

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

---

Case No.: 2009-CP-02-2417

---

John Kittrell, #334595.....Petitioner,

v.

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

---

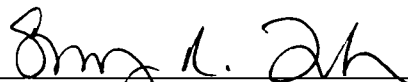
**NOTICE OF APPEAL**

---

The Petitioner John Kittrell, #334595, appeals the Honorable R. Ferrell Cothran, Jr.'s August 23, 2013, order denying post-conviction relief to the Respondent.

Undersigned counsel received notice of entry of the order on September 25, 2013. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

  
\_\_\_\_\_  
Sonja R. Tate  
S.C. Bar No. 16206  
Attorney for Applicant

September 26, 2013

FULCHER HAGLER, LLP  
Post Office Box 1477  
Augusta, GA 30903  
(706) 724-0171

**RECEIVED**

SEP 30 2013

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

---

Case No.: 2009-CP-02-2417

---

John Kittrell, #334595.....Petitioner,

v.

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

---

PROOF OF SERVICE

---

I, Sonja R. Tate, certify that I have today served the within notice of appeal by depositing a copy of it in the United States Mail, postage prepaid, addressed to:

South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

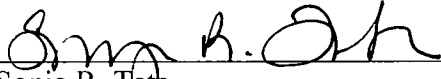
South Carolina Commission on Indigent Defense  
P.O. Box 11433  
Columbia, SC 29211-1433

Office of the Attorney General  
Attn: Megan E. Harrigan  
P.O. Box 11549  
Columbia, SC 29211-1549

John Kittrell, #334595  
Perry Correctional Institution  
430 Oaklawn Road  
Pelzer, SC 29669

Aiken County Court of Common Pleas  
P.O. Box 583  
Aiken, SC 29802

Dated: September 26, 2013

  
\_\_\_\_\_  
Sonja R. Tate  
S.C. Bar No. 16206  
Attorney for Applicant

FULCHER HAGLER, LLP  
Post Office Box 1477  
Augusta, GA 30903  
(706) 724-0171

STATE OF SOUTH CAROLINA )  
COUNTY OF AIKEN )

IN THE COURT OF COMMON PLEAS  
FOR THE SECOND JUDICIAL CIRCUIT

John Kitrell, #334595, )  
Applicant, )

Case No. 2009-CP-02-2417

v. )

**ORDER OF DISMISSAL**

State of South Carolina, )  
Respondent. )

#### PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed October 14, 2009. The Respondent made its Return on December 13, 2009. An evidentiary hearing into the matter was convened on July 10, 2013, at the Aiken County Courthouse. The Applicant was present at the hearing and was represented by Sonja Tate, Esquire. The Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Applicant was indicted during the March 2009 term of the Aiken County Grand Jury for Criminal Sexual Conduct with a Minor in the First Degree (2009-GS-02-336).<sup>1</sup> He was represented by Justin M. Mims, Esquire, on all charges.

On January 7, 2010, Applicant appeared before the Honorable Doyet A. Early, III, where he pled guilty as indicted. Pursuant to negotiations between Applicant and the State, Judge Early sentenced Applicant to the mandatory minimum sentence of twenty-five years

<sup>1</sup> Applicant was also indicted for several other related offense involving the same minor victim, these charges were dismissed pursuant to the plea based on negotiations between the State and Applicant.

FILED 8/23/13  
J. J. Anderson  
C.C.P. & G.S.  
Shannon J. Anderson  
Deputy Clerk

imprisonment. Several other charges involving the same minor victim were also dismissed pursuant to negotiations with the State. Applicant did not appeal his guilty plea or sentence.

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

1. Ineffective Assistance of Counsel.
  - a. "Counsel failed to do any pre-trial investigation."
2. Involuntary Guilty plea;
  - a. "Counsel failed to discuss defenses available:
3. Erroneous advice of counsel
  - a. "Counsel [advised] me to plea without investigation."

