

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2017-CP-42-00854

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MAY 09 2019
SC Court of Appeals

Scotty M. Brown, #257869,

Appellant,

v.


State of South Carolina,

Respondent.

NOTICE OF APPEAL

The Appellant, Scotty M. Brown, hereby appeals from the order of the Circuit Court, Hon. Grace Gilchrist Knie, presiding Judge, entered on March 20, 2019. On May 3, 2019, Appellant received written notice that his Motion for Reconsideration was denied.

May 7th, 2019


Richard W. Vieth S.C. Bar #5711
HENDERSON, BRANDT & VIETH, P.A.
360 East Henry Street, Suite 101
Spartanburg, South Carolina 29302
(864) 582-2962
Attorney for Appellant

Other Counsel of Record:

Assistant Attorney General Jacob A. Isenberg
SC Attorney General's Office
Rembert C. Dennis Building
1000 Assembly Street
Columbia, SC 29201
Attorney for Respondent

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM SPARTANBURG COUNTY
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Scotty M. Brown, #257869,

Appellant,

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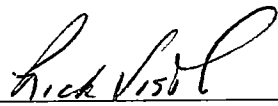
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S.C. SUPREME COURT

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on State of South Carolina by depositing a copy of it in the United States Mail, postage prepared, on the 7 day of May, 2019, addressed to its attorneys of record, Assistant Attorney General Jacob A. Isenberg, SC Attorney General's Office, Rembert C. Dennis Building, 1000 Assembly Street, Columbia, SC 29201

May 7th, 2019


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*Also licensed in North Carolina

Attorneys At Law

May 7, 2019

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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SC Court of Appeals

RE: **Scotty M. Brown v. State**
Case No.: **2017-CP-42-00854**

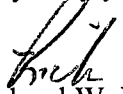
Dear Ms. Kitchings:

Enclosed for filing is the original Notice of Appeal, along with a Proof of Service, in the above case. I am including a self-addressed, stamped envelope for your use when forwarding me back a filed copy.

Also enclosed is a copy of the Order of Dismissal, Rule 59(e) Motion to Alter or Amend the Judgment and Order Denying Motion for Reconsideration.

Please do not hesitate to contact me should you have any questions.

Very truly yours,


Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
www.hbvlaw.com
RWV/kwh
enclosure

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cc: Office of Seventh Judicial Circuit Solicitor
Office of Attorney General
Office of Appellate Defense

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

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

Scotty M. Brown,
Applicant,

ORDER DENYING MOTION FOR
RECONSIDERATION

Civil Action Number(s): 2017-CP-42-0854

vs.

State of South Carolina,
Respondent.

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SC Court of Appeals

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PRESIDING JUDGE:
DATE OF HEARING:
PLAINTIFFS' ATTORNEY:
DEFENDANT'S ATTORNEY:
COURT REPORTER:

Grace Gilchrist Knie
March 20, 2019
Richard W. Vieth
Jacob A. Isenberg
Mike Watts

This matter was before The Court on March 20th, 2019, upon the Applicant's SCRCR Rule 59 Motion for Reconsideration regarding The Court's prior decision and order in this Post Conviction Relief matter.

Present at the hearing were Applicant, Applicant's Counsel Richard W. Vieth, of Henderson, Brandt and Vieth Law Firm, and Respondent's counsel, Jacob A. Isenberg of the SC Attorney General's Office. Having fully considered the matter, reviewed the record and notes regarding the hearing on the merits, the Motion for Reconsideration, the transcript of the hearing, all memoranda in support of all parties positions, and the arguments of counsel at the reconsideration hearing, the Court finds no basis upon which to modify The Court's prior decision. The Motion for Reconsideration of the Court's Decision is DENIED.

1 of 2 pgs

IT IS SO ORDERED.



The Honorable Grace Gilchrist Knie
Resident Judge, Seventh Judicial Circuit

May 3, 2019

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

)
) IN THE COURT OF GENERAL SESSIONS
) SEVENTH JUDICIAL CIRCUIT

Scotty M. Brown, #257869,
Applicant,
vs.

)
) **RULE 59(e) MOTION TO ALTER OR**
) **AMEND THE JUDGMENT**

State of South Carolina,
Respondent.

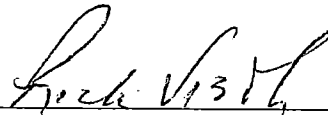
) **CASE NO.: 2017-CP-42-00854**
)
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)

The Applicant, Scotty Brown, #257869, by and through his attorney Richard Vieth, file this Rule 59(e) Motion to have a rehearing on the fact that the Applicant does not believe the Order accurately reflects the testimony. A copy of the transcript may be required.

