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December 30, 2016

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: George Brown, 2013-CP-15-000059

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Colleton County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc: Ruston Neely, Esq.; George Brown 301460.

Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM COLLETON COUNTY

Court of Common Pleas

Honorable Michael G. Nettles, Circuit Judge

Case No.: 2013-CP-15-00059

George Brown 301460.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner George Brown appeals the Honorable Michael G. Nettles December 20, 2016, Order of Dismissal. Undersigned counsel received notice of entry of the order on December 30, 2016. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

December 30, 2016

Ruston Neely, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

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Honorable Michael G Nettles, Circuit Judge

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PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Ruston Neely, Esq, Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this December 30, 2016.

James K Falk
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Charleston, SC 29402

STATE OF SOUTH CAROLINA COUNTY OF COLLETON	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
George Brown, #301460, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2013-CP-15-0059 **ORDER OF DISMISSAL**

This Court convened an evidentiary hearing into the matter on October 18, 2016, at the Beaufort County Courthouse. Applicant was present at the hearing and represented by James Falk, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant's trial counsel, Harris Beach, Esquire (hereinafter "trial counsel") is deceased. Testimony was elicited from Applicant. The Court had before it a copy of the trial transcript, the records of the Colleton County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the direct appeal records, and the pleadings in this matter. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Colleton County Clerk of Court. Applicant was indicted at the January 2011 term of the Colleton County Grand Jury for armed robbery (2011-GS-15-0029) and kidnapping (2011-GS-15-0118). Applicant was represented by Harris Beach, Esquire.

On January 26, 2011, Applicant proceeded to trial and was convicted. Applicant was sentenced by the Honorable Perry M. Buckner, III to confinement for a period of twenty years for both kidnapping and armed robbery. The sentences are to be served concurrently.

Applicant filed a timely Notice of Appeal. His appeal was perfected by Breen Stevens, Esquire of the Office of Appellate Defense. Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Brown, No. 2012-UP-640 (S.C. Ct. App. December 5, 2012). The Remittitur was issued on February 4, 2013.

II. ALLEGATIONS

On October 18, 2016, at the evidentiary hearing, Applicant moved forward on three grounds:

1. Counsel was ineffective for failing to object to statements in the trial judge's preliminary charge, which improperly shifted the burden of proof to the Applicant.
2. Counsel was ineffective for failing to object to the statement of Applicant's codefendant at trial.
3. Counsel was ineffective for failing to object to the Solicitor's closing arguments, which improperly asked the jury to place themselves in the victim's place.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court reviewed the record in its entirety, listened to the testimony given, and heard the arguments presented at the evidentiary 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 fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of plea counsel as a ground for relief, Applicant must prove plea counsel's "conduct so undermined the proper functioning of the adversarial process" that the plea proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this first prong, the proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S.at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). Second, any deficient performance must have prejudiced 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." Strickland, 466 U.S. at 688.

This Court begins with a strong presumption trial counsel made all significant decisions in the exercise of reasonable professional judgment. Applicant has not overcome this presumption. The Court finds it can be reasonably inferred from the transcript that trial counsel

chose not to object to the Doyle[1] violation in order to cross-examine law enforcement on their failure to obtain forensic evidence, consistent with his prior attacks on the evidence of the case. Therefore, this Court finds trial counsel was not deficient.

Applicant alleges the purported deficiencies prejudiced him and resulted in an unfair trial. The Court finds Applicant was not prejudiced by trial counsel's lack of objection. Applicant failed to meet his burden to prove prejudice sufficient to undermine confidence in the result of the trial for constitutional concerns raised in Doyle as applied by Gantt v. State, 354 S.C. 183, 80 S.E.2d 133 (2003).

A. Burden Shifting

Applicant alleges the following statements made in trial judge's preliminary charge were an improper shift of the burden of proof from the State to Applicant. Applicant argues trial counsel should have objected to the forgoing comments. The excerpts are as follows:

> That's for entertainment. And this – an actual trial is not for entertainment. It's a search for the truth in an effort to make sure that justice is done between the parties before the Court. Transcript page 64: 1-5.
>
> It is a search for the truth in an effort to make sure that justice is done between the parties that are before the Court. Transcript page 74: 20-22.

Taking the preliminary charge and the jury instructions as a whole, it was made clear to the jury that defendant was presumed to be innocent, the state has the burden of proof, and the burden is beyond a reasonable doubt.

[1] Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976)

Petitioner argues Daniels[2] and Aleksey[3] stand for the proposition that trial counsel's failure to object to the Court's "seek the truth" language during preliminary remarks prejudiced Applicant. This Court disagrees and finds, similar to Aleksey, the trial court gave an adequately complete instruction, which remedied any potential burden-shifting. "There is not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt. The trial court's instructions concerning seeking the truth were given in the context of the jury's role in determining the credibility of witnesses." State v. Aleksey, 343 S.C. 20, 28–29, 538 S.E.2d 248, 252 (2000).

This Court finds the instant case distinguishable from Daniels. In Daniels, the Court's majority opinion was the matter was not preserved for review. In the consenting opinion, the Court still affirmed the conviction, but did so under a harmless error analysis. The concurring opinion distinguished Daniels from Aleksey as follows:

> In the instant case, the trial court included several improper statements as part of his jury instruction. However, the trial court prefaced those remarks with full and adequate instructions on reasonable doubt. It is troubling that the trial court concluded his jury instruction with statements that could have distracted the jury from their core functions: to examine evidence and make factual determinations, weigh credibility, and perhaps most importantly, decide whether the State has proven its case beyond a reasonable doubt.

State v. Daniels, 401 S.C. 251, 260, 737 S.E.2d 473, 477 (2012).

