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September 3, 2013

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: Johnnie L. Jones, #340271 vs. State of South Carolina
Case No. 2012-CP-05-077

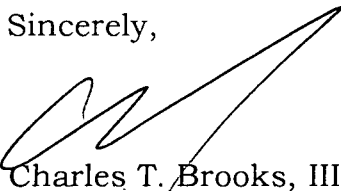
Dear Sir or Madam:

Enclosed herewith you will find the **Notice of Appeal, Order of Dismissal**, along with a **Proof of Service** in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,



Charles T. Brooks, III
CTB/srw

RECEIVED

SEP 06 2013

S.C. SUPREME COURT

Enclosed as stated

Cc: Daniel Gourley, Office of Attorney's General
South Carolina Office of Appellate Defense
Johnnie L. Jones, #340271

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas
Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Case No: 2012-CP-05-077

Johnnie L. Jones.....Appellant
S.C.D.C. 340271
v.
The State Respondent

NOTICE OF APPEAL

Johnnie L. Jones, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable R. Ferrell Cothran, Jr., August 19, 2013, which I, Charles T. Brooks, III, received on August 28, 2013.

RECEIVED

SEP 10 2013

S.C. SUPREME COURT



Charles T. Brooks, III
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Attorney for Appellant

Other Counsel on Record:
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BAMBERG COUNTY

Court of Common Pleas
Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Case No: 2012-CP-05-077

Johnnie L. Jones.....Appellant

S.C.D.C. 340271

v.

The State..... Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 3rd day of September, 2013, I served the foregoing **Notice of Appeal, Order of Dismissal**, as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on September 3, 2013, addressed to the following as indicated below:

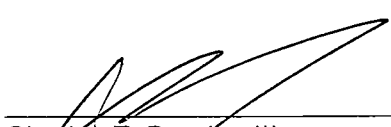
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

South Carolina Office of Appellate Defense
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29211-1589

Office of Attorney's General
Attn: Daniel Gourley, Esquire
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Columbia, South Carolina 29211-1549

Johnnie L. Jones, 340271
Lieber Correctional Institution
PO Box 205
Ridgeville, South Carolina, 29472

Dated: September 3, 2013



Charles T. Brooks, III
Attorney for the Appellant
309 Broad Street
Sumter, South Carolina 29150
(803) 418-5708

STATE OF SOUTH CAROLINA
COUNTY OF BAMBERG

FILED
BAMBERG COUNTY
2013 AUG 23
9:15
CLERK OF COURT
BAMBERG, SC

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Johnnie L. Jones, #340271,

Case No. 2012-CP-05-077

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before the Court by way of an application for post-conviction relief filed April 30, 2012, and amended July 1, 2013. Respondent made its Return on August 9, 2012. An evidentiary hearing into the matter was convened on July 8, 2013, at the Aiken County Courthouse. Applicant was present at the hearing and was represented Charles T. Brooks, III, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Bamberg County Clerk of Court. Applicant was indicted at the June 2007 term of the Bamberg County Grand Jury for Attempted Kidnapping (2007-GS-05-169) and Assault and Battery with Intent to Kill (2007-GS-05-168). On April 13, 2010, Applicant proceeded to a jury trial before The Honorable Doyet A. Early, III. Judge Early sentenced Applicant to a period of eighteen years confinement for Attempted Kidnapping and ten years for Assault and Battery of a High and Aggravated Nature, with the sentences to be served concurrently.

Applicant subsequently filed a Notice of Appeal and an appeal was perfected. On January 25, 2012, the South Carolina Court of Appeals affirmed the sentences and convictions and dismissed the Appeal. State v. Jones, No. 2012-UP-034 (Ct. App. January 25, 2012). The Remittitur was sent on February 14, 2012.

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

1. Ineffective Assistance of Counsel.
 - a. "Failing to object to the solicitor's improper closing that violated the golden rule and denied Petitioner his right to a fair trial."
 - b. "Failing to request the trial court instruct the jury on essential element of 'criminal intent,' which is an essential element of every common law offense."
 - c. "Lack of Chain of Custody"
 - d. "Solicitor misleading witness"
 - e. "Counsel never discussed plea bargain with Applicant."

