



Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1343  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

April 17, 2012

The Honorable Daniel E. Shearouse  
Clerk, S.C. Supreme Court  
Post Office Box 11330  
Columbia, SC 29211

**RECEIVED**

APR 17 2012

**S.C. Supreme Court**

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

Jamie Goss v. State of South Carolina

4/16/2012

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Loriene French  
Legal Services Coordinator



ALAN WILSON  
ATTORNEY GENERAL

February 28, 2012

RECEIVED

**VIA HAND DELIVERY**

FEB 28 2012

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

S.C. Supreme Court

**RE: Jamie Goss v. State of South Carolina  
PCR Appeal – Horry County**

Dear Mr. Shearouse:

A notice of appeal in the above-referenced PCR matter was served on February 1, 2012. I am writing to advise the Court that a "Motion to Amend Judgment, pursuant to Rule 59(e), SCRCP, and/or in the alternative, Motion for Relief from Judgment, pursuant to Rule 60(b), SCRCP" was filed by Petitioner's counsel on January 9, 2012. The motion was served upon the State on January 27, 2012. The State served a response on February 4, 2012, requesting that the motion be dismissed as untimely. As of this date, no order has been filed regarding disposition of Petitioner's motion.

I am attaching copies of Petitioner's motion and the State's response for the court's information. Please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,

Christina J. Catoe  
Assistant Attorney General

Enclosures: Rule 59(e) Motion & Response

cc: Daniel A. Selwa, II, Esquire  
Office of Indigent Defense, Division of Appellate Defense

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )  
 )  
JAMIE GOSS (AKA JAMES GAUSE) )  
#294885, )  
 )  
RESPONDENT, )  
 )  
vs. )  
 )  
STATE OF SOUTH CAROLINA, )  
 )  
APPELLANT. )

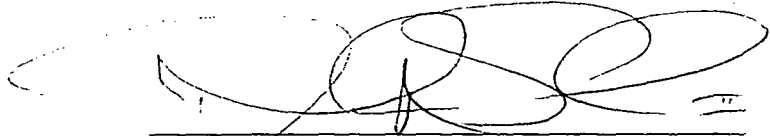
IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-26-10057

MOTION TO AMEND JUDGMENT 59(e)  
AND/OR IN THE ALTERNATIVE  
MOTION FOR RELIEF FROM JUDGMENT  
60(b)

FILED  
CLERK OF COURT  
HORRY COUNTY  
12 JAN - 9 PM 1:11  
RD

PLEASE TAKE NOTICE that the above named Applicant does hereby move before the Honorable Larry B. Hyman in the Court of Common Pleas of the Fifteenth Judicial Circuit for an Order amending the final post conviction relief order and/or in the alternative for an Order granting relief from the final post conviction relief order. The Applicant may file a supplemental brief and memorandum upon receipt of the transcript.



Daniel A. Selwa, II  
*Attorney for Petitioner/Applicant*  
1053 London Street, Suite A  
Myrtle Beach, SC 29577  
(843) 492-5449 Office  
(843) 353-0683 Fax  
(843) 450-7566 Mobile

January 4, 2012

**CERTIFICATE OF SERVICE**

I certify that on this date a copy of the foregoing was served on each party or counsel of record by  mailing  emailing,  facsimile, or  hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 27 day of Jan, 2012

DANIEL A. SELWA, II ATTORNEY AT LAW, LLC

BY: Shella Knight

STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )  
) )  
Jamie Goss, (a.k.a. James Gause), # 294885, )  
) )  
Applicant, )  
) )  
v. )  
) )  
State of South Carolina, )  
) )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT

2010-CP-26-10057

**STATE'S RESPONSE TO APPLICANT'S  
RULE 59(e) / RULE 60(b) MOTION**

The State, making its response to the Applicant's Motion to Amend Judgment, pursuant to Rule 59(e), SCRCPP, and/or in the alternative, Motion for Relief from Judgment, pursuant to Rule 60(b), SCRCPP, would submit the following:

