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April 2, 2019

RECEIVED
APR 05 2019
S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 1133
Columbia, South Carolina 29211

RE: David Ingram vs. State of South Carolina
Case No.: 2016-CP-02-00860

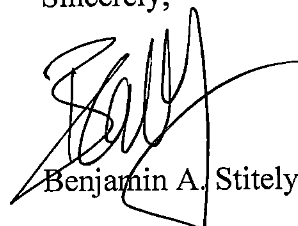
Dear Mr. Shearouse:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

(1) Proof of Service of the Notice of Appeal on the respondent.

(2) A copy of the Order which is to be challenged on appeal.

Sincerely,



Benjamin A. Stitely

BAS:tmh

Enclosures

cc: Megan Harrigan Jameson, SADAG
David Ingram, #328252

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
APR 05 2019
S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Diane S. Goodstein, Circuit Court Judge

Civil Case Number: 2016-CP-02-00860

David Ingram, #328252..Appellant,

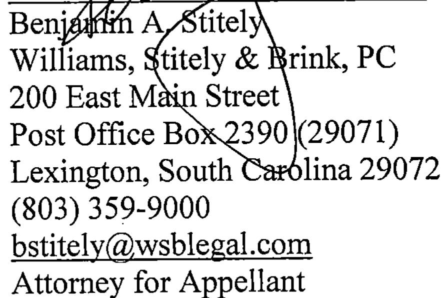
v.

State of South Carolina ....Respondent.

NOTICE OF APPEAL

David Ingram appeals the Order issued by the Honorable Diane S. Goodstein, dated March 20, 2019, and received on March 26, 2019, denying Mr. Ingram's PCR application. A copy of said order is attached hereto.

April 2, 2019



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APR 05 2019

S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Diane S. Goodstein Court Judge

2016-CP-02-00860

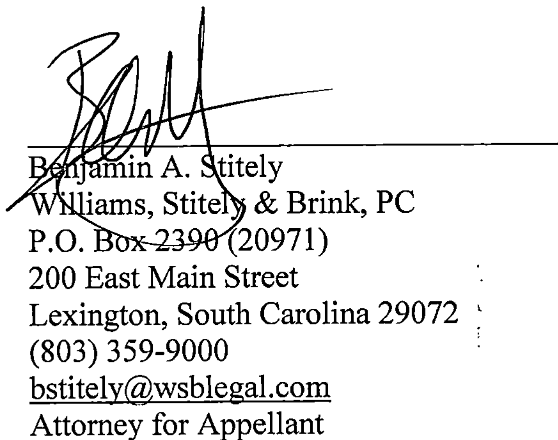
David Ingram, #328252 ....Appellant,

v.

State of South Carolina ....Respondent.

PROOF OF SERVICE

I certify that I have served the **Notice of Appeal** by depositing a copy in the United States Mail, postage prepaid, on April 2, 2019, addressed to the Clerk of Court for Supreme Court of South Carolina, the Clerk of Court for Aiken County and Megan Harrigan Jameson, Senior Assistant Deputy Attorney General.



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ELECTRONICALLY FILED - 2019 Mar 26 9:47 AM - AIKEN - COMMON PLEAS - CASE#2016CP0200860

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
David G. Ingram, #328252, Applicant,	)	2016-CP-02-00860
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on April 14, 2016. Respondent submitted its Return on April 17, 2017. An evidentiary hearing was convened on May 25, 2017, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Aimee Zmroczek, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

Applicant testified on his own behalf at the evidentiary hearing, and presented testimony from Patricia Ann Heath Ledford, Jennifer Thompson, and Robert Watkins. The State presented testimony from Applicant's plea counsel, Courtney Clyburn Pope, Esquire ("Plea Counsel"). The Court had before it a copy of the plea transcript, the records of the Aiken County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings. Applicant requested that the record remain open to allow him to submit the transcript from the hearing on the Motion to Reconsider. The records have remained open since the hearing on May 25, 2017 and despite requests no transcript has been received by the Court. By order dated March 18, 2019 Ms. Aimee Zmroczek was relieved as counsel and Mr. Benjamin Stitely substituted. The Court finds as follows:

