

MARK A. PEPER, ESQ.
MARK@PEPERLAWFIRM.COM



THE PEPER LAW FIRM, PA
1637 SAVANNAH HWY., STE. 202
CHARLESTON, SC 29407
843.225.2520 (O)
843.225.2554 (F)

March 21, 2013

VIA US MAIL

WWW.PEPERLAWFIRM.COM

Daniel E. Shearhouse
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: Donovan Murray v. State of South Carolina
Case Number: 2011-CP-10-8319

Dear Mr. Shearhouse:

I hope this correspondence finds you doing well. It has come to my attention that I prematurely filed Mr. Murray's Notice of Intent to Appeal the Denial of his Post-Conviction Relief application, thus I wanted to bring this to your attention. Subsequent to filing the Notice, the Applicant requested that I file a Motion to Reconsider the Court's denial of his PCR application, which I have done. For your records and clarification, I have included the prematurely filed Notice of Intent to Appeal, the Applicant's Motion to Reconsider, and the State's Return and Motion to Dismiss Motion to Alter or Amend. Said Motion has not been ruled on yet by the trial Court, thus it was premature to file the Notice of Intent to Appeal and I regret this error.

Upon receiving the Court's decision on the Motion to Reconsider, I will promptly file the required documents as required by the Appellate Rules and copy the appropriate parties. In the meantime, please do not hesitate to contact me with any questions or concerns.

With best regards, I am

Sincerely,



Mark A. Peper

Enclosures as stated.

cc: Office of Indigent Defense
Ashleigh Wilson, Esquire

RECEIVED

MAR 25 2013

S.C. SUPREME COURT

SOUTH CAROLINA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
DONOVAN TERRELL MURRAY,)
304604,)
)
VS.)
)
STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NUMBER: 2011-CP-10-8319

MOTION TO RECONSIDER

TO: THE HONORABLE R. MARKLEY DENNIS:

The Applicant, DONOVAN TERRELL MURRAY, moves before this Court to amend and/or alter the dismissal of the above-captioned Post-Conviction Relief passed down on January 22nd, 2013. The Honorable R. Markley Dennis executed and filed the Order of Dismissal on February 28th, 2013. Applicant moves pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure and has submitted a Notice of Intent to Appeal should this Motion to Reconsider be denied.

The Applicant asserts the following for this Court's review and consideration. Please note that these are Applicant's specifically enumerated allegations and are submitted per his request by his Post-Conviction Relief Attorney, Mark A. Peper.

1. Applicant alleges that, at Trial, The Honorable Roger M. Young, Sr. released the Jury Charges for the jurors to review on their own while in deliberation against judicial procedures. Further, Applicant alleges that he was deprived of due process for the charges to be explained on the record.
2. Applicant alleges that his Trial Counsel did not impeach the discovered evidence of crack and cocaine being analyzed and weighed as powder cocaine.
3. Applicant alleges that his Trial Counsel failed to disclose all relevant discovery. Specifically, Applicant did not receive the SLED drug analysis report or his chain of custody forms.
4. Applicant alleges that his mere presence in a room that drugs are located does not, in itself, support an inference of constructive possession.¹ and ²

¹ State v. Alston, 508 SE 2d 315 (NC: Court of Appeals 1998)

² State v. James, 344 SE 2d 77 (1986)

5. Applicant alleges that his Trial Counsel did not perform a reasonable investigation of Applicant's case prior to trial.

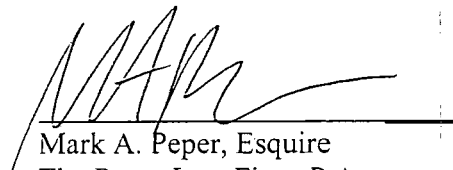
6. Applicant alleges that his first Post-Conviction Relief Attorney abandoned him without notice and that he did not properly go before a Judge for his Substitution of Counsel.

7. Applicant alleges that the denial of his requested continuance at his Post-Conviction Relief Hearing was unlawful as he was unable to present alibi witnesses.

8. Applicant alleges that his PCR Counsel, the undersigned Mark A. Peper, was unaware of the Applicant's issues which he wanted stated on the record. Applicant further alleges that Attorney Peper engaged in a heated discussion due to Applicant's desire for a continuance.

9. Applicant alleges that Attorney Peper was not prepared and did not care about the issues with which he wanted to present to the Court.

Respectfully submitted,



Mark A. Peper, Esquire
The Peper Law Firm, P.A.
1637 Savannah Hwy., Suite 202
Charleston, SC 29407
(O): 843-225-2520
(F): 843-225-2554
mark@peperlawfirm.com

This 1st day of March, 2013
Charleston, South Carolina

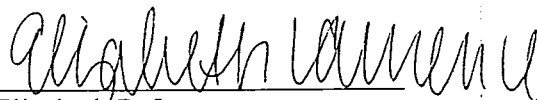
CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing **MOTION TO RECONSIDER** has been served upon the following party by U.S. Mail, first class, postage prepaid this 1st day of March, 2013.

