ALAN WILSON
ATTORNEY GENERAL

April 11, 2012

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia SC 29211

RE: John Ward v. State of South Carolina
2008-CP-08-6637

Dear Mr Shearouse:

I have received a Notice of Appeal in the above-captioned case. Please accept this letter as notification that I will be representing the Respondent in this matter. As such, please forward all future correspondence regarding this case directly to my attention.

If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Ashleigh R. Wilson
Assistant Deputy Attorney General

ARW/arh

cc: Appellate Defense
Trisha Allen, Victim Services

The Supreme Court of South Carolina

John Henry Ward, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Deadra L. Jefferson
Charleston County
Trial Court Case No. 2008-CP-10-06637

ORDER

The request for an extension until May 2, 2012 to serve and file the Return to the Petition for Writ of Certiorari is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY _____
Clerk

Columbia, South Carolina

April 2, 2012

cc: Appellate Defender Elizabeth A. Franklin-Best
Assistant Attorney General Ashleigh Wilson

ALAN WILSON
ATTORNEY GENERAL

April 2, 2012

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia SC 29211

Re: **John Ward, #309958 v. State of South Carolina**
2008-CP-08-6637

Dear Mr. Shearouse:

The Return to the Petition for a Writ of Certiorari in the above appeal is due to be served and filed today. I would respectfully request a 30-day extension in which to serve and file this Return.

This extension request is not intended for the purpose of delay, but is necessitated by my heavy workload.

Sincerely,

Ashleigh Wilson
Assistant Attorney General

AW/arh

cc: Appellate Defense

The Supreme Court of South Carolina

John Henry Ward, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Deadra L. Jefferson
Charleston County
Trial Court Case No. 2008-CP-10-06637

ORDER

Petitioner seeks an extension until February 16, 2012 to serve and file the Petition for Writ of Certiorari and Appendix, and asserts that extraordinary circumstances justify this extension. The opposing party consents to the extension. The request for an extension is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extensions will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

C.J.

For the Court

Columbia, South Carolina

January 19, 2012

cc: Appellate Defender Elizabeth A. Franklin-Best
Assistant Attorney General Matthew J. Friedman

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Charleston County

Deadra L. Jefferson, Circuit Court Judge

JOHN HENRY WARD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

(4

PETITION FOR EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR
WRIT OF CERTIORARI AND APPENDIX

Counsel for John Henry Ward respectfully petitions this Court for a **final 30 day extension, until February 16, 2012,** in which to file the petition for writ of certiorari and appendix on behalf of her client. In support of this petition, counsel shows:

1. The petition for writ of certiorari and appendix is due today. The Court has granted three previous extensions.

2. Counsel respectfully submits that good cause exists to warrant the granting of an additional extension of time.

3. Specifically, counsel, because of her substantial caseload, has not had the time to complete her client's case, consistent with her duty to provide effective assistance of

counsel as guaranteed by the U.S.C.A. 6, 14. *See* Evitts v. Lucey, 469 U.S. 387 (1985) (to be effective appellate counsel must give assistance of such quality as to make appellate proceedings fair). *See also* Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001); Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999); South Carolina Bar Ethics Advisory Committee, Advisory Op. 04-12 (2004) (citing the 2002 ABA maximum caseload standards of 25 appeals). *See generally* Polk County v. Dodson, 454 U.S. 312 (1981); Gideon v. Wainwright, 372 U.S. 335 (1963). Counsel has prioritized her caseload to complete the cases with the largest number of extensions first.

4. Counsel diligently works to keep up with her case load. Counsel is currently working on the initial brief of appellant and designation of matter in the death penalty case of State v. Steven Barnes, which is due with this Court on January 26, 2012 and has a 2344 page transcript. Counsel filed the petition for rehearing in State v. David Lee Coward with the Court of Appeals on January 4, 2012. Counsel also filed the petition for rehearing in State v. Reico Lamont Welch with the Court of Appeals on January 4, 2012. Counsel filed the petition for writ of certiorari in James Wright, III v. State with this Court on December 19, 2011. Counsel filed the petition for rehearing in State v. Michael D. Jackson with the Court of Appeals on December 16, 2011.

5. In the month of January counsel is assigned to file **21** briefs and writ of certioraris.

6. As indicated by the signature below, the Attorney General's Office does not oppose the request.

7. Counsel makes this request in good faith and not for purposes of delay.

Respectfully, counsel requests a **final 30 day extension, until February 16, 2012,** in which to file her client's petition for writ of certiorari and appendix.

Respectfully submitted,

Elizabeth A. Franklin-Best
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

T. Patton Adams
Executive Director/
J. Hugh Ryan, III
General Counsel

January 17, 2012

I do not oppose:

Matthew J. Friedman

The Supreme Court of South Carolina

John Henry Ward, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Deadra L. Jefferson
Charleston County
Trial Court Case No. 2008-CP-10-06637

ORDER

For good cause shown, the request for an extension until January 17, 2012 to serve and file the Petition for Writ of Certiorari and Appendix in this matter is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what measures are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY _____
Clerk

Columbia, South Carolina

December 19, 2011

cc: Appellate Defender Elizabeth A. Franklin-Best
Assistant Attorney General Matthew J. Friedman

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Deadra L. Jefferson, Circuit Court Judge

JOHN HENRY WARD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

(3)

