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November 12, 2019

Clerk of Court, South Carolina Supreme Court
Case # 2012-CP-45-0363

Levern McCrea v State of South Carolina

Please see the included Notice of Appeal. I have also forwarded by separate mail copies to:

The Williamsburg County Clerk of Court
The Office of the Attorney General of South Carolina
SC Office of Indigent Defense / Commission of Indigent Defense
The Honorable Judge George M. McFaddin, Jr.

Please file the included NOTICE OF APPEAL for the case captioned.

Attorney Timothy L. Griffith was appointed as PCR Council and not retained and will not be handling the Appeal.

Thank You,

Timothy L. Griffith, Esquire

NOTICE OF APPEAL FROM A PCR DENIAL BY THE COURT OF COMMON PLEAS

THE STATE OF SOUTH CAROLINA
In Supreme Court of SC

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

George McFaddin, Jr., Circuit Court Judge

Case # 2012-CP-43-0363

The State, Respondent,

v.

Levern McCrea Appellant.

NOTICE OF APPEAL

Levern McCrea, appeals the decision of the Court, on June 1, 2018, where Mr. McCrea was granted his request for PCR on one element of his application and denied on all other elements and pleas for Relief. Mr. McCrea was represented at the hearing by Lance Boozer, Attorney at Law. The case was then assigned by the Commission on Indigent Defense to Attorney Timothy L. Griffith, who files this notice on behalf of the Appellant. The order herein attached and a copy of which is also forwarded to the SCCID Appellate Division.

Dated 11/12/2019

Timothy L. Griffith, Esquire
360 W. Wesmark Blvd,
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Telephone: (803)607-9087
Attorney for Appellant (relieved)
Will not be representing on appeal

Other Counsel of Record:
Julie A. Coleman, Esquire, Assistant Attorney General
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P.O. Box 11549
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PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

George McFaddin, Jr., Circuit Court Judge

Case # 2012-CP-45-0363

The State, Respondent,

v.

Levern McCrea Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Office of the Attorney General of South Carolina, PCR Division, by U.S. Postal Service, postage prepaid, to P.O. Box 11549, Columbia, S.C. 29211, on November 12, 2019.

I received a copy of the Notice of Appeal
on this ____ day of _____, 2019

_____
Office of the Attorney General
PCR Division

Timothy L. Griffith
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Telephone: (803) 607-9087
Attorney for Appellant

STATE OF SOUTH CAROLINA COUNTY OF WILLIAMSBURG	)	IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT
	)	2012-CP-45-0363
Levern McCrea, #348291, Applicant, v. State of South Carolina, Respondent.	)	**ORDER GRANTING POST-CONVICTION RELIEF**

This matter comes before the Court by way of an Application for post-conviction relief filed on July 9, 2012, by Levern McCrea (Applicant). The State (Respondent) filed a return on September 5, 2013, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on June 1, 2018, at the Sumter County Courthouse. Applicant was present at the hearing and represented by Lance Boozer, Esquire. Assistant Attorney General Julie Coleman of the South Carolina Attorney General's Office appeared on behalf of the State. At the hearing, Applicant testified on his own behalf. Charles Barr, Esquire (Barr); Cezar McKnight, Esquire, (McKnight); Henry M. Anderson, Jr., Esquire (Anderson); and Assistant Solicitor Kimberly V. Barr (Assistant Solicitor) of the Third Circuit Solicitor's Office also testified. After a review of the record and all evidence presented, this Court grants Applicant's relief as to Applicant's allegation that he was not properly advised of the dangers of pro se representation under Faretta. Accordingly, Applicant is granted a new trial. However, this Court finds Applicant has failed to meet the requisite burden of proof on the remaining allegations in his application and denies and dismisses those allegations with prejudice.

PROCEDURAL HISTORY

The records before this Court establish the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. During the September 2008 term, the Williamsburg Grand Jury indicted Applicant for murder, possession of a weapon during a violent crime, and misprison of a felony (2010-GS-45-135). Applicant originally retained Barr to represent him on the charges. Applicant eventually fired Barr due to irreconcilable differences. The court appointed McKnight, to represent him. McKnight filed a motion to be relieved as counsel on November 24, 2010. A hearing was held on December 6, 2010, in front of the Honorable George C. James, Jr. After hearing from both McKnight and Applicant, the court relieved McKnight and appointed Anderson. Anderson filed a motion to be relieved as counsel, citing irreconcilable differences. A hearing was held on June 22, 2011, in front of the Honorable Howard P. King. Judge King denied the motion to be relieved after hearing from Anderson, Applicant, and Assistant Solicitor. Judge King advised Applicant that if he continued his course of conduct then he would have no choice but to relieve Anderson and require Applicant proceed pro se.

Shortly thereafter, Applicant wrote Anderson various letters stating that Anderson was lying, would not represent him properly, and explaining that he wanted Anderson relieved and he would represent himself. By Order filed September 14, 2011, Judge King relived Anderson. The Court noted that Applicant was "very difficult if not impossible to deal with, not only as a client but as an individual. He has been abusive, vile, and profane to Anderson as evidenced by letters dated February 9, 2011 and May 17, 2011." Applicant proceeded pro se in his case and represented himself during his jury trial before the Honorable W. Jeffrey Young. The jury found Applicant guilty as indicted for murder and possession of a

weapon during a violent crime. On October 20, 2011, Judge Young sentenced Applicant to life in prison for murder, and five years imprisonment for possession of a weapon during a violent crime to run consecutively with the sentence for murder.

Applicant subsequently filed for appeal. Applicant failed to timely serve the notice of appeal on opposing counsel, as provided for in Rule 203, SCACR. Applicant's pending appeal was dismissed by Order dated April 20, 2012. The remittitur was issued on August 3, 2012.

Applicant filed a timely application for post-conviction relief on July 9, 2012. An evidentiary hearing into the matter was convened on June 1, 2018, at the Sumter County Courthouse. Applicant was present at the hearing and represented by Lance Boozer, Esquire. Assistant Attorney General Julie Coleman of the South Carolina Attorney General's Office appeared on behalf of the State.

