

LAW OFFICE OF  
**Kristy Grafton Goldberg, LLC**  
ATTORNEY AT LAW

---

September 3, 2013

**RECEIVED**

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

SEP 05 2013

**S.C. SUPREME COURT**

RE: Jerry McGriff, SCDC # 178234, vs. State of South Carolina  
Case No. 2011-CP-29-01704

Dear Mr. Shearouse,

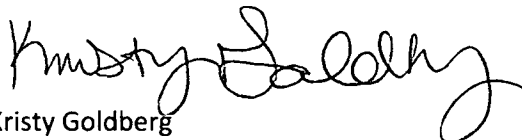
Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the court order which is to be challenged on appeal.

I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal so that they may begin representation of Mr. Woods. I am also hereby requesting that Appellate Defense obtain a copy of the court transcript within the time required by this court.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,

  
Kristy Goldberg

CC: Suzanne White  
Assistant Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211-1549

Jerry McGriff, SCDC # 178234  
McCormick Correctional Institution  
386 Redemption Way  
McCormick, SC 29899

Jeff Hammond, Clerk of Court  
Post Office Box 1809  
Lancaster, South Carolina 29721

Office of Appellate Defense  
Chief Appellate Defender – Robert Dudek  
PO Box 11433  
Columbia, SC 29211-1433

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

SEP 05 2013

**S.C. SUPREME COURT**

APPEAL FROM LANCASTER COUNTY  
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2011-CP-29-01704

Jerry McGriff, SCDC # 178234, ..... Appellant

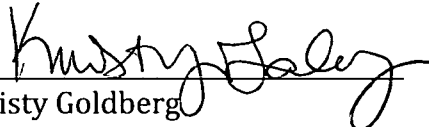
v.

State of South Carolina, ..... Respondent.

NOTICE OF APPEAL

Applicant Jerry McGriff hereby appeals from the Order of the Honorable J. Ernest Kinard, Jr. presiding Judge for the 6<sup>th</sup> Judicial Circuit, filed August 21, 2013 and received by counsel for the Applicant on August 29, 2013 in the matter of Jerry McGriff v. State of South Carolina, Case No. 2011-CP-29-01704.

September 3, 2013

  
\_\_\_\_\_  
Kristy Goldberg  
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.  
1720 Main Street, Suite 301  
Columbia, SC 29201  
Phone (803) 252-2299  
kristy@kristygoldberglaw.com

Other Counsel of Record:

Assistant Attorney General, Suzanne White  
Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM LANCASTER COUNTY  
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

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Case No. 2011-CP-29-01704

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Jerry McGriff, SCDC # 178234, ..... Appellant

v.

State of South Carolina, ..... Respondent.

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PROOF OF SERVICE

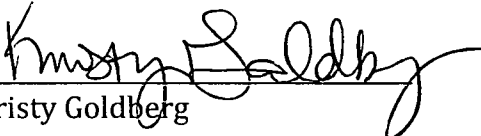
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Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes  
and states:

She is the counsel of record for Applicant;  
Service by mail is proper in this instance; and  
She has served the NOTICE OF APPEAL on the following party on September 3, 2013 by  
depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Suzanne White  
Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211

September 3, 2013

  
Kristy Goldberg

Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.  
1720 Main Street, Suite 301  
Columbia, SC 29201  
Phone (803) 252-2299  
[kristy@kristygoldberglaw.com](mailto:kristy@kristygoldberglaw.com)

# Lancaster County

Jeff Hammond  
Clerk of Court

Clerk of Court of Lancaster County  
Post Office Box 1809  
Lancaster, S.C. 29721

Phone (803) 285-1581  
Fax (803) 416-9388

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

IN THE COURT OF COMMON PLEAS

6<sup>TH</sup> JUDICIAL CIRCUIT

Jerry Louis McGriff #178234

Applicant

VS

State of South Carolina

Respondent

## CERTIFICATE OF SERVICE

CASE# 2011-CP-29-01704

I certify that, on (date) August 21, 2013, I served a copy of the Order of Dismissal by mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Jerry Louis McGriff #178234  
McCormick Correctional Institution

