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NOV 21 2013

S.C. Supreme Court

*The Law Offices*  
*of*  
**Daniel A. Hunnicutt**

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November 19, 2013

The Honorable Daniel E. Shearouse  
South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC, 29211

RE:           Derrick M. Hollingsworth v. State of South  
              Carolina  
              Civil Action Number: 2011-CP-26-2843

To Whom it May Concern,

Please find enclosed for filing a Notice of Appeal, Certificate of Service, and the orders of the lower court being appealed. Please note that my office was appointed on this case, and as such it is our understanding that no filing fee is required. Please let us know if this is not the case. Please note that by copy of this letter, we are also sending the enclosed notice to the South Carolina Commission on Appellate Defense.

Thank you for your time and attention to this matter. Should you have any questions or concerns, please contact my office.

Sincerely,



**Daniel A. Hunnicutt, Esq.**

Enclosures (as stated)  
cc: South Carolina Attorney General  
      South Carolina Commission on Appellate Defense.

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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NOV 21 2013

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

S.C. Supreme Court

The Honorable John L. Breeden Circuit Court Judge

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Case No. 2011-CP-26-2843

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DERRICK HOLLINGSWORTH, -----APPELLANT,

v.

STATE OF SOUTH CAROLINA,-----RESPONDANT.

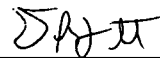
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**NOTICE OF APPEAL**

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Derrick Hollingsworth seeks an *Austin* appeal of the judgment of the Honorable John L. Breeden, Jr., dated May 24, 2006, denying his motion for post-conviction relief. Appellant was given permission to pursue said appeal by Order of The Honorable L. Cordell Maddox, Jr., dated October 30, 2013.

November 19, 2013



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Daniel A. Hunnicutt  
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P.O. Box 1735  
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(843) 488-2424  
Attorney for Appellant

Other Counsel of Record:

Christina J. Catoe, Esquire  
Assistant Attorney General  
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Attorney for Respondent  
(803) 734-3970

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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NOV 21 2013

APPEAL FROM HORRY COUNTY  
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The Honorable John L. Breeden Circuit Court Judge

Case No. 2011-CP-26-2843

DERRICK HOLLINGSWORTH, -----APPELLANT,


v.

STATE OF SOUTH CAROLINA,-----RESPONDENT.

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of Appellant's Notice of Appeal on the Respondent State of South Carolina by mailing a copy, first class mail, to their counsel of record at the address listed below, this 19<sup>th</sup> day of November, 2013.

November 19, 2013

  
\_\_\_\_\_  
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P.O. Box 1735  
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(843) 488-2424  
Attorney for Appellant

Other Counsel of Record:

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Assistant Attorney General  
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Attorney for Respondent  
(803) 734-3970



2000, the Applicant proceeded to trial after which he was found guilty of the charge. He was sentenced by the Honorable Howard P. King to confinement for a period of life.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Hollingsworth, Op. No. 2001-UP-504 (S.C. Ct. App. filed November 15, 2001).

In his current application for post-conviction relief, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel; and,
2. Lack of subject matter jurisdiction.

#### **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. 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).

During the evidentiary hearing, the Applicant testified that he could not recall viewing the discovery in the case. He stated that he told his trial counsel that he was innocent and that he wanted to testify in his own defense. The Applicant further testified that he told his trial counsel that he had an alibi witness who did not testify, one Michelle Skipper. He also claimed that he told his trial counsel that he wished to get any tapes in the case, but was told no tapes were available. The Applicant alleged as well that he believed he should have had a psychiatric evaluation prior to his trial, although he admitted there was no reason to believe that he was mentally ill or incompetent. The Applicant claimed in addition that the indictment in his case was defective for failing to allege

the degree of murder and other elements.

