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ATTORNEY AT LAW

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January 16, 2019

**Via US Mail**

Daniel Shearouse  
Clerk of Court  
South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

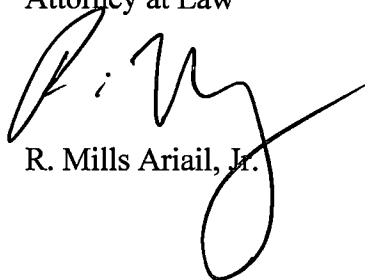
***Re: Notice of Intent to Appeal from Lorgio Danilo Morales vs. State of South Carolina C.A. No.: 2018-CP-23-3012***

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable Alex Kinlaw's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,  
LAW OFFICE OF R. MILLS ARIAIL, JR.  
Attorney at Law



R. Mills Ariail, Jr.

RMAjr/dl  
Enclosures (as stated)

**RECEIVED**

**JAN 18 2019**

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

---

Alex Kinlaw, Circuit Court Judge

Case No. 2018-CP-23-3012

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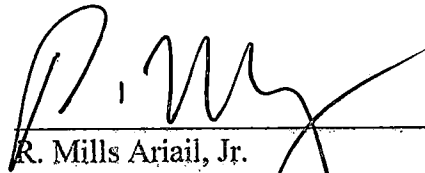
Lorgio D. Morales,..... Appellant,

v.

State of South Carolina ..... Respondent.

**NOTICE OF APPEAL**

Appellant appeals the Honorable Alex Kinlaw's Order of Dismissal dismissing Appellant's application for post-conviction relief. On January 7, 2019, the Honorable Alex Kinlaw signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on January 14, 2019. A copy of the Honorable Alex Kinlaw's Order of Dismissal is attached.



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Attorney for Lorgio Morales

Greenville, South Carolina  
January 16, 2019

**RECEIVED**

**JAN 18 2019**

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
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Alex Kinlaw, Circuit Court Judge

Case No.2018-CP-23-3012

---

Lorgio D. Morales,..... Appellant,

v.

State of South Carolina ..... Respondent.

**CERTIFICATE OF SERVICE**

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this January 16, 2019, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

**Janell Gregory, Esq.**  
**Assistant Attorney General**  
**PO Box 11549**  
**Columbia, SC 29211**  
**Attorney for the State of South Carolina**

**Greenville County Clerk's Office**  
**Greenville County Courthouse**  
**305 East North Street**  
**Greenville, SC 29601**

**Lorgio Morales SCDC# 375312**  
**Perry Correctional Institution**  
**430 Oaklawn Road**  
**Pelzer, SC 29669**

**SC Commission of Indigent Defense**  
**Division of Appellate Defense**  
**PO Box 11433**  
**Columbia, SC 29211-1433**

**RECEIVED**

**JAN 18 2019**

**S.C. SUPREME COURT**

*Denise Tanner LaBeck*  
Denise Tanner LaBeck

January 16, 2019

STATE OF SOUTH CAROLINA )  
COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS )  
FOR THE THIRTEENTH JUDICIAL CIRCUIT )

Lorgio D. Morales, #375312, )

2018-CP-23-3012 )

Applicant, )

**ORDER OF DISMISSAL** )

v. )

State of South Carolina, )

Respondent. )

FILED OVERSEER OF COURT  
PAUL A. BRYANT, CLERK  
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This matter comes before the Court by way of an application for post-conviction relief filed on May 24, 2018, by Lorgio Morales ("Applicant"). The State ("Respondent") filed a Return on September 27, 2018, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on December 17, 2018, at the Greenville County Courthouse. Applicant was present at the hearing and represented by Mills Ariail, Jr., Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Scott D. Robinson, Esquire ("Counsel"), also testified at the hearing. 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.

### **I. PROCEDURAL HISTORY**

The records before this Court establish Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's order of commitment. During the February 2016 term, the Greenville County Grand Jury indicted Applicant for tampering with utility meter for purpose of growing or manufacturing a controlled substance (2016-GS-23-3018), trafficking marijuana (2016-GS-23-3019), manufacturing



marijuana (2016-GS-23-3020), and theft of electric current (2016-GS-23-4086). Counsel represented Applicant. Assistant Solicitor Katryna B. Owens of the Thirteenth Circuit Solicitor's Office prosecuted the case.