The Honorable R. Markley Dennis
Charleston County Judicial Center
100 Broad St., Suite 368
Charleston, SC 29401

Charleston County Clerk of Court
Court of Common Pleas
100 Broad Street, Suite 106
Charleston, South Carolina 29401

Ashleigh R. Wilson, Esquire
Assistant Attorney General
P.O. Box 11549
Columbia, S.C. 29211



Elizabeth R. Lawrence
Paralegal to Mark A. Peper
The Peper Law Firm, P.A.
1637 Savannah Highway, Suite 202
Charleston, SC 29407
P: (843) 225-2520
F: (843) 225-2554
elizabeth@peperlawfirm.com

COURT OF COMMON PLEAS
AND GENERAL SESSIONS
100 BROAD STREET, SUITE 106
CHARLESTON, S.C. 29401-2258
(843) 958-5000
(843) 958-5020 FAX
www3.charlestoncounty.org



FAMILY COURT OF THE
NINTH JUDICIAL CIRCUIT
CHARLESTON COUNTY
100 BROAD STREET, SUITE 143
CHARLESTON, S.C. 29401-2265
(843) 958-4400
(843) 958-4434 FAX
www3.charlestoncounty.org

JULIE J. ARMSTRONG
CLERK OF COURT
CHARLESTON COUNTY

From: Clerk of Court, Charleston County, South Carolina.

The enclosed document is being returned for the following reason(s):

The document is not signed / notarized.

The filing fee is insufficient. The correct amount is: \$25.00

This document is a copy. We must have an original.

This is not a Charleston County case.

The check or money order must be made payable to the Clerk of Court.

This case is ended. Date ended: _____
Reason ended: _____

Your check must be signed.

Inmate litigation must comply with S. C. Code of Laws, Title 24, Chapter 27.

There is not a case listed in our system that matches this caption.

Information may be obtained from our web-site at www3.charlestoncounty.org.

The required **new case** coversheet is not included. (SCCA234) July 1, 2004

The required **motion/order** coversheet is not included. (SCCA/233)-Jan.15, 2003

The required **order (Form 4)** coversheet is not included. (SCRCP Form 4C)-Oct. 17, 2011

Other: _____

Please make the necessary corrections and return this document for filing. Thank you for your assistance.

Staff initials MB

Date 3/6/13

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
DONOVAN TERRELL MURRAY,)
304604,)
)
VS.)
)
STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NUMBER: 2011-CP-10-8319

MOTION TO RECONSIDER

FILED
Clocked
2013 MAR 15 10:40
JULIE J. ARMSTRONG
CLERK OF COURT
Appealed

TO: THE HONORABLE R. MARKLEY DENNIS:

The Applicant, DONOVAN TERRELL MURRAY, moves before this Court to amend and/or alter the dismissal of the above-captioned Post-Conviction Relief passed down on January 22nd 2013. The Honorable R. Markley Dennis executed and filed the Order of Dismissal on February 28th, 2013. Applicant moves pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure and has submitted a Notice of Intent to Appeal should this Motion to Reconsider be denied.

The Applicant asserts the following for this Court's review and consideration. Please note that these are Applicant's specifically enumerated allegations and are submitted per his request by his Post-Conviction Relief Attorney, Mark A. Peper.

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9. Applicant alleges that Attorney Peper was not prepared and did not care about the issues with which he wanted to present to the Court.

Respectfully submitted,



Mark A. Peper, Esquire
The Peper Law Firm, P.A.
1637 Savannah Hwy., Suite 202
Charleston, SC 29407
(O): 843-225-2520
(F): 843-225-2554
mark@peperlawfirm.com

This / day of March, 2013
Charleston, South Carolina

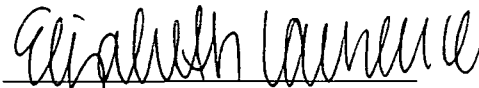
CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing **MOTION TO RECONSIDER** has been served upon the following party by U.S. Mail, first class, postage prepaid this 1st day of March, 2013.

The Honorable R. Markley Dennis
Charleston County Judicial Center
100 Broad St., Suite 368
Charleston, SC 29401

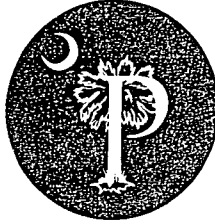
Charleston County Clerk of Court
Court of Common Pleas
100 Broad Street, Suite 106
Charleston, South Carolina 29401

Ashleigh R. Wilson, Esquire
Assistant Attorney General
P.O. Box 11549
Columbia, S.C. 29211



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MARK A. PEPER, ESQ.
MARK@PEPERLAWFIRM.COM



THE PEPER LAW FIRM, PA
1637 SAVANNAH HWY., STE. 202
CHARLESTON, SC 29407
843.225.2520 (O)
843.225.2554 (F)

March 1, 2013

WWW.PEPERLAWFIRM.COM

VIA US MAIL

Supreme Court of South Carolina
Attention: Daniel Shearouse
Post Office Box 11330
Columbia, SC 29211

Re: Donovan Terrell Murray v. State of South Carolina
Case Number: 2011-CP-10-8319

To Whom It May Concern:

I hope this correspondence finds you doing well. My office served as Counsel for the Post-Conviction Relief in the above-referenced case number. Enclosed, please find Attorney Mark A. Peper's Notice of Intent to Appeal filed on behalf of the Plaintiff. If you could please file this with the court, I would be most appreciative.