SUMMARY OF FACTS

Facts for Underlying Murder and Weapon Offense Charge

Applicant and his friend, Christopher Briggs (Briggs), went to Mt. Olive, North Carolina together on March 10, 2009. (Trial Tr. 122.) Applicant was going to North Carolina to meet up with Roberta Smith (Smith) who has a child in common with Applicant. (Trial Tr. 122.) Applicant and Briggs stayed there for a while and left that afternoon "about dark." (Trial Tr. 127.) Briggs testified when they left they were in Smith's vehicle because Applicant wanted to use it to tow another vehicle he owned back to his house. (Trial Tr. 127-128.) Briggs testified they consumed alcohol and Applicant smoked a blunt containing tobacco and cocaine on their way home. (Trial Tr. 129.) Briggs testified he fell asleep on their drive home and when he woke up he was still in the passenger seat of Smith's vehicle which was parked in Cora Brown's (Victim) front yard. (Trial Tr. 130.) Briggs testified Applicant was not in the vehicle when he woke up. (Trial Tr. 130.) Briggs testified he heard a gunshot coming from Victim's residence,

observed two cars pass by the residence, and then heard several additional gunshots. (Trial Tr. 130.) Briggs testified a couple of moments later Applicant came out of Victim's residence walking "with a little speed." (Trial Tr. 135.) Briggs testified Applicant was carrying a little black bag and a purse when he left Victim's residence. (Trial Tr. 135.)

Briggs testified Applicant said, "Man listen to me, listen man my life is in your hands. If you feel like you going to say something I can go ahead and take care of this now." (Trial Tr. 136.) Briggs testified he took that statement to mean that Applicant would do him bodily harm. (Trial Tr. 137.) Briggs testified Applicant had a "rubber glove . . . like they use in the hospital" on his right hand when he came out of the house. (Trial Tr. 138.) Briggs testified Applicant also changed the license plate on Smith's vehicle the night of the murder. (Trial Tr. 140-141.) Briggs testified Applicant told him, "I took care of that. Won't be calling nobody else no faggot." (Trial Tr. 141.) Briggs testified Applicant told him he knocked on Victim's door and she cracked the door open, he forced his way into her home. (Trial Tr. 141.) Briggs testified Applicant then drove Smith's vehicle back to North Carolina with Briggs in the car. (Trial Tr. 141.) Applicant and Briggs then stayed the night at Smith's residence and left early the following morning. (Trial Tr. 142.) Briggs testified Applicant attempted to sell the gun to Smith's brother when they returned to North Carolina. (Trial Tr. 144.) Smith's brother did not purchase the gun.

Briggs testified on their way back to South Carolina, Applicant had the gun in a bag. Briggs testified Applicant pulled over and threw the bag in a wooded area. (Trail Tr. 146.) Briggs testified he later took law enforcement to the area where Applicant threw out the gun and they were able to recover it. (Trial Tr. 150.) Briggs testified in the weeks after Victim's murder,

Applicant told Briggs if Applicant got arrested to go recover the gun and shoot Applicant's sister, Stephanie, so the police would think the killer is still out there. (Trial Tr. 154.)

Motions to Relieve Counsel

On the April 6, 2010, Applicant retained Barr to represent him in his criminal trial. (PCR Tr. 100-101.) Barr testified he met with Applicant several times and represented him at a bond hearing. (PCR Tr. 101.) Barr testified Applicant's bond motion was denied and Barr requested a preliminary hearing. (PCR Tr. 101-102.) Barr testified the first preliminary hearing was cancelled by the sheriff's office, but during the second preliminary hearing, Applicant came in "raising sand" with Barr and he had to request a continuance in order to give Applicant time to get another attorney. (PCR Tr. 102-103.) Barr testified he was later relieved as counsel through a consent order. (PCR Tr. 103.) Barr testified he was relieved because Applicant was "very upset" with him for failing to file Rule 5 motion prior to the preliminary hearing. (PCR Tr. 103.) Barr testified Applicant was "talking a lot of trash" to him and he does not allow clients to speak to him in that manner. (PCR Tr. 103-104.) Barr testified Applicant was going to fire him, so he believed their separation was mutual. (PCR Tr. 104.)

Applicant was appointed his second attorney, McKnight, by Judge Clifton Newman in July 2010. McKnight testified he filed a motion to be relieved because he felt like he "was getting the short end of the stick." (PCR Tr. 115.) McKnight testified Applicant went out and hired Barr and then said he was indigent and Judge Newman appointed McKnight. (PCR tr. 115-116.) Judge Newman did not relieve McKnight at that time and McKnight testified he "shook it off" and "began to do what I could to vigorously represent [Applicant]." (PCR Tr. 116.) On November 14, 2010, McKnight filed a motion to be relieved and a hearing was held before the Honorable George C. James, Jr. on December 6, 2010. (PCR Tr. 116.) McKnight testified he

filed that motion because "there existed such a level of acrimony between myself and [Applicant] that we could not effectively communicate." (PCR Tr. 116.) McKnight testified they came up with viable defenses but then Applicant would "bombarded with all of this mail that was laced with profanity." (PCR Tr. 116.) Applicant accused McKnight of being in "cahoots" with the Solicitor's Office, which McKnight testified was not true. (PCR Tr. 116.) At the conclusion of that hearing, Judge James relieved McKnight and allowed another attorney to be appointed to represent Applicant. (Dec Tr. 20.)