On February 5, 2018, Applicant proceeded to a jury trial before the Honorable Edward W. Miller. On February 6, 2018, the jury found Applicant guilty as indicted. Following the verdict, Judge Miller sentenced Applicant to imprisonment for ten years for tampering with utility meter for purposes of growing or manufacturing a controlled substance, twenty-five years for trafficking marijuana, twenty years for manufacturing marijuana, and time served for theft of electric current. All sentences were to run concurrent. Applicant did not appeal his conviction or sentence.

#### SUMMARY OF FACTS

On April 23, 2012, deputies with the Greenville County Sheriff's Office responded to a request for assistance from Duke Power at a warehouse on Old Piedmont Highway. (Trial Tr. 48.) Upon arrival, Duke Power explained to deputies that power was being diverted from lines into the warehouse and they needed assistance to cut the electricity. (Trial Tr. 48.) Once power was cut, a wave of hot air left the warehouse that smelled of marijuana. (Trial Tr. 49.) Deputy Reece entered the warehouse believing there was a risk of fire because he observed melting wires leading into the warehouse and felt heat emitting from the warehouse. (Trial Tr. 37-38.) Deputy Reece entered the warehouse to clear it for safety reasons and discovered a grow room and living quarters. (Trial Tr. 40.) Once the warehouse was cleared, Deputy Reece obtained a search warrant due to exigent circumstances. (Trial Tr. 39-40.) During the execution of the search, deputies found eight separate rooms of marijuana plants in various stages of growth, packing material, drying rooms, and living quarters. (Trial Tr. 49.) Deputies processed the warehouse and recovered ninety fingerprints; thirty of those prints matched Applicant. (Trial Tr. 85.) Deputies seized 687 plants

that field-tested positive as marijuana, along with chemicals and equipment used to manufacture marijuana. (Trial Tr. 199.) Deputies also seized 125 pounds of marijuana from boxes located in the living quarters of the warehouse. (Trial Tr. 199.)

## **II. ALLEGATIONS RAISED**

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

1. Ineffective Assistance of Counsel:
  - a. Counsel failed to investigate facts, evidence, and witnesses;
  - b. Counsel failed to have proper defense for physical evidence;
  - c. Counsel abandoned Applicant during trial;
  - d. Counsel failed to review discovery with Applicant;
  - e. Counsel failed to move for a mistrial after Assistant Solicitor Owens expressed her own opinion of Applicant's guilt;
  - f. Counsel failed to call witnesses on Applicant's behalf;
  - g. Counsel failed to request a preliminary hearing;
  - h. Counsel failed to challenge testimony of State's witnesses and failed to adequately object and preserve objections of the witnesses testimony;
  - i. Counsel failed to cross-examine the witnesses on their testimony;
  - j. Counsel failed to move for pre-trial directed verdict;
  - k. Counsel failed to move for a directed verdict at the end of the State's case and at the end of the entire case;
  - l. Counsel failed to move to suppress evidence;
  - m. Counsel failed to quash indictments;
  - n. Counsel failed to provide a valid defense;
  - o. Counsel failed to move for a speedy trial;
  - p. Counsel failed to object to State's circumstantial evidence being introduced at trial;
  - q. Counsel failed to file a direct appeal.

On December 7, 2018 and December 12, 2018, Respondent received three letters from Applicant amending his application to include the following allegations:

1. Ineffective Assistance of Counsel:
  - a. Counsel failed to establish chain of command with SLED in weight of material, and no report from SLED.
  - b. Counsel failed to challenge the destruction of evidence;
  - c. Counsel failed to give a mere presence charge to the jury and Counsel's charge was incomplete;
  - d. Counsel failed to properly prepare for trial because he took a year off for illness

- and came back to take Applicant's case.
- e. Solicitor failed to establish an exact time frame in Applicant being present in the warehouse.

An evidentiary hearing was held on December 17, 2018, where Applicant proceeded on the following grounds for relief:

1. Ineffective Assistance of Counsel
  - a. Counsel failed to review discovery with Applicant;
  - b. Counsel failed to investigate Applicant's case;
  - c. Counsel failed to file a speedy trial motion;
  - d. Counsel failed to object to Assistant Solicitor Owens' inappropriate comment;
  - e. Counsel failed to challenge the search warrant and the search warrant return;
  - f. Counsel failed to move for pre-trial directed verdict;
  - g. Counsel failed to discuss the stipulations with Applicant;
  - h. Counsel failed to file an appeal on Applicant's behalf;
  - i. Counsel failed to provide a mere presence jury charge;
  - j. Counsel advised Applicant to turn down ten year plea offer.

