

FORM 4
NOTICE OF APPEAL FROM AN ORDER OF DISMISSAL IMPOSED BY
THE COURT OF COMMON PLEAS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Roger E. Henderson, Circuit Court Judge

Case No. 2017-CP-46-0582, 0456, 0457 & 0458

RECEIVED

OCT 23 2018

Tyress Antonio Littlejohn,
SCDC #263016,

Appellant,

SC Court of Appeals

v.

The State of South Carolina,

Respondent.

RECEIVED

OCT 25 2018

S.C. SUPREME COURT

NOTICE OF APPEAL

Tyress Antonio Littlejohn appeals his denial of Post Conviction Relief and Order of Dismissal. The hearing was conducted on April 18, 2018, and the Order was imposed by the Honorable Roger E. Henderson on August 7, 2018. The Order was filed on September 6, 2018 and served upon Counsel for Defendant on September 18, 2018.

October 18, 2018


Lir P. Derieg

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Columbia, South Carolina 29250

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Attorney for Appellant

Other Counsel of Record:
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Attorney for Respondent

FORM 7
PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Roger E. Henderson, Circuit Court Judge

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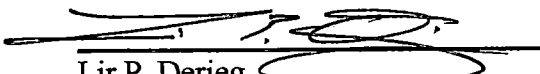
The State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on October 18, 2018, addressed to its attorney of record, Assistant Attorney General Julie A. Coleman, Post Office Box 11549, Columbia, South Carolina 29211.

October 18, 2018


Lir P. Derieg
Post Office Box 5479
Columbia, South Carolina 29250
(803) 206 - 3140
Attorney for Appellant

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S.C. SUPREME COURT

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SC Court of Appeals

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Tyress Antonio Littlejohn, #263016,)

2017-CP-46-0582

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

RECEIVED

Respondent.)

OCT 23 2018

SC Court of Appeals

DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

2018 SEP -6 AM 10:17

FILED-RECEIVED

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on February 23, 2017. Respondent submitted its Return on June 8, 2017. An evidentiary hearing was convened on April 18, 2018, at the York County Courthouse. Applicant was present at the hearing and was represented by Lir P. Derieg, Esquire. Respondent was represented by Assistant Attorney General Justin Hunter of the South Carolina Attorney General's Office.

The Court had before it the records of the York County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. In November 2013, the York County Grand Jury indicted Applicant for trafficking crack cocaine, 28-100 grams, first offense (2010-GS-23-4112). Geoffrey M. Dunn, Esquire represented Applicant. Assistant Solicitor Leslie D. Robinson, Esquire prosecuted the case. On October 14-15, 2014, Applicant proceeded to trial before the Honorable John C. Hayes, III. The

jury found Applicant guilty as indicted. Judge Hayes sentenced Applicant to imprisonment for fifteen years for trafficking cocaine, 28-100 grams, first offense.

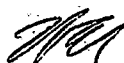
Applicant filed a timely notice of appeal. David Alexander, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals dismissed Applicant's appeal on April 6, 2016. State v. Littlejohn, Op. No. 2016-UP-161 (S.C. Ct. App. filed April 6, 2016). The remittitur was issued on May 6, 2016.

II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully based on the following allegations:

1. Ineffective Assistance of Counsel

- a. "Trial counsel did not act in Littlejohn's best interest during his defense of this case,"
- b. "Trial counsel did not properly prepare for trial in this matter,"
- c. "Trial counsel did not independently verify drug analyzation evidence in this case,"
- d. "Trial counsel did not properly investigate this case,"
- e. "Trial counsel did not move to suppress drug evidence in this case,"
- f. "Trial counsel did not require the State to produce a full chain of custody in the trial of this case,"
- g. "Trial counsel did not provide Discovery materials to or review Discovery material with Defendant prior to trial of this case,"
- h. "Trial counsel did not require State to produce all Discovery materials prior to the trial of this case,"
- i. "Trial counsel did not adequately consult with Littlejohn prior to trial of this case,"
- j. "Trial counsel did not allow Littlejohn to participate in developing a defense for the trial of this case,"
- k. "Trial counsel did not subpoena relevant evidence to aide in the defense of Littlejohn in the trial of this case,"
- l. "Trial Counsel did not interview all witnesses prior to trail of this case,"
- m. "Trial counsel did not properly impeach State's witnesses during the trial of this case,"
- n. "Trial counsel did not adequately challenge evidence entered by the State during the trial of this case,"
- o. "Trial counsel did not call witnesses known to Littlejohn during the trial of this case,"