As always, please do not hesitate to contact the numbers listed above should you have any questions or concerns.

With best regards, I remain

Sincerely,

Elizabeth R. Lawrence
Paralegal to Mark A. Peper

Enclosures as stated.

cc: Donovan Terrell Murray
Ashleigh Wilson, Esquire
SC Office of Indigent Defense

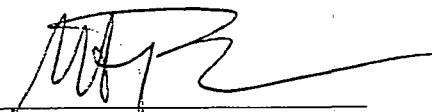
UNITED STATES OF AMERICA)
STATE OF SOUTH CAROLINA)
)
)
)
)
DONOVAN TERRELL MURRAY,)
(Inmate Number 304604),)
)
VS.)
)
STATE OF SOUTH CAROLINA)

IN THE SUPREME COURT
FOR THE STATE OF SOUTH CAROLINA
CASE NUMBER: 2011-CP-10-8319

NOTICE OF INTENT TO APPEAL

Donovan Terrell Murray, Inmate Number 304604, hereby gives notice of his intent to appeal the dismissal of his Post-Conviction Relief in this case. The dismissal was imposed by the Honorable R. Markley Dennis on January 22nd, 2013. The Order for Dismissal was filed on February 28th, 2013.

Respectfully Submitted,



Mark A. Peper, Esq.
The Peper Law Firm, P.A.
1637 Savannah Hwy., Suite 202
Charleston, SC 29407
O: (843) 225-2520
F: (843) 225-2554
mark@peperlwafirm.com
Attorney for Plaintiff

March 1, 2013
Charleston, South Carolina

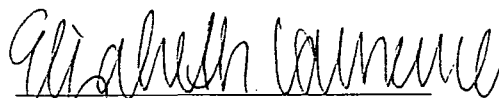
CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing **NOTICE OF INTENT TO APPEAL** has been served upon the following party by U.S. Mail, first class, postage prepaid this 15th day of March, 2013.

Donovan Murray
(Inmate Number 304604)
Broad River Correction Institution
Saluda B/208
4460 Broad River Road
Columbia, SC 29210

Ashleigh R. Wilson, Esquire
Assistant Attorney General
P.O. Box 11549
Columbia, S.C. 29211

Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211



Elizabeth R. Lawrence
Paralegal to Mark A. Peper
The Peper Law Firm, P.A.
1637 Savannah Highway, Suite 202
Charleston, SC 29407
P: (843) 225-2520
F: (843) 225-2554
elizabeth@peperlawfirm.com



ALAN WILSON
ATTORNEY GENERAL

March 7, 2013

The Honorable Julie Armstrong
Charleston County Clerk of Court
100 Broad St. Ste 106
Charleston, SC 29401

Re: Donovan Terrell Murray, #304604 v. State of South Carolina
2011-CP-10-8319

Dear Ms. Armstrong:

Enclosed please find the original Return and Motion to Dismiss, Motion to Alter or Amend Pursuant to Rule 59(e) SCRPC of the Respondent in the above-captioned case for filing in your office.

Sincerely,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh

cc: Mark Peper

The Honorable R. Markley Dennis

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Donovan Terrell Murray, #304604)
)
 Plaintiff,)
)
 vs.)
)
 State of South Carolina)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 9TH JUDICIAL CIRCUIT
 CASE NO.: 2011-CP-10-8319

**MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET**

Plaintiff's Attorney: Mark Peper, Bar No. _____ Address: The Peper Law Firm 1637 Savannah Hwy, Suite 202 Charleston, SC 29407 Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: Ashleigh R. Wilson, Bar No. 100269 Address: Attorney General's Office PO Box 11549 Columbia, SC 29211 Phone: 803734-4037 Fax _____ E-mail: _____ Other: _____
--	--

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)


SECTION I: Hearing Information

Nature of Motion: _____
 Estimated Time Needed: _____ Court Reporter Needed: YES/ NO

