

The Supreme Court of South Carolina

Demetrio Sears,

Petitioner,

v.

State of South Carolina,

Respondent.

ORDER

This matter is before the Court by way of a notice of appeal from an order denying petitioner's application for post-conviction relief (PCR). Petitioner was initially represented by the Division of Appellate Defense, but moved to proceed *pro se*. The motion was granted, and on January 21, 2011, petitioner filed a *pro se* petition for a writ of certiorari. The State filed its return on April 8, 2011.

In February 2012, Jeremy Thompson informed the Clerk of Court that he had been retained to represent petitioner in this matter. Mr. Thompson has now submitted a motion to file an amended petition for a writ of certiorari. The State has not filed a return to the motion.

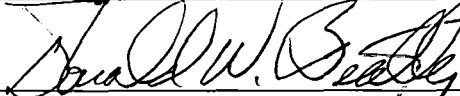
The motion to file an amended petition for a writ of certiorari is granted. The amended petition shall be served and filed within thirty days of the date of this order.



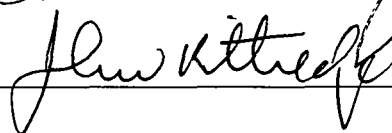
C. J.



J.



J.



J.

 J.

Columbia, South Carolina

April 5, 2012

cc: Demetrio Sears #271284
Division of Appellate Defense
Jeremy Adam Thompson, Esquire
Assistant Attorney General Robert D. Corney

ORIGINAL

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2006-CP-40-1599

DEMETRIO SEARS, #271284,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,
RECEIVED

RESPONDENT.

MAR 01 2012

S.C. SUPREME COURT

MOTION TO FILE AMENDED PETITION FOR WRIT OF CERTIORARI

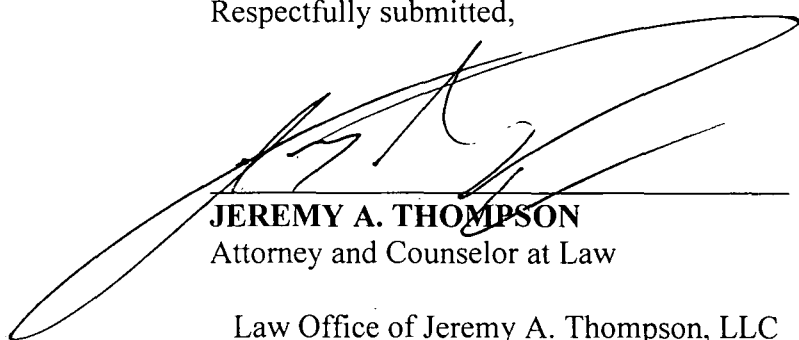
NOW COMES the Petitioner in the above-captioned action, acting by and through undersigned counsel, respectfully filing this Motion to File Amended Petition for Writ of Certiorari. In support of this motion, the Petitioner would show unto this Honorable Court the following:

Acting *pro se*, the Petitioner filed a Petition for Writ of Certiorari with this Court on January 21, 2011. The State has made its Return. While the Petitioner's issues are presented competently in his *pro se* petition, the Petitioner would argue that his arguments would be presented in a clearer and in a more complete manner with undersigned counsel preparing them.

Due to the amount of time that this matter has been pending with this Court,¹ undersigned counsel will not request any extensions of time in which to file his amended certiorari petition if the Court grants this motion.

WHEREFORE, having set forth his grounds, the Petitioner respectfully requests that this Court permit him to file an amended certiorari petition.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'J. Thompson', is written over a horizontal line.

JEREMY A. THOMPSON
Attorney and Counselor at Law

Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
Columbia, SC 29211
803-779-2555
803-779-2556 FAX
jeremyatlaw@yahoo.com

ATTORNEY FOR PETITIONER.

This 28th day of February, 2012.

¹ Undersigned counsel would note that while the certiorari petition has been pending for over a year, undersigned counsel has represented the Petitioner for less than a week.

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2006-CP-40-1599

DEMETRIO SEARS, #271284,

PETITIONER,

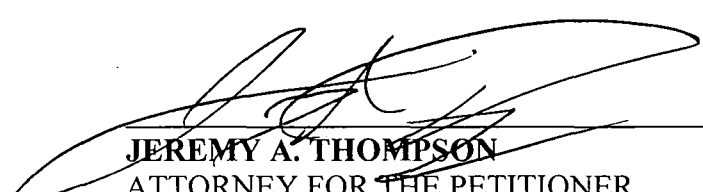
v.

STATE OF SOUTH CAROLINA,

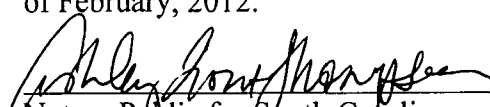
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Petitioner's Motion to File Amended Petition for Writ of Certiorari in the above-entitled case has been served upon opposing counsel, Robert M. Corney, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 28th day of February, 2012.


JEREMY A. THOMPSON
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 28th day
of February, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: 2/22/2018



LAW OFFICE OF
JEREMY A. THOMPSON
LLC

February 28, 2012

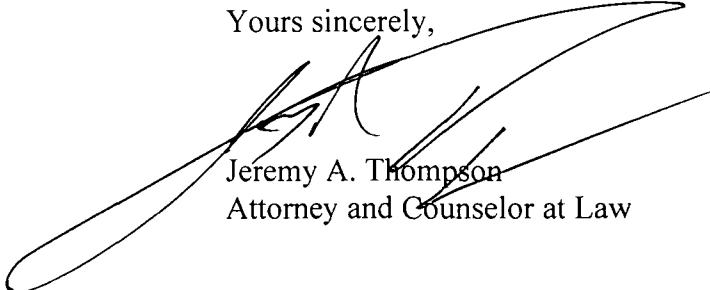
The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211-1330

RE: Demetrio Sears, #271284 v. State of South Carolina; 06-CP-40-1599

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of my Motion to File Amended Petition for Writ of Certiorari in the above-captioned matter. I would appreciate your filing the original and six copies, clocking the seventh copy, and returning the clocked copy to me in the enclosed self-addressed, stamped envelope. With my thanks for your assistance in this matter, and my best regards, I am,

Yours sincerely,


Jeremy A. Thompson
Attorney and Counselor at Law

JAT/
Enclosures

cc: Robert Corney, Assistant Attorney General (w/ motion)
Demetrio Sears, #271284 (w/ motion)
Rhonda Harris (w/ motion)

RECEIVED

MAR 01 2012

S.C. SUPREME COURT

COLUMBIA SC 292
TUE 28 FEB 2012



The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211-1330



LAW OFFICE OF
JEREMY A. THOMPSON
LLC

February 23, 2012

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211-1330

RE: Demetrio Sears, #271284 v. State of South Carolina; 06-CP-40-1599

Dear Mr. Shearouse:

I have been retained in the above-captioned pending PCR appeal. It is my understanding that Mr. Sears has proceeded *pro se* in this matter. Therefore, I would ask that the Court note my appearance as counsel in this appeal. Please do not hesitate to contact me if there is anything else the Court needs from me. With my thanks for your assistance in this matter, and my best regards, I am,

Yours sincerely,

Jeremy A. Thompson
Attorney and Counselor at Law

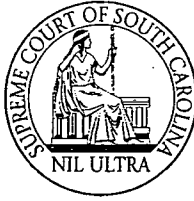
JAT/

cc: Robert Corney, Assistant Attorney General
Demetrio Sears, #271284
Rhonda Harris

RECEIVED

FEB 27 2012

S.C. SUPREME COURT



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

December 16, 2011

Demetrio Sears #271284
Kershaw Correctional Institution
4848 Gold Mine Hwy
Kershaw, SC 29069

Re: Sears, Demetrio v. The State

Dear Mr. Sears:

This responds to your letter of December 12, 2011.

Your *pro se* Petition for Writ of Certiorari is currently awaiting consideration by the Court. Due to the volume of pending cases, it is impossible for me provide you with any indication of when the Court may act on this matter.

Very truly yours,

CLERK

DES/jj

cc: Division of Appellate Defense
Assistant Attorney General Brian Petrano

From: Demetrio Sears #271284
4848 Goldmine Hwy, PA52 KCI
Kershaw, SC 29067

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DEC 15 2011

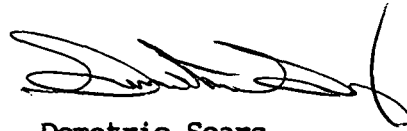
TO: SC Supreme Court
Clerk's Office

S.C. SUPREME COURT

Re": PCR Appeal "Sears v. State"

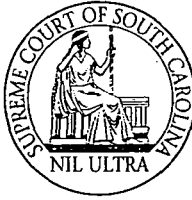
Dears Clerk of Court,

I know it is close to Christmas and your office is busy, but would you please check to ensure that my appela has not been ruled on as of this date. It has ben oin for quite some time and I have not heard anything on it. Your help is appreciate. Thank you



Demetrio Sears

December 12, 2012



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 23, 2011

Demetrio Sears #271284
Kershaw Correctional Institution
4848 Gold Mine Hwy
Kershaw, SC 29069

Re: Sears, Demetrio v. The State

Dear Mr. Sears:

This responds to your letter of June 21, 2011.

Your *pro se* petition for writ of certiorari is currently awaiting consideration by the Court. Due to the volume of pending cases, it is impossible for me provide you with any indication of when the Court may act on this matter.

Very truly yours,

CLERK

DES/jj

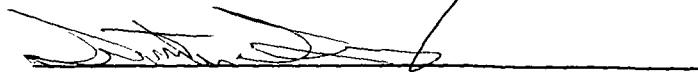
cc: Division of Appellate Defense
Assistant Attorney General Brian Petrano

To: SC Supreme Court
PO Box 11330
Columbia, SC 29211

RE: 2006-CP-40-01599
SEARS vs. STATE

Dear Clerk of Court,

I know letters about the status of a case are not favored, but I am representing myself so I must ensure no action has taken place as my case has been pending for some time. Your understanding and help is appreciated and all I need to know is if my writ has been reviewed. Thank you.



Demetrio Sears 271284

~~4848~~ 4848 Goldmine Hwy. KLT PA-52
Kershaw, SC 29067

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JUN 23 2011

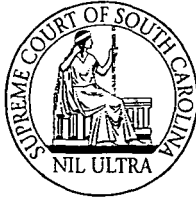
S.C. SUPREME COURT

June 21, 2011

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JUN 23 2011

S.C. SUPREME COURT



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

January 31, 2011

Demetrio Sears #271284
Kershaw Correctional Institution
4848 Gold Mine Hwy
Kershaw, SC 29069

Re: Sears, Demetrio v. The State

Dear Mr. Sears:

The following Order has been endorsed on your Motion for Extension of Time in the above entitled case on appeal.