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I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Applicant was indicted by the September 2015 term of the Aiken County Grand Jury for Pointing and Presenting a Firearm (2015-GS-02-01378), Possession of a Firearm or Ammunition by Person Convicted of a Crime of Violence (2015-GS-02-01381), Safecracking (2015-GS-02-00300) and Use of a Vehicle Without Permission and Intent to Deprive (2015-GS-02-00259). Courtney Clyburn Pope, Esquire, represented Applicant. On October 21, 2015, Applicant pled guilty as indicted to Safecracking and Use of a Vehicle Without Permission[1]. The possession of a firearm charge and the pointing and presenting a firearm charge were dismissed in exchange for his guilty plea. The Honorable Roger M. Young, Sr., sentenced Applicant to incarceration for fifteen (15) years for Safecracking and three (3) years for Use of a Vehicle Without Permission, to run concurrently with his probation revocation sentence. However, on November 2, 2015, Judge Young amended Applicants sentence for him to serve ten (10) years. Applicant did not appeal his conviction and sentence.

II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully based on the following allegations:

1. Ineffective Assistance of Counsel
    a. Failure to advise of improper arrest warrant
    b. Failure to present alibi witnesses
    c. Failure to investigate
    d. Failure to file a direct appeal
        i. Applicant requests relief under White v. State
2. Involuntary Guilty Plea

[1] Applicant only challenges his Safecracking conviction in his applicant for post-conviction relief, 2015-GS-02-00300.

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III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their 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, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 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, 386 S.E.2d at 625. 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, 386 S.E.2d at 625. With respect to guilty pleas, the Applicant must show that 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, 106 S.Ct. 366 (1985).

IV. SUMMARY OF RELEVANT TESTIMONY

At the evidentiary hearing, Applicant testified that when he pled guilty, he was under the impression that he would get a sentence of three to five years' imprisonment. He stated that he met with Plea Counsel three times before the guilty plea, and they talked about his potential witnesses, including his mother, his girlfriend, and Officer Drayton. He testified that he was at the Howard Johnson hotel when the crime took place, and he wanted Plea Counsel to investigate that through his alibi witnesses and his phone records. He stated that he did not participate in the safecracking; he is actually guilty of receiving stolen goods, but he decided to plead to safecracking so that he could get the plea deal.

Applicant testified that Plea Counsel filed a motion to reconsider the day after he was sentenced, and the plea judge resentenced him. He stated that the plea judge took five years off his sentence, so he is now serving a ten year sentence. Applicant stated that he asked his attorney to file an appeal, but she did not. He stated that he wanted the original five year deal that he was promised. Applicant testified that the arrest warrant was improper because it was not based on facts; it was based on information and belief.

After Applicant's testimony, Patricia Ann Heath Ledford took the stand. She testified that she did not know Applicant, but her son, Adam Ledford, was Applicant's codefendant. She stated that her son is an alcoholic, she could not control him, and he got arrested all the time. She stated that her son told her that he and his friends broke into a safe, so she asked the police about it. She stated that she spoke to two detectives and gave them a tip on the safe, which aided in their

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investigation. She stated that she did not have any personal knowledge of the crime and was not there to witnesses it, so she did not know who was there or who participated.

Jennifer Thompson then took the stand and testified that she is Applicant's ex-girlfriend. She stated that Applicant was with her at the Howard Johnson hotel the entire night that the crime took place. She stated that she tried to contact people to tell them about this defense, but no one ever contacted her. She testified that they were sleeping at the hotel that night, and Applicant did not leave the hotel, although she was asleep most of the night and could not say what he was doing while she was asleep. She stated they got to the hotel around 2:00 P.M. on June 6, 2014, and checked out at 11:00 A.M.

