

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas  
J. Derham Cole, Circuit Judge

Case No.: 2015-CP-42-04699

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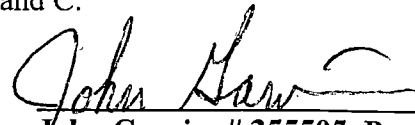
S.C. SUPREME COURT

John Garvin..... Appellant-Petitioner,  
v.  
The State of South Carolina..... Appellee-Respondent.

NOTICE OF APPEAL

This Notice is hereby given that Appellant-Petitioner in the above-name case, hereby appeals the Order of the Honorable, J. Derham Cole, denying Appellant-Petitioner's Motion for Reconsideration to Alter/Amend Judgment that was entered and filed on September 11, 2020, (see Exhibit – A), which relates to an Order of Dismissal for Post-Conviction Relief that was filed on July 10, 2020. (see Exhibit – B). Appellant-Petitioner received written notice of the entry of the Order on September 29, 2020, from the Spartanburg County Clerk of Court via Lieber Correctional Institutional internal mail staff. Appellant-Petitioner also appeals the Order of the Honorable Michael G. Nettles, filed on June 4, 2018, denying Appellant-Petitioner's three pro-se Motions. (see Exhibit – C). This appeal is taken from the Orders of Judge Cole filed on September 11, 2020, and July 10, 2020, in addition to the Order of Judge Nettles filed on June 4, 2018. A copies of the Orders are attached as Exhibits – A, B, and C.

DATED: October 19, 2020  
Ridgeville, South Carolina

  
John Garvin, # 355505, Pro-se.  
Lieber Correctional Institution  
136 Wilborn Avenue  
Ridgeville, S.C. 29472

*Other Counsel of Record:*  
Johnny E. James, Jr., Asst. Att'y. Gen.  
South Carolina States Attorney General Office  
1000 Assembly Street  
Columbia, S.C. 29201

# EXHIBIT

A

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE - PCR

CASE NO. 2015-CP-42-04699

John Dwayne GARVIN, SCDCID #355509,

The STATE of South Carolina,

Applicant

Respondent

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED** (CHECK REASON):  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  S. C. Code Ann. Section 56-36-100
- ACTION STRICKEN** (CHECK REASON):  Rule 40(j) SCRPC;  Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other

**IT IS ORDERED AND ADJUDGED:**  formal order to follow;  Statement of Judgment by the Court:

This matter comes before this Court on Applicant's **MOTIONS** for "**RECONSIDERATION TO ALTER/AMEND JUDGMENT, PURSUANT TO RULE - 52(b) & Rule - 59(e), SCRPC**" and "**TO RESTORE CASE STRICKEN FROM DOCKET, PURSUANT TO RULE - 40(j), SCRPC**", which relate to an Order of Dismissal in the above-captioned application for post-conviction relief filed July 10, 2020.

After careful consideration of the argument and submissions accompanying the motions filed with the Court and after review of the Application and Order of Dismissal, this Court finds that its Order has appropriately addressed each of the allegations set forth in the Application for Post-Conviction Relief and makes specific findings of fact and its conclusions of law relating to each of the issues presented by the Applicant at the hearing in accordance with S. C. Code Ann. Section 17-27-80 and therefore finds that;

The Applicant's **MOTIONS** should be and **ARE** therefore **DENIED**.

  
 \_\_\_\_\_  
**J. DERHAM COLE, PRESIDING JUDGE**

This judgment was entered on the 11 day of September and a copy mailed first class this 11 day of September to attorneys of record or to parties (when appearing pro se) as follows:

**JOHN DWAYNE GARVIN**  
Lieber Correctional Institute  
Ridgeville, South Carolina 29472

**JOHNNY E. JAMES, Jr., Esq.**  
Post Office Box 11549  
Columbia, South Carolina 29211

THE APPLICANT, appearing *pro se*

ATTORNEY FOR THE RESPONDENT

  
 \_\_\_\_\_  
**AMY W. COX, CLERK OF COURT**

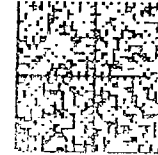
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**AMY W. COX**

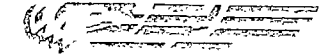
Clerk of Court, Spartanburg County  
Post Office Box 3483  
Spartanburg, South Carolina 29304-3483

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John Garvin #355509  
Lieber CI  
136 Wilborn Ave  
Ridgeville SC 29472

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SEP 28 2020

**MAILROOM  
LIEBER CI**

15 HRDUNMP 29472



**EXHIBIT**

**B**

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE - PCR

CASE NO. 2015-CP-42-04699

John Dwayne GARVIN, SCD CID #355509  
Applicant,

The STATE of South Carolina,  
Respondent,

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED** (CHECK REASON):  Rule 12(b), SCRC P;  Rule 41(a), SCRC P (Vol. Nonsuit);  Rule 43(k), SCRC P (Settled);  Other
- ACTION STRICKEN** (CHECK REASON):  Rule 40(j) SCRC P;  Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other


**IT IS ORDERED AND ADJUDGED:**  See formal order attached;  Statement of Judgment by the Court:

This matter came before this court on an application for post-conviction relief filed pursuant to *South Carolina Code Annotated Section 17-27-10 et seq.* The applicant proceeded on various allegations involving (1) ineffective assistance of appellate counsel; (2) ineffective assistance of trial counsel; and (3) prosecutorial misconduct.

Based upon the record of the case, the evidence presented at the evidentiary hearing held in this matter, the argument of the parties, and consideration of the applicable statutory and case law, this court finds that the applicant has failed to establish any deficient performance on the part of counsel and/or any prejudice resulting from counsel's performance *Strickland v. Washington*, 466 US 668 (1984) and *Cherry v. State*, 300 SC 115 (1989) or any other cognizable claim allowed under S. C. Code Ann. Section 17-27-20.

Applicant's request for **POST-CONVICTION** relief should be and **IS** therefore **DENIED** and the **APPLICATION DISMISSED WITH PREJUDICE**

Dated this the 9<sup>th</sup> day of **JULY, 2020.**

  
 \_\_\_\_\_  
 PRESIDING JUDGE, J. DERHAM COLE

This judgment was entered on the 10 day of July, 2020, and a copy mailed first class this day of July, 2020 to attorneys of record or to parties (when appearing pro se) as follows:

**JOHN DWAYNE GARVIN**  
 Liber Correctional Institution  
 Ridgeville, South Carolina 29472  
 THE APPLICANT, appearing pro se

**JOHNNY E. JAMES, JR., Esq.**  
 Post Office Box 11549  
 Columbia, South Carolina 29211  
 ATTORNEY FOR THE RESPONDENT

AMY W. COX  
 CLERK OF COURT  
 11-11-20  
 0111

  
 AMY W. COX, CLERK OF COURT

|                                     |   |  |
|-------------------------------------|---|--|
| <b>STATE OF SOUTH CAROLINA</b>      | ) |  |
| COUNTY OF <b>SPARTANBURG</b>        | ) | IN THE COURT OF COMMON PLEAS             |
| John Dwayne <b>GARVIN</b> ,         | ) |  |
|                                     | ) |  |
| Applicant,                          | ) | <b>ORDER</b>                             |
|                                     | ) |  |
| -vs-                                | ) |  |
|                                     | ) |  |
| The <b>STATE</b> of South Carolina, | ) | Civil Action No. <b>2015-CP-42-04699</b> |
|                                     | ) |  |
| <u>Respondent.</u>                  | ) |  |