"Motion is denied as unnecessary since Petition and Appendix have already been received.

Jean H. Toal C.J.
For the Court

By s/ Daniel E. Shearouse
Clerk

January 31, 2011."

Very truly yours,



CLERK

DES/jj

cc: Division of Appellate Defense
Assistant Attorney General Brian Petrano

To: SC Supreme Court
Clerk of Court Office
PO Box 11330
Cola, SC 29211

Re: Sears v. State, 06-CP-40-1599

Dear Mr. Shearouse,

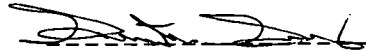
Please find enclosed petitioner's motion for extension of time.
Thank you

RECEIVED

JAN 21 2011

S.C. SUPREME COURT

Sincerely,



Demetrio Sears
4848 Goldmine Hwy, KCI
Kershaw, SC 29069

Petitioner pro se

Dated January 17, 2011

*** My brief was suppose to be sent to the Indigeht Defense office by Jan. 8, 2011, but the Indigent Defense did not send me my appendix to finish my brief until today (Jan. 17). The Indigent Defense office has 15 days from the 8th to file my brief so the deadline is Jan. 23 by my calculations. Therefore I requested an extension simply as a cautionary measure for 30 days from the 23rd. The Indigent Defense Office was sent my brief the same time I sent this motion to your office so they already have it.

State of South Carolina)
County of Richland)

In The Supreme Court of South Carolina

Case No. 2006-CP-40-1599

Demetrio Sears #271284,
Petitioner,

v,

State of South Carolina,
Respondent.

PETITIONER'S MOTION TO EXTEND
TIME FOR FILING BRIEF UNDER RULE
234 (b), SCACR.

The petitioner, pursuant to Rule 234(b), SCACR, moves the Court to extend the time for filing the petition for writ of certiorari in this matter by thirty (30) days. In support of this motion, the petitioner shows the following to the Court:

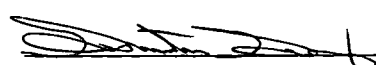
1. Due to the inadequate amount of time the SCDC has provided the petitioner with access to the law library, the petitioner is in need of additional time to research and draft an adequate petition and properly frame the issues.

2. That the petitioner is in actual need of this additional time and submits this motion in the interest of justice.

WHEREFORE, the petitioner submits that good cause has been shown to extend the time for filing the petition for writ of certiorari by thirty (30) days to and including February 23, 2011, and the petitioner moves that the Court extend the time accordingly.

Respectfully submitted

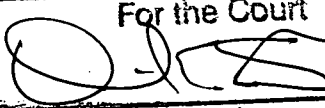
~~GRANTED~~
MOTION IS DENIED AS
UNNECESSARY SINCE
PETITION AND APPENDIX
HAVE ALREADY BEEN
RECEIVED.


Demetrio Sears
4848 Goldmine Hwy, KCI
Kershaw, SC 29069

Petitioner pro se

Date January 17, 2011

Jean H. Toal C.J.
For the Court


Clerk

January 31, 2011

PROOF OF SERVICE

I, Demetrio Sears, do hereby certify that I have deposited notice of the petitioners motion for extension of time in the US mail, postage prrepaid, on this January 17, 2011, addressed to the following:

SC Office of the Attorney General
PO Box 11549
Cola, SC 29211



Demetrio Sears
4848 Goldmine Hwy, KCI
Kershaw, SC 29069

Petitioner pro se

Dated January 17, 2011

The Supreme Court of South Carolina

Demetrio Sears,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Alison Renee Lee
Richland County
Trial Court Case No. 2006-CP-40-01599

ORDER

The motion to exceed the page limitation is granted in part. The petition for a writ of certiorari filed in this matter may not exceed thirty-six (36) pages.

Petitioner shall provide a copy of the petition for a writ of certiorari to the Division of Appellate Defense for copying within thirty (30) days of the date of this order. This petition must comply with the requirements of Rule 243(e), SCACR. The Division of Appellate Defense shall then have fifteen (15) days to file the petition and appendix with this

Court, and serve a copy of these documents on opposing counsel.

IT IS SO ORDERED.


FOR THE COURT C.J.

Columbia, South Carolina

December 8, 2010

cc: Appellate Defender Elizabeth A. Franklin-Best
Mr. Demetrio Sears, #271284
Assistant Attorney General Brian Petrano

To: Daniel Shearouse, Clerk of Court
PO Box 11330
Cola, SC 29211

Re: Sears v. State, 06-CP-40-1599
Motion to Exceed Page Limitation

Dear Mr. Shearouse,

I have been granted permission to proceed pro se in my appeal. As I have not yet been informed, please advise me of my filing date for submitting my writ of certiorari.

Also, please find enclosed my motion to exceed the page limitation for briefs pursuant to court rules. Thank you.

Sincerely,



Demetrio Sears
4848 Goldmine Hwy, KCI
Kershaw, SC 29069

Petitioner pro se

November 26, 2010

RECEIVED
NOV 30 2010
S.C. SUPREME COURT

State of South Carolina)
County of Richland)

In The Supreme Court of South Carolina

Case No. 2006-CP-40-1599

Demetrio Sears #271284,
Petitioner,)

v.)

State of South Carolina,
Respondent.)

MOTION TO EXCEED PAGE LIMITATION
FOR WRIT OF CERTIORARI PURSUANT TO
RULE 208(b)(5), SCACR.

The Petitioner, above-named, moves before this Court for permission to exceed the twenty-five page limitation for filing a writ of certiorari from post-conviction relief matters. In support of this motion, the Petitioner states the following:

1. That the Petitioner raised eighteen (18) claims of error at his PCR hearing that were all addressed in his Order of Dismissal. That the Petitioner is entitle to petition this Court to review each of those claims.

2. That the Petitioner has selected arguments, drafted a proposed petition that is concise and excludes unnecessary detail, and cannot fully and fairly litigate his claims with a twenty-five page brief limitation.

3. That, in the interest of justice, the Petitioner be allowed to exceed the twenty-five page limitation.

WHEREFORE, the Petitioner respectfully requests this Court grant his motion to exceed the page limitationfor the filing of his writ of certiorari from his post-conviction relief denial.

Respectfully submitted,

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NOV 30 2010
S.C. SUPREME COURT


Demetrio Sears
4848 Goldmine Hwy, KCI
Kershaw, SC 29069
Petitioner pro se

November 26, 2010

The Supreme Court of South Carolina

Demetrio Sears,

Petitioner,

v.

State of South Carolina,

Respondent.

ORDER

Petitioner moved to proceed pro se in this matter. By order dated November 8, 2010, petitioner was warned of the dangers and disadvantages of proceeding pro se. Petitioner was given twenty days to notify this Court whether, in light of the warnings, he still wished to proceed pro se or wanted to continue with appointed counsel. Petitioner has now informed the Court that he wishes to proceed pro se. He has also filed a motion for appointment of stand-by counsel.

Petitioner's motion to proceed pro se is granted and counsel of record for petitioner is hereby relieved. In response to petitioner's motion for appointment of stand-by counsel, the Commission on Indigent Defense, Division of Appellate Defense, shall remain associated for the limited purpose of providing copies of the petition, appendix and any briefs that may

be necessary.

IT IS SO ORDERED.

A handwritten signature in cursive script, appearing to read "Mr. Sears", is written above a horizontal line.

J.

FOR THE COURT

Columbia, South Carolina

November 22, 2010

cc: Appellate Defender Elizabeth A. Franklin-Best
Demetrio Sears #271284
Assistant Attorney General Brian Petrano

TO: SOUTH CAROLINA SUPREME COURT
DANIEL E. SHEAROUSE, CLERK OF COURT
PO BOX 11330
COLUMBIA, SC 29211

RECEIVED

NOV 16 2010

RE: PETITIONER'S MOTION TO PROCEED PRO SE

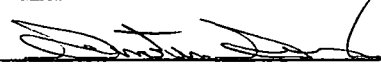
DEAR CLERK OF COURT, S.C. SUPREME COURT

I RELIEVED YOUR LETTER DATED NOVEMBER 8, 2010, INFORMING ME OF THE DANGERS OF SELF-REPRESENTATION AND REQUESTING ME TO NOTIFY THE COURT WITHIN TWENTY (20) DAYS WHETHER I STILL WISH TO PROCEED PRO SE. MY ANSWER IS YES. I STILL WISH TO PROCEED PRO SE. HOWEVER, YOUR OFFICE SHOULD BE AWARE THAT THE POLICIES OF THE SOUTH CAROLINA DEPT. OF CORRECTIONS PREVENTS MY FULL COMPLIANCE WITH ALL APPLICABLE RULES AND PROCEDURES. FOR INSTANCE:

1. IN REGARDS TO RULE 238(C), SCACR, I MAY BE UNABLE TO SUBMIT DOCUMENTS THAT ARE "TYPEWRITTEN OR MACHINE DUPLICATED" AS THE SCDJ DOES NOT PROVIDE TYPEWRITERS FOR OUR USE OR ALLOW US TO MAKE COPIES OF ANY DOCUMENT WE CREATE BY HAND. (POLICY GA 1.03)
2. THE SCDJ DOES NOT PROVIDE INMATES USE OF A BINDING MACHINE WHICH PREVENTS MY COMPLIANCE WITH RULE 238(D), SCACR.
3. I WILL NOT BE ABLE TO SUBMIT COPIES OF MY PETITION OR MAJOR PORTIONS OF MY APPENDIX AS SCDJ DOES NOT ALLOW ME TO MAKE COPIES OF ANY DOCUMENTS THAT ARE "HAND-GENERATED." (SCDJ POLICY GA 1.03) PREVENTING MY COMPLIANCE WITH RULE 243(D), SCACR.
4. THE SCDJ WILL NOT PROVIDE ME WITH COLOR PAPER TO COMPLY WITH RULE 238(e), SCACR.