Trial counsel William H. Monckton, VI, testified that he had met with the Applicant several times and had discussed all of the discovery in the case with him. Monckton stated that he did interview the alibi witness, but she refused to testify after the Solicitor told her he would prosecute her for perjury if she lied under oath. Monckton further testified that he had no tapes, and that he had no reason to obtain a mental evaluation of the Applicant. Monckton recommended that the Applicant not testify due to his temper, his prior record, and his poor performance during test cross-examinations; the Applicant agreed with him, according to Monckton. Trial counsel Monckton stated as well that he had cross-examined the witnesses on their inconsistent statements. Unfortunately, Monckton noted, there were about three eyewitnesses to the incident, and the Applicant was positively identified as one of the shooters by at least one of the eyewitnesses.

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 815 (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, Id.

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

This Court does not find the Applicant's testimony to be credible on the issues in this case. Trial counsel's testimony is found credible. This Court finds that trial counsel did meet sufficiently with the Applicant and discussed the case with him thoroughly. Trial counsel articulated a valid strategic reason for recommending that the Applicant not testify, namely the Applicant's prior record and his poor performance under test cross-examination. This Court notes that the Applicant elected not to testify after consultation with his counsel. Trans. p. 422, ll. 2-23. Trial counsel met with the Applicant's alleged alibi witness, and she refused to testify because of the threat of perjury charges should she lie under oath. Trial counsel thoroughly cross-examined all the witnesses and pointed out various inconsistencies in their testimony and statements. The Applicant has not shown any credible evidence to support the existence of any tapes in this case.

Given the above findings, the Applicant has failed to carry his burden of proof in this case. Trial counsel's performance did not fall below reasonable professional standards. Further, the Applicant suffered no prejudice as a result of the alleged errors. There is no reasonable probability that the result of the trial would have been different but for the alleged errors. Further, this Court specifically finds a valid and reasonable trial strategy on the part of trial counsel regarding the Applicant's decision to testify or not to testify. That recommendation by counsel cannot therefore be deemed ineffective. *See Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 530 (1992).

The Applicant's claim that the trial court lacked subject matter jurisdiction due to defects in the indictment is without merit. Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. See State v. Gentry, Op. No. 25949, 2005 WL 524813 (S.C.); Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994). An Applicant may challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001, *overruled in part by Gentry, supra*). However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Gentry, supra, \*4; See also S.C. Const. Art. V, § 7. Therefore, the indictment could not affect the court's subject matter jurisdiction at all. First, this Court notes that South Carolina does not recognize degrees of murder. Second, the indictment, even if a timely and proper objection had been raised to its sufficiency, is sufficient on its face. A murder indictment is legally sufficient when it alleges time and place, along with a plain statement of the manner in which the death of the victim occurred and charges that the accused did "feloniously, wilfully and of his malice aforethought" proximately cause the death of the victim. S.C. Code § 17-19-30 (2003). See also Winns v. State, 2004 WL 3250294 (S.C.); Joseph v. State, 351 S.C. 551, 571 S.E.2d 280 (2002). As with all indictments, an indictment for murder must be viewed with a "practical eye" in light of the surrounding circumstances to ascertain whether it fulfills its functions to notify the accused of the charge he must answer, notify the court of what judgement and sentence to pronounce, and present a bar to subsequent prosecution. See State v. Gentry, Op. No. 25949, 2005 WL 524813 (S.C.). The indictment here mirrors the language of S.C. Code Ann. § 17-19-30 and more than sufficiently meets the requirements for a murder indictment therein.

**CONCLUSION**

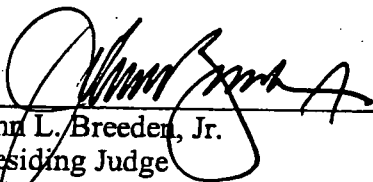
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that he must file and serve a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. His attention is also directed to South Carolina Appellate Court Rule 227 for appropriate procedures after notice has been timely filed.

