

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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APPEAL FROM THE COUNTY OF HORRY

Court of Common Pleas

The Honorable Circuit Court Judge, PAUL M. BURCH

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Case No. 2014-CP-26-05918

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JOHN E. SESSIONS, SCDC # 359143..... Petitioner,

v.

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

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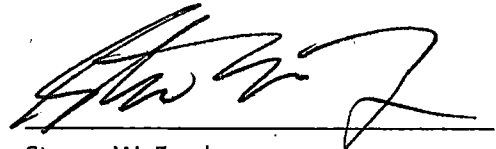
**NOTICE OF APPEAL**

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The Petitioner appeals the Honorable Judge PAUL M. BURCH'S Order filed on September 28, 2018, denying post conviction relief to the Petitioner.

The Order was received by the undersigned counsel on October 2, 2018. A copy of the said Order on appeal is attached to this Notice.

This is the 9th day of October, 2018.



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OCT 12 2018

**SC. SUPREME COURT**

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**S.C. SUPREME COURT**

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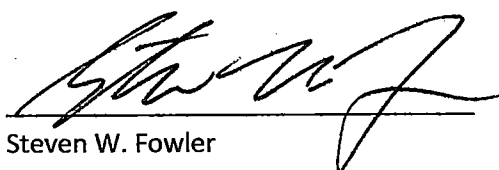
**PROOF OF SERVICE**

I, Steven W. Fowler, court- appointed attorney for Petitioner, certify that I have today served within Notice of Appeal and Copy of the Order signed by the presiding Judge upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the following:

- 1) Assistant Attorney General, PO Box 11549, Columbia, SC 29211 and
- 2) Clerk of the South Carolina Supreme Court , 1231 Gervais St, Columbia, SC 29201
- 3) SCCID Appellate Defense, PO Box 11433, Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served on this below named date.

This is the 9th day of October, 2018.



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prosecuted the case. On March 5, 2014, Applicant pled guilty as indicted. The Honorable Edward B. Cottingham sentenced Applicant to imprisonment for a term of 12 years. Applicant did not appeal his plea or sentence.

### **Present Application**

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

1. "Plaintiff was denied effective assistance of counsel."
  - a. "Plaintiff was promised a nonviolent sentence as it reflects on sentence sheet by counsel. Involuntary guilty plea by counsels failure to follow through with sentence agreed upon by state."
2. "Also states failure to provide evidence in response to discovery request (Brady v. Maryland) (confession)."

At the evidentiary hearing, Applicant reframed his Brady allegation as one of ineffective assistance of counsel.

## **II. 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 records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

### **A. Ineffective Assistance of Counsel**

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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." Butler at 442, 334

S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry at 117, 386 S.E.2d at 625 (citing Strickland 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 at 117-18, 386 S.E.2d at 625 (citing Strickland at 694). With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel’s alleged

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errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

### *1. Misadvice as to Violent/Non-Violent Status*

Applicant alleges Counsel was ineffective by misadvising him that he was pleading in exchange for a sentence of 12 years, non-violent, when in fact he pled to a violent crime. Defendants need not be informed of collateral consequences of sentencing in order to knowingly, intelligently, and voluntarily enter a guilty plea. Randall v. State, 356 S.C. 639, 641, 591 S.E.2d 608, 609-10 (2004). Like parole eligibility, the violent/non-violent status of an offense is a collateral consequence. Smith v. State, 329 S.C. 280, 285, 494 S.E.2d 626, 629 (1997). However, if the defendant's attorney undertakes to advise the defendant about a collateral consequence and errs, then the plea may be collaterally attacked. Id. at 283, 494 S.E.2d at 628 (citing Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989)). Armed robbery is classified as a violent crime. S.C. Code Ann. § 16-1-60. As to sentencing sheet errors, "[a]n unambiguous sentencing pronouncement will control over an ambiguous sentence, whether oral or written, so long as giving effect to that pronouncement does not result in an illegal sentence or deprivation of a defendant's constitutional rights." Bordeaux v. State, 410 S.C. 495, 500, 765 S.E.2d 143, 145 (2014) (citing Boan v. State, 388 S.C. 272, 277, 695 S.E.2d 850, 852 (2010)).

There was no mention of the violent/non-violent categorization of armed robbery at the plea proceeding; "violent" only appears in the context of the charges dropped as part of the plea: burglary in the first degree, kidnapping, possession of a weapon during a *violent* crime, and criminal conspiracy. (Tr. 9, ll. 3-10). It is unclear if the agreement was a recommendation or negotiated sentence—the plea court freely used both terms and, although "recommendation" was marked on the sentencing sheet, Judge Cottingham made abundantly clear through his comments throughout the colloquy that he would not deviate from the 12 year sentence requested. (Tr. 12-13; Tr. 14-15; Tr. 16-17). The sentencing sheet was pre-marked "NON-VIOLENT"

At the evidentiary hearing, Applicant testified he closely examined the paper he signed, presumably referring to the sentencing sheet, and that it indicated he was pleading to 12 years non-violent. When he arrived at SCDC, he was classified as violent. Applicant expressed he felt he was tricked. This Court observed that SCDC pays no heed to the checkboxes on the sentencing sheet, but strictly adheres to the classifications associated with the CDR code. Applicant testified he believed the checkboxes were correct and meant the sentence had to be classified as such. Applicant claimed Counsel presented the sentencing sheet as an accurate reflection of the deal.

