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July 3, 2013

**RECEIVED**

JUL 08 2013

**S.C. SUPREME COURT**

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

RE: Eric Hemingway v. State of South Carolina  
Case No. 2010-CP-03-15 (Allendale County)

Dear Clerk Shearouse:

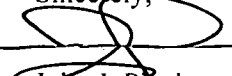
Pursuant to Rules 203, 207, and 243, SCACR, (for appeals of Post Conviction Relief matters), enclosed for filing in this matter are:

- 1) Notice of Appeal;
- 2) Proof of Service of Notice of Appeal; and,
- 3) Copy of Order being challenged on appeal.

My understanding is that no filing fees are required in this post-conviction relief case. Rule 240(d), SCACR. My further understanding is that per Rule 602, SCACR, and Rule 71.1, SCRPC, or otherwise, I am automatically relieved as Appellant's counsel upon the filing of the Notice of Appeal and that the Office of Indigent Defense will be representing the Appellant going forward.

Please file the original pleadings and return to me a stamped copy for my records in the self-addressed and stamped envelope provided. Please let me know how I may further assist you in this matter.

Sincerely,

  
John J. Pinckney

cc:

Counsel for Appellant - Office of Indigent Defense, PO Box 11433, Columbia, SC 29211-1433  
Counsel for Respondent - Ashleigh R. Wilson, Assistant Attorney General, P.O. Box 11549, Columbia, SC 29211  
Appellant - Eric Hemingway (#290037), Lieber C.I., AB-28, P.O. Box 205, Ridgeville, SC 29472  
Clerk of Allendale County Court - Elaine Sabb, Clerk of Court, PO Box 126, Allendale, S.C. 29810-0126

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM ALLENDALE COUNTY  
Court of Common Pleas

D. Craig Brown , Circuit Court Judge

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Case No. 2010-CP-03-15

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Eric Hemingway,

Appellant,

v.

State of South Carolina,

Respondent.


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NOTICE OF APPEAL

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Eric Hemingway appeals the order of the Honorable D. Craig Brown dated October 6, 2011. Appellant received written notice of entry of this order on June 18, 2013.

July 3, 2013



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John J. Finckney  
14 Westbury Park Way, Suite 3200  
Bluffton, SC 29910  
(843) 815-3530  
Attorney for Appellant

Other Counsel of Record:  
Ashleigh R. Wilson  
Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
Attorney for Respondent  
(803) 734-3970

THE STATE OF SOUTH CAROLINA  
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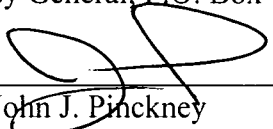
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PROOF OF SERVICE FOR NOTICE OF APPEAL

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I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on July 3, 2013, addressed to its attorney of record, Ashleigh R. Wilson, Assistant Attorney General, P.O. Box 11549, Columbia, SC 29211.

July 3, 2013

  
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Bluffton, SC 29910  
(843) 815-3530  
Attorney for Appellant

Other Counsel of Record:  
Ashleigh R. Wilson  
Assistant Attorney General  
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FILED FOR RECORD )  
 STATE OF SOUTH CAROLINA )  
 2011 OCT 13 PM 2:09 )  
 COUNTY OF ALLENDALE )  
 ELAINE SABB )  
 #290013 CLERK OF COURT )  
 ALLENDALE COUNTY, S.C. )  
 Eric Hemingway, )  
 Applicant, )  
 v. )  
 State of South Carolina, )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 2010-CP-03-15

**ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed February 9, 2010, and amended on August 24, 2010, and August 30, 2011. The Respondent made its Return on June 11, 2010. An evidentiary hearing into the matter was convened on September 1, 2011, at the Beaufort County Courthouse. The Applicant was present at the hearing and was represented by John J. Pinckney, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

Applicant testified on his own behalf at the PCR hearing. Trial counsel, Stephen Plexico, Esquire, testified at the hearing. This Court had before it the records of the Allendale County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the Record on Appeal, the Final Anders Brief, the Court of Appeals' opinion dismissing the appeal, the Remittitur dated December 9, 2009, the PCR application and amended applications, and Respondent's Return thereto.