I CAN ONLY SUGGEST THAT I EITHER BE ALLOWED TO BY-PASS THESE RULES OR THAT "STAND-BY" COUNSEL BE APPOINTED TO ME (SUCH AS THE INDIGENT DEFENSE OFFICE) TO ASSIST ME SOLELY WITH THE CONCERNS LISTED ABOVE. I HAVE ENCLOSED A MOTION FOR CONSIDERATION BY THE COURT AS I CANNOT OTHERWISE PROCEED PRO SE AS THE SCDJ WOULD MAKE IT IMPOSSIBLE TO COMPLY WITH THE RULES. PLEASE RESPOND.

SINCERELY



DEMETRIO SEARS 271284
4848 GOLDMINE HWY, KCI HB-177
KERSHAW, SC 29069

NOVEMBER 10, 2010

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND }

IN THE SUPR - COURT

CASE NO. 2006-LP-40-01599

DEMETRIO L. SEARS #271284.
PETITIONER, }

vs.

MOTION FOR APPOINTMENT OF STAND-BY
COUNSEL

STATE OF SOUTH CAROLINA.
RESPONDENT. }

THE PETITIONER, ABOVE-NAMED, MOVES BEFORE THIS COURT FOR THE APPOINTMENT OF STAND-BY COUNSEL. IN SUPPORT OF THIS MOTION, THE PETITIONER STATES THE FOLLOWING:

1. THAT THE PETITIONER HAS MOVED TO PROCEED PRO SE ON HIS APPEAL FROM THE DENIAL OF HIS POST-CONVICTION RELIEF APPLICATION. THAT THIS COURT HAS ALLOWED THE PETITIONER TO PURSUE HIS APPEAL PRO SE UPON ACKNOWLEDGEMENT THAT FULL COMPLIANCE WITH ALL APPLICABLE RULES AND PROCEDURES ARE EXPECTED UPON PENALTY OF DISMISSAL.

2. THAT THE SCDC'S POLICIES AND THE PETITIONER'S INDIGENT STATUS WILL MAKE COMPLIANCE WITH CRITICAL RULES IMPOSSIBLE UNLESS STAND-BY COUNSEL IS APPOINTED. SPECIFICALLY, THE POLICIES OF SCDC AND LAW LIBRARY INADEQUACIES WILL PREVENT THE PETITIONER FROM:

- A.) PRODUCING DOCUMENTS THAT ARE TYPEWRITTEN OR MACHINE DUPLICATES;
- B.) BIND DOCUMENTS AS NO BINDING MACHINE IS AVAILABLE;
- C.) MAKE COPIES OF PETITION AND SIGNIFICANT PORTIONS OF APPENDIX AS NO COPIES OF HAND-GENERATED DOCUMENTS ARE ALLOWED;
- D.) OBTAINING THE APPROPRIATE COLOR PAPER FOR BRIEF COVERS.

3. THAT THE RESTRICTIONS WILL PREVENT COMPLIANCE WITH RULE 238(d) AND (c), SCACR, AS WELL AS RULE 243(d), SCACR. THAT STAND-BY COUNSEL IS ONLY NEEDED TO ENSURE PETITIONER'S RIGHT TO PROCEED PRO SE IS PROTECTED AND ONLY FOR THE REASONS ABOVE.

4. THAT THE PETITIONER REQUEST THE SOUTH CAROLINA OFFICE ON INDIGENT DEFENSE BE ASSIGNED TO ASSIST IN THIS MATTER AS THE PETITIONER HAS A RELATIONSHIP AND COMMUNICATION WITH THEM AND THEY ARE FAMILAR WITH THE PROCESS AS THE PETITIONER CANNOT HIMSELF MEET THE COURT'S REQUIREMENT DUE TO SCDC'S RULES AND POLICIES.

WHEREFORE, THE PETITIONER RESPECTFULLY REQUESTS THAT THIS COURT GRANT HIS MOTION FOR STAND-BY COUNSEL OR ELSE PROVIDE SOME OTHER REMEDY AS THE COURT DEEMS FIT.

RESPECTFULLY SUBMITTED

Demetrio Sears

DEMETRIO SEARS 271284

4848 GOLDMINE HWY, KLI 4B-177

KERSHAW, SC 29069

NOVEMBER 10, 2010

CERTIFICATE OF SERVICE

I, DEMETRIO SEARS, DO HEREBY CERTIFY THAT I HAVE DEPOSITED A TRUE COPY OF PETITIONERS MOTION FOR STAND-BY COUNSEL IN THE UNITED STATES MAIL, POSTAGE PREPAID, VIA SCDJ MAILROOM, THIS NOVEMBER 10, 2010, AND ADDRESSED TO THE FOLLOWING:

TO: SC OFFICE OF THE ATTORNEY GENERAL
PO Box 11549
COLUMBIA, SC 29201



DEMETRIO SEARS 271284
4848 GOLDMINE HWY, KLT HB-177
KERSHAW, SC 29067

NOVEMBER 10, 2010

The Supreme Court of South Carolina

Demetrio Sears,

Petitioner,

v.

State of South Carolina,

Respondent.

ORDER

Petitioner moves to proceed pro se in this matter. Petitioner may proceed pro se as long as he knowingly and intelligently waives his right to counsel. See Faretta v. California, 422 U.S. 806 (1975); State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997). However, it is not apparent from petitioner's motion that he is fully aware of the dangers and disadvantages of proceeding pro se. We therefore take this opportunity to warn petitioner that if he chooses to proceed pro se, this Court will require full compliance with all applicable rules and procedures, and failure to comply with such rules and procedures could result in the dismissal of the petition and forfeiture of the right to discretionary review. Petitioner is certain to be unlearned in other aspects of the law as well. Representation by an attorney trained in the law would be highly beneficial, and we strongly encourage petitioner to proceed

with representation by appointed counsel.

After considering this information, petitioner shall, within twenty (20) days of the date of this order, notify this Court whether he wishes to proceed pro se or continue to be represented by appointed counsel. If petitioner fails to notify this Court of his intentions within twenty (20) days, appointed counsel will continue to represent him in this matter.

IT IS SO ORDERED.


C. J.
FOR THE COURT

Columbia, South Carolina

November 8, 2010

cc: Appellate Defender Elizabeth A. Franklin-Best
Demetrio Sears #271284
Assistant Attorney General Brian Petrano

STATE OF SOUTH CAROLINA }
COUNTY OF RICHLAND }

IN THE SUPREME COURT
CASE NO: 2006-CP-40-01599

DEMETRIUS SEARS #271284,
Appellant.

MOTION TO PROCEED PRO SE
ON APPELLATE REVIEW OF ORDER
DENYING POST-CONVICTION RELIEF.

RECEIVED

OCT 1 8 2010

S.C. SUPREME COURT

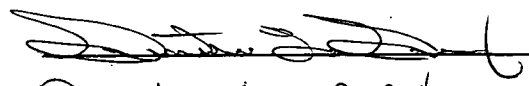
✓
State of South Carolina,
Respondent.

The Appellant, above-named, herein moves before this Court to proceed pro se on certiorari review from the denial of his post-conviction relief. In support of this motion, the appellant states the following:

1. That the Appellant, Demetrio Sears #271284, filed an application for Post-Conviction Relief on March 20, 2006, alleging numerous violations of his State and Federal Constitutional rights (Case no. 2006-CP-40-01599). Attorney Charlie J. Johnson, Jr., represented the Appellant during the course of the proceedings and an evidentiary hearing was convened on February 20, 2008 at the Richland County Courthouse before the Honorable Judge Allison Renee Lee. An Order of Dismissal was filed on December 22, 2009, and a timely notice of appeal was filed.
2. That the Appellant is currently represented by Mrs. Elisabeth Franklin Best of the South Carolina Office of Indigent Defense. That the Appellant has conversed with Mrs. Best several times and is aware that, as of the date of this letter-motion, no initial brief has been submitted on his behalf by Mrs. Best.
3. That the Appellant believes that it is in his best interest to pursue certiorari relief pro se. The Appellant respectfully requests that this Court exercise its discretionary power to authorize the Appellant to proceed pro se as recognized in State v. Roberts, 344 S.C. 583, 614 S.E.2d 626 (S.C. 2005) (Allowing appellants to proceed pro se in an appeal from a criminal conviction upon Courts discretion).
4. That the Appellant is competent and sufficiently legally versed to properly and effectively pursue certiorari review pro se.

WHEREFORE, the Appellant respectfully requests this Court grant this motion to proceed pro se and any and all other relief the Court deems appropriate.

Respectfully Submitted



Demetrio Sears 271284
990 Wiscoky Hwy. LT 5M-2186
BISHOPVILLE, SC 29010

APPELLANTS MOTION TO PROCEED PRO SE IS: GRANTED DENIED



CLERK OF COURT / JUDGE

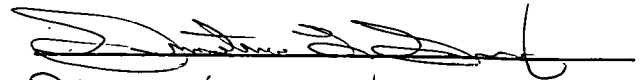
DATE

SEPTEMBER 29, 2010

PROOF OF SERVICE

I DO HEREBY CERTIFY THAT I, DEMETRIO SEARS #271284, HAVE DEPOSITED A COPY OF APPELLANT'S MOTION TO PROCEED PRO SE IN THE UNITED STATES MAIL, POSTAGE PREPAID, VIA SCDJ MAILROOM PERSONEL, ON OCTOBER 4, 2010, ADDRESSED TO THE FOLLOWING:

TO: SC OFFICE OF THE ATTORNEY GENERAL
PO BOX 11549
COLUMBIA, SC 29201



DEMETRIO SEARS 271284
990 WISACKY HWY, LCI SUM-2126
BISHOPVILLE, SC 29010

OCTOBER 4, 2010



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Defender
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
Joseph L. Savitz, III, Senior Appellate

October 29, 2010

RECEIVED

OCT 29 2010

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

S.C. Supreme Court

Re: Demetrio Sears v. State

Dear Mr. Shearouse:

In response to petitioner's motion to proceed pro se, counsel has no objection to petitioner's motion to proceed pro se.

Should you have any questions, please feel free to contact me.