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

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented testimony from plea counsel, Justin M. Mims, Esquire (herein "Counsel"). This Court also had before it a copy of the Applicant's guilty plea transcript, the records of the Aiken County Clerk of Court, and the Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified that he met with Counsel three or four times before his guilty plea, as well as corresponded by telephone and letter. He testified that Counsel was appointed to represent him and that Counsel was his second attorney. He elaborated that he asked for a new attorney because his prior counsel did not visit him enough. He testified that he reviewed his discovery with Counsel and that Counsel gave him an entire copy of his discovery. He testified that based on this discovery, he discussed possible defenses with Counsel, including potential witnesses for trial.

Applicant testified that he gave a statement to law enforcement following a polygraph test. He testified that it was his idea to take a polygraph test and that he took the polygraph

voluntarily. He testified that he had been asking Counsel and law enforcement to give him a polygraph test for months. He testified that he left Aiken at six o'clock in the morning to be transported to the South Carolina Law Enforcement Division headquarters in Columbia. He testified that Counsel was not present during testing and that he was not aware Counsel would be absent beforehand. He testified that he ask for Counsel several times throughout the day of testing. He testified that he was given a polygraph test four separate times. He testified that following the testing, he gave a written confession at approximately five o'clock in the evening. He testified that he was "forced" to make a statement after he was "manhandled" and "threatened by detectives." He testified that the statement was "not accurate." He testified that law enforcement made him write the statement over and over again and that he signed the statement. He acknowledged on cross examination that the statement admitted to various sexual acts with the minor victim, who was his girlfriend's minor son that he had raised since birth.

He testified that he met with Counsel twice following the written statement, and that he discussed the statement with Counsel. He testified that "[Counsel] told me I was screwed" and it was "[his] word against law enforcement." He testified that after the statement, Counsel presented him with a negotiated plea offer from the State. He elaborated that the State's offer was for a negotiated twenty five year sentence, which was the mandatory minimum sentence he could receive for Criminal Sexual Conduct with a Minor in the First Degree. He testified that he was aware that the negotiation was that the State would also dismiss several other charges involving the same minor victim. He testified that it was his decision alone to accept the State's plea offer and that he voluntarily took the plea to avoid the possibility of life in prison.

He testified that he recalled telling the plea judge that he wanted to plead guilty and that he was in fact guilty. He testified he agreed with the facts presented by the solicitor during his

plea. He testified that he told the plea court that he was satisfied with his attorney's representation, that he had enough time to discuss the case and available defenses with Counsel, and that Counsel had investigated the case to his satisfaction. He testified that he is serving nineteen natural life sentences for similar crimes in Florida against his son.

Following Applicant's testimony, Respondent called Counsel to testify. Counsel testified that he has been practicing law since 2007 and that at the time of his representation of Applicant, he was employed by the Second Circuit Public Defender's office. He testified that he was the second public defender assigned to the case and that David Mauldin originally represented Applicant. He testified that he met with Applicant as many as five times, as well as spoke to Applicant by phone. He testified that he reviewed the elements of the charges that Applicant faced, as well as the potential sentences with Applicant. He testified that he filed the necessary discovery motions and reviewed all discovery materials with Applicant. He testified that Applicant pointed out several areas in discovery that he wanted Counsel to investigate further and that he followed up per Applicant's request. He testified that the discovery included a forensic interview with the victim, where the minor gave good detail, including specific time frames and locations.