Suzanne H White  
P.O. Box 11549  
Columbia, SC 29211

Anne Mueller  
P.O. Box 11549  
Columbia, SC 29211

Kristy Grafton Goldberg  
1720 Main Street, Suite 301  
Columbia, SC 29201

FILED  
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OF COURT  
2013 AUG 21 PM 1:37  
CLERK OF COURT  
LANCASTER, SC

8/21/13

Date

Jeff Hammond  
Signature

Jeff Hammond

8/21/2013

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Clerk of Court of Lancaster County  
Post Office Box 1809  
Lancaster, S.C. 29721  
(803) 285-1581


Jerry Louis McGriff, #178234

Re: Case# 2011-CP-29-01704

Mr. McGriff:

I have enclosed a copy of the Order of Dismissal.

Sincerely,



Jeff Hammond  
Clerk of Court

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CLERK OF COURT  
LANCASTER, SC

# Lancaster County

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STATE OF SOUTH CAROLINA  
COUNTY OF LANCASTER

IN THE COURT OF COMMON PLEAS  
6<sup>TH</sup> JUDICIAL CIRCUIT

Jerry Louis McGriff #178234

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VS

State of South Carolina

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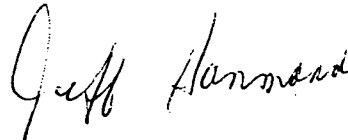
Jerry Louis McGriff, #178234

Re: Case# 2011-CP-29-01704

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I have enclosed a copy of the Order of Dismissal.

Sincerely,



Jeff Hammond  
Clerk of Court

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OF COURT  
2013 AUG 21 PM 1:37  
CLERK OF COURT  
LANCASTER, SC

STATE OF SOUTH CAROLINA )

COUNTY OF LANCASTER )

Jerry Louis McGriff, #178234, )

Applicant, )

v. )

State of South Carolina, )

Respondent. )

IN THE COURT OF COMMON PLEAS  
SIXTH JUDICIAL CIRCUIT

2011-CP-29-1704

ORDER OF DISMISSAL

FILED  
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OF COURT  
2013 AUG 21 PM 2:36  
CLERK OF COURT  
LANCASTER, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 15, 2011<sup>1</sup>, and amended application filed January 30, 2013. The Respondent made its Return on or about July 17, 2012. An evidentiary hearing into the matter was convened on February 5, 2013, at the Lancaster County Courthouse. The Applicant was present at the hearing and was represented by Kristy G. Goldberg, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. William P. Frick, Esquire, also testified. This Court also had before it a copy of the records of the Lancaster County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, the trial transcript, and exhibits presented to the Court by the Applicant.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lancaster County Clerk of Court. The Applicant was

<sup>1</sup> This Court notes that Applicant attached a document captioned "Motion for Discovery," requesting a reproduction of his file to include a transcript of the grand jury proceedings and minutes, with his application, which was

indicted at the March 2007 term of the Lancaster County Grand Jury for murder (07-GS-29-0305), unlawful carrying of pistol (07-GS-29-0306), and possession of weapon during commission of a violent crime (07-GS-29-0307). He was represented by William P. Frick, Esquire. On May 7, 2008, the Applicant proceeded to trial where he was found guilty as charged. He was sentenced by the Honorable Brooks P. Goldsmith to a term of confinement of forty years for murder, five years for possession of a weapon during the commission of a violent crime, and one year for unlawful carrying of a pistol, all set to run concurrently.

The Applicant filed a timely Notice of Appeal. The South Carolina Court of Appeals affirmed his conviction and sentence. State v. McGriff, Op. No. 2010-UP-538 (filed December 16, 2010). The Remittitur was returned on January 5, 2011.

### ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel, in that:
  - a. Counsel failed to object to introduction of foundation vent used by State as evidence,
  - b. Counsel failed to object to allowing the concept of "hand of one, hand of all" to broaden the scope of his indictment,
  - c. Counsel failed to ensure Applicant was aware of possibility of conviction based upon accomplice liability, which led to Applicant's decision to reject plea offer and proceed to trial,
  - d. Counsel failed to inform Applicant as to the law relating to probable cause and how the 4<sup>th</sup> amendment applied to the case,
  - e. Counsel failed to investigate or make motion for probable cause hearing regarding arrest warrant,
  - f. Counsel failed to object to jury instructions on reasonable doubt,

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addressed in the State's Return. The request was not raised at the hearing, so this Court finds that the request and motion were voluntarily waived.