Applicant's third attorney, Anderson, was appointed by the Williamsburg County Clerk of Court in December 2010. Anderson testified he represented Applicant until September 2011. (PCR Tr. 131.) Anderson testified he met with Applicant seventeen times, received discovery from the State, and reviewed the discovery with Applicant. (PCR Tr. 131-132.) Anderson reviewed possible defenses with Applicant and was preparing Applicant's case for trial. (PCR Tr. 132.) Anderson testified when he met with Applicant in person he did not have an issue with him, however, Anderson testified he received numerous letters accusing him of lying to Applicant, conspiring with the State, and stating Applicant no longer wanted his services. (PCR Tr. 133.) Anderson testified the letters were the basis for him filing a motion to be relieved. (PCR Tr. 136.) On June 22, 2011, a hearing was held on Anderson's motion to be relieved as counsel for Applicant before the Honorable Howard P. King. During that hearing, Anderson testified his relationship with Applicant deteriorated and Applicant told Anderson he did not want to talk to him anymore and "[f]orbid me to talk to his girlfriend, his family. He didn't want anything else to do with me." (June 2011 Tr. 9.) At the conclusion of that contentious hearing, Judge King gave Applicant the choice to proceed pro se or continue with Anderson. Applicant stated, "I don't have a choice, I am going to have to keep him. I don't have a choice; the court is

not giving me a choice." (June 2011 Tr. 40.) Judge King denied Anderson's motion to be relieved and lectured Applicant about treating Anderson with respect. (June 2011 Tr. 41.) Judge King advised Applicant that if he found out Applicant was not treating Anderson with respect, he would relieve Anderson and have Applicant proceed pro se with Anderson as possibly stand-by counsel. (June 2011 Tr. 41.)

Following that hearing, Anderson testified he thought he and Applicant were doing "pretty good." (PCR Tr. 141.) Anderson testified he met with Applicant ten times after the June 2011 hearing before Judge King. (PCR tr. 141.) However, on August 29th, Applicant wrote Anderson a letter stating,

> Because of your deliberate betrayal of me and my family for the third time, I no longer need your lying assistance. I will now represent myself in my case when the time comes. Now you can put in the paperwork to Judge King or Judge James. I don't give a damn. Or I'll do it myself. You have played with my freedom long enough. You protected Kimberly Barr and the State who is paying you. There are no more warnings, [Anderson].

(PCR Tr. 141-142.) Anderson testified that letter was the basis of Judge King's order relieving him as counsel. (PCR Tr. 142.) In Judge King's order, Judge King found Applicant waived his right to counsel based on his behavior.

PROCEDURAL HISTORY AND ALLEGATIONS FOR THE CURRENT ACTION

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

1. Denied the right to appeal
    a. Applicant did not voluntarily and intelligently waive his right to appeal.
2. Defendant's waiver of right to counsel was not knowing and voluntary
    a. Defendant was not warned of dangers of self-representation
3. "Was Applicant 3 trial counsels ineffective prior to Applicants trial, which forced Applicant to proceed to trial with no trial counsel, or standby counsel and applicant never waived his rights to counsel in a violation of Applicants Const. rights of the U.S. under

the 6th Amendment , and a violation of Applicants due process and equal protection under ther 14th Amendment?"

a. "Did the investigators commit investigative misconduct in a violation of Applicants U.S. Constitutional right under the 14th Amendment under De Process and Equal Protection of law?"

On October 20, 2014, Applicant, through counsel, amended his post-conviction relief application to include the following allegations:

1. "Preliminary hearing taken, in State v. McClure, 277 S.C. 432, 289 S.E.2d 158; State v. Funderburke, 259 S.C. 256, 191 S.E.2d 520. S.C. Code Law 17-23-160."
2. "That July 12, 2009, to July 8, 2010, indictment flawed. It has been rubber stamped. State v. Rector, 158 S.C. 212, 155 S.E. 385."
3. "Direct Appeal taken, State v. White, 208 S.E.2d 35, 29."
4. "Sixth Amendment right to counsel was violated and Fourteenth Amendment Right to due process of law was violated. Gardner v. State, 570 S.E.2d 184; U.S. v. Midgett, 342 F. 3d. 321."
5. "State made Applicant wear shackles during trial and the jurors saw them when he sat down and stood up. Deck v. State of Missouri, 125 S.Ct. 200 (2005). That prejudiced Applicant."

On December 3, 2014, Applicant, through counsel, issued a motion for summary judgement alleging there were no genuine issues of material fact to be decided in Applicant's matter as Applicant was not properly advised of the dangers of proceeding pro se prior to trial pursuant to Faretta v. California, 422 U.S. 806 (1975). Applicant's motion stated the record failed to demonstrate Applicant made an informed choice when proceeding *pro se* in his jury trial.

On February 20, 2015, Applicant's post-conviction relief counsel, Charles T. Brooks, III, issued a motion to be relieved as Applicant's counsel on three grounds:

1. Applicant requested Brooks be relieved;
2. Applicant threatened, harassed, and displayed vulgarity in several written communications;
3. Applicant filed two grievances with the Office of Disciplinary Counsel, which damaged their relationship.

On February 25, 2015, Judge Cothran signed Brooks' motion to be relieved as counsel and asked the clerk's office to appoint another attorney for Applicant. In October of 2016, Lance S. Boozer, Esquire (Boozer) was appointed by the clerk's office to represent Applicant in his post-conviction relief matter.

On July 12, 2015, Respondent issued a response to Applicant's motion for summary dismissal stating Applicant forfeited his Sixth Amendment right to counsel due to his continued irreprehensible behavior towards three separate defense counsels. On February 8, 2016, the Honorable Tanya A. Gee filed an order denying Applicant's motion for summary judgment finding issues of material fact exist with regard to whether the Applicant forfeited his right to counsel based on his behavior. Judge Gee also ordered the State to provide Applicant with a copy of his prior transcripts.

In May 2018, Respondent received a pro se amendment to Applicant's original post-conviction relief application. In Applicant's amendment, he accuses Assistant Attorney General Julie Coleman (AAG Coleman) and the "State's attorney's / witnesses" of conspiring for the purpose of impeding, hindering, and obstructing the "due court of justice."

After submission of pre-hearing briefs by both parties, Applicant's post-conviction relief hearing went forward before the Honorable George M. McFaddin on June 1, 2018. Applicant was represented by Boozer and AAG Coleman represented the State. Applicant proceeded on the following issues:

1. Applicant's rights were violated when he was shackled throughout the duration of his trial.
2. Brady violations were committed by the State resulting in prosecutorial misconduct.
3. Applicant was denied his right to counsel.

Following the evidentiary hearing, this Court requested post-hearing briefs from Applicant and Respondent.

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 trial 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).

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.

Applicant alleges his rights were violated because he was shackled during his trial.