This matter came before the Court for hearing on application for post-conviction relief filed by John Dwayne Garvin (Applicant) on November 18, 2015 and subsequently amended on April 22, 2016 and again on July 5, 2019. At the evidentiary hearing held in this matter, Applicant was present and appearing *pro se* after having previously had his motion to relieve court-appointed post-conviction relief counsel granted by the Court. Assistant State Attorney General Johnny Ellis James, Jr., appeared on behalf of the respondent. The evidentiary hearing was held in this matter on July 26, 2019 and July 31, 2019 at the Spartanburg County Courthouse.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Spartanburg County Grand Jury returned a True Bill on Indictment Number 2012-GS-42-05979 at the December 2012 term of General Sessions Court charging Applicant with "Trafficking In Heroin, Fourteen Grams Or More But Less Than Twenty-eight Grams" in violation of Section 44-53-370 of the Code of Laws of South Carolina. The case proceeded to trial before Circuit Judge R. Lawton McIntosh and a jury on May 21, 2013. Scott D. Robinson, Esq., represented Applicant at trial by court appointment substituting for the Public Defender who had a conflict due to the representation of a co-defendant. J. Edward Hunter, Assistant Circuit Solicitor for the Seventh Judicial Circuit, presented the case on behalf of the State. On May 23, 2013 the jury returned a

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 AMY W. COX

*[Signature]* 1

verdict of guilty. Applicant was sentenced to the mandatory minimum term of imprisonment of twenty-five (25) years and ordered to pay a fine of two hundred thousand dollars (\$200,000).

Applicant timely filed a Notice of Appeal of his conviction and sentence which were affirmed by the South Carolina Court of Appeals on November 13, 2014 in an opinion State v. Garvin, Op. No. 2014-UP-414 and the remittitur returned December 12, 2014. Applicant timely filed an application seeking post-conviction relief on November 18, 2015. Counsel was appointed to represent the applicant in this action but subsequently relieved by the circuit court after hearing on motion at the request of Applicant.

In his original application for relief Applicant claims he is being held in custody unlawfully as the result of:

- (a) Ineffective Assistance of Appellate Counsel
- (b) Ineffective Assistance of Counsel, Scott D. Robinson has violated Petitioner's right to adequate legal representation.
- (c) Malicious Prosecutorial Misconduct
- (d) Conspiracy
- (e) Insufficient Grand Jury Indictment
- (f) The Judge's erroneous jury charges of "The Hand of One, Hand of All"
- (g) Involuntary Confession
- (h) Falsified Arrest Warrant
- (i) Actual Innocence

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Applicant states that the facts which support each of the above-stated grounds are that:

- (a) Appellate Counsel was ineffective in failing to raise and brief issue of trial court's error in not granting petitioner's Motion to Relieve Counsel and his objection to Counsel Robinson's representation of his at trial.
- (b) Trial counsel's insidious representation consisted of deliberate failures that are as follows: (1) Counsel's failure to object to the State's adduce evidence of a falsified involuntary confession. (2) Counsel Robinson's failure to prepare law and evidence for trial. (3) Counsel's failure to assert timely claim of double jeopardy violation. (4) Counsel's failure to file motion to quash indictment. (5) Counsel's failure to object

to the solicitor's manipulation of court docket in the prosecution of case. (6) Counsel's failure to advise the court concerning an existing conflict of interest. (7) Counsel's failure to object to judge's erroneous jury charge. (8) Counsel's failure to object during Solicitor's Summation. (9) Counsel's failure to investigate. (10) Counsel's failure to file motion for release on bail. (11) Counsel's failure to be present for petitioner's preliminary hearing.

(c) Solicitor, James E. Hunter has abused the judicial process of the petitioner with his official lawlessness in the enforcement of South Carolina Statute Section 44-53-370(e). He has shown bad faith, has prosecuted the petitioner's case maliciously and sadistically to cause harm to him.

(d) Solicitor, James E. Hunter has conspired with the petitioner's appointed counsel, Scott D. Robinson, Esq., to deprive petitioner of his rights and privileges guaranteed by the constitution.

(e) The indictment lacked jurisdiction for the petitioner's case at the time of the indictment. It does not state facts sufficient to constitute an offense, and it fails to put petitioner on proper notice of the true nature and the true actual cause of accusation to legally support the conviction.

(f) The judge's erroneous jury charges had a substantial and injurious effect and it influenced the jury's verdict, it shifted the burden of proof from the state to the petitioner, and it violates the double jeopardy clause, as well as the principles of collateral estoppel.

(g) Officer Ashley Asbill has falsified an inculpatory statement that the petitioner did not make or even write and was mentally coerced into signing.

(h) Office Ken Hancock has falsified an arrest warrant by fabricating the weight of evidence knowingly and intentionally with reckless disregard for the truth.

(i) The constitutional errors in petitioner's trial has deprived the jury of critical exculpatory evidence that would have established insufficient evidence of guilt and would have also proved his innocence.

On April 22, 2016 Applicant filed amendments to his original application to include in paragraph 10;

(a) "Ineffective Assistance of Appellate Counsel: (1) Appellate counsel has failed to effectively raise in brief, the inadequacies of petitioner's Jackson v. Denno hearing and admission of an involuntary confession. (2) Appellate counsel's failure to include in record on appeal a redacted involuntary confession improperly admitted at trial. (3) Appellate counsel's failure to report, petitioner's complaint about his transcript not being fully transcribed. (4) Failure to advise petitioner of his right to challenge the accuracy of the transcription."

(b) "Ineffective Assistance of Counsel: Trial counsel's insidious representation consisted of deliberate failure's that are as followed; (12) Effective Assistance of Counsel was abandoned entirely during the critical stages of petitioner's state proceeding and was misrepresented at trial. (13) trial counsel was ineffective for failing to object to solicitor's

3

bolstering of state's witnesses (14) trial counsel was ineffective for failing to move for a mistrial in response to bolstering. (15) Trial counsel's performance as a whole was deficient and prejudicial. (16) Trial counsel was ineffective for failing to object to the redaction of an inculpatory statement. (17) Trial counsel was ineffective for failing to suppress audio and video recordings. (18) Trial counsel was ineffective for failing to inform petitioner of and to utilize exculpatory evidence. (19) Failure to represent client with undivided loyalty. (20) Failure to communicate with client/keep client informed (21) Failure to preserve client confidences."

(g) "Involuntary Confession: The trial judge erred in admitting involuntary confession that was redacted to hide the facts about police misconduct."

(j) "The constitutionality of S. C. Statute Section 44-53-370(e)(3): South Carolina's Drug Trafficking statute is patently and flagrantly unconstitutionally vague. It expands and over reached with its definition of drug trafficking and fails to put petitioner on proper notice within its subsection. And it classifies a non-violate offense as a violate crime, as defined in S. C. Statute Section 16-1-60."

(k) "Fraud: The solicitor and petitioner's trial counsel deliberately conspired to scheme to defraud courts, knowingly and intentionally."