PETITION FOR EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR
WRIT OF CERTIORARI AND APPENDIX

Counsel for John Henry Ward respectfully petitions this Court for a **final 30 day extension, until January 16, 2012** to file the petition for writ of certiorari and appendix on behalf of her client. In support of this petition, counsel shows:

1. The petition for writ of certiorari and appendix is due today. The Court has granted two previous extensions.

2. Counsel respectfully submits that good cause exists to warrant the granting of an additional extension of time.

3. Specifically, counsel, because of her substantial caseload, has not had the time to complete her client's case, consistent with her duty to provide effective assistance of

counsel as guaranteed by the U.S.C.A. 6, 14. *See* Evitts v. Lucey, 469 U.S. 387 (1985) (to be effective appellate counsel must give assistance of such quality as to make appellate proceedings fair). *See also* Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001); Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999); South Carolina Bar Ethics Advisory Committee, Advisory Op. 04-12 (2004) (citing the 2002 ABA maximum caseload standards of 25 appeals). *See generally* Polk County v. Dodson, 454 U.S. 312 (1981); Gideon v. Wainwright, 372 U.S. 335 (1963). Counsel has prioritized her caseload to complete the cases with the largest number of extensions first.

4. Counsel diligently works to keep up with her case load. Counsel filed the initial brief of appellant and designation of matter in State v. Marion Bonds with the Court of Appeals on December 8, 2011. Counsel also filed the return to respondent's petition for rehearing in State v. William Coaxum, Sr. with the Court of Appeals on December 8, 2011. Counsel filed the brief of petitioner in Clay A. Blake v. State with this Court on December 7, 2011. Counsel also filed the motion to remand to reconstruct the record or, in the alternative, for a new trial in State v. Ervin Outz with the Court of Appeals on December 7, 2011. Counsel filed the initial brief of appellant and designation of matter in State v. Willie Poole with the Court of Appeals on November 28, 2011. Counsel filed the petition for writ of certiorari to the Court of Appeals in State v. Billy Walter Winchester with this Court on November 16, 2011. Counsel filed the initial brief of appellant and designation of matter in State v. Willie Poole with the Court of Appeals on November 16, 2011. Counsel had an oral argument in State v. Anthony Acanfora before the Court of Appeals on November 16, 2011.

5. In the month of December counsel is assigned to file **18** briefs and writ of certioraris.

6. As indicated by the signature below, the Attorney General's Office does not oppose the request.

7. Counsel makes this request in good faith and not for purposes of delay.

Respectfully, counsel requests a **final 30 day extension, until January 16, 2012,** in which to file her client's petition for writ of certiorari and appendix.

Respectfully submitted,

Elizabeth A. Franklin-Best
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

December 16, 2011

I do not oppose:

Matthew J. Friedman

The Supreme Court of South Carolina

John Henry Ward, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Deadra L. Jefferson
Charleston County
Trial Court Case No. 2008-CP-10-06637

ORDER

For good cause shown, the request for an extension until December 16, 2011 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY _____
Clerk

Columbia, South Carolina

November 17, 2011

cc: Appellate Defender Elizabeth A. Franklin-Best
Assistant Attorney General Matthew J. Friedman

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Charleston County

Deadra L. Jefferson, Circuit Court Judge

JOHN HENRY WARD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

(2

PETITION FOR EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR WRIT
OF CERTIORARI AND APPENDIX

Counsel for John Henry Ward respectfully petitions this Court for an additional 30 days to file the petition for writ of certiorari and appendix on behalf of her client. In support of this petition, counsel shows:

1. The petition for writ of certiorari and appendix is due today. The Court has granted one previous extension.

2. Counsel respectfully submits that good cause exists to warrant the granting of an additional extension of time.

3. Specifically, counsel, because of her substantial caseload, has not had the time to complete her client's case, consistent with her duty to provide effective assistance of

counsel as guaranteed by the U.S.C.A. 6, 14. *See* Evitts v. Lucey, 469 U.S. 387 (1985) (to be effective appellate counsel must give assistance of such quality as to make appellate proceedings fair). *See also* Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001); Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999); South Carolina Bar Ethics Advisory Committee, Advisory Op. 04-12 (2004) (citing the 2002 ABA maximum caseload standards of 25 appeals). *See generally* Polk County v. Dodson, 454 U.S. 312 (1981); Gideon v. Wainwright, 372 U.S. 335 (1963). Counsel has prioritized her caseload to complete the cases with the largest number of extensions first.

4. Counsel diligently works to keep up with her case load.

5. In the month of November, counsel is assigned to file **14** briefs and writ of certioraris.

6. Counsel makes this request in good faith and not for purposes of delay.

Respectfully, counsel requests a 30 day extension in which to file her client's petition for writ of certiorari and appendix.

Respectfully submitted,

Elizabeth A. Franklin-Best
Appellate Defender

November 16, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Deadra L. Jefferson, Circuit Court Judge

JOHN HENRY WARD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the petition for extension of time in which to file the petition for writ of certiorari and appendix in the above referenced case has been served upon Matthew J. Friedman, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of November, 2011.

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 16th day of November, 2011.

(L.S.)
Notary Public for South Carolina
My Commission Expires: May 16, 2021 .