The Defendant would respectfully request a hearing on this issue at the earliest convenience of the Court.

Respectfully submitted,

HENDERSON, BRANDT & VIETH, P.A.



RICHARD W. VIETH
ATTORNEY FOR THE APPLICANT
360 E. HENRY STREET, SUITE 101
SPARTANBURG, S.C. 29302-2646
PHONE: 864-582-2962 FAX:864-583-1894

DATE: 10/3/2018

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SC Court of Appeals

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M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

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

Scotty M. Brown, #257869)
Applicant,)

2017-CP-42-0854

v.)

State of South Carolina,)

Respondent.)

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SC Court of Appeals

ORDER OF DISMISSAL

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J. HOPE BLACKLEY

This matter comes before the Court by way of an application for post-conviction relief filed on March 16, 2017, by Mr. Scotty M. Brown (Applicant). Respondent made its Return on or about September 7, 2017, moving to partially dismiss the allegations by the Applicant and requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on June 22, 2018, at the Spartanburg County Courthouse in Spartanburg, South Carolina.

Applicant was present and represented by Richard W. Vieth, Esquire. Respondent was represented by Jordan A. Cox, Esquire, of the South Carolina Attorney General's Office. At the evidentiary hearing, Applicant testified on his own behalf. Applicant also called his mother, Annette Brown, and Ms. Debbytte Bush as witnesses. Respondent called Fletcher N. Smith, Jr., Esquire, and John C. Strickland, Esquire, as witnesses at the hearing. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies the application.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of confinement of the Spartanburg County Clerk of Court. In May 2014, the Spartanburg County Grand Jury indicted Applicant for two counts of distribution of heroin (2014-GS-42-1804, -1805). Applicant was subsequently indicted

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in September 2014 for trafficking in heroin (2014-GS-42-3942) and possession of cocaine, third offense (2014-GS-42-4458). Fletcher N. Smith, Jr., Esquire, and John Strickland, Esquire, represented Applicant. Assistant Solicitor Matthew Kendall represented the State.

On April 1, 2015, Applicant pleaded guilty as indicted to two counts of distribution of heroin, second offense (-1804 and -1805) before the Honorable J. Derham Cole. Pursuant to the State's recommendation, Judge Cole sentenced Applicant to concurrent terms of imprisonment for ten years for both counts. Applicant did not appeal his guilty pleas or sentences.

On August 25, 2015, pursuant to negotiation on the trafficking charge (-3942), Applicant pleaded guilty to the lesser included offense of distribution of heroin, third offense before Judge Cole. Pursuant to State's recommendation, Judge Cole sentenced Applicant to seventeen years' imprisonment to be served concurrently with his previous sentences. Applicant did not appeal his guilty plea or sentence.

On November 16, 2015, Applicant pleaded guilty as indicted to possession of cocaine, third offense (-4458) before the Honorable Roger L. Couch.¹ Pursuant to the State's recommendation, Judge Couch sentenced Applicant to imprisonment for ten years to be served concurrently with his previous sentences. Applicant did not appeal his guilty pleas or sentences.

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FACTUAL HISTORY

On two occasions, Officers with the Spartanburg County Narcotics Unit used a confidential informant ("C.I.") to purchase heroin from Applicant. On September 11, 2012, the C.I. was able to purchase approximately .44 grams of heroin directly from Applicant. On September 20, 2012,

¹ At this time, Applicant also pleaded guilty to possession of a weapon with an obliterated serial number (2014-GS-42-3943). Judge Cole sentenced him to five years' imprisonment to run concurrent to all other sentences. Applicant does not contest this guilty plea and sentence in his PCR application.

officers equipped the C.I. with a camera and the C.I. was able to successfully purchase .55 grams of heroin from Applicant. This was the factual basis for Applicant's guilty plea on April, 1 2015.

On April 17, 2014, officers with the Spartanburg County Narcotics Unit used a C.I. to purchase 4.94 grams of heroin from Applicant. This was the factual basis for Applicant's guilty plea on August 25, 2014. On July 2, 2014, officers with the Spartanburg County Narcotics Unit executed a search warrant at the address of 55 Shady Lane in Spartanburg County. The basis of the search was the prior purchases of heroin from Applicant. During the search of the home, Applicant was found in the proximity of a pistol, .57 grams of cocaine, and Xanax pills. Applicant entered a guilty plea on November 16, 2015, to the resulting charges of the search warrant execution.