Sincerely,

Elizabeth A. Franklin-Best
for Elizabeth A. Franklin-Best
Appellate Defender

EAF/fkb

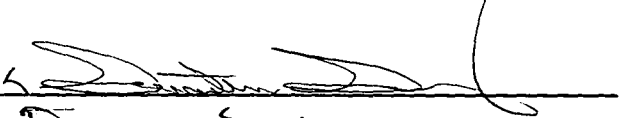
TO: SC SUPREME COURT
PO Box 11330
COLUMBIA, SC 29211

RE: ADDRESS CHANGE
2006-CR-40-01549

DEAR CLERK OF COURT:

PLEASE BE AWARE THAT MY ADDRESS HAS CHANGED TO:

DEMETRIO SEARS 271284
4848 GOLDMINE HWY, KCI PAB
KERSHAW, SC 29067


DEMETRIO SEARS

OCTOBER 16, 2010

RECEIVED

OCT 19 2010

S.C. SUPREME COURT

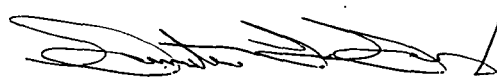
Demetrio Sears #271284
990 Wisacky Hwy, LCI Sum-2126
Bishopville, SC 29010

TO: SC Supreme Court
Clerk of Court

Re: 2006-CP-40-01599

Dear Clerk of Court,

Please find enclosed for filing Appellants Motion to proceed pro se. Thank
you.



Demetrio Sears

RECEIVED

OCT 18 2010

S.C. SUPREME COURT

October 4, 2010

The Supreme Court of South Carolina

Demetrio Sears,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Alison Renee Lee
Richland County
Trial Court Case No. 2006-CP-40-01599

ORDER

For good cause shown, the request for an extension until October 29, 2010 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

September 27, 2010

cc: Appellate Defender Elizabeth A. Franklin-Best
Assistant Attorney General Brian Petrano

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Honorable Alison Renee Lee, Circuit Court Judge

RECEIVED

SEP 24 2010

DEMETRIO SEARS,

S.C. SUPREME COURT

PETITIONER,

V.

THE STATE,

RESPONDENT.

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

Counsel for Demetrio Sears 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 **on September 29, 2010**.

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.

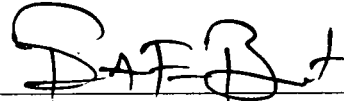
3. Specifically, counsel, because of her substantial caseload, has not had the time to complete her client's case, consistent with her duty to provide effective assistance of counsel as guaranteed by the U.S.C.A. 6, 14. *See Evitts v. Lucey*, 469 U.S. 387 (1985) (to be effective appellate counsel must 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 September, counsel is assigned to file 27 briefs.
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,

A handwritten signature in black ink, appearing to read 'EAFB', with a horizontal line drawn underneath it.

Elizabeth A. Franklin-Best
Appellate Defender

September 24th, 2010

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Honorable Alison Renee Lee, Circuit Court Judge

DEMETRIO SEARS,

PETITIONER,

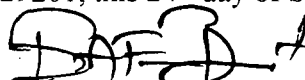
V.

THE STATE,

RESPONDENT.

CERTIFICATE OF SERVICE

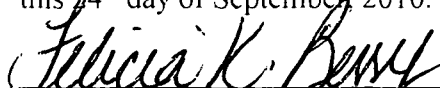
The undersigned attorney hereby certifies that a true copy of the petition for extension of time in which to file the petition for writ of certiorari and appendix in the above referenced case has been served upon Brian Petrano, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of September, 2010.



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 24th day of September, 2010.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: June 21, 2020 .

The Supreme Court of South Carolina

Demetrio Sears,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Alison Renee Lee
Richland County
Trial Court Case No. 2006-CP-40-01599

ORDER

The request for an extension until September 29, 2010 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 *Drenda F. Shealy*
Clerk

Chief Deputy
Columbia, South Carolina

August 31, 2010

cc: Appellate Defender Elizabeth A. Franklin-Best
Assistant Attorney General Brian Petrano



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

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
Joseph L. Savitz, III, Senior Appellate Defender

RECEIVED

AUG 30 2010

S.C. SUPREME COURT

August 30, 2010

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

Re: Demetrio Sears v. State of South Carolina

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix in the above-referenced case are due to be served and filed today. Because of my present workload, I respectfully request a thirty-day extension of this deadline. No prior extensions have been requested in this case.

By copy of this letter to Assistant Attorney General Brian Petrano, I am informing him of this request.

Thank you for your assistance in this matter.

Sincerely,

Elizabeth A. Franklin-Best

Elizabeth A. Franklin-Best
Appellate Defender

EAF/fkb

cc: Brian Petrano, 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
Joseph L. Savitz, III, Senior Appellate Defender

RECEIVED

JUN 30 2010

S.C. SUPREME COURT

June 30, 2010

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.

Demetrio Sears v. State of South Carolina

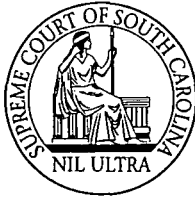
6/30/2010

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
Administrative Coordinator



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 21, 2010

Demetrio Sears #271284
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

Re: Sears, Demetrio v. The State

Dear Mr. Sears:

This responds to your letter of May 28, 2010.

A timely notice of appeal was filed on your behalf by Charlie Jay Johnson, Esquire. The Division of Appellate Defense currently represents you and their office has requested the transcript from the Court Reporter. It is our understanding that once the transcript has been delivered, their office will be in contact with you.

If you have other questions, you may contact them at: Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211. The phone number is 803-734-1343.

Very truly yours,

CLERK

DES/jj

cc: Appellate Defense
Assistant Attorney General Brian Petrano

TO: SC SUPREME COURT

PO Box 11330

COLUMBIA, SC 29211

RE: DEMETRIUS SEARS 271284 V. STATE

CASE NO. 2006-CP-40-1599

DEAR CLERK OF COURT,

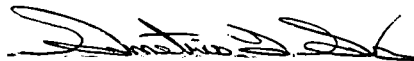
MY APPEAL FROM MY PCR IS SUPPOSE TO HAVE BEEN FILED ON JANUARY 2, 2010, FROM RICHLAND CO. (JUDGE ALLISON R. LEE). MY ATTORNEY, CHARLIE J. JOHNSON, FILED IT BUT IT HAS BEEN 6 MONTHS AND I HAVE NOT HEARD ANYTHING. PLEASE CHECK TO ENSURE IT HAS BEEN FILED. I WROTE TWO PREVIOUS LETTERS BUT HAVE NOT HEARD ANYTHING. THANK YOU.

RECEIVED

JUN 24 2010

S.C. SUPREME COURT

JUNE 20, 2010



DEMETRIUS SEARS

940 WISACKY HWY, LEFT LANE - 2208

BISHOPVILLE, SC 29010

TO: SOUTH CAROLINA SUPREME COURT
P.O. BOX 11330
COLUMBIA, SC 29211

RECEIVED

JUN 04 2010

S.C. SUPREME COURT
RE: SEARS V. STATE, 2006-CP-40-1599

DEAR CLERK OF COURT,

MY APPEAL IN THE ABOVE-REFERENCED CASE WAS SUPPOSE TO BE FILED WITH YOUR OFFICE ON JANUARY 11, 2010. I HAVE NOT HEARD ANYTHING IN 6 MONTHS ABOUT IT AND AM CONCERNED. CAN YOU PLEASE TELL ME IF IT IS FILED AND WHO REPRESENTS ME IF SO. THANK YOU



DEMETRIO SEARS 271284
990 WISACKY HWY, LEE CT
BISHOPVILLE, SC 29010

MAY 28, 2010



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
Joseph L. Savitz, III, Senior Appellate Defender

RECEIVED

January 26, 2010

JAN 26 2010

S.C. SUPREME COURT

Ms. Daphne D. Helms
Circuit Court Reporter
556 Heron Glen Drive
Columbia, SC 29229

Dear Ms. Helms:

Our office has been requested to perfect the appeal arising out of:

Demetrio Sears v. State of South Carolina

Case #:

06-CP-40-01599

County: Richland

Date of Trial: February 20, 2008

Presiding Judge: Alison Renee Lee

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript 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. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

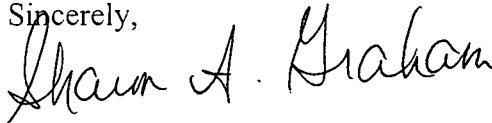
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms. Daphne D. Helms
January 26, 2010
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Sharon A. Graham". The signature is written in a cursive, flowing style.

Sharon A. Graham
Administrative Coordinator

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JAN 12 2010

APPEAL FROM RICHLAND COUNTY
In The Court of Common Pleas

S.C. SUPREME COURT

Alison Renee Lee, Circuit Court Judge

DOCKET NUMBER - 2006-CP-40-1599

Demetrio L. Sears APPELLANT

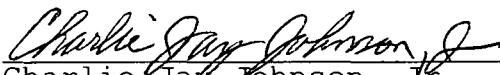
-vs-

STATE OF SOUTH CAROLINA. RESPONDENTS

NOTICE OF APPEAL

Demetrio L. Sears appeals the Order of the Honorable William P. Keesley denial of Application for Post Conviction Relief for the Appellant, dated December 22, 2009. The Order was filed on December 22, 2009, and received by counsel on December 23, 2009.

January 6, 2010


Charlie Jay Johnson, Jr.
Post Office Box 11212
Columbia, SC 29211
(803) 765-0400
Attorney for Appellant

Other Counsel of Record:
Robert Brown
Assistant Attorney General
The State Of South Carolina
Office Of The Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
Attorney for Respondent State of South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JAN 12 2010

APPEAL FROM RICHLAND COUNTY
In The Court of Common Pleas

S.C. SUPREME COURT

Alison Renee Lee, Circuit Court Judge

DOCKET NUMBER - 2006-CP-40-1599

Demetrio L. Sears APPELLANT

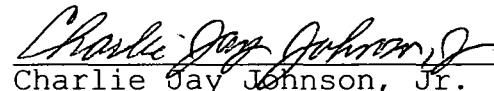
-vs-

STATE OF SOUTH CAROLINA. RESPONDENTS

PROOF OF SERVICE

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 January 7, 2010, addresses to the Attorney of record, Robert Brown, Office of the Attorney General, Post Office Box 11549, Columbia, SC 29211-1549.

January 6, 2010



Charlie Gay Johnson, Jr.
Post Office Box 11212
Columbia, SC 29211
(803) 256-7001
Attorney for Appellant

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF RICHLAND

CASE NO: 2006CP4001599

IN THE COURT OF COMMON PLEAS

Demetrio L # 271284 Sears

vs.

State of South Carolina

Plaintiff

Defendant

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 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 Columbia, South Carolina, this _____ day of _____, 2009.