Procedural History

This matter came before the Court pursuant to an Application for post-conviction relief filed October 26, 2010, by Jamie Goss, a.k.a. James Gause. Respondent made a Return on December 23, 2010. An evidentiary hearing was convened at the Horry County Courthouse on November 7, 2011, before the Honorable Larry B. Hyman, Jr. The Applicant was present in court and represented by Daniel A. Selwa, II, Esquire. Following the hearing, the Court issued an Order Denying Post-Conviction Relief on December 6, 2011. The Order was filed on December 16, 2011. On January 9, 2012, the Applicant filed a Motion to Amend Judgment, pursuant to Rule 59(e), SCRCPP, and/or in the alternative, Motion for Relief from Judgment, pursuant to Rule 60(b), SCRCPP. The motion was dated January 4, 2012. The motion was served upon the State by mail on January 27, 2012, as evidenced by a "Certificate of Service" stamp on the motion.

### Argument

First, the State submits that the motion pursuant to Rule 59(e) is not timely and cannot be considered by this Court. Rule 59(e), SCRCP, states that “[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.” Taking into account Rule 6(e), SCRCP (adding five days where the party was served by mail), and assuming the Applicant received the Order Denying Post-Conviction Relief as late as January 4, 2012 (the date on which the motion was signed), the Applicant would have had until January 19, 2012 to serve a timely Rule 59(e) motion. However, the Applicant’s motion was not served until January 27, 2012. Therefore, the State submits the motion is not timely under the rule. The State hereby requests that this Court issue an order dismissing the Rule 59(e) motion on this basis.

Regarding the motion for relief from judgment pursuant to Rule 60(b), SCRCP,<sup>1</sup> which is not required to be served within ten days as is the Rule 59(e) motion, the State cannot respond to the motion because no particular grounds for relief are stated. See Rule 7(b), SCRCP (requiring that all motions “shall state with particularity the grounds therefor, and shall set forth the relief or order sought.”). In any event, Rule 60(b) provides for relief from a judgment for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer

---

<sup>1</sup> Respondent would note that although a *timely* Rule 59(e) motion stays the 30-day appeal period, a Rule 60(b) motion does not affect this time frame. See Rule 59(f), SCRCP; Rule 60(b), SCRCP.

equitable that the judgment should have prospective application. See Rule 60(b)(1-5), SCRPC. The Applicant's motion does not set forth any of these reasons as a basis for relief from the judgment. In that vein, Respondent submits that it is clear that none of these reasons for relief are present in this case. Accordingly, the State requests that this Court issue an order dismissing the Applicant's Rule 60(b) motion.

WHEREFORE, the State submits that both of the Applicant's motions should be dismissed.<sup>2</sup>

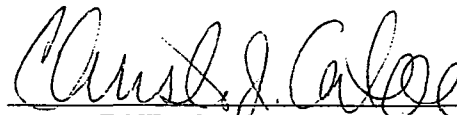
Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Senior Assistant Deputy Attorney General

CHRISTINA J. CATOE  
Assistant Attorney General



**ATTORNEYS FOR RESPONDENT**  
Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

February 4, 2012

---

<sup>2</sup> The Applicant states in his motion that he may file a supplemental brief and memorandum upon receipt of the transcript. Respondent submits that further briefing with respect to the Rule 59(e) motion would be futile since the motion was not timely, as discussed above. Further, with respect to the Rule 60(b) motion, Respondent submits that the transcript could not possibly lead to discovery of any of the grounds enumerated in Rule 60(b); therefore, Respondent submits that briefing after receipt of the transcript is unwarranted.

STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )  
 )  
Jamie Goss, # 294885, )  
 )  
Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT

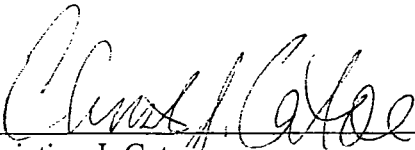
2010-CP-26-10057

**CERTIFICATE OF SERVICE BY MAIL**

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the State's **RESPONSE TO APPLICANT'S RULE 59(e)/RULE 60(b) MOTION** in the above captioned matter on the following person(s) by depositing in the United States mail, postage prepaid:

**Daniel A. Selwa, II, Esquire**  
**Attorney At Law, L.L.C.**  
**1053 London Street**  
**Myrtle Beach, SC 29577**

DATED this 4<sup>th</sup> day of February, 2012.

