

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

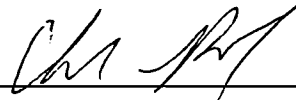
APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas  
Honorable Diane S. Goodstein, Circuit Court Judge

Case No: 2009-CP-18-1350

Devin Miller.....Appellant  
S.C.D.C. 330228  
v.  
The State.....Respondent

NOTICE OF APPEAL

Devin Miller, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable Diane S. Goodstein, June 11, 2013, which I, Charles T. Brooks, III, received on June 21, 2013.



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PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 24<sup>th</sup> day of June 2013, I served the foregoing **Notice of Appeal, Order of Dismissal**, as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on June 24, 2013, 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: Megan E. Harrigan, Esquire  
Post Office Box 11549  
Columbia, South Carolina 29211-1549

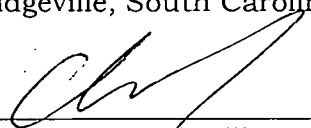
Devin Miller, 330228  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina, 29472

Dated: June 24, 2013

**RECEIVED**

JUN 26 2013

**S.C. SUPREME COURT**

  
Charles T. Brooks, III  
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309 Broad Street  
Sumter, South Carolina 29150  
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STATE OF SOUTH CAROLINA )  
COUNTY OF DORCHESTER )

IN THE COURT OF COMMON PLEAS  
FOR THE FIRST JUDICIAL CIRCUIT

Devin Miller, #330228, )  
Applicant, )

Case No. 2009-CP-18-1350

v. )

**ORDER OF DISMISSAL**

State of South Carolina, )  
Respondent. )

### PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed May 15, 2009 and amended on July 13, 2009. The Respondent made its Return on November 16, 2009. An initial evidentiary hearing into the matter was convened on March 1, 2010, at the Dorchester County Courthouse; a subsequent hearing was held on December 1, 2011. Applicant was present at both hearings and was represented by Charles T. Brooks, III, Esquire. Respondent was represented by Assistant Attorney Generals Mary S. Williams and Robert D. Corney of the South Carolina Attorney General's Office.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dorchester County Clerk of Court. Applicant was indicted during the January 2007 term of the Dorchester County Grand Jury for Murder (2001-GS-18-0109). Applicant was represented by Thomas R. Sims, Esquire. On August 26, 2008, Applicant appeared before the Honorable James C. Williams, Jr., where he pled guilty to the lesser included offense of Voluntary Manslaughter. Judge Williams sentenced Applicant to twenty years imprisonment.

A notice of appeal was filed on Applicant's behalf. The South Carolina Court of Appeals dismissed Applicant's appeal on October 15, 2008 for "failure of [Applicant] to provide written

explanation showing there [was] an issue which can be review of appeal” from his guilty plea. The Remittitur was sent on October 31, 2008.

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following allegations:

1. Ineffective Assistance of Counsel.
  - a. “Failure to inform and provide favorable evidence”

In his amended application, filed July 13, 2009, Applicant alleged that his guilty plea was involuntarily entered because Counsel “failed to inform him of the direct consequences of the mandatory post-release supervision requirement.”

#### **SUMMARY OF TESTIMONY PRESENTED**

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from plea counsel, Thomas R. Sims, Esquire (herein “Counsel”). This Court also had before it a copy of the Applicant’s guilty plea transcript, the records of the Dorchester County Clerk of Court, Applicant’s appellate records, and Applicant’s records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified that his family retained Counsel to represent him and that he met with Counsel “like two or three times” before his guilty plea hearing. He testified that he informed Counsel that he was acting in self-defense during the incident giving rise to this murder charge. Applicant elaborated that four individuals approached and confronted him at his significant other’s apartment and he “grabbed [his] weapon before [he] even seen [another] weapon.” Applicant testified that he “ducked, started firing blindly. [He] never saw [the victim] get hit . . . [he] was just shooting to keep from getting shot.” In regards to his allegation that Counsel was ineffective for failing to provide him with favorable evidence,

Applicant testified that he never knew that the State found a .45 caliber bullet, which he felt was exculpatory because he "had a Highpoint 9-millimeter." Applicant elaborated that the first time he was made aware of this was during his guilty plea.