Applicant alleges his rights were violated because he wore shackles during his trial, which he claims made it "virtually impossible" to move about the courtroom. (PCR Tr. 77.) Applicant further alleges the jury observed his shackles during the trial. (PCR Tr. 77.) Applicant testified during his trial he also had a remote controlled "shock device" strapped to his chest and back. (PCR Tr. 77.) Applicant testified the leg shackles would get stuck periodically throughout the trial where the officer had to pull up his pants to unlock the shackles. (PCR Tr. 77.) Applicant testified you could hear the shackles when he would walk around. (PCR Tr. 78.) Applicant testified the "shock device" was not visible, but that officers had a remote control. (PCR Tr. 78.)

Assistant Solicitor Barr testified she believed Applicant may have had leg restraints on during the trial. (PCR Tr. 166.) Assistant Solicitor Barr testified she was unaware of any device under his clothes until she heard his testimony during the PCR hearing. (PCR Tr. 166.) Assistant Solicitor Barr testified she did not make a request to have Applicant placed in restraints, however, her experience has been any defendant who has been on trial for a serious crime like Applicant, it would be proper to have him in restraints. (PCR Tr. 167.) Assistant Solicitor Barr testified there was never a hearing regarding Applicant's restraints. (PCR Tr. 167.) Assistant Solicitor Barr testified she did not see Applicant's leg restraints during court. (PCR Tr. 168.) Assistant Solicitor Barr testified she observed them during breaks when law

enforcement would secure Applicant to go in and out of the courtroom outside of the presence of the jury. (PCR Tr. 168.) Assistant Solicitor Barr testified Applicant was free to walk around with the restraints on and he did walk up to the podium during the trial. (PCR Tr. 168-169.) Assistant Solicitor Barr testified none of Applicant's restraints were visible in court. (PCR Tr. 167, 168.)

In Deck v. Missouri, 544 U.S. 622 (2005), the United States Supreme Court held routine use of visible restraints violates due process, and found visible restraints may be used only if "justified by an essential state interest" such as security. Deck, 544 U.S. at 624 (quoting Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986)). Relying on precedent concerning the guilt phase of trials, the Court concluded "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial judge's determination, in the exercise of his discretion, that they are justified by a state interest specific to a particular trial" including "potential security problems and the risk of escape at trial." Id. at 629. Due to the prejudicial effect of visible shackles, "due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case." Id. at 632. Even if exceptional circumstances warrant the use of visible restraints, the trial judge must make on-the-record findings as to the circumstances that compel their use. Id. at 633 (emphasizing that the determination "should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial").

Deck emphasizes its holding is limited to the use of **visible** shackles: "Thus, where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." Id. at 634; see also Cole v. Roper, 623 F.3d 1183, 1193 (8th Cir. 2010) (finding

defendant's restraints did not violate due process because the defendant was not subject to visible restraints).

This Court finds Applicant failed to present evidence substantiating his claim that his rights were violated because he was shackled throughout the trial. This Court finds Assistant Solicitor Barr's testimony credible that Applicant's restraints were not visible to the jury. Assistant Solicitor Barr testified Applicant was shackled by his legs during the trial, which was standard security protocol. She further testified Applicant was free to move about the courtroom, and he was not visibly constrained to his table. Assistant Solicitor Barr also testified she did not recall the restraints being visible to the jury. "The law has long forbidden routine use of **visible** shackles during the guilt phase." Deck v. Missouri, 544 U.S. at 626 (emphasis added). Because the shackles were not visible, Applicant's constitutional rights were not violated in this regard. Applicant has also failed to establish any resulting prejudice from this allegation because the jury did not see his shackles. Accordingly, this allegation is denied and dismissed with prejudice.

Applicant alleges Brady violations were committed by the State resulting in prosecutorial misconduct.

Applicant alleges the State failed to provide him with material discovery prior to the start of trial and alleges he was handed material evidence during the trial, which should have been provided to him in advance.

Applicant testified he was prejudiced by the State because Assistant Solicitor Barr was handing him "exculpatory, impeaching Brady evidence that was material to my defense the first, second, and third day during my trial." (PCR Tr. 60.) Applicant testified he addressed the court during his trial and claimed he was being "spoon-fed" discovery. (PCR Tr. 60.) Applicant alleged Assistant Solicitor Barr failed to give him an interview transcript from Smith's second statement to law enforcement. (PCR Tr. 71.) Applicant also testified there was a second

statement from another witness that the State failed to provide him as well. (PCR Tr. 72.) Applicant also testified there was a statement that was vital to his defense from Clinton Dorsey that he never received in discovery. (PCR Tr. 74.) Applicant alleged a "letter of leniency"[1] was not turned over to him in discovery. (PCR Tr. 20-21.) Applicant also testified photographs[2] of bullets used at trial were not provided to him by the State. (PCR Tr. 70.)

Anderson represented Applicant from December 2010 until September 2011. Anderson testified he received all of the discovery from the State and he believed it was a full and complete copy. (PCR Tr. 131-132.) Anderson testified he reviewed all of the discovery with Applicant and he believed Applicant understood the evidence against him. (PCR Tr. 133.) Applicant proceed to trial on October 17, 2011.

Assistant Solicitor Barr testified that she turned over all Rule 5, SCRCrimP, and Brady materials to McKnight while he represented Applicant, and when he was relieved from the case and Anderson was appointed, she turned discovery over to him, as well. (PCR Tr. 151, 154.) Assistant Solicitor Barr testified that certain discovery was not available when the initial discovery went out, but it would have been supplemented as her office received it. (PCR Tr. 155.) Assistant Solicitor Barr testified that when Anderson was relieved from the case, she sent the discovery to Applicant himself. Assistant Solicitor Barr testified that she gave Applicant all of the Brady material that she had. (PCR Tr. 158-159.) Assistant Solicitor Barr went on to testify that she did not have the "letter of leniency" in her possession, which is why it was not

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[1] This letter was allegedly between investigators to Briggs indicating law enforcement was trying to get Briggs leniency "on his charge." (PCR Tr. 65.) Barr testified the letter appeared to be from law enforcement to Briggs indicating they believe he had knowledge of the homicide and if he was willing to provide a truthful statement that could be corroborated by polygraph, they would agree to talk to the Solicitor and to the judge and advise them of his cooperation and request leniency on his charge. (PCR Tr. 173.)

