WALLER
LAW GROUP

January 29, 2019



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

Re: Antonio D. Fairey vs. State of South Carolina
C/A No: 2017-CP-38-0525

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Fairey in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,

Jonathan D. Waller

Cc: Benjamin Limbaugh, South Carolina Office of Attorney General

Enclosures

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STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JAN 31 2019
S.C. SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY
Robin B. Stillwell, Circuit Court Judge

2017-CP-38-0525

Antonio D Fairey, # 276486,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Antonio D Fairey, # 276486, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed January 18, 2019, issued by the Honorable Robin B. Stillwell, Presiding Judge, First Judicial Circuit.

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ATTORNEY FOR PETITIONER

January 29, 2019

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STATE OF SOUTH CAROLINA
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APPEAL FROM ORANGEBURG COUNTY
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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Benjamin Limbaugh, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to his office located at P.O. Box 11549, Columbia, SC 29211.

Lyndsay Murray

January 29, 2019

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF ORANGEBURG | ) | IN THE COURT OF COMMON PLEAS<br>IN THE FIRST JUDICIAL CIRCUIT |
| Antonio Desmond Fairey, #276486,<br><br>Applicant, | ) | 2017-CP-38-0525<br><br>ORDER OF DISMISSAL |
| State of South Carolina,<br><br>Respondent. | ) | |





This matter comes before the Court by way of a post-conviction relief (PCR) application filed on April 13, 2017. An evidentiary hearing into the matter was convened on July 9, 2018, at the Dorchester County Courthouse. Applicant was present at the hearing and was represented by Jonathan D. Waller, Esquire. Respondent was represented by Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office.

Before this Court were the records of the Orangeburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the plea transcript, Applicant's the State's return, and Applicant's PCR application. Based on these records and the testimony presented, 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 Orangeburg County Clerk of Court. Applicant waived presentment to the grand jury on charges of domestic violence, second degree (2016-GS-38-0517), kidnapping (2016-GS-38-1073), and attempted murder (2016-GS-38-1074). James R. Adams, III, Esquire ("Plea Counsel"), represented Applicant. Assistant Solicitor Sarah Ford, Esquire, prosecuted the case. On December 13-14, 2016, Applicant pled guilty as indicted to all

charges before the Honorable Edgar W. Dickson. Applicant first appeared before Judge Dickson on December 13, 2016, where it was discussed that the State was recommending a sentence of twenty years, suspended upon the service of a range of ten to fifteen years with probation for five years. It had been Applicant and Plea Counsel's understanding the state was recommending fifteen years suspended to ten. Therefore, court was reconvened on December 14, 2016, after Applicant had the opportunity to consider the State's recommendation and discuss it with his family. Pursuant to the State's recommendation, Judge Dickson sentenced Applicant to imprisonment for concurrent terms of three years for domestic violence, and twenty years each for kidnapping and attempted murder, provided that upon the service of thirteen years' incarceration, the balance was suspended to probation for five years. Applicant did not appeal from his guilty plea or sentence.

*Factual Basis of Guilty Plea*

Applicant's charge for domestic violence, second-degree resulted from a March 6, 2016, incident in which he struck the victim in her lip with his closed fist. This occurred in the presence of her two children. Applicant had been living with the victim for several months. GP Tr. p. 12.

Applicant's charges for kidnapping and attempted murder resulted from a June 9, 2017, incident involving the same victim. Applicant brutally beat the victim over an approximately eight hour period. That day, Applicant had noticed a text message on the victim's phone and accused her of cheating. He then proceeded to force her into the bedroom, tie her arms and legs with shoelaces and apron, and then beat her all about her body and face. This beating lasted for hours, and Applicant also cut the victim with a knife and severed tendons in her hand. Throughout the night, Applicant repeatedly told the victim he was going to kill her. The victim

was able to escape when Applicant's brother came to the home the next morning. GP Tr. pp. 12-13.