  
\_\_\_\_\_  
Christina J. Catoe  
Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

Jamie Goss 204885  
Lee Corr. Inst,  
990 Wisahy Highway  
Birmingham AL 35200

Re: State vs. Jamie Goss

**RECEIVED**

MAR 01 2012

**S.C. SUPREME COURT**

Dear Mr. Shearhouse

I wrote your office several week ago and you were very helpful. I want to thank your office very much!

However, another problem has risen, My Attorney Filed a Rule 59E and GOB motion in the court, which is still pending (see copy of notice) Attached) He filed a notice of Intent to appeal PCR order of dismissal, to SC Supreme Court.

Wasn't he suppose to wait until the 59E and GOB were ruled on, because as I understand it, the court cannot have Jurisdiction of the same matters.

I wrote him, but he doesn't respond just like when I initially sent him a letter asking him to amend issue to my PCR application prior to hearing. See (Attachment of letter)

Thank You!  
Jamie Goss

(Please **SEE** all attachments.)

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )  
 )  
JAMIE GOSS (AKA JAMES GAUSE) )  
#294885, )  
 )  
RESPONDENT, )  
 )  
vs. )  
 )  
STATE OF SOUTH CAROLINA, )  
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APPELLANT. )

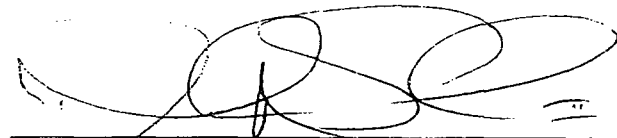
IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-26-10057

MOTION TO AMEND JUDGMENT 59(e)  
AND/OR IN THE ALTERNATIVE  
MOTION FOR RELIEF FROM JUDGMENT  
60(b)

FILED IN COURT  
JAN 9 PM 1:48

PLEASE TAKE NOTICE that the above named Applicant does hereby move before the Honorable Larry B. Hyman in the Court of Common Pleas of the Fifteenth Judicial Circuit for an Order amending the final post conviction relief order and/or in the alternative for an Order granting relief from the final post conviction relief order. The Applicant may file a supplemental brief and memorandum upon receipt of the transcript.



Daniel A. Selwa, II  
*Attorney for Petitioner/Applicant*  
1053 London Street, Suite A  
Myrtle Beach, SC 29577  
(843) 492-5449 Office  
(843) 353-0683 Fax  
(843) 450-7566 Mobile

January 4, 2012

August 10, 2011

Jamie Goss 294993  
Lee-C-I  
990 Wisacky Highway  
Bishopville, South Carolina  
29010

Attorney Daniel A. Selwa, II  
905 Sea Mountain Highway, Suite 4  
North Myrtle Beach, South Carolina 29582

Dear Daniel A. Selwa:

I'm requesting that you amend these two issues: 1. That my trial counsel was ineffective for not requesting that the charge against me be dismissed w/prjudice because the state and or its agents destroyed evidence that could have exonerated / proved applicant innocence and without the evidence, applicant could not receive his constitutional right to a fair trial and a meaningful defense. 2. Judge sent the jury home after they had been selected, Judge never instructed jury not to discuss the case with family, friends, or look on internet, etc nor allow anyone to approach them and discuss this case. Also you will have to get with →

my old Attorney William I. Diggs for the  
witness informationing you requesting. Once  
again amend these two issue, 1 and 2.

Thank You,  
Jamie Boss

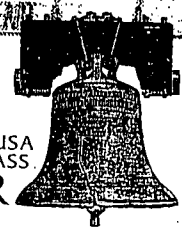
Jamie Boss 294885  
Lee-C-I. Ric B 269  
990 Wisacky Highway  
Bishopville SC 29010

COLUMBIA SC 290

29 FEB 2012 PM 2 T

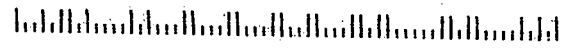


USA  
FIRST-CLASS  
FOREVER



Daniel E. Shearouse - S.C. Supreme Court  
Attorney General Christina J. Cofoe  
P.O. Box ~~11330~~ 11330  
Columbia, SC 29211

29211+1330





# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

February 29, 2012

Mr. Henry P. Young  
Circuit Court Reporter  
518 22nd Ave., North  
North Myrtle Beach, SC 29582

Dear Mr. Young:

Please provide us with the following transcript:

Jamie Goss v. State of South Carolina

Case #:

10-CP-26-10057

County: Horry

Date of Trial: November 7, 2011

Presiding Judge: Larry B. Hyman, Jr.

