

R. MILLS ARIAIL, JR.  
ATTORNEY AT LAW

11 NORTH IRVINE STREET, SUITE 11 • GREENVILLE, SC 29601  
PHONE 864.232.9390 • FAX 864.232.9392 • E-MAIL MILLS@RMALAWOFFICE.COM

March 12, 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 Brian Edward Norris vs. State of South Carolina C.A. No.: 2018-CP-39-0165***

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 Jr.'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 Pickens 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**

MAR 18 2019

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

APPEAL FROM PICKENS COUNTY  
Court of Common Pleas

---

Alex Kinlaw Jr., Circuit Court Judge

Case No. 2018-CP-39-0165

---

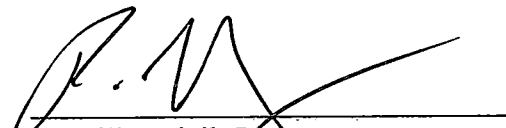
Brian Edward Norris,..... Appellant,

v.

State of South Carolina ..... Respondent.

**NOTICE OF APPEAL**

Appellant appeals the Honorable Alex Kinlaw Jr.'s Order of Dismissal dismissing Appellant's application for post-conviction relief. On November 5, 2018, the Honorable Alex Kinlaw Jr. 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 March 12, 2019. A copy of the Honorable Alex Kinlaw Jr.'s Order of Dismissal is attached.



---

R. Mills Ariail, Jr.  
Attorney at Law  
11 North Irvine St., Suite 11  
Greenville, SC 29601  
Telephone (864) 232-9390  
Facsimile (864) 232-9392  
Attorney for Brian Edward Norris

Greenville, South Carolina  
March 12, 2019

STATE OF SOUTH CAROLINA )  
COUNTY OF PICKENS )

Brian Edward Norris, #307297 )  
Applicant, )

v. )

State of South Carolina, )  
Respondent. )

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

2018-CP-39-0165 )

ORDER OF DISMISSAL )

CLERK OF COURT  
GREENVILLE COUNTY  
2018 NOV 12 P 2:55

This matter comes before the Court by way of an application for post-conviction relief filed on January 30, 2018 by Brian Edward Norris (Applicant). Respondent made its Return on July 25, 2018. An evidentiary hearing into the matter was convened on October 22, 2018, at the Greenville County Courthouse in Greenville, South Carolina. Applicant was present and represented by R. Mills Ariail, Jr., Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's Plea Counsel Steven Alexander, Esquire also testified. This Court had before it a copy of the records of the Pickens County Clerk of Court regarding the Applicant's convictions, the transcript from Applicant's guilty plea, the PCR application, Respondent's Return and Applicant's records from the Department of Corrections. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

## PROCEDURAL HISTORY

Brian Edwards Norris (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of confinement of the Pickens County Clerk of Court. In February 2017, the Pickens County Grand Jury indicted Applicant for possession with intent to distribute methamphetamine, third offense (2016-GS-39-02446). Applicant was also indicted by the Greenville County Clerk of Court in June of 2017 for another count of possession with intent to distribute methamphetamine (2017-GS-23-5088). Applicant was represented by Steven Alexander, Esquire. Brandi Hinton, Esquire prosecuted this case for the Solicitor's Office of the Thirteenth Circuit of South Carolina. On August 28, 2017, Applicant proceeded to plead guilty to both charges of possession with the intent to distribute, third degree. Applicant was sentenced to eleven years imprisonment, to run concurrent with his second charge of possession with the intent to distribute out of Greenville County for which he received ten years imprisonment. (Gp.p.9). He was given fifteen days credit for time served and the condition of enrollment and attending of the addiction treatment unit (ATU). (Gp.p.9).

## FACTUAL HISTORY

Regarding the Pickens County charges on September 13, 2016, Applicant was present at a Pickens County residence that was being investigated in regards to a stolen vehicle. (Gp.p.6). Applicant was being questioned when he consented to a search by the officer. (Gp.p.6). Here, it was discovered that he was in possession of a clear baggie containing six grams of methamphetamine on his person. (Gp.p.6). Regarding the Greenville County charges on March 15, 2017 deputies encountered Applicant near Serene Street in Greenville County in the course of a robbery investigation. (Gp.p.6). After initially complying, Applicant took off running when he was ordered to show his hands. (Gp.p.6). A deputy observed him toss what appeared to be a

gun as he was running. (Gp.p.6). He was eventually apprehended and found to be in possession of 1.94 grams of methamphetamine in pocket. (Gp.p.6).