**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 24 day of May, 2006.

  
\_\_\_\_\_  
John L. Breeden, Jr.  
Presiding Judge  
Fifteenth Judicial Circuit

Orinway, South Carolina.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF HORRY )  
 )  
 DERRICK HOLLINGSWORTH, )  
 #265683 )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 Defendant. )

THE COURT OF COMMON PLEAS  
 FIFTEENTH JUDICIAL CIRCUIT  
 2011-CP-26-2843

ORDER

FILED  
 Horry County  
 2013 MON - 4 PM 1:51  
 MELANIE HUGGINS-WARD  
 CLERK OF COURT

This matter comes before the Court pursuant to the Plaintiff's application for post conviction relief filed March 29, 2011, seeking a finding of ineffective assistance of counsel stemming from a PCR application filed in July of 2002. Specifically, applicant seeks the right to belatedly file an appeal of his previous denial of post-conviction relief. Applicant argues that his initial PCR counsel was ineffective for not filing an appeal and for not informing applicant of his right to appeal. Respondent argues that even if applicant's initial PCR counsel was ineffective, applicant's request for relief should be barred by the doctrine of laches since he didn't file the instant petition for almost five years, and the transcript from the initial PCR hearing has been destroyed. For the reasons discussed herein, I find that applicant's current application is not barred by the doctrine of laches, and that his initial PCR counsel was ineffective for not pursuing an appeal of applicant's denial of his PCR application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to a conviction for murder from Horry County. Applicant was indicted in July of 1999 for the

murder of Isaac Lee Cox (199-GS-26-1653). Applicant was represented by William Monckton, Esquire, and was convicted on April 13, 2000. He was sentenced to life in prison. A notice of appeal was timely filed, and Applicant was represented by Daniel T. Stacey, Esquire, on appeal. The conviction was upheld by the South Carolina Court of Appeals on November 19, 2001 (2001-UP-504).

Applicant filed his initial PCR application on July 16, 2002 (2002-CP-26-4025). A hearing was held on January 20, 2005 before the Honorable John L. Breeden, Jr. The applicant was represented by Robert H. Gwin, III, Esquire. The Court denied post conviction relief by Order dated May 24, 2006. No notice of appeal was filed from this decision.

On March 29, 2011, applicant filed the instant application, seeking the right to belatedly appeal his denial of post conviction relief. Respondent filed a Return and Motion to Dismiss on April 19, 2011, asserting the application was successive and barred by the statute of limitations. The Court initially entered a Conditional Order of Dismissal on July 14, 2011, which gave Applicant time to show why the conditional dismissal should not become final.

On September 13, 2011, applicant filed a document entitled "Applicant's Opposition and Reply to the Conditional Order." The Honorable Steven H. John subsequently issued an order granting Applicant a hearing on the sole issue of whether the Applicant is entitled to seek belated review of the denial of his first PCR application. The order also appointed counsel for Applicant.

A hearing was held on August 28, 2013. Applicant was present and represented by Daniel Hunnicutt, Esquire, and Respondent was represented by Josh Thomas, Esquire. The sole issue before the Court was whether or not Applicant should be able to file his appeal from his denial of his first PCR application

since Applicant waited almost five years to file the instant application. Laches is an equitable remedy which prevents a litigant from sitting on a right for such a long period of time that it deprives other parties of the opportunity to properly litigate the issue. Respondent argues that since the transcript of the original PCR hearing has been destroyed, it cannot properly present its arguments on appeal. However, as stated, Laches is an equitable remedy, and balancing the equities in the instant case I find that any prejudice to Respondent from the destruction of the transcript would certainly be less than any prejudice to the Applicant, and as such the doctrine of Laches does not bar this application.

**THEREFORE, IT IS HEREBY ORDERED:**

- 1) DERRICK HOLLINGSWORTH'S APPLICATION FOR POST  
CONVICTION RELIEF IS HEREBY GRANTED;**
- 2) MR. HOLLINGSWORTH MUST FILE HIS NOTICE OF APPEAL WITHIN  
THIRTY DAYS OF THE SIGNING OF THIS ORDER;**

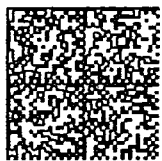
**IT IS SO ORDERED.**

  
\_\_\_\_\_  
The Honorable L. Cordell Maddox, Jr.

Anderson, South Carolina  
November 30, 2013  
*October*

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P.O. Box 1735  
Conway. SC 29527

The Honorable Daniel E. Shearouse  
South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC, 29211



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