Counsel testified he never told Applicant he was going to get a nonviolent sentence. Rather, Counsel implied the error on the sentencing sheet was a purposeful effort to try and secure Applicant some benefit. Counsel affirmed Applicant knew what the sentence was going to be, and what the consequences of that sentence would be, and what the law had to say with respect to serving the sentence in light of the charges. Counsel also explained Applicant had never strongly committed to either taking the case to trial or taking a plea offer, but rather waffled as to what he wanted to do for so long that the solicitor grew frustrated. Applicant rejected an offer to plead guilty for a sentence of 10 years, so the solicitor replaced it with a 12

year offer. At that point, facing the impending reality of trial, Applicant decided to finally plead guilty. Counsel noted that Applicant understood the ultimate sentence was up to the plea judge.

The Court finds no deficiency on the part of Counsel, nor prejudice therefrom. The Court finds credible Counsel's testimony that he never told Applicant he would get classified as a nonviolent offender. The Court is alarmed by the proposition of purposefully committing an error on court documents, and condemns it, but does not find the error on the sentencing sheet adequate to show that Applicant was affirmatively misadvised his sentencing classification, or that he was confused as to his sentencing classification. This Court had the opportunity to closely observe Applicant throughout the course of his testimony, and finds his testimony not credible. Additionally, the proposition that even a layperson could reasonably conclude that "armed robbery" is non-violent strains credulity. For these reasons, the Court finds Applicant has failed to meet his burden under either prong of Strickland, and his request for relief by way of this allegation is **DENIED**.

## *2. Failure to Discuss Evidence*

At the evidentiary hearing, Applicant clarified his Brady allegation to mean that Counsel was ineffective in failing to discuss and share with him a supposed DVD video recording of him confessing to law enforcement. At the plea proceeding, the prosecution indicated Applicant made a full confession to law enforcement. (Tr. 10-11). The plea court, in rejecting Counsel's request for a 10 year sentence, noted the presence of a confession to Counsel, who confirmed it. (Tr. 13, ll. 2-5). The plea court again made note of the confession in explaining to Applicant his right to confront the witnesses and evidence against him. (Tr. 15, ll. 11-18).

At the evidentiary hearing, Applicant asserted there was a DVD which purportedly contained his confession, but that he had never seen it. Applicant immediately thereafter affirmed the video was taken at the Surfside Beach Police Department. Applicant recalled that

although Counsel had visited with him, he was in too great a hurry to stop and permit him to watch the DVD. Applicant claimed to have not seen any other tangible evidence, either. Applicant testified his efforts to contact Counsel while he was incarcerated were unsuccessful.

Counsel testified that a motion for discovery was filed before he was assigned the case, but that he did receive a discovery packet and believed it to be complete. Counsel testified he reviewed discovery with Applicant and understood its contents. Counsel couldn't specifically recall a DVD.

The Court finds no deficiency on the part of Counsel, nor prejudice therefrom. As an initial matter, the Court must note the allegation is largely self-defeating: Applicant complains of not seeing his own confession. Applicant was present for his confession and, having been present, can be held to know and recall what he told to law enforcement. Applicant recalled where he confessed during the evidentiary hearing. Secondly, the Court finds credible Counsel's testimony that he received complete discovery and reviewed it with Applicant. Though Counsel could not specifically recall the particular use of a disc in this particular case, Counsel demonstrated a thorough command of the facts of the case from memory and articulated them in his testimony. Third, the DVD in question was never presented to this Court, so its details beyond that it was apparently a full-throated confession, are left to this Court's imagination. For all these reasons, Applicant has failed to meet his burden under either prong of Strickland, and his request for relief by way of this allegation is **DENIED**.

### III. CONCLUSION

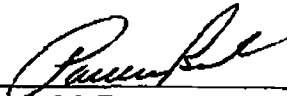
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.


This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

#### IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

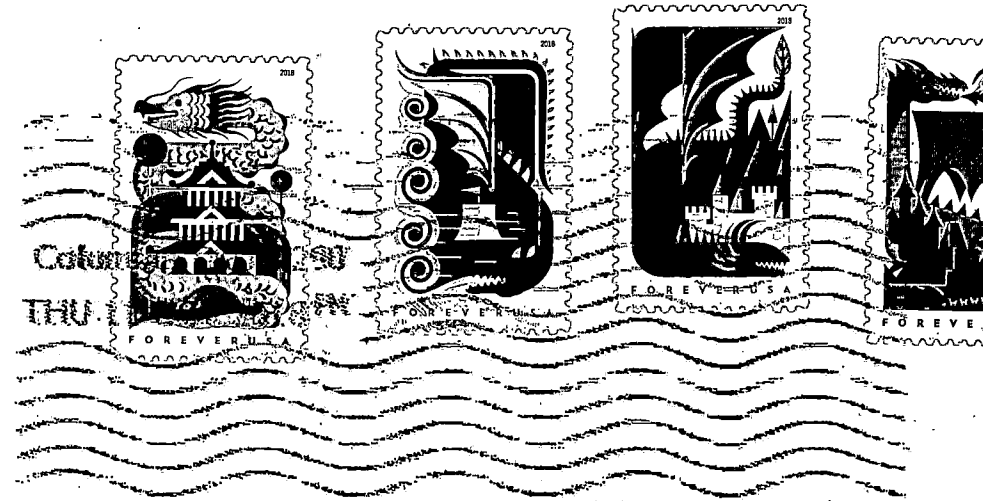
AND IT IS SO ORDERED this 5<sup>th</sup> day of September, 2018.

  
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PAUL M. BURCH  
Presiding Judge  
Fifteenth Judicial Circuit

  
\_\_\_\_\_, South Carolina

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