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from plea counsel, Daniel W. Luginbill, Esquire (Counsel). This Court also had before it a copy of Applicant's trial transcript, the records of the Bamberg County Clerk of Court, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified Counsel was appointed to represent him for his various charges and he met with Counsel twice prior to his trial. Applicant testified he was out on bond for three years prior to his trial. Applicant testified he recalled reviewing discovery with Counsel. Applicant further testified Counsel conducted no investigation in the case. Applicant testified he discussed possible defenses with Counsel and gave Counsel several

witnesses to investigate all of whom testified at trial. Applicant testified that he viewed evidence with Counsel and Police at Counsel's office. Applicant further testified SLED conducted a mouth swab for DNA analysis. Applicant testified Counsel failed to object to Solicitor's closing argument when the Solicitor mischaracterized the trench coat as a windbreaker. Applicant testified he was concerned that the jury was unable to hear a portion of the testimony of one of the witnesses. Applicant further testified Sandra Tavanis perjured herself regarding a chain of custody issue involving evidence being placed in a brown paper bag and then a clear plastic bag. Applicant testified that he learned after his trial that there had been a three year plea offer with additional probation time. Applicant further testified "I know I deserved time and [Judge] Lee gave me time I know I deserve."

Following Applicant's testimony, Counsel was called to testify by the State. Counsel testified he has been practicing Criminal Law since the early 2000's. Counsel testified he was court appointed. Counsel further testified he met with Applicant at least six separate times prior to his trial. Counsel testified he received discovery in this case and reviewed it with Applicant. Counsel further testified he received and reviewed several medical records per Applicant's request. Counsel testified he investigated all leads and spoke with all potential witnesses prior to trial. Counsel testified they raised the defense of alibi. Counsel testified there was incriminating evidence against Applicant. Specifically, Counsel testified there was physical evidence including a jacket, stalking cap, and blood splatter. Counsel testified Applicant's DNA and Victim's DNA were found on several different pieces of evidence.

Counsel testified that Applicant was mischaracterizing the law in regards to the Solicitor's closing argument and he did not feel there was any basis for an objection. Counsel further testified there was no basis for an objection to the jury charge as given and it was his

opinion that as a whole, the charge accurately reflected the law. Counsel testified he attempted to negotiate a plea bargain with the Solicitor. However, the Solicitor refused to offer a plea deal. Counsel testified the police brought evidence, including a coat, wool cap, and glove to his office, and he and Applicant viewed the evidence. Counsel testified Applicant stated the coat belonged to him. Regarding the chain of evidence, Counsel testified he objected to the introduction of the evidence based on a chain of custody issue. Counsel was concerned that the evidence was initially placed in a brown paper bag and then was documented as being in a clear plastic bag. Counsel testified, at the time there had been no testimony explaining who removed the evidence from the brown paper bag into the clear plastic bag. Counsel testified the State recalled Sandra Tavanis, who perjured herself by admitting that she had taken the evidence out of the brown paper bag and placed it in the clear plastic bag. Counsel testified he made it a point to argue to the jury that Sandra Tavanis had perjured herself.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Specifically, this Court finds that Counsel's testimony is very credible while Applicant's testimony is not as credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must

prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. After careful review based on the standard discussed above, the Applicant has failed to carry his burden in this action.

Counsel was ineffective for failing to object to Solicitor's closing argument

This Court finds Applicant's allegation that he was denied effective assistance of trial counsel due to Counsel's failure to object to Solicitor's closing argument is without merit. This Court finds that after careful review of the trial transcript, along with Counsel's credible testimony, there was nothing improper with the Solicitor's closing argument. The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be

drawn from the evidence. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Furthermore, the solicitor's closing argument must not appeal to the personal biases of the jurors. Id. To be entitled to a new trial for improper closing arguments, the test is whether "the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (2001). This Court finds the Solicitor's closing argument was confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. Therefore, this Court finds Applicant has failed to meet his burden of proving Counsel's performance was deficient for not objecting to the Solicitor's closing argument or that he was prejudiced thereby. Accordingly, this allegation is denied.