(l) "Judicial Bias: The trial judge had person and extrajudicial reasons that was partial and he thrust - upon a conflict, on the petitioner during his trial proceedings. Whereas his failure to inquire thoroughly into the factual basis of petitioner's dissatisfaction with his trial counsel is an abuse of discretion, when petitioner had raised a seemingly substantial complaint about his trial counsel."

(m) "Denied motion for directed verdict: Trial judge abused his discretion in denying petitioner motion for directed verdict."

(n) "Denied motion to relieve counsel: Trial judge abused his discretion in denying petitioner's motion to relieve counsel."

(o) "Police Misconduct: The evidence that was provided at petitioner's trial, derived from the illegal arrest and the misrepresentation of the facts that was provided by Spartanburg County Sheriff's officer, Lt. Ken Hancock; A.T.F. Special Agent, David H. Pait; S.L.E.D. Officer Asley Asbill. And would not have come to light if not for the illegal actions of the above-mentioned law enforcement officer, whereas, the evidence has been obtained by the exploitation of that illegality."

(p) "Pre and Post-Indictment Delay: The solicitor's pre and post-indictment delay in prosecuting petitioner, violates his due process, the fundamental concept of justice, fair play, and decency."

On July 5, 2019 Applicant filed amendments to paragraphs 10 and 11 of his amended application to include the following additional grounds supporting his request for relief;

(b) "Ineffective Assistance of Counsel: Trial counsel's insidious representation consisted of deliberate failure's that are as followed; (18).

Failure to request a Franks Hearing; (19) Failure to impeach the State's witnesses.

(c) Prosecutorial Misconduct: (2) Asst. Solicitor, James E. Hunter, has vouched for the credibility of the state's witnesses, that have committed perjury during Petitioner's trial.

(d) Grand Jury Indictment Lacks Subject Matter Jurisdiction: (1) The indictment lacks jurisdiction of the Petitioner's case at the time of the indictment. (2) The indictment does not state the facts to constitute the offense to put Petitioner on notice of what he is being charged. (3) The indictment fails to put the Petitioner on notice of the true nature and the true actual cause of accusation to legally support the conviction. (4) The Spartanburg County Court of General Session had no jurisdiction to try Petitioner until he had his requested preliminary hearing. (5) The indictment is manifest error affecting Petitioner's Constitutional rights.

(e) The Judge's erroneous jury charge of "The Hand of One, is the Hand of All": (1) The Judge's erroneous jury charge had a substantial injurious effect on the jury; (2) It influenced the jury's verdict; (3) It shifted the burden of proof from the State to the Petitioner; (4) The judge's erroneous jury charge was unsupported by any evidence to support it being charged to the jury; (5) The Petitioner was not put on notice that he could be charged as an accomplice under the Judge's Jury Charge of "The Hand of One, is the Hand of All". (6) The Judge's Jury Charge of "the Hand of One, is the Hand of All," is manifest error affecting Petitioner's Constitutional rights.

(j) Double Jeopardy: Asst. Solicitor, James E. Hunter, has indicted Petitioner for the same offense twice, to be twice put in jeopardy of drug trafficking Heroin.

#### Pre-Evidentiary Hearing Motions

At the evidentiary hearing this Court addressed a number of pre-trial motions filed by the applicant which included the following;

(1) Motion to Dismiss for lack of jurisdiction based upon a removal of the matter to federal court.

(2) Motion to Disqualify the PCR judge due to prejudice, bias, lack of impartiality, and conflict.

(3) Motion to prohibit the attorney general from drafting the dispositional order to be filed in this matter and for the Court to prepare the order.

(4) Motion for relief from judgment pursuant SCRPC Rule 60(b)(2),(3),(4) and S. C. Code Ann. Section 17-27-20(a)(4) based upon newly discovered evidence and extrinsic fraud, misrepresentation, and misconduct of the prosecutor and trial counsel.

STATE OF SOUTH CAROLINA  
SPARTANBURG COUNTY  
JAMES W. COX  
CLERK OF COURT  
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(5) Motion for issuance of a Rule to Show Cause requiring certain witnesses to appear and show cause why they should not be held in contempt for providing perjured testimony.

(6) Motion to Amend the application for relief.

(7) Motion for discovery of audio/video evidence of an event not charged or prosecuted.

(8) Motion for Summary Judgment and Declaratory Judgment to "determine the legalities and constitutionality of the grand jury actions."

(1) Lack of jurisdiction:

Applicant asserts that this State post-conviction relief proceeding cannot be heard because the matter has been removed to the Federal District Court due to action taken by the U. S. Attorney. It appears that upon Applicant having a subpoena served on a federal agent who was a witness at his State criminal trial, the U. S. Attorney filed an action in federal court to have the validity or propriety of the subpoena addressed by a federal judge.

In support of his argument Applicant cites Title 28 U.S.C. Section 1446 and the case of South Carolina v. Moore, 447 F.2d 1067 (4th Cir. 1971). Section 1446 relates to the removal of certain civil cases to federal district court on request of a defendant under specified circumstances. Moore involved a petition for habeas corpus where a state prisoner was seeking removal of a state criminal prosecution to federal district court. Neither of those scenarios is relevant to the present action. The United States is not a party to this post-conviction proceeding, no defendant has requested removal of this case to federal district court, nor is this action one which would be appropriate to remove to federal district court as this is a state proceeding that provides a state statutory remedy under circumstances specified by the statute and the applicant has made no claim or request for relief that would confer jurisdiction of this post-conviction relief proceeding on the federal district court.

STATE OF ARIZONA  
COURT OF APPEALS  
CLERK OF COURT  
JANUARY 11, 2011  
AMY W. COX

Applicant's claim is without merit and relief is denied.

(2) Disqualification of the judge assigned to decide the application for post-conviction relief:

Applicant has filed a motion pursuant to "Rule-501, SCACR, Canon-3(C)(E)(1)(a)" to disqualify or have the assigned post-conviction relief judge recused and to have his application "placed before a judge that will rule in his favor".

As grounds for the motion, Applicant states that he "questions the Judge's impartiality to render a decision in this matter, due to his personal and extra-judicial relationship with the Seventh Circuit Solicitor's Office and the undue influence of the adverse party and the witnesses that is to be call to testify in this matter." Applicant asserts "there is an unconstitutional potential for bias and/or prejudice, due to Judge Cole's personal and extra-judicial relationship with the Seventh Circuit Solicitor's Office. Such a relationship that is within the degree of consanguinity and is accordingly grounds for disqualification." He claims just cause exists for disqualification due to the fact that the judge was previously employed as an assistant circuit solicitor until 1985 and that connection creates "a risk that Judge Cole is psychologically wedded to his previous position" and would therefore "consciously or unconsciously be bias and/or prejudice" in presiding over the applicant's hearing.

Applicant also asserts bias in that the judge "presided over [his] co-defendant's plea deal", and he believes the judge to be prejudiced against defendants in drug prosecutions.

The Code of Judicial Conduct, Rule 501, SCACR: Canon 3 Section (E), addressing disqualification of a judge from participation in a proceeding, provides that:

(1) "A judge shall disqualify himself ... in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party ... or personal knowledge of disputed evidentiary facts concerning the proceeding . . . ."