He testified that from the beginning of representation, Applicant requested a polygraph test several times. Counsel testified he asked law enforcement to test Applicant, and after months of asking, the solicitor's office informed him that Applicant could be tested on a particular date with short notice. Counsel testified that he was unavailable on this date due to prior commitments and asked for the test to be rescheduled. He testified that he was told this was the only date offered, and if Applicant turned it down, he might not be able to be tested at a later date. He testified that he informed Applicant of the testing date, but informed him that he

would not be present for the testing due to prior commitments and the short notice given. He testified that Applicant fully understood that Counsel would not be at the testing, but that he still wished to proceed with the polygraph testing in Counsel's absence. He testified that shortly after the polygraph, he received the results indicating deception. He testified that he also learned that Counsel gave an oral statement admitting his guilty on the way back to Aiken from the testing in Columbia. He testified that Applicant also gave a signed, written statement admitting his guilt. He testified that in the written statement, Applicant admitted to performing various sex acts on the minor victim. He testified that he met with Applicant shortly after the statement was given and that Applicant never told him the statement was made undue coercion or duress. He testified that Applicant never told him the statement was involuntary or false.

Counsel testified that prior to Applicant's confession, his approach was to thoroughly review the victim's statement and try to poke as many holes as possible by identifying inconsistencies. He testified that following Applicant's confession, he advised Applicant that the statement would likely be used against him at trial and would likely result in confession. He testified that he believed the statement would be admissible and would likely be deemed voluntary. He testified that Applicant asked him to negotiate a plea offer on his behalf. He testified that the State offered to allow Applicant to plead guilty to Criminal Sexual Conduct with a Minor in the First Degree for the mandatory minimum of twenty-five years, as well as the dismissal for several related offenses involving the same minor victim. He testified that he informed Applicant of the plea offer, the consequences and benefits of the offer, and advised him of his constitutional rights. He testified that Applicant appeared to understand the terms of the offer and never indicated that he did not understand something. He testified that it was Applicant's decision to plead guilty and receive the benefit of the State's plea offer.

## 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 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(c), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, an applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 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). An applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, an applicant must prove that counsel's performance was deficient. Under this

prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

After careful review based on the standard discussed above, Applicant has failed to carry his burden in this action. Specifically, this Court finds that Counsel's testimony is credible while Applicant's testimony is not credible. This Court finds that Applicant's allegations that he was denied effective assistance of plea counsel are without merit. This Court finds that the extensive guilty plea record, as well as the testimony from both Counsel and Applicant, reveals the proficient competency of counsel. Counsel testified that upon receiving discovery, he reviewed the materials and highlighted inconsistencies in the victim's statements. Applicant and Counsel both testified that Applicant repeatedly asked for a polygraph test, which Applicant voluntarily took. Counsel's credible testimony reveals that he fully advised Applicant that he was unable to be present for the polygraph and that Applicant elected to proceed with the test without Counsel present. Following Applicant's confession, which Counsel believed would be admissible at trial, Counsel was able to negotiate an extremely favorable plea deal for the mandatory minimum sentence and the dismissal of several related charges. This Court finds that the Applicant's attorney demonstrated a normal degree of skill, knowledge and professional judgment that is expected of an attorney who practices criminal law. Additionally, this Court finds that the

Applicant has not met the burden of proof with respect to the prejudice requirement, as Applicant stated that he pled guilty to avoid the possibility of a harsher punishment if convicted at trial. Therefore, this Court finds this application must be denied and dismissed with prejudice.

#### CONCLUSION

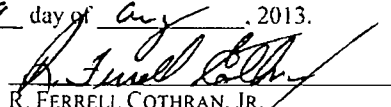
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

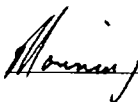
This Court notes that that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right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

#### IT IS THEREFORE ORDERED:

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

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

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

 South Carolina

STATE OF SOUTH CAROLINA )

COUNTY OF AIKEN )

John Kitrell, #334595 )  
 Plaintiff )

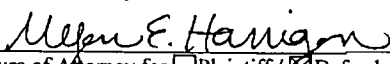
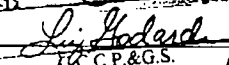
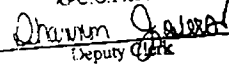
v. )

State Of South Carolina )  
 Defendant. )