The Supreme Court of South Carolina

John Henry Ward, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Deadra L. Jefferson
Charleston County
Trial Court Case No. 2008-CP-10-06637

ORDER

The request for an extension until November 16, 2011 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY 
Clerk

Columbia, South Carolina

October 18, 2011

cc: Appellate Defender Elizabeth A. Franklin-Best
Assistant Attorney General Matthew J. Friedman

ORIGINAL

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

RECEIVED
OCT 17 2011
S.C. Supreme Court

October 17, 2011

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: John Henry Ward v. State

Dear Mr. Shearouse:

The Petition for Writ of Certiorari from the Court of Appeals and accompanying appendix are due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting a thirty day extension in which to serve and file the petition.

By copy of this letter, I am informing Matthew J. Friedman, Esquire, of the Attorney General's Office, of my request.

Sincerely,

Elizabeth A. Franklin-Best
Appellate Defender

EAF/cms

cc: Matthew J. Friedman, Esquire

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

August 18, 2011

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

John Henry Ward v. State of South Carolina 8/18/2011

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Sharon A. Graham

Sharon A. Graham
Administrative Coordinator

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

April 13, 2011

Ms. Anne Bouley Meyer
Circuit Court Reporter
P O Box 12093
Charleston, SC 29422

Dear Ms. Meyer:

Please provide us with the following transcript:

John Henry Ward v. State of South Carolina Case #: 08-CP-10-06637

County: Charleston Date of Trial: July 20, 2010

Presiding Judge: Deadra L. Jefferson

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

Sharon A. Graham

Sharon A. Graham
Administrative Coordinator

cc: S.C. Supreme Court
Attorney General's Office

The Brooks Law Offices, LLC

Charles T. Brooks, III
Attorney

309 Broad Street
Sumter, South Carolina 29150
Post Office Box 3512, Sumter, SC 29151
Post Office Box 291226, Columbia, SC 29229
OFFICE: (803) 418-5708
FAX: (803) 934-9618 TOLL FREE: (877) 770-8792
Email: cbrooks@ctbrooks.com

Irma R. Brooks
Attorney

March 4, 2011

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: John Henry Ward v State of South Carolina
Case No. 2008-CP-10-6637

Dear Sir or Madam:

Enclosed herewith you will find the **Notice of Appeal, Order of Dismissal,** along with a **Proof of Service** in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,

Charles T. Brooks, III
CTB/jlb

Enclosed as stated

Cc: Matthew J. Friedman, Office of Attorney's General
South Carolina Office of Appellate Defense
John Henry Ward, 309598

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Deadra L. Jefferson, Circuit Court Judge

Case No: 2008-CP-10-6637

John Henry Ward.....Appellant
S.C.D.C. 309598
v.
The State.....Respondent

NOTICE OF APPEAL

John Henry Ward, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable Deadra L. Jefferson, March 3, 2011, which I, Charles T. Brooks, III, received on March 4, 2011.

Charles T. Brooks, III
309 Broad Street
Post Office Box 3512
Sumter, South Carolina, 29151
(803) 418-5708
Attorney for Appellant

Other Counsel on Record:
Matthew J. Friedman, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3970

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas
Honorable Deadra L. Jefferson, Circuit Court Judge

Case No: 2008-CP-10-6637

John Henry Ward.....Appellant

S.C.D.C. 309598

v.

The State.....Respondent

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 4th day of March, 2011, I served the foregoing **Notice of Appeal, Order of Dismissal** , as well as **Certificate of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on March 4, 2011, addressed to the following as indicated below:

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

South Carolina Office of Appellate Defense
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29211-1589

Office of Attorney's General
Attn: Matthew J. Friedman, Esquire
Post Office Box 11549
Columbia, South Carolina 29211-1549

John Henry Ward, 309598
McCormick Correctional Institution
386 Redemption Way
McCormick, South Carolina, 29899

Dated: March 4, 2011

Charles T. Brooks, III
Attorney for the Appellant
309 Broad Street
Sumter, South Carolina 29150
(803) 418-5708

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	Case Number: 2008-CP-10-6637
	)	
	)	
John Henry Ward, #309598,	)	
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

FILED
2011 MAR -3 AM 10:59
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Presiding Judge:	Deadra L. Jefferson
Applicant's Attorney:	Charles T. Brooks, III, Esq.
Respondent's Attorney:	Matthew J. Friedman, Esq.
Trial Counsel:	Martha Kent Runey, Esq.
	Beattie Butler, Esq.
Date of Hearing:	July 20, 2010
Court Reporter:	Anne Meyer

This matter came before the Court by way of an application for post-conviction relief (PCR) filed November 20, 2008 and amended on August 10, 2009 and October 13, 2009. The Respondent made its Return on May 13, 2009. An evidentiary hearing into the matter was convened on July 20, 2010 at the Charleston County Courthouse.[1] The Applicant was present at

[1] Counsel for the Applicant requested a continuance on the basis that the Applicant's family had expressed a desire to hire an investigator. Trial counsel had indicated to PCR counsel that he did not hire a ballistics expert and, therefore PCR counsel indicated to the Court that a report from a ballistics expert would be relevant insofar as it clarified whether trial counsel's failure to hire a ballistics expert prejudiced the Applicant. Due to state budget cuts, PCR counsel was recently informed that the Office of Indigent Defense does not have funds to reimburse PCR counsel for funds expended to hire an investigator. Upon receiving this information from PCR counsel, the Applicant's family communicated to PCR counsel that they wanted to hire an investigator and or ballistics expert. The Court explained to PCR counsel that this request was not the basis for a continuance as the public defender's office employs full time investigators that would have fully investigated the case and assisted trial counsel, but that the Court would agree to leave the record open until August 20, 2010 in order to allow the Applicant's family adequate time to hire a ballistics expert and or investigator. The Court also agreed to allow the investigator and or ballistics expert fifteen additional days to complete his investigation and therefore agreed to leave the record open for additional testimony until September 6, 2010, if the Applicant's family does in fact hire an investigator by August 20, 2010. The Court was informed on August 26, 2010 that the Applicant's family did not hire an