PRESIDING JUDGEThis judgment was entered on the _____ day of _____, 2009, and a copy mailed first class this 23rd day of Dec, 2009, to attorneys of record or to parties (when appearing pro se) as follows:_____
Charlie J Johnson Jr

ATTORNEY(S) FOR THE PLAINTIFF(S)

Robert L Brown

ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanette W McBride
Clerk of Court

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Demetrio Sears, 271284,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

DOCKET NO. 2006-CP-40-1599

ORDER OF DISMISSAL

RICHLAND COUNTY
FILED
2009 DEC 22 AM 10:19
JEANETTE W. MCBRIDE
C.C.P. & G.S.

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 20, 2006. The Respondent made its Return on January 4, 2007.

The Applicant submitted several typed amendments:

Amendment 1 – May 31, 2007

Amendment 2 – May 31, 2007

Amendment 3 – May 31, 2007

Amendment 4(A) – May 31, 2007

Amendment 4(B) – November 21, 2007

Amendment 5 – submitted the day of the PCR hearing.

An evidentiary hearing into the matter was convened on February 20, 2008 at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Charlie J. Johnson, Esquire. Brian T. Petrano of the South Carolina Attorney General's Office represented the Respondent.

At the hearing, the Applicant testified on his own behalf. The Applicant's trial counsel, Douglas Strickler, Esquire also testified. This Court had before it the records of the Richland County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Applicant was indicted at the December 2002 term of the Court of General Sessions for Richland County for attempted armed robbery (02-GS-40-10992). He was represented by Douglas Strickler,

and
#1

Esquire. The first trial occurred September 23, 2003 and resulted in a mistrial after a deadlocked jury. On January 5, 2004, the Applicant proceeded to trial for a second time after which he was found guilty of attempted armed robbery. He was sentenced by the Honorable G. Thomas Cooper, Jr., to confinement for a period of eighteen (18) years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals dismissed Applicant's appeal. State v. Sears, Op. No. 2006-UP-126 (S.C. Ct. App. filed February 24, 2006). Thereafter, Applicant filed the current application for post conviction relief.

As stated earlier, Applicant filed an original application and several amendments. The previous amendments are all consolidated into Amendment 5 which was presented to the court at the hearing. Amendment 5 is the document used to address all the claims of Applicant. At the hearing, the Court inquired to assure that all of Applicant's issues were raised in Amendment 5. Each of the 18 items in this amendment is addressed below. Many of the Applicant's issues overlap, nevertheless this Court will attempt to address them in the order presented. Accordingly, some of the findings of fact and conclusions of law contained herein may be duplicated in part or in whole amongst other individually listed issues.

STANDARD FOR POST CONVICTION RELIEF

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008); 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); Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999); Butler, *supra*.

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. Brown v. State, 375 S.C. 464, 652 S.E.2d 765 (Ct. App. 2007); Butler, *supra*. The Applicant must overcome this presumption to receive relief. Fernandez v. State, 306 S.C. 264, 411 S. E.2d 426 (1991); 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. Brown, supra, 375 S.C. at 468, 385 S.E.2d at 767; see 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. Id. In order to obtain relief on a claim of ineffective assistance, the applicant must demonstrate both that counsel's performance fell below professional norms, and that the applicant suffered prejudice as a result of counsel's deficient performance. Prejudice is defined as a reasonable probability that had trial counsel not been deficient, the result at trial would have been different. E.g., Miller v. State, 379 S.C. 108, 665 S.E.2d 596 (2008).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the transcript of the second trial that resulted in the conviction in its entirety and has heard the testimony at the post-conviction relief hearing. The transcript from the first trial was not presented or considered except as raised and provided by the Applicant in his amended applications. 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 (Rev. 2003).

Summary of testimony

The Applicant testified that he was "locked up" before trial and saw trial counsel around September of 2003. Originally, he was assigned a different attorney from the public defender's office, and he had met with an investigator and one of the other assigned attorneys. The Applicant often wrote to trial counsel's office requesting a copy of his file. When he did meet with trial counsel, he was informed that his file was not complete. Trial counsel inquired as to how the Applicant would feel about lesser charges, i.e. a gun charge. Applicant was told trial counsel would meet at a later time to further discuss the case. The Applicant was told by trial counsel that a plea to fifteen (15) years was better than twenty (20) years after a trial. The Applicant testified that he was not comfortable going to trial after only an hour or so of going over materials and that he was never presented with his discovery materials. After the first trial ended in a hung jury, the Applicant never saw trial counsel before the second trial. He testified

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he was offered several plea deals: 15, 12, 10, and then 8 years, but that no deal is a good deal if innocent. The Applicant testified that trial counsel seemed mad that Applicant would not plea.

The Applicant testified that he and the others were in a minivan and pulled up to the store to see the owner standing outside with a gun, the Applicant reached for a gun and a gun fight erupted, outside the store. The Applicant was shot. The Applicant did fire shots at the store owner, but that there was never an attempted armed robbery. The Applicant could not plea to something he did not do. Before the second trial, Applicant wanted a continuance and even attempted to ask the judge himself. He never had an opportunity to meet with trial counsel to discuss the case, trial counsel only wanted to talk about a plea.

About the second trial, Applicant testified that nothing was done regarding a situation when a juror was observed speaking to one of the victims. The Applicant testified that the solicitor had blue tennis shoes taken from his [Applicant] Aunt's house, that the victim testified that the Applicant had blue tennis shoes on when the Applicant put a gun to his head. The Applicant explained that there was discrepancy between the victim's statements at the first trial and the second regarding the shoes but that trial counsel was not effective in fully cross-examining the victim regarding the shoes. The Applicant testified that the State was aware that his shoes were taken at the hospital and were not the same ones taken from the Aunt's house. The State knew he did not live at the Aunt's house. The Applicant testified that trial counsel also failed to properly utilize the bullet or shell casing found in the parking lot which supported the Applicant's version of events, i.e. the shooting occurred outside. Trial counsel simply did not do enough to reveal inconsistencies in the testimony of the victims and because this trial mainly concerned credibility of the victims' story versus that of the Applicant and co-defendant, the ineffectiveness of trial counsel's failure to reveal weaknesses/inconsistencies prejudiced him.

Trial counsel, Doug Strickler, testified that originally this case was assigned to different attorneys within the Public Defender's Office. Notes indicate discovery materials were reviewed with the Applicant by his then assigned attorney Jason King sometime in March 2003. Another one of the Applicant's original attorneys had a conflict, but the file notes indicate she also went over the discovery materials with the Applicant sometime in March 2003. Trial counsel testified that as chief public defender he is responsible for all Richland County public defenders. According to the notes in the file, the Applicant inquired about a plea deal in April 2003. Trial counsel was later assigned the case in May 2003. The notes in the file indicated that the

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potential issues for trial included the statements from the cousin (the co-defendant) and the lack of blood. Trial counsel recognized that an investigator was needed and utilized the services of both the "in-house" investigator at the public defender's office as well as another crime scene expert (Don Girndt). Trial counsel testified that he met with the Applicant to discuss the case and review discovery materials on August 29, 2003. He conferred with the investigator, the crime scene expert, the prosecutors, and the applicant. In his opinion, "the evidence didn't look that hot" for Applicant.

Trial counsel testified that he met again with the Applicant on the day of the trial in September 2003. During the first trial, Trial counsel did not attempt to elicit testimony from his investigator because it supported the State's version. Regarding plea offers, trial counsel testified that due to two prior convictions for strong armed robbery the Applicant would be looking at fifteen years with a straight-up plea. Trial counsel testified that it was not unusual for the solicitor to offer a better deal when the jury is deliberating for long periods. Trial counsel testified that Applicant at one point inquired about the possibility of an offer to strong armed robbery for fifteen (15) years, suspended on three (3) years with five (5) years probation. Trial counsel testified that he was prepared for the first trial. He met with Applicant for about an hour and the notes in the file were enough. Trial counsel testified that a discovery request is automatically done when the case is first assigned. This case was first assigned on October 24, 2002.

Trial counsel agreed that the case was ultimately about the credibility of witnesses. There was nothing to impeach the cousin (co-defendant) concerning the letters he wrote from jail because the co-defendant testified consistent with the letter. Trial counsel testified that the angles of the bullets can be argued to support any theory when people are moving around. Based upon his twenty-five (25) years of experience trying homicide cases and based on his judgment, analysis, and conversations with the investigator(s), he "knows" that he would be unable get any knowledgeable expert to state with any degree of certainty that the shots happened in a way other than the State's version.

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PCR APPLICATION AMENDMENT 5

Issue 1: Counsel failed to adequately consult or communicate, prepare for trial, or attempt to have a working relationship with Applicant.

Applicant testified that Trial Counsel failed to consult with him before the first trial in late September 2003. He first saw Trial Counsel in September 2003. Initially, another attorney from the Public Defender's office represented Applicant. He spoke to this attorney once and also talked with the investigator twice between March 2003 and September 2003. Applicant states he never received the discovery prior to the first trial in September. He learned about the evidence and the witnesses during the first trial.

Between the first trial and the second trial in January 2004, he did not see Trial Counsel. At the second trial, he was tried with his cousin, the co-defendant. He states that Trial Counsel was very upset when Applicant would not accept a plea for 8 years. His attorney never discussed the case with him or asked him what happened. He admits he was in possession of a gun but he objected to the attempted armed robbery.

Trial Counsel testified that he had no independent recollection of the representation and referred to notes maintained in his office. In October 2002, the file was opened and Applicant was assigned an attorney who first met with him in November 2002 at the jail. She met with Applicant on at least two other occasions in November and February 2003. Another attorney was assigned in February and in March 2003 because the initial attorney left the office and there was a conflict with the other attorney. In March 2003, the attorney, Jason King met with Applicant to discuss the plea offers. This attorney's notes reflect that he reviewed with Applicant the pros and cons going to trial and the evidence available to him. This attorney left the office in May 2003 and Trial Counsel took over the representation.

The notes of the attorneys in the file reveals that there was discussion about the letter received from Applicant's cousin, the lack of blood at the scene, shell casings on the ground, and statements given. Trial Counsel also reviewed the notes of the other attorneys. These notes indicated that an investigation needed to be done. The in-house investigator at the Public Defender's office was contacted. Trial Counsel met with the investigator to review the file. Arrangements were made to hire a crime scene expert.

In August 2003 before the trial, Trial Counsel met with Applicant to discuss the discovery, shots fired at Applicant, and his injuries. They also discussed his cousin's statement

including the statement that if Applicant died, the cousin would be charged with murder. On the same day, Trial Counsel conferred with the prosecutors and the investigator. He came to the conclusion that the evidence "does not look that hot for us." He reviewed the ballistics and other lab reports. He met again with Applicant to discuss what he had learned. He also discussed that the crime scene expert (Don Girndt) supported the State's theory of what occurred.

