STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

Honorable Brian M. Gibbons, Circuit Court Judge

JAKEIVAN A. PULLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000371

SUPPLEMENTAL APPENDIX

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JANELL GREGORY
Assistant Attorney General
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

INDEX

Re: 2014-CP-30-0138

Dear Clerk,

Would you please stamp-date and file both copies of my PCR amendments and forward the extra copy back to me.

I am thanking you in advance for your time and efforts in this matter.

I, Jakevian A. Pulley #344247 certify under the penalty of perjury that the foregoing is true and correct.

Jakevian Pulley 344247

6/29/16

LYNN W. LANCASTER
2016 JUL -1 A 10:09
LAURENS COUNTY
CLERK OF COURT

RECEIVED
JUN 29 2016
P.C.I. MAILROOM

2

State of South Carolina) In the Court of Common Pleas
LYNN W. LANCASTER
County of Laurens) 2014-CP-30-0138

Jakevian A. Pulley, #344247) AMENDMENTS TO ORIGINAL
Applicant,) P.C.R. APPLICATION
2016 JUL -1 A 10:09
v.)

State of South Carolina) LAURENS COUNTY
Respondent.) CLERK OF COURT

The applicant in the above entitled case respectfully request to Amend his Original PCR Application that was filed on February 19, 2014 in the Laurens County Clerk of Court's office.

Attached and enclosed are the following amendments:

LEGAL CITATION

The applicant allege and can prove that he was denied effective assistance of counsel. The applicant submits that the extensive trial transcript record speaks for itself as to the competency of counsel. Trial counsel and appellate counsel was not diligent in their representation of the applicant and did not perform well within the range of competence demanded of attorneys in criminal matters and did not perform within the wide range of reasonable professional assistance.

In Strickland v. Washington, 466 U.S. 668, the United States Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial, 104 S.Ct. 2064. The applicant submits that counsel's performance was deficient and his performance prejudiced him.

Counsel's performance prejudiced the applicant to the point where there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The applicant is requesting an evidentiary hearing and a new trial.

ANSWER TO QUESTIONS #10 & #11 ON PCR APPLICATION.

Due Process Violation

- Trial counsel failed to object to the Due Process violation that the state committed.

- Trial counsel failed to produce the co-defendant's plea transcript.

- Counsel was ineffective for failure to argue applicant's Due Process rights pertaining to Rule 3(b), 3(c).

- Trial counsel failed to challenge/move to suppress my co-defendant's involuntary statement.

- Trial counsel failed to properly challenge my co-defendant's pre-arranged plea agreement with the state.

- Trial counsel failed to request a jury charge of the lesser included offense.

- Trial counsel was ineffective for failing to object to introduction of the evidence seized pursuant to the unlawful search.

- Trial counsel was ineffective for failing to object to the pictures introduction.

- Trial counsel failed to request a mental competence hearing/evaluation which denied applicant due process of law.

Due Process Violation

Trial Counsel Failed To Object To The Due Process Violation That The State Committed.

During trial and prior to Robinson's testimony, Pulley moved to exclude the testimony based on the fact that the state failed to disclose that Robinson was allowed to plead guilty to misprison of a felony and given a probationary sentence in exchange for his cooperation, in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194. (R. p. 186-188; p. 197, lines 3-23). It appears that on July 20, 2011, Robinson waived presentment of the indictment to the grand jury and pled guilty to misprison of a felony. (R. p. 189, lines 10-p. 190, lines 1-17). During a proffer offered by Pulley, Robinson was asked if he was testifying because of any offer made by the prosecution. (R. p. 182, lines 11-15).

The state denied the existence of a deal and stated. "I'm aware of nothing, your Honor. If there was anything, it would have been an informal vocal agreement, oral agreement that would comeback and testify for us. I'm not even aware of that. (R. p. 190, lines 7-10). The attorney who represented Robinson at the guilty plea was questioned during the proffer about the existence of a deal. (R. p. 192 lines 17-19). Robinson's attorney testified, I mentioned that he would [Robinson] cooperate and I told him that he may be called as a witness in this case. (R. p. 192, lines 21-25).

The judge denied the motion to exclude Robinson's testimony based upon public knowledge. Obviously there was a deal in place for Robinson to testify for probation. Trial counsel failed to secure the necessary documents/records to prove that the State hid the fact that Robinson's testimony was bought.

The suppression by the prosecution of evidence favorable to an excused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Brady, 373 U.S. at 87, 83 S.Ct. at 1196-97. Brady 373 U.S. at 87, 83 S.Ct. at 1196-97. Brady applies to impeachment evidence as well as exculpatory evidence. State v. Von Dohlen, 322 S.C.

234, 241, 471 S.E.2d 689, 693. However, Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, as in the case at bar. See, State v. Penland, 273 S.E.2d 765, 766.

Under Brady the test is not whether the solicitor failed to reveal the information, but whether the omission deprived the defendant of a fair trial. Frodella v. Town of Mount Pleasant, 325 S.C. 469, 479, 482 S.E.2d 53, 58 the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense. A defendant shows a Brady violation as in the case at bar by demonstrating that favorable evidence could have been presented to put the whole case in such a different light as to undermine confidence in the verdict.

The evidence of an agreement with Robinson in exchange for his cooperation in Pulley's trial was favorable to the accused, was known by the prosecutor, was not disclosed by the state and was impeaching. The knowledge of an agreement between the state and Robinson was in the exclusive control of the state. Pursuant to Brady, the state had a duty to disclose the agreement. The failure to disclose constitutes a due process violation. Robinson's testimony should have been objected to and suppress, based upon the Brady violation.

Trial Counsel Failed To Produce The Co-Defendant's Plea Transcript.

By the time of the trial, the applicant's co-defendant Robinson had already pled guilty, Robinson offered to turn state's witness in return for a lenient sentence. (App. p. 664 2-24). Evidence was proffered at the applicant's trial, both by Robinson's attorney and a Eighth Circuit solicitor, regarding Robinson's plea and any potential deals involved.

Instead of requesting a copy of Robinson's plea transcript, trial counsel failed to challenge the co-defendant's plea with accurate proof from Robinson's plea hearing. It is a reasonable probability that had counsel supplied the Court with a proof of a deal by Robinson, there is a reasonable probability that

the outcome of the applicant's jury trial would have been different.

The applicant was denied a fair trial by the act and omissions of trial counsel.

Counsel Was Ineffective For Failure To Argue Applicant's Due Process Rights Pertaining To Rule 3(b), 3(c).

In accordance with Rule 3(b) and Rule 3(c) of the S.C. Rules of Criminal Procedure, an arrest warrant must be transferred to the solicitor within 2 days from receipt from the issuing official and the accused must be indicted within 90 days of a warrant being issued. The applicant was served with a warrant and an indictment which was not served within 90 days and therefore, the indictments should have been dismissed. Trial counsel did not properly address and follow through with the issue of the dismissal of the indictment and therefore was ineffective in his representation of the applicant in the trial of the matter. Therefore this Court should grant relief.