[2] Applicant exhibit 7 are the five photos referenced by Applicant during his testimony.

turned over to Applicant. (PCR Tr. 172.) Assistant Solicitor Barr testified if she had the letter it would have been disclosed pursuant to Rule 5. (PCR Tr. 172.) Assistant Solicitor Barr testified she checked with law enforcement when the issue came up at trial and they did not have a copy of that letter. (PCR Tr. 175.) Assistant Solicitor Barr testified Applicant received all Rule 5 and Brady material before the trial or as she received it, and a status conference was held before Judge Clifton Newman before the trial to ensure Applicant had all discovery material.

Brady v. Maryland, 373 U.S. 83 (1963) requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). 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. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing U.S. v. Bagley, 473 U.S. 667 (1985). In order to prevail on this claim, Applicant must show "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 434 (1995).

Applicant has failed to establish the State has committed prosecutorial misconduct by failing to provide Brady material prior to Applicant's trial. Anderson represented Applicant up until about a month before his trial. Anderson testified he had received full and complete discovery from the State and reviewed that discovery with Applicant less than a month before Applicant proceeded to trial. Although Anderson was relieved prior to the trial, Assistant

Solicitor Barr testified she provided Applicant with all of the discovery and held a status conference prior to the start of trial to ensure Applicant had received all of his requested material. (PCR Tr. 161.)

Applicant has failed to show this Court how any of the discovery materials he claims were withheld from him by the State could undermine the confidence in the verdict since Applicant has failed to establish the State was in possession of the any of the materials Applicant alleges were withheld from him prior to trial. As Anderson and Assistant Solicitor Barr testified, the State provided full and complete discovery prior to trial. Additionally, Anderson testified he reviewed all of the discovery with Applicant and Applicant understood the evidence against him.

Additionally, Applicant has failed to establish that the statement from Clinton Dorsey actually exists. Applicant testified based on a search warrant he saw, he believes Clinton Dorsey involved himself in Applicant's case and that there was a statement taken from him by law enforcement. (PCR Tr. 73-74.) If the statement does in fact exist, Applicant has failed to show the statement was material to his guilt or innocence since Applicant failed to produce the statement during the evidentiary hearing. It is inconceivable that Applicant could satisfy his burden of proving his allegation of prosecutorial misconduct as he has failed to show this Court the alleged statement he claims was withheld by the State. See Rule 71.1(e), SCRCP (an applicant has the burden of proving the allegations in his or her application); Caprood, 338 S.C. at 109, 525 S.E.2d at 517 (an applicant has the burden of proving both deficiency and prejudice). See also State v. Decker, 275 Kan. 502, 507, 66 P.3d 915, 920 (2003) (internal citations omitted).

This Court finds Applicant failed to present any evidence substantiating his claim that the State violated the rules of discovery. This Court finds Anderson and Assistant Solicitor Barr's testimony very credible that she complied with Rule 5 and Brady motions with McKnight and

Anderson and later with Applicant himself. This Court finds Applicant's testimony not credible. As such, Applicant has failed to meet his burden as set forth in Strickland and this allegation is denied and dismissed with prejudice.

Applicant alleges he was denied his right to counsel

Applicant alleges he was forced to proceed to his trial pro se and was never properly warned regarding the dangers of proceeding pro se at trial.

Applicant testified on April 3, 2010, he retained Barr Barr, Esquire. (PCR Tr. 28.) Applicant testified Barr represented him until June of 2010. (PCR Tr. 28.) Applicant testified Barr met with him at the Kingstree County jail and told Applicant he was going to "put in a bond hearing, preliminary hearing" and Applicant agreed. (PCR Tr. 28-29.) Applicant testified he asked Barr to about a discovery motion and Barr responded that he would do the discovery motion after the bond hearing and preliminary hearing. (PCR Tr. 29.) Applicant testified that did not make any sense to him and that Barr looked at him "strange" and stated he would be in touch. (PCR Tr. 29.) Applicant testified he did not hear anything from Barr until eight weeks later, despite calling him and sending him letters. (PCR Tr. 29.) Applicant testified Barr saw him just before he was to appear before a judge and began asking him personal questions. (PCR Tr. 30.) Applicant testified they went before the judge and Applicant's bond was denied. (PCR Tr. 30.) Applicant testified he was really upset with Barr and wanted to speak with him prior to his preliminary hearing, but Barr never responded to his letters. (PCR Tr. 30.) Applicant testified two weeks later he was before the court for his preliminary hearing and he addressed his concerns about Barr with the court. (PCR Tr. 30.) Applicant testified he fired Barr that day in court and asked the court to make Barr give him his money back. (PCR Tr. 30.)

Applicant testified on June 23, 2010, Assistant Solicitor Barr brought Applicant back to court and had William Rivers appointed to represent him. (PCR Tr. 32.) Applicant testified Mr. Rivers was a family member of the victim in his case and asked the court to appoint him another attorney. (PCR Tr. 32 -33.)

Applicant testified on July 20, 2010, McKnight was appointed to represent him. (PCR Tr. 33.) Applicant testified McKnight then put in a motion to be relieved because Applicant had attempted to retain his services after firing Barr. (PCR Tr. 33.) A hearing on McKnight's motion was held before Judge Clifton Newman on August 12, 2010. (PCR Tr. 33-34.) Applicant testified McKnight did not want to represent him because he believed Applicant could afford his fees. (PCR Tr. 35.) Applicant testified McKnight was not getting his usual fee to represent someone charged with murder, and he neglected to assist him in his case. (PCR Tr. 36.) Applicant testified he met with McKnight two times before he was relieved on December 6, 2010. Applicant testified McKnight never discussed with him the dangers of proceeding pro se in his case. (PCR Tr. 38.) Applicant testified he was not informed during the December 6, 2010, hearing regarding the dangers of proceeding pro se. (PCR Tr. 38.)