- p. "Trial counsel did not properly advise Littlejohn on the potential sentence he could receive in this matter,"
- q. "Trial counsel waived Littlejohn's plea offer without Littlejohn's consenting or being present during such waiver."

Applicant filed supplement to his application on January 17, 2018, claiming an additional allegation of newly discovered evidence based on newly obtained information regarding Applicant's prior co-defendant.

III. 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. With respect to guilty pleas, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

V. SUMMARY OF RELEVANT TESTIMONY

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from Jywan Williams. Respondent presented testimony of Geoffrey Dunn (hereinafter "Trial Counsel") and Assistant Solicitor Leslie Robinson ("Solicitor").

Applicant

At the evidentiary hearing, Applicant testified he was 33 years old when he was arrested in 2014. He stated that at the time he was working two jobs, had some college education, and he was in college when he was arrested. He testified he was facing two charges, both with the same confidential informant. The first charge was from August 14, 2012, and the second from August 16, 2012. He stated that on those dates, he was not supplying the drugs, but he was just meeting someone at his mom's house. Applicant testified he was just there at the house while the confidential informant met someone there, and he did not put the drugs in the confidential informant's hands.

Applicant testified the drugs from the two dates were weighed by law enforcement, and the drugs from August 14 were originally listed as 56 grams and were weighed at 56 grams, as well. However, he stated the drugs from August 16 were originally listed as 56 grams but changed, and they were only weighed as 49.1 grams. Applicant testified Trial Counsel did not hire a private investigator and they never discussed an investigator. He stated he wanted Trial Counsel to verify the evidence on his own. Applicant stated he met with Trial Counsel four or



five times before the trial, and they met once or twice for thirty to forty-five minutes specifically to prepare for the trial.

Applicant testified Trial Counsel told him they did not have to put up a defense because the burden was on the State. He stated that at that time there were no witnesses he wanted Trial Counsel to present on his behalf. Applicant testified there was no discussion of a plea offer, and there was a plea offer from the State but Trial Counsel did not know what it was. He stated he did not tell Trial Counsel that he wanted to reject a plea offer. Applicant testified Trial Counsel never filed any pre-trial motions, but he wanted him to. He stated he told Trial Counsel that he wanted to testify at trial, but Trial Counsel convinced him not to, and they discussed having the last closing argument if they did not put up a defense.

Applicant testified he never saw a full chain of custody, and not all of the chain of custody witnesses were called at trial. He stated he believes he was missing discovery, such as the evidence of weights of the drugs and pieces of the chain of custody. He stated there was no evidence that he ever committed a trafficking. He stated Trial Counsel should have subpoenaed all the cell phone records to prove the "deal" never existed.

Jywan Williams

Jywan Williams testified that he was charged as a co-defendant in these two drug charges. He stated he was subpoenaed by Trial Counsel to appear at the trial, but he chose to plead the Fifth Amendment because his attorney advised him to remain silent at the time. He stated he never met Trial Counsel before the trial and no one interviewed him. Williams testified the confidential informant lied to the State and told them Williams was on the video tape, but he was not actually on the tape.

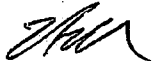


Trial Counsel

Trial Counsel testified he practices primarily criminal and disability law, and he was appointed to this case from May to October of 2016. He stated he met with Applicant at least five times, he met with Applicant's wife, and he met with the President of the York chapter of the NAACP to discuss this case. He stated they discussed with Applicant the evidence, plea deals, the trial, and the discovery. Trial Counsel explained that he cannot get the entire discovery file because the State is not required to give them information about the confidential informant. He stated he did get the incident report, the evidence logs, and the drug report.