Applicant has presented no evidence, either direct or circumstantial, which establishes or has any tendency to establish, bias, prejudice, conflict, or partiality on the part of the judge. The judge was last employed in the circuit solicitor's office in 1985 – thirty-five years ago – and has no extra-judicial relationship with anyone in the circuit solicitor's office. I am unaware of any bias towards those persons convicted of drug offenses and the applicant has presented no evidence of any such bias. Applicant asserts that I presided over his co-defendant's "plea deal". I have no recollection of that fact nor do I have any recollection of any facts relating to the underlying conviction for which the applicant seeks relief.

Applicant apparently relies upon an overactive imagination and creative speculation to support his claim of bias, prejudice, and partiality on the part of the judge. I am confident that my impartiality cannot "reasonably" be questioned.

Applicant's motion to disqualify the judge has no merit and is denied.  
(3) Motion for Relief from Judgment pursuant to Rules 60(b)(2), 60(b)(3) and 60(b)(4), SCRPC, and S. C. Code Ann. Section 17-27-20(A)(4)

Applicant moves for relief from the judgment entered in his criminal prosecution and to have his conviction and sentence vacated pursuant to Rules 60(b)(2), 60(b)(3) and (4), SCRPC, and S. C. Code Ann. Section 17-27-20(A)(4). The rules of civil procedure cited in support of his motion are not applicable to a judgement of guilt entered in a criminal prosecution.

Applicant's motion for relief from his conviction and sentence pursuant to the cited civil rules of procedure is without merit and is denied.

The relief requested pursuant to S. C. Code Ann. Section 17-27-20(A)(4) is and was appropriately addressed during the evidentiary hearing on the application for post-conviction relief and all are fully addressed in this order.

(4) Motion for issuance of a Rule to Show Cause:

Applicant moves for the issuance of a Rule to Show cause requiring A.T.F. agent Pait and SLED agent Asbill to appear and show cause why they should not be held in

contempt of court for providing perjured testimony during the trial of underlying criminal prosecution.

Applicant has failed to make a prima facie showing as to why a Rule to Show Cause is appropriate to be issued in this matter and a post-conviction relief proceeding is not the appropriate forum to address whether or not perjured testimony was provided during the trial of his case, aside from considering any evidence of such in determining whether or not the applicant has established entitlement to relief from his conviction pursuant to S. C. Code Ann. Section 17-27-20.

Applicant's motion for issuance of a Rule to Show Cause is denied.

(5) Motion to Amend application for post-conviction relief:

Applicant seeks to amend his application for post-conviction relief to include the additional or restated grounds for relief:

(b) Ineffective Assistance of Counsel: Trial counsel's insidious representation consisted of deliberate failure's that are as followed; (18) Failure to request a Franks Hearing; (19) Failure to impeach the State's witnesses.

(c) Prosecutorial Misconduct: (2) Asst. Solicitor, James E. Hunter, has vouched for the credibility of the state's witnesses, that have committed perjury during Petitioner's trial.

(d) Grand Jury Indictment Lacks Subject Matter Jurisdiction: (1) The indictment lacks jurisdiction of the Petitioner's case at the time of the indictment. (2) The indictment does not state the facts to constitute the offense to put Petitioner on notice of what he is being charged. (3) The indictment fails to put the Petitioner on notice of the true nature and the true actual cause of accusation to legally support the conviction. (4) The Spartanburg County Court of General Session had no jurisdiction to try Petitioner until he had his requested preliminary hearing. (5) The indictment is manifest error affecting Petitioner's Constitutional rights.

(e) The Judge's erroneous jury charge of "The Hand of One, is the Hand of All": (1) The Judge's erroneous jury charge had a substantial injurious effect on the jury; (2) It influenced the jury's verdict; (3) It shifted the burden of proof from the State to the Petitioner; (4) The judge's erroneous jury charge was unsupported by any evidence to support it being charged to the jury; (5) The Petitioner was not put on notice that he could be charged as an accomplice under the Judge's Jury Charge of "The Hand of One, is the Hand of All". (6) The Judge's Jury Charge of "the Hand of One, is the Hand of All," is manifest error affecting Petitioner's Constitutional rights.

(j) Double Jeopardy: Asst. Solicitor, James E. Hunter, has indicted Petitioner for the same offense twice, to be twice put in jeopardy of drug trafficking Heroin.

There appears to be no prejudice to the State in allowing the amendment and the State consents to the motion.

Applicant's motion to amend filed July 5, 2019 is granted.

(6) Motion for Discovery of audio/video of an event not charged or prosecuted.

Applicant has failed to establish the relevancy of the discovery request and therefore his request is denied.

(7) Motion for Summary Judgment and Declaratory Judgment.

Applicant moves for summary judgment pursuant to Rule 56, SCRPC, and for a declaratory judgment pursuant to S. C. Code Ann. Section 15-15-10 et. seq. and Rule 57, SCRPC, on the ground that "the pleadings and evidence adduced in the affidavit of John Garvin ... show that Petitioner is entitled to judgment as a matter of law" as there is no genuine issue of material fact based upon the fact that the assistant solicitor and the county grand jury have made an investigation of the applicant and returned an indictment against him that is in violation of state law and a denial of equal protection and due process.

Applicant appears to allege that the grand-jury proceeding is a "one-sided" proceeding which allows the prosecutor to abuse the criminal process by seeking criminal indictments through a grand jury proceeding without permitting Applicant an opportunity to be heard. He seeks a declaration by this Court that the actions of the solicitor and the grand jury are "invalid, illegal, and in deprivation of those rights secured ... by the United States Constitution and South Carolina Constitution."

Summary judgment is appropriate when it is clear that no genuine issue as to any material fact exists and a party is entitled to judgment as a matter of law. Summary judgment is not appropriate until the opposing party has had a full and fair opportunity to discover evidence in support of and in opposition to the allegations made by the

moving party. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999) Conclusory statements as to the facts in support of relief, without providing testimony and other evidence for the establishment of those facts on which judgment in favor of the moving party is dependent, is not sufficient to support a grant of summary judgment. In this case, Applicant has a special statutory remedy in the form of an application for post-conviction relief, pursuant to S. C. Code Ann. Section 17-27-10 et seq., which is effective, appropriate, adequate, and well suited for addressing Applicant's claims.

There appears to be a genuine issue as to the material facts necessary to render judgment in favor of Applicant and the grand jury process appears to have proceeded in the regular and ordinary course, subject to a presentation of evidence during the evidentiary hearing which may show otherwise. Applicant's motions for summary judgment and declaratory judgment are denied.

Any and all other motions filed by the applicant have been previously heard by the Circuit Court and decided or have been withdrawn by the applicant or abandoned by failing to present evidentiary support in favor and therefore waived by the applicant.

#### **DISCUSSION AND ANALYSIS**

In an action seeking post-conviction relief, the applicant has the burden of proving the allegations entitling him to relief. Rule 71.1(e), S.C.R. Civ. P. 71.1(e); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). A defendant is entitled to effective assistance of counsel. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). When an applicant alleges ineffective assistance of counsel as a ground for relief in a trial context, the applicant bears the burden of proving 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." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland v. Washington, 466 U.S. 668 (1984)).

The standard for measuring counsel's performance is whether counsel provided representation within the range of competence required in criminal cases under prevailing professional norms. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler. The applicant must overcome this presumption 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. First, the applicant must prove that counsel's performance was deficient in that it "fell below an objective standard of reasonableness under prevailing professional norms." Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at 117-18, 386 S.E.2d at 625. A "reasonable probability" is one sufficient to undermine confidence in the outcome of the trial. Patrick v. State, 349 S.C. 203, 562 S.E.2d 609 (2002).