ALLEGATIONS

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

1. Ineffective Assistance of Counsel
 - a. "My defense attorneys did not advise me of all of my rights or take any actions that were necessary to protect or preserve them, knowing that I was illiterate of the law."
 - b. "My defense attorneys never properly ascertained whether or not I actually understood or comprehended all of the issues that were involved in my case."
 - c. "Trial Counsel's ineffective in failing to fully apprise Applicant of the sentencing consequences of his guilty plea."
 - d. "Applicant would have insisted on going to trial, if it were not for counsel's acts and omissions."
 - e. "Applicant was denied a fair proceeding when counsel failed to place the State's agreements on the record."
 - f. "Counsel failed to object to allege lesser included offense."
2. "Involuntary Guilty Plea"
 - a. "Applicant was induced to pled guilty on all charges by the advice of both attorneys."

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SPARTANBURG COUNTY
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- b. "My defense attorneys coerced me into making a plea bargain on my charges when they had not done the necessary legal research or investigations into the merits of my cases prior to inducing me."
 - c. "Trial attorney's erroneous advice concerning parole eligibility rendered his guilty plea invalid."
3. "After Discovered Evidence"²
- a. "Parole projection date was rescinded on 2-1-17."
 - b. "Applicant specifically inquired about his parole eligibility."
 - c. "Both attorneys advised Applicant to plea to all charges which would be back dated to indict 2014101804-05 and remain parole eligible pursuant to an agreement."
 - d. "If this case was not back date and ran concurrent along with his parole eligibility, he would have insisted on going to trial."
 - e. "Trial counsel stated to applicant that he will remain parole eligible despite his conviction being added on. No procedural changes will occur."

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Applicant

At the evidentiary hearing, Applicant testified on his own behalf. Applicant testified that he was represented by Mr. Smith and Mr. Strickland during three guilty plea proceedings in 2015. Applicant testified that he received a parole eligibility date after pleading guilty on April 1, 2015. Applicant testified to his understanding of the parole process, including that his parole eligibility is not determined by the circuit court, his attorneys, or the solicitor's office.

Applicant testified that the original plan was to go to trial in August 2015 for multiple charges, but his attorneys worked out a favorable plea deal. Applicant testified that he decided to enter a guilty plea for the second time on August 25, 2015. Applicant testified that his attorney promised him his parole date would not change as a result of his pleas. Applicant testified he only became aware of the change in February 2017. Applicant testified that as a result of his second

² At the evidentiary hearing, Applicant indicated that he would not be proceeding with a claim of after discovered evidence, as his application was timely. Applicant's reasoning behind this allegation is more appropriate for a claim of ineffective assistance of counsel.

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plea, his max out date changed to the year 2030 and he no longer has a parole date.

Applicant admitted that he told each trial judge, during the plea colloquy, he was not promised anything in exchange for his plea. Applicant testified that he told each judge that he was being truthful during the plea. Applicant testified that he told each judge that he was not being pressured to enter a guilty plea for each of the charges against him. Applicant testified that he simply was doing what his lawyer's told him to do in order to protect his parole eligibility. Applicant testified that had he known his parole eligibility would have been effected, he would have continued on with the trial. Applicant testified that he never informed the court that he was promised parole, but that was in accordance with his attorney's advice. Applicant admitted that there was only a parole board that could determine his parole eligibility.

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Applicant's Mother

Applicant's mother, Annette Brown, testified on behalf of Applicant. She testified that was present at Applicant's trial that began on August 25, 2015, and that her son's attorney told her that pleading guilty to the charges would not effect his parole eligibility and his parole date would remain the same.

Applicant's Family Friend

Ms. Debbytte Bush, a friend of Applicant's family, testified on his behalf. Ms. Bush testified that she was at Applicant's August 25, 2015 trial and was scheduled to be a witness. She testified that she overheard Applicant's attorney tell Applicant's mother that his parole eligibility would not be effected by his guilty plea.

Mr. Fletcher M. Smith, Esq.

Mr. Fletcher M. Smith testified on behalf of Respondent. Mr. Smith testified that he has practiced law since 1979 and is very experienced in criminal law. Mr. Smith testified that he was



retained to represent Applicant along with Mr. John Strickland. Mr. Smith testified that when Applicant entered his first guilty plea, there was no recommendation from the State. During the second guilty plea, Mr. Smith testified that Applicant was facing life without parole at trial before accepting a plea offer of 17 years. There was no offer from the State in regards to a parole date. Mr. Smith testified that, as is his practice, he made no promises to Applicant. Mr. Smith testified that he never promised Applicant or his family anything in regards to parole eligibility, but he did promise to attempt to win at trial. Mr. Smith testified that it was Applicant's decision to enter a guilty plea. Mr. Smith testified that he is unable to make promises of parole to his clients, since that is a decision solely left up to the parole board.