Trial Counsel testified Applicant told him the person he was in 2012 was different than who he was now, and Applicant had bettered himself, gotten a job, and gone to college. He stated Applicant did not want to hear what Trial Counsel had to tell him. Trial Counsel testified he discussed a plea offer with Applicant for fifteen years, but Applicant did not want to do any of the conditions or negotiate with the State. Trial Counsel stated the State presented a video, which was shaky and unfocused, but in the video Applicant was clearly visible, holding a bag on the floorboard of the car which was filled with a white substance. He stated Applicant would not tell him what the substance in the bag was, which made it difficult to develop a defense.

Trial Counsel testified he subpoenaed Jywan Williams to appear at trial, but Williams invoked his Fifth Amendment right to remain silent and did not testify on his behalf. He stated he could not interview Williams because he was represented by an attorney and the attorney would not allow him to speak with Williams. Trial Counsel testified he discussed the plea offer with Applicant and made Applicant aware he was going to reject the plea. He stated Applicant was present at the time and never told Trial Counsel he wanted to plead guilty.



Trial Counsel testified his investigation consisted of going over the evidence with Applicant and making notes on the video tape. He stated he probably did not show the video to Applicant because of the order of confidentiality with the confidential informant ordered by the Solicitor's Office. Trial Counsel testified there was some discrepancy in the weight of the drugs from the police report to the drug report, but the both amounts were way over the 28 gram threshold required for this criminal charge, so he believed it did not make a difference in his case. He stated there was no reason to challenge the amount of drugs at trial because it would not make a difference. Trial Counsel testified he did not recall discussing getting an independent expert with Applicant. Trial Counsel explained that Applicant insisted to him that the material in the bag was not crack, but Applicant could never tell him what it was, so Trial Counsel did not suspect that it was not crack.

Trial Counsel testified that if he thought there was a reason to challenge the chain of custody he would have done so. He stated he was not aware of any materials that were missing from discovery that came out at trial. He testified he advised Applicant of his right to testify at trial, but he did not specifically recall the conversation. Trial Counsel testified he impeached the confidential informant at trial with the charges he was facing. He stated he advised Applicant of his exposure and the potential sentences he could get at trial during their discussions about the plea offer and also at the rejection hearing. He stated Applicant did not sign any paperwork to reject the plea offer, but it was not typical to do so.

Trial Counsel testified that he will object to drugs if there is a reason to do so, but he will not if there is no valid basis to object. He stated that in this case there was no reason to move to suppress the drugs. He stated Applicant never told him he was not at the scene of the crime, and he never denied that it was him in the video tape. Trial Counsel stated it was clear to him that



Applicant was on the video because his face was clearly visible and his tattoos on the video match his tattoos.

Solicitor

Assistant Solicitor Leslie Robinson testified she chose to go to trial on the August 16, 2012 drug transaction because there was a video that very clearly showed drugs in Applicant's hand with a clear shot of his face and a visible, prominent tattoo that you could easily see on his arm in person. She testified the discovery she provided to Trial Counsel would have included the incident report, Applicant's criminal history, screenshots from the video which showed his face, and sheets from custody. The Solicitor testified that Applicant has a right to know the identity of the confidential informant if he chooses to, but their office policy is that if they tell him, they will not offer any more plea deals. She testified that the discrepancies in the drug weights did not affect the criminal charge because all the possible weights were within the same range for the offense.

The Solicitor testified she does not use affidavits to prove chain of custody, and the defense is able to come and see the actual evidence if they chose to. She stated this case did not involve a missing witness, and she called every witness in the chain of custody at trial. The Solicitor testified she dropped the charges against the co-defendant, Jywan Williams, because the evidence against him was not as strong, but the video they had clearly showed Applicant, whereas you could not clearly see Williams in the video. She stated she had no reason not to believe it was Williams in the vehicle on the tape, but she could not clearly see him on the tape, so she dropped his charges. She testified she never had any indication that the confidential informant was lying about Williams.