In analyzing a claim of ineffective assistance of appellate counsel the same two-pronged test as mandated by Strickland is applicable. Applicant is required to prove that (1) appellate counsel's performance was deficient and (2) he has suffered prejudice by that deficient performance. "Prejudice" means that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Bennett v. State, 383 S.C. 303, 680 S.E.2d 273 (2009).

This Court has had the opportunity to review the record in its entirety and to have heard the testimony received at the post-conviction relief hearing and to have observed each witness during the direct and cross-examination of the witness. The Court is therefore in a position to evaluate and to pass upon the credibility of the witness, the reliability of the information provided, and its probative value as it relates

to the allegations made in support of a request for post-conviction relief. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. Section 17-27-80.

Applicant's Claims for Post-Conviction Relief

I. Ineffective Assistance of Appellate Counsel

Applicant makes a claim of ineffective assistance of appellate counsel (1) "in failing to raise and brief issue of trial court's error in not granting petitioner's Motion to Relieve Counsel and his objection to counsel Robinson representation of him at trial"; (2) "in failing to effectively raise and brief, the inadequacies of petitioner's Jackson v. Denno hearing"; (3) in failing "to include in record on appeal a redacted involuntary confession improperly admitted at trial"; (4) in failing "to report petitioner's complaint about his transcript not being fully transcribed"; and (5) in failing "to advise petitioner of his right to challenge the accuracy of the transcription."

A criminal defendant, who desires to appeal a conviction and sentence, is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985).

It appears from the record that the applicant initially applied for representation by the Public Defender. Due to a conflict with their representation of a co-defendant, Scott Robinson was court-appointed to represent the applicant for the case. The record reflects that at the May 21, 2013 trial, immediately prior to jury selection in the case, trial counsel and the applicant appear to make a joint motion to have counsel relieved from further representation. In support of his motion to have counsel relieved Applicant complained that counsel (1) never requested that bond be set; (2) refused to keep him updated on court notices; (3) failed to notify him of his December 2012 indictment until March of 2013; (4) waived his preliminary hearing without his knowledge and consent; and (5) that he was "representing him with prejudice".

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After hearing from both counsel and the applicant, the trial judge denied the motion to relieve counsel and jury selection commenced.

A motion to relieve counsel is addressed to the discretion of the trial judge and the burden is upon the applicant to establish a satisfactory cause for removal. State v. Graddick, 345 S.C. 383, 548 S.E.2d 210 (2001). A mere disagreement between a defendant and counsel as to tactics or strategy is not sufficient cause to have counsel relieved. State v. Jones, 270 S.C. 587, 243 S.E.2d 461 (1978).

In order to be entitled to relief the applicant must show that the trial judge abused his discretion in denying the motion to have counsel relieved and that appellate counsel should have raised that issue for appellate review because there is a reasonable probability that if she had the result of the appeal would have been different. A review of the record does not reflect any satisfactory cause or other compelling reason for the granting of the motion to relieve counsel. At no time did Applicant assert any right to self-representation. The record does not support a finding of an abuse of discretion on the part of the trial judge in his denial of the motion to relieve counsel, nor does it reflect that counsel performed to the prejudice or detriment of the applicant.

Effective assistance of counsel in the context of an appeal does not require that appellate counsel raise every non-frivolous claim, but may exercise discretion in the selection of those claims that maximize the likelihood of success. Smith v. Robbins, 528 U.S. 259, 120 S. Ct. 746 (2000); Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990). In addressing the question as to why she had not raised a claim of error in the trial judge's denial of the motion to relieve trial counsel, appellate counsel testified that, "... I did not feel that was as important as the other issues that I raised. And when you have important issues that you think are maybe winning issues you don't want to add ones that may take away from that." "Appellate defenders do not have to raise all the significant issues. They have to choose the issue that they feel are winning issues."

In the exercise of professional discretion appellate counsel may determine appropriate strategy in presenting issues for appellate review and may determine which

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SPAINSBURY COUNTY  
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are the strongest or most winnable issues and decline to present less winnable positions in order to have a more persuasive impact on the appellate court. Where counsel articulates a valid reason for employing a certain strategy, the exercise of such professional discretion cannot be deemed to be ineffective assistance. Porter v. State, 368 SC 378, 629 S.E.2d 353 (2006).

For Applicant to be entitled to relief, he must establish that he has suffered prejudice by any deficient performance claimed and proven on the part of counsel. He must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Bennett.

Applicant claims ineffective assistance of appellate counsel in failing to effectively raise and brief, the inadequacies of petitioner's Jackson v. Denno hearing and failing "to include in record on appeal a redacted involuntary confession improperly admitted at trial."

According to the testimony at the evidentiary hearing, the redacted portion of the statement claimed by the State to be an incriminating statement provided by the applicant at the time of his arrest and which was introduced as evidence in the trial, referenced an earlier drug transaction involving the applicant. Trial counsel perceived that reference to be irrelevant and highly prejudicial to the applicant if presented during the trial of a case relating to another drug transaction involving the same participants and the same drug for which the applicant was standing trial. The redaction was made by agreement of trial counsel.

A review of the trial record, the record on appeal, and the brief of appellate counsel, establishes that the issue regarding admission of the incriminating statement attributed to the applicant was adequately asserted, briefed, and presented by counsel for appellate review. Applicant has failed to establish any deficient performance on the part of appellate counsel in the presentation of this issue for appellate review. Further Applicant has failed to establish how the omission of the redacted version of his purported statement had any relevance to his appeal and therefore appellate counsel

cannot be deemed deficient in failing to include this document for the purpose of appellate review.

Applicant further claims that appellate counsel was deficient in failing "to report petitioner's complaint about his transcript not being fully transcribed" and failing "to advise petitioner of his right to challenge the accuracy of the transcription".

Applicant has failed to present any evidence tending to establish that the trial transcript is not accurate.

Applicant has failed to establish either a deficiency in performance on the part of appellate counsel or that he would have likely prevailed on appeal had appellate counsel performed differently than she did in her handling of Applicant's direct appeal. Applicant's claims of ineffective assistance of appellate counsel have no merit and relief on those grounds are therefore denied.

Prosecutorial Misconduct

Applicant claims that the prosecutor has "abused the judicial process of the petitioner with his official lawlessness in the enforcement of South Carolina Statute Section 44-53-370(e)", has shown bad faith in prosecuting the applicant's case "maliciously and sadistically" to cause him harm, that he conspired with trial counsel to deprive him of his constitutional rights by a "scheme to defraud the courts", and the prosecutor "vouched for the credibility of the State's witnesses that have committed perjury during Petitioner's trial." Applicant asserts that Officer Ken Hancock provided false testimony in his acquisition of Applicant's arrest warrant and in his testimony at trial. Applicant asserts that Agent Ashley Asbill fabricated evidence and provided perjured testimony regarding the applicant having provided a voluntary statement which implicated him in the crime for which he stood trial and was convicted.

Where the applicant alleges prosecutorial misconduct as a ground for relief, it is the applicant's burden to establish actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1999).