### ALLEGATIONS

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

1. Ineffective Assistance of Counsel
  - a. "Primary focus of law is injury and not criminal". (Application Ap. p. 1).
  - b. "[Attorney] did not understand the complete sentencing scheme plainly set forth by the legislature". "Counsel's non-understanding of the penalty provisions of the statute 44-53-370; PWID and interpretation of the complex language scheme used is clear in the exhibited documents". (Application Ap. p. 1).
  - c. "Failed to accept the lesser plea negotiation". (Application Ap. p. 1).
  - d. "Deficiently guided Defendant under inaccurate knowledge and presentment of the level of charges and sentencing." (Application Ap. p. 3).
  - e. "Where the State's offer of 2<sup>nd</sup> P.W.I.D. is a 'parolable' offense, and counsel advised Defendant that it was not 'parolable'". (Application Ap. p. 3).
  - f. "Counsel failed to present/notify Defendant of State's commitment in writing to P.W.I.D. 2<sup>nd</sup> under 10 years, instead of P.W.I.D. 3<sup>rd</sup> 11 years with no parole." (Application Ap. p. 3).
  - g. "Unprofessional errors". (Application Ap. p. 4).
  - h. "Breach of Duty" (Application Ap. p. 5).
2. Due Process Violation
  - a. "Defendant can show through documents that counsel's performance fell below an objective standard of reasonableness, U.S. [Constitution amendment VI] (due process)". (Application Ap. p. 3).
  - b. Violated right to know all plea offers, have all offers and punishments made clear and understandable by and through due diligence of counsel under Civil Rule 407; Competence 1.1, 1.2 Scope of Representation, 1.3 Professional Conduct, 1.4 Communication and Diligence". (Application Ap. p. 3).
3. Involuntary Guilty Plea
  - a. "Failed to accept the lesser plea negotiation on behalf of the Defendant and because of, Defendant had to plea to greater charge and sentence because of deficient representation". (Application Ap. p. 1).
  - b. "Counsel for Defendant prejudiced Defendant while under duress and not understanding counsel's actions or advice into accepting a plea that was left 'open' without negotiation or recommendation as indicated by Defendant's sentencing sheet." (Application Ap. p.p. 3-4).

### SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

### Applicant's Testimony

Applicant testified Plea Counsel represented him on his Pickens County charge. He testified he ended up pleading guilty to two drug charges for which he received a ten year sentence for one and an eleven year sentence for the other. Applicant testified he was arrested and charged with the drug charge out of Pickens County first and was later arrested on the Greenville charge. He testified he was released on bond after being charged in Pickens County. Applicant testified Plea Counsel discussed his charges with him and also reviewed his discovery with him. He testified he met with Plea Counsel twice during the course of his representation. Applicant testified he received a plea offer of ten years to plead guilty to PWID 2<sup>nd</sup> for his Pickens County charge. He testified he rejected the plea offer based on Plea Counsel's advice and his case was then placed on the trial docket. Applicant testified Plea Counsel did not accurately look at his criminal history in evaluating whether his charge he was facing was a true third offense.

On cross-examination, Applicant testified he was satisfied with his Plea Counsel's services at his guilty plea. Applicant testified he rejected the plea offer from the State for a ten year sentence for PWID 2<sup>nd</sup>.

### Plea Counsel's Testimony

Plea Counsel testified he had practiced law since 2003 and had also practiced criminal law since that time. He testified he was appointed to represent Applicant on his Pickens County charges in January of 2017. He testified he met with Applicant a couple of times during the course of his representation. Plea Counsel testified he reviewed the discovery in Applicant's case with him. He testified he discussed with Applicant how his prior record of convictions could play a factor into the disposition of his case. Plea Counsel testified Applicant never indicated to him

*[Handwritten signature]*  
#4

he did not understand their discussion about Applicant's charges or his rights. Plea Counsel testified the State sent Applicant a plea offer of ten years for PWID 2<sup>nd</sup> in April of 2017. He testified he relayed this plea offer to Applicant who rejected the offer. Plea Counsel testified in terms of parole eligibility, his general practice was he does not advise regarding parole eligibility. He testified Applicant ended up pleading guilty to PWID 3<sup>rd</sup> and received a sentence of eleven years for his Pickens County charge. Plea Counsel testified Applicant's potential exposure was thirty years imprisonment.