## II. ALLEGATIONS

In his PCR application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
    a. "Counsel failed to investigate the facts and prepare for a trial"
    b. "Counsel failed to investigate and present a 'self-defense' defense"
    c. "Counsel failed to investigate alleged victim and a very similar incident approximately a year prior to this incident"
    d. "Counsel failed to investigate fact witnesses and potentially exculpatory witnesses"
2. "Involuntary Guilty Plea"
3. "Due Process Violation"
    a. "Sixth and Fourteenth Amendments to the U.S. Constitution; Art. I, §§ 3 & 14 of the S.C. Const."

## III. SUMMARY OF TESTIMONY PRESENTED

Plea Counsel testified at the PCR hearing, and Applicant testified on his own behalf. Applicant also called Adrian Jackson, a purported alibi witness, to testify.

### *Applicant*

Applicant testified he was told by Plea Counsel that his plea deal was for a sentence of ten years when the offer was actually twenty years suspended to a range of ten to fifteen. Applicant also testified he gave Plea Counsel information on potential witnesses to use in his defense, but Plea Counsel failed to investigate them. However, Applicant was unable to produce any evidence, aside from his own testimony, that he did in fact provide contact information of witnesses to Plea Counsel. Applicant testified he pled guilty because he felt Plea Counsel was unprepared and felt better about pleading guilty than taking his chances at trial with Plea Counsel.

Applicant acknowledged he told the plea judge he was satisfied with Plea Counsel's services and Plea Counsel had answered all of his questions. Moreover, Applicant acknowledged he told the plea judge he had understood everything Plea Counsel had told him and he also told the judge he had talked to his family about the State's recommended sentence of twenty years suspended to a range of ten to fifteen years and wanted to plead guilty.

*Adrian Jackson*

Adrian Jackson testified she visited Applicant's house the date of the incident which gave rose to Applicant's charges for attempted murder and kidnapping. Jackson testified she visited with Applicant and talked to him that day and would have been prepared to testify as a witness at trial. However, Jackson acknowledged the allegations were that Applicant tied up Victim and beat her over a *period of hours*. Furthermore, while Jackson testified she attempted to call Plea Counsel's office, she could not produce any evidence to corroborate this testimony.

*Plea Counsel*

Plea Counsel testified he did indeed first understand the plea offer to be for a recommended fifteen year sentence suspended to ten years, but this was cleared up at Applicant's guilty plea hearing. Moreover, Plea Counsel recalled Applicant was able to come back the next day and accept this plea offer after thinking it over and discussing it with his family. Plea Counsel testified Applicant seemed to understand what he was doing.

Plea Counsel testified he reviewed discovery with Applicant and did look into potential witnesses. However, Plea Counsel explained Applicant was unable to provide him with any contact information for potential alibi witnesses and he has no record of these purported witnesses contacting the office. Plea Counsel did not feel the witnesses he did speak with would have been helpful at trial, and they could not provide an alibi to show Applicant could not have

committed the crimes. Plea Counsel recalled perhaps the victim had slapped Applicant before but nothing that would help them at trial. Plea Counsel also explained Applicant did not want to proceed to trial.

## IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged 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 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption 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. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty pleas, the Applicant must

show 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 (1985).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, [an Applicant's] right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). Statements made during a guilty plea should be considered conclusively, unless an [Applicant] presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975) overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4th Cir.1985).

## V. 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 witness 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).

First, this Court finds the testimony of Plea Counsel to be credible and persuasive. By contrast, this Court finds the testimony of Applicant to be self-serving and lack credibility.

### 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. The record and testimony before this Court conclusively reveals Plea Counsel's performance was reasonable under professional norms. Applicant has failed to satisfy his burden of proving both deficiency on the part of Plea Counsel and any prejudice therefrom.

*"Counsel failed to investigate the facts and prepare for trial"*

Applicant alleges Plea Counsel was ineffective for failing to investigate the facts of the

case and prepare for trial. This Court finds this allegation to be meritless. Plea Counsel credibly testified he spoke with potential witnesses and reviewed discovery with Applicant. This is corroborated by Applicant's own sworn statements at his guilty plea in which he told the plea judge Plea Counsel had reviewed the evidence with him, answered all his questions, and he was satisfied with Plea Counsel's services. GP Tr. p. 10. Furthermore, although Applicant alleges Plea Counsel failed to prepare for a trial, the record reveals Applicant did not want to proceed to trial. Plea Counsel credibly testified Applicant did not want a trial, and Applicant himself told the plea judge he did not want a jury trial. GP Tr. p. 10. Applicant has presented no valid reason why he should be allowed to depart from the truth of his statements at his guilty plea.