**PROCEDURAL HISTORY**

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Allendale County Clerk of Court's orders of commitment. The Applicant was

indicted at the December 2005 term of the Allendale County Grand Jury for murder (2005-GS-03-139), criminal sexual conduct (CSC) – 1<sup>st</sup> degree (2005-GS-03-143), and burglary – 1<sup>st</sup> degree (2005-GS-07-142). Stephen Plexico, Esquire, represented the Applicant. On April 23-26, 2007, the Applicant proceeded to trial, after which a jury found him guilty as indicted. The Honorable J. Michelle Childs sentenced the Applicant to confinement for thirty (30) years for murder and fifteen (15) years for CSC – 1<sup>st</sup> degree. The sentences were to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Robert M. Dudek of the South Carolina Commission on Indigent Defense filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal. State v. Hemingway, Op. No. 2009-UP-563 (S.C. Ct. App. filed November 23, 2009). The Remittitur was issued on December 9, 2009.

### ALLEGATIONS

In his application and amended applications, 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 object to court's jury instruction for CSC – 1<sup>st</sup> degree.
  - b. Failed to object to trial court not charging the whole law for CSC – 1<sup>st</sup> degree.
  - c. Failed to effectively argue to the jury, and to the court during directed verdict stage, that Applicant's skin, hair, blood, or in the alternative, Applicant's DNA was not found under the fingernails of the deceased.
  - d. Failed to object to jury charge for crime of murder.
  - e. Failed to alert the court that Applicant did not waive his extradition rights to face the charge of CSC – 1<sup>st</sup> degree.
  - f. Failed to request a jury instruction pertaining to "if Applicant was not found guilty of the predicate charge, then he could not be found guilty of the following charges."
  - g. Failed to request jury instruction for jury not to consider false evidence adduced at trial.
  - h. Failed to object to court charging the jury on the facts in this case.
  - i. Failed to effectively argue murder charge during directed verdict stage.

- j. Failed to argue the motion to quash the murder indictment correctly.
  - k. Failed to object multiple times during trial.
  - l. Engaged in improper closing argument that impermissibly invoked the Golden Rule argument.
  - m. Failed to object when the trial judge commented upon the facts of the case during his malice instructions to the jury that used examples directly relating to Applicant's case and in doing so prematurely directed a verdict for the State.
  - n. Failed to object to the burden-shifting jury instructions when the trial court failed to instruct the jury they could "accept or reject" the instructions that "malice is implied from the use of a deadly weapon."
  - o. Failed to argue that the State's evidence only raised a suspicion of guilt and not guilt itself beyond a reasonable doubt and that the State's evidence submitted in the trial of this case did not rise to the level of substantial circumstantial evidence necessary to submit the case to the jury. See State v. Bostick, 703 S.E.2d 774, 392 S.C. 134 (2011).
2. Ineffective assistance of appellate counsel in that counsel
- a. Filed an Anders brief.
  - b. Failed to inform Applicant that he could litigate his case all the way up to the U.S. Supreme Court.
  - c. Failed to visit Applicant to consult about the case.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. 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).

Applicant testified that counsel did not make a directed verdict motion. He testified that the State had no case without Michael Williams' testimony. He asserted that he did not testify at trial.

Trial counsel testified that he had enough time to prepare for trial. He asserted that he

explained the right to testify to Applicant, and Applicant indicated that he did not want to testify at trial. Counsel testified that Michael Williams' testimony was damaging to Applicant, but he focused on Mr. Williams' credibility and the State's lack of evidence. He contended that there was no getting around Mr. Williams' testimony that Applicant came over after the incident and told Mr. Williams that he just raped the victim. Counsel testified that the State's DNA evidence was meaningless and he tried to argue to the jury that the State was twisting the evidence around, but he asserted that it came down to Mr. Williams' credibility. Counsel testified that he reviewed the evidence with Applicant, went over the file, and argued that the State lacked sufficient evidence to convict Applicant.

Counsel testified that he made a motion for a directed verdict. He testified that he argued corpus delicti because he thought the State had a problem showing the body and elements of the crimes. He testified that he argued there was not substantial evidence and that the State's evidence was speculative.

#### **Ineffective Assistance of Trial 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. 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 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The applicant must overcome this presumption in order to receive relief. Cherry, 386 S.E.2d 624.

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." Id. at 625 (citing Strickland, 466 U.S. 668). 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." Id. at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

This Court finds that counsel's testimony was credible. This Court finds that counsel is a trial practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on numerous occasions. During conferences with the Applicant, counsel discussed the pending charges, the elements of the charges and what the State was required to prove, Applicant's constitutional rights, and possible defenses or lack thereof.

Regarding Applicant's claims of ineffective assistance of counsel, this Court finds 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 Applicant, reviewed the discovery with Applicant, conducted a proper investigation, and was thoroughly

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 or 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 243 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 this 6<sup>th</sup> day of October, 2011.

  
The Honorable D. Craig Brown  
Presiding Judge  
14<sup>th</sup> Judicial Circuit

Albena, South Carolina.