Applicant testified his next attorney was Anderson. (PCR Tr. 38.) Applicant testified Anderson was appointed on December 12, 2010. (PCR Tr. 39.) Applicant testified Anderson was relieved in September of 2011. (PCR Tr. 39.) Applicant testified he met with Anderson more than a dozen times. (PCR Tr. 39.) Applicant testified his relationship with Anderson was good from the beginning. (PCR Tr. 39.) Applicant testified he started questioning a few inconsistencies that occurred in conversations with Anderson. (PCR Tr. 40.) Applicant testified they discussed Anderson getting a copy of his vehicle sale contract, and when he discussed it with Anderson later, Anderson did not know what he was talking about. (PCR Tr. 40.)

Applicant testified Anderson's response to him regarding his request for a second bond hearing led him to start to "distrust" Anderson. (PCR Tr. 44.) Applicant testified Anderson eventually asked to be relieved from Applicant's case. (PCR Tr. 48.)

Applicant testified on June 22, 2011, Anderson asked to be relieved in a motion hearing before Judge King. (PCR Tr. 49.) Applicant testified he told the court about all of the "lies and inconsistencies" in Anderson's letters to him. (PCR Tr. 49.) Applicant testified at the hearing Judge King gave him two options: 1) keep Anderson, or 2) go forward on your own. (PCR Tr. 49.) Applicant testified he felt he did not really have a choice and was forced to keep Anderson. (PCR Tr. 50.) Applicant testified he was not warned of the dangers of proceeding pro se during that hearing with Judge King. (PCR Tr. 50.) Applicant testified he believed Anderson would be appointed as stand by counsel for him if Anderson was relieved. (PCR Tr. 50.) Applicant testified he did not want stand by counsel as he is indigent and the court is required to immediately appoint substitute counsel. (PCR Tr. 51.) Applicant testified Anderson stayed on as his counsel after the hearing. (PCR Tr. 51.)

On August 30, 2011, Applicant testified he has a bond hearing where Anderson represented him and made prejudicial comments. (PCR Tr. 52.) Applicant testified Anderson told the bond court that, "They cannot say, Yes, we are sure this is the gun used; or, No, we're sure this gun wasn't used." (PCR Tr. 52.)[3] Applicant testified Anderson told him that his comment did not sway the court's decision in denying him bond. (PCR Tr. 53.) Applicant testified Judge King relieved Anderson from Applicant's case by order dated September 12, 2011. (PCR Tr. 53.) Applicant testified he was not appointed another lawyer and could not afford to retain one at that time. (PCR Tr. 53.) Applicant testified there was never any colloquy

[3] Applicant referenced the bond hearing transcript during his testimony and the quote comes from the bond hearing transcript on August 30, 2011, page 8, lines 17-18.

conducted with him regarding the dangers of proceeding pro se or representing himself. (PCR Tr. 53-54.) Applicant testified he was forced to represent himself. (PCR Tr. 54.)

Applicant testified he had a pretrial hearing before Judge Clifton Newman on October 12, 2011, regarding discovery issues and he appeared pro se at that hearing. (PCR Tr. 54.) Applicant testified Judge Newman did not ask him whether he wanted counsel at that time. (PCR Tr. 54-55.) Applicant testified no stand by counsel was ever appointed to him. (PCR Tr. 55.) Applicant testified his trial started on October 17, 2011 before Judge Young. (PCR Tr. 56.) Applicant testified at the beginning of trial Judge Young stated Applicant had elected to represent himself, and he disagrees with that statement. (PCR Tr. 57.) Applicant testified he was not asked if he wanted another lawyer and was not offered stand by counsel. (PCR Tr. 57.) Applicant testified he was not proved any Faretta[4] warnings prior to his trial. (PCR Tr. 58.) Applicant testified after his trial he attempted to file an appeal, but his appeal was dismissed because he did not serve opposing counsel. (PCR Tr. 58-59.)

On cross-examination, Applicant testified he understood the serious nature of his charges. (PCR Tr. 97.) Applicant testified he had been in trouble before and was represented by attorney on his previous case. (PCR Tr. 95-96.) Applicant testified he recalled Judge King warning Applicant that he did not have his choice of attorneys and he needed to respect his attorneys or he may have to go pro se. (PCR Tr. 98.) Applicant testified he recalled Judge King warning Applicant that if he threatened Anderson or wrote him any other "nasty letters" that Anderson would be relieved without a hearing. (PCR Tr. 98.)

Barr testified he was retained by Applicant on April 6, 2010. (PCR Tr. 101.) Barr testified he represented Applicant during his bond hearing, and bond was denied because the

[4] Faretta v. California, 422 U.S. 806 (1975).

court felt Applicant was a danger to the community. (PCR Tr. 101.) Barr testified the original preliminary hearing was cancelled by the sheriff's department and at the second preliminary hearing Applicant came in "raising sand" with him, so he requested a continuance to give Applicant time to hire another lawyer. (PCR Tr. 102.) Barr testified he represented Applicant for eight or nine weeks. (PCR Tr. 103.) Barr testified Applicant talked a lot of "trash" to him and he does not allow his clients to talk to him like that. (PCR Tr. 103.) Barr testified he got off Applicant's case after he was told by Applicant that he was going to fire him. (PCR Tr. 104.) Barr testified he received letters from Applicant where Applicant called him a "bastard" and accused him of conspiring with the State. (PCR Tr. 107.) Barr testified Applicant filed a fee dispute and a grievance against him. (PCR Tr. 107.) Barr testified Applicant threatened to destroy his business and claimed he had letters regarding Barr's use of drugs. (PCR Tr. 110.) Charels testified Applicant threatened to send out "dozens" of letters to organizations to destroy his reputation. (PCR Tr. 110.) Barr testified he did not discuss with Applicant proceeding pro se in his case because he believed Applicant would obtain another attorney after he was relieved. (PCR Tr. 110.) Barr testified there was not a hearing relieving him from Applicant's case because it was done through a consent order. (PCR Tr. 111.) Barr testified he did not discuss the dangers of proceeding pro se with Applicant. (PCR Tr. 112.) Barr testified Applicant understood the seriousness of the charges against him and he had discussed with him potentially damaging testimony that would be coming from a State's witness. (PCR Tr. 112.)