Mr. John Strickland, Esq.

Mr. John Strickland testified on behalf of Respondent. Mr. Strickland testified that he has worked in criminal law for over ten years. Mr. Strickland testified that he has never promised a client anything in regards to parole eligibility. Mr. Strickland was retained to represent Applicant before his first guilty plea. Mr. Strickland testified that Applicant was facing a ten year sentence during the first plea, but was facing life without parole in August 2015. Mr. Strickland testified that the only promise made by the State in regards to his prior guilty plea was that the sentences of all pleas would run concurrent. Mr. Strickland testified that Applicant was told this would still only be a recommendation to the judge and Applicant was never promised anything about his parole eligibility. Mr. Strickland testified that Applicant plead guilty to avoid a possible life sentence at trial. Mr. Strickland testified that he was in the room with Applicant's family and Mr. Smith prior to Applicant's second guilty plea. Mr. Strickland testified that during this meeting, nothing was ever discussed about Applicant's parole eligibility.

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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. This Court has considered Applicant's Motion to Supplement the Record, filed August 3, 2018. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

Ineffective Assistance of Counsel

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

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performance by its “reasonableness under professional norms.” Id. (quoting Strickland, 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, an 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 (1985).

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden of proof and has not established any ineffectiveness of counsel. Below are the findings in regards to each specific allegation of ineffective assistance of counsel raised by Applicant:

Applicant alleges his defense attorneys did not advise him of the consequences of pleading guilty to his charges and the possible changes to his parole eligibility. Applicant further alleges that he was prejudiced by his attorneys’ representation, as he would not have plead guilty had he known he would not be eligible for parole. The record clearly refutes this allegation. During all three guilty plea proceedings, the trial judge explained Applicant his constitutional rights and that entering a guilty plea would give up those rights. Applicant, under oath, proclaimed at all three proceedings that he understood his rights and that he still wished to enter a guilty plea. During the evidentiary hearing, Applicant’s attorneys testified credibly that it was Applicant’s decision to enter a guilty plea. Applicant has failed to meet his burden of proof. This allegation is denied and dismissed with prejudice.

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Involuntary Guilty Plea

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, 654 S.E. 2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). An applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness. Porter v. State, 368 S.C. 378, 629 S.E. 2d 353 (2006). 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 (1969); Roddy v. State, 339 S.C. 29 (2000).

Applicant alleges his guilty plea was not knowingly and voluntarily made. Applicant also alleges his guilty plea was not made with a complete understanding of the nature of the charges and the inadequacies of the plea potential. This Court finds the record supports Applicant's plea was made knowingly, voluntarily and upon the sound advice from Counsel. The underlying facts to the crime are overwhelming to establish Applicant's guilt of the offenses to which he pled. His attorneys appeared credible when testifying during the evidentiary hearing. The transcript of the plea hearing is thorough as to Applicant's understanding of his right to a trial and his willingness to forgo the trial. Specifically, the Transcript of Record shows that the Judge, during all three guilty plea proceedings, questioned Applicant extensively regarding his willingness to enter the guilty plea, his understanding of the guilty plea, and the potential sentence of pleading guilty. Therefore, the Applicant has failed to meet his burden of proof. This allegation is denied and dismissed with prejudice.



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CONCLUSION

Based on all the foregoing, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, the allegations are denied and dismissed with prejudice.


This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record 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 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. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 20 day of August

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SPARTANBURG COUNTY
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M. HOPE BLACKLEY



GRACE G. KNIE
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483



Phone (864) 596-2591
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Scotty M. Brown
Applicant #207869

7TH JUDICIAL CIRCUIT

CASE # 2017-CJ-42-854

vs
Hale
Respondent

CERTIFICATE OF SERVICE

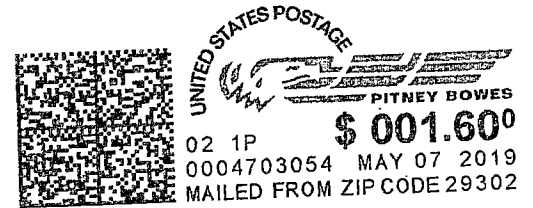
I certify that, on this date, I served a copy of the Order of Dismissal
In this action dated 8-20, 2018 on 8-21-18

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Megan Jamison
Richard Veth

8-21-18
(Date)

Colleen Feag
(Signature)



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S.C. SUPREME COURT

**Henderson
Brandt &
Vieth, P.A.**

SUITE 101
360 EAST HENRY STREET
SPARTANBURG, SC 29302

— Attorneys At Law —

TO:

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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SC Court of Appeals

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