



ALAN WILSON  
ATTORNEY GENERAL

April 17, 2012

RECEIVED

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S.C. Supreme Court

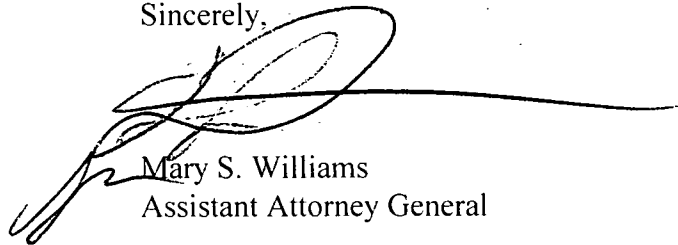
The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: Jonathan Coburn v. State of South Carolina**  
**2009-CP-18-1636**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above case.

Sincerely,



Mary S. Williams  
Assistant Attorney General

MSW/lm  
Enclosures

cc: Jim Brown, Esquire  
Trisha Allen, Victim Services

# The Supreme Court of South Carolina

Jonathan Coburn,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Diane Schafer Goodstein  
Dorchester County  
Trial Court Case No. 2009-CP-18-01636

---

## ORDER

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For good cause shown, the request for an extension until April 18, 2012 to serve and file the Return to the Petition for Writ of Certiorari 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

March 20, 2012

cc: James Arthur Brown, Jr, Esquire  
Assistant Attorney General Mary S. Williams



ALAN WILSON  
ATTORNEY GENERAL

March 19, 2012

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

(3)


**Re: Jonathan Coburn v. State of South Carolina**  
**2009-CP-18-1636**

Dear Mr. Shearouse:

The Return to Petition for Writ of Certiorari in the above appeal is due to be served and filed on today's date. However, this is to respectfully request a 30-day extension to serve and file this Return. By his signature below, Jim Brown, indicates that he consents to this extension.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a workload.

Sincerely,

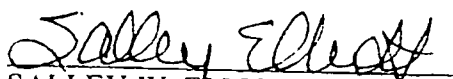
  
Mary S. Williams  
Assistant Attorney General


MSW/lm

cc: Jim Brown, Esquire

In compliance with:

*In Re: Extensions in Criminal and Post-Conviction Relief Cases*, (S.C. Sup. Ct. order dated March 18, 2009) (Davis Adv. Sh. No. 13 at 1).

  
SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

  
JIM BROWN  
Esquire



ALAN WILSON  
ATTORNEY GENERAL

March 19, 2012

RECEIVED

MAR 19 2012

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

S.C. Supreme Court

**Re: Jonathan Coburn v. State of South Carolina**  
**2009-CP-18-1636**

Dear Mr. Shearouse:

The Return to Petition for Writ of Certiorari in the above appeal is due to be served and filed on today's date. A copy of the extension letter has been forwarded to opposing counsel's office via fax ((843) 470-0004) and e-mail ([jimbrownlaw@hargray.com](mailto:jimbrownlaw@hargray.com)). Our office was informed that counsel has been in court all day and has been unable to sign the extension. By copy of this letter, we are requesting that counsel please sign a copy of the extension letter and forward to the Supreme Court for filing.

If there are any questions or comments, please feel free to contact me.

Sincerely,

Mary S. Williams  
Assistant Attorney General

MSW/lm

cc: Jim Brown, Esquire (Enclosure)



ALAN WILSON  
ATTORNEY GENERAL

March 19, 2012

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

**Re: Jonathan Coburn v. State of South Carolina**  
**2009-CP-18-1636**

Dear Mr. Shearouse:

The Return to Petition for Writ of Certiorari in the above appeal is due to be served and filed on today's date. However, this is to respectfully request a 30-day extension to serve and file this Return. By his signature below, Jim Brown, indicates that he consents to this extension.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a workload.

Sincerely,

Mary S. Williams  
Assistant Attorney General

MSW/lm

cc: Jim Brown, Esquire

In compliance with:

*In Re: Extensions in Criminal and Post-Conviction Relief Cases*, (S.C. Sup. Ct. order dated March 18, 2009) (Davis Adv. Sh. No. 13 at 1).

SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

---

JIM BROWN  
Esquire

# The Supreme Court of South Carolina

Jonathan Coburn,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Diane Schafer Goodstein  
Dorchester County  
Trial Court Case No. 2009-CP-18-01636

---

## ORDER

---

For good cause shown, the request for an extension until March 19, 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 and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Brenda J. Shely*  
*Chief Deputy* Clerk

Columbia, South Carolina

February 17, 2012

cc: James Arthur Brown, Jr, Esquire  
Assistant Attorney General Mary S. Williams



ALAN WILSON  
ATTORNEY GENERAL

February 16, 2012

RECEIVED

FEB 16 2012

S.C. Supreme Court

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

**Re: Jonathan Coburn v. State of South Carolina**  
**2009-CP-18-1636**

(2)

Dear Mr. Shearouse:

The Return to Petition for Writ of Certiorari in the above appeal is due to be served and filed on today's date. However, this is to respectfully request a 30-day extension to serve and file this Return.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a workload.

Sincerely,

Mary S. Williams  
Assistant Attorney General

MSW/lm

cc: Jim Brown, Esquire





ALAN WILSON  
ATTORNEY GENERAL

January 17, 2012

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

RECEIVED  
JAN 17 2012  
S.C. Supreme Court

**Re: Jonathan Coburn v. State of South Carolina**  
**2009-CP-18-1636**

Dear Mr. Shearouse:

The Return to Petition for Writ of Certiorari in the above appeal is due to be served and filed on today's date. However, this is to respectfully request a 30-day extension to serve and file this Return.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a workload.

Sincerely,

Mary S. Williams  
Assistant Attorney General

MSW/lm

cc: Jim Brown, Esquire

**Law Offices of Jim Brown, P.A.**

1600 Burnside St., Suite 100 • P.O. Box 592  
Beaufort, SC 29901-0592

Phone: (843) 470-0003 Fax: (843) 470-0004

[jimbrownlaw@hargray.com](mailto:jimbrownlaw@hargray.com)

[www.attorneyjimbrown.com](http://www.attorneyjimbrown.com)

December 16, 2011

The Honorable Daniel Shearhouse  
Clerk of Court  
Supreme Court of South Carolina  
PO Box 11330  
Columbia, South Carolina 29211

RECEIVED  
DEC 20 2011 pm  
12-16-11 *da*  
S.C. Supreme Court

RE: Coburn v. State of South Carolina; 2009-CP-18-1636

Mr. Shearhouse:

Please find enclosed for filing in the above referenced matter the following: an original and six (6) copies of the Petition for Writ of Certiorari and an original and two (2) copies of the Appendix. One of each is unbound. Also included is the Proof of Service for the same. Should you require anything further, please do not hesitate to contact me.

Sincerely,



Maria Chavez, Paralegal to  
Jim Brown

w/enclosures

cc: Robert D. Corney, Assistant Attorney General, w/enclosures  
Jonathan Coburn, w/enclosures

# The Supreme Court of South Carolina

Jonathan Coburn,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Diane Schafer Goodstein  
Dorchester County  
Trial Court Case No. 2009-CP-18-01636

---

## ORDER

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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.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

November 14, 2011

cc: James Arthur Brown, Jr., Esquire  
Assistant Attorney General Mary S. Williams

**Law Offices of Jim Brown, P.A.**

1600 Burnside St., Suite 100 • P.O. Box 592

Beaufort, SC 29901-0592

Phone: (843) 470-0003 Fax: (843) 470-0004

[jimbrownlaw@hargray.com](mailto:jimbrownlaw@hargray.com)

[www.attorneyjimbrown.com](http://www.attorneyjimbrown.com)

November 14, 2011

Via e-mail [jjohnson@sccourts.org](mailto:jjohnson@sccourts.org) and US Mail

Clerk

South Carolina Supreme Court

PO Box 11330

Columbia, South Carolina 29211

RE: Coburn v. State of South Carolina; 2009-CP-118-01636

Clerk:

I am requesting an extension to file the brief in the above matter. I was unaware that the brief in this matter was due November 16, 2011 until Thursday, November 10, 2011. Therefore, I am respectfully requesting that the court grant me a thirty day extension of time to file the brief in this matter. Thank you and please contact my office with any questions or concerns.