SECTION II: Motion/Order Type

- Written motion attached
 Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


 Signature of Attorney for Plaintiff/ Defendant

3/7/13
 Date submitted

SECTION III: Motion Fee

- PAID - AMOUNT: \$ _____
 EXEMPT: (check reason)
- Rule to Show Cause in Child or Spousal Support
 - Domestic Abuse or Abuse and Neglect
 - Indigent Status State Agency v. Indigent Party
 - Sexually Violent Predator Act Post-Conviction Relief
 - Motion for Stay in Bankruptcy
 - Motion for Publication Motion for Execution (Rule 69, SCRPC)
 - Proposed order submitted at request of the court; or,
 reduced to writing from motion made in open court per judge's instructions
 Name of Court Reporter: _____
 - Other: Return and Motion to Dismiss Motion to Alte or Amend Pursuant to
 Rule 59(e) SCRPC

JUDGE'S SECTION

Motion Fee to be paid upon filing of the attached order.
 Other: _____

JUDGE CODE _____
 Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____
 MOTION FEE COLLECTED: \$ _____
 CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
)
)
Donovan Terrell Murray, #304604,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

2011-CP-10-8319

**RETURN AND MOTION TO DISMISS
MOTION TO ALTER OR AMEND
PURSUANT TO RULE 59(e) SCRPC**

This matter comes before the Court by way of the Applicant's Motion pursuant to Rule 59(e), SCRPC, in which he asks the Court to alter or amend its Order dismissing his Application for post-conviction relief (PCR). The Respondent (the State) would submit the following:

I.

The Order of Dismissal of the Honorable R. Markley Dennis, dated February 13, 2013, contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976), and Rule 52(a) SCRPC. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991).

II.

The State therefore requests that the relief requested by the Applicant be denied and that his Motion be dismissed.

III.

WHEREFORE, having made its Return to the motion, the State requests that the relief requested in the Applicant's Motion be denied and that said Motion be dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Deputy Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

BY:



ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

Columbia, South Carolina
March 7, 2013

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON)	
)	
)	2011-CP-10-8319
)	
DONOVAN TERRELL MURRAY, #304604)	
Applicant,)	
)	
vs)	AFFIDAVIT OF SERVICE BY MAIL
)	
STATE OF SOUTH CAROLINA,)	
Respondent.)	
_____)	

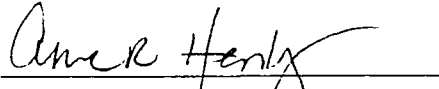
1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return and Motion to Dismiss, Motion to Alter or Amend Pursuant to Rule 59(e) SCRC**P in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mark Peper, Esquire
 The Peper Law Firm
 1637 Savannah Hwy, Suite 202
 Charleston, SC 29407

DATED this 7th day of March, 2013


 Anne Henley, Legal Assistant
 For Respondent

AG
AT
GS
SOL

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
)
Donovan Terrell Murray, #304604,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
2011-CP-10-8319

ORDER OF DISMISSAL

FILED
2013 FEB 28 AM 9:03
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

This matter comes before the Court by way of an application for post-conviction relief (PCR) dated November 8, 2011. The Respondent made its Return on May 1, 2012. An evidentiary hearing on the matter was convened on January 22, 2012 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Mark Peper, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant was present and testified on his own behalf. Also present and testifying was Daniel Prenner, Esquire. The Court had before it the trial transcript, the Charleston County Clerk of Court's records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's Return, the appellate records, and the exhibits submitted by the Applicant during the evidentiary hearing.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Applicant was indicted at the March 2008 term of the Charleston County Grand Jury for possession with

Rm 11/1

intent to distribute cocaine within the proximity of a school (2008-GS-10-2286), possession with intent to distribute cocaine- 3rd offense (2008-GS-10-2285), possession of a weapon during the commission of a violent crime (2008-GS-10-2289), possession with intent to distribute cocaine base within the proximity of a school (2008-CP-10-2288), and trafficking cocaine base- 3rd offense (2008-GS-10-2287). He was represented by Daniel Prenner, Esquire.

The Applicant proceeded to trial and was found guilty of possession with intent to distribute cocaine within the proximity of a school (2008-GS-10-2286) and possession with intent to distribute cocaine- 3rd offense (2008-GS-10-2285). On July 9, 2008, the Honorable Deadra L. Jefferson sentenced the Applicant to confinement for 10 years for the proximity charge and 15 years with a \$50,000 fine which will be suspended upon service of 15 years for the possession with intent to distribute cocaine. After being convicted and sentenced, the Honorable Deadra L. Jefferson also revoked five years of the Applicant's probation on a previous possession with intent to distribute cocaine base charge (2006-GS-10-9761).

A notice of appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. M. Celia Robinson, Esquire, of the South Carolina Office of the Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Murray, Op. No. 2011-UP-424 (S.C. Ct. App. filed September 20, 2011).

ALLEGATIONS

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

1. Ineffective assistance of counsel
 - a. Failure to investigate
 - b. Improperly stipulated to the chain of custody
 - c. Assisted the prosecution in the covering up of evidence
2. Prosecutorial misconduct
 - a. The solicitor allowed a state witness to commit perjury on the stand.