As additional authority not previously mentioned, applicant cites, State v. Jane Blackwell, indictment for obstruction of justice Greenwood County Court of General Sessions Order of Judge Wyatt T. Saunders dated March 3, 2008, dismissing charge because the State failed to comply with Rule 3 of the criminal practice which dictates the state has 90 days to indict once a warrant is issued.

Exceptional circumstances exists because this Court should consider the case of State v. Jane Blackwell, Greenwood County Court of General Sessions Order - Equal Protection of the Law. The applicant was grievously prejudiced by the solicitor's negligence in not taking action on the arrest warrant.

There is a reasonable probability that the outcome would have been different had trial counsel challenged Rule 3(c).

Trial Counsel Failed To Challenge/Move To Suppress My Co-Defendant's Involuntary Statements.

Statements are inadmissible at trial when they are made involuntarily. State v. Franklin, 299 S.C. 133, 382 S.E.2d 911

(1989). A statement is made involuntarily when it is induced by a promise of leniency. State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987).

Trial Counsel Failed To Properly Challenge My Co-Defendant's Pre-Arranged Plea Agreement With The State.

The deliberate deception of a court and jurors by the presentation of evidence known to be false violates the Fourteenth Amendment. The same result obtains when the state/solicitor, although not soliciting false evidence, allows it to go uncorrected when it appears. Giglio v. United States, 405 U.S. 150. In other words, the state cannot create a materially false impression regarding the facts or the credibility of the witness.

Prosecutor's falsehood alone do not automatically entitle a petitioner to relief. Relief is compelled when the false impressions are material, which means when there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. United States v. Agurs, 427 U.S. 97, 103; Napue v. Ill., 360 U.S. 264; Mooney v. Holohan, 394 U.S. 103; Campbell v. Reed, 594 F.2d (4th Cir.). The record will suggest a reasonable likelihood that during deliberations the jurors considered the false evidence or plea deal. This does not entail an inquiry into whether the evidence might have made a difference in the outcome if it had not been considered. There is a reasonable probability that the outcome would have been different had trial counsel properly argued with the necessary documents to show that there was in fact a deal that was not brought to light. Applicant was denied a trial.

Trial Counsel Failed To Request A Jury Charge Of The Lesser Included Offense.

Trial Counsel's actions prejudiced the applicant and unduly subjected him to federal law violations. The applicant in the entitled case was not identified as one of the robbers. In Keeble v. United States, 412 U.S. 205, 93 S.Ct. 1993. The Supreme Court stated although the lesser included offense doctrine developed at common law to assist the prosecution in cases where the

evidence failed to establish some element of the offense originally charged, it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater. Sansome v. United States, 380 U.S. 343 85 S.Ct. 1004, Berra v. United States, 351 U.S. 131 76 S.Ct. 685. Petitioner/Applicant should have been granted a lesser charge to the jury.

In Stevenson v. United States, supra, The U.S. Supreme Court ruled that where some of the elements of the crime charged themselves constitute a lesser crime if the evidence justified it, would no doubt be entitled to an instruction which would permit a finding of guilt of the lesser offense. See, Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154. The absence of a lesser included instruction increases the risk that the jury will convict...simply to avoid setting the defendant free. The goal of the "Beck Rule" in other words is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all or nothing choice between capital murder and innocence. See, Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382.

Applicant asserts that the failure of trial counsel to request a jury instruction of the lesser included offense not only subjected him to due process rights violations under the 14th Amendment, but also clearly subjected him to equal protection rights violation under the 5th Amendment of the U.S. Constitution. As the result of the S.C. Supreme Court's ruling and mandates in State v. Heyward, supra; State v. Lambright, supra and State v. Drafts, supra, the very same constitutional equal protection rights should have been afforded to the applicant.

Applicant asserts he was denied a substantial constitutional right of effective assistance of counsel in violation of the 6th amendment of the U.S. Constitution.

Trial Counsel Was Ineffective For Failing To Object To Introduction Of The Evidence Seized Pursuant To That Unlawful Seizure.

The Applicant relies heavenly on 4th amendment precedent

to contend that his arrest was illegal. The State of South Carolina is free to provide its citizens with a greater degree of protection than that guaranteed by the Federal Constitution. California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 3460. See the clear language of South Carolina's law governing warrantless arrests.

This State's law is explicitly clear on the authority of a police officer to make a warrantless arrest. See §17-13-30 (violate any of the criminal laws of this State if such arrest be made at the time of such violation of law or immediately thereafter. Section §17-13-30 is further buttressed by the requirements of §23-13-60, which clearly holds that:

> The deputy sheriffs may for any suspected freshly committed crime, whether upon view or upon prompt information or complaint, arrest without warrant and, in pursuit of the criminal or suspected criminal, enter houses or break and enter them, whether in their own country or in an adjourning county.

See, State v. Martin, 275 S.C. 111, 268 S.E.2d (1980) (holding that §17-13-30 must be construed in light of §23-13-60). Both of these statutes employ terms such as "freshly committed," "immediately thereafter" and "upon prompt information or complaint", indicating that the Legislature stressed the immediacy of events necessary for a warrantless arrest. It did not authorize law enforcement to conduct warrantless arrest long after the commission of a crime, as in the case here. Where a crime can no longer be considered "freshly committed", law enforcement must obtain a warrant in order for the arrest to be valid.

Here, the store was robbed by three people around nine o'clock p.m. on April 24, 2011. The police were contacted and arrived 15 minutes later. Not long after arriving at the store, the Respondent's co-defendants had been apprehended. The question now becomes whether the robbery constituted a freshly committed crime or whether the extended period of time between the robbery and the arrest rendered the crime stale.

The record in this case demonstrates that the applicant was arrested without a warrant in contradiction of South Carolina law. The clothing seized by law-enforcement where the applicant

was booked into the detention center was a direct product of this unlawful arrest. This evidence was the most damaging evidence presented by the prosecution during the applicant's trial. By failing to object to the introduction of this evidence, applicant was denied a fair trial.

Trial Counsel Was Ineffective For Failing To Object To The Pictures Introduction.

Nothing in the record shows that law enforcement had probable cause to search the applicant's cell phone for the pictures that were used to convict him. The 4th amendment provides that no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. These fundamental protections are applicable to the states through the Fourteenth Amendment. Stanford, 379 U.S. at 481, Wolf v. Colorado, 338 U.S. 25, Map v. Ohio, 81 S.Ct. 1684.

