

 **RESNICK & LOUIS, P.C.**  
ATTORNEYS AT LAW

Christopher L. Murphy  
Admitted in SC  
[cmurphy@rlattorneys.com](mailto:cmurphy@rlattorneys.com)

REPLY TO THE CHARLESTON OFFICE  
234 Seven Farms Drive, Suite 128  
Charleston, SC 29492  
(843) 800-1187

December 13, 2018

**RECEIVED**

DEC 17 2018

**S.C. SUPREME COURT**

VIA U.S. MAIL

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

Re: Kenneth Murray, #294286 v. State of South Carolina  
Civil Action No.: 2017-CP-10-5154

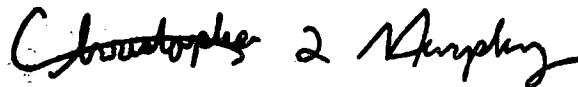
Dear Mr. Shearhouse:

Enclosed for filing, please find an original and two copies of Appellant's Notice of Appeal of the denial of his application for Post-Conviction Relief, and a Proof of Service regarding same. If you find everything in order, please file the original and return the clocked-in copies in the enclosed self-addressed envelope.

Please note, I was appointed to this and case and have copied the Office of Appellate Defense on this who will handle the appeal. Please call if you have any questions.

With kindest regards, I am

Sincerely,



Christopher L. Murphy, Esq.  
For the Firm

CLM/jh

Enclosures

cc (w/ encls.): Mr. Kenneth Murray  
Megan Harrigan Jameson, Senior Asst. AG  
Office of Appellate Defense  
The Honorable Deadra L. Jefferson  
The Honorable Julie J. Armstrong, Clerk, 9th Jud. Cir.

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No.: 2017-CP-10-5154

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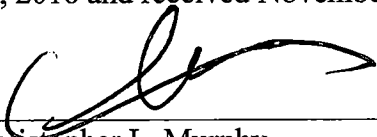
**S.C. SUPREME COURT**

Kenneth Murray, #294286 ..... Appellant  
v.  
State of South Carolina ..... Respondent

NOTICE OF APPEAL

Appellant appeals the Court's denial of his application for post-conviction relief.  
Attached is the order from the court dated November 7, 2018 and received November 22, 2018.

December 13, 2018

  
\_\_\_\_\_  
Christopher L. Murphy  
Resnick & Louis, PC  
234 Seven Farms Drive, Suite 128  
Charleston, SC 29492  
Phone & Fax: (843) 800-1187  
Email: [cmurphy@rlattorneys.com](mailto:cmurphy@rlattorneys.com)

Other Counsel of Record:  
Megan Harrigan Jameson  
Senior Asst. Attorney General  
Rembert C. Dennis Building  
PO Box 11549  
Columbia, SC 29211-1549  
Phone: (803) 734-3970  
Fax: (803) 253-6283  
[mjameson@scag.gov](mailto:mjameson@scag.gov)

STATE OF SOUTH CAROLINA )  
 COUNTY OF CHARLESTON )  
 )  
 Kenneth Murray, SCDC #294286, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2017-CP-10-5154

**ORDER OF DISMISSAL**

**FILED**  
 2018 NOV 15 AM 10:32  
 JULIE J. ARMSTRONG  
 CLERK OF COURT

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Christopher L. Murphy, Esq.
Respondent's Attorney:	Megan H. Jameson, Esq.
Trial Counsel:	Alicia Penn, Esq. Megan Ehrlich, Esq.
Date of Hearing:	July 25, 2018
Court Reporter:	Joyce Rueger

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed on October 10, 2017 by Kenneth Murray (Applicant). The Respondent made its Return on or about January 16, 2018. An evidentiary hearing into the matter was convened on July 25, 2018 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Christopher L. Murphy, Esquire. Megan H. Jameson of the South Carolina Attorney General's Office was also present on behalf of the State of South Carolina. Testimony was taken from the Applicant and his trial counsel, Alicia Penn.<sup>1</sup> After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this Application with prejudice.