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SPARTANBURG COUNTY  
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Aside from Applicant's own testimony, there has been presented no evidence tending to establish that the State's witnesses provided perjured or false testimony, fabricated evidence used against the applicant in his trial, or that the prosecutor fraudulently or improperly relied upon that testimony in the prosecution of the applicant's case.

Applicant further asserts that the prosecutor "has indicted Petitioner for the same offense twice, to be twice put in jeopardy of drug trafficking heroin."

The record reflects that prosecution of the applicant proceeded in the usual and ordinary course with the obtaining of an arrest warrant founded upon an affidavit before a magistrate and the subsequent arrest of the applicant. Subsequently the prosecutor upon a review of the case prepared an indictment for presentation to the county grand jury based upon the same factual claims. The record reflects that the county grand jury acted upon the indictment by the return of a "True Bill" of indictment.

Other than the applicant's claim, there is no evidence of the existence of perjury or fraud in the prosecution of the applicant for the crime for which he was convicted by a jury after having testified and providing them with his version of the disputed facts. No evidence has been presented which establishes any defect in the indictment or any irregularity or abuse in the grand jury process. There has been presented no evidence establishing that the applicant has been twice put in jeopardy for the same criminal offense. Nothing in the record of this case establishes that the applicant (1) has been twice put to trial for the same offense after an acquittal, (2) has been twice put to trial for the same offense after conviction, or (3) has been twice put to trial for the same offense after an improvidently granted mistrial, or (4) has received multiple punishment for the same offense.

Applicant's claims of prosecutorial misconduct have no merit and relief on those grounds are therefore denied.

Subject matter jurisdiction

Applicant alleges that defects in the indictment denied the Court subject matter jurisdiction to hear the case and trial counsel was ineffective in his failing to object and moving to quash the indictment.

Subject matter jurisdiction of the circuit court to hear a matter and the sufficiency of an indictment called for trial by the State are two separate and distinct concepts. United States. v. Cotton, 535 U.S. 625, 122 S. Ct. 1781 (2002); State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "Subject matter jurisdiction is the power of the court to hear and determine cases of a general class to which the proceedings in question belong." Dove v. Gold Kist, Inc., 314 SC 235, 442 S.E.2d 598 (1994). The State Constitution establishes the jurisdiction of the circuit court, providing that, "the Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior court . . ." S. C. Const. Art. V, Section 1, and therefore the subject matter jurisdiction of the circuit court is generally only limited where the legislature has granted exclusive jurisdiction of certain matters to another court.

The legislature has not granted exclusive jurisdiction for the trial of "Trafficking in Heroin" to a court other than the circuit court. It is evident that a criminal indictment charging a defendant with "Trafficking in Heroin" falls within the ambit of cases which a court of general sessions has subject matter jurisdiction to hear. Any issue as to this Court having jurisdiction over the subject matter of this civil action cannot be reasonably disputed.

S. C. Code Ann. Section 17-19-20 provides that:

"Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided."

S. C. Code Ann. Section 17-19-90 provides that:

"Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards."

In determining whether an indictment meets the legal sufficiency standard the language of the indictment must be viewed with a practical eye and the fact that it could have been made more definite or certain is not relevant to the inquiry. Gentry. An indictment is deemed adequate where the offense alleged is stated with sufficient certainty and particularity so as to allow the court to know what judgment to pronounce and the defendant to know what charge has been made against him. Where the indictment alleges a statutory crime the indictment is deemed sufficient where it alleges the offense substantially in the language of the statute. State v. Michau, 355 S.C. 73, 583 S.E.2d 756 (2002).

The caption of the indictment document reflects that the Spartanburg County grand jury met on December 6, 2012 and returned a "True Bill" on indictment numbered 2012-GS-42-5979 charging the defendant John Dwayne Garvin with the crime of "Trafficking in Heroin" in violation of "SC Code: 44-53-370" and signed by the foreperson. The body of the indictment states that:

"At the Court of General Sessions, convened on December 6, 2012, the Grand Jurors of Spartanburg County present upon their oath:

**TRAFFICKING IN HEROIN**

That John Dwayne Garvin did in Spartanburg County on or about July 17, 2012, knowingly sell, manufacture, cultivate, deliver, purchase or bring into this State, or did provide financial assistance or did otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase or bring into this State, or did knowingly actually or constructively possess or did knowingly attempt to become in actual or constructive possession of more than (14) grams of Heroin, a schedule I controlled substance, in violation of Section 44-53-3670, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided."

A presumption of regularity attaches to all proceedings in the courts of this State and the burden is upon one who challenges a particular proceeding to prove any irregularity or defect complained of and which would otherwise divest the court of

jurisdiction to hear the matter, Tate v. State, 345 S.C. 577, 549 S.E.2d 601 (2001), which the applicant has failed to do.

Applicant's claim of lack of subject matter jurisdiction has no merit and relief on that ground is therefore denied.

Ineffective Assistance of Trial Counsel.

Applicant has the burden of proving the allegations in the application. S.C.R. Civ. P. 71.1(e); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of trial counsel is alleged 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 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 385 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. First, the applicant must prove that trial counsel's performance was deficient measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 385 S.E.2d at 625.

Applicant has asserted several potential grounds for relief based upon a claim of ineffective assistance of trial counsel. His initial application and subsequent amendments allege a number of specific allegations of ineffective assistance which the

court will address in this order. Applicant alleges other general allegations of ineffective assistance without the specificity necessary to permit this Court to know what Applicant is claiming as to trial counsel's deficient performance. Applicant's grounds set out in his initial application in paragraph 11(b)(2), (8), and (9), and in his amended application of April 22, 2016 in paragraph 11(b)(12), (15), (19), and (21), are dismissed on the ground that they are not alleged with the specificity necessary for this Court to identify the claim and determine the matter with particularity.

Applicant claims trial counsel was ineffective "in failing to object to the State's adduce evidence of a falsified involuntary confession".

The record reflects that an objection to the admissibility of an incriminating statement attributed to the applicant was preserved for appellate review and the issue addressed in Applicant's direct appeal of his conviction. Trial counsel requested a hearing for the Court to determine the voluntariness and admissibility of a statement attributed to the applicant which implicated him in the crime for which he was convicted. The State presented evidence relevant to the admissibility of the statement. The applicant elected not to testify during the hearing. The same evidence was presented during the trial of the case and the applicant did testify and present his version of the facts relevant to the statement. The jury after considering that evidence found the applicant guilty of the crime beyond a reasonable doubt. Applicant has presented no additional evidence relevant to the issue and has failed to provide credible evidence proving that the "involuntary confession" was "involuntary" and is in fact false.

Applicant's claim has no merit and relief on that ground is therefore denied.

Applicant claims trial counsel was ineffective in his "failure to assert a timely claim of double jeopardy violation."

In order to prevail on a claim of double jeopardy the applicant must show either that he (1) has been twice put to trial for the same offense after an acquittal, or (2) has been twice put to trial for the same offense after conviction, or (3) has been twice put to trial for the same offense after an improvidently granted mistrial, or (4) has received

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multiple punishment for the same offense. Riley v. South Carolina, 82 F. Supp.2d 474 (D.S.C. 2000); State v. Baum, 355 S.C. 209, 584 S.E.2d 419 (Ct. App. 2003), cert. denied.