The affidavit in support of the search warrant in question states that the applicant and co-defendants:

> conspired and did rob at gun point the Guatemex store located at 1105 N. Harper St., in the City limits of Laurens, S.C.. The subjects touched items in the store and all three suspects had cell phones on their person at the time of arrest and it is believed that the three may have had conversations on their cell phones before and or after the robbery between themselves and or others.

Nothing in this affidavit indicates any information whatsoever supporting a probable cause to seize pictures from the applicant's cell phone. There is nothing in the affidavit that demonstrates that the affirming officer Leann Riggott, even knew of the pictures in question much less that they were evidence of the crime in question. Instead, it merely states that conversations were made by the suspects. Rigott testified that the only knowledge she had of the cell phone being used in connection with the robbery was limited to applicant and a co-defendant texting one another. Law enforcement was unaware that these incriminating pictures even existed until the applicant's phone was searched. The complete lack of probable cause supporting seizure of these pictures is so bare on the face of the search warrant and application that even a reasonably

trained officer could not reasonably rely on the affidavit. U.S. v. Leon, 468 U.S. 897, 923 quoting Brown v. Illinois, 422 U.S. 590, 6 10-11 (Powell, J, concurring in part.

Instead, the pictures in question were seized from the applicant's phone were used to connect him to the robbery. This gun was never recovered despite law enforcement finding numerous other items located at Laurens Terrance allegedly taken from the store. Had trial counsel objected to the introduction of the pictures, there is a substantial likelihood that the result of the trial would have been different. Applicant was denied a fair trial.

Patrick Durkin was proffered as an expert witness by the state for the purpose of testifying that the gun in the pictures taken from the Respondents phone was the same gun depicted in the Guatemex surveillance footage - See testimony of Patrick Durkin (App. p. 254-360).

Trial Counsel Was Ineffective For Calling/Allowing Diana Melendez To The Stand Without Previously Investigating Her Testimony.

It was both error and prejudice for trial counsel to have called Diana Melendez to testify in the applicant's case in chief.

Melendez was an eye-witness to the allege robbery and personally observed both robbers. Never having even spoken to Melendez prior to calling her as a witness, trial counsel called her to the stand for the purpose of testifying that Pulley was the gunman. Trial counsel failed to object. Melendez testified while incriminating the applicant Pulley.

At a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. There was no investigation into the witness Melendez, counsel failed to object and he never spoke to her before allowing her to be put on the stand. This was not trial strategy, it was a gamble and the applicant lost. Applicant was denied a fair trial.

Trial Counsel Failed To Request A Mental Competency Hearing/Evaluation Which Denied Him Due Process Of Law.

The applicant in the referenced case gave his attorney information about his childhood. Mental competency became a issue because of the prior treatment and medication that he was taking. Trial counsel refused to request a mental evaluation which denied him due process and procedural due process of law.

When a criminal defendant's mental capacity is questioned and the trial attorney has reason to believe that the applicant is not fit to stand trial because the person lacks the capacity to understand the proceeding against him or to assist in his own defense, upon request the judge shall:

1. Order examination of the person by two eaminers designated by the Dept. of Mental Health.

2. Order the person committed for examination and observation to an appropriate facility of mental health or Dept. of Disibilities and Special need.

In applicant's case, defense counsel's representation alone should have invoked S.C. Code §44-23-410. Counsel was in a unique position to evaluate applicant's ability to assist him, since that entailed frequent conversation and interaction. Defense counsel's concern about applicant's mental capacity was additionally supported by the uncharacteristic nature of the charge. Applicant had a relatively clean criminal record when he was arrested. The prosecution would have suffered no harm from a mental examination if trial counsel would have requested an examination well before his hearing/trial.

In Medina v. Singletary, 116 S.Ct. 2505, Due Process [also] requires that a hearing be held whenever evidence raises a sufficient doubt about the mental competency of an accused to stand trial. This procedural competency principle operates as a safeguard to ensure that the substantive competency principle is not violated. Claims involving these principles raise similar but distinct issues, the issue in a substantive claim is whether the defendant was in fact competent to stand trial, but the issue in a procedural competency claim is whether the trial court should have conducted a competency hearing. See. Sheley v. Singletary, 955 F.2d 1434, 1438; United States v. Day, 949

F.2d 973, 982. A denial of either of these rights as in the case at bar should proved the basis for relief. Weisberg v. Minnesota, 29 F.3d at 1276.

Applicant have made a substantive competency claim by alleging he was tried and convicted while mentally incompetent. Due Process prohibits the conviction of a person who is mentally incompetent. Bishop v. U.S., 350 U.S. 961, 76 S.Ct. 44, 100 L.Ed 835, Godines v. Moran, 509 U.S. 389, 113 S.Ct. 2680, Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, Jeter v. State, 417 S.E.2d 594.

Trial counsel knew that sanity was an issue that should have been fully addressed. Mental alertness and understanding displayed by the applicant in colloquies with the trial court did not justify ignoring applicant's history with his attorney's pronounced irrational behavior, while the applicant's demeanor at the plea hearing might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to forgo a hearing on that very issue. Bishop, 350 U.S. 961, 76 S.Ct. 440.

Applicant's constitutional rights were abridged by his failure to receive an adequate hearing on his competence to stand trial. See, Cooper v. Oklahoma, 517 U.S. 348, 116 S,Ct. 1373 (1996) and Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896.

In Pate v. Robinson, 383 U.S. 375 the court held the failure to observe procedures adequate to protect a defendants right not to be tried and convicted while incompetent to stand trial deprives him of his due process right to a fair trial.

Counsel's performance was deficient and that deficient performance prejudiced his defense.

14

State of South Carolina) Court of Common Pleas
)
County of Laurens) 2014-CP-30-0133

LYNN W. LANCASTER

Jakevian A. Pulley, #344247,)
Applicant,) CERTIFICATE OF SERVICE

2016 JUL -1 A 10:09

v.)
)
State of South Carolina,)
Respondent.)

LAURENS COUNTY
CLERK OF COURT

The applicant in the above entitled case certify that he have served a copy of his PCR amendments on the Respondents by placing a copy in the Perry mailroom hands for mailing postage prepaid addressed as follows:

Office of Attny. General
P.O. Box 11549
Columbia, S.C. 29211

Laurens County Clerk
P.O. Box 287
Laurens, S.C. 29360

I, Jakevian A. Pulley, #344247, certify and verify under the penalty of perjury that the foregoing is true and correct.

344247
Jakevian A. Pulley, #344247

6/29/16

This __, Day of July 2016,

at Pelzer, South Carolina.