The Solicitor testified she did not recall having any concerns about pre-trial issues in this case because there was no warrant, there were no statements given, there was no photo lineup, and there was no traffic stop. She stated those are usually the types of issues that create pre-trial motions, but here there were none. She testified that if Trial Counsel had moved to suppress the drugs based solely on the allegation that they were listed in different weights she would have objected because it was not appropriate for him to do so just to size up the witnesses in the case. She testified that when she came into the case, there was a fifteen year plea offer, and she participated in plea negotiations with Trial Counsel. She testified there was a plea offer rejection hearing in front of Judge Addy, but she did not recall the specifics.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant has asserted several allegations of ineffective assistance of counsel. This Court finds these claims to be meritless and they should be denied and dismissed with prejudice. Each specific allegation is addressed below.

- a. *"Trial counsel did not act in Littlejohn's best interest during his defense of this case"*

This Court finds this allegation meritless. The record before the Court and the testimony presented at the evidentiary hearing clearly shows Trial Counsel's representation of Applicant was well within reasonable professional norms, and he did all he could to represent Applicant's



best interests. Trial Counsel fully discussed the case and the evidence with Applicant, fully prepared for trial, zealously argued on his behalf, and also participated in and discussed plea negotiations on his behalf, which Applicant rejected. Applicant has failed to prove any deficiency in any of Trial Counsel's actions or inactions, and that anything counsel could have done differently would have affected the outcome of the trial. Accordingly, this allegation is denied and dismissed with prejudice.

b. "Trial counsel did not properly prepare for trial in this matter"

This Court finds this allegation meritless. Applicant himself testified at the evidentiary hearing that he met with his attorney multiple times, and at least two of those meetings were specifically to discuss their trial preparation. Trial Counsel's testimony shows he thoroughly reviewed all evidence and discovery material with Applicant and alone to prepare for trial. He testified that he discussed potential trial defenses to use with Applicant, but Applicant made it difficult for him to develop a defense by refusing to tell him what the white substance in the bag he was recorded holding was. Applicant has failed to present credible evidence of any way Trial Counsel should have better prepared for trial and thus has failed to meet either prong of the Strickland test. Therefore, this allegation is denied and dismissed with prejudice.

c. "Trial counsel did not independently verify drug analyzation evidence in this case"

This Court finds Applicant has failed to prove deficiency in failing to have an independent verification of the drug analyzation evidence. Applicant was charged with and convicted of trafficking crack cocaine, 28 – 100 grams. While the testimony showed there may have been a dispute between whether the drugs weird either 56 grams or 49.1 grams, neither of these weights are anywhere near the bottom threshold of this charge. Because the alleged discrepancy in drug weights was so small and very distant from the threshold for a lesser charge,

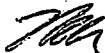


it was reasonable for Trial Counsel to choose not to challenge this evidence. For the same reason, Applicant can show no prejudice. Even if Trial Counsel had independently verified the drug evidence weight, it very likely would not have been weighed at less than 28 grams, so his charge and conviction would be the same regardless. Accordingly, this allegation is denied and dismissed.

d. "Trial counsel did not properly investigate this case"

This Court finds Applicant has failed to meet his burden of proving anything Trial Counsel failed to investigate which would have changed the outcome of the trial. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

Trial Counsel testified his investigation consisted of reviewing all discovery and evidence against Applicant as well as discussion the facts of the case with Applicant to develop a defense. In a case such as this, Trial Counsel's strategy to attack the State's evidence rather than gathering more of his own is reasonable given the facts and circumstances of the case. Trial Counsel further testified he did not recall a conversation with Applicant about hiring an independent



expert. This Court finds Trial Counsel's choices in investigating the case were reasonable under the circumstances, and Applicant has failed to present any evidence of deficiency or any resulting prejudice. This allegation is denied and dismissed with prejudice.