1 of 19

the hearing and was represented by Charles T. Brooks, III, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

The Applicant, Martha Kent Runey, Esquire and Beattie Butler, Esquire, testified at the PCR hearing. This Court had before it the records of the Charleston County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the records from the Court of Appeals regarding the Order affirming Applicant's sentence and denying his Petition for Rehearing, the records from the Supreme Court regarding the Order denying Applicant's Petition for Writ of Certiorari, the Remittitur, the Applicant's PCR application and amended applications, the Respondent's Return thereto, the trial transcript, and the transcripts of the Applicant's prior testimony and Tremayne R. Washington's prior testimony, both from the Applicant's first trial.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. The Applicant was indicted at the September 2003 term of the Charleston County Grand Jury for Murder (2003-GS-10-5895). Martha Kent Runey, Esquire (sitting first chair) and Beattie Butler, Esquire (assisting as second chair), represented the Applicant. On June 6-9, 2005, the Applicant proceeded to trial with his co-defendant Washington, after which a jury found both guilty as indicted. The Honorable Roger M. Young, Sr. sentenced the Applicant to confinement for thirty (30) years. The Applicant was tried previously by jury on December 6-9, 2004 by Judge Markley Dennis with his co- Defendant Washington testifying against him which trial ended in a mistrial. The State and Defendant were represented by the same counsel during this previous trial.

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investigator or ballistics expert. Applicant's counsel advised the Court that he would not be supplementing the record with any additional testimony. Therefore, the record was closed on September 6, 2010.

2/9/19

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Joseph L. Savitz, III, Esquire of the South Carolina Office of Appellate Defense, and William J. Watkins, Jr., Esquire represented the Applicant on appeal. Following full briefing by both sides, the South Carolina Court of Appeals Affirmed the Applicant's conviction. See State v. Ward, 374 S.C. 606, 649 S.E. 2d 145 (Ct. App. 2007). Applicant filed a Petition for Rehearing on July 9, 2007. By Order dated August 24, 2007, the Court of Appeals denied the Petition for Rehearing. Subsequently, the Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court on September 21, 2007. By Order dated August 7, 2008, the Supreme Court denied the Petition for Writ of Certiorari. The Remittitur was issued on August 20, 2008.

ALLEGATIONS

The Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel in that counsel
    a. Failed to move to quash the indictment
    b. Failed to object to the "hand of one is the hand of all" jury charge
    c. Failed to object to the Solicitor leading his witnesses to place Applicant and Co-defendant together outside the club
    d. Failed to object to Solicitor's comment referring to the Applicant as a member of a gang
    e. Failed to move for a separate trial
    f. Failed to object to the use of the Co-defendant's recorded testimony from Applicant's first trial[2]
    g. Failed to allow Applicant to testify at the trial
2. Lack of subject matter jurisdiction because indictment was defective
3. Violation of procedural and substantive due process
4. Ineffective assistance of appellate counsel in that appellate counsel failed to move to correct the record before the appellate court.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[2] The Court notes that the Applicant's argument that trial counsel failed to object to the use of the co-defendant's prior trial testimony is in opposition to the Applicant's argument on appeal. See State v. Ward, 374 S.C. 606, 616 n.1, 649 S.E. 2d 145, 150 n. 1 (Ct. App. 2007). The Court of Appeals noted that "[o]n appeal, Ward admit[ted] he acquiesced to the playing of the former testimony. Id. Moreover, "Ward never argued the trial court erred in allowing his co-defendant's testimony to be played during his current trial, nor did he argue that the change in the State's strategy prevented him from thoroughly cross-examining his co-defendant during that first trial." Id.

3 of 19

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. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon his or her 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. § 17-27-80 (2003).

The Applicant testified that trial counsel advised him not to testify at his second trial. He testified that trial counsel did not fully explain why they were advising him not to testify, but they indicated that it had to do with some type of confusion during his first trial. He also testified that trial counsel did not explain accomplice liability to him. The Applicant further testified that he is not a member of a gang, but that the Solicitor, during opening statements, referred to him as a member of a gang and his trial counsel did not object to this statement.

In regards to accomplice liability, the Applicant testified that he could not have been acting in concert with his co-defendant, Tremayne R. Washington, because he did not come to the club with Mr. Washington and was never with Mr. Washington at the club. The Applicant testified that he came to the club with Mr. Ravenel. The Applicant further testified that trial counsel did not call Mr. Ravenel as a witness, despite the fact that they served him with a subpoena for both trials.[3] The Applicant testified that Mr. Ravenel would have added credibility to the assertion that the Applicant was not acting in concert with Mr. Washington and would have contradicted other witnesses. To explain his presence in Mr. Washington's truck, the

[3] Martha Kent Runey, Esq. testified that Ravenel was subpoenaed for both trials. She testified that her in house investigator interviewed Mr. Ravenel. She testified that Ravenel's testimony would corroborate that Applicant went to the club with him that night, that he left the club with another friend or family member when the shooting occurred, and that Applicant went back in the club to retrieve his shirt. She testified that Ravenel's testimony would not be able to shed any light on the Applicant's movements when he came back out of the club. Ravenel's testimony could only confirm that Applicant went to the club with him and that he left Applicant at the club when he went back inside to retrieve his shirt. Ms. Runey could not recall why she did not call Ravenel to testify.