While Applicant now contends Plea Counsel should have spoken with purported alibi witness Adrian Jackson, this Court finds this contention to also be meritless. Plea Counsel credibly testified he had no record of Jackson contacting his office, and Applicant was never able to provide him with any contact information for Jackson. Applicant was unable to produce any corroborating evidence to show he actually provided Jackson's information to Plea Counsel. Moreover, Jackson was unable to provide any corroborating evidence she attempted to contact Plea Counsel. Again, Applicant told the plea judge he was satisfied with Plea Counsel's services and did not need more time with Plea Counsel. GP Tr. p. 10. Even if Plea Counsel had spoken with Jackson, she would have been unable to provide an alibi as the facts of the case alleged Applicant brutally beat the victim over a period of eight hours while she was tied up inside the home. GP Tr. p. 12.

This Court finds Plea Counsel was not deficient regarding this allegation as Plea Counsel adequately investigated the case, talked to available witnesses, and explained this information to Applicant. Furthermore, this Court finds Applicant has failed to prove prejudice regarding this

allegation because the record reveals Applicant did not want a trial, and Plea Counsel adequately investigated his case regardless. Accordingly, this allegation is denied and dismissed with prejudice.

*"Counsel failed to investigate and present a 'self-defense' defense"*

Applicant alleges Plea Counsel was ineffective for failing to investigate and present a defense of self-defense. This Court finds this allegation also to be meritless. As previously noted, Plea Counsel spoke to the available potential witnesses in this case, but Plea Counsel credibly testified he did not feel the witnesses he spoke to would have been helpful. Again, Plea Counsel credibly testified Applicant did not want a trial, and this is corroborated by Applicant's sworn statement at his guilty plea. GP Tr. p. 10.

Applicant has failed to prove both deficiency and prejudice as Applicant has provided no credible evidence to support a theory of self-defense based on the facts of this case. Self-defense requires a defendant to meet each of four separate elements to be justified in using deadly force:

> (1) The defendant was without fault in bringing on the difficulty;
> (2) The defendant ... actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger.
> (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief ...; and
> (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011).

Applicant was charged with domestic violence, second-degree after punching the victim in the lip in the presence of her two children. Applicant was charged with attempted murder after tying the same victim to a bed and beating her and cutting her over a span of eight hours. Nothing in the record supports a viable self-defense theory. Therefore, Applicant has failed to prove Plea

 R13

Counsel was deficient regarding this allegation or that he was prejudiced from Plea Counsel's performance. Accordingly, this allegation is denied and dismissed with prejudice.

*"Counsel failed to investigate alleged victim and a very similar incident approximately a year prior to this incident"*

Applicant alleges Plea Counsel was ineffective for failing to investigate the "alleged victim" and a purported very similar incident approximately a year prior. This Court finds this allegation also to be meritless. Plea Counsel credibly testified that while the victim may have slapped Applicant before, there was no information available to actually help them at trial or give rise to a viable defense to Applicant's charges. Moreover, Applicant has failed to show how any further investigation into the victim's past would have provided a viable defense in light of the underlying facts of his guilty plea. In fact, Applicant told the plea judge he heard the State recite the facts to which he was pleading guilty and he still wished to plead guilty. GP Tr. pp. 14-16. Again, Applicant has provided no valid reason why he should be allowed to depart from the truth of his statements. For these reasons, this Court finds Applicant has failed to prove both deficiency and prejudice regarding this allegation. Accordingly, this allegation is denied and dismissed with prejudice.