Robert Watkins then took the stand and testified that he is a private investigator. He stated that he contacted the Howard Johnson hotel on Whiskey Road in his investigation into this case to see if Applicant and Ms. Thompson had rented a room on the date in question. However, he stated that they informed him that the guest registry no longer existed.

Respondent called Plea Counsel to the stand. Plea Counsel testified that she was appointed to this case at least six or seven months before the guilty plea, and she met with Applicant at least eight or nine times. She stated that Applicant told her three or four different versions of the facts of the case throughout the course of her representation, and as he began to trust her more, he began to tell her the true version. She stated that he told her he was sick during the crime and did not want to help his brother open the safe, and he did not touch the safe, but he helped them open it.

Plea Counsel testified that her focus was not on going to trial, but on working toward getting as many of the several charges against Applicant dismissed as possible. She stated that she was able to get some of the charges dismissed successfully. Plea Counsel testified that Applicant admitted to her that he was there for the crime, and that he was at the Howard Johnson hotel, but

he left to go to his mother's house. She stated that Applicant never used the Howard Johnson as an alibi because he left. Plea Counsel stated that Applicant was not identified in the photo lineup because there were two different men in town named David with the nickname "Soup," and the other man was put in the lineup by mistake. The photo lineup was introduced as Applicant's Exhibit One.

Plea Counsel testified that she did not get an expert for Applicant's cell phone because he wanted to plead guilty. She stated that a woman named Brittany Stringfellow contacted her office three or four times a day to tell Plea Counsel to go see Applicant. Plea Counsel testified that she explained to Applicant that the State's plea offer was a fifteen year cap, and he could be sentenced up to fifteen years. She stated that she never promised him that he would get three to five years by pleading guilty, and he seemed to understand their discussions about the plea offer and potential consequences of pleading guilty. Plea Counsel stated that she filed a motion to reconsider as Applicant asked her to after the guilty plea, and a hearing was held. She stated that at the motion to reconsider hearing, Applicant told the plea court that Plea Counsel had promised him that he would get a sentence of three to five years. As a result, the plea court reduced Applicant's sentence by five years.

Plea Counsel stated that she does not remember Applicant asking her to file an appeal. She testified that it is her normal practice to discuss the right to appeal after a guilty plea. She stated

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that if Applicant had wanted her to file an appeal, she would have done so. She testified that there was no factual or legal basis to appeal, and no objections were made during the guilty plea.

At the conclusion of the evidentiary hearing, this Court held the record open to allow Applicant to obtain a copy of the transcript from the hearing held over his motion to reconsider his sentence. This transcript was later submitted and has been added to the record before the Court.

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 witnesses 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).

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant raises several allegations arguing that Plea Counsel was ineffective in his representation surrounding his trial. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). This Court finds that the testimony presented at the PCR hearing satisfies neither prong of the Strickland test; Applicant can show neither ineffectiveness nor prejudice, thus these allegations should be denied and dismissed with prejudice.

In general, this Court finds that Applicant cannot prove prejudice in any of his allegations of ineffective assistance of counsel because he has failed to prove that he would have gone to trial rather than plead guilty. To be successful in an action for post-conviction relief, "[w]ith respect to guilty pleas, the Applicant must show that there is a reasonable probability that, but for counsel's

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alleged errors, he would not have pled guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985). Applicant did not testify that he would have gone to trial had Plea Counsel represented him effectively, but instead he testified that he wanted the original five year plea deal that he believed he had been promised. Plea Counsel credibly testified that there was never a plea offer for a five year deal. Based on this testimony, this Court finds that Applicant has failed to meet his burden of proving prejudice because he would not have gone to trial, but only wanted to plead guilty and receive a lighter sentence. This cannot, as a matter of law, satisfy his burden of proof.