On cross-examination, Plea Counsel testified concerning an email he received from Assistant Solicitor Brandi Hinton in which she extended a plea offer to Applicant to plead guilty to PWID 2<sup>nd</sup> for ten years imprisonment. He testified the Solicitor was also in communication with the Greenville Solicitor handling Applicant's Greenville County charges. Plea Counsel testified Applicant was aware that a plea to PWID 2<sup>nd</sup> carried a sentence of zero to thirty years and a plea to PWID 3<sup>rd</sup> carried a mandatory sentence of ten years up to a cap of thirty. He testified it was his understanding that the plea offer from the State on the Pickens charge was for a PWID 2<sup>nd</sup> for a sentence of ten years straight up. Plea Counsel testified he believed the offer from the Pickens County Solicitor was a universal offer for all of Applicant's charges. He testified he did not guarantee Applicant he would receive a specific sentence.

#### **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 had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth

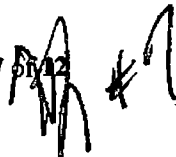
below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

In a post-conviction relief action, the 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). 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. at 443, 334 S.E.2d at 814. 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. at 689. 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).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel’s performance was deficient. Id. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Id. (quoting Strickland v. Washington, 466 at 688). 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 plea counsel, Applicant must show that there is a reasonable probability that, but for counsel’s alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 (1985).

In PCR cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citations omitted). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Lockhart, 474 U.S. at 56. Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." McMann v. Richardson, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." Id. at 771.

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, an applicant's right to contest the validity of such a plea is usually 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



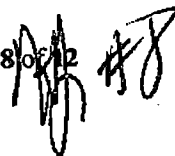
Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)). "In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error 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)).

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel. This Court finds as follows on the following grounds presented by Applicant at the evidentiary hearing:

**Ineffective Assistance of Counsel**

*Failure to Explain Charges and Convey Plea Offer*

Applicant alleges Plea Counsel was ineffective in that he did not properly explain whether his current charges were an actual second or third offense and the impact on his parole eligibility. Applicant also testified in a cursory fashion that Plea Counsel did not convey a plea offer to him. This court finds both of these allegations to be without merit and finds the following concerning each issue. First, this court finds Plea Counsel was not deficient regarding advising Applicant about his charges. A review of Applicant's records from the Department of Corrections indicates he had multiple prior convictions for drug related charges for which he served a period of incarceration beginning in 2006. This court finds Applicant was properly charged with a third drug offense. Additionally, this court finds Plea Counsel was not deficient regarding parole eligibility advice as Plea Counsel testified in terms of parole eligibility, his



general practice was he does not advise regarding parole eligibility. A guilty plea is not rendered involuntary if the defendant is not informed of the collateral consequences of his sentence. Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991). Typically, parole eligibility is considered a collateral consequence of a sentence. However, if trial counsel actively misinforms the defendant about parole eligibility, the defendant must prove he relied on the misinformation to receive PCR. Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997); Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983). Furthermore, this court finds Applicant cannot demonstrate sufficient prejudice because when offered a plea deal by the State to a plea to PWID 2<sup>nd</sup> offense, Applicant rejected it. Moreover, this court finds credible Plea Counsel's testimony that the State extended a plea offer of ten years to PWID 2<sup>nd</sup> to Applicant which Applicant ultimately rejected. This Court concludes Applicant has not met his burden of proving Plea Counsel failed to render reasonably effective assistance. This court would also note Applicant received a plea deal where several other drug charges were dismissed. Because of this, this court finds Applicant has failed to meet his burden to show Plea Counsel was ineffective. The allegations of failure to explain Applicant's charges and convey a plea offer are denied and dismissed with prejudice.