<sup>1</sup> Megan Ehrlich, Esquire was also present and represented the Applicant at trial, but was not called to testify at the evidentiary hearing.

## PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Applicant was indicted at the April 2012 term of the Charleston County Grand Jury for Armed Robbery (2012-GS-10-02229).<sup>2</sup> This charge stems from an incident occurring on July 22, 2011 in Mount Pleasant, S.C., wherein the Applicant and a co-defendant, entered a Pizza Hut restaurant with weapons, and robbed the restaurant.

The Applicant proceeded to a jury trial on this charge before the Honorable R. Knox McMahon on October 30, 2013. The Applicant was present at trial and represented by Alicia Penn, Esquire and Megan Ehrlich, Esquire of the Ninth Circuit Public Defender's Office. Jennifer Shealy, Esquire and Alexander Ziegler, Esquire of the Ninth Circuit Solicitor's Office prosecuted the case on behalf of the State of South Carolina. The jury found the Applicant guilty of Armed Robbery on November 1, 2013. Judge McMahon sentenced Applicant to imprisonment for a term of twenty-eight years.

The Applicant thereafter filed a timely Notice of Appeal. Leah B. Moody, Esquire, represented the Applicant on appeal and filed a brief on his behalf, alleging that the trial court erred by admitting his statements to law enforcement into evidence and by denying his Motion for a Directed Verdict. Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence by unpublished opinion. State v. Kenneth Murray, 2016-UP-409 (Ct. App. filed Sept. 14, 2016). The Remittitur was issued on October 4, 2016.

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<sup>2</sup> "A person who commits robbery while armed . . . is guilty of a violent, most serious felony, and upon conviction, must be imprisoned for a mandatory minimum term of not less than ten years or more than thirty years, no part of which may be suspended or probation granted." S.C. CODE ANN. § 16-11-330 (2005). A person convicted under this section is not eligible for parole until the person has served at least seven years of the sentence. Id.

## ALLEGATIONS

In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully based on allegations of ineffective assistance of counsel, due process violations, subject matter jurisdiction, and prosecutorial misconduct without any supporting facts. The Respondent made its Return and Motion for a More Definite Statement on January 16, 2018. Thereafter, Applicant amended his PCR application to provide specific allegations of ineffective assistance of counsel, and the Respondent requested an evidentiary hearing.

At the evidentiary hearing, the Applicant informed the Court and the Respondent that he intended to proceed forward on the following grounds for relief:

1. Counsel failed to request a jury instruction on spoliation of evidence;
2. Counsel failed to request a preliminary hearing;
3. Counsel failed to properly challenge the search warrant; and
4. Counsel failed to provide the Applicant with discovery.

Applicant argued all of these allegations at the evidentiary hearing. However, the Applicant failed to present any evidence or testimony regarding any other allegations; therefore, this Court deems any other allegations to have been abandoned by the Applicant.

## 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 and arguments presented at the Post-Conviction Relief hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, closely pass upon his or her credibility, and weigh his or her testimony accordingly. The Court has detailed its relevant findings of facts and conclusions of law below, as required by S.C. Code Ann. §17-27-80 (1985).

The Applicant seeks relief from his conviction on the basis that he received ineffective assistance of counsel at his criminal trial in violation of the Sixth Amendment. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984). In an action for post-conviction relief, the Applicant bears the burden of proving the allegations in his or her application by a preponderance of the evidence. 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, 466 U.S. at 686, 104 S. Ct. at 2064; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court must apply a two-pronged test. Strickland, 466 U.S. 668, 104 S. Ct. at 2064. First, the applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690, 104 S. Ct. at 2064). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690, 104 S. Ct. at 2064). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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." Id. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

After careful review of the entire record, including the testimony presented at the evidentiary hearing, and in consideration of the above standard, this Court finds that Applicant has failed to carry his burden of proof and had not established any ineffectiveness of counsel. The Court will address each of the specific allegations made by the Applicant as follows.

