

RICHEY AND RICHEY

ATTORNEYS AT LAW

A Professional Association

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**RECEIVED**

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**S.C. SUPREME COURT**

November 4, 2013

*Offices:*  
Greenville/Spartanburg

*Website:*  
www.richeyandrichey.com

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

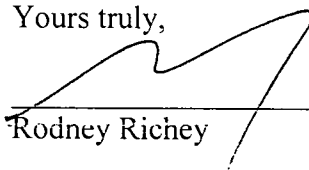
Re: Clarence Crittendon, SCDC # 266744 vs. The State of South Carolina  
Case No: 2012-CP-37-893

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and a Proof of Service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,

  
Rodney Richey

RWR/tlg  
enclosures

cc: Walt Whitmire, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM OCONEE COUNTY  
Court of Common Pleas

HONORABLE R. LAWTON MCINTOSH

2013-CP-37-893

CLARENCE E. CRITTENDON, SCDC#: 266744,

APPELLANT,

against

STATE OF SOUTH CAROLINA,

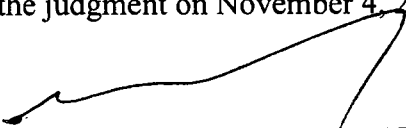
RESPONDENT.

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**NOTICE OF APPEAL**

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Clarence Crittendon appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable R. Lawton McIntosh, Circuit Judge on September 16, 2013 and Order issued on October 25, 2013 and filed on October 31, 2013. The Appellant received notice of the judgment on November 4, 2013.



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Rodney W. Richey  
Attorney for the Appellant  
Post Office Box 10916  
Greenville, South Carolina 29603  
(864) 467-0503

Other Counsel of Record:  
Walt Whitmire, Esquire  
Office of Attorney General State of SC  
Post Office Box 11549  
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM OCONEE COUNTY  
Court of Common Pleas

HONORABLE R. LAWTON MCINTOSH

2013-CP-37-893

CLARENCE E. CRITTENDON, SCDC#: 266744,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

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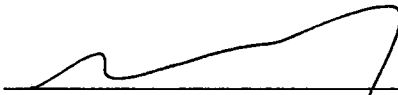
**PROOF OF SERVICE**

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I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on November \_\_, 2013, addressed to their attorney of record, Walt Whitmire, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: November \_\_, 2013

RICHEY & RICHEY, P.A.



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Rodney W. Richey  
Attorney for the Appellant  
Post Office Box 10916  
Greenville, South Carolina 29603  
(864) 467-0503

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-37-00893

Clarence E. Crittendon #266744

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or
	<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)
N/A	N/A	\$N/A
		\$
		\$

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.

**S/ R. LAWTON McINTOSH**

Circuit Court Judge

2155

Judge Code

10/25/2013

Date

**For Clerk of Court Office Use Only**

This judgment was entered on the 31<sup>st</sup> day of October, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 31<sup>st</sup> day of October, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Rodney W. Richey

J. Walt Whitmire

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**ATTORNEY(S) FOR THE DEFENDANT(S)**

Beverly H. Whitfield

**CLERK OF COURT**

**Court Reporter:** Renee Tollison

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**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.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF OCONEE )  
 )  
 Clarence E. Crittendon, )  
 S.C.D.C. No. 266744, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FOR THE TENTH JUDICIAL CIRCUIT

Case No. 2013-37-893

FILED OCT 31 2013  
 BEVERLY H. WHITFIELD  
 CLERK OF COURT  
 31 PM 1 37

**ORDER OF DISMISSAL  
 GRANTING APPELLATE REVIEW  
 PURSANT TO AUSTIN v. STATE<sup>1</sup>**

This matter comes before the Court by way of an Application for post-conviction relief (PCR) filed October 10, 2012. The Respondent made its Partial Return and Motion to Dismiss on January 25, 2013. The matter was scheduled for an evidentiary hearing on September 16, 2013 at the Oconee County court house. Applicant was present and represented by Rodney Richey, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of The Attorney General.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Oconee County Clerk of Court. Applicant was indicted at the March 2004 term of the Oconee County Grand Jury for lewd act upon a child under sixteen (2004-GS-37-0509) and criminal sexual conduct with minor-first degree (2006-GS-37-0927). Bruce Byrholdt, Esquire, represented him. On December 12, 2006, Applicant underwent trial, pursuant to which he was found guilty as indicted. The Honorable Alexander S. Macaulay

<sup>1</sup> Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991)

concurrently sentenced him to confinement for thirty (30) years for lewd act upon a child and fifteen (15) years for criminal sexual conduct with minor-first degree.