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

  
Lorlene French  
Legal Services Coordinator

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

RECEIVED

FEB 29 2012

S.C. Supreme Court



DANIEL A. SELWA, II  
ATTORNEY AT LAW, L.L.C.

LITIGATION OFFICE:  
1053 LONDON STREET  
MYRTLE BEACH, S.C. 29577  
OFFICE: (843) 492-5449  
FAX: (843) 353-0683  
MOBILE: (843) 450-7566  
SELWA@SCLAWYERS.NET

REAL ESTATE OFFICE:  
905 SEA MOUNTAIN HWY, STE 3  
N. MYRTLE BEACH, S.C. 29582  
OFFICE: (843) 281-2156  
FAX: (843) 281-2159  
LUANNE@SCLAWYERS.NET  
WWW.SCLAWYERS.NET

February 1, 2012

Daniel E. Shearouse  
Clerk of Court – SC Supreme Court  
Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

Re: Jamie Goss, #294885 vs. State of South Carolina  
2010-CP-26-10057

Dear Mr. Shearouse:

Enclosed please find the original Notice of Appeal in the above-entitled action and one copy. Please file and return the copy to me in the self addressed stamped envelope enclosed.

If you should have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Daniel A. Selwa, II

**RECEIVED**

FEB 01 2012

**S.C. SUPREME COURT**



THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

APPEAL FROM Horry COUNTY  
Court of Common Pleas

Honorable Larry B. Hyman, Jr., Circuit Court Judge

---

Case No.: 2010-CP-26-10057

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Jamie Goss, #294885,..... Petitioner,

v.

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

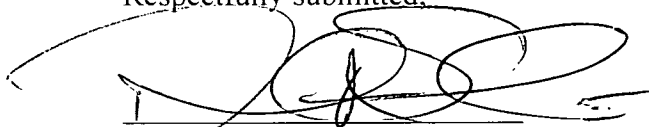
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**NOTICE OF APPEAL**

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The Petitioner appeals the Honorable Larry B. Hyman, Jr.'s December 6, 2011, order denying post-conviction relief to the Respondent. Undersigned counsel received notice of entry of the order on January 3, 2012. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Daniel A. Selwa, II  
1053 London Street, Suite A  
Myrtle Beach, SC 29577  
Attorney for the Applicant

February 1, 2012.

*Other counsel of record:*

Alan Wilson

Attorney General

Christina J. Catoe

Assistant Attorney General

**RECEIVED**

FEB 06 2012 - 1 -

**S.C. SUPREME COURT**

Post Office Box 11549  
Columbia, SC 29211-1549

Robert M. Dudek  
Chief Appellate Defender  
1330 Lady Street, Suite 401  
Columbia, SC 29201

Jamie Goss #294885  
c/o Lee Correctional Institution  
990 Wisacky Highways  
Bishopville, SC 29010

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

APPEAL FROM Horry COUNTY  
Honorable Larry B. Hyman, Jr., Circuit Court Judge

---

Case No.: 2010-CP-26-10057

---

Jamie Goss, #294885,..... Petitioner,

v.

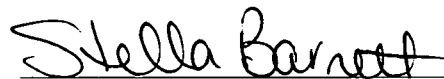
State of South Carolina,..... Respondent.

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**PROOF OF SERVICE**

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I, Stella Barnett, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record, Alan Wilson, Attorney General, Post Office Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this 1st day of February 2012.