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Applicant testified that he went back inside the club to find his jersey, but when he returned outside, the fight had escalated and he could not locate Mr. Ravenel or Mr. Ravenel's vehicle. The Applicant testified that he "flagged down" Mr. Washington for a ride home, because he could not find Mr. Ravenel. The Applicant further testified that, despite the fact that he has very long arms that would have been noticeable to witnesses; no witnesses testified that they saw his arm come out of Mr. Washington's truck. However, there was direct and circumstantial evidence in the record corroborating his placement in the vehicle as a passenger.

The Applicant testified that he asked trial counsel if they could sever the trials, but that trial counsel never made a motion for severance and never objected to the joint trial. Further, the Applicant testified that the indictment was defective because it was stamped by the Grand Jury on September 2, 2005, but the Grand Jury only meets on the second Monday of each month. The Applicant also testified that his appellate counsel was ineffective for failing to correct the record on appeal and not communicating with him.

Beattie Butler, Esq., who sat as second chair in Applicant's trial, also testified at the PCR hearing. Mr. Butler testified that Martha Kent Runey, Esq. was the Applicant's lead counsel at trial, but that he assisted her with the trial because of the difficulty of the trial. Mr. Butler testified that the Applicant's first trial ended in a hung jury and that the Solicitor's office told him that the jury had voted 11-1 to acquit the Applicant. Mr. Butler also testified that the Applicant faced some complex issues during his second trial, because the State decided to try the Applicant by himself in the first trial and then decided to try the Applicant with his co-defendant in the second trial. Mr. Butler testified that he would have done things differently in the first trial if he had known that the Applicant was going to later be tried in a joint trial with his co-defendant. Mr. Butler testified that he always thought the Applicant's co-defendant, Mr.

Washington, was the shooter and that he thought he was able to destroy Mr. Washington's credibility by effectively cross-examining him in the first trial and almost getting him to admit that he was the shooter. However, Mr. Butler testified that he would have approached the cross-examination differently if he had known that the two co-defendants would be tried together in a second trial and that Mr. Washington's testimony from the first trial would be used against both Defendants in the second trial. Mr. Butler also testified that he would have approached the cross-examination differently if he had known that the "hand of one" charge was going to be used in the second trial.

Further, Mr. Butler testified that he did not object to the joint trial because he did not think he had a basis on which he could object, but he would have objected if he had known that the State was going to use Mr. Washington's recorded testimony from the first trial in the second trial. Mr. Butler testified that, in retrospect, he should have objected to the joint trial and should have objected to the State's request to play Mr. Washington's testimony from the first trial during the second trial. He testified that he did not think the recorded testimony was hearsay or had any Bruton[4] issues during the trial, but, at the time, he did not realize that his cross-examination would have been different in the second trial because of use of the "hand of one" charge in the second trial. He also testified that he now thinks he could have objected to the recorded testimony on the basis of the confrontation clause or hearsay, but could not specify or articulate the precise legal theory or basis under which the testimony would be excluded.[5] He

[4] Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968).

[5] When asked if he had an objection to Mr. Washington's prior testimony being played, Mr. Butler replied that he did not think he could object because he had the opportunity to fully cross examine the witness, and the testimony qualifies under the exception of former testimony. Mr. Butler did place on the record that Mr. Washington was unavailable because he was going to assert his Fifth Amendment privilege in this trial. (Tr. 488:6-488:17, June 6-9, 2005). In addition there is a lengthy colloquy between the Court and counsel regarding the admissibility of the former sworn testimony of Mr. Washington. (Tr.487:14-490:16, June 6-9, 2005). Mr. Washington's counsel,

also testified that both the Applicant and co-defendant were found guilty at the second trial, but that he thought the Applicant was "punished" at the second trial because of his (Mr. Butler's) effective cross-examination by destroying Mr. Washington's credibility during the first trial. Mr. Butler explained that, because the "hand of one" charge was used in the second trial, any evidence that made Mr. Washington look guilty, specifically trial counsel's effective cross-examination of Mr. Washington also impacted the jury's perception of the Applicant's guilt.

Mr. Butler also testified that they did not use a ballistics expert, but did call a reconstruction expert at trial. However, Mr. Butler testified that the reconstruction expert did not do a good job testifying and that he wishes he would have called a ballistics expert instead. He also testified that he thinks a ballistics expert would have testified that Mr. Washington was the shooter, but that it is difficult to speculate as to whether the use of a ballistics expert would have made a difference in the trial.

Mr. Butler also testified that he should have objected to the State's change in theory and strategy in the second trial in regards to the recorded testimony as well as the State's inconsistent positions in the first and second trial. Specifically, Mr. Butler testified that he should have objected to the joint trial, because, as a result of the joint trial, the State was able to use different theories in their prosecution of the case, such as calling Jermaine Heyward as a witness in the second trial. Mr. Butler testified that during the first trial, he called Mr. Heyward as a witness because Mr. Heyward's testimony implicated Mr. Washington as the shooter, but, during the second trial, the State called Mr. Heyward as a witness because his testimony now implicated both co-defendants as a result of the joint trials and the "hand of one" charge. Mr. Butler testified that the Applicant was prejudiced as a result of his failures. On cross-examination, Mr.