Applicant has failed to show that he has been twice put in jeopardy for the same criminal conduct and therefore has failed to prove ineffective assistance of counsel in counsel not objecting to the criminal proceeding on the ground of "double jeopardy".

Applicant's claim has no merit and relief on that ground is therefore denied.

Applicant claims trial counsel was ineffective in his "failure to file a motion to quash indictment."

As has been previously addressed in the section regarding "subject matter jurisdiction," the indictment appears to be regular on its face and Applicant has presented no evidence which would cast the slightest doubt upon its validity. Applicant has failed to establish any defect or insufficiency of the indictment. The indictment tracks the language of the statute defining the crime of "Trafficking in Heroin".

Applicant has failed to prove that there was any basis for objecting to or moving to quash the indictment and therefore has failed to meet his burden of proving any deficient performance on the part of trial counsel or prejudice in his failing to do either.

Applicant claims trial counsel was ineffective in his "failure to object to the solicitor's manipulation of court docket in the prosecution of the case."

Applicant claims the prosecutor was manipulating the court docket and the scheduling of this case in order to have the matter tried in front of a particular judge which the prosecutor favored. The Court docket in the Seventh Circuit is a "court-run" docket with scheduling of cases being handled by the court coordinator under the supervision of the chief judge for administrative purposes. The prosecutor is not in control of the preparation of the trial docket nor is the prosecutor in control of the scheduling of cases as had been the procedure in times past. No credible evidence has been presented which tends to establish that the prosecutor manipulated the court docket or even that he had the opportunity to manipulate the scheduling of cases by

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the court and therefore trial counsel cannot be deemed deficient by not objecting to the scheduling of the applicant's case. Applicant has further failed to establish any prejudice in the manner by which his case was scheduled and proceeded to trial.

Applicant's claim has no merit and relief on that ground is therefore denied.

Applicant claims trial counsel was ineffective in his "failure to advise the court's concerning an existing conflict of interest."

Applicant claims that trial counsel "was deficient because of his representation of me of a conflict of interest that was present at the time" due to Applicant having filed a complaint with the Office of Disciplinary Counsel alleging deficient performance on the part of trial counsel in his representation of the applicant. Such a circumstance does not give rise to a conflict of interest for which counsel was required to recuse himself of representation of the applicant. Applicant has failed to present any evidence in support of the proposition that trial counsel was conflicted in any way, had divided loyalties, or at any time advanced his own interests or that of another to the detriment the applicant, his client.

Applicant's claim has no merit and relief on that ground is therefore denied.

Applicant claims trial counsel was ineffective in his "failure to object to judge's erroneous charge."

Applicant claims trial counsel was deficient in his failure to object to the trial judge charging the jury on the legal theory of accomplice liability and the legal maxim that "the hand of one is the hand of all".

The law to be charged to the jury is determined by the evidence presented at trial. State v. Hernandez, 386 S.C. 655, 690 S.E.2d 582 (Ct. App. 2010). "A defendant may be convicted on a theory of accomplice liability on an indictment charging him only with the principal offense." State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987).

In this case the indictment alleged:

That John Dwayne Garvin did in Spartanburg County on or about July 17, 2012, knowingly sell, manufacture, cultivate, deliver, purchase or bring into this State, or did provide financial assistance or did

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otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase or bring into this State, or did knowingly actually or constructively possess or did knowingly attempt to become in actual or constructive possession of more than (14) grams of Heroin, a schedule I controlled substance, in violation of Section 44-53-3670, THE CODE OF LAWS OF SOUTH CAROLINA, (1976), as amended.

The indictment alleges that he committed the crime of "Trafficking in Heroin" either as the principal offender or acting as an accomplice with another. A review of the trial record reveals the existence of more than sufficient evidence tending to show that the applicant was involved in the crime of trafficking in heroin as principal or as an accomplice, aider, abettor, or co-conspirator with another person who was not a law enforcement agent and therefore accomplice liability including "the hand of one is the hand of all" charge was an appropriate instruction to be given as determined by the evidence presented in the case. The charge was not erroneous and trial counsel cannot be deemed deficient in his performance by his failure to object to a proper jury instruction.

Applicant's claim has no merit and relief on that ground is therefore denied.

Applicant claims trial counsel provided ineffective assistance of counsel when he "failed to object during solicitor's summation."

Applicant has presented no evidence of inappropriate argument by the prosecutor during his closing summation and the record does not reflect any inappropriate, improper, or objectionable content in the prosecutor's summation.

Applicant's claim has no merit and relief on that ground is therefore denied.

Applicant claims trial counsel was ineffective in his "failure to file motion for release on bail."

This is not a ground upon which relief can be granted through an application for post-conviction relief, but even if it was, Applicant has failed to show any prejudice from counsel's performance.

Applicant's claim has no merit and relief on that ground is therefore denied.

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Applicant claims trial counsel was ineffective in his "failure to be present for petitioner's preliminary hearing."

This is not a ground upon which relief can be granted through an application for post-conviction relief, but even if it were Applicant has failed to show any prejudice from counsel's performance.

Applicant's claim has no merit and relief on that ground is therefore denied.

Applicant claims trial counsel was ineffective in "failing to object to solicitor's bolstering of state's witnesses" and in "failing to move for a mistrial in response to bolstering."

Applicant has presented no evidence supporting an allegation of improper bolstering of witnesses by the prosecutor and a review of the record does not reveal the existence of any improper bolstering of any witness testimony by the prosecutor and therefore trial counsel cannot be deemed deficient in his failure to move for a mistrial due to a claim of improper bolstering.

Applicant's claim has no merit and relief on that ground is therefore denied.

Applicant claims trial counsel was ineffective in his "failing to suppress audio and video recordings."

The video and audio recordings allowed in evidence during the applicant's trial were established to be recordings of the drug transaction which was the basis for the applicant's conviction and which were captured by a recording device worn by the confidential informant who arranged the transaction while working on behalf of law enforcement.

A review of the record reflects that the appropriate foundation was established for the admission of the evidence and there was no factual or legal basis for objecting to their admission as evidence during the trial and therefore trial counsel cannot be deemed ineffective for not objecting to their introduction.

Applicant's claim has no merit and relief on that ground is therefore denied.

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Applicant claims trial counsel was ineffective in his "failing to inform petitioner of and to utilize exculpatory evidence."

Applicant has presented to evidence in support of this claim and therefore the claim has no merit and relief on that ground is denied.

Applicant claims trial counsel was ineffective in his "failure to request a Franks hearing."

Applicant has presented no credible evidence that the affidavit in support of the arrest warrant charging him with "Trafficking in Heroin" contained perjured or otherwise false testimony nor has Applicant presented any credible evidence that the testimony provided the grand jury or presented during the trial of his case was perjured or otherwise false testimony. Counsel cannot be deemed ineffective in failing to request a hearing challenging the truthfulness of testimony contained in an affidavit provided in support of an arrest warrant when he has no evidence in support of such a challenge and an examination of the witnesses will not produce such evidence. Each of the witnesses who could provide relevant testimony regarding the allegations made in the arrest warrant making the charge did testify during the trial of Applicant's case and were subject to cross-examination. By their verdict a jury was apparently convinced beyond a reasonable doubt that the testimony of the State's witnesses were credible and truthful and that the applicant's testimony was not.

Applicant's claim has no merit and relief on that ground is therefore denied.