Whereas in Aleksey:

> The "seek" language here did not appear in either the reasonable doubt or circumstantial evidence charges, but in the instructions on juror credibility. Both the reasonable doubt and circumstantial evidence charges were complete and proper.

State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251–52 (2000).

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[2] State v. Daniels, 401 S.C. 251, 260, 737 S.E.2d 473, 478 (2012)
[3] State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000)

In the instant case, the trial court's "seek the truth" language pertained only to the trial judge's opening remarks before the start of the trial. They were cured by the trial judge's complete review of the State's burden and the correct charges on reasonable doubt and circumstantial evidence, which were given at the end of the trial.

Applicant further argues that trial counsel's opening statement was improper burden shifting and that he was ineffective in making these statements. The statement is as follows:

> You've got a hard task in front of you today. You have to, as the Judge said, find the truth. That's what verdict means. It means to speak the truth. And this case is a case of armed robbery and kidnapping, and that's what the State has charged my client, Mr. Brown, with committing.

Transcript page 96: 20-25.

Trial counsel's argument, during the trial, was that Applicant's story was the truth. There was no prejudice to Applicant from trial counsel asserting his story as the truth and asking the jury to find his client not guilty. Furthermore, the evidence in this case was overwhelming. Video evidence as well as witness testimony proved the guilt of Applicant. "The presence of overwhelming evidence of guilt negates any claim that counsel's performance could have reasonably affected the result of the defendant's trial." Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), *cert. denied,* 535 U.S. 1114, 122 S.Ct. 2332 (2002); Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt). Therefore, this allegation is dismissed.

B. Bruton Issue

Trial counsel is deceased and, therefore, unable to testify in his own defense. The Court

strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690. When trial counsel cannot be present to defend their strategy, all articulable arguments, which can be inferred from the transcript as trial strategy, can be argued in favor of competence. "A strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn't to have to personally identify his or her thinking. It is enough that the record shows a basis for strategy, not that counsel announce that strategy on the record." Wood v. Allen, 558 U.S. 290, 130 S.Ct. 841 (2010). Strickland itself recites that there are countless ways to provide effective assistance and even the best lawyers would not defend a particular client in the same way. 466 U.S. at 689. When counsel focuses on some issues to the exclusion of others, there is a strong presumption of doing so for tactical reasons rather than sheer neglect. Yarborough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1, 5 (2003).

Trial counsel could have objected to the introduction of the statement of codefendant Mr. Clemmons. However, taking the transcript as a whole, it is clear that it was justifiable trial strategy to let it in. Moreover, the statement is duplicative of the video that was played at trial that obviously put Applicant at the scene and participating in the robbery.

Furthermore, the statement of Applicant was also duplicative. He admitted to the substance of the statement of codefendant Mr. Clemmons. A close look at trial counsel's cross-examination of the investigator who took Mr. Brown's statement reveals it was a reasonable trial strategy to allow the statement to be admitted. Additionally, at the evidentiary hearing, Applicant conceded he and trial counsel were hopeful the codefendant's statement would be admitted. Applicant also testified during cross-examination that both he and trial

counsel wanted the statement to come in, in an attempt to shift the responsibility to Applicant's codefendant Mr. Clemmons. Therefore, this allegation is denied.

C. Golden Rule

Applicant alleges he was prejudiced by trial counsel's failure to object to an impermissible 'Golden Rule' argument made by the solicitor in his closing argument. "A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice." State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006).

> But what you didn't see – you weren't able to be on the ground level. You weren't able to be eye-to-eye with him this close. You weren't a single woman in that store at eleven-thirty at night and the only other employee in that store an eighteen-year-old young man.

Trans. page 255: 2-5.

This excerpt does not violate the Golden Rule. It was merely a legitimate argument to explain the element of fear as it related to the charge of kidnapping and armed robbery.

> Again, we see it through the prism of the video. We weren't there. We don't know the fear. They testified to the fear. Why didn't Devron Brown just go out the emergency exit? It's not kidnapping.

Trans. page 255: 2-5.

This is also a legitimate argument addressing how fear of a gun can support a conviction of kidnapping and armed robbery.

> He didn't know what was going on. All that matters is what happened in the store. Lucky for you, every one of you, you know that. You know that. Not just by seeing it, by experiencing it through what the victims felt.

Trans. page 261: 20-23.

This does not violate the Golden Rule, but is instead an explanation of why the jury should not consider the fact that defendant was initially charged with strong armed robbery.

> Again, we see it through the prism of the video. We weren't there. We don't know the fear. They testified to the fear. Why didn't Devron Brown just go out the emergency exit? It's not kidnapping.

Trans. Page 255: 2-5.

The way the jury experienced and came to know the victims' fear was through the victim's extensive testimony. Fear was the only force that kept the victim's kidnapped in the store. Fear of a firearm, which did not in actuality exist, was the only evidence by which armed robbery could be asserted. The jury judged the fear in both cases to be reasonable and found the Applicant guilty therewith. Therefore, this allegation is denied.

D. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes 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.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt of written notice of entry of judgment to secure the appropriate appellate review.

See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

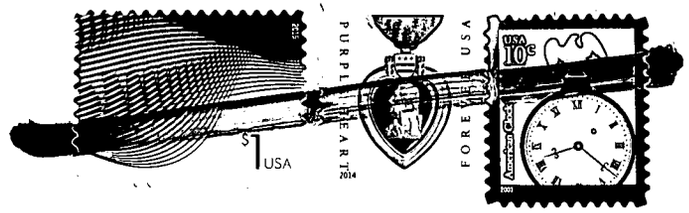
1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 20 day of December, 2016.

MICHAEL G. NETTLES
Presiding Judge
Fourteenth Judicial Circuit

Florence, South Carolina



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