This court finds, further, that the Applicant's allegation that trial counsel did not conduct an adequate pre-trial investigation is without merit. The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Harris v. State, 377 S.C. 66, 659 S.E.2d 140, quoting Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from counsel's alleged lack of time to prepare. United States v. Cronin, 466 U.S. 648 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). Here, the Applicant could not point to any specific matters counsel failed to discover aside from his other allegations of ineffective assistance of counsel, for failing to utilize certain theories presented by the Applicant, and other speculative issues. As discussed herein, this Court finds those allegations without merit, and therefore, this allegation is also without merit. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008), quoting Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998).

2. Counsel was ineffective in failing to request a continuance (at the second trial).

Applicant testified that he did not know anything about the case. Trial Counsel should have reviewed discovery with him. He was never consulted about any of the evidence.

Trial Counsel did not see Applicant between the first and second trials. He has no recollection of requesting a continuance or being asked to request a continuance. Trial Counsel did not believe a continuance was necessary because he was prepared for trial on both occasions. All of the evidence has been presented at the first trial and there was no need for a continuance at the second trial.

Applicant is not credible on this issue or the issue about the discovery. The records of the attorneys clearly reflect that evidence and discovery was discussed with him. Trial Counsel's efforts yielded a hung jury in the first trial and the State's trial tactics were exposed for Trial

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Counsel to prepare for the second trial. "Where there is no showing that any other evidence on behalf of the [Applicant] could have been produced, or that any other points could have been raised had more time been granted for the purpose of preparing the case for trial," a continuance is unnecessary. State v. Colden, 372 S.C. 428, 641 S.E.2d 912 (Ct.App. 2007), quoting State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51-52 (1996). The Applicant does not claim that he was denied access to witnesses or lacked time to prepare a specific defense. Furthermore, the Applicant must show actual prejudice from the denial of a continuance. State v. Colden, *supra*; Skeen v. State, 325 S.C. 210, 213-14, 481 S.E.2d 129, 130-32 (1997)(Absent showing that additional preparation would have benefited defense, counsel's failure to request continuance did not result in ineffective assistance). Accordingly, since it has not been demonstrated what the additional preparations would have yielded, the Applicant has not shown counsel's failure to request a continuance was ineffective assistance. Skeen, 325 S.C. at 214-15, 481 S.E.2d at 132. This Court dismisses any claims of ineffective assistance of counsel regarding a purported failure to request a continuance before the second trial.

3. Counsel provided deficient performance in failing to object to alleged juror misconduct and failing to object to trial court's failure to investigate such.

Applicant testified that one of the jurors was seen talking to one of the victims outside of the courtroom. She was seated on the jury in the second trial. Applicant's aunt testified about the conversation she heard between them. The matter was never pursued any further. According to Applicant, the judge said he would question the juror but he did not. Trial Counsel has no independent recollection of this event and whatever the record reflects is what action he took.

The record reflects that after jury selection a juror sent a note and revealed that she had a cousin who was a sheriff deputy working courthouse security. Trial Counsel informed the court that had he known this information, his consideration of the juror would be different. At the time of the selection of the juror, Trial Counsel could have exercised a strike not to seat the juror, and he requested that she be excused. Counsel for the co-defendant added that a juror (they believed it was the same juror) was seen talking with one of the victims in the hallway. Applicant's aunt was called to testify about the matter. She testified that prior to jury selection when the juror was coming into the courtroom the juror said hello to the victim and they walked into the courtroom together. According to her testimony the only conversation was that they said hello to each other and then they walked in together. The aunt's impression was that they knew each other. She did

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not know the juror's name but described what the juror was wearing. The record does not reflect any additional identifying information about which juror was being described.

After the aunt testified, the court asked the juror who sent the note to come into the courtroom. He questioned her about her cousin who was a deputy at the courthouse. After questioning by the court, there was a bench conference with the attorneys before the juror left. The court asked one additional question about the relative and then dismissed the juror from the courtroom. The court found her to be a fair and impartial juror and denied the motion to excuse the juror. Nothing further was discussed about the juror. Trial Counsel acted appropriately and a record was made for appeal.

Regarding any potential issues and the purported contact between the victim and a juror, the trial court gave proper instruction to the jury regarding what information could or could not use to make their decisions. Jurors are presumed to follow the instructions of the trial court. State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007); State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975). Additionally, there is no evidence to show there was any improper conduct between the juror and the victim.

- 4. Trial counsel provided ineffective assistance of counsel in failing to present favorable existing evidence and pursue favorable line of questioning (shoe report).**
- 5. Trial counsel provided ineffective assistance of counsel in failing to object to prosecutor misconduct (presentation of shoes).**

The solicitor at trial said Applicant was wearing blue tennis shoes. According to Applicant, white shoes were taken from his aunt's house. Applicant asserts this is important because the victim testified he was on the floor with a gun held to his head and all he could see were the shoes of the person holding the gun. Applicant states that Trial Counsel asked about the shoes during cross examination but failed to follow through to impeach the victim. The property records in the sheriff's office could have been used to impeach the witness. Trial Counsel has no recollection of the shoe issue. Whatever the record reflects is what he did.

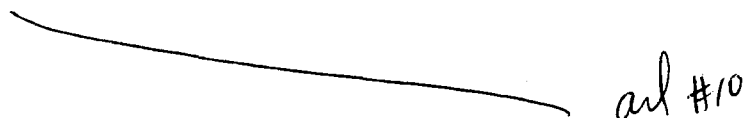
Applicant claims the victim's testimony was that the person holding the gun to his head was wearing blue shoes. Copies of the pages attached by Applicant state that the person with the gun was wearing blue and white shoes. The property report form of the shoes taken from Applicant at the hospital states the shoes were white and gray Nike shoes. The consent to search form signed to allow the search of the co-defendant's home contains a description of the property to be searched (emphasis added): "guest room, white/blue Nike shoes, black shorts, and gray

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sweatpants”. This does not appear to be a description of the property actually recovered during the search as Applicant suggests.

A review of the trial transcript does not show any misconduct on the part of the solicitor. The shoes were not introduced at trial. The solicitor did not ask the victim about the color of the shoes. The witnesses did not testify that the shoes were blue. Again the victim’s testimony was that the shoes were blue and white. Whether the shoes were blue and white or gray and white is not significant without a visual reference to the shoes. The trial testimony has always been consistent that the shoes were blue and white. The document referred to by the victim during his testimony was a robbery questionnaire containing the information provided to the police that day. Shortly after the incident occurred that day, the description given of the person, who pushed the victim to the floor, put a gun to his head, and dragged him, was a gray shirt, white and blue shoes – court shoes. Any discussion by the Solicitor about the shoes in opening or closing statements is not evidence and the jury was instructed accordingly. There was no prosecutorial misconduct and it was not ineffective for Trial Counsel not to object.

Additionally, this Court finds no resulting prejudice from trial counsel’s purported failure to fully examine whether the shooter’s shoes were gray and white or blue and white. It was trial counsel who cross-examined the victim regarding the color of the shoes. The Applicant’s PCR application and arguments raise allegations that trial counsel failed to properly cross-examine the victim when he claimed that the Applicant was wearing “blue” shoes. According to the Applicant, other evidence exists to show that he was wearing white shoes. At first blush this appears to be a significant issue: a victim testifying the Applicant was wearing blue shoes and trial counsel not utilizing a report indicating the shoes were white. However, a full review reveals that the victim actually testified the Applicant was wearing blue and white shoes (not just blue), while the evidence purportedly not exploited by trial counsel shows that the Applicant was wearing gray and white shoes (not just white). It was trial counsel who questioned the victim about the shoe color and brought this evidence to the jury’s attention. Accordingly, this claim is without merit.

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6. **Ineffective assistance of counsel in failing to realize and impeach with numerous inconsistent statements and contradictions of the alleged victims and to make note of favorable evidence. Specifically involving: (a) bullet in parking lot; (b) going to bank; (c) conversation with alleged perpetrators; (d) skin complexion and gloves; (e) van pursuit; (f) facial description; (g) Kassim Hosendove identification & Inv. McDonald's credibility.**

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information', of the evidence that would have been obtained had his counsel undertaken the desired investigation and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing that the witnesses' answers at trial would have been materially different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense. While a second trial is certainly advantageous to a defendant in that there has been a preview of exactly what to expect at the second trial, this Court notes that a mistrial, and subsequent retrial, can also present a difficult situation for defense counsel. Given a second opportunity to try a case, the State is able to see what techniques and testimony were effective in the prior trial and bolster and strengthen their case during the second trial.

In each of the enumerated instances mentioned above, the Applicant points out an inconsistency in the testimony between the first trial and the second trial.

(a) bullet in parking lot: A projectile (bullet or shell casing) was found in the parking lot, but the testimony of the victims was that all of the shooting occurred inside the location. The glass door to the premises was shattered and there was glass inside and outside of the location. Crime scene photos were introduced and there was testimony about where projectiles and bullets were found in and around the premises. Applicant argues that Trial Counsel did not use this evidence to his advantage. He believes this evidence supports that the shooting occurred outside not inside. However, the testimony shows that projectiles and casings were also found inside the premises.

(b) going to the bank: The victims' testimony did not match about when one of them went to the bank. This inconsistency is not material to the subsequent events. While it may

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demonstrate some inconsistency, it is not material to what occurred when the defendants arrived on the scene.

(c) conversation with alleged perpetrators: The testimony of the victims was inconsistent about whether there was conversation with or between the perpetrators or no conversation at all when the shooting began. Again, while this seems to be important, the difference in the testimony is miniscule. The testimony was clear about where the shooting occurred and the actions of the persons committing the offense.

(d) skin complexion and gloves: Victim does not recall if gloves were worn, but described the perpetrator as being light skinned because he saw the back of his hands. Investigator testifies it's possible there are no fingerprints on one of the guns because gloves were worn. There is no inconsistency here. There were several people involved in the incident. The witnesses testified about the possible use of gloves. No one stated that all of the perpetrators were or were not wearing gloves. Applicant has failed to demonstrate how further cross examination on this issue would have had a material impact on the result of this case.