e. "Trial counsel did not move to suppress drug evidence in this case"

This Court finds Trial Counsel was not deficient for failing to move to suppress the drug evidence in this case, as there was no valid legal basis to suppress the evidence based on the facts and circumstances of the case. This charge resulted from a drug buy with a confidential informant, and there was no search warrant or traffic stop, etc., by which to challenge the admission of the drug evidence. Trial Counsel credibly testified he saw no legal reason to move to suppress the drugs in this case, and if there had been a reason he would have made the motion. Applicant has failed to meet his burden of proving any basis for a motion to suppress the drugs, or that any such motion would have been successful and changed the outcome of the trial. This allegation is denied and dismissed with prejudice.

f. "Trial counsel did not require the State to produce a full chain of custody in the trial of this case"

This Court finds Applicant has failed to prove any missing sections of the chain of custody in this case or that Trial Counsel's failure to object in this manner would have affected the outcome of the trial. The Solicitor credibly testified she did not recall anything missing from the chain of custody, and she presented all chain of custody witnesses at trial in this case. Trial Counsel credibly testified that if he thought there was a reason to challenge the chain of custody, he would have, and he did not in this case. Applicant has failed to meet either prong of the Strickland test, and this allegation is denied and dismissed with prejudice.



g. *"Trial counsel did not provide Discovery materials to or review Discovery material with Defendant prior to trial of this case"*

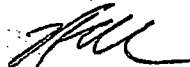
This Court finds Trial Counsel did fully review and discuss all available discovery material with Applicant prior to trial. Trial Counsel credibly testified there was some evidence he was not permitted to show Applicant through order of the Solicitor's Office per their office policy, such as the video tape, which revealed the identity of the confidential informant. While Applicant could have elected to view the videotape and learn the identity of the confidential informant if he so chose, he would have lost his ability to negotiate a potential plea offer. He was, however, shown still photographs which were pulled from the video, which showed the evidence against him in a clear shot of his face and arms holding the drugs in question. Trial Counsel reviewed all available discovery with Applicant before the trial. Therefore, this allegation is denied and dismissed with prejudice.

h. *"Trial counsel did not require State to produce all Discovery materials prior to the trial of this case"*

This Court finds, based on the credible testimony of the Solicitor and Trial Counsel, that the State did produce all discovery materials to Trial Counsel prior to the trial of this case. Applicant has failed to meet his burden of proving otherwise, and this allegation is denied and dismissed with prejudice.

i. *"Trial counsel did not adequately consult with Littlejohn prior to trial of this case"*

This Court finds, as discussed above, Applicant himself testified Trial Counsel met with him at least five times to discuss his case, and at least two of those meetings were specifically to prepare for the trial. Trial Counsel's testimony also showed they met at least five times and thoroughly discussed the case, the facts, potential defenses, the evidence against him, and plea negotiations. "Even if the meetings were brief, this fact alone is not indicative of inadequate trial



preparation." Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Easter v. Estelle, 609 F.2d 756, 759 (5th Cir.1980) (recognizing that brevity of time spent in consultation with defendant, without more, did not establish that trial counsel was ineffective)). Applicant has failed to prove that Trial Counsel was deficient in his consultations with him and that any further consultation would have changed the outcome of the trial. This allegation is denied and dismissed with prejudice.

j. Trial counsel did not allow Littlejohn to participate in developing a defense for the trial of this case"

This Court finds this allegation meritless. Trial Counsel credibly testified he fully discussed potential defenses with Applicant, but it was difficult for him to develop a defense because Applicant never denied being in the video or at the scene but would not tell him what was in the bag. Applicant has failed to show that Trial Counsel somehow prevented Applicant from participating in his trial preparation. This allegation is denied and dismissed with prejudice.

k. "Trial counsel did not subpoena relevant evidence to aide in the defense of Littlejohn in the trial of this case"