Counsel failed to request the trial judge instruct jury on essential element of criminal intent

Applicant alleges Counsel was ineffective for failing to request the trial judge instruct the jury on the "essential element of criminal intent" is without merit. The trial judge charged "Intent simply means the, intending the result which actually occurred. It's not accidental or involuntary. Intent may be shown by acts and conduct of the defendant from other circumstances from which you may naturally and reasonably infer intent." This Court finds the trial judge properly charged the standard intent charge. See State v. Foust, 325 S.C. 12, 15, 479 S.E.2d 50 (1996) (holding "in charging juries the law of ABWIK, South Carolina trial judges should give a standard 'intent' charge). Counsel testified that he saw no basis for an objection to the jury instruction. Counsel further testified that in his opinion the jury instruction accurately charged the law. This Court finds Counsel's performance was reasonable and effective. Therefore, this Court finds this allegation of ineffective assistance of counsel must be denied and dismissed with prejudice.

Counsel was ineffective for failing to object to chain of custody

Applicant alleges Counsel was ineffective for failing to object to chain of custody issue involving evidence being removed from a brown paper bag and put into a clear plastic bag is without merit. Counsel testified that he objected to the chain of custody and that objection was overruled. Counsel further testified the State called Sandra Tavanis, whose perjured testimony explained that she took the evidence out of the brown paper bag and put the evidence into the clear plastic bag. This Court finds Applicant has failed to meet his burden of proof in regards to this allegation and therefore, it must be denied and dismissed with prejudice. Based on the foregoing, this Court finds that Applicant has not shown that trial counsel's performance fell below "professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

Solicitor misleading witness

Applicant alleges Counsel was ineffective for failing to object to the Solicitor misleading witnesses. This Court finds Applicant failed to allege any specific incidents where Solicitor allegedly misled witnesses. Further, this Court finds Counsel's performance reasonable and effective. Based on the foregoing, this Court finds that Applicant has not shown that Counsel's performance fell below "professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

Counsel never discussed plea bargain

Applicant alleges Counsel was ineffective for failing to relay a "three year plea offer plus probation" is without merit. Counsel testified that he presented various plea offers to the Solicitor, however the Solicitor never accepted any of the presented offers. The decision

whether to offer a plea bargain is within the Solicitor's discretion. State v. Johnson, 287 S.C. 171,337 S.E.2d 204, 205 (1985). Counsel further testified, Solicitor never offered a plea deal in this case. Based on the foregoing, this Court finds that Applicant has not shown that trial counsel's performance fell below "professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

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

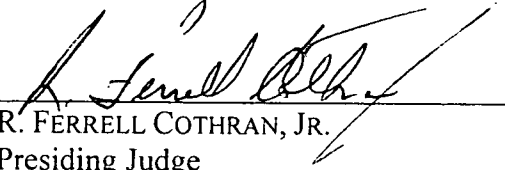
This Court notes that that Applicant must file and serve a Notice of Appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's

behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

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



R. FERRELL COTHRAN, JR.
Presiding Judge
Second Judicial Circuit


_____, South Carolina

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

JOHNNIE L. JONES, #340271

Applicant,

v.

STATE OF SOUTH CAROLINA,

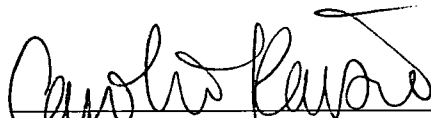
Respondent.

CERTIFICATE OF SERVICE

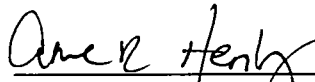
The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

**Charles T. Brooks, III, Esquire
Law Office of Charles T. Brooks, III
309 Broad Street
Sumter SC 29150**

This 27th day of August, 2013.


Caroline Kaiser, Legal Assistant
For Respondent

SWORN to before me this 27th day of August, 2013.

 7/18/2012
Notary Public for South Carolina.
My Commission Expires:

CHARLES T. BROOKS, III
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