RM/DT/12

- b. The solicitor improperly bolstered a witness.
 - c. The solicitor withheld exculpatory and impeachment evidence.
 - d. The solicitor misrepresented the case to the court.
3. Violation of various constitutional rights
 - a. Violation of the 5th and 14th amendments.
 - b. Improper admission of evidence.
 - c. Violation of Miranda.
 - d. The jury was improperly given charge on mere presence.
 4. Newly discovered evidence
 - a. Police committed collusion to hide crack cocaine.

At the hearing, the Applicant amended his Application to include ineffective assistance of appellate counsel. At the evidentiary hearing, the Applicant proceeding solely on the allegations of ineffective assistance of counsel and ineffective assistance of appellate counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing and reviewed the exhibits submitted by the Applicant at the hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

Summary of Testimony¹

At the evidentiary hearing, Donovan Murray testified that he retained Daniel Prenner and he met with counsel twice prior to trial. He testified that he received copies of his discovery, but did not review what he received with counsel. He testified that he did not discuss any possible defenses with counsel and he did not give counsel any leads or potential witnesses to investigate. He testified further that counsel was ineffective for failing to investigate or prepare his case. He testified that had counsel further investigated, he would have found that the chain of custody was broken and been able to obtain the evidence needed to suppress the drugs. The Applicant also testified that his preliminary hearing was waived without his consent. He testified that the State offered a bond reduction if his preliminary hearing was waived.

The Applicant testified that trial counsel did not move to suppress the chain of custody. He testified that he did not discuss the chain of custody with counsel and that he would have told counsel not to stipulate to the chain because the chain was broken when a quantity of crack was weighed with the cocaine. The Applicant testified further that counsel did not investigate the weight of the drugs found and that he did not receive the SLED report or the chain of custody form prior to trial. He testified that he would have asked counsel to move to suppress all evidence. The Applicant also recalled Jill Clark's testimony at trial about the weight and type of drugs found in the hotel room.

¹ At the beginning of the evidentiary hearing, the Applicant made a *pro se* motion for a continuance claiming that counsel was unprepared for the hearing because he had recently been appointed. PCR Counsel stated that he was ready to proceed and did not need a continuance. However, PCR counsel requested that he be allowed to amend the Applicant's post-conviction relief application to include ineffective assistance of appellate counsel. The Court denied the Applicant's request for a continuance and granted PCR counsel's request to amend the application without objection from the Respondent.

Rm 07/14

The Applicant testified that trial counsel was ineffective for failing to go to the hotel where he was arrested to obtain room registration documents to show that the registration form says the person who the room is registered to is responsible for the contents of the room. The Applicant also testified that counsel was ineffective for failing to object to the jury instructions given at trial. He testified that the mere presence charge was not helpful to his case and that counsel should have objected. He also testified that the Court did not read the entire charge and that he did not review the jury charges with counsel. The Applicant testified further that the crack found in the pill bottle in the hotel room where he was arrested was newly discovered evidence.

The Applicant testified that he filed an appeal and was represented by Celia Robinson. He testified that appellate counsel was ineffective for failing to raise on appeal the Court's denial of the Applicant's directed verdict motion at trial. He testified further that he wanted to submit a *pro se* brief to the Court, but was told by Robert Dudek that Robinson was no longer with the office, but that she had already submitted the final brief in his case. He testified that he sent the *pro se* brief to the Court of Appeals and was told that he could not submit the brief because he was represented by counsel. The Applicant testified further that appellate counsel should have raised plain and structural error.

The Applicant testified that counsel was ineffective for failing to prepare for the Jackson v. Denno² hearing held prior to trial. The Applicant testified that counsel did not file a Jackson v. Denno motion prior to trial. He also testified that counsel failed to challenge the credibility of his co-defendant, Edward Ickes, and Officer William Johnson. Lastly, the Applicant attempted to

² Jackson v. Denno, 378 U.S. 368, 376-77, 84 S. Ct. 1774, 1780-81, 12 L. Ed. 2d 908 (1964).

present a claim based on prosecutorial misconduct. The Court denied the Applicant's request to pursue this allegation unless it was specifically raised by PCR counsel during the hearing.

The Applicant's testimony was followed by that of Daniel Prenner, Esquire. Counsel testified that he has been practicing law since 2000 and that most of his experience has been in criminal law. He testified that he was retained in 2007 to represent the Applicant. He testified that he met with the Applicant more than twice and communicated with the Applicant multiple times via letter. He testified that he filed Brady³ and Rule 5 motions on the Applicant's behalf. He testified that he received all evidence from the State and generally reviewed the contents of the discovery with the Applicant.

Counsel testified that prior to trial he discussed with the Applicant the elements of the charges he was facing and what the State was required to prove. He testified that he discussed the Applicant's version of the facts which was that he did not have possession of the drugs. Counsel testified further that he discussed possible defenses with the Applicant and that the case was primarily about witness credibility.