### **III. TESTIMONY FROM POST-CONVICTION RELIEF HEARING**

#### *Applicant's Testimony*

Applicant testified on his own behalf during the post-conviction relief hearing. Applicant testified he retained Counsel to represent him in this case. Applicant testified he was arrested nearly three years after the warehouse was searched. After his arrest, Applicant testified he was extradited from Miami, Florida. Applicant testified he made bond when he came to South Carolina and was out of jail while his case was pending. Applicant testified he met with Counsel four or five times. Applicant testified he received discovery about three or four months after he hired Counsel and Counsel briefly went over it with him. Applicant testified he did understand the evidence the State had against him and understood how the State tied him to the warehouse. Applicant testified Counsel went over the elements of each of his charges with him and told him the sentences he could face. Applicant testified he told Counsel he broke into the warehouse to

burglarize it and that his how his fingerprints ended up all over the interior of the building. Applicant also testified he provided Counsel an alibi that he was in Miami. Applicant testified Counsel told him about a ten year plea offer from the state, but advised him not to take it because he would win the case. Applicant testified Counsel did not properly investigate his case. Applicant testified he went with Counsel to the warehouse, but Counsel did not get out of the vehicle. Applicant testified he wanted Counsel to get out of his car and look at the melted wires. Applicant testified he wanted Counsel to talk to a witness who had observed a white male in a van coming to the warehouse.

Applicant testified during trial Counsel failed to challenge statements of the State's witnesses. Applicant testified Counsel did not argue enough about the exigent circumstances in the search warrant. Applicant testified one of his allegations against Counsel was that he did not challenge the improper return date on the search warrant, however, during the hearing, Applicant testified he understood Counsel did challenge the search warrant return. Applicant testified he did allege Counsel did not file a pre-trial directed verdict, but he now understands that motion does not exist.

Applicant testified Counsel did not discuss the stipulations with him prior to trial. Applicant testified he wanted SLED to testify and verify the weight. Applicant testified Counsel told him that if SLED came to testify it would be more prejudicial. Applicant testified Counsel had an incomplete mere presence charge for the jury. Applicant testified he believed the charge provided to the jury by the judge was sufficient. Applicant testified he did not have access to a phone or Counsel's address to request an appeal, but that he wanted to appeal his conviction.

#### *Counsel's Testimony*

Counsel also testified at the post-conviction relief hearing. Counsel testified he has been practicing law for over twenty years and nearly all of that time has been spent in criminal law.

Counsel testified he was retained by Applicant and represented him since from the beginning of his case. Counsel testified Applicant was indicted four years after the grow operation was discovered. Counsel testified Applicant was in Florida for a decent amount of time, but he did not recall when Applicant returned to South Carolina. Counsel testified he has handled grow cases in the past and did not believe the size of the operation mattered since the elements of the crimes are the same. Counsel testified he felt like he could handle the case. Counsel testified he met with Applicant five or six times. Counsel testified he did obtain discovery in this case and reviewed discovery with Applicant. Counsel testified he believed Applicant understood those discussions.

Counsel testified he went to the warehouse with Applicant to investigate the scene. Counsel testified he got records from the county and found Applicant had nothing to do with the property; he did not own, lease or rent the warehouse. However, Counsel testified Applicant told him he left the warehouse five or ten minutes prior to Duke Power and deputies showing up at the scene. Counsel testified Applicant never denied being involved with the operation inside the warehouse. Counsel testified Applicant gave him the burglary theory for a defense, but Counsel did not think that was viable especially since nothing was taken. Additionally, Counsel testified some of Applicant's fingerprints were found in interior locked areas of the warehouse. Counsel testified Applicant told him he helped set the whole thing up. Counsel testified the witness Applicant wanted Counsel to use would have identified Applicant as the white male he observed in the white van coming and going from the warehouse. Counsel testified the van the witness would have identified was Applicant's vehicle. Counsel testified there were no other witnesses who came forward.

Counsel testified he did not see a way to suppress the evidence from the grow operation. Counsel testified he stipulated to certain things after discussing it with Applicant. Counsel testified

there were positive and negative aspects to the stipulations and he discussed with Applicant how it would look to a jury. Counsel testified Applicant consented to the stipulations. When asked about the statement Applicant claimed Assistant Solicitor Owens made during the trial, Counsel testified she did not make such a statement. Counsel testified the State offered Applicant a plea deal with a ten year sentence on a mandatory twenty-five year charge and he recommended Applicant take the offer. Counsel testified it was a good offer and even talked about the offer on the record at trial. Counsel testified he never told or guaranteed Applicant they would win his case. Counsel testified his trial theory was the presence of Applicant's fingerprints in the warehouse did not equate to guilt. Counsel testified he requested a mere presence charge for the jury and the judge used his own charge, which was sufficient. Counsel testified Applicant did not ask him to appeal his case. Counsel testified he would have filed an appeal on Applicant's behalf had one been requested.