**I. Failure to Request a Jury Instruction on Spoliation of Evidence**

The Applicant asserts that trial counsel was ineffective for failing to request a jury instruction on spoliation of evidence. During trial, the State presented testimony from Ann Son, who managed a dry cleaners next to the Pizza Hut at the time of the robbery. (Transcript of Trial at 226:19 – 227:4, State v. Kenneth Murray, October 31, 2013). The dry cleaning store was equipped with surveillance cameras, including one particular camera that was aimed directly at the Pizza Hut and captured the suspects entering and leaving the restaurant. (Id. at 229: 11-21; 231:13 – 233:6). Trial counsel made a contemporaneous objection to Ms. Son testifying about the contents of the surveillance footage from the dry cleaners. (Id. at 227: 19-25). Counsel argued that Ms. Son's testimony would violate the Best Evidence Rule because the surveillance video does not exist (Id.). During an in-camera hearing, Ms. Son proffered testimony that she watched the surveillance footage several times, and attempted to make a copy of the video for the Mount Pleasant Police Department, but was ultimately unable to do so because the computer had a virus.

(Id. at 229:20-230:25). After hearing argument from counsel, the trial court ruled that Ms. Son's surveillance video testimony was admissible under the best evidence rule and Rule 1004, SCRE, because the video is lost, destroyed, or otherwise unavailable to the parties as a result of computer technology. (Id. at 237: 2-5).

Despite this ruling, trial counsel requested a jury instruction on spoliation of evidence based on the missing or destroyed surveillance footage. (Id. at 417: 2-16). The trial court denied counsel's request for a spoliation charge because there was no evidence that the State destroyed the evidence in bad faith or that the evidence possessed an apparent exculpatory value before it was destroyed. (Id. at 419: 7-12). However, the trial court indicated that it would allow counsel to argue spoliation of the evidence to the jury during closing argument. (Id. at 419: 14-15).

This Court finds that this allegation is clearly refuted by the record as the record shows that trial counsel did, in fact, contemporaneously object as well as request a jury instruction on spoliation of evidence based on the missing or destroyed surveillance footage. Further, this request to charge was properly denied by the trial court; indeed, such a charge is not warranted in criminal cases in South Carolina. See, e.g., State v. Reaves, 414 S.C. 118, 128, 777 S.E.2d 213, 218 (2015) (“[A]n adverse inference charge based on missing evidence, sometimes referred to as a spoliation of evidence charge, has been limited to civil cases in South Carolina.”). Moreover, even if applicable, a spoliation charge would not have been appropriate under these facts because the surveillance video in question was in the possession, custody, or control of an independent, third party, and not the State, at all relevant times hereto. The Applicant has thus failed to demonstrate a due process violation by the Court or deficiency by Counsel, and the allegation is denied with prejudice.

## II. Failure to Request a Preliminary Hearing

Applicant further asserts that trial counsel was ineffective for failing to request a preliminary hearing on his behalf. The sole purpose of a preliminary hearing is "to determine whether sufficient evidence exists to warrant the defendant's detention and trial." Rule 2(a), SCRCrimP. However, a defendant does not have a constitutional right to a preliminary hearing. See State v. Ballington, 346 S.C. 262, 269, 551 S.E.2d 280, 283 (Ct. App. 2001) (overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009)).

At the evidentiary hearing, trial counsel, Alicia Penn, credibly testified that she did not request a preliminary hearing because the Applicant had already been indicted on the charge of Armed Robbery when she became involved in the case.<sup>3</sup> Moreover, Ms. Penn testified regarding a note in Applicant's file from previous counsel, Cody Groeber, indicating that Mr. Groeber spoke with the Applicant and his fiancée regarding a preliminary hearing on August 24, 2011 and decided not to request one because there was sufficient probable cause to overcome a dismissal at the preliminary hearing.