Stella Barnett  
1053 London Street, Suite A  
Myrtle Beach, SC 29577  
Attorney for the Applicant

**RECEIVED**

FEB 06 2012

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )  
) )  
Jamie Goss, # 294885, )  
) )  
Applicant, )  
) )  
v. )  
) )  
State of South Carolina, )  
) )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT

2010-CP-26-10057

**ORDER DENYING  
POST-CONVICTION RELIEF**

HORRY COUNTY  
11 DEC 16 PM 2:17  
CLERK OF COURT

This matter came before the Court pursuant to an Application for post-conviction relief filed October 26, 2010, by Jamie Goss, a.k.a. "James Gause." Respondent made a Return on December 23, 2010. An evidentiary hearing was convened at the Horry County Courthouse on November 7, 2011. The Applicant was present in court and represented by Daniel A. Selwa, II, Esquire. The Respondent was represented by Christina J. Catoe, Assistant Attorney General.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to a conviction from Horry County. The Applicant was indicted in November 2006 for trafficking in crack cocaine, 10-28 grams (2006-GS-26-4735). Orrie E. West, Esquire, represented the Applicant. On February 12-13, 2007, the Applicant was tried and convicted pursuant to a jury trial before the Honorable Edward B. Cottingham. Judge Cottingham sentenced the Applicant, as a third-time drug offender, to 28 years. The Applicant subsequently filed a motion for new trial based upon newly-discovered evidence. A hearing was held on the motion on March 22, 2007. The Applicant was represented by William I. Diggs, Esquire, at this hearing. Judge Cottingham denied the motion for new trial. Thereafter, a notice of appeal was timely filed, and an Anders Brief was submitted on the Applicant's behalf by Kathrine H. Hudgins, Esquire. The South Carolina Court of

Appeals affirmed the conviction on December 22, 2009 (2009-UP-610). The case was remitted to the circuit court on January 7, 2010.

### STANDARD OF REVIEW

In a post-conviction relief proceeding, the applicant bears the burden of proving his or her allegations by a preponderance of the evidence. Caprood v. State, 338 S.C. 103, 109-110, 525 S.E.2d 514, 517 (2000); Rule 71.1(e). 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The correct measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, supra. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case." Caprood, supra, at 109, 525 S.E.2d at 517 (citations omitted). The 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. When a defendant challenges his conviction after a trial, the proper consideration is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt. Smith v. State, 375 S.C. 507, 515, 654 S.E.2d

523, 527-28 (2007. (citations omitted). In order to receive relief, an applicant must prove both ineffective assistance and resulting prejudice. See, e.g., Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

### ALLEGATIONS

In his Application, Mr. Goss alleged that his custody was unlawful for the following reasons:

- (1) U.S. constitutional violation 6<sup>th</sup> amendment – counsel’s performance was deficient below the standard;
- (2) Lack of probable cause determination – no physical evidence on record for probable cause for the driving violation, no documentation, summons, ticket, arrest warrant, no videotape; and
- (3) Lack of evidence to support the conviction – because of the above mentioned there is no evidence that conclusively puts Applicant in said car.

The Applicant stated he was seeking to have the conviction set aside, the sentence vacated, and to have a new trial.

### Summary of Relevant Trial Facts

At trial, the following facts were developed. On October 9, 2006, around 8:30 pm, the Applicant was stopped for having a tag light out. As the officer approached the Applicant’s van, he saw the Applicant’s face in the mirror looking at him and he also saw that the Applicant was wearing a white shirt. At that point, the Applicant sped off and the officer got back into his vehicle and gave chase. He followed the van into an apartment complex where the Applicant finally stopped the van, got out, and started running away. The officer caught up with him and arrested him for reckless driving. A key was found in the Applicant’s pocket, and the Applicant told the officer that it was the key to the van in question. When he inventoried the van, the officer discovered crack and marijuana in the center floor board area. The drugs were found beside a cell phone with the Applicant’s picture on the cell phone’s display background. The officer did not give the Applicant a ticket for the tag light since he was charging him with general sessions-level

offenses; however, the Applicant was ticketed for reckless driving and resisting arrest. The Applicant turned out not to be the registered owner of the van. The officer also testified that, although the stop had been recorded by his in-car video camera, the tape had been accidentally recorded over and could not be presented at trial.