- g. Counsel failed to request twenty-four delay between conviction and sentencing proceedings and failure to request signatures of all jury members on verdict form,
  - h. Counsel failed to make a motion to sequester witnesses,
  - i. Counsel failed to request a jury instruction on a lesser-included offense,
  - j. Counsel failed to object to the prosecution's use of the word "mob" (Tr. p. 420),
  - k. Counsel failed to object to inadmissible hearsay statements made by the victim,
  - l. Counsel failed to properly impeach William Jackson with a prior inconsistent statement,
  - m. Counsel failed to correctly advise Applicant regarding admissibility of prior convictions, resulting in Applicant involuntarily waiving his right to testify and
2. Ineffective assistance of appellate counsel, in that;
- a. Appellate counsel failed to raise issue of improper jury charge regarding inference of malice based upon use of deadly weapon,
  - b. Appellate counsel failed to file for a writ of certiorari or object to the State's statement of facts.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

This Court finds that, as indicated by the Applicant and his counsel at the beginning of the hearing, Applicant voluntarily waived the allegations of ineffective assistance of counsel as it relates to failure to correctly advise Applicant regarding admissibility of prior convictions, resulting in Applicant involuntarily waiving his right to testify and failing to move to sequester

witnesses.

### **Ineffective Assistance of Counsel**

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

*Pre-trial investigations, communication, and motions*

The Applicant alleged that Counsel was ineffective because he failed to ensure that the Applicant was aware of the possibility of his conviction based upon the theory of accomplice liability, which led to Applicant's decision to reject plea offer and proceed to trial. The Applicant testified that he was served an arrest warrant for murder, but the warrant did not indicate anyone else was involved and his indictment indicated that Applicant was being charged with the murder, but does not reference a conspiracy. In fact, the Applicant testified that three co-defendants were also arrested, but they were charged with accessory before the fact to murder and possession of a weapon charges. The Applicant testified that Counsel never discussed the concept of accomplice liability or "hand of one, hand of all" with the Applicant. The Applicant testified that the State offered to allow him to plead to voluntary manslaughter for a sentence of thirty years, but he did not want to plead guilty because he did not kill anyone. However, Applicant testified that he probably would have taken an Alford plea had he understood the concept of "hand of one, hand of all." Applicant presented the arrest warrant, indictment and case histories for the co-defendants as exhibits.

Counsel acknowledged that the concept of accomplice liability is sometimes difficult to explain and had not been a topic of discussion prior to the trial based upon the evidence and statements provided in discovery. Counsel testified that the State's theory of accomplice liability appeared to develop during trial following the testimony of Mr. Jackson, so Counsel attempted to address the issue during trial as best he could. However, Counsel testified that the Applicant was always aware of the possibility of a charge of murder as a principal or accomplice, but as indicated, Counsel testified that he was not sure that Applicant fully understood the concept.

Counsel testified that he always uses the example of a Felony DUI case from the Upstate where someone who was not the driver of a vehicle that killed someone was found guilty as an accomplice. Counsel testified that he always talks with his clients about changes as they occur during trial. Counsel testified that he does not independently recall the State's offer, but does recall the Applicant indicating that he did not think it was a good offer and he was adamant that he did not want to plead guilty.

This Court finds the testimony of Counsel to be credible as to this issue. Although the concept is one that can be difficult to understand, it is clear that Counsel attempted to explain the concept and possibility of conviction based upon the concept to Applicant. This Court does not find it credible that the Applicant would have chosen to plead guilty to voluntary manslaughter for thirty years based upon his continued claim of innocence. In addition, this Court notes that the Applicant testified that he "probably" would have taken the offer, indicating that he was not confident that he would have made that decision if he had the opportunity again. This Court finds that Counsel acted reasonably in how he handled the information available prior to trial and changes that occurred during trial. Therefore, this claim is denied and dismissed.