McKnight testified Applicant approached him about representing him after Barr and Applicant had a falling out. (PCR Tr. 114.) McKnight testified after preliminary talks, McKnight had to have emergency appendectomy surgery and spent eight days in the hospital. (PCR Tr. 115.) McKnight testified he then received a notice of appointment from the court and

that is how he came to represent Applicant. (PCR Tr. 115.) McKnight testified he filed two motions to be relieved in Applicant's case. (PCR Tr. 115.) McKnight testified he filed the first motion because he felt he was getting the short end of the stick. (PCR tr. 115.) McKnight testified Applicant went out and hired a lawyer, paid the lawyer, and is now suddenly indigent. (PCR Tr. 115.) McKnight testified Judge Newman denied his first motion to be relieved and McKnight testified he "shook that off" and proceeded to vigorously represent Applicant. (PCR Tr. 116.)

McKnight testified his filed a second motion to be relieved on November 24, 2010. (PCR Tr. 116.) McKnight testified there was a hearing on this motion before Judge James on December 6, 2010. (PCR Tr. 116.) McKnight testified he filed the second motion because there was "a level of acrimony" between him and Applicant and they could not effectively communicate. (PCR Tr. 116.) McKnight testified he discussed the case with Applicant and they would talk about viable defenses and then he would get bombarded with mail "laced with profanity." ((PCR Tr. 116.) McKnight testified Applicant accused him of being in "cahoots" with the State, which was not true. (PCR Tr. 116-117.) McKnight testified he felt he needed to file a motion to be relieved because Applicant made it impossible to talk to him. (PCR Tr. 117-118.) McKnight testified he was worried about visiting him in jail because he did not feel comfortable working with him as he had a "mercurial tempter." (PCR Tr. 118.) McKnight testified he explained to Applicant that he was filing a motion to be relieved because his behavior was not conducive to a good attorney/client relationship. (PCR Tr. 120.) McKnight testified he did explain to Applicant that "he who represents himself has a fool for a client, and if you go out there on this murder case, you're gonna get hammered." (PCR Tr. 120.) McKnight testified he told Applicant that Assistant Solicitor Barr was going to eat him alive. (PCR Tr. 121.)

McKnight testified he had a specific recollection of telling Applicant it is not a good idea to represent himself. (PCR Tr. 121-122.) McKnight testified Applicant is extremely intelligent, too smart for his own good. (PCR Tr. 122.) McKnight testified Applicant understood his charges and the consequences if he were to get convicted. (PCR Tr. 122.)

On cross-examination, McKnight testified Applicant sees everyone as his enemy and no one as his friend. (PCR Tr. 124.) McKnight testified Applicant never physically threatened him, but the tone of the letters were antagonistic and contained foul language. (PCR Tr. 125.) McKnight testified the tone of the letters made him feel unsafe. (PCR Tr. 126.) McKnight testified he visited Applicant after received those letters and Applicant's demeanor in person was that McKnight was the greatest thing, but in the letters Applicant was mean. (PCR Tr. 126.)

McKnight testified he did not go into detail with Applicant regarding the technicalities and procedural issues Applicant may face if he were to represent himself. (PCR Tr. 128.) McKnight testified the court did not go over the dangers of proceeding pro se with Applicant during either motion to be relieved because that was not before the court. (PCR Tr. 128-129.)

Anderson testified he was appointed to represent Applicant in December 2010 and represented Applicant until September of 2011. (PCR Tr. 131.) Anderson testified he met with Applicant seventeen times, not including the times they were in court together. (PCR Tr. 131.) Anderson testified he had received full discovery from the State. (PCR Tr. 132.) Anderson testified he reviewed discovery with Applicant, and he believes Applicant understood the evidence against him. (PCR Tr. 132.) Anderson testified he reviewed possible defenses with Applicant and was preparing for trial. (PCR Tr. 132.) Anderson testified Applicant assisted him in his defense and they discussed strategies and arguments. (PCR Tr. 132.) Anderson testified he never had an issue with Applicant in person, but that he received numerous letters accusing

him of lying to Applicant and stating Applicant no longer wanted his services. (PCR Tr. 133.) Anderson testified the letters he received included profanity and accused Anderson of being in "cahoots" with the State. (PCR Tr. 135-136.) Anderson testified he filed a motion to be relieved because of the letters Applicant sent him in this case. (PCR Tr. 136.) Anderson testified there was a hearing on June 22, 2011, before Judge King regarding his motion to be relieved. (PCR Tr. 136.) Anderson testified he was not relieved at that time. (PCR Tr. 136.) Anderson testified he told Judge King that it was hard to defend someone who constantly saying you are lying, you are withholding evidence, and you are working with the State. (PCR Tr. 137.) Anderson testified he discussed the motion with Applicant and Applicant wanted Anderson relieved. (PCR Tr. 137.) Anderson testified Applicant sent him letters saying he no longer wanted to speak to Anderson and that he would file a motion to have Anderson relieved it Anderson did not file one on his own. (PCR Tr. 137.) Anderson testified Applicant told him he would represent himself. (PCR Tr. 137-138.) Anderson testified he told Applicant about his qualifications when they first met and explained to Applicant that he would do an excellent job representing him. (PCR Tr. 139.) Anderson testified he does not recall any specific discussion with Applicant regarding how he should not represent himself. (PCR Tr. 139.) Anderson testified Applicant told him he had a twelfth grade education and Anderson believed Applicant understood everything they discussed about his case. (PCR Tr. 140-141.)

Anderson testified he received a letter from Applicant on August 29, 2011, that stated, "Because of your deliberate betrayal to me and my family for the third time, I no longer need your lying assistance. I will now represent myself in my case when the time comes." (PCT Tr. 141.) Anderson went on to testify that the letter stated, "You can put in the paperwork to Judge King or Judge James. I don't give a damn. Or I'll do it myself. You have played with my

freedom long enough. You protected [Assistant Solicitor Barr] and the State who is paying you. There are no more warnings, Mr. Anderson." (PCR Tr. 141-142.) Anderson testified he provided that letter to Judge King when he asked to be relieved the second time. (PCR Tr. 142.) Anderson testified Judge King's order reliving him found Applicant had waived his right to counsel through his behavior. (PCR Tr. 142.)