#### The PCR Hearing

At the PCR hearing, the Applicant testified that he was found guilty of trafficking crack cocaine following a trial. Orrie West was his attorney. He stated that counsel was ineffective for failing to fully investigate his case. He stated that he believed counsel had insufficient time to prepare for trial because a trial on this particular charge was not set up in advance. He stated that he would have had time to locate his witnesses if he and counsel had more notice of trial and more time to prepare. The Applicant testified that he never talked about the trial with counsel until about fifteen minutes before the jury selection. The reason he did not have much time to talk to counsel before trial was because he was late for both jury selection and trial. However, he stated that during their brief pre-trial meeting, he told counsel about a potential witness for the defense. He indicated that this witness was the person actually driving the car that night and was therefore the person to whom the drugs belonged. He stated that this person was not present at trial and did not testify for the defense. The Applicant stated that he did not testify at trial because his attorney told him that he was before an "old time judge" and that he should not say anything. He acknowledged that the judge went over his right to testify or not testify and advised him that he had an absolute right to testify at trial.

The Applicant indicated that he felt the drugs should have been suppressed based upon officer misconduct and destruction of the videotape of the stop. He acknowledged that his counsel did make a motion to suppress the drugs based on lack of probable cause/pretextual stop, and the record reflects that counsel brought out information about the destroyed videotape during cross-

examination of the officer. The Applicant also testified that his counsel failed to object to the admission of the van key into evidence. He stated that the officer never checked to see if the key actually opened the van. However, on the Applicant's cross-examination it was revealed that the officer testified that the Applicant told him that it was the key to the van. The Applicant's cross-examination also revealed that Ms. West did make an objection to the key on the ground of a lack of foundation.

The Applicant testified that he hired attorney Bill Diggs to represent him for purposes of post-trial motions. Mr. Diggs filed a timely motion for a new trial, along with a supporting memorandum, on February 23, 2007, based upon destruction of the videotape of the stop and upon a mistake of identity as to the perpetrator. In his motion, he asserted that the real perpetrator in the case was Mark Anthony Wright. The memorandum asserted that Mr. Wright was driving the van that night and that the Applicant, who happened to be in the parking lot already, also ran because he did not want to become involved in the events occurring. Thus, Mr. Diggs contended, the officer stopped the wrong person on foot in the parking lot. Mr. Diggs submitted two affidavits in support of his motion for new trial, one from Kendrick Sumpter and one from Terrill Carr. No affidavit from Mark Anthony Wright was presented. Mr. Sumpter's affidavit states that in the early evening on October 9, 2006, he picked up the Applicant and gave him a ride to the home of Nakima Goss and Patsy Goss in the apartment complex in question. The affidavit does not provide a specific time frame. The affidavit of Terrill Carr states that on October 9, 2006, Mr. Carr was visiting the home of Nakima Goss and Patsy Goss. Around 6:00 pm, the Applicant knocked on the door and asked if Nakima was at home. The affidavit states that the Applicant did not appear to be running from the police and simply left the apartment.

At the hearing on the Applicant's motion for new trial, Mr. Diggs argued that the affidavits showed that the Applicant was already in the parking lot when the van in question pulled in, and

that he had been at the home of Patsy Goss. Mr. Diggs also argued that the young man who was the real perpetrator resembles the Applicant. The judge pointed out that the Applicant could have testified to those facts at trial but he declined to do so after extensive questioning by the court. The judge also pointed out that the Applicant was now trying to change his trial strategy as presented by Ms. West. In a written Order filed on April 10, 2007, Judge Cottingham denied the motion for a new trial, concluding that the information presented was not "new" and did not warrant a new trial because the information was known to the defendant prior to trial.

The Applicant also called his former trial counsel to testify at the PCR hearing. Orrie West, Esquire, testified that she represented the Applicant at his trial in February 2007. She stated that she had three open files on the Applicant at the time, including two files from 2005 and one file from 2006. She stated that she sent letters to the Applicant asking him to come to meet with her, but he failed to come to any meetings. She stated that she had some phone contact with him. Ms. West testified that the Applicant was late for trial and therefore they had a brief pre-trial meeting. At this meeting, the Applicant, for the first time, mentioned a potential witness to her. She did not feel like she could do anything about it at that point. Ms. West stated that there must have been a reason that she did not move for a continuance, but she could not recall what the reason was.