Sincerely,



Jim Brown

cc:

Robert D. Corney, SC Assistant Attorney General, w/encl.  
Jonathan Coburn, w/enclosure

**Law Offices of Jim Brown, P.A.**

1600 Burnside St., Suite 100 • P.O. Box 592  
Beaufort, SC 29901-0592

Phone: (843) 470-0003 Fax: (843) 470-0004

[jimbrownlaw@hargray.com](mailto:jimbrownlaw@hargray.com)

[www.attorneyjimbrown.com](http://www.attorneyjimbrown.com)

November 7, 2011

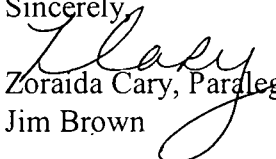
Clerk  
South Carolina Supreme Court  
PO Box 11330  
Columbia, South Carolina 29211

RE: Coburn v. State of South Carolina; 2009-CP-118-01636

Clerk:

I am writing to advise you that our office has received the transcripts in the above matter. Thank you and please contact me with any questions or concerns.

Sincerely,

  
Zoraida Cary, Paralegal to  
Jim Brown

cc: Robert D. Corney, SC Assistant Attorney General, w/encl.  
Jonathan Coburn, w/enclosure

**RECEIVED**

NOV 09 2011

**S.C. SUPREME COURT**

RECEIVED SEP 2 11 2011

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

JUDGMENT IN A CIVIL CASE  
CASE NO: 2009CPI801636

Jonathan Coburn #329567 vs. South Carolina State Of

329567

CLERK OF COURT  
DORCHESTER COUNTY

CERTIFIED COPY  
2011 SEP 15 AM 9:51

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: \_\_\_\_\_
- 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;  Statement of Judgment by the Court:

Dated at St. George, South Carolina, this 15th day of September, 2011.

Court Reporter:

*Cheryl Graham*

Cheryl Graham, Clerk of Court, By: Carolyn Ayer, Deputy

This judgment was entered on the 15th day of September, 2011, and a copy mailed first class this 15th day of September, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

James Arthur Brown Jr. Attorney at Law P.O. Box 592 Beaufort, SC 29901

Mary S. Williams Assistant Attorney General P.O. Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

RECEIVED SEP 2 11 2011

STATE OF SOUTH CAROLINA )

COUNTY OF DORCHESTER )

JONATHAN COBURN, #329567 )

Petitioner, )

vs. )

STATE OF SOUTH CAROLINA, )

Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE FIRST JUDICIAL CIRCUIT  
CASE No.: 2010-CP-18-1636

2009

**ORDER DENYING PETITIONER'S  
MOTION TO ALTER OR AMEND  
JUDGMENT**

CERTIFIED COPY  
2011 SEP 15 AM 9:07  
CLERK OF COURT  
DORCHESTER COUNTY

This matter came before this Court by way of Petitioner's Memorandum in Support of Motion to Alter or Amend Judgment brought forth pursuant to South Carolina Rules of Civil Procedure 59. Because the Petitioner's Motion does not raise any novel issues for the Court's consideration, the Petitioner's Motion to Reconsider is denied.

**AND IT IS SO ORDERED.**

September 13, 2011



Judge Diane S. Goodstein  
First Judicial Circuit

RECEIVED SEP 20 2011

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF DORCHESTER )

IN THE COURT OF COMMON PLEAS

2009-CP-18-1636

Jonathan Coburn, )  
 )  
Applicant, )

v. )

**ORDER OF DISMISSAL**

State of South Carolina, )  
 )  
Respondent. )

This matter comes before the Court by way of an Application for Post-Conviction Relief filed June 12, 2009. An evidentiary hearing into the matter was convened on March 4, 2010, at the Dorchester County Courthouse. The Applicant was present at the hearing and was represented by Jim Brown, Esquire. The Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying were Tim Kulp, Esquire, ("Counsel") and Blair Jennings, Esquire ("Solicitor"). This Court had before it the records of the Dorchester County Clerk of Court, the guilty plea transcript, and the Applicant's records from the South Carolina Department of Corrections.