During cross-examination, Applicant testified that he gave a statement to law enforcement implicating himself in the shooting. Applicant testified that it was "[his] choice" to go forego a trial based on the advice and experience of his attorney. He elaborated that Counsel informed him that "the State has like 20 some witnesses . . . expert witnesses" who would testify against him if he proceeded to trial.

Following Applicant's testimony, Respondent provided testimony from Counsel. Counsel testified that he has been practicing law since 1978 and has been a member of the South Carolina Bar since 1980. He elaborated that he was an Assistant Solicitor, Deputy Solicitor, and acting Solicitor from 1981 to 1991, and since 1991 he has been a sole practitioner with a focus on criminal defense. Counsel testified that he was retained by Applicant's family and met with Applicant several times, as well as members of Applicant's family. Counsel testified that he reviewed the facts of the case and Applicant's version of events at these meetings. Counsel testified that he was ready to proceed to trial and was prepared to set forth a defense of self at trial, as well as challenge the search warrant which produced the weapon used in the crime. Counsel testified that he told Applicant and Applicant's family: "I'm ready to go to trial. I think this is a case that I can win. However, if I go to trial and you get convicted, I'm not going to be doing the time, so this is a decision that you got to make in regards to this issue." Counsel testified that after such discussion and reviewing all the evidence, Applicant decided to enter a guilty plea to the lesser included offense of voluntary manslaughter. Counsel testified that he reviewed all evidence with Applicant, including all bullet evidence and the statements of

Applicant and witnesses. Counsel testified that if Applicant pled guilty to voluntary manslaughter, he would be sentenced up to thirty years imprisonment. Counsel testified that following Applicant's guilty plea, he was contacted by Applicant's family. Counsel testified that he responded by letter dated October 27, 2008, which was entered without objection as State's Exhibit #1.

### **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. Specifically, this Court finds that Counsel's testimony is very credible while Applicant's testimony is not as credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

#### ***Ineffective Assistance of Counsel***

In a post-conviction relief action, an applicant has the burden of proving the allegations in his application. 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, an 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether an 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). An 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).

After careful review based on the standard discussed above, the Applicant has failed to carry his burden in this action. This Court finds that Applicant's allegations that he was denied effective assistance of counsel due to Counsel's "fail[ure] to inform and provide [] favorable evidence" is without merit. This Court finds that the guilty plea transcript, along with Counsel's credible testimony, reveals the proficient competency of counsel. Applicant alleges that Counsel failed to inform him of the existence of a .45 caliber bullet at the crime scene as well as develop viable defenses. However, Counsel testified that he reviewed Applicant's case extensively with Applicant and Applicant's family and he was fully prepared to proceed to trial. Additionally, the guilty plea transcript reveals that the plea court thoroughly explained to Applicant that this was a "no parole" offense, as well as a most violent and a serious offense. This Court finds that Counsel demonstrated the degree of skill, knowledge and professional judgment that is expected

of an attorney who practices criminal law. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

### 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.

This Court notes that that Applicant must file and serve a notice of appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

### IT IS 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 11 day of June, 2013.



DIANE S. GOODSTEIN  
Presiding Judge  
First Judicial Circuit

Orangibury, South Carolina

PCR

# The Brooks Law Office, LLC

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June 21, 2013

South Carolina Supreme Court  
PO Box 11330  
Columbia, SC 29211

RE: Devin Miller, 330228 v State of South Carolina  
Case No. 2009-CP-18-1350

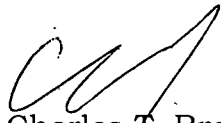
Dear Sir or Madam:

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/srw

**RECEIVED**

JUN 26 2013

**S.C. SUPREME COURT**

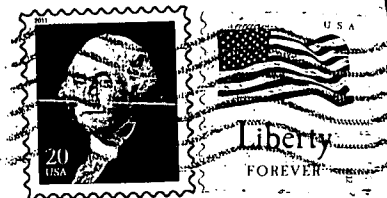
Enclosed as stated

Cc: Megan E. Harrigan, Office of Attorney's General  
South Carolina Office of Appellate Defense  
Devin Miller, 330228

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