William Runyon, Esq. does not object to the admission of his client's prior sworn testimony. (Tr.487:24-488:9), June 6-9, 2005).

Butler testified that he did object to the "hand of one" charge. He also testified that the co-defendant did not appear to be credible during his testimony in the first trial.

Martha Kent Runey, Esq., Applicant's lead trial counsel, also testified at the PCR hearing. Ms. Runey testified that she used two investigators, talked to all of the State's witnesses, and recalls doing an extensive investigation of the case. She also testified that she attempted to locate all of the witnesses given to her by the Applicant, but that some of the witnesses did not return her phone calls and could not be located.

Ms. Runey testified that she thinks that trial counsel's inability to cross-examine Mr. Washington at the second trial had a negative effect on the Applicant's second trial. She also testified that she failed to object to the State's use of the co-defendant's recorded testimony and that she could have objected on the basis of the confrontation clause. When questioned, Ms. Runey could not specify precisely the basis upon which she would have objected to the admission of the co-defendant's recorded testimony. Ms. Runey further testified that she would have made a severance motion if she had known that the State was going to use Mr. Washington's recorded testimony. Additionally, she testified that she advised the Applicant not to testify at the second trial based on her conversations with the jurors from the first trial.

Ms. Runey also testified that she does not recall why she did not call Mr. Ravenel as a witness in the trial, but that she did interview him. She also testified that there were not any issues with the Applicant's indictment.

Ineffective Assistance of Counsel

The Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application by a preponderance of the evidence. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334

S.E.2d 813 (1985). Where ineffective assistance of 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." Id. at 442, 334 S.E.2d at 814 (quoting Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-90, 104 S. Ct. at 2064-66. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. The Applicant must overcome this presumption in order to receive relief. Id.; Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. at 2065). Secondly, 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

This Court finds that Mr. Butler and Ms. Runey are trial practitioners with experience in the trial of serious offenses. Counsel conferred with the Applicant on numerous occasions and represented him during two full trials. In regard to Counsel's communication with the Applicant,

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the Court finds Counsel to be credible and finds that Counsel had a reasonable strategy in advising the Applicant not to testify at the second trial and did not base their advice on legal errors. Further, the Court notes that the Applicant has failed to meet his burden, because he has not proven that counsel's performance was deficient or that, but for any deficiency, the result of the trial would have been different. The Court specifically notes that the State presented multiple witnesses who testified against the Applicant and conflicted with Applicant's testimony from the first trial. Cf. Horton v. State, 306 S.C. 252, 411 S.E.2d 223 (1991) (Counsel can be found ineffective where his advice not to testify was based on an error of law and undercover officer's testimony was sole testimony against defendant).

Further, the Court finds that Applicant did not produce adequate evidence to suggest that Counsel failed to discuss the pending charges, the elements of the charges, what the State was required to prove, Applicant's version of the facts, Applicant's constitutional rights, the discovery materials, the possible punishments, and the possible defenses or lack thereof. Further, the Court finds that Counsel properly investigated the case and properly attempted to contact Applicant's witnesses. Specifically, the Court finds that the Applicant has failed to meet his burden of proof in regards to the allegation that trial counsel failed to call Mr. Ravenel as a witness.[6] Specifically, the Court finds that the Applicant has not proven any prejudice from any alleged deficient performance of trial counsel. The Applicant failed to prove that Mr. Ravenel's testimony would have impacted the outcome of the trial. The Court also notes that the Applicant alleged in his application that trial counsel was ineffective in failing to object to the Solicitor leading his witnesses to place the Applicant and Co-defendant together at the club. However, at

[6] The Court notes that the Applicant did not list this specific allegation in his PCR application or amended PCR applications, but presented argument on this issue at the hearing, and, therefore, the Court chooses to address the issue.

the PCR hearing, the Applicant failed to present any evidence regarding this allegation and, therefore, the Applicant failed to meet his burden of proof regarding this allegation.

In regards to the allegation that counsel was ineffective for failing to quash the fatally defective indictment, the Court finds that the indictment was proper and that the Applicant has failed to meet his burden in regards to this allegation. An indictment is adequate and valid on its face if the "indictment is returned by a legally constituted and unbiased grand jury" and if "the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce and the defendant to know what he is called upon to answer." State v. James, 321 S.C. 75, 76, 472 S.E.2d 38, 40 (Ct. App. 1996); Costello v. United States, 350 U.S. 359, 76 S.Ct. 406 (1956). The indictment in this case is facially valid, because it contains all of the necessary elements of the charged offense, as well as the accurate statute under which the Applicant was charged.[7] Further, according to the Court's research of the official court record of the 2005 Grand Jury terms, the indictment was issued during a valid Grand Jury term, specifically the term of September 2, 2005. The Court finds that, because the indictment was valid, the Applicant has failed to show any prejudice from Counsel's failure to object to the indictment. Further, the Court notes that Applicant's trial counsel attempted to get Applicant's case dismissed at the directed verdict stage of the trial due to a perceived issue with the indictment but was unsuccessful. The trial court refused to find that the indictment had fatal errors and warranted a directed verdict, and, similarly, this Court fails to be persuaded that the indictment was fatal or that any failure by trial counsel to challenge the indictment had a prejudicial effect on the Applicant.