RECEIVED
JUN 29 2016
P.C.I. MAILROOM

STATE OF SOUTH CAROLINA

CITY OF LAURENS

SUMMARY COURT SUMMONS

You are hereby summoned to be and appear personally in the **LAURENS MUNICIPAL COURT, 250 WEST LAURENS STREET, LAURENS, SC 29360** on **MAY 17, 2011 at 11:00 AM** for a Preliminary Hearing in the case of **THE STATE OF SOUTH CAROLINA vs. JAKEIVAN ARTEVIUS PULLEY**, Case Number: **I-284958** in the Offense of **CONSPIRACY TO COMMIT ARMED ROBBERY** and **I-284954** in the Offense of **ARMED ROBBERY.**

IF A PUBLIC DEFENDER IS TO REPRESENT YOU AND YOU HAVE NOT APPLIED FOR ONE, YOU MUST APPLY FOR ONE AT THE CLERK OF COURT'S OFFICE IMMEDIATELY.

HEREIN FAIL NOT, ON PAIN OF FORFEITING THE LAWFUL PENALTY IN SUCH CASE MADE AND PROVIDED.

Leesa Inabinet

Leesa W. Inabinet, Judge
Laurens Municipal Court
201 West Main Street, Suite B
Laurens, SC 29360
Phone (864) 681-2353
Fax (864) 984-5054

Courtesy Copies:

JAKEIVAN ARTEVIUS PULLEY.....Defendant

DET. LEANN RIGGOTT.....Officer

GUATEMEX STORE.....Victim

MAY 06, 2011

PETITIONER'S EXHIBIT 1 10-16-18

A True Copy
Of The Original
Recorder, Laurens City

Lynn W. Lancaster
Laurens County Clerk of Court
P.O. Box 287
Laurens SC 29360
(864) 984-3538

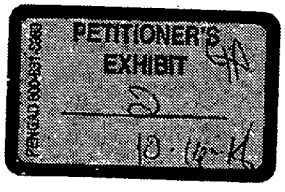
MEMO - LETTER

Date: November 13, 2014

To: Jakevian Pulley, # 344247

RE: Letter dated Nov. 10, 2014

We have looked through your case file and do not find a request for preliminary or the results of a preliminary hearing. The probation violation matter will have to be dealt with by the probation office. This office has nothing to do with any probation matter. Exhibits are released only from this court to another court in the case of a pending action. By our records, your appeal was dismissed and therefore, no pending actions exist.



SCARLET B. MOORE, ESQ.
Attorney at Law
P.O. BOX 17615
GREENVILLE, SC 29606
(864) 980-3457
(864) 752-0930 (FAX)

July 15, 2011

Jakevian Pulley
c/o Laurens County Detention Center
P.O. Box 329
Laurens, SC 29360

RE: State v. Pulley

Dear Mr. Pulley,

I received a telephone message yesterday on your behalf, requesting a visitation with you. I am going out of town tomorrow until July 26, 2011. I will schedule a visit during the week when I return. I have enclosed the discovery that I received from the State in your case. We can discuss the case further when I return the week of July 26, 2011. With kind regards, I remain

Very Truly Yours,

Scarlet B. Moore Esq

Scarlet B. Moore, Esq.

SBM/s

Enclosure

scarlet28@msn.com

2002-10-23-01

The Supreme Court of South Carolina

RE: Filing Indictments With the Clerk of Court

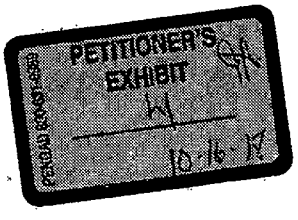
ORDER

Rule 3(c), SCRCrimP, requires solicitors to file indictments with the Clerk of Court. In some counties, solicitors are retaining the original indictments which have been returned by the grand jury until the proceedings are concluded. This local practice leads to problems and confusion in some cases. Accordingly, effective the date of this order, all original indictments which have been returned by the grand jury shall immediately be filed with the Clerk of Court.

IT IS SO ORDERED

s/Jean Hoefer Toal
Jean Hoefer Toal, Chief Justice

Columbia, South Carolina
October 23, 2002



10 CP 8638

STATE OF SOUTH CAROLINA

County/Municipality of LAURENS

SEARCH WARRANT

Date 04/27/2011

Officer DET SGT. LEANN RIGGOTT

000000000105

Date Printed: 04/27/2011 09:33:18 AM

STATE OF SOUTH CAROLINA }
COUNTY OF LAURENS }

SEARCH WARRANT

Form Approved by
S.C. Attorney General
Section 17-13-160
March 15, 1978

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY OF LAURENS:

It appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

THE PERSON OF DAVORIS TANYATA SMILEY WHO IS CURRENTLY IN THE LAURENS COUNTY JAIL AND SAMSUNG T MOBILE CELL PHONE BELONGING TO DAVORIS TANYATA SMILEY

Now, therefore, you are hereby authorized to search the subject premises for the property described below, and to seize such property if found:

DESCRIPTION OF PROPERTY

BUCCAL SWAB FROM DAVORIS T. SMILEY AND BLUE SAMSUNG T MOBILE CELL PHONE TO INCLUDE ALL INFORMATION ON CELL PHONE NOT LIMITED TO ALL CALLS (INCOMING AND OUTGOING) , TEXT MESSAGES (INCOMING AND OUTGOING) , CONTACTS, AND PHOTOS

This Search Warrant shall not be valid for more than ten days from the date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to

JUDGE PAUL D LYLES

within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such search if practicable, and, if not, to such person as soon thereafter as is practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to a prominent place on such premises.

Laurens, S.C.
4-27-11

Signature of Judge (L.S.)

SCAA/513
(3-78)

Date Printed: 04/27/2011 09:33:18 AM

A. P 2

STATE OF SOUTH CAROLINA }
COUNTY OF LAURENS } AFFIDAVIT

Personally appeared before me, one LEANN RIGGOTT who, being duly sworn, says that there is probably cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

BUCCAL SWAB FROM DAVORIS T. SMILEY AND BLUE SAMSUNG T MOBILE CELL PHONE TO INCLUDE ALL INFORMATION ON CELL PHONE NOT LIMITED TO ALL CALLS(INCOMING AND OUTGOING), TEXT MESSAGES (INCOMING AND OUTGOING), CONTACTS, AND PHOTOS.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED

THE PERSON OF DAVORIS TANYATA SMILEY WHO IS CURRENTLY IN THE LAURENS COUNTY JAIL AND SAMSUNG T MOBILE CELL PHONE BELONGING TO DAVORIS TANYATA SMILEY

REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

ON 04/24/2011 DAVORIS T. SMILEY ALONG WITH JAKEIVAN FULLEY AND LAKASION ROBINSON CONSPIRED AND DID ROB AT GUNPOINT THE GUATEMEX STORE LOCATED AT 1105 N. HARPER ST IN THE CITY LIMITS OF LAURENS, SC. THE SUBJECTS TOUCHED ITEMS IN THE STORE AND ALL THREE SUSPECTS HAD CELL PHONES ON THEIR PERSON AT THE TIME OF ARREST AND IT IS BELIEVED THAT THE THREE MAY HAVE HAD CONVERSATIONS ON THEIR CELL PHONES BEFORE AND OR AFTER THE ROBBERY BETWEEN THEMSELVES AND OR OTHERS.

