

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas – Post Conviction Relief

The Honorable Frank R. Addy, Jr., Circuit Court Judge  
The Honorable William P. Keesley, Circuit Court Judge

Case No. 2011-CP-32-4590  
Case No. 2009-CP-32-02962

Ann Smith, SCDC#326549

Petitioner,

v.

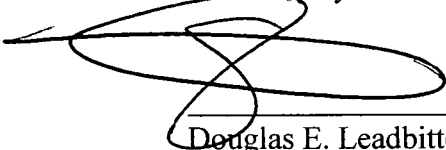
The State of South Carolina

Respondent.

NOTICE OF APPEAL

Ann Smith appeals the Order of the Honorable Frank R. Addy, Jr. (Austin Appeal) dated April 23, 2013. Appellant received written notice of entry of this order on May 15, 2013.

May 29, 2013



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Attorney for Petitioner

**RECEIVED**

Other Counsel of Record:

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Assistant Attorney General  
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Columbia, South Carolina 29201

MAY 31 2013

S.C. SUPREME COURT



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

FORM 4

JUDGMENT IN A CIVIL CASE

ORIGINAL

FILED

CASE NO. 2011 CP-32-4590

ANN SMITH

2013 APR 23 A 11 30 State of S.C.

APPLICANT  
 PLAINTIFF(S)

BEVERLY J. BRIDGES  
 CLERK OF COURT  
 LEXINGTON, SC

DEFENDANT(S)

Submitted by: COURT

Attorney for :  Plaintiff  Defendant  
 or  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court: Based upon the consent of the parties, Applicant's motion for an Austin appeal is granted. The appeal shall be related solely to issues addressed in Applicant's prior PCR.

ORDER INFORMATION

This order  ends  does not end the case.  
 Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|--|--|--|
|  |  | \$   |
|  |  | \$   |
|  |  | \$   |

If applicable, describe the property, including tax map information and address, referenced in the order:



STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF LEXINGTON

CASE NO: 2008CP3202962

IN THE COURT OF COMMON PLEAS

Ann Baxley Smith vs. State of South Carolina

CHECK ONE:

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

IT IS ORDERED AND ADJUDGED:

See attached order:

Statement of Judgment by the Court:

Court Reporter: \_\_\_\_\_

\_\_\_\_\_  
PRESIDING JUDGE -

This judgment was entered on the 5th day of april 2011, and a copy mailed first class this 6th day of april 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Frederick Arnold Beacham Jr. 506 East Main  
Street Lexington, SC 29072

Gregory P Jones Jr P O Box 11549 Columbia.  
SC 292111549

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/v

\_\_\_\_\_  
Beth A. Carrigg - Clerk of Court

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF LEXINGTON )  
 )  
 Ann B. Smith, # 326549, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FOR THE ELEVENTH JUDICIAL CIRCUIT  
 Case No.: 2008-CP-32-196

**ORIGINAL**

**ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 21, 2008. The Respondent made its Return on December 9, 2009. An evidentiary hearing into the matter was convened on September 15, 2010, at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by Arnold Beacham, Esquire. The Respondent was represented by A. West Lee of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Respondent presented testimony from the Applicant's Plea Counsel, William Tetterton, Esquire. This Court also had before it a copy of the transcript from the Applicant's guilty plea proceedings, the records of the Lexington County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the Application for Post-Conviction Relief, the State's Return, and evidence presented at the hearing.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the October 2006 term of the Lexington County Grand Jury for Murder (2006-GS-32-

*CPA #1*

3722). He was represented by William S. Tetterton, Esquire. On January 31, 2008, the Applicant pled guilty to voluntary manslaughter. She was sentenced by the Honorable J.C. Nicholson, Jr., to confinement for a period of twenty-five (25) years. The Applicant did not appeal her guilty plea or sentence.

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

- 1) Ineffective assistance of Counsel
  - a. "Counsel never told Applicant about appeal process."

### APPLICABLE LAW

#### *Ineffective Assistance of Counsel*

*WPA #2*  
This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; 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." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that Counsel rendered adequate

assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of Counsel. First, the Applicant must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, Counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty Plea Counsel, the Applicant must show that there is a reasonable probability that, but for Counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

WAL  
#3

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the Applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

An Applicant who enters a plea on the advice of Counsel may only attack the voluntary and intelligent character of the plea by showing that trial Counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial Counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial, Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993).

Given Applicant's burden of proof and the analysis to be applied to this claim, the Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of Counsel, and it will be treated as such.

### *Involuntary Guilty Plea*

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

W  
#4

The transcript reflects that the guilty plea was knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea. Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, [an Applicant's] right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). Statements made during a guilty plea should be considered conclusively, unless an [Applicant] presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 347 (4<sup>th</sup> Cir. 1975) *overruled on other grounds by U.S. v. Whitley*, 759 F.2d 327 (4<sup>th</sup> Cir. 1985). This Court finds that Applicant presented no reasons to show that he should be allowed to depart from the truth of the statements he made during his guilty plea hearing.

An Applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial counsel's

errors, the defendant would not have pled guilty, but would have insisted on going to trial, Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Given Applicant's burden of proof and the analysis to be applied to this claim, the Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it will be treated as such.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### *Failure to Advise Applicant of Appellate Rights*

With respect to this claim, this Court finds that the Applicant has failed to meet her burden of proof. Applicant testified that she was not advised of her appeal rights. Counsel testified that because it was a guilty plea he did not see that there were any appealable issues, but that he advised her of her appeal rights nonetheless, as did the court during the course of the Applicant's guilty plea. This Court finds Counsel's testimony on this issue to be credible, as it is supported by the transcript of the guilty plea hearing. During her colloquy with the plea court, the judge asked the Applicant if she understood that she had the right to appeal her guilty plea within ten days of the hearing, and the Applicant replied that she understood. (Tr. p. 12, lines 4-7). Therefore, this Court finds Applicant's testimony on this issue not to be credible. As such, this Court finds that the Applicant is unable to prove either ineffective assistance of counsel or resulting prejudice. Accordingly, this allegation is denied and dismissed.

### *Ineffective Assistance of Counsel Generally*

With respect to any other assertions with regard to ineffective assistance of counsel which may have brought forth through the Applicant's testimony at the PCR Hearing, this Court again finds that the Applicant has failed to meet her burden of proof. Counsel testified that there was a

wealth of evidence against the Applicant. He testified that this evidence included eyewitness testimony, her statement, the fact that the Applicant called her sister after the incident instead of calling police, and the fact that the Applicant fled. However, Counsel testified that despite that, if the Applicant had chosen to go to trial, he would have been prepared to do so. Counsel further testified that he felt a plea to voluntary manslaughter had a benefit for his client, but indicated that he in no way pressured or coerced her into entering a guilty plea. He also stated that he never told the Applicant that she would not receive over ten years if she pled guilty, despite her assertion to the contrary. Counsel admitted that he did not feel the Applicant should take the witness stand, but asserted that it was because the Applicant was in an emotional state and he did not want her to harm her case on the stand. Finally, Counsel testified that he met with Applicant on multiple occasions, and discussed the charges against her, her constitutional rights, and the discovery in the case. This Court finds Counsel's testimony on these issues to be credible, while simultaneously finding Applicant's testimony on these issues not to be credible. As such, this Court finds that the Applicant is unable to prove either ineffective assistance of counsel or resulting prejudice. Accordingly, this allegation is denied and dismissed.

WAL  
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*All Other Claims*

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is

reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

### CONCLUSION

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

*WAC*  
*#7*  
This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by Counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate Counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, PCR Counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 29<sup>th</sup> day of MARCH, 2011.

William P. Keesley

William P. Keesley  
Presiding Judge  
Eleventh Judicial Circuit

Edgefield, South Carolina.

#8

FILED  
MARCH 29 2011  
CLERK OF COURT  
ELEVENTH JUDICIAL CIRCUIT  
EDGEFIELD, SOUTH CAROLINA

# Douglas E. Leadbitter, LLC

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Douglas E. Leadbitter  
Attorney At Law

May 29, 2013

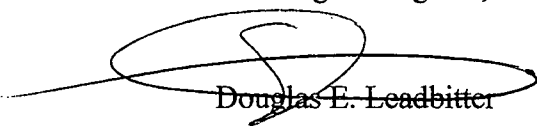
The Honorable Beth Carrigg  
Lexington County Clerk of Court  
205 East Main Street  
Lexington, SC 29072

Re: Ann Smith v. State of South Carolina  
Civil Action No. 2011-CP-32-4590  
PCR Application Appeal  
DEL File No. 6.00001

Dear Ms. Carrigg:

Enclosed for filing is a copy of the Notice of Appeal (Austin Appeal) to the Supreme Court in the above referenced case.

With highest regards,



Douglas E. Leadbitter

DEL

Enclosures

cc: W. Walt Whitmire (with enclosure)  
Ann Smith (with enclosure)  
Daniel Shearouse (with enclosure)

# Douglas E. Leadbitter, LLC

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Douglas E. Leadbitter  
Attorney At Law

May 29, 2013

The Honorable Daniel E. Shearouse  
Supreme Court Clerk of Court  
Supreme Court Building  
1231 Gervais Street  
Columbia, South Carolina 29201

**RECEIVED**

MAY 31 2013

Re: Ann Smith v. State of South Carolina  
Civil Action No. 2011-CP-32-4590  
PCR Application Appeal  
DEL File No. 6.00001

S.C. SUPREME COURT

Dear Mr. Shearouse:

Enclosed for filing is an original and 2 copies of the Notice of Appeal in the above referenced case. Please return clocked copies to me in the enclosed SASE. If you need any additional information please do not hesitate to contact me.

With highest regards,



Douglas E. Leadbitter

DEL

Enclosures

cc: J. Walt Whitmire (with enclosure)  
Ann Smith (with enclosure)

Freedom FOREVER  
Equality FOREVER  
Equality FOREVER  
Justice FOREVER  
Freedom FOREVER  
Liberty FOREVER  
Justice FOREVER

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