[7] The Court notes that the Applicant argued in his Amended PCR Application that the indictment was defective because it included language about "acting in concert with others." The Court finds that the indictment is not invalid as a result of this language. The indictment is a notice document. The indictment in this case charged the Applicant with murder and clearly gave the Applicant notice of the charge and its elements.

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The Court notes that the Applicant also alleges that the trial court lacked subject matter jurisdiction because the indictment was defective, but the Court finds that this argument is without merit and that the Applicant has failed to meet his burden of proof in regards to this allegation as well. Subject matter jurisdiction "is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." Pierce v. State, 338 S.C. 139, 150, 526 S.E.2d 222, 227 (2000) (citing Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994)). The Supreme Court of South Carolina has acknowledged that "subject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts." State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005). In Gentry, the Court held,

> [I]f an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards. . . . However, a defendant may for the first time on appeal raise the issue of the trial court's jurisdiction to try the class of case of which the defendant was convicted.

Id. at 101–02, 610 S.E.2d at 499 (holding that because appellant did not raise the sufficiency of the indictments before the jury was sworn, he could not raise the issue on appeal); see also S.C. Code Ann. § 17-19-90 (2003). The Court notes further that a presentment of an indictment is not needed to confer subject matter jurisdiction on the circuit court. Gentry, 363 S.C. at 102 n.6, 610 S.E.2d at 499 n.6. The Applicant has failed to show that he raised the sufficiency of his indictment prior to the jury being sworn. Thus, he cannot now raise the issue on appeal. Nevertheless, because an indictment is not needed to confer subject matter jurisdiction, the trial court clearly had subject matter jurisdiction to adjudicate the Applicant's case. Therefore, the Applicant cannot show any failure of counsel to act had any prejudicial effect on him.

In regards to Applicant's allegation that trial counsel failed to object to the Solicitor's comment referring to the Applicant as a gang member, the Court finds that the Applicant has

failed to meet his burden on this allegation as well. The transcript does not support this allegation. The Solicitor referenced animosities between Petersfield and Cherry Hill in his opening statement, but never directly referred to the Applicant as a gang member. (Tr. 81:2-25, June 6-9, 2005.) The Court finds that the Applicant has failed to show that either prong of the Strickland test has been met in regards to this allegation.

In regards to Applicant's allegation that trial counsel failed to object to the "hand of one" jury charge, the Court finds that the Applicant has failed to meet the Strickland burden. The Court finds trial counsel credible as to this issue. Trial counsel testified that he objected to the "hand of one" charge. Upon the Court's review of the transcript, the trial court had a lengthy charge conference with all of the attorneys involved in the trial. During this charge conference, Applicant's trial counsel objected to the "hand of one" charge and then, upon the Court's denial of his objection, again renewed his objection to the charge. (Tr. 746:10-765:14, June 6-9, 2005.) As such, the Applicant has failed to meet the first prong of the Strickland test. Trial counsel's representation did not fall below an objective standard of reasonableness, because trial counsel clearly objected to the "hand of one" charge during Applicant's trial.

The Court also finds that the Applicant was not prejudiced by trial counsel's failure to move for a separate trial. "Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right." State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999). Joint trials are generally allowed, even "when a defendant's severance motion is based upon the likelihood he and a codefendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime." Id. However, in joint trials, the trial judge "must assure protection of each defendant's constitutional right to confront witnesses against him." Id. at 282, 523 S.E.2d at 176. Further, the decision to deny or grant a severance is left to the sound

discretion of the trial court and a "severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." Id.

The Court finds that despite the mutually antagonistic defenses presented by the Applicant and his co-defendant, trial counsel had no proper basis on which he could request a separate trial or any assurance that such a motion was likely to be granted. The Applicant has failed to prove by a preponderance of the evidence that he was prejudiced by trial counsel's performance. Specifically, the Applicant has failed to prove that a motion for severance would have been granted, because he has failed to prove that one of his specific trial rights was compromised. Additionally, the Applicant has failed to prove that the joint trial prevented the jury from making a reliable judgment about his guilt. The Court notes that if the Applicant's right to cross examine or confront witnesses had been compromised by the joint trial or if the Applicant had pointed to a specific trial right that was prejudiced by the joint trial then perhaps the Court's analysis would be different. Further, if the Applicant proved that the joint trial prevented the jury from making a reliable judgment about his guilt, due to issues such as confusing or overlapping facts, then perhaps the Court's analysis would find that a motion for severance would have been required. However, the Applicant has failed to prove that trial 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.

In regards to the Applicant's allegation that trial counsel was ineffective because trial counsel failed to object to the use of the co-defendant's prior trial (recorded) testimony, the Court finds that the Applicant has failed to meet the Strickland test, especially the prejudice prong. The fact that both trial counsel testified that they should have objected to the co-

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defendant's testimony does not prove that the perceived error was prejudicial to the Applicant. Under Strickland, an Applicant alleging a deficiency in attorney performance must "affirmatively prove prejudice." Strickland, 466 U.S. at 693, 104 S. Ct. at 2067. Further, "[e]ven if a defendant shows that particular errors of counsel were unreasonable," the defendant still must prove that the errors "had an adverse effect on the defense," and, specifically, more than "some conceivable effect on the outcome of the proceeding." Id. As, the Court in Strickland explained, "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id.