Failure to advise of improper arrest warrant

Applicant alleges that Plea Counsel was ineffective for failing to advise him of the improper arrest warrant in his case, which he testified was improper because it was based on information and belief, not on facts. This allegation is meritless.

Applicant has failed to prove that this arrest warrant was improper or invalid in any way, or that Plea Counsel was ineffective for failing to advise him. Applicant has not met his burden of proving that Plea Counsel was deficient in failing to challenge the arrest warrant, or that any challenge to the warrant would have been successful and changed the outcome of the trial.

Furthermore, even if the arrest warrants were invalid in some way, Applicant waived his right to challenge the warrants by pleading guilty. "The general rule is that guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including the claims of a violation of a constitutional right prior to the plea." Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981). By admitting in open court that he is guilty of the charges against him, Applicant waived his right to challenge the warrant used to arrest him for the crime.

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Therefore, because Applicant has failed to prove deficiency or prejudice, this allegation is denied and dismissed with prejudice.

Failure to present alibi witnesses

Applicant alleges that Plea Counsel was ineffective for failing to investigate or present testimony from alibi witness Jennifer Thompson. This allegation is meritless.

To qualify as an alibi, a witness's testimony must account for the defendant's whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime. Walker v. State, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012). In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Walker v. State provides a two part test for analyzing alibi witness testimony:

> When a PCR applicant alleges trial counsel failed to investigate or present an alibi witness, the PCR court must make two findings to determine if counsel's deficient performance constitutes prejudice under *Strickland.* First, the court must find as a matter of law whether the witness's testimony meets the legal definition of an alibi. Second, the court must assess the witness's credibility. In making the first finding, the court must consider the entire record to determine what the testimony would have been if it had been presented at trial. The PCR court must consider the testimony as a whole, take it as true and credible, and view it in the light most favorable to the PCR applicant.

Walker v. State, 397 S.C. 226, 238, 723 S.E.2d 610, 616 (Ct. App. 2012).

This Court first finds that Thompson's testimony does not meet the legal definition of an alibi. Her testimony was vague and did not include many specific details of the night in question. She testified that Applicant was with her the entire night, from the time they checked into the hotel

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around 2:00 P.M. until they checked out at 11:00 A.M. the next morning, but when asked what they did that night, she stated only that they were sleeping or watching television. Furthermore, she admitted that she could not have known what Applicant was doing during the night while she was asleep. There was no way for her to account for Applicant's whereabouts the entire evening. Therefore, her testimony does not prove that it was physically impossible for Applicant to commit the crime.

This Court further finds the testimony of witness Jennifer Thompson to be not credible, especially in light of Plea Counsel's credible testimony that Applicant admitted to her that he left the Howard Johnson hotel to commit the crime. Therefore, this Court finds that this witness's testimony would not have affected the outcome of the trial, had there been one.

This Court further finds that Plea Counsel cannot be ineffective for failing to present this witness's testimony because Applicant chose to plead guilty rather than go to trial. Plea Counsel credibly testified that Applicant told her about this alibi witness, but he also told her that he left the hotel to help crack the safe open. Therefore, it is a valid trial strategy for Plea Counsel to choose not to investigate or obtain testimony from this witness, but instead work toward dismissing the charge or obtaining a favorable plea offer. Plea Counsel also testified that Applicant wanted a plea; he did not want to go to trial. Therefore, the witness's testimony would not have been presented regardless. Applicant has failed to prove that Plea Counsel was deficient in this regard or that he was prejudiced by her decision not to call Ms. Thompson as a witness. Accordingly, this allegation is denied and dismissed with prejudice.