The Applicant also alleged that Counsel failed to inform Applicant as to the law relating to probable cause and how the 4<sup>th</sup> amendment applied to the case and failed to make a motion for a probable cause hearing regarding the arrest warrant. However, at the PCR hearing, the Applicant failed to offer any testimony or evidence to support this claim. Therefore, this Court finds that the Applicant has failed to meet his burden of proof as to this claim and it is denied and dismissed.

#### *Trial actions*

The Applicant alleged that Counsel was ineffective when he failed to object to the

prosecution's use of word "mob" during cross-examination. Counsel testified that he had not and did not believe that it was anything that affected the trial. This Court notes that the Applicant specifically referred to the transcript where the word "mob" was used only twice during the State's cross-examination of one of the defense witnesses, while the word "crowd" was used three times. (Tr. p. 420). This Court finds that there Counsel was not deficient for failing to object to the word "mob" used during the State's cross-examination, when there is no indication that the word had any impact on the jury's decision or verdict. Therefore, this claim is denied and dismissed.

The Applicant also alleged that Counsel was ineffective when he failed to object to the introduction of the foundation vent by State as evidence. Counsel testified that he was not aware that the State intended to introduce the foundation vent into evidence at trial, but saw no reason to object because the State did not have a bullet or gun to link to the apparent hole in the vent. This Court finds that the Applicant has failed to meet his burden of proof as to this claim. The Applicant has failed to establish that the introduction of the foundation vent had any effect on the jury or that the outcome of his trial would have been different had Counsel made an objection to the vent. Therefore, this claim is denied and dismissed.

The Applicant argued that Counsel was ineffective when he failed to object to allowing the State to broaden the scope of his indictment by the concept of "hand of one, hand of all." As indicated previously, Applicant testified that he was not aware of the concept or possibility that he could be convicted of murder even if the jury believed that his cousin and not Applicant shot the victim. "It is well settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Dickman, 341 S.C. 293,

295, 534 S.E.2d 268, 269 (2000)). This Court finds that the Applicant failed to meet his burden of proof as to this claim. There is no evidence presented that Counsel acted unreasonably or was deficient relating to this issue. Therefore, this claim is denied and dismissed.

Specifically, as it relates to the State's request to charge the jury with the "hand of one, hand of all," the record reflects that Counsel did object to the jury being presented with that instruction; however, Counsel's objection was overruled. In fact, this Court notes that the issue raised and ruled upon on appeal was whether or not the jury instruction relating to the "hand of one, hand of all" was proper. The South Carolina Court of Appeals ruled that the charge was appropriate based upon the evidence presented at trial and affirmed the Applicant's conviction and sentence. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). Counsel cannot be found ineffective for failing to object to the presentation of "hand of one, hand of all" to a jury when the Court of Appeals found that the instruction was properly provided to the jury. Therefore, this claim is denied and dismissed.

The Applicant also argued that Counsel was ineffective because Counsel failed to properly impeach William Jackson with prior inconsistent statements. Applicant also testified that he thought that both Mr. Jackson and Ms. Barbara Green would testify as to what they stated they saw as indicated in the incident report. Applicant presented the incident report to the Court as an exhibit and noted that the investigating officer at the time indicated that Mr. Jackson stated that he never saw the Applicant with a gun; however, at trial Mr. Jackson testified that he did see the Applicant with a gun. Counsel testified that he did not believe the incident report could have

been used to impeach Mr. Jackson and he felt that he had sufficiently drawn attention to the inconsistent statements Jackson made. In fact, Counsel testified that he felt that every witness had credibility issues and he attempted to draw attention to inconsistencies.

In regards to the Applicant's allegation that Counsel was deficient in his cross-examination of Jackson, this Court finds that the Applicant has failed to meet his burden of proof. The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2<sup>nd</sup> 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 (7<sup>th</sup> Cir. 1995). The record reflects that Counsel did attempt to bring to light the various inconsistencies in Jackson's testimony, as well as impeach his credibility with his prior record. The record also reflects that Counsel focused on issues of inconsistencies and lack of credibility with all of the state witnesses. Accordingly, the Applicant has not shown that a different approach to cross-examination of Mr. Jackson or other witnesses would have been beneficial to the defense. This claim is dismissed.