*"Counsel failed to investigate fact witnesses and potentially exculpatory witnesses"*

Applicant alleges Plea Counsel was ineffective for failing to investigate fact witnesses and potentially exculpatory witnesses. This Court finds this allegation also to be meritless. First, Applicant has failed to prove Plea Counsel was deficient as to this allegation. Plea Counsel credibly testified he spoke with available witnesses and found they would not have been helpful at trial. While Applicant now alleges Plea Counsel should have interviewed Adrian Jackson, Plea Counsel credibly testified Applicant was never able to provide him information with which to

contact this witness. In fact, Applicant nor Jackson could provide any evidence to corroborate their claim that Jackson tried to contact Plea Counsel. Again, Applicant told the plea judge he was satisfied with Plea Counsel's services, and he did not need any more time with Plea Counsel. GP. Tr. p. 10. Plea Counsel also credibly testified Applicant did not want to go to trial, and this is corroborated by Applicant's representation to the plea judge that he did not want a jury trial. GP. Tr. p. 10. For these reasons, Applicant has failed to satisfy his burden of proving Plea Counsel was deficient as to this allegation.

Furthermore, Applicant has failed to satisfy his burden of proving that but for the alleged deficiencies, he would have chosen to proceed to trial. Regardless of whether Plea Counsel was able to contact Jackson, this Court finds Jackson's testimony would not have been exculpatory or provided an alibi defense. To establish an alibi defense and thus be entitled to an instruction of alibi, a defendant must present some evidence that he was at another place at the time of the crime and could not therefore have committed the crime. State v. Diamond, 280 S.C. 296, 297, 312 S.E.2d 550 (1984). Jackson's testimony that she merely visited Applicant's home during the day of the kidnapping and attempted murder did nothing to show Applicant could not have committed the crime. The facts to which Applicant pled guilty indicate the abuse took place over approximately eight hours while the victim was tied to a bed inside the home. The fact that Jackson may have visited Applicant, and notably never entered the home or the bedroom, does nothing to show Applicant could not have abused the victim over this timeframe as alleged by the State. Therefore, notwithstanding the fact Applicant never provided the information necessary for Plea Counsel to speak with Jackson, her testimony would not have been enough to provide a viable defense. Therefore, Applicant has failed to satisfy his burden of proving that but

for this alleged deficiency, he would have chosen to proceed to trial. Accordingly, this allegation is denied and dismissed with prejudice.

INVOLUNTARY GUILTY PLEA

Applicant also alleges his guilty plea was not voluntarily entered. This Court finds this allegation to be meritless. The record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Further, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton, at 137–38, 654 S.E.2d at 874 (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Therefore, admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)). "In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing." Id. at 138–39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

In this case, the record fully supports the knowing and voluntary nature of Applicant's

plea. Plea Counsel credibly testified he reviewed discovery with Applicant, explained his constitutional rights, and it was Applicant's decision to plead guilty rather than proceed to trial. Furthermore, Applicant told the plea judge he was not threatened or forced to plead guilty. GP Tr. p. 7. Furthermore, Applicant told the plea judge he understood what he was doing and believed pleading guilty was in his best interest. GP Tr. p. 7. Again, Applicant reaffirmed he was thinking clearly and understood what he was doing. GP Tr. p. 9. Applicant also told the plea judge Plea Counsel explained his Constitutional rights as well as the evidence and law of the case, and Applicant claimed to understand everything Plea Counsel told him. GP Tr. p. 10. After hearing the facts recited by the State, Applicant told the plea judge he still wished to plead guilty and understood his sentence. GP Tr. pp. 16-17.

Therefore, the record clearly reveals the voluntary and knowing nature of Applicant's guilty plea. This Court has heard nothing to allow Applicant to depart from the truth of his statements made at his guilty plea. Accordingly, this allegation is denied and dismissed with prejudice.

DUE PROCESS VIOLATION

In his PCR application, Applicant simply listed "Sixth and Fourteenth Amendments to the U.S. Constitution; Art. I, §§ 3 & 14 of the S.C. Const.," as a Due Process violation in his application alleging he received ineffective assistance of counsel and his guilty plea was involuntary. As noted above, this Court has found each of the raised allegations of ineffective assistance of counsel to be meritless as Applicant failed to satisfy his burden of proving both deficiency and prejudice as to each of them. Furthermore, this Court has found Applicant's allegation that he involuntarily pled guilty to be meritless. Accordingly, as Applicant has failed

to satisfy his burden of proving his allegations, this application is denied and dismissed with prejudice.

## VI. CONCLUSION

Based on all the foregoing, this 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.