Counsel testified that he did not recall the Applicant giving any potential witnesses or leads for investigation. He testified that his investigation included talking to his client and reviewing the discovery. He testified that because the Applicant and his co-defendant were the only people in the hotel room they were the only two potential witnesses for him to call. Counsel testified that he was unable to talk to the co-defendant because he was represented by counsel.

Counsel testified that investigating the hotel room registration was not significant because it was undisputed that the room was registered to the co-defendant. Counsel also

³ Brady v. Maryland, 373 U.S. 83, 83 S. CT. 1194 (1963).

rm077/6

testified that he was unaware of any hotel documents that said the stuff found in the hotel room belong to the person in whose name the room was registered.

Counsel testified that he did not specifically recall why he waived the preliminary hearing, but that it was probably because the Applicant wanted a bond reduction. He testified that it was worth waiving the preliminary hearing to obtain a bond reduction for the Applicant.

Counsel testified that prior to trial he sent the Applicant a letter advising him that though the State's evidence was slim, proceeding to trial was risky in light of the Applicant's prior record. Counsel testified that he went to the jail to discuss and review the letter with the Applicant. He testified further that once the Applicant decided to proceed to trial his trial strategy was to highlight for the jury the scarcity of evidence against the Applicant.

Counsel testified that he made several pre-trial motions including a Jackson v. Denno motion, a motion to exclude references to pink pills found in the hotel room, a motion to exclude the Applicant's prior bad acts, and a motion to suppress the statements made by the Applicant prior to any Miranda⁴ warning. Counsel testified that he discussed the Jackson v. Denno motion with the Applicant prior to trial. He testified he was prepared for the hearing prior to trial. Counsel testified further that as a result of his motion, the Applicant's pre-Miranda statement about the pink pills was suppressed.

Counsel testified that prior to trial he agreed to stipulate to the chain of custody in exchange for the admission of a police report created by Officer Jordan. Counsel testified that Officer Jordan was not present at trial and he felt that the police report without Jordan's testimony showed that the State's case lacked evidence. Counsel testified that he discussed the stipulation with the Applicant and it was their strategic decision to stipulate to the chain of

⁴ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

custody in exchange for the police report being entered into evidence absent the officer's live testimony to rehabilitate the report.

Counsel testified further that he could not recall any problems with the chain of custody, but that there must have been some issue with the chain of custody warranting his agreement to stipulate to the chain of custody in exchange for Jordan's report coming into evidence. He testified further that had he objected to the chain of custody, it is likely the case would have been continued until the absent officer was available to testify. He also testified that he would not have stipulated to the chain of custody if he thought objecting would have been successful.

Counsel testified that he did not recall a problem with the weight of the crack cocaine found in the pill bottle. Counsel testified that it would not have helped the Applicant at trial if the jury knew that crack was in the co-defendant's pill bottle because the Applicant was found not guilty on the crack cocaine charges. Counsel testified that he was able to cross-examine the Applicant's co-defendant- Ickes, at trial on his prior drug use and was able to get into his prior convictions.

Counsel also testified that he discussed the jury charges with the Applicant and objected to the failure to testify and hand of one charges. Counsel testified that it is his general practice to object to jury charges that are improper or objectionable. Lastly, counsel testified that he advised the Applicant of his right to appeal and filed a Notice of Appeal on his behalf.

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For the Applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

This Court finds that counsel has extensive experience in the practice of criminal law and has been practicing law since 2000. This Court finds that counsel met with the Applicant numerous times prior to trial and fully investigated the Applicant's case. This Court finds that counsel filed Brady and Rule 5 motions on the Applicant's behalf and reviewed the received discovery with the Applicant. This Court finds that counsel discussed with the Applicant the elements of the charges against him and what the State was required to prove. This Court finds that counsel discussed the Applicant's version of the facts and possible defenses with the Applicant.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

Rm 477/3

This Court finds trial counsel was not ineffective for failing to investigate the chain of custody. This Court also finds that trial counsel was not ineffective for stipulating to the chain of custody prior to trial. This Court finds that trial counsel gave credible testimony that he discussed the chain of custody with the Applicant prior to trial and made a strategic decision to stipulate to the chain of custody. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Trial counsel testified that he agreed to stipulate to the chain of custody in exchange for the admission into evidence of a police report created by Officer Jordan. Counsel testified that Officer Jordan was not present at trial and the police report without the officer's testimony to rehabilitate the report showed that the State's case lacked evidence. Counsel testified further that had he thought objecting to the chain of custody would have resulted in suppression, he would have done so. This Court finds that counsel articulated a valid trial strategy for stipulating to the chain of custody. This Court finds further that any attempt to object to the chain of custody would likely have been futile. This Court finds the Applicant has failed to carry his burden of proving that counsel's performance was deficient and the Applicant failed to show that counsel's performance resulted in prejudice.

