C. 442, 453; 503 S.E.2d 214, 220 (Ct. App. 1998). "Determining whether evidence withheld by the state is 'material' under Brady turns on whether the cumulative effect of the withheld evidence results in a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." State v. Hill, 368 S.C. 649, 661, 630 S.E.2d 274, 280-81 (2006). Put another way, to establish a Brady violation, the aggrieved party must show "that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 434 (1995). This Court finds, as to Applicant's Brady allegation, Applicant failed to present evidence the State committed such a violation as no evidence was shown that another version of the video from the pawnshop existed or ever existed. The allegation is denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

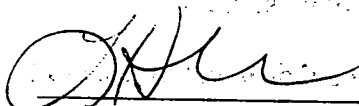
This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate

appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCR. Refer to Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

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

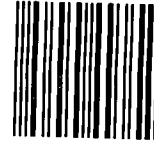
AND IT IS SO ORDERED this 31 day of July, 2018.



LETITIA H. VERDIN
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

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