The Applicant did not present the testimony of any alibi witnesses or any other fact witnesses at the PCR hearing.

Set forth below are the relevant findings of fact and conclusions of law, as required by S.C. Code Ann. § 17-27-80 (2003):

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

In considering the Applicant's case, this Court had before it the Applicant's PCR file, including all pleadings filed, the records of the Horry County Clerk of Court regarding the convictions, the Applicant's records from the South Carolina Department of Corrections, the trial

transcript, the post-trial motion filings and the post-trial hearing transcript, and the direct appeal records. This Court carefully listened to all of the testimony presented at the hearing and weighed the same according to credibility. This Court found the testimony of Orrie West, Esquire, to be highly credible in all respects, while the Applicant's testimony was lacking in credibility, particularly with respect to his asserted alibi defense.

The Applicant's overarching contention at the PCR hearing was that counsel failed to interview and present his potential witnesses at trial. This Court finds that the Applicant failed to establish prejudice as to this allegation. See Strickland v. Washington, 466 U.S. 668, 697 (1984) (holding that if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed). In order to support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. The applicant's mere speculation regarding the witnesses' testimony cannot satisfy the applicant's burden of showing prejudice. Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995); see also Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense, he failed to establish prejudice); Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) ("Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR."); Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence.").

In this case, the Applicant failed to present the testimony of any fact or alibi witnesses at the PCR hearing. This Court finds that the two affidavits contained in the post-trial motion filings are

insufficient to sustain the Applicant's burden of proof, where these witnesses were not called at the PCR hearing and could not be subjected to cross-examination. In any event, the affidavits do not necessarily refute the crime or establish an alibi for the Applicant at the time of the crime, i.e., around 8:30 pm. Therefore, the Applicant failed to prove that any potential witness would have actually been helpful to his defense at trial. Accordingly, this Court concludes that the Applicant failed to establish any entitlement to relief on the ground that counsel failed to interview and call potential witnesses at trial. See, e.g., Bannister v. State, 333 S.C. 298, 303-304, 509 S.E.2d 807, 809-810 (1998).

As to the Applicant's second allegation in his PCR Application, regarding a "lack of probable cause determination," and the Applicant's third allegation, regarding a "lack of evidence to support the conviction," this Court finds that these issues are not appropriate for PCR because they involve allegations of trial court error. See, e.g., Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); see also Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001) (citation omitted) ("PCR is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal."). In any event, the officer's testimony regarding the tag light being out supported probable cause for the stop, as the trial court implicitly concluded following counsel's motion to suppress. Therefore, allegation # 2 is without merit. Allegation # 3 is similarly without merit because there is, in fact, evidence supporting the conviction and placing the Applicant in the van in question, including the officer's testimony identifying the Applicant as the driver of the van and his testimony that he saw the Applicant's picture on the cell phone found in the car beside the drugs. Therefore, these allegations are also denied and dismissed.

#### CONCLUSION

In conclusion, based upon the entire record, this Court finds and concludes that the Applicant failed to meet his burden of proof as to any of his claims. Therefore, the Application for

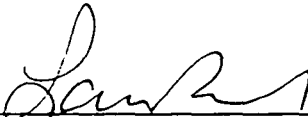
post-conviction relief must be denied and dismissed with prejudice for failure to meet the burden of proof under Strickland v. Washington, 466 U.S. 668 (1984), and Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Counsel's attention is directed to Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), and Rule 59(e), SCRCR, regarding the filing of a Motion to Alter or Amend should counsel believe this Order fails to adequately address all issues raised as required by S.C. Code Ann. § 17-27-80 (2003). This Court further advises that if Applicant desires to secure appellate review of this Order, a notice of appeal must be filed and served **within thirty (30) days** of the service of this Order. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

**IT IS THEREFORE ORDERED THAT:**

1. The Application for post-conviction relief is **DENIED and DISMISSED with PREJUDICE**.
2. The Applicant must remain in the custody of the State for completion of his sentence.

**AND, IT IS SO ORDERED** this 6 day of Dec, 2011.

  
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The Honorable Larry B. Hyman, Jr.  
Presiding Judge  
Fifteenth Judicial Circuit

Conway, South Carolina