This Court finds that trial counsel was not ineffective for waiving the Applicant's preliminary hearing. Trial counsel testified that he waived the right to a preliminary hearing in exchange for a bond hearing which he thought was more important to the Applicant. This Court finds further that no prejudice resulted from counsel's waiver. In a preliminary hearing, the State

Rmpt/10

must show that there was “probable cause” to arrest the defendant for the commission of some crime. Absent this showing, the charge must be dismissed. State v. McClure, 277 S.C. 432, 434, 289 S.E.2d 158, 160 (1982). In order to return a “true bill” of indictment, twelve or more state grand jurors must find that probable cause exists for the indictment and vote in favor of it. S.C. Code Ann. § 14-7-1750.

The Applicant has failed to show that had a preliminary hearing been held, the State would not have been able to show probable cause to justify the Applicant’s arrest for the commission of the crime. This finding is supported by the fact that the Applicant was indicted by the grand jury in March 2008 which indicates that probable cause was established by the grand jury and the same would have likely been established by the State had a preliminary hearing been held. This Court finds the Applicant has failed to carry his burden of proving that counsel’s performance was deficient and the Applicant failed to show that counsel’s performance resulted in prejudice.

This Court finds that trial counsel was not ineffective for failing to investigate the hotel room registration. Without a doubt a criminal defense attorney has the duty to investigate, but this duty is limited to reasonable investigation. Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (citing Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir.1986)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments. Wiggins v. Smith, 539 U.S. 510, 521-22, 123 S. Ct. 2527, 2535, 156 L. Ed. 2d 471 (2003). This Court finds that counsel articulated a reasonable basis for not investigating the registration of the hotel room where the defendants were found. Trial counsel gave credible testimony and the record reflects that the hotel room was registered to the Applicant’s co-

AMDT/11

defendant and this issue was never in dispute. This Court finds that had the hotel room registration been investigated further it would not have resulted in any additional defenses or arguments that would have been successful trial. This Court finds the Applicant has failed to carry his burden of proving that counsel's performance was deficient and the Applicant failed to show that counsel's performance resulted in prejudice.

This Court finds that trial counsel was not ineffective for failing to object to the jury instructions given at trial. The record reflects that the jurors were given proper instruction on the law applicable to this case. Further, the Applicant has failed to show how the jury charges were objectionable when given to the jury. This Court finds the Applicant has failed to carry his burden of proving that counsel's performance was deficient and the Applicant failed to show that counsel's performance resulted in prejudice.

This Court finds that counsel was not ineffective for failing to prepare for the Jackson v. Denno hearing prior to trial. The record reflects that counsel adequately cross-examined the witnesses called by the State during the pre-trial hearing. Counsel also gave credible testimony that he was prepared for the hearing and for the Applicant's trial. This Court finds further that the Applicant did not offer any evidence or argument as to how counsel's alleged lack of preparation for the pre-trial hearing prejudiced him. This Court finds the Applicant has failed to carry his burden of proving that counsel's performance was deficient and the Applicant failed to show that counsel's performance resulted in prejudice.

This Court finds that counsel was not ineffective for failing to challenge the credibility of the Applicant's co-defendant and Officer Johnson. This Court finds that counsel adequately cross-examined and attacked the credibility of the State's witnesses at trial. On cross-examination of the Applicant's co-defendant, Edward Ickes, counsel successfully elicited

testimony about Ickes' pending charges and potential sentences on those charges, Ickes' lie to the police that none of the drugs found in the hotel room were his, Ickes' drug use, and his prior drug conviction. (T. 177-180). On cross-examination of Officer Johnson, counsel successfully elicited testimony about the lack of a description of the person involved in drug activity in the hotel room, the officer's failure to investigate the caller providing the tip, the inability of the officer to obtain fingerprints from the side tables in which drugs were found in the hotel room, and that there was a discrepancy in the weight of drugs in the arrest warrant and the SLED report. (T. 320-361). This Court finds the Applicant has failed to carry his burden of proving that counsel's performance was deficient and the Applicant failed to show that counsel's performance resulted in prejudice.

Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test- that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in their representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland- that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

Ineffective Assistance of Appellate Counsel

The Applicant alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by

RM/TJ/13

the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). For judges to second-guess reasonable professional judgments and impose on counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy. Jones, 463 U.S. at 754, 103 S.Ct. 3308.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. *See* Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

This Court finds that the Applicant has failed to carry his burden of proving appellate counsel was ineffective for failing to raise the denial of his directed verdict motion on appeal. This Court finds that the Applicant has failed to show that there was a reasonable probability that he would have prevailed on this issue had it been presented on appeal.

This Court also finds that appellate counsel provided effective assistance by not allowing the Applicant to file a *pro se* brief during his appeal proceeding. Our Courts have held that there is no right under the South Carolina Constitution to hybrid representation. Since there is no right to hybrid representation, substantive documents filed *pro se* by a person represented by counsel are not accepted unless submitted by counsel. State v. Stuckey, 333 S.C. 56, 58, 508

kmpt/14

S.E.2d 564 (1998). This Court finds that appellate counsel provided effective assistance of counsel.