(e) van pursuit: One victim testified in first trial he could see the van pull out of the parking lot. In the second trial, he said the van was gone. Specifically, the transcript reflects the victim hears the doors close and is able to see the van leaving the parking lot. By the time he gets to the parking lot, the van is going down the road and some other cars are behind them. At the second trial, the victim testified that he heard the car pull out, he looked out the window and the van was gone. Later, he testifies that he could see the van going down the street and cars pulling up behind them. They were already on the road. This is also not a material inconsistency.

(f) facial description: Applicant believes there is an inconsistency regarding how one of the victims was able to identify the perpetrator. The statements and testimony go only to a description of one of the alleged perpetrators as being "light skinned". The victim testified that when the person got out of the van he had his hand "kind of like over his face ... I don't know if he was pulling it up or he was just holding it up." The investigator's notes state that the victim described one of the men as a light complexion Hispanic or Asian, he saw his face before he put a rag over his face. The other two males were both black males. There is no inconsistency in this testimony.

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(g) Kassim Hosendove identification: Applicant wanted to impeach Investigator McDonald's testimony about how Hosendove came to be a suspect and the fact that he was in Florida when the incident occurred and not at the location. McDonald testified about the victim stating that Applicant and Hosendove were at the store the previous day looking at merchandise. Trial Counsel objected to the testimony and after a side bar conversation, the court sustained the objection. Whatever objection Trial Counsel had about the testimony, the Court sustained the objection, and there was no harm to the Applicant. Trial Counsel was protecting Applicant's interest.

7. Trial counsel provided deficient performance in failing to present or utilize favorable evidence (dispatch records).

Applicant believes the dispatch records would impeach the witnesses about where the shooting occurred. The dispatch records show that a description of the van included possible back glass shot out. According to Applicant, if the shooting occurred inside there is no necessity to describe the back glass as being shot out. According to the Applicant's testimony at trial, he claims he was shot when he was standing outside by the van. The main witness for the state testified that Applicant came and shot at him therefore he returned fire. Other witnesses said they heard no shots fired and did not know what happened before the van left the location.

Dispatch records are hearsay and cannot be offered for the truth of the matter asserted. S.C. Evid. R. 804(8). These records can only be used to show a call was received at a certain date and time or to demonstrate what actions the police took. See State v. Kirby, 325 S.C. 390, 481 S.E.2d 150 (Ct. App. 1996) (testimony about a police dispatch call was not hearsay as it was not offered for the truth but to demonstrate the basis for police investigation). The records do not prove or disprove that shooting took place inside or outside. The dispatch operator was not called as a witness. Further, the records would not reveal who placed the call to police and is not reliable for establishing the truth of what was stated.

This Court finds any allegations of ineffective assistance of counsel for trial counsel's purported failure to utilize differing statements made by witnesses and victims during the incident to be without merit. Trial counsel attacked the credibility of the State's case during closing arguments by utilizing the different statements made by witnesses and victims during the incident.

3. Trial counsel provided ineffective assistance in failing to obtain a crime scene expert to analyze the scene and in failing to challenge the allege victim's version of events in regards to the manner in which he shot Applicant.

According to Applicant, the victim testified at trial that he could only see part of Applicant's body because he [Victim] was behind a partition in the shop. Applicant questions, then, how he was able to get shot below the belt in the pubic area. Further, Applicant states there were no bullet holes in the partition according to the officer.

Trial Counsel testified he consulted with Don Girndt, a crime scene expert. In addition, a Public Defender investigator conducted an investigation. According to the crime scene expert, he would not be able to definitively dispute the state's version of how the shots were fired or how Applicant was able to be wounded. Since the expert would not be able to rule out the possible scenario espoused by the State it would not be beneficial for the defense to obtain one or have Mr. Girndt testify. Trial Counsel made a tactical decision based upon his years of experience and the information presented to him by the crime scene expert not to present testimony from an expert on this point.

The Applicant has not shown that counsel was deficient in that choice of tactics. Trial counsel testified that based upon his years of experience he would not be able to find an expert to reliably refute the State's version of events. Finally, the Applicant did not present any expert testimony at the PCR hearing to refute the State's conclusions and therefore, there can be no prejudice based on trial counsel's purported failure to do the same. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what another expert witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Dalton v. State, 376 S.C. 130, 654 S.E.2d 870 (Ct. App. 2007); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Therefore, it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense. See Dempsey v. State, 363 S.C. 365, 369, 610

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S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."); see also Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) ("Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR."); Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008).

This Court recognizes that indeed in all cases, perhaps trial counsel could have done some things slightly different, but this Court cannot sit to second guess trial counsel's decisions made during the pressures of trial and speculate that other tactics would have been more successful. Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009); Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992); see also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Trial counsel articulated valid strategic reasons for not presenting testimony from his crime scene expert (it supported the victim's), or focusing the jury's attention on the potentially different colored shoes that the victim saw while a gun was pressed against his head, or that the co-defendant's statement occurred partially while the codefendant was under the impression that a fatality had occurred, etc.

9. Counsel provided ineffective assistance in failing to advocate Applicant's defense and attempt to establish victim's version of events as impracticable and implausible.

Applicant states that the victim, Sterling Patterson, testified at trial that two gunmen entered the shop before Applicant. Patterson exchanged gunfire with them before directing his gunfire at Applicant. The gunmen were about ten feet away. Applicant complains that Trial Counsel should have attacked the plausibility of the testimony that Patterson fired multiple shots at two people only ten feet away and missed. During all of this, Applicant with a loaded firearm waited for Patterson to cease firing at the other two before Applicant then started shooting at Patterson. This is unreasonable and if Trial Counsel had challenged the testimony of Patterson, the outcome would have been different.

A review of the transcript reveals that Applicant has misconstrued the testimony. Patterson testified consistently during direct and cross examination by both defense attorneys

about what occurred. His testimony was that he saw three individuals get out of the van. Two of them had weapons and all three had masks. Patterson went to the office to retrieve his gun. He heard the men enter the shop and one instructed Stokes (the other victim) to get on the ground and not to move. As he came out of the office, Patterson made eye contact with the gunmen and began firing. As he fired, two of the men ran out the shop. The remaining gunman (Applicant), who was holding a gun to Stokes, lifted his arm to point the gun at Patterson and Patterson continued to shoot. Applicant was struck. The testimony revealed that all of this occurred within a brief period of time. The testimony elicited by Trial Counsel during cross examination of the witness did not change the testimony of Patterson. Trial counsel was not ineffective. The jury is the ultimate fact finder in the trial. Clearly, the jury did not find the testimony of the victim to be inconsistent.

10. Ineffective assistance of counsel in failing to present favorable (Blood transfusion report) and in failing to adequately cross-examine Dr. Bynoe regarding this evidence.

11. Ineffective assistance of Trial Counsel in failing to obtain a second opinion or an expert to counter Dr. Bynoe's narrow and conclusively stated opinions, or to object to these opinions as outside the scope of his expertise, regarding the lack of blood evidence at the scene of the incident and in failing to adequately cross-examine Dr. Bynoe regarding such.

The transcript testimony does not support Applicant's assertion. Dr. Bynoe testified that "initially in the trauma room he received two units of blood. And from there we gave him – we said his blood loss was two liters." On cross examination by Trial Counsel, Dr. Bynoe was asked, "So he lost two units of blood?" Dr. Bynoe answered, "I said two liters....He got two when he came in. But he lost two liters of blood in his abdomen when we opened him up." The doctor went on to testify during questioning that two liters of blood would be 67 units. Trial Counsel questioned Dr. Bynoe in great detail about Applicant's internal injuries to the lung, abdomen, pelvis, and colon (intestines).

The doctor testified that most of the bleeding that occurred was internal. "The longer you sit the more you are going to bleed." With Applicant's injuries, there were no "vascular structures that are easily accessible to the outside of the body" that were struck to cause external bleeding. Dr. Bynoe was qualified as an expert in trauma, critical care, specifically trauma surgery. Additionally, Dr. Bynoe testified about his treatment of Applicant at the hospital. It was not ineffective for an expert in trauma surgery to testify about the injuries sustained and the effect those injuries would have on internal and external bleeding or blood loss.

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This Court finds the above issue to be without merit, the fact that the Applicant lost significant quantities of blood was not an issue at trial. The Applicant is attempting to use the fact that he received a blood transfusion to support his claim that he must not have been shot in the store because there was no blood found in the store. The Applicant presented no evidence or testimony (expert or otherwise) that would serve to dilute the State's expert who concluded the blood (or lack thereof) was consistent with the facts as presented by the victims. Dr. Bynoe testified that the bleeding experienced by Applicant was mostly internal. They could not identify any external bleeding source when Applicant arrived at the hospital. Further, Dr. Bynoe testified no arteries or veins were hit by the bullets and based upon the nature of his injuries, he may not have left any blood at the scene. Dr. Bynoe testified his total blood loss was two liters. Trial counsel cross examined the doctor in great detail about Applicant's blood loss and transfusion.

Trial Counsel was not ineffective in cross examining Dr. Bynoe and was able to specifically show that Applicant lost a lot of blood as a result of being shot and that his injuries were not superficial. Finally, this Court notes that trial counsel used the blood transfusion evidence throughout his closing argument. Any allegation that trial counsel did not exploit the blood transfusion evidence is wholly without merit.

12. Ineffective assistance of Trial Counsel in failing to obtain an expert to examine the trajectory of the projectiles fired and the wounds suffered by Applicant, or in failing to adequately cross examine Dr. Bynoe regarding the wounds.

This argument focuses on the injury to the upper left shoulder. Dr. Bynoe testified in great length about the wounds, injuries, and treatment of Applicant. Dr. Bynoe could not state which wounds were entry or exit wounds. According to Applicant, the testimony by the victim indicated that Applicant was standing when he was shot. This would preclude a downward trajectory of the bullet entering Applicant's shoulder. Applicant claims he was bending over to get into the car when he was shot and the entry of the projectile into his back and exit at the shoulder is consistent with his testimony. An expert would have supported his testimony. According to trial counsel, all of these claims (the bullets, angles of the bullets, and medical information) were discussed with Don Girndt. Expert testimony would not be able to conclusively establish that the wounds occurred only as espoused by Applicant, but that an expert would also confirm that they wounds could have occurred in a manner consistent with the

evidence presented by the State. Counsel made a tactical decision not to hire an independent expert for that reason.

The Applicant's mere speculation as to what another expert witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). As previously addressed, an applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Dalton v. State, *supra*; Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Therefore, it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense. See Dempsey v. State, *supra*; see also Porter v. State, *supra*.