Sworn to and Subscribed before me
this 27th day of April 2011.
Leisa Drakeford (L.S.)
Signature of Judge

Affiant

Address 250 W LAURENS ST
LAURENS SC 29360

Phone 864-984-3532

Date Printed: 04/27/2011 09:33:18 AM

W P3

22.

RETURN

I received the attached Search Warrant 4-27-11, and have executed it as follows:

On 4-27-11 at 2:05 o'clock pm, I searched

(the person) described in the warrant and (the premises)

I left a copy of the warrant with Dawns Smiley
Name of person searched or "at the place of search" with.
Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:
Blue Samsung Tmobile cell Phone

This inventory was made in the presence of _____

AND _____

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this _____
day of _____, _____.

_____ (L.S.)
Signature of Judge

_____
(Signature of Officer Executing Warrant)

Date Printed: 04/27/2011 09:33:18 AM

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THE STATE OF SOUTH CAROLINA
OFFICE OF THE SOLICITOR
EIGHTH JUDICIAL CIRCUIT

State's Offer for Plea Agreement

Defendant: **JAKEIVAN PULLEY**

Date of Offer: **JUNE 10, 2011**

Counsel for Defendant:

Offer Expires: **AUGUST 19, 2011**

Solicitor: **Ronald N. Fleming**

	Warrant/ Indictment #	Charge	Recommended Sentence	Restitution
☒ Plea ☐ NP	I-284954	ARMED ROBBERY	10 YRS	$ AS DOCUMENTED
☒ Plea ☒ NP	I-284958	CRIMINAL CONSPIRACY	5 YRS CONCURRENT WITH ABOVE	$
☐ Plea ☐ NP				$
☐ Plea ☐ NP				$
☐ Plea ☐ NP				$
☐ Plea ☐ NP				$
☐ Plea ☐ NP				$
☐ Plea ☐ NP				$
			Total Restitution =	$

Comments:

STATE OF SOUTH CAROLINA COUNTY OF LAURENS	IN THE COURT OF COMMON PLEAS FOR THE EIGHTH JUDICIAL CIRCUIT
Jakeivan A. Pulley, #344247, Applicant, v. State of South Carolina, Respondent.	2014-CP-30-0138 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed on February 19, 2014, by Jakeivan Pulley ("Applicant"). The State ("Respondent") filed a Return on June 16, 2014, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on October 16, 2018, at the Greenwood County Courthouse. Applicant was present at the hearing and represented by Carson Henderson, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf. Scarlett Moore, Esquire, ("Counsel") also testified. 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 this application.

I. PROCEDURAL HISTORY

The records before this Court establish Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Laurens County Clerk of Court's order of commitment. During the July 2011 term, the Laurens County Grand Jury indicted Applicant for armed robbery (2011-GS-30-1057) and criminal conspiracy (2011-GS-30-1058). Counsel represented Applicant. Assistant Solicitors Warren Mowry and Rosemerry Fielder-Commander of the Eighth Circuit Solicitor's Office prosecuted the case.

On February 28, 2012, Applicant proceeded to a jury trial before the Honorable Roger L. Couch. After a three day trial, the jury found Applicant guilty as indicted. Judge Couch sentenced Applicant to imprisonment for twelve years on the armed robbery charge and a concurrent five years for the criminal conspiracy charge.

A timely notice of appeal was filed on Applicant's behalf and an appeal was perfected pursuant to Anders v. California, 386 U.S. 783 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction by written order. State v. Pulley, Op. No. 14-UP-008 (S.C. Ct. App. Filed January 8, 2014). The Remittitur was issued January 27, 2014.

II. SUMMARY OF FACTS

On April 24, 2011, Applicant and two co-defendants planned and executed an armed robbery of the Guatemex store in Laurens County. Anna Sebastian ("Victim") was working as the clerk in her brother-in-law's store on that date and testified at trial that Applicant came into the store about 8:45p.m. on April 24th. (Trial Tr. 88.) Victim testified Applicant asked if he could buy something for one dollar in the store. (Trial Tr. 89.) Victim sent her niece to show Applicant where he could find a soda for less than a dollar. (Trial Tr. 89.) Applicant provided Victim with payment and he left the store. (Trial Tr. 89-90.) A few minutes later, a woman came into the store to send money. (Trial Tr. 90.) While she was sending money, Applicant and one of his co-defendant's entered the store brandishing a gun and demanded all of the money the woman was sending. (Trial Tr. 90.) Victim testified she recognized Applicant during the robbery as the same man that had come in earlier and purchased a soda. (Trial Tr. 90.) Victim testified she recognized Applicant even though he had covered his mouth covered during the robbery. (Trial Tr. 90.) Victim also testified Applicant and his co-defendant made her open the cash register and she complied. (Trial Tr. 92.) Victim testified both Applicant and co-defendant took money from the

cash register after she opened it. (Trial Tr. 92.) Victim testified some of the money fell on the floor and when Applicant went to pick it up, he noticed Victim attempting to set off the alarm. (Trial Tr. 93-94.) Victim testified Applicant grabbed her by the hair and then fled the scene with co-defendant. (Trial Tr. 94.)

Victim testified officers showed up after Applicant and co-defendant fled. (Trial Tr. 94.) The store was equipped with high quality video surveillance and officers were able to see a video of the incident that night. (Trial Tr. 69, 131.) Captain Christy Cofield, who was a patrol lieutenant at the time of the incident, testified she observed the video of Applicant coming into the store to purchase a soda prior to the robbery. (Trial Tr. 141.) Capt. Cofield stated she recognized Applicant because he is part of her extended family and she is familiar with him. (Trial Tr. 142.) Capt. Cofield testified based on the video she had officers looking for a black male with "some type of orangey red looking emblem on the back pockets." (Trial Tr. 143.) Capt. Cofield testified she knew Applicant as "J Rock," but once she learned his name, she told her officers to be on the lookout for Applicant. (Trial Tr. 144.)

Officer Patrick Durkin with the Greenwood City Police Department testified he responded to the armed robbery and was told to be on the lookout for two males. (Trial Tr. 271-272.) Officer Durkin testified he observed two males about two blocks from the incident location getting into a vehicle that had just stopped and then immediately pulled off again. (Trial Tr. 272.) Officer Durkin testified he found the behavior suspicious and radioed to see if he could get additional descriptors of the suspects. (Trial Tr. 272 -273.) Officer Durkin testified he relayed what he observed over the radio and was in the process of stopping the vehicle when Capt. Cofield instructed him to stop the vehicle. (Trial Tr. 273.) Officer Durkin testified Applicant was in the vehicle with another co-defendant and two females. (Trial Tr. 274.) Officer Durkin testified

Applicant was wearing the same pants that were seen in the surveillance video at the time. (Trial Tr. 275.) Capt. Cofield came to the scene of the traffic stop and identified Applicant herself. (Trial Tr. 280-281.)