A timely Notice of Appeal was filed on Applicant's behalf. On October 6, 2008, the Court of Appeals issued an Order of Dismissal and Remittitur dismissing the appeal because Appellant withdrew the appeal.

**2008-CP-37-1471**

In his first Application, Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
  - a. Counsel failed to investigate applicant's claim the there was a violation of the Speedy Trial Act.
  - b. Counsel failed to investigate whether or not he was set up.
  - c. Counsel failed to object to re-indictment prior to trial.
  - d. Counsel failed to call a medical expert.
  - e. Counsel failed to object to prosecutor's improper comments made during closing arguments alluding to Applicant's right not to testify.
  - f. Counsel failed to request a jury charge of the lesser-included offense of assault and battery of a high and aggravated nature.
2. Prosecutorial misconduct.
3. Lack of subject matter jurisdiction.

The Applicant was present at the hearing and was represented by R. Mills Ariail, Jr., Esquire. The Respondent was represented by Kaelon E. May of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf and offered the testimony of Tim Crittendon. The State offered the testimony of Bruce Byrholdt, Esquire (Mr. Byrholdt) Applicant's trial counsel. The Honorable J. Cordell Maddox, Jr., denied and dismissed the Application with prejudice in an order dated January 5, 2012. Applicant did not appeal.

**2013-37-893**

In Applicant's current application for post-conviction relief, the Applicant alleged he was being held unlawfully for the following reasons:

1. "PCR attorney failed to file appeal to S.C. Supreme Court as directed by Applicant."

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court's records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and exhibits from the prior proceedings, and, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

#### APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

### I.

This Court finds PCR counsel was ineffective for failing to file a notice of appeal from the PCR judge's order of dismissal. Applicant testified he requested an appeal. Applicant submitted correspondence to that effect. PCR counsel testified Applicant wrote him and requested a Rule 59, SCRCP, motion along with an appeal prior to the PCR judge issuing the order the dismissal. PCR counsel testified the request was premature. After the order was issued, PCR counsel directed correspondence to Applicant regarding the matter of an appeal. PCR counsel testified Applicant failed to respond. Thus as a result, PCR counsel did not file a notice of appeal on Applicant's behalf. This Court finds counsel was deficient because it was objectively and subjectively reasonable to believe Applicant desired an appeal although he made a premature request. Therefore, this this Court denies and dismisses this Application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Applicant withdrew any and all other allegations.

### **IT IS THEREFORE ORDERED:**

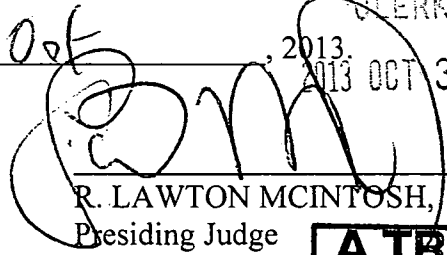
1. That this current Application for Post-Conviction Relief be dismissed.
2. That the Applicant is granted an appeal from the denial of her first PCR application – filed March 29, 2011 and captioned 2008-CP-

32-2692.

FILED OCONEE, SC  
BEVERLY H. WHITFIELD  
CLERK OF COURT

AND IT IS SO ORDERED this 15 day of Oct, 2013.

2013 OCT 31 PM 1 37



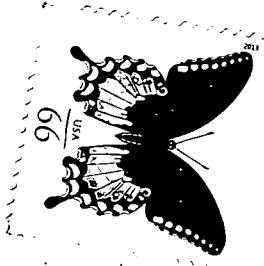
R. LAWTON MCINTOSH,  
Presiding Judge  
Tenth Judicial Circuit

Anderson, South Carolina

**A TRUE COPY**  
**OCT 31 2013**  
CLERK OF COURT - OCONEE COUNTY

Richey & Richey, PA  
Attorneys at Law  
Post Office Box 10916  
Greenville, South Carolina 29603

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



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