#### IV. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her 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 (1984); Butler, 286 S.C. 441, 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, 300 S.C. 115. 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, 300 S.C. 115.

#### V. FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the plea transcript, and Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

#### Ineffective Assistance of Counsel

This Court finds Applicant has failed to meet his burden of proving he is entitled to post-conviction relief on any of his allegations of ineffective assistance of counsel. Applicant has failed to prove both deficiency on the part of Counsel and any prejudice therefrom. Furthermore, after observing the witnesses and passing on their credibility, this court finds Counsel's testimony to be credible. By contrast, this Court finds Applicant's testimony lacks credibility.

*Counsel failed to review discovery with Applicant*

Applicant alleges Counsel was constitutionally ineffective for failing to review discovery with Applicant. During Applicant's testimony, Applicant stated he received discovery from Counsel about three or four months after he hired Counsel. Applicant testified Counsel went over discovery with him enough for him to understand the evidence the State had against him and how the State tied him to the warehouse. Applicant also testified Counsel went over each of his charges with him and the potential sentence he could face on each charge. During Counsel's testimony, Counsel testified he obtained and reviewed discovery with Applicant. Counsel testified that Applicant understood those discussions.

This Court finds credible Counsel's testimony that he obtained and reviewed discovery with Applicant. This Court finds Applicant has failed to establish any deficiency of Counsel or any resulting prejudice from the alleged deficiency. Therefore, Applicant has failed to meet his burden and this allegation must be denied and dismissed with prejudice.

*Counsel failed to investigate Applicant's case*

Applicant alleges Counsel was constitutionally ineffective for failing to investigate his case. Applicant testified Counsel did go to the warehouse with him, but Counsel did not get out of the vehicle and did not look at the melted wires. Applicant also testified Counsel did not interview a witness who observed a white male in a van coming and going from the warehouse. In contrast, Counsel testified he did go to the warehouse with Applicant, although he does not recall whether he got out of the vehicle. Counsel testified he did talk to the witness Applicant wanted Counsel to use would, but that witness would have identified Applicant as the white male he observed coming and going from the warehouse. Counsel testified the witness would also have described Applicant's van as the vehicle he observed coming and going from the warehouse.

Counsel further testified he researched the property and warehouse and found Applicant was not listed as the owner, renter, or leasee of the property, but the challenge in the case was Applicant's fingerprints were found in numerous locked areas inside the warehouse.

This Court finds credible Counsel's testimony that he investigated the facts and circumstances giving rise to Applicant's charges, as well as possible defenses. Therefore, this Court finds Applicant has failed to establish any deficiency. Additionally, this Court finds Applicant has failed to establish any prejudice from this purported deficiency, as Applicant has failed to establish what benefit would have been gleaned from any additional investigation. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.")). As Applicant has failed to establish what additional investigation Counsel should have performed as well as what benefit such investigation would have yielded, he has failed to establish prejudice. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

*Counsel failed to file a speedy trial motion*

Applicant alleges Counsel was constitutionally ineffective because he failed to file a speedy trial motion on his behalf and his failure to do so was a violation of his Due Process. According to the record, the grow operation was discovered in the warehouse in April of 2012, but warrants were not obtained on Applicant until 2015. At the time of his arrest, Applicant was in Miami, Florida and Assistant Solicitor Owens noted on the record Applicant's extradition from Florida was one of the reasons the case was delayed. (Trial Tr. 224.) Additionally, Applicant can

Counsel both testified Applicant was out on bond while his case was pending. Based on the record before this Court, Applicant remained on bond until the first day of his trial, February 6, 2018.