### **PROCEDURAL HISTORY**

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dorchester County Clerk of Court. The Applicant was indicted at the January 2007 term of the Dorchester County Grand Jury for Murder (2007-GS-18-0163) and Assault and Battery with Intent to Kill ("ABWIK")

(2007-GS-18-0164). Applicant was represented by Timothy Clay Kulp, Esquire. On July 14, 2008, the Applicant pled guilty before the Honorable Paul M. Burch, and sentencing was deferred. On July 17, 2008, Applicant was sentenced to thirty (30) years imprisonment for Murder and to twenty (20) years imprisonment for ABWIK. The sentences were to be served concurrently. Applicant did not appeal his conviction and sentence.

In his application for post-conviction relief (PCR), Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
  - a. "Incorrect advisement of eligibility of good time credits."

In an amendment dated February 26, 2010, Applicant sets forth his allegations as follows:

1. Ineffective assistance of counsel.
  - a. "Trial counsel provided advice to the applicant regarding the application of good time credits prior to the entry of a plea to the charges serving as the basis of this application."
  - b. "The applicant specifically requested this advice in order to evaluate the plea offer and relied upon this advice when he decided to enter his plea."
  - c. "This advice was incorrect."
  - d. "But for counsel's deficient performance, the applicant would not have pled guilty."
2. Ineffective assistance of counsel in failing "to properly advise the applicant regarding the law concerning the felony murder rule, the inference of malice and the offense of voluntary manslaughter."
  - a. "Prior to the entry of the plea in this matter, the applicant was provided advice regarding the propriety of the charges pending against him."
  - b. "This advice did not include a full advisement regarding the felony murder rule or the nature of the inferences applicable to murder charges."
  - c. "Trial counsel also failed to discuss the lesser included offense of voluntary manslaughter in relation to the evidence available for submission at trial."
  - d. "But for trial counsels' deficient performance, the applicant would not have pled guilty."

### 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 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. section 17-27-80.

### **Ineffective Assistance of Counsel**

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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 v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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, supra). 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. "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). 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).

#### *Summary of Facts*

Applicant entered his plea on July 14, 2008, with the agreement to testify against his co-defendant, Vincent Payton ("Payton"). Sentencing was deferred pending Applicant's trial testimony. There were no negotiations or recommendations as to sentence.

At his plea, the solicitor proffered testimony from Applicant as to what he would say at trial. (July 14 Tr. p. 8, line 21 – p. 15, line 7.) According to this proffer, Applicant and Payton discussed a plan to rob Melvin Bryant ("Bryant"). Applicant stated that he did not know Bryant prior to the incident. Pursuant to the plan, Applicant telephoned Bryant and arranged a meeting under the pretense that Payton was in jail and Applicant was repaying a drug debt for Payton. Applicant arranged to meet Bryant at the King's Grant golf course on Saturday. That day, Applicant armed himself with a knife, and there were rifles in the car. Applicant claimed that Payton instructed him to cut Bryant's throat. Bryant did not appear. The next day, Sunday, Applicant and Payton decided to attempt the plan again. They revised their plan such that Applicant would carry a gun instead of the knife. Applicant contacted a man named Gunther to procure the weapon and vehicle he would use. Applicant telephoned Bryant and again arranged to meet him at King's Grant golf course.

purportedly at Payton's instruction. The plan on Sunday was that Applicant would take the loaded handgun and "put the gun to [Bryant's] head and take everything, and then leave and go about our business." (July 14 Tr. p. 13, lines 9-11.) They proceeded to the arranged meeting place and waited for Bryant to arrive. Bryant arrived in a vehicle driven by a young lady, Lisa Thompson ("Lisa"). Applicant testified that he approached the vehicle and "I just - I fired into the car." (July 14 Tr. p. 13, line 23.) Applicant stated that he intentionally fired the gun because he got scared (July 14 Tr. p. 15, lines 6-7) and that he only intended to rob Bryant and "just freaked out." (July 18 Tr. p. 12, lines 7-11.) Applicant fired the weapon twice. Lisa sustained a fatal gunshot wound to the head, but Bryant was not killed. According to Applicant, they frantically fled the scene in the borrowed vehicle. Applicant gave Payton the gun for disposal, and the two parted ways on foot. Though Applicant claimed in a written statement that he thought that Bryant moved to reach under the seat, he made no such claim at his plea.