Failure to investigate

Applicant alleges that Plea Counsel was ineffective for failing to investigate his case. This allegation is meritless.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

Applicant has failed to meet his burden of proving that Plea Counsel failed to investigate anything that could have affected the outcome of the case. While Investigator Robert Watkins testified that he attempted to obtain the guest registry from the Howard Johnson hotel to prove that Applicant had rented a room for the night, the records no longer exist and Applicant cannot provide them. Even if these records had been provided, they would not prove to a jury that Applicant was at the Howard Johnson hotel the entire night of the crime. And finally, these records would not have been used by Applicant because, as Plea Counsel credibly testified, Applicant did not want to go to trial but wanted to plead guilty. As stated above, Plea Counsel employed a valid strategy of choosing to work toward a plea agreement at Applicant's request rather than investigating this case to prepare it for trial. Therefore, because Applicant has failed to prove deficiency or prejudice, this allegation is denied and dismissed with prejudice.

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Failure to file a direct appeal

Applicant alleges that Plea Counsel was ineffective for failing to file a notice of appeal of his guilty plea. Plea Counsel credibly testified that she did not remember Applicant asking her to file an appeal, but if he had, she would have filed the notice of appeal. She stated that Applicant asked her to file a motion to reconsider, and she did, and successfully had his sentence reduced. Plea Counsel's practice is to discuss her client's right to file an appeal immediately following the guilty plea, and Applicant has failed to meet his burden of proving that he requested an appeal from Plea Counsel in this case. Therefore, this allegation is denied and dismissed with prejudice.

INVOLUNTARY GUILTY PLEA

Applicant argues his plea was not given freely and voluntarily. This Court finds otherwise and concludes that Applicant's plea was entered freely and voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). 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 court and defendant, between 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)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, statements made during a guilty plea should be considered

conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir. 1975).

Applicant claims his plea was given involuntarily because Plea Counsel misled him as to the sentence he would receive in exchange for his guilty plea. Applicant claims he was promised a three to five year sentence by Plea Counsel which he did not receive. This Court finds that this allegation is untrue. Applicant was never promised or offered a five year deal in exchange for his guilty plea, and there is absolutely no evidence in the record or the testimony presented to support his reliance on this idea. Plea Counsel credibly testified that Applicant understood going into the guilty plea that he could receive a sentence of up to fifteen years in prison. This Court finds that the record reflects that Applicant was fully advised of the rights he was giving up by pleading guilty. Applicant presented no credible evidence as to why he should be able to depart from his statements at the plea hearing. This Court finds very credible Plea Counsel's testimony that he advised Applicant of all facts and risks of pleading guilty, including the potential length of his sentence.

The record reflects Applicant fully admitted his guilt to the plea court. "A guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 129 (2014) (citing State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013); Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Notably the South Carolina Supreme Court has held "[a] guilty plea represents a break in the chain of events which has preceded it in the criminal process." Id. (citations omitted). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Id. (citing Rice, 401 S.C.

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at 332, 737 S.E.2d at 486). Therefore, this Court finds the plea judge correctly found Applicant's plea was freely, voluntary, and intelligently made. Accordingly, this allegation must be denied and dismissed with prejudice.

VI. 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.

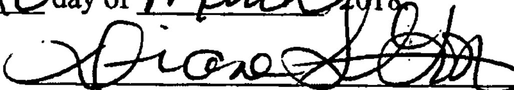
This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an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

IT IS THEREFORE ORDERED:

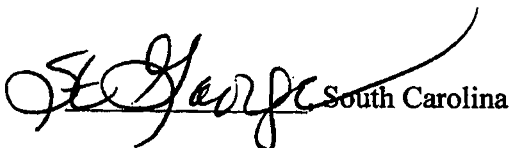
1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and

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

AND IT IS SO ORDERED this 20 day of March 2018.



DIANE S. GOODSTEIN
Presiding Judge
Second Judicial Circuit


South Carolina

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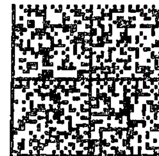

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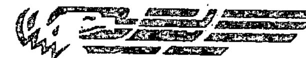

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Stitely & Brink, PC
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ı, SC 29071

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