Prosecutorial Misconduct

The Applicant alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issues that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). This Court finds that this allegation is without merit and the Applicant has failed to show any evidence of prosecutorial misconduct.

Violation of Various Constitutional Rights

The Applicant alleges a violation of various constitutional rights. The Applicant does not explain with any specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires the Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985). This Court finds that this allegation is without merit and the Applicant has failed to explain with specificity the grounds upon which the alleged constitutional violations are based.

Newly Discovered Evidence

The Applicant alleges that a quantity of crack cocaine in a pill bottle found in the hotel room where he was arrested is newly discovered evidence. A party requesting a new trial based

RMDT/157

on after-discovered evidence must show that the evidence: (1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and, (5) Is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

This Court finds that the quantity of crack found in a pill bottle in the hotel room where he was arrested is not newly discovered evidence. The record reflects that the State called Jill Clark, a forensic scientist at SLED, to testify about the nature of the substances collected from the hotel room. The record reflects that Clark testified that she was given a prescription pill whose contents she later determined to be 0.17 grams of crack cocaine and 0.42 grams of cocaine. (T. 424:13-425:3). This Court finds that this quantity of crack was discovered prior to trial and therefore is not newly discovered evidence. This Court finds further that this quantity of crack is not material to the issue of guilt or innocence because the Applicant was acquitted of the charges related to crack cocaine. This Court finds that this allegation is without merit and the Applicant has failed to carry his burden of proving that the quantity of crack found in the pill bottle is newly discovered evidence.

All Other Allegations

As to any and all allegations that were raised in the application or at the evidentiary hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

RMT/16

CONCLUSION

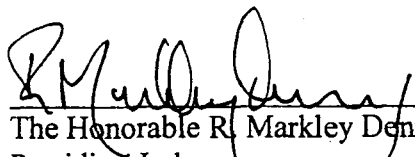
Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice;
and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 15th day of February, 20 13



The Honorable R. Markley Dennis
Presiding Judge
9th Judicial Circuit

Meeks Corner, South Carolina.

Rm 1/17

The Supreme Court of South Carolina

Donovan Murray, Petitioner,

v.

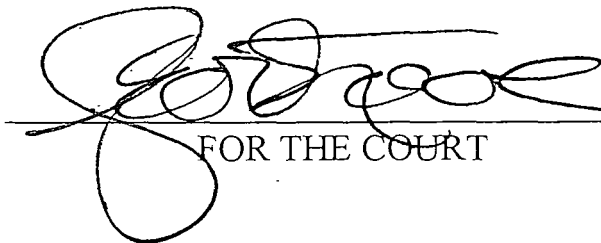
State of South Carolina, Respondent.

Appellate Case No. 2013-000157

ORDER

Petitioner has filed two *pro se* notices of appeal in this matter. Petitioner's counsel has advised this Court that a formal written order has not been filed in this matter, and has provided this Court with a form order dated January 22, 2013, which indicates that a formal order is to be prepared by the Office of the Attorney General.

Under Rule 243(a) of the South Carolina Appellate Court Rules (SCACR) and S.C. Code Ann. §17-27-100, only a final decision or judgment in a post-conviction relief case is subject to appellate review. *See Lewis v. State*, 368 S.C. 630, 630 S.E.2d 464 (2006) (defining final decision or judgment). Since a final decision or judgment has been filed in this matter, the notices of appeal are hereby dismissed without prejudice to petitioner's ability to timely serve and file a notice of appeal once a final decision or judgment is filed. The remittitur will be sent as provided by Rule 221(b), SCACR.


C.J.
FOR THE COURT

Columbia, South Carolina
March 6, 2013

cc: Suzanne Hollifield White, Esquire
Mark Andrew Peper, Esquire
Mr. Donovan Murray, 00304604

MARK A. PEPER, ESQ.
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March 11, 2013

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VIA US MAIL

Charleston County Clerk of Court
Court of Common Pleas
100 Broad Street, Suite 106
Charleston, South Carolina 29401

Re: Donovan Terrell Murray v. State of South Carolina
Case Number: 2011-CP-10-8319

To Whom It May Concern:

I hope this correspondence finds you doing well. Enclosed, please find Attorney Mark A. Peper's Motion to Reconsider Sentence as requested by the Applicant. If you could please file these with the court, I would be most appreciative.

In addition, please find the previously forwarded Motion which was returned by error. This PCR Motion does not incur a fine.

As always, please do not hesitate to contact the numbers listed above should you have any questions or concerns.

With best regards, I remain

Sincerely,

Elizabeth R. Lawrence
Paralegal to Mark A. Peper

Enclosures as stated.

cc: The Honorable R. Markley Dennis
Ashleigh R. Wilson, Esquire
Donovan Murray

RECEIVED

MAR 25 2013

S.C. SUPREME COURT



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