One of Applicant's co-defendants, Lakasion Robinson ("Robinson"), also testified at the trial. (Trial Tr. 211- 253.) During his testimony, Robinson testified he, Applicant, and the other co-defendant discussed robbing the store as they walked past it initially that evening. (Trial Tr. 218.) Robinson also testified he gave Applicant his black thermal to wear that night. (Trial Tr. 221.) The surveillance video of the incident shows Applicant wearing jeans with a distinctive design on the pockets and a black thermal during the robbery.

III. ALLEGATIONS RAISED

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

1. Subject Matter Jurisdiction
   a. "I would contend that the circuit court lacked jurisdiction to entertain my case, and sentence me. Thus violating my rights under the 14th Amendment and Art. IV. § 2 of the U.S. Constitution an(sic) under Art. I § 3 of the S.C. Constitution."
2. Ineffective Assistance of Counsel
   a. "I would further contend that I received ineffective assistance of appellate court counsel. Thus violating my rights under the 6th and 14th Amendments and Art. IV. § 2 of the U.S. Constitution and under Art. I § 3 and 14 of the S.C. Constitution."
   b. "I would further contend that I received ineffective assistance of trial counsel. Thus violating my rights under the 14th Amendment and Art. IV. § 2 of the U.S. Constitution and under Art. I § 3 and 14 of the S.C. Constitution."

An evidentiary hearing was held on October 16, 2018, Applicant informed this Court he intended to proceed on the following grounds for relief:

1. Subject Matter Jurisdiction
    a. Applicant claims court did not have jurisdiction because his indictments were not true billed and filed with the court;
    b. Applicant claims the court did not have jurisdiction because he requested a preliminary hearing and never received a preliminary hearing.
2. Ineffective Assistance of Counsel
    a. Counsel failed to challenge the traffic stop;
    b. Counsel failed to object to his clothes being introduced at trial;
    c. Counsel failed to conduct a hearing pursuant to Neil v. Biggers, 409 U.S.188 (1972);
    d. Counsel failed to obtain discovery regarding Robinson's plea deal;
    e. Counsel failed to properly argue her directed verdict motion;
    f. Counsel failed to convey a plea offer prior to expiration.

IV. TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Applicant's Testimony

During the evidentiary hearing, Applicant testified on his own behalf. Applicant testified the lower court did not have subject matter jurisdiction because he does not believe his indictments were true billed. Applicant testified his indictments were not filed with the clerk of court. Applicant testified he requested a preliminary hearing on his charges, but never received one. Applicant testified at the time he requested the preliminary hearing he was not represented by any attorney. Applicant testified he received a letter from Counsel stating she was going to obtain discovery and it also would include a copy of his summons. Applicant testified he proceeded to a jury trial on his charges. Applicant testified he filed a direct appeal in his case. Applicant testified he met with Counsel four or five times regarding his case. Applicant testified Counsel did not investigate his case and he did not believe she had much experience. Applicant testified he asked her how much experience she had and she never answered his question.

Applicant testified on the night of the incident he got into a car with some other people. Applicant testified when he got into the car he saw headlights from a police car and noticed that a police car was following them. Applicant testified police pulled over the car and the officer did

not explain why he pulled the car over. Applicant testified he talked to Counsel about the stop, but she never filed a motion to suppress the bad stop. Applicant testified his clothes were very similar to the clothes worn by the robber during the robbery. Applicant testified the search warrant in the case was only for his cell phone and did not mention his clothes. Applicant testified Counsel did not object to the clothes being introduced into evidence. Applicant testified if Counsel had kept his clothing from coming in at trial, the trial would have been different. Applicant testified Counsel did not object to a lot of things during the trial. Applicant testified there were no photo line-ups prior to trial and Counsel did not object to any of the identifications made during trial. Applicant testified Counsel should have had a Biggers hearing and he was prejudiced as a result of her failure to request such a hearing.

Applicant testified there was a Brady violation because one of the co-defendant's had a deal that was not turned over to Counsel. Applicant testified when his co-defendant testified about pleading guilty, Counsel and Applicant had a discussion about his co-defendant's plea deal. Applicant testified he only found out about his co-defendant's plea deal during his co-defendant's testimony at trial. Applicant testified Counsel did not properly argue her directed verdict motion. Applicant testified he wants a new trial on his charges.

During cross-examination, Applicant testified he went over discovery with Counsel. Applicant testified he had an alibi. Applicant testified he did receive a plea offer from the State, but it had expired by the time he learned about it.[1] Applicant testified he rejected the plea offer. Applicant testified he was on probation at the time of the robbery. Applicant testified he recalled apologizing to the court for the incident.

[1] Applicant entered a written plea agreement into evidence that showed a plea offer from the State with an expiration date of August 19, 2011. (See Plaintiff's Exhibit 6.)

Counsel's Testimony

Counsel also testified at the post-conviction relief hearing. Counsel testified she has been practicing law for seventeen years and most of that time has been spent in criminal law. Counsel testified she was a public defender for two years as well. Counsel testified she was appointed to represent Applicant. Counsel testified she filed Rule 5 and Brady motions and went over all of the discovery with Applicant. Counsel testified she does not recall Applicant requesting a preliminary hearing. Counsel testified a preliminary hearing would not have made a difference in this case. Counsel testified she received two true billed indictments for Applicant. Counsel testified there were no issues with the indictments.

Counsel testified Applicant was on probation through the Department of Juvenile Justice at the time of the incident. Counsel testified Applicant was released only a few days before the robbery occurred. Counsel testified the facts of the case were that Applicant went into the store without a mask on prior to the robbery to buy a soda. Counsel testified the video surveillance showed Applicant and his two co-defendants walking around the store and then shows Applicant and one of the co-defendants re-entering the store and masks on. Counsel testified the first officer on the scene was a family member of Applicant's and recognized him from the video. Counsel testified the store clerk also identified Applicant during the trial. Counsel testified the vehicle Applicant was riding in was stopped and Applicant was wearing the distinctive pants that were observed on the video surveillance. Counsel testified she had no basis to challenge the identification of Applicant as one of the suspects in the robbery.

Counsel testified she discussed the elements of the crimes with Applicant and reviewed the surveillance video with him. Counsel testified the co-defendant that was tried with Applicant was not arrested at the same time as Applicant. Counsel testified Applicant's phone was picked up by

police. Counsel testified Applicant's clothes were taken incident to his arrest as he was wearing them at the time he was arrested. Counsel testified she did not file a motion to suppress because the traffic stop was good based on the identification information provided to officers. Counsel testified she did make several objections to the pants being introduced, but did not see any real basis to prevent the clothes from coming in at trial.