On cross-examination, Anderson testified he believes Judge King discussed with Applicant that Applicant was not trained in the law and he would be his "best bet" to have an attorney, but he does not recall Judge King specifically advising him of the dangers of proceeding pro se. (PCR Tr. 144.) Anderson testified after his first motion to be relieved, Judge King indicated that if he were to relieve Anderson that he would remain on Applicant's case as stand by counsel, however, Anderson testified that after his second motion to be relieved was granted by order from Judge King he believed he was fully relieved from Applicant's case. (PCR Tr. 147.) Anderson testified had he been stand by counsel for Applicant he could have helped him file his appeal. (PCR Tr. 147-148.)

Assistant Solicitor Barr testified that once Applicant went pro se she made sure he had a full and complete copy of his discovery. (PCR Tr. 158.) Assistant Solicitor Barr testified she started to receive letters from Applicant accusing her of conspiring with his previous attorneys and trying to get him imprisoned for the rest of his life. (PCR Tr. 158-159.) Assistant Solicitor Barr testified she wrote Applicant a letter explaining what she would provide him and what she would not provide him as some of the things he was requesting were not discoverable. (PCR Tr. 159.) Assistant Solicitor Barr testified they had a status conference prior to the trial so Applicant could air out any grievances and make all of the requests he wanted to so those issues would not come up at trial. (PCR Tr. 161.) Assistant Solicitor Barr testified Applicant was very intelligent

individual and she realized early in the trial she should not assume he did not know what he was doing. (PCR Tr. 162.) Assistant Solicitor Barr testified Applicant's closing argument was appropriate and he made repeated references to hearsay throughout the trial and was clearly prepared for trial. (PCR Tr. 164.)

On cross-examination, Assistant Solicitor Barr testified that she does not recall any specific warnings being provided to Applicant regarding the advantages and disadvantages of proceeding pro se at his trial. (PCR Tr. 165.) Assistant Solicitor Barr testified she believes at the first bond hearing a judge inquired about Applicant's education, but does not recall the judges at the subsequent motion hearings inquiring into Applicant's background. (PCR Tr. 166.)

The Sixth Amendment to the Constitution requires that in all criminal proceedings, the accused shall have the right to the assistance of counsel. U.S. Const. amend. VI. A defendant may waive his Sixth Amendment right to counsel. According to the United States Supreme Court, in order to waive the right to counsel, the accused must be (1) advised of his right to counsel and (2) adequately warned of the dangers of self-representation. Gardner v. State, 351 S.C. 407, 411, 570 S.E.2d 184, 186 (2002). The courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and do presume acquiescence in the loss of fundamental rights. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Absent a specific inquiry by the trial court into the hazards of proceeding pro se, a court will examine the record to determine whether the accused was advised of his rights from some other source or had sufficient background to intelligently waive his right to counsel. Gardner v. State, 351 S.C. 407, 411, 570 S.E.2d 184, 186 (2002). Courts considering the following factors in determining if the accused has a sufficient background to understand the dangers of self-representation: 1) the accused's age, educational background, and physical and mental health; 2) whether the accused was

previously involved in criminal trials; 3) whether the accused knew the nature of the charge(s) and the possible penalties; 4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation; 5) whether the accused was attempting to delay or manipulate the proceedings; 6) whether the court appointed stand-by counsel; 7) whether the accused knew he would be required to comply with the rules of procedure at trial; 8) whether the accused knew of legal challenges he could raise in defense to the charges against him; 9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and 10) whether the accused's waiver resulted from either coercion or mistreatment. State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992) (citations omitted).

The record before this Court shows Applicant was not provided proper Faretta warnings by any judge that relieved counsel in Applicant's case. This Court finds the testimony of Barr, McKnight, Anderson, and Assistant Solicitor Barr very credible as it relates to this allegation. The testimony of each of Applicant's prior attorneys and Assistant Solicitor Barr indicates Applicant was not provided a sufficient warning of the dangers of proceeding pro se before Applicant represented himself at trial. Although there is no scripted Faretta hearing a judge must undertake, the record must demonstrate "the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied." Gardner, 351 S.C. at 411-412, 570 S.E.2d at 186 (2002) (citations omitted). In a PCR action, if the record fails to demonstrate the petitioner made an informed choice to proceed pro se, with "eyes open," then the petitioner did not make a knowing and voluntary waiver of counsel, and the case should be remanded for a new trial. Watts v. State, 347 S.C. 399, 556 S.E.2d 368 (2001).

This Court finds Applicant was not provided sufficient warning regarding the dangers of proceeding pro se prior to representing himself at trial. As such, this Court grants Applicant's application for post-conviction relief as it relates to this allegation. Accordingly, this Court grants Applicant a new trial.

CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has established he is entitled to a new trial based on his allegation that he was not adequately warned of the dangers of proceeding pro se prior to representing himself at trial. Accordingly, Applicant is entitled to a new trial. As to the remaining allegations in Applicant's application for post-conviction relief, this Court finds Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application as it relates to the remaining allegations.

The Court notes either party 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 Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for post-conviction relief is granted as it relates to Applicant's claim that he was not adequately advised of the dangers of proceeding pro se prior to his trial; and

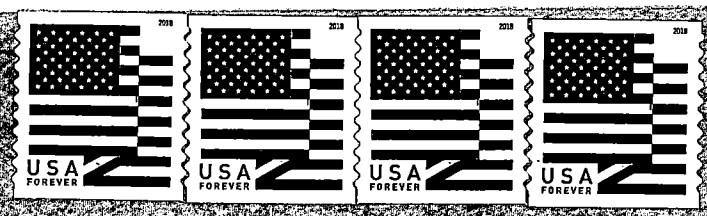
2. Applicant's remaining allegations for post-conviction relief are denied and dismissed with prejudice; and

3. Applicant shall be transported back to Williamsburg County to await retrial.

AND IT IS SO ORDERED this 3 day of October, 2019.

GEORGE M. MCFADDIN
Presiding Judge
Third Judicial Circuit

Sumter, South Carolina



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