This Court finds Applicant failed to present any favorable evidence which should have been used in his trial to change the outcome of the trial. The South Carolina Supreme Court has repeatedly held a PCR applicant must produce the favorable evidence he alleges should have been used in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from failure to present this evidence at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). The applicant's mere speculation what the evidence would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). Accordingly, Applicant has failed to meet either prong of the Strickland test, and this allegation is denied and dismissed with prejudice.



l. "Trial Counsel did not interview all witnesses prior to trial of this case"

This Court finds Applicant has failed to meet his burden of proving that Trial Counsel failed to interview favorable witnesses which were available for him to interview and that those witness's testimony would have changed the outcome of the trial. At the evidentiary hearing, Applicant presented testimony from his former co-defendant, Jywan Williams, and argued Trial Counsel should have interviewed this witness and used his testimony at trial. However, Trial Counsel credibly testified that he could not interview Williams before the trial because Williams was represented by counsel, and the attorney would not let him speak to Williams. He further testified that he subpoenaed Williams for trial, but Williams invoked his Fifth Amendment right against self-incrimination and refused to testify for Applicant. Under these facts and circumstances, it was reasonable for Trial Counsel not to interview this witness. Further, because Williams chose not to testify at Applicant's trial, Applicant can show no resulting prejudice from the failure to interview him. This allegation is denied and dismissed with prejudice.

m. "Trial counsel did not properly impeach State's witnesses during the trial of this case"

This Court finds Applicant has failed to meet his burden of proving Trial Counsel was deficient for failing to properly impeach any witnesses at trial. The record shows Trial Counsel thoroughly cross-examined and impeached all necessary witnesses, including the confidential informant, who he impeached with the charges he was facing if he did not cooperate with the State. This Court finds Trial Counsel's actions reasonable under the circumstances. Applicant has failed to prove either prong of the Strickland test, and this allegation is denied and dismissed with prejudice.



n. "Trial counsel did not adequately challenge evidence entered by the State during the trial of this case"

This Court finds Trial Counsel's challenge to the State's evidence in this case was adequate and reasonable under the facts and circumstances of this case. Applicant has failed to provide any credible evidence of deficiency on this ground and has not presented a different way of challenging the evidence which would have changed the outcome of the trial. Therefore, this allegation is denied and dismissed with prejudice.

o. "Trial counsel did not call witnesses known to Littlejohn during the trial of this case"

This Court finds Applicant has failed to present testimony of any witness which Trial Counsel did not call at trial. Although he presented testimony of co-defendant Williams, the record shows Trial Counsel did subpoena this witness and call him to testify at trial, but Williams refused to testify and invoked his Fifth Amendment right against self-incrimination at the trial. Trial Counsel was not deficient in any regard with this witness. Applicant has failed to prove deficiency or prejudice, and this allegation is denied and dismissed with prejudice.

p. "Trial counsel did not properly advise Littlejohn on the potential sentence he could receive in this matter"

This Court finds this allegation meritless. Trial Counsel credibly testified at the evidentiary hearing that he advised Applicant of his exposure and the potential sentence he could receive if convicted at trial. He stated he knew he did so, although he could not specifically remember when the conversation took place. He stated he advise Applicant of this during their discussion of the plea offer and at the plea offer rejection hearing, as well. This Court finds Applicant was fully advised of the potential sentence he could receive at trial. Furthermore, even if this allegation were true, Applicant can show no resulting prejudice because any further advice



on this matter would not have changed the outcome of the trial. Therefore, this allegation is denied and dismissed with prejudice.

q. "Trial counsel waived Littlejohn's plea offer without Littlejohn's consenting or being present during such waiver"

This Court finds this allegation meritless. Trial Counsel credibly testified that he fully discussed the State's plea offer with Applicant, and Applicant did not want to consent to the terms of the offer and rejected it. He further testified, and the Solicitor testified as well, that Applicant rejected this offer himself before the trial court at a plea rejection hearing on the record. Applicant has failed to meet his burden of proving this allegation, and it is denied and dismissed with prejudice.