This Court finds that the Applicant voluntarily waived his right to a preliminary hearing. The evidence before the Court establishes that counsel discussed a preliminary hearing with Applicant and his fiancée and, that Applicant waived his right to a preliminary hearing following these discussions. See Bonnette v. State, 277 S.C. 17, 19, 282 S.E.2d 597, 599 (1981) (finding an applicant's prior silence before the trial court concerning the desire for a preliminary hearing constitutes evidence of waiver). Thereafter, the Applicant was indicted by the Charleston County

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<sup>3</sup> Applicant was originally represented by Cody Groeber of the Charleston Public Defender's Office. Cody Groeber resigned from the Public Defender's office during the course of this representation, and Alicia Penn and Megan Ehrlich were substituted as counsel in his stead.

Grand Jury based on sufficient probable cause. There is no evidence that the Applicant was not properly indicted by the Grand Jury, that there was not sufficient probable cause for an indictment, or that the Applicant's charges would have been dismissed at a preliminary hearing. In light of the foregoing, this Court finds that the Applicant has failed to meet his requisite burden of proof and denies this allegation.

### **III. Failure to Properly Challenge the Search Warrant**

Applicant also asserts that counsel was ineffective for failing to properly challenge the search warrant that led to his arrest. The search warrant was executed on the Applicant's residence by the Mount Pleasant Police Department on July 28, 2011 in connection with an investigation into another Armed Robbery of a Piggly Wiggly. The Applicant was present at the residence during the execution of the search warrant and was taken into custody. When officers performed a frisk of the Applicant for weapons pursuant to Terry v. Ohio, they discovered cocaine on his person. Applicant was subsequently arrested for Possession of Cocaine. After his arrest, Applicant made several statements to law enforcement that implicated him and his co-defendant in the Pizza Hut robbery. Applicant also disclosed the location of a BB gun used in the robbery to law enforcement. The gun was later recovered from under the Applicant's bed.

Prior to trial, counsel moved to suppress Applicant's statements to law enforcement and the BB gun recovered from his residence based on the fruit of the poisonous tree doctrine. (Transcript of Trial at 149: 25-150:12, State v. Kenneth Murray, October 30, 2013). Specifically, counsel argued that the search warrant was deficient as it is conclusory in nature, unreliable, and lacking in probable cause, and that as a result, the ensuing search of Applicant's residence, the Applicant's arrest, and the Applicant's statements to law enforcement were unlawful as fruits of

the illegal search. (Id.) Following a lengthy pre-trial hearing and zealous argument by trial counsel in support of suppression, the trial court denied counsel's motion to suppress on the basis that the warrant contained sufficient probable cause. (Id. at 168:11-170:12). The statements were subsequently introduced by the State at trial despite contemporaneous objections by trial counsel. (Id. at 290: 8-17).

This Court finds that the Applicant has failed to establish any deficiency of counsel with regard to this allegation. Trial counsel vigorously argued for the suppression of Applicant's statements and the BB gun, and properly preserved the issue for appellate review. Moreover, Applicant has failed to establish any prejudice, as he failed to establish what, if any, additional arguments counsel should have made on his behalf or that these arguments would have led to the suppression of the evidence in question. This allegation is therefore denied and dismissed with prejudice.

#### **IV. Failure to Provide the Applicant with Discovery**

Lastly, Applicant asserts that trial counsel was ineffective for failing to provide him with discovery. At the hearing, Applicant testified that counsel provided him with the police and SLED reports, including the statements made by the Applicant. Applicant further testified that he discussed the evidence against him with counsel. However, he testified that counsel failed to provide him with his "paperwork" and "Rule 5 evidence." Conversely, counsel testified that she reviewed the discovery with Applicant and provided him with copies of the reports. This Court finds counsel's testimony to be credible as to the fact that she reviewed the discovery with the Applicant and provided him with copies of the reports. Counsel was not deficient in this regard,

and there is no prejudice to the Applicant. Accordingly, this allegation is denied and dismissed with prejudice.