Because the Applicant did not present any expert testimony at the PCR hearing concerning any expert testimony of bullet trajectory there can be no prejudice based on trial counsel's purported failure to do the same. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what another expert witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Dalton v. State, *supra*; Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Therefore, it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense. See Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."); see also Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) ("Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR.").

13. Ineffective assistance of Trial Counsel in failing to review Applicant's medical records prior to trial and misstating facts as a result thereof.

Applicant claims that Trial Counsel's misstatement in opening statement before the jury about the number of times Applicant was shot conflicted with the testimony of Dr. Bynoe and therefore diminished the credibility of the defense particularly about the lack of blood at the scene.

Based upon all the testimony in this case, this claim is without merit. Any comments made in opening statements to the jury are not evidence. The opening statement serves to inform the jury of the general nature of the action and the issues involved so they can better understand the evidence presented. State v. Brown, 277 S.C. 203, 284 S.E.2d 777 (1981). The evidence that was presented during the course of the trial reveals there were numerous differences in the number of times Applicant was shot, the number of injuries as a result of being shot and the number of bullets and projectiles recovered. Even if Applicant was only shot five times (instead of the eight stated by Trial Counsel in opening), the medical testimony showed the severity of the injuries, the number of internal organs that were damaged by the bullets, the critical nature of the injuries, and the lengthy hospital stay. All of this testimony certainly lent credibility to the defense employed in the case. Trial Counsel testified he had copies of the medical records and had reviewed them. He was prepared for the examination of the physician who treated Applicant. Any misstatement by Trial Counsel was harmless.

14. Trial Counsel was deficient in failing to present evidence that Applicant had invoked his right to have counsel present during questioning.

When Applicant was found bleeding in the van shortly after the incident he informed the officers of his name and requested an attorney. Applicant was immediately transported to the hospital and no questioning was conducted at that time. Applicant states that he was in and out of consciousness. Several weeks later, Applicant was questioned about the incident. He was advised of his Miranda rights prior to any questioning and waived all of his rights. At the Jackson v. Denno hearing before trial, the officer was asked, "Prior to interrogating him also, this defendant had never invoked any of his rights prior to you coming into contact with him on that date, right?" The response was "No, he had not." Applicant claims this was error.

This claim is without merit. The officer who testified was not the officer at the scene several weeks prior when Applicant requested a lawyer. Further, the question was limited to the

specific date on which the officer interrogated him. Even if the request for an attorney several weeks previously could be construed as an ongoing request, Applicant never reasserted his desire to have an attorney present or to speak with an attorney at the time the officers initiated contact with him on the date of the statement. During Applicant's testimony, he testified that he was aware of his rights and waived those rights at the time the officers questioned him and he made the statement. Additionally, Trial Counsel made numerous objections throughout the course of the trial to the admissibility of the statement.

This Court finds the issue relating to trial counsel's purported ineffectiveness to present evidence that the Applicant invoked his right to remain silent to be without merit. A full review of the record reveals that trial counsel made numerous objections to the use/introduction of the statements made by the Applicant to the police. Specifically, during the testimony of the Applicant himself at trial, trial counsel made the proper objections to the introduction (renewal of previous objections) of the Applicant's statements.

15. Ineffective assistance of counsel in failing to present evidence that co-defendant's statement was unreliable and product of coercion and duress.

Applicant states that the co-defendant gave three statements. Only the third statement implicates Applicant. At the pre-trial hearing regarding the statement, the Co-Defendant stated he was coerced and threatened to make the statement. Applicant argues that counsel should have admitted the letters the co-defendant wrote to Applicant while in jail to corroborate the co-defendant's testimony that he was threatened. The co-defendant testified at trial that he was coerced and threatened into making the statement. His testimony was consistent with the information contained in the letters and is simply cumulative and self-serving information. The letters are not independent corroboration of any coercion. Further, a review of the other information contained in the letter could be construed to implicate both defendants. It was not ineffective for counsel not to discuss the letters or to introduce them as evidence to support the coercion. This Court finds this issue to be without merit, Trial Counsel did expose the examples of alleged coercion; he did not need to introduce any letters to cumulate the issue.

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16. Trial Counsel was ineffective in failing to request self-defense charge and request jury be instructed that Applicant had a right to arm himself in self-defense if he reasonably believed he was acting in self-defense.

Applicant's testimony is that he armed himself after seeing the victim with the gun preparing to shoot. He had no intention of robbing anyone. Trial Counsel testified that there was not a basis to seek a self defense charge. Part of self defense is to establish that the defendant was without fault in bringing on the difficulty. Trial Counsel testified that the theory was the defendants were at the scene to collect a drug debt and had armed themselves for that purpose. Self-defense was not part of the defense at trial. Trial Counsel testified the defense strategy was that the Victims' statements were unbelievable and the other evidence presented supported their fabrication. The self defense issue was the sole basis for the direct appeal. The Court of Appeals reviewed the entire record and the brief pursuant to Anders and dismissed the appeal. It was not ineffective for Trial Counsel not to raise this issue.

For a defendant to be entitled to a jury instruction on a lesser-included offense there must be some evidence in the record that would tend to show that the defendant is guilty of the lesser rather than the greater offense. State v. Suber, 371 S.C. 554, 640 S.E.2d 884 (2007); State v. Fields, 356 S.C. 517, 589 S.E.2d 792 (Ct. App. 2003); State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976). The possibility that the jury might believe some of the State's case and not the rest is an insufficient argument for a lesser-included offense instruction. State v. Geiger, 370 S.C. 600, 635 S.E.2d 669 (Ct.App. 2006); Funchess, 267 S.C. at 430, 229 S.E.2d at 332. In the case at hand, the Applicant claims that he should be entitled to a lesser-included offense, such as a gun charge, is without merit.

Furthermore, the Applicant's defense was that there was no armed robbery at all. In such circumstances, a lesser-included offense instruction would not be warranted. Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) (where there was no evidence that the defendant committed assault and battery of a high and aggravated nature as opposed to criminal sexual conduct, a defendant is not entitled to abhan as a lesser included charge of CSC); see e.g. Moultrie v. State, 354 S.C. 646, 583 S.E.2d 436 (2003) (where defendant's defense was that he never assaulted the victim at all, a lesser-included offense charge was not warranted).

17. Ineffective assistance of Trial Counsel in failing to develop viable defense strategy.

Trial Counsel developed a defense strategy that was viable. The strategy employed resulted in a hung jury during the first trial and provided the opportunity to hear all of the testimony to be offered by the State. Trial Counsel articulated valid strategic decisions and the reasons for the decisions made. Considering that Applicant defense was that he was innocent and did not know why the events occurred, the main strategy was to put the State to its burden of proof and to create a reasonable doubt in the minds of the jurors.

Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009); Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992); see also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). [Attorney] articulated valid strategic reasons for [p]. The Applicant has not shown that counsel was deficient in that choice of tactics. In addition, Trial Counsel testified and the record reflects that the strategy was to "poke holes" in the State's case to create reasonable doubt. Considering the burden of proof, this Court finds nothing ineffective regarding trial counsel's tactics nor was the Applicant prejudiced.

18. Denial of effective assistance of counsel in cumulative effect of counsel's errors.

The Uniform Post-Conviction Procedure Act requires the Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (Rev. 2003); Miller v. State, 377 S.C. 99, 659 S.E.2d 492 (2008); Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). This allegation is vague. Since the Applicant has not made the minimum prima facie showing, the Court should dismiss this ground for failure to comply with the Uniform Post-Conviction Procedure Act. In addition, there is no current precedent to support the theory that cumulative errors that are by themselves not prejudicial can be used as a whole to establish prejudice. Lorenzen v. State, *supra*.

This Court has reviewed the record in whole and has read the transcript of record numerous times reviewing not only the testimony of the witnesses discussed by Applicant but all of the witnesses. In considering the testimony of trial counsel and the failure of the Applicant to introduce any expert testimony during the PCR hearing, this Court finds this issue to be without

merit, the Applicant has not presented any factual evidence that he is indeed “actually innocent” and that but for trial counsel’s ineffectiveness the outcome of the trial would have been different. In making a case for “actual innocence,” the evidence would need to show “factual innocence, not mere legal insufficiency.” Bousley v. United States, 523 U.S. 614, 623 (1998).

CONCLUSION

As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed. As stated above, this Court finds that most, if not all, of the Applicant’s allegations are framed around trial counsel’s failure to elicit testimony or present evidence to support the Applicant’s version of events that there was no armed robbery, that the shootout occurred outside, as opposed to the victims’ claims that the shootout occurred inside – during the course of a robbery. The Applicant does not dispute that a shootout occurred, that he armed himself and fired shots at the victim. This Court finds that the Applicant has failed to meet his burden of proof and convince this Court that trial counsel could have done more to convince the jury that the victim’s were lying about both where the shooting took place and the existence of the armed robbery.

This Court finds Applicant’s testimony is not credible, while also finding trial counsel’s testimony is credible. Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – counsel failed to render reasonably effective assistance under prevailing professional norms. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by counsel’s performance.

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. Counsel was not deficient in any manner, nor was Applicant prejudiced by counsel’s representation. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

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, 409 S.E.2d 395 (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.

Applicant and counsel are directed to Rules 203, 208, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

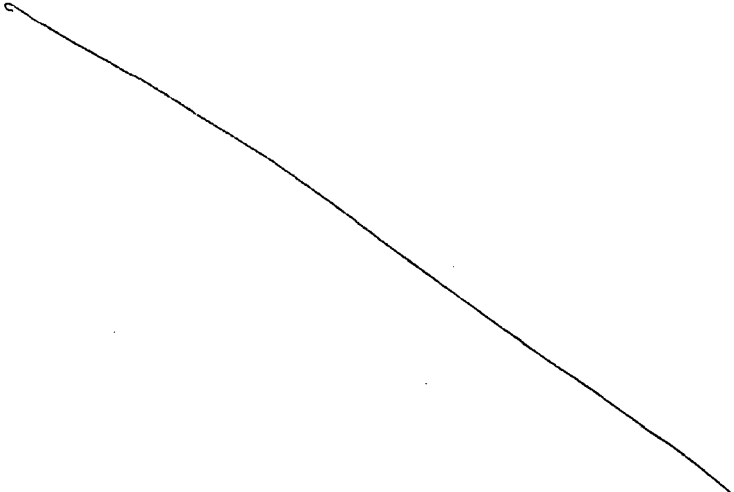
IT IS THEREFORE ORDERED:

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.


ALISON RENEE LEE
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina
December 22, 2009


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