The Applicant claimed that Counsel was ineffective when he failed to object to inadmissible hearsay statements made by the victim and introduced through the testimony of others, specifically during the testimony of the victim's brother, Shaun Witherspoon. Counsel testified that he did not recall any particular issues of hearsay during Shaun's testimony and believed that overall, the State did a good job with trying to keep issues of hearsay out. This Court notes that there are several references in the transcript where the State informed the witness that he could not testify as to what his brother or anyone else said or told him. (Tr. p. 55,

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56, 59). However, this Court finds that even if Counsel was deficient for failing to object to instances of hearsay, the Applicant has failed to meet his burden of proof in establishing that Counsel was ineffective. The Applicant failed to demonstrate that he was prejudiced by Counsel's failure to object to hearsay. Therefore, this claim is denied and dismissed.

The Applicant also alleged that Counsel was ineffective when he failed to request a twenty-four hour delay between conviction and sentencing proceedings and failed to request signatures of all jury members on verdict form. However, the Applicant failed to present any testimony or evidence in support of either of these allegations. Therefore, this Court finds that the Applicant failed to meet his burden of proof and the allegations are denied and dismissed.

#### *Jury charges*

The Applicant alleged that Counsel was ineffective when he failed to object to the jury instructions on reasonable doubt. This Court finds that the Applicant failed to offer any testimony or evidence in support of this claim, so it is denied and dismissed.

However, Applicant also referenced the jury instructions regarding "implied malice" by possession of a weapon. Counsel testified that at the time of Applicant's trial, the jury instructions regarding "implied malice" were proper because the Belcher case had not come out, which held that the charge instructing juries that malice should be inferred from the use of a deadly weapon was no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). This Court notes that there was no evidence introduced to justify the homicide, rather, the Applicant's defense was one of innocence. South Carolina law dictates that jury instructions, when analyzed, must be considered in their entirety. See Todd v. State, 355 S.C. 396, 585 S.E.2d 305 (2003). Based upon the review of the jury instructions and evidence

presented at trial, this Court finds that Counsel was not ineffective for failing to object to the jury charge regarding "implied malice," especially in light of the evidence presented that Applicant waited outside of the victim's residence for the night following an earlier altercation. Therefore, this claim is denied and dismissed.

The Applicant alleged that Counsel failed to request a jury instruction on a lesser-included offense. The Applicant testified that he never discussed a lesser-included charge with Counsel, but believes that Counsel should have requested an assault charge. Counsel testified that he did not believe that the evidence presented would have allowed for a jury charge on assault and battery with intent to kill or any other assault charge. However, Counsel did note that he requested and the jury was charged with mere presence.

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. 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. Funchess, 267 S.C. at 430, 229 S.E.2d at 332. The fact that the Applicant claims that he did not shoot the victim, but acknowledges fighting with the victim prior to the shooting is not sufficient evidence for a lesser-included offense of assault, as the victim died by gunshot when he was running away from the Applicant and Applicant's cousin. Therefore, this Court finds that Counsel is not deficient for failing to request a charge on a lesser-included offense, when the evidence does not support the charge. This claim is denied and dismissed.

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

The Applicant also alleged that he received ineffective assistance of appellate counsel because of appellate counsel's failure to file a Petition for Writ of Certiorari and for failing to object to the statement of facts in the State's appellate brief. Applicant testified that he discussed his case with appellate counsel through letters and paperwork, but believes that appellate counsel should have filed a Petition for Writ of Certiorari. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift v. State, 302 S.C. 535, 537, 397 S.E.2d 523, 525 (1990); Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). The Applicant provided no evidence that appellate counsel's performance was deficient or that had a Petitioner for Writ of Certiorari been filed and objections to the statement of facts made, the outcome of his appeal would have been any different. Therefore, this claim is denied and dismissed.

#### *Summary*

This Court finds in regards to the allegations of ineffective assistance of counsel, Counsel's testimony is most credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that

Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland -- that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

### CONCLUSION

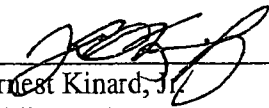
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

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

**AND IT IS SO ORDERED** this 19 day of AUGUST, 2013.

  
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J. Ernest Kinard, Jr.  
Presiding Judge

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