Applicant claims trial counsel was ineffective in his "failure to impeach the State's witnesses."

A review of the trial transcript reflects that trial counsel performed adequately in his cross-examination of each of the witnesses called by the State to testify during Applicant's trial. Applicant has failed to present any credible evidence as to how counsel was deficient in his examination of the State's witnesses testifying during Applicant's trial and therefore failed to establish any deficient performance on the part of counsel.

Applicant's claim has no merit and relief on that ground is therefore denied.

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**CONCLUSION**

Having reviewed the entire record, including the evidence presented at the evidentiary hearing held in this matter, this Court finds that Applicant has failed to establish that either appellate counsel or trial counsel failed to perform within the range of competence and reasonableness under prevailing professional norms and he has failed to establish had either done anything different there is a reasonable probability that the result of the trial would have been different or that he would have prevailed in his direct appeal of his conviction. Strickland; Butler.

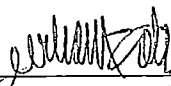
Applicant has further failed to establish any other ground permitted under S. C. Code Ann. Section 17-27-20 entitling the applicant to relief from his conviction or sentence and therefore,

The application requesting **POST-CONVICTION RELIEF** should be and **IS** therefore **DENIED** and the application **DISMISSED** with **PREJUDICE**.

APPLICANT IS ADVISED that he must file and serve a notice of appeal within thirty days from the receipt by him 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), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS SO ORDERED!**

July 9, 2020

  
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**J. DERHAM COLE**, Presiding Judge  
The Seventh Judicial Circuit Court

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# **EXHIBIT**

# **C**

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

John Garvin, # 355509,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT

2015-CP-42-4699

ORDER ON APPLICANT'S  
*PRO SE* MOTIONS

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S. HOPE BLACKLEY

This matter is before the Court from an application for post-conviction relief filed November 13, 2015. A hearing was convened February 21, 2018 at the Spartanburg County Courthouse to address a number of outstanding motions filed by Applicant *pro se*. Applicant was present and represented himself. Respondent was represented by Valerie Garcia Giovanoli of the Office of the Attorney General.

At the start of the hearing, the court inquired into whether Applicant was asserting his right of self-representation knowingly and voluntarily. Applicant confirmed he previously relieved two court appointed attorneys. Applicant indicated he was aware of his right to counsel and the dangers of proceeding *pro se*. Applicant also indicated it was his wish to represent himself in his PCR action. Applicant proceeded to put his motions before the court. The court rules as follows on Applicant's motions:

I. *Motion for entry of default and judgment in default*

Applicant moved for an entry of default and judgment in default. Applicant argued the State failed to respond to his PCR application within the 90 days required by the rules. However, Applicant failed to show how he was prejudiced by the delay. For an applicant to be granted default judgment in post-conviction relief, he must show **prejudice** from

the State's delay in failing to timely answer his application. Kneece v. State, 269 S.C. 177, 236 S.E.2d 745 (1977); Herring v. State, 262 S.C. 597, 206 S.E.2d 885 (1974). The mere passage of time, alone, is not prejudicial. Having failed to show how he has been prejudiced, Applicant's motion is **denied**.

II. *Motion for leave to amend petition*

Applicant moved for leave to amend his PCR application. Respondent did not oppose the motion. This Court finds Applicant is entitled to amend his application. Therefore, Applicant's motion is **granted**.

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2018 JUN -4 AM 11:54  
M. HOPE BRADLEY

III. *Motion to inspect grand jury documents and challenge array of grand jury*

Applicant moved to inspect and challenge grand jury documents and proceedings. Applicant claimed he believes no grand jury ever convened to indict him and that the State has conspired against Applicant. Respondent agreed a PCR applicant may be entitled to grand jury documents, but only upon a showing of good cause. Respondent argued Applicant's conspiracy claim was pure conjecture and not the basis for good cause. Respondent also informed the court that upon her investigation, she does not believe the documents Applicant seeks (impanelment documents including the sex, age, race of grand jury members, minutes of grand jury proceedings, etc) even exist. This court finds Applicant is entitled to copies of his indictment which bears the true bill stamp and the signature of the Grand Jury Foreperson. Therefore, the motion is **denied in part and granted in part**.

IV. *Motion for leave to file requests for production, interrogatories, and requests for admissions*

Applicant moved for leave to file requests for production, interrogatories, and requests for admissions. Attached to Applicant's motions were the actual requests and interrogatories, which are extremely specific and detailed in nature. However, Applicant could not articulate his need for or the

relevancy of such information and therefore cannot demonstrate good cause to invoke these discovery tools. Therefore, these motions are denied.

*V. Motion to compel defense attorney to produce defense file*

Applicant moved to compel his trial counsel, Scott D. Robinson, to supply him with a copy of his defense file. Respondent did not oppose the motion, but expressed concern regarding how many times trial counsel must supply a copy of his defense file to Applicant. Trial counsel is ordered to provide a copy of his defense file from Applicant's criminal case to Applicant within ten (10) days of service of this order upon him. In the event trial counsel has previously provided a copy of his defense file to Applicant, trial counsel should submit to the Attorney General an affidavit swearing to such. The Attorney General shall then file his affidavit in this action with the Spartanburg County Clerk of Court. This motion is **granted**.

*VI. Motion for a pre-trial hearing*

Applicant moved for a pre-trial hearing to resolve issues prior to his evidentiary hearing. This motion is **granted** and the hearing held on February 21, 2018 shall constitute a pre-trial hearing.

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SPARTANBURG COUNTY  
2018 JUN 14 AM 11:54  
M. HOPKINS  
BLAKLEY

*VII. Motion to subpoena witnesses for evidentiary hearing*

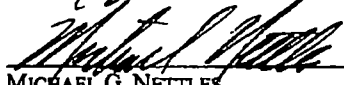
Applicant orally moved for leave to subpoena law enforcement officers involved in his criminal case to testify at his PCR evidentiary hearing. This Court finds Applicant is entitled to subpoena witnesses he intends to call during his PCR evidentiary hearing. Therefore, the motion is **granted**.


Applicant further indicated all of his outstanding motions have been resolved and no other matter is pending before the court.

Respondent requested Applicant be ordered to serve copies of any subpoenas he issues for a

witnesses' appearance at the hearing in order to provide proper notice to the State. Respondent's request is **granted**. Applicant must serve a copy of any subpoena issued for a witness to testify at the evidentiary hearing.

AND IT IS SO ORDERED this 29 day of May, 2018.

  
MICHAEL G. NETTLES  
Presiding Judge  
Seventh Judicial Circuit

 \_\_\_\_\_, South Carolina

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SPARTANBURG COUNTY  
2018 JUN -4 AM 11:55  
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# Spartanburg County

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M. Hope Blackley  
Clerk of Court

May 4, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Cybil Carwin # 355509

7<sup>TH</sup> JUDICIAL CIRCUIT

CASE # 2015CP42-4699

Applicant

CERTIFICATE OF SERVICE

VS  
Stall  
Respondent

I certify that, on this date, I served a copy of the Codes on Applicant's Pro Se Motions  
In this action dated 5-29 2018 on 6-4-18

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

Cybil Carwin  
Megan Jameson  
\_\_\_\_\_  
\_\_\_\_\_

6-5-18  
(Date)

Corrie King  
(Signature)