A speedy trial "simply means a trial without unreasonable and unnecessary delay." State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012) (citing Wheeler v. State, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966)). "The clock starts running on a defendant's speedy trial right when he is indicted, arrested, or otherwise officially accused," and therefore we include the time between arrest and indictment. Id. (quoting United States v. MacDonald, 456 U.S. 1, 6 (1982)). "The main goals of this right are to prevent undue pretrial incarceration, minimize the anxiety stemming from public accusation of a crime, and limit the possibility of long delays impairing an accused's defense." Id. In Barker v. Wingo, 407 U.S. 514, 531 (1972), the United States Supreme Court held the length of the time necessary to trigger the full inquiry "is necessarily dependent upon the peculiar circumstances of the case." The Court in Barker set forth factors that should be considered by courts when evaluating delays. Id. "Those factors include the length of the delay, the reason for it, the defendant's assertion of his right to a speedy trial, and any prejudice he suffered." Langford, 400 S.C. at 441, 147 S.E.2d at 482.

Here, the warehouse grow operation was discovered in 2012, Applicant was arrested in 2015, indicted in 2016, and proceeded to trial in 2018. This Court finds Counsel was not deficient in failing to file a speedy trial motion on Applicant's behalf because the delay in Applicant's trial was due, at least in part, to his extradition from Miami, Florida. Additionally, this Court finds Applicant can show no actual prejudice resulting from Counsel's failure to file a speedy trial motion as Applicant was out on bond up until the first day of his trial in 2018. Applicant also failed to provide any testimony showing how the delay affected his ability to prepare and present a defense in his case. Counsel testified the one witness Applicant provided to Counsel would have

identified Applicant and his vehicle as the white male he observed coming and going from the warehouse in a van. Counsel further testified no other witnesses came forward on Applicant's behalf, which was not attributed in any way to the delay in Applicant's trial. Therefore, this Court finds Applicant has failed to meet his burden on this allegation and it must be denied and dismissed with prejudice.

*Counsel failed to object to Assistant Solicitor Owens' inappropriate comment*

Applicant alleges Counsel was constitutionally ineffective because he failed to object to Assistant Solicitor Owens' inappropriate comment during the trial. Applicant testified Assistant Solicitor Owens said, "They come here to our city to manufacture drugs" and Applicant testified this comment "tainted the jury." (PCR Application 11(a)(7)) However, during his testimony Applicant admitted the statement was not in the trial transcript, but stated he remembered her making the statement. In contrast, Counsel testified no such statement was made by Assistant Solicitor Owens during the trial.

This Court finds credible Counsel's testimony that Assistant Solicitor Owens did not make the statement Applicant has alleged she made during trial. Additionally, this Court reviewed the record and can find no such statement. This Court finds Applicant has failed to meet his burden on this allegation and, consequently, this allegation is denied and dismissed with prejudice.

*Counsel failed to challenge the search warrant and search warrant return*

Applicant alleges Counsel was constitutionally ineffective for failing to challenge the search warrant and search warrant return. During his testimony, Applicant conceded that Counsel did challenge the search warrant and the search warrant return. However, Applicant went on to testify that he did not believe Counsel provided enough argument regarding the search warrant obtained by law enforcement that claimed exigent circumstances. Applicant testified Counsel

should have done more to argue the lack of exigent circumstances. Applicant also testified Counsel should have also challenged the return of the search warrant since it exceeded ten days.

This Court finds this allegation meritless. As the record reflects, Counsel made a motion to suppress the evidence seized in the warehouse based on a faulty search warrant. (Trial Tr. 35.) An *in camera* hearing was held regarding Counsel's motion and Counsel called the deputy who obtained the search warrant under exigent circumstances to testify. (Trial Tr. 37-43.) Counsel also challenged the search warrant return during this hearing. (Trial Tr. 40-41.) Counsel also made an argument to the trial court regarding his position that the search warrant was faulty based on the lack of exigent circumstances and the return date error. (Trial Tr. 45-46.) The trial court did not rule in Applicant's favor, but that is not an indication that Counsel was deficient. This Court finds Applicant has failed to meet his burden on this allegation and this allegation must be denied and dismissed with prejudice.

*Counsel failed to move for a pre-trial directed verdict*

This Court finds this allegation has been waived by Applicant because, Applicant testified during the post-conviction relief hearing that he understands this type of motion cannot be made because it does not exist. Therefore, this allegation is dismissed with prejudice.

*Counsel failed to discuss the stipulations with Applicant*

Applicant alleges Counsel was constitutionally ineffective because he failed to discuss the stipulations he presented at trial with Applicant. The State and Counsel provided three stipulations during trial. Those stipulations stated in part: thirty fingerprints belonging to Applicant were located inside the warehouse, 125 pounds of processed and packaged marijuana was located in the warehouse, and 687 marijuana plants were removed from the warehouse. (Trial Tr. 75, 154-155.) Applicant testified he wanted SLED to come testify during trial regarding the weight of the

*M. H. 13*

marijuana recovered from the warehouse. Applicant testified Counsel told him if SLED were to testify it could potentially be more prejudicial. However, Counsel testified he stipulated to certain things after discussing the possible pros and cons with Applicant. Counsel testified Applicant consented to the stipulations he provided at trial.