Counsel testified there was a plea offer on the table up until the date of the trial. Counsel testified she met with Applicant on September 16, 2011, where he rejected the plea offer. Counsel testified Applicant gave incriminating statements to law enforcement. Counsel testified Applicant told her he did commit the armed robbery and wanted to see if he could get a plea deal if he became an informant for law enforcement. Counsel testified the State rejected this idea because they felt they had a strong case against Applicant. Counsel testified Applicant never denied committing the crime.

Counsel testified she did object to the testimony of Robinson. Counsel testified she was not aware of Robinson's plea deal until Applicant's father told her. Counsel testified Applicant's father overheard a conversation between Robinson and the State and that is how he found out. Counsel testified she proffered Robinson's testimony and the trial court allowed the testimony. Counsel testified she did not request a curative instruction regarding Robinson's testimony.

Counsel testified she did not move to severe the trial because of incriminating statements Applicant made and having Applicant and one of his co-defendants tried together kept the statements from being used against Applicant at trial. Counsel testified she did argue for a directed verdict. Counsel testified there were no issues with the search warrant.

On cross-examination, Counsel testified Applicant and his co-defendants had distinctive clothing on the day of the incident. Counsel testified she did not challenge the traffic stop because

the stop was investigatory and Applicant had been identified as one of the suspects by a family member in law enforcement who viewed the high quality surveillance video when she responded to the scene. Counsel testified based on the incident report she did not find a legal basis to challenge the traffic stop. Counsel testified she believed there was probable cause to arrest Applicant.

Counsel testified because of Applicant's confession, she had ethical questions about certain trial strategies. Counsel testified she did not object to Victim's in court identification of Applicant. Counsel testified Applicant rejected the ten year plea offer. During the hearing, Counsel was presented with the cover letter Applicant introduced during his testimony that showed a plea offer from the State expired on August 19, 2011. Counsel testified the plea offer was still on the table as of September and all the way up until the date of trial.

APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her 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 (1984); Butler, 286 S.C. 441, 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, 300 S.C. 115. 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, 300 S.C. 115.

V. FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the plea transcript, and Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

Subject Matter Jurisdiction

Applicant does not believe indictments are valid

Applicant alleges his indictments were not true billed or filed with the clerk's office. This Court finds this allegation meritless as this Court was able to review the record in this case, which included a copy of Applicant's true billed indictments. This Court finds Applicant's indictments were also filed with the clerk's office. Consequently, this allegation is denied and dismissed with prejudice.

Applicant alleges the trial court did not jurisdiction since he did not have a preliminary hearing

Applicant claims the trial court did not have subject matter jurisdiction over his case because he was not provided a preliminary hearing. The defendant's right to request a preliminary hearing is provided solely by state statute. It is not required by either the State or Federal Constitution and is not necessary before a grand jury can indict a person for a crime. State v. Irby, 166 S.C. 430, 164 S.E. 912 (1932). The indictment itself constitutes a finding of probable cause and thus avoids the need for a preliminary hearing. State v. McClure, 277 S.C. 432, 289 S.E.2d 158 (1982) (citations omitted).

This Court finds Applicant was properly indicted by the Laurens County Grand Jury and therefore a preliminary hearing was not required. This Court finds credible Counsel's testimony that a preliminary hearing would not have made a difference in the outcome of Applicant's case. This Court finds Applicant has failed to establish how Counsel was deficient for not requesting a preliminary hearing or how he was prejudiced as a result. Therefore, Applicant has failed to meet his burden and this allegation must be denied and dismissed with prejudice.

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. Applicant has failed to prove both deficiency on the part of Counsel and any prejudice therefrom. Furthermore, after observing the witnesses and passing on their credibility, this court finds Counsel's testimony to be credible. By contrast, this Court finds Applicant's testimony lacks credibility.

Counsel failed to challenge the traffic stop

Applicant alleges Counsel was ineffective for failing to file a motion to suppress the traffic stop. Applicant's implication that the traffic stop in this case was unlawful is entirely without

merit. "A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for the arrest, that the person is involved in criminal activity." State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (2001) (internal citations omitted). "[A]n officer may stop a car and briefly detain the occupants if he has a reasonable suspicion that the occupants are involved in a criminal activity." Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994).

At trial, Officer Durkin testified he responded to the robbery call and was told to be on the lookout for two males. He also testified he observed two males getting into a car that barley stopped and then immediately took off again. This suspicious activity was observed shortly after the robbery and within close proximity of the robbery location. As Officer Durkin relayed what he observed over the radio as he initiated a stop on the vehicle. Capt. Cofield, who had observed the video surveillance of the robbery and is a relative of Applicant, came to the traffic stop location and was able to identify Applicant as one of the suspects involved in the robbery.

This Court finds credible Counsel's testimony that she did not see a legal basis to file a motion to suppress as she believed the traffic stop was investigatory and valid. After a review of the record and testimony provided during the post-conviction relief hearing, this Court finds Applicant has failed to establish how Counsel was deficient for failing to file a motion to suppress the traffic stop or how he was prejudiced by her decision since, based on the information before this Court, it is unlikely that motion would have been successful. Therefore, Applicant has failed to meet his burden and this allegation must be denied and dismissed with prejudice.

Counsel failed to object to Applicant's clothes being introduced at trial

Applicant alleges Counsel was constitutionally ineffective for failing to object to his clothes being introduced as evidence at trial. Applicant testified at the post-conviction relief hearing that his clothes were similar to the clothes worn by the robbery suspect. Specifically, Applicant was wearing a pair of jeans that had an orange design on the pockets and was readily indefinable in the surveillance video.

This Court finds this allegation is without merit. This Court finds credible Counsel's testimony that she did not see a legal basis to keep the clothes from being introduced as evidence. Although multiple clothing items attributed to Applicant were introduced at trial, Counsel did make several objections to the jeans being offered into evidence. (Trial Tr. 98.) Counsel's objection led to a discussion outside the presence of the jury regarding the admissibility of Applicant's jeans. The lower court allowed the State to proceed to mark the jeans for identification purposes, but required additional foundation be laid before being admitted into evidence. The State again attempts to enter the jeans into evidence through Officer Durkin's testimony, and again Counsel objected. (Trial Tr. 276.) A discussion regarding Counsel's objection was held and the lower court again instructed the State to lay a better foundation prior to admitting the jeans into evidence. The State was finally able to admit the jeans into evidence after the proper foundation had been laid. (Trial Tr. 371.)

Based on the foregoing, this Court finds Applicant has failed to establish how Counsel was constitutionally ineffective as Counsel made appropriate objections to clothing items during the trial. This Court finds the clothing admitted against Applicant during trial was proper and Counsel made objections where appropriate. Therefore, Applicant has failed to meet his burden and this allegation must be denied and dismissed with prejudice.