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:**

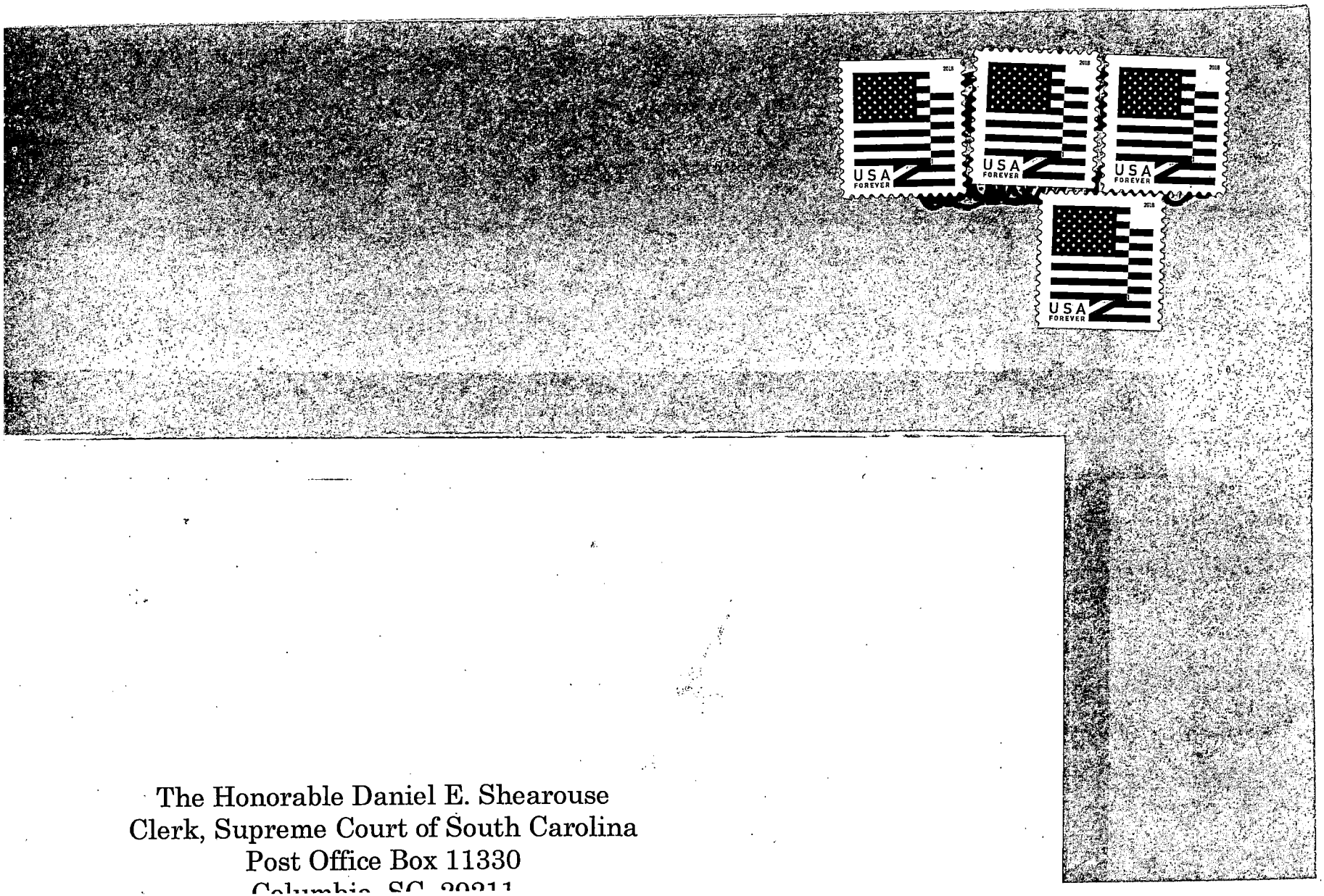
1. That the application for Post-Conviction Relief is denied and dismissed with prejudice in regard to all allegations; and

2. Applicant must be remanded to the custody of Respondent.

**AND IT IS SO ORDERED** this 7 day of Jan, 2019.

ROBIN B. STILWELL
Presiding Judge
First Judicial Circuit

Colleton, South Carolina




The Honorable Daniel E. Shearouse
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