IN THE COURT OF COMMON PLEAS

CASE NO.  
2009-CP-02-2417

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

Plaintiff's Attorney: Sonja R. Tate, Bar No. Address: PO Box 1477 Augusta, GA 30903-1477 phone: fax: e-mail: other:	Defendant's Attorney: Megan Harrigan, Bar No. Address: P.O. Box 11549 Columbia, SC 29211 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input checked="" type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
<b>SECTION I: Hearing Information</b>	
Nature of Motion: Estimated Time Needed: Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO	
<b>SECTION II: Motion/Order Type</b>	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	
August 14, 2013 Date submitted	
<b>SECTION III: Motion Fee</b>	
<input type="checkbox"/> PAID - AMOUNT: <input checked="" type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
<b>JUDGE'S SECTION</b> <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	JUDGE _____ CODE: _____ Date: _____
<b>CLERK'S VERIFICATION</b>	
Collected by: _____ <input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	Date Filed: _____ FILED <u>023 13</u>  CC C.P.&G.S.  Deputy Clerk

SCCA/233 (11-03)

FORM 4

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

JUDGMENT IN A CIVIL CASE  
 CASE NUMBER 2009CP0202417

John Kittrell	South Carolina State Of
---------------	-------------------------

PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

**DISPOSITION TYPE (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 or heard and a decision rendered.  See Page 2 for additional information.
- 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; (formal order to follow)  Statement of Judgment by the Court:

**ORDER INFORMATION**

This order  ends  does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order: \_\_\_\_\_

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

Judge Code

8/23/2013

Date

For Clerk of Court Office Use Only

This judgment was entered on 23rd day of August, 2013, and a copy mailed first class or placed in the appropriate attorney's box on 23rd day of August, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Sonja Renee Tate PO Box 1477 Augusta, GA 309031477

Mary Shannon Williams PO Box 11549 Post-Conviction  
Relief Section Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

*Liz Godard* *Mary Shannon Williams* *OK*

Court Reporter

Liz Godard - Clerk of Court

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

---

---

---

---

---

---

---

---

Fulcher Hagler LLP  
ATTORNEYS AT LAW SINCE 1946

PCR

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS  
Post Office Box 1477 • Augusta, Georgia 30903-1477  
One 10th Street, Suite 700 • Augusta, Georgia 30901  
Telephone: (706) 724-0171

Sonja R. Tate  
Direct Fax No: (706) 396-3625  
E-mail Address: [State@fulcherlaw.com](mailto:State@fulcherlaw.com)  
Admitted in Georgia and South Carolina

September 26, 2013

Daniel E. Shearouse, Clerk  
Supreme Court for the State of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

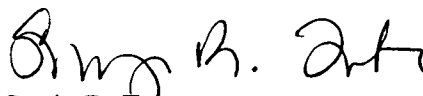
RE: *Notice of Appeal for John Kittrell v. State of South Carolina*  
Our File No. 1016/206

Dear Mr. Shearouse:

Enclosed please find an original and one copy of each of the Notice of Appeal and Proof of Service for filing in the captioned case. Once the originals have been filed, please return the date-stamped copies to me in the envelope provided for your convenience.

Thank you for your assistance.

Very truly yours,

  
Sonja R. Tate  
For the Firm

SRT/gc  
Enclosures

RECEIVED

SEP 30 2013

S.C. SUPREME COURT

neopost<sup>®</sup>

09/26/2013

**US POSTAGE**

**\$01.92**

FIRST-CLASS MAIL



ZIP 30901  
041L11221779

**First Class Mail**

018-1916/206

**Fulcher Hagler LLP**  
ATTORNEYS AT LAW SINCE 1946

Post Office Box 1477 • Augusta, GA 30903-1477  
One 10th Street, Suite 700 • Augusta, GA 30901

Daniel E. Shearouse, Clerk  
Supreme Court for the State of South Carolina  
P.O. Box 11330  
Columbia, SC 29211