Counsel failed to conduct a Biggers hearing

Applicant alleges Counsel should have challenged the identification of Applicant as one of the suspects in the robbery. In Neil v. Biggers, 409 U.S. 188, 198-200 (1972), the United States Supreme Court set forth a two-pronged test to determine whether due process requires the suppression of an eyewitness identification. "To ensure due process, Neil v. Biggers requires courts to assess, on a case-by-case basis, the following: (1) whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, (2) whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." State v. Heyward, 422 S.C. 488, 494, 812 S.E.2d 432, 435 (Ct. App. 2018), reh'g denied (Apr. 26, 2018), cert. granted (Sept. 21, 2018) (citing State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012)).

This Court finds a Biggers hearing was unnecessary as Applicant was identified by his relative, Capt. Cofield, and Victim on the night of the robbery. At trial, Victim testified she observed Applicant come into the store prior to the robbery to buy a soda. Shortly thereafter, two masked suspects entered the store and Victim recognized one of the masked suspects as Applicant during the robbery. Victim testified at trial she was also recognized Applicant by his jeans. Victim was also able to identify Applicant in court during the trial.

Capt. Cofield was able to recognize Applicant as she reviewed the surveillance video of the robbery during her investigation. Capt. Cofield was familiar with Applicant based on her familial connection to him and her identification of Applicant was not premised on any unnecessary or unduly suggestive police procedure. This Court also finds credible, Counsel's testimony that she did not see a legal basis to challenge the identification of Applicant.

Therefore, this Court finds Applicant cannot meet his requisite burden of establishing Counsel was constitutionally ineffective for failing to request a Biggers hearing. Additionally, there is no reasonable likelihood the identification would have been suppressed had the trial court conducted a Biggers hearing, as Capt. Cofield was familiar with Applicant because of their familial connection. Therefore, this allegation is denied and dismissed with prejudice.

Counsel failed to obtain discovery regarding Robinson's plea deal

Applicant alleges Counsel was constitutionally ineffective for failing to obtain information regarding Robinson's plea deal prior to trial. However, this Court finds this allegation is without merit as this Court finds credible Counsel's testimony that she did file Rule 5 and Brady motions in this case and Robinson's plea deal was not provided to her despite her efforts.

This Court finds credible Counsel's testimony that she did obtain discovery from the State and reviewed that discovery with Applicant. During the trial, Counsel objected to Robinson's testimony and argued the State's failure to provide information regarding Robinson's plea deal was a violation of the discovery motions she filed. (Trial Tr. 186 -187.) Counsel also argued Robinson's testimony should be excluded under Rule 601(b)(1), SCRE. (Trial Tr. 186 -187.) The State provided the lower court with a copy of Robinson's plea agreement, which showed there was no condition in Robinson's plea deal that required him to provide testimony against Applicant and the other co-defendant. Further, Robinson's plea agreement was entered in July of 2011, nearly seven months before the start of Applicant's trial. Robinson's attorney, Kate Anderson-Kendall, also testified. She testified that during the plea hearing she told the plea court Robinson would cooperate and may be called as a witness during Applicant's trial. (Trial Tr. 192.) However, Anderson-Kendall also testified Robinson would not suffer any consequences for not testifying against Applicant or his co-defendant since his case was closed. (Trial Tr. 193.)

Counsel argued the State violated Brady by not providing Robinson's plea deal in the original discovery. The State responded Robinson's confession that he gave law enforcement the night of their arrest was provided to Counsel and corroborated what was seen on the surveillance video. After a brief recess, the lower court found the State did not violate the discovery motions since Counsel was provided Robinson's confession, which corroborated what was captured on the surveillance video, which was also provided to Counsel. Additionally, the lower court cited Anderson v. Leeke, 271 S.C. 435, 248 S.E.2d 120 (1978), to show the State only has an obligation to provide favorable evidence to the defendant that the State has and the defendant is not able to obtain. The lower court found Counsel could have obtained the plea hearing transcript just as easily as the State since it was a public plea. Ultimately, the lower court allowed Robinson to testify at trial.

Based on the foregoing, this Court finds Applicant has failed to establish how Counsel was constitutionally ineffective as she did obtain discovery in this case and she did attempt to exclude Robinson's testimony at trial. Further, this Court finds Applicant has failed to show any resulting prejudice from Counsel's alleged deficiency. Therefore, this allegation is denied and dismissed with prejudice.

Counsel failed to properly argue her directed verdict motion

Applicant alleges Counsel was constitutionally ineffective because she did not properly argue her directed verdict motion. Applicant believes Counsel should have argued the traffic stop was invalid and the resulting evidence against Applicant should be suppressed. This Court finds this allegation meritless. Based on a review of the record and Counsel's credible testimony, this Court finds Counsel did properly argue for a directed verdict at the close of the State's case. (Trial Tr. 471.) The lower court properly found there was sufficient evidence to justify the case going

forward and denied Counsel's motion. Applicant has failed to meet his requisite burden for this allegation and this allegation must be denied and dismissed with prejudice.

Counsel failed to convey a plea offer prior to expiration

Applicant alleges Counsel was constitutionally ineffective for failing to convey a plea offer prior to its expiration[2]. To be successful on an allegation of an unconveyed plea offer, Applicant must prove: (1) trial counsel's failure to communicate the State's initial plea offer constituted deficient performance, and (2) Petitioner was prejudiced by the deficient performance, or there was a reasonable probability that but for this deficient performance, he would have accepted he original plea offer. Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009). Generally, failure to convey a plea offer constitutes deficient performance, although the existence of prejudice needs to be evaluated on a case-by-case basis. Id. at 613, 675 S.E.2d at 422. To show prejudice from a failure to convey a plea offer, Applicant must:

> Demonstrate a reasonable probability [he] would have accepted the earlier plea offer had they been afforded effective assistance of counsel. [He] must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Missouri v. Frye, 566 U.S. 134 (2012).

This Court finds credible Counsel's testimony that Applicant had a plea offer open up until the date of his trial. This Court also finds credible Counsel's testimony that the plea offer was conveyed to Applicant and Applicant rejected the offer. Although Applicant claims he was told about the plea offer after it expired, he also testified that he rejected the plea offer. Applicant has

[2] See Plaintiff's Exhibit 6

failed to meet his requisite burden for this allegation. Therefore, this allegation must be denied and dismissed with prejudice.

VI. CONCLUSION

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

The Court notes Applicant must file and serve a notice of appeal within thirty days from post-conviction relief counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, 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 THAT:

1. The application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this _____ day of 2/19, 2019.

BRIAN M. GIBBONS
Presiding Judge
Eighth Judicial Circuit

_____, South Carolina