This Court finds credible Counsel's testimony that he discussed the stipulations prior to trial with Applicant. This Court finds credible Counsel's testimony that Applicant consented to the stipulations. This Court finds Applicant has failed to establish any deficiency of Counsel or any resulting prejudice from this alleged deficiency since each of the stipulations could have been proven by the State through an expert witness. Consequently, this allegation must be denied and dismissed with prejudice.

*Counsel failed to file an appeal on Applicant's behalf*

Applicant alleges Counsel was constitutionally ineffective because he failed to file an appeal on his behalf. Through post-conviction relief, an applicant can assert he is entitled to a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), by asserting his counsel failed to file a direct appeal on his behalf when requested.

Applicant testified he wanted to appeal his conviction, but he did not have access to a phone or Counsel's address to make the request. Counsel testified Applicant never asked him to file an appeal, but, if Applicant had asked, he would have filed an appeal on his behalf. This Court finds credible Counsel's testimony that Applicant never asked Counsel to appeal his conviction. This Court finds credible Counsel's testimony that he would have filed an appeal on Applicant's behalf if such a request had been made. This Court finds Applicant has failed to meet his burden regarding this allegation and this allegation must be denied and dismissed with prejudice.

*Counsel failed to provide a mere presence jury charge*

Applicant alleges Counsel is constitutionally ineffective for failing to provide a mere presence jury charge. However, this allegation is refuted by the record as the record shows Counsel requested a mere presence charge be provided to the jury and the trial court properly provided a mere presence charge to the jury. (Trial Tr. 180, 215.) Applicant testified that during the trial Assistant Solicitor Owens made a comment to the trial judge that the mere presence charge provided by Counsel was incomplete. However, the trial judge then stated he would be using his own mere presence charge. (Trial Tr. 181.) During his testimony, Applicant testified he believed the mere presence charge provided to the jury by the judge was sufficient.

This Court finds Applicant has failed to show how Counsel was deficient since he requested a mere presence charge and the trial court provided a proper mere presence charge to the jury. This Court also finds Applicant has failed to establish any resulting prejudice of the alleged deficiency, especially in light of Applicant's own testimony that he believed the mere presence charge provided to the jury was sufficient. This Court finds Applicant has failed to meet his burden and therefore, this allegation must be denied and dismissed with prejudice.

*Counsel advised Applicant to turn down the ten year plea offer*

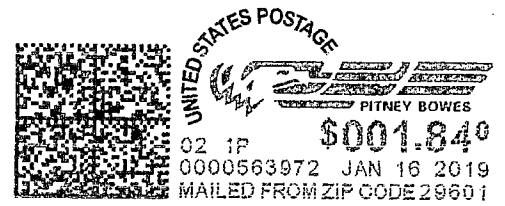
Applicant alleges Counsel was constitutionally ineffective because he advised Applicant to turn down the ten year plea offer and assured Applicant they would win his case. Applicant testified Counsel did tell him about a ten year plea offer from the State, but testified Counsel told him not to take it because Counsel guaranteed he would win his case. In contrast, Counsel testified the State did offer Applicant a ten year plea agreement and he believed it was a good deal. Counsel testified he advised Applicant to take the ten year plea offer, especially since Applicant could potentially face a mandatory twenty-five year sentence on just one of his charges. Counsel testified

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MS # 16

Copy mailed to
Attorney
on

he put the plea on the record so there would be a record of Applicant's rejection. (Tr. 182.)  
Counsel testified he never guaranteed he would win Applicant's case.  
This Court finds credible Counsel's testimony that he advised Applicant about the plea  
offer and recommended Applicant accept the offer. This Court also finds credible Counsel's  
testimony that he never guaranteed Applicant he would win his case. This Court finds Applicant  
has failed to show how Counsel was deficient or any resulting prejudice from Counsel's alleged  
deficiency. This Court finds Applicant has failed to meet his burden and this allegation must be  
denied and dismissed with prejudice.





██████████  
ARIAIL, JR.

██████████  
IE STREET, SUITE 11  
LE, SC 29601

Daniel Shearouse  
Clerk of Court  
South Carolina Supreme Court  
Post Office Box 11330  
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