**CONCLUSION**

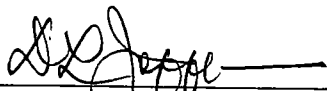
In light of the foregoing, this Court finds and concludes that the Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. The Application is therefore denied and dismissed with prejudice.

The Court advises the Applicant that he must file and serve a notice of appeal within thirty days from the receipt of this Order if he wants to secure the appropriate appellate review. See Rule 203, SCACR. The applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief; however, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf pursuant to Rule 71.1(g), SCRCP. See Austin v. State, 305 S.C. 453 (1991). The Applicant is hereby directed to South Carolina Appellate Court Rule 243 for the appropriate procedures for appeal.

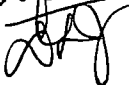
**IT IS THEREFORE ORDERED:**

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 7<sup>th</sup> day of November, 2018.

  
\_\_\_\_\_  
DEADRA L. JEFFERSON  
Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina

10 of 10  


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

\_\_\_\_\_  
KENNETH MURRAY, #294286

**RECEIVED**  
Applicant,

DEC 17 2018

v.

STATE OF SOUTH CAROLINA,


**S.C. SUPREME COURT,**  
Respondent.

\_\_\_\_\_  
**CERTIFICATE OF SERVICE**  
\_\_\_\_\_

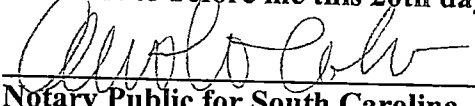
The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

Christopher L. Murphy, Esquire  
Murphy Law Offices, LLC  
234 Seven Farms Drive, Suite 128  
Charleston, SC 29492

This 20<sup>th</sup> day of November, 2018.

  
\_\_\_\_\_  
Jennifer Jennison  
Legal Assistant for Respondent

SWORN to before me this 20th day of November, 2018.

  
\_\_\_\_\_  
Notary Public for South Carolina.  
My Commission Expires: 5/20/2025

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

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Case No.: 2017-CP-10-5154

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Kenneth Murray, #294286 .. ..... Appellant  
v.  
State of South Carolina ..... Respondent

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PROOF OF SERVICE

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I certify that I have served APPELLANT'S NOTICE OF APPEAL by delivering a copy via U.S. Mail First-Class postage prepaid on the 13th day of December, 2018, on the following:

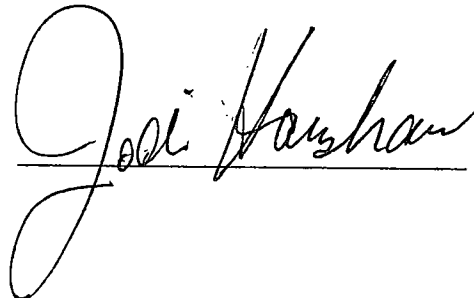
Megan Harrigan Jameson, Esquire  
Senior Assistant Attorney General  
SC Office of the Attorney General  
PO Box 11549  
Columbia, SC 29201

The Honorable Deadra L. Jefferson  
100 Broad Street, Suite 336  
Charleston, SC 29401

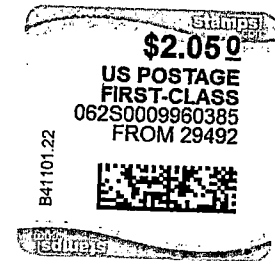
The Honorable Julie J. Armstrong  
Clerk of Court, Ninth Judicial Circuit  
100 Broad Street, Suite 106  
Charleston, SC 29401

Office of Appellate Defense  
PO Box 11433  
Columbia, SC 29211-1433

Mr. Kenneth Murray, #294286  
Lieber Correctional Institution  
PO Box 205  
Ridgeville SC 29472



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 **RESNICK & LOUIS, P.C.**  
ATTORNEYS AT LAW

234 Seven Farms Drive, Suite 128, Charleston, SC 29492

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