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December 23, 2013

**Via Regular Mail**

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

**RECEIVED**

DEC 27 2013

**S.C. Supreme Court**

**Re:** WILLIAM JERMAINE HENRY v. State

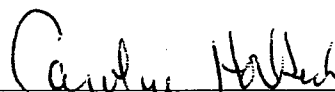
Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,



Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General  
Office of Appellate Defense

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
THE HONORABLE ROBIN B. STILWELL

RECEIVED

DEC 27 2013

S.C. Supreme Court

CA No. 2012-CP-23-4209

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMMER  
2013 DEC 5 AM 9 57

WILLIAM JERMAINE HENRY,

APPELLANT,

vs.

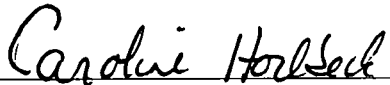
STATE OF SOUTH CAROLINA

RESPONDENT.

NOTICE OF APPEAL

Appellant WILLIAM JERMAINE HENRY, appeals from the Order of the Honorable Edward W. Miller, Circuit Court Judge clocked November 26, 2013

Respectfully submitted,



Caroline M. Horlbeck, Esq.  
101 Whitsett St  
Greenville, SC 29601

Date: December 4, 2013

Other Counsel of Record: Karen Ratigan, Esq.  
Assistant Attorney General  
Post Office Box 11549  
Columbia, SC 29211

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

IN THE SUPREME COURT

WILLIAM JERMAINE HENRY, )  
 )  
 )  
APPELLANT, )

C.A. No. 2012-CP-23-4209

-vs- )

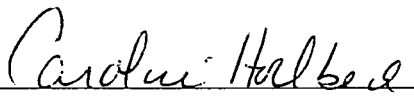
CERTIFICATE OF SERVICE

STATE OF SOUTH CAROLINE, )  
 )  
 )  
RESPONDENT. )  
\_\_\_\_\_ )

This is to certify that I am an employee in the law office of Caroline M. Horlbeck, attorney for Applicant, and that I have this day caused to be served upon the person(s) named below Applicant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Lorie French  
S.C. Office of Appellate Defense  
1205 Pendleton St., Suite 306  
Columbia, SC 29201

Karen Ratigan, Esq.  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

  
Caroline M. Horlbeck

Greenville, South Carolina

Dec. 23, 2013

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 William Jermaine Henry, )  
 S.C.D.C. No. 276767, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2012-CP-23-4209

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSIMMER  
 2013 NOV 26 PM 2 36

**ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 29, 2012. The Respondent made its return and partial motion to dismiss on November 30, 2012. An evidentiary hearing into the matter was convened on October 22, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Thomas M. Creech, Jr., Esquire. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return and partial motion to dismiss, and the appellate records.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the November 2006 term of the Greenville County Grand Jury for kidnapping (2006-GS-23-

9698), assault and battery with intent to kill (2006-GS-23-9699), murder (2006-GS-23-9700), and armed robbery (2006-GS-23-9701). He was represented by Thomas M. Creech, Jr., Esquire.

After the State took the case to trial, the Applicant was found guilty of murder and not guilty of all other charges. On February 4, 2009, the Honorable G. Edward Welmaker sentenced the Applicant to fifty years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire perfected the appeal. The Court of Appeals affirmed the Applicant's conviction and sentence. State v. Henry, Op. No. 2011-UP-333 (S.C. Ct. App. filed June 27, 2011).

### **ALLEGATIONS**

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel:
  - a. "My lawyer failed to object to perjury testimony."
  2. "The State failed to produce competent reliable evidence."
  3. "The State must prove every element of the charge of Murder."
  4. Subject matter jurisdiction.

In an "Amended Petition for Post Conviction Relief" filed by counsel on August 27, 2013, the Applicant made the following additional allegations:

1. Ineffective assistance of trial counsel:
  - a. Failed to object to the jury charge regarding aiding and abetting.
  - b. Failed to object to the State's failure to present an indictment to the Grand Jury within 90 days after receipt of the arrest warrant.
  - c. Failed to object to the State's failure to petition the court for an order delaying action on the warrant for a successive 90 day period.
  - d. Failed to timely object to:
    - i. Testimony regarding the Applicant's attendance of a school for children with behavior problems.
    - ii. Testimony regarding cell phone and tower information.
    - iii. Testimony regarding victim statements.

- e. Failed to inform the Applicant of the potential penalty he faced on all charges.
  - f. Failed to object to the State's Brady violation and failure to provide counsel with copies of Brooks' statements.
  - g. Failed to move to suppress Brooks' testimony.
  - h. Failed to have the Applicant evaluated for competency and criminal responsibility.
  - i. Failed to argue the court's charge on malice shifted the burden of proof.
  - j. Failed to object to the court's abuse of discretion in sentencing the Applicant more harshly than his co-defendants.
2. Ineffective assistance of appellate counsel:
- a. Failed to raise trial counsel's failure to object to the State's non-compliance with Rule 3(c), SCRCrimP.

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

This Court has had the opportunity to review the record and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe the witnesses who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

#### **Ineffective Assistance of Counsel**

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant

must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated he had four meetings with trial counsel and that they only discussed a few pieces of evidence. The Applicant stated they did not review potential penalties but did discuss his version of events, possible defenses, and that the State had three witnesses who identified him as the shooter. The Applicant stated trial counsel did not object when the State violated Rule 3, SCRCrimP and indicted him more than 90 days after his arrest. The Applicant stated trial counsel should have objected to a Brady<sup>1</sup> violation because the fact that Brooks saw the shooting was not contained in the discovery materials. The Applicant stated trial counsel failed to move to suppress Brooks' statement. The Applicant stated trial counsel should have objected to the jury