#### *Involuntary Guilty Plea*

Applicant also contends his guilty plea was involuntary as he was under duress during his guilty plea. This Court finds Applicant has failed to meet his burden of proof. This Court finds Plea Counsel provided effective assistance in this case and Applicant's decision to plead guilty was made freely and voluntarily. Further this Court finds Applicant's testimony not credible regarding this allegation.

This Court further finds the record reflects Applicant's plea was entered freely, voluntarily, knowingly, and intelligently. The plea judge explained the charges to Applicant. The

plea judge also went through Applicant's constitutional rights and questioned Applicant as to whether he understood those rights and wished to give them up to plead guilty. Applicant agreed that he did. Applicant admitted he was guilty of these offenses told the plea judge that he was satisfied with his attorney. Applicant further told the plea judge no one had threatened him or made him any promises to get him to plead guilty, and he was doing so of his own accord. Additionally, Applicant told the plea judge he did not have any physical or mental issues which would prevent him from understanding the proceeding, and Applicant indicated he understood all of the plea judge's questions and had answered them honestly. This Court therefore finds that Applicant understood the terms of the plea and the possible sentences he could receive.

Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court also finds that the record fully supports the knowing and voluntary nature of Applicant's guilty plea. See Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (holding defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both."). In addition, Applicant has presented no evidence or valid reasons why he should be allowed to depart from the truth of his statements made at the plea. See Dalton, 376 S.C. at 137, 654 S.E.2d at 874 ("[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."). This Court

concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

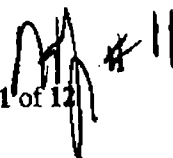
*Due Process Violation*

Applicant alleged a due process violation in his application for post- conviction relief. Applicant did not present any evidence on this allegation at the PCR hearing or specify what constitutional violations were infringed upon. Accordingly, this Court finds Applicant failed to prove there was any evidence of a due process violation. Accordingly, this Court denies and dismisses this allegation.

**CONCLUSION**

Based on all the foregoing, this Court finds and concludes that 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.

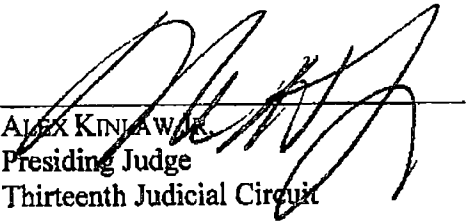
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

Handwritten signature and the number 11.

**IT IS THEREFORE ORDERED THAT:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 5 day of November, 2018.

  
ALEX KINLAW  
Presiding Judge  
Thirteenth Judicial Circuit

Greenville, South Carolina

CLERK OF COURT  
SOUTH CAROLINA  
GREENVILLE

2018 NOV 12 P 2:56

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

APPEAL FROM PICKENS COUNTY  
Court of Common Pleas

---

Alex Kinlaw Jr., Circuit Court Judge

Case No.2018-CP-39-0165

---

Brian Edward Norris,..... 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 March 13, 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:

**DeShawn H. Mitchell, Esq.**  
**Assistant Attorney General**  
**PO Box 11549**  
**Columbia, SC 29211**

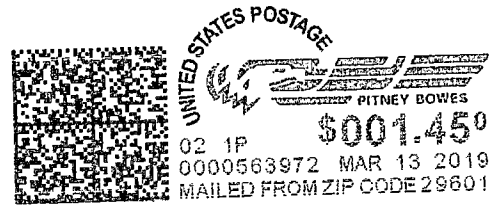
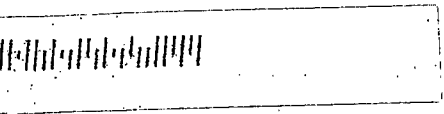
**Pickens County Clerk's Office**  
**Pickens County Courthouse**  
**214 East Main Street**  
**Pickens, SC 29671**

**Brian Edward Norris SCDC# 307297**  
**Tyger River Correctional Institution**  
**200 Prison Road**  
**Enoree, SC 29335**

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

  
Denise Tanner LaBeck

March 13, 2019



AIL, JR.

ET, SUITE 11  
29601

Daniel Shearouse  
Clerk of Court  
South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 2921