Testimony of Jywan Williams

Finally, this Court finds all of Applicant's allegations regarding co-defendant Jywan Williams to be meritless. First, this Court notes Williams' testimony was not credible and was directly contradicted by the credible testimony of the Solicitor. The Solicitor testified she only dropped the charges against Williams because the evidence against him was, in her opinion, not strong enough to pursue the charge. On the contrary, she testified the evidence against Applicant was stronger, as it included a videotape with a very clear picture of Applicant, with recognizable features, holding the drugs in the vehicle. The Solicitor testified she had no indication that the information she received from the confidential informant was a lie.

Furthermore, Williams' testimony cannot be the ground for a successful claim of ineffective assistance of counsel, as Trial Counsel did subpoena this witness to testify at trial, but Williams refused to testify and invoked his right to remain silent. Trial Counsel could have done nothing further to secure this testimony without violating Williams' rights. Therefore, his actions were reasonable and he cannot be deficient in this regard.



Last, Williams' testimony does not qualify as "newly discovered evidence" which would entitle Applicant to a new trial. "A party requesting a new trial based on after-discovered evidence must show that the evidence (1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and, (5) Is not merely cumulative or impeaching." Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983). Williams' testimony fails to meet all five factors of the test for newly discovered evidence.

The testimony could have been discovered before the trial through the exercise of due diligence. It likely would not have changed the outcome of the trial, as the testimony was speculative and not credible, and in light of the strong evidence against Applicant, including a videotape with a clear shot of Applicant holding the drugs during the transaction, this testimony likely would not have affected the jury's verdict. The testimony is not directly material to the issue of guilt or innocence, and the testimony is merely impeaching of the confidential informant. Therefore, the testimony does not satisfy the test for newly discovered evidence which would entitle Applicant to a new trial.

Therefore, Applicant has failed to meet his burden of proving any way that Williams' testimony would entitle him to post-conviction relief, and these allegations are denied and dismissed with prejudice.

[conclusion and signature page to follow]



VII. CONCLUSION

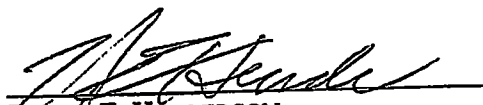
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

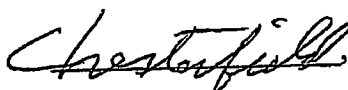
IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 7th day of August, 2018.



ROGER E. HENDERSON
Presiding Judge
Sixteenth Judicial Circuit

 South Carolina

FORM 8
LETTER TO THE APPELLATE COURT CLERK
FILING THE NOTICE OF APPEAL

October 18, 2018

RECEIVED

OCT 25 2018

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

S.C. SUPREME COURT

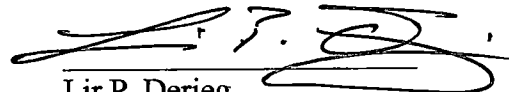
RE: Tyress Antonio Littlejohn, Applicant, v. The State of South Carolina,
Respondent, Case No. 2017-CP-46-0582

Dear Ms. Kitchings:

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

- (1) Proof of service of the notice of appeal on the respondent[s].
- (2) A copy of the order[s] which is [are] to be challenged on appeal.

October 18, 2018



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Attorney for Respondent

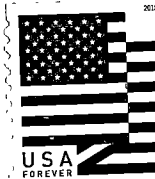
RECEIVED

OCT 23 2018

SC Court of Appeals

* Under Rule 203(d)(1)(B)(iii) and (d)(2)(B)(iii), SCACR, a filing fee is not required if the appeal is from a criminal case including juvenile delinquency matters, or if the appeal is taken by the State of South Carolina, its departments or agencies. Further, no filing fees are required in post-conviction relief cases. Rule 240(d), SCACR.

DERIEG LAW FIRM, LLC
1924 BARNWELL ST
COLUMBIA, SC 29201



RECEIVED

OCT 23 2018

SC Court of Appeals

THE HONORABLE JENNY ABBOTT KITCHINGS
CLERK OF COURT
SOUTH CAROLINA COURT OF APPEALS
POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211