Here, even if trial counsel erred in failing to object to the admissibility of the co-defendant's testimony, the Applicant has failed to 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 or that there is a reasonable probability that, but for the alleged errors of counsel, the result of the proceeding would have been different. Based on the Court's review of the transcript, there were at least two witnesses who testified that the Applicant had a gun in his hand and was firing shots. Further, there were multiple witnesses that testified that the Applicant was present with Mr. Washington (the co-defendant) in the truck at the time of the shooting. Even after hearing the testimony, the jury, as the factfinder, could have reached a number of different conclusions.

Here, the Applicant has not proven that the outcome of the trial would have been different if trial counsel had objected to the testimony. First, the Applicant has not proven that trial counsel had a basis upon which to object. Therefore, there is no evidence that the objection would have been successful. The Applicant had an opportunity to fully cross-examine the co-defendant at the first trial and the co-defendant's testimony was reliable and admissible as prior

sworn testimony. Rule 804(b)(1) SCRE; Danny R. Collins, South Carolina Evidence, § 17.6, 531 (2d ed., South Carolina Bar 2000); See generally Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004); Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968); State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999). Admittedly, as presented, this presents a novel factual circumstance rarely seen in a subsequent trial; however, it is uncontroverted that the same trial testimony was presented and much the same questions asked by counsel as the first trial. It is hard to imagine that there would have been any great variance in the cross examination of the witness for the first versus the second trial. As subsequently observed the purpose of cross examination is to impeach the credibility of the witness such that the jury gives little if any weight to the testimony and does not believe the witness is telling the truth. Further, the co-defendant was unavailable at trial, because he asserted his Fifth Amendment right to remain silent. Additionally, even if trial counsel made a successful objection, the Applicant has not proven that the outcome of the trial would have been different. Trial counsel testified that he successfully impeached the co-defendant during his cross-examination of the co-defendant and destroyed the co-defendant's credibility. Trial counsel asserts that this style of cross-examination harmed the Applicant in the second trial because the co-defendant's lack of credibility negatively impacted the Applicant under the "hand of one" theory. However, the Court does not find this reasoning to be persuasive. It is highly probable the Co-defendant's lack of credibility had a positive impact and did not negatively affect the Applicant, because, even without the Co-defendant's testimony, the jury could have found that the Applicant was the lone shooter and was guilty of murder or that the Applicant was not the shooter but was involved in the murder. Additionally, it is more likely and highly probable that the Co-defendant's lack of credibility positively impacted the Applicant, which is precisely why trial counsel attempted to

destroy the Co-defendant's credibility in the first trial. The co-defendant's lack of credibility was more likely exculpatory than inculpatory of the Applicant. In fact, it is more likely a lack of credibility inculpated the co-defendant as the lone actor. Such a lack of credibility is more likely to have had the effect of reinforcing the co-defendant's attempt to insulate himself from his criminal actions by shifting the blame to someone else. Regardless of the co-defendant's testimony, ample evidence existed that would have supported a jury finding that the Applicant was guilty of murder. The Court also notes that the Applicant failed to prove that he was prejudiced by not objecting to the State's change in theory in the second trial, because the Applicant did not prove that he had any basis to object to the State's theory.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with the Applicant, reviewed the discovery materials with Applicant, conducted a proper investigation, and was thoroughly competent in their representation of the Applicant. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

Accordingly, in regards to all of Applicant's allegations regarding ineffective assistance of counsel, this Court finds that Applicant has failed to prove the first prong of Strickland, specifically that counsel failed to render reasonably effective assistance under prevailing professional norms. This Court also finds the Applicant has failed to prove the second prong of Strickland; specifically that he was prejudiced by plea counsel's performance. Applicant's

complaints concerning counsel's performance are without merit and are denied and dismissed.

Ineffective Assistance of Appellate Counsel

The Applicant alleges ineffective assistance of appellate counsel for failure to correct the factual record on appeal.[8] A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). "However, appellate counsel is not required to raise every non-frivolous issue." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308 (1983). The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537, 397 S.E.2d at 523; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). This Court finds that appellate counsel, William J. Watkins, Esq., is an experienced attorney. This Court finds that if an error existed in the record and any meritorious reason to correct the record existed, then Mr. Watkins would have taken appropriate measures to correct the record. The Court finds that appellate counsel did a thorough job representing the Applicant on appeal. Further, the Court finds that the Applicant has failed to show that appellate counsel's representation was deficient in any manner.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, specifically the allegation that the Applicant's procedural and substantive due process rights were violated, this Court finds the Applicant failed to present sufficient evidence regarding such allegations. Accordingly, this

[8] Applicant's Amended PCR Application states that the appellate record contained incorrect facts, specifically that the victim was killed while the two cars were shooting at each other.

Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, 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 in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this application for PCR 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 written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and 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.

D.L. Jefferson

Deadra L. Jefferson
Presiding Judge
9th Judicial Circuit

March 3, 2011
Charleston, South Carolina.

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S., F.C.

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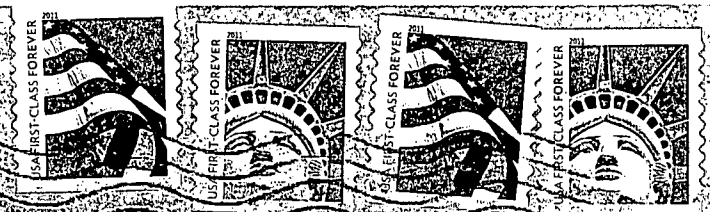

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