#### *Parole Eligibility*

Pursuant to statute, a person sentenced for the crime of Murder sentence is not "eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section." S.C. Code §16-3-20. Applicant submits that his pleas were rendered involuntary as a result of misadvice regarding parole eligibility and potential "good time credits." Counsel claimed that he "mistakenly advised [Applicant] that he would be eligible [for parole] after service of 85 percent of his sentence." (PCR Tr. p. 11, lines 24-25.) Counsel stated that "in the course of discussions regarding the plea and so forth, with my focus on, the focus being on avoiding [Applicant] being sentenced to life without parole, I overlooked that."

(PCR Tr. p. 12, lines 3-7.) Counsel stated that like any defendant, Applicant was concerned with getting the least amount of time. Counsel informed his client that even where one was eligible for parole, the ultimate determination of whether he would actually be paroled was made by the "Department of Corrections based upon discipline and a host of other factors that one faces when seeking short term release." (PCR Tr. p. 12, line 24 – p. 13, line 3.) Counsel advised Applicant that "85 percent parole" meant that there was no guarantee of early release but that there would be no way to do less than 85 percent of whatever sentence was levied. (PCR Tr. p. 14, lines 1-5.) Counsel advised that Applicant could serve the entire thirty years. (PCR Tr. p. 52, lines 12-19.)

Counsel also testified that he pursued plea negotiations with the solicitor's office for a plea to Voluntary Manslaughter (PCR Tr. p. 48, lines 19 – 22.) As part of these discussions, Counsel stated that the benefit of parole eligibility for Voluntary Manslaughter as opposed to day-for-day service of a Murder sentence was implied as "something we both [Counsel and Solicitor] would know." (PCR Tr. p. 48, line 23 – p. 49, line 11.) Counsel stated that he was "sure [he] knew" that a Murder sentence was served day-for-day, but Counsel stated that his primary focus leading up to the plea was the urgency to avoid a life sentence. (PCR Tr. p. 50, lines 3-12.) Solicitor also testified that Counsel sought out a plea to Voluntary Manslaughter. Solicitor stated that:

... it is working knowledge of the people involved in criminal law that [Murder is] no parole, no good time credit. A 30-year sentence is a day-for-day sentence. Our conversations with [Counsel] never involved the range of voluntary from 2 to 30 years and was always allowing him to plead to voluntary for 30 years so that he would be eligible for parole after serving 85 percent of the sentence.

(PCR Tr. p. 113, lines 4-11.)

Interestingly, it seems that both Counsel and Solicitor understood the well-known parole

eligibility consequences of the offenses of Murder and Voluntary Manslaughter. If Counsel, in spite of this, advised that Applicant could be eligible for parole after service of 85% of the sentence, this advice was clearly incorrect. See for example Frasier v. State, 351 S.C. 385, 570 S.E.2d 172 (2002) (applicant need not be advised of collateral consequences such as parole, but if attorney actively misinforms the applicant must show reliance on the erroneous advice).

However, even where an Applicant has proven deficient performance by counsel, he must still show "something more." See Hunter v. State, 316 S.C. 105, 447 S.E.2d 203 (while misadvice from the bench could mislead a defendant to his detriment, it is wholly impractical to maintain a rule which requires automatic reversal of a plea without something more) (abrogated on other grounds by Simpson v. State, 329 S.C. 43, 495 S.E.2d 429 (1998)). An Applicant bears the burden of showing that but for counsel's alleged error, 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. 203 (1985). While this point may be satisfied by the Applicant's testimony, it is still within the province of the court to determine the credibility of that testimony.

In the present case, Applicant acknowledged that he understood that his sentence could range from a minimum sentence of thirty years up to a life sentence as a result of his plea to Murder. (July 14 Tr. p. 5, lines 1-3; PCR Tr. p. 92, line 24 – p. 93, line 7.) Applicant even understood that the twenty-year sentence for ABWIK could be consecutive. (PCR Tr. p. 78, lines 10-13.) The plea carried no negotiations or recommendations as to sentence. Given the distinct charge of ABWIK, Applicant actually faced greater than a life sentence if the two sentences were given consecutively. (PCR Tr. p. 65, lines 11-17.) Therefore, Applicant's misunderstanding regarding parole eligibility affected only the minimum sentence he believed he would face. There is no evidence that he

acknowledged the possibility of receiving a sentence in excess of thirty years.

Further, while Counsel advised that parole was a possibility, Counsel clearly advised that actually being paroled prior to the service of the entire sentence was not guaranteed. Pursuant to this advice, Applicant understood that he could serve the entire thirty year sentence actually imposed. While Applicant may have pled under the hope of receiving the minimum sentence (understanding that up to life was possible) and under the hope that he could be paroled if he received the minimum sentence (understanding that he may not be paroled at all), Applicant clearly understood that these minimums were not assured as a result of his plea. See Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (Wishful thinking does not equate with misapprehension as to sentence). Applicant's assertion that he thought he would receive 25 years and 5 months would only be applicable to the minimum sentence, a sentence he was not assured of receiving, and even if he received it, he may never be paroled. Therefore, it strains credulity to suggest that if he had been told that he was, not possibly but in fact, facing 30 years to life day-for-day (plus twenty years for ABWIK), Applicant would have decided against accepting the plea. See Roscoe v. State, 345 S.C. 16, 21, 546 S.E.2d 417, 419 (2001). Accord Manley v. United States, 588 F.2d 79, 82 (4th Cir. 1978) (holding "a mistake of a few years in advice about the length of what would otherwise be a long term would not constitute ineffectiveness of counsel").

While Applicant naturally had a strong desire for the shortest sentence possible, it is manifest from Counsel's advice and Applicant's understanding that he felt this end was most likely accomplished through a plea, not through a trial. This finding is compounded by the overwhelming evidence Applicant would face at trial. Lisa was killed and Bryant injured during the course of an admitted armed robbery, a robbery planned well in advance and executed again upon failure of the

first attempt. During his plea, Applicant abandoned his feeble claim at self-defense outlined in his written statement, and at PCR hearing, Applicant expressly denied a self-defense claim.<sup>1</sup> (PCR Tr. p. 69, lines 3-7.) Counsel stated that he discussed various aspects of the case as it would likely play out at jury trial. (See for example PCR Tr. p. 42, line 1 – 43, line 3; p. 62; pp. 66-67; p. 89 – p. 90, line 1.) Counsel considered defenses and the lesser-included offense of Voluntary Manslaughter. Based on this review, Counsel reported that trial carried a high risk of life imprisonment with little likelihood of a minimum sentence of thirty years; the guilty plea would hopefully avoid a life sentence and increase the likelihood of a lower sentence in that range, possibly even the minimum of thirty years. (PCR Tr. p. 51, line 12 – p. 52, line 11.) Counsel stated that the evidence was of concern to him in rendering his advice to plead guilty. (PCR Tr. p. 72, lines 5-7.) Increasing the odds of avoiding a life sentence was paramount in Counsel's advice, and the decision was left to Applicant following thorough discussion of the evidence and avenues for defense. For all these reasons, this Court finds Applicant has failed to establish credible evidence of prejudice such that he would have insisted on going to trial but for Counsel's mistaken advice.

#### *Voluntary Manslaughter*

Applicant asserts that Counsel rendered deficient advice with regard to the lesser offense of voluntary manslaughter. Applicant testified that Counsel did not really discuss Voluntary Manslaughter with him. (PCR Tr. p. 83, lines 4-17; p. 88, lines 10-16.) Counsel testified that he advised Applicant that a conviction of Voluntary Manslaughter following a jury trial was not likely. (PCR Tr. p. 34, lines 1-8.) Counsel even opined that a jury charge on Voluntary Manslaughter was

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<sup>1</sup> Some jurisdictions have even precluded self-defense in the case of felony murder. See for example *State v. Richardson*, 341 N.C. 658, 462 S.E.2d 492 (1995); *State v. Cooke*, 89 Conn. App. 530, 874 A.2d 805 (2005); *State v. Kirkpatrick*, 184 P.3d 247 (Kan. 2008).

not likely. (PCR Tr. p. 41, lines 1-10.) Counsel discussed with his client potential aspects such as Voluntary Manslaughter and self-defense. (PCR Tr. p. 42, line 1 – 43, line 3.) Counsel advised Applicant that the felony murder doctrine would be “a big problem in the case for us.” (PCR Tr. p. 23, line 13.) Counsel added that malice could also be inferred from the use of a deadly weapon, valid advice at the time of Applicant’s plea.<sup>2</sup> (PCR Tr. p. 24, lines 4-9 & lines 18-21.)

Based on the record, this Court does not find Counsel’s advice regarding the offense of Voluntary Manslaughter to be unreasonable. Voluntary manslaughter is the unlawful killing of another in sudden heat of passion upon sufficient legal provocation. A crime victim attempting to protect himself will not provide sufficient provocation. State v. Tucker, 324 S.C. 155, 171, 478 S.E.2d 260, 269 (1996) (no error in refusal to charge voluntary manslaughter were would-be robbery victim reached for gun) (citing State v. Tyson, 283 S.C. 375, 323 S.E.2d 770 (1984), *cert. denied*, 471 U.S. 1006, 105 S.Ct. 1873, 85 L.Ed.2d 165 (1985) (evidence that victim was defending himself from armed robbery and got killed in the process not sufficient legal provocation to warrant voluntary manslaughter charge). The decision to waive trial involves the evaluation of evidence and making of difficult judgments. Uncertainty is inherent, and counsel must make his best judgment as to the State’s case and predict how a court and jury would view the facts adduced. See Brady v. U.S., 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747; McMann v. Richardson, 397 U.S. 759, 769-770, 90 S.Ct. 1441, 1448, 25 L.Ed.2d 763, 772-773 (1970). As previously discussed, Counsel thoroughly reviewed the evidence with Applicant and provided his opinion of the likelihood of success at trial. Based on the foregoing, this Court finds that Counsel’s advice was within reasonable professional

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<sup>2</sup> As Counsel noted in his testimony, Belcher v. State, 385 S.C. 597, 685 S.E.2d (2009) overruled longstanding caselaw approving of the instruction on inference of malice from use of a deadly weapon. Therefore, at the time of Applicant’s plea in July 2008, this advice was accurate and well within reasonable professional norms.

norms.

### **Other Allegations**

No other allegations were raised at the PCR hearing. Therefore, any additional allegations are deemed waived because no evidence was presented.

### **CONCLUSION**

Given 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. Based on the entire record and the testimony at the post-conviction relief hearing, and even assuming that counsel's performance was deficient when measured against "reasonableness and professional norms," Applicant was not prejudiced such that there is a reasonable probability that, but for counsel's errors, the Applicant would not have plead guilty and would have insisted on going to trial. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland, *supra*). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

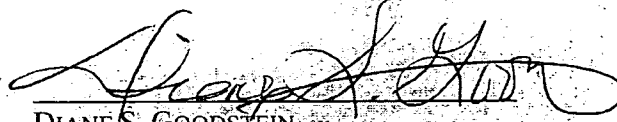
This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. His attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely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

### **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 22 day of June, 2011.



DIANE S. GOODSTEIN  
Presiding Judge  
First Judicial Circuit

St. George, South Carolina.

# The South Carolina Court of Appeals

Jonathan Coburn,

Appellant,

v.

State of South Carolina,

Respondent.

The Honorable Diane S. Goodstein  
Dorchester County  
Trial Court Case No. 2009-CP-18-1636

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OCT 26 2011

S.C. Supreme Court

ORDER

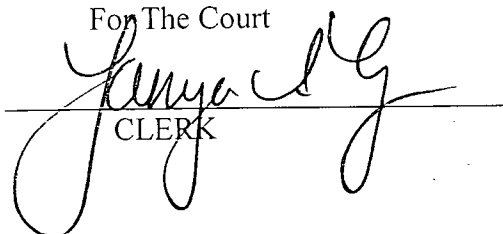
The appeal in the above captioned matter is transferred to the South Carolina Supreme Court under the filing provisions of Rule 243 of the South Carolina Appellate Court Rules.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE  
For The Court

BY

CLERK



Columbia, South Carolina

cc: James A. Brown, Jr., Esq.  
Chief Appellate Defender Robert M. Dudek  
Assistant Attorney General Robert D. Corney  
The Honorable Daniel Shearouse

FILED

10/25/11

**Law Offices of Jim Brown, P.A.**

1600 Burnside St., Suite 100 • P.O. Box 592

Beaufort, SC 29901-0592

Phone: (843) 470-0003 Fax: (843) 470-0004

[jimbrownlaw@hargray.com](mailto:jimbrownlaw@hargray.com)

[www.attorneyjimbrown.com](http://www.attorneyjimbrown.com)

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OCT 26 2011

S.C. Supreme Court

October 17, 2011

Clerk of Court

Court of Appeals

1015 Sumter Street

PO Box 11629

Columbia, South Carolina 29211

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OCT 21 2011

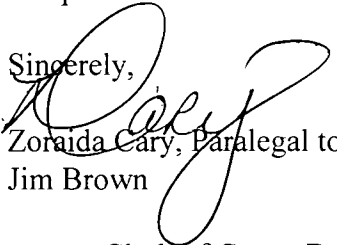
SC Court of Appeals

RE: Coburn v. State of South Carolina; 2009-CP-118-01636

Clerk:

Under cover of this letter, please find enclosed for filing in your court a Notice of Appeal and Proof of Service in the above-referenced matter. Kindly file the original and return the copy marked filed to me in the self addressed stamped envelope enclosed for this purpose. Thank you and please contact me with any questions or concerns.

Sincerely,

  
Zoraida Cary, Paralegal to  
Jim Brown

cc: Clerk of Court, Dorchester County Courthouse, w/encl.  
Robert D. Corney, SC Assistant Attorney General, w/encl.  
Jonathan Coburn, w/enclosure

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OCT 26 2011

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas, Non Jury

Diane S. Goodstein, Circuit Court Judge

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OCT 21 2011

**SC Court of Appeals**

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Case Number: 2009-CP-18-1636  
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Jonathan Coburn.....Appellant

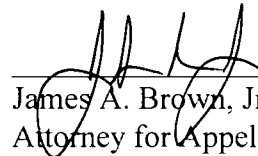
v.

The State,.....Respondent

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NOTICE OF APPEAL  
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The appellant, Jonathan Coburn appeals the judgment of the Circuit Court, the Honorable Diane S. Goodstein presiding, denying his Application for Post Conviction Relief. This Order was signed on June 24, 2011 and received by counsel for the appellant on June 28, 2011. An Order denying appellant's Rule 59 Motion to Alter or Amend Judgment was issued on September 15, 2011 and received by appellant's counsel on September 20, 2011.

October 17, 2011

  
James A. Brown, Jr.  
Attorney for Appellant

Law Offices of Jim Brown, PA  
1600 Burnside St., Suite 100  
P.O. Box 592  
Beaufort, South Carolina 29901  
(843) 470-0003

Opposing Attorney of Record:

Robert D. Corney, Office of the Attorney General  
PO Box 11549  
Columbia, SC 29211-11549

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OCT 26 2011

**S.C. Supreme Court**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court  
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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas, Non Jury

Diane S. Goodstein, Circuit Court Judge

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OCT 21 2011

**SC Court of Appeals**

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Case Number: 2009-CP-18-1636  
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Jonathan Coburn.....Appellant.

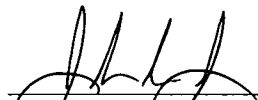
v.

The State,.....Respondent.

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PROOF OF SERVICE  
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Counsel for Jonathan Coburn hereby certifies that he has prepared and served a Notice of Appeal this 17<sup>th</sup> day of October , 2011 upon the State, as specified in S.C. Code Section 203 (b) (1) by depositing a copy, postage pre-paid, in the United States Mail, addressed to

October 17, 2011

  
-----  
James A. Brown, Jr.  
Attorney for Appellant

Law Offices of Jim Brown, PA  
1600 Burnside St., Suite 100  
P.O. Box 592  
Beaufort, South Carolina 29901  
(843) 470-0003

Opposing Attorney of Record:

Robert D. Corney, Office of the Attorney General  
PO Box 11549  
Columbia, SC 29211-11549

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OCT 26 2011

**S.C. Supreme Court**

Law Offices of Jim Brown  
1600 Burnside St., Suite 100  
PO Box 597  
Beaufort, SC 29901



*Jonathan  
Casum*

Clerk of Court  
Court of Appeals  
1015 Sumter Street  
PO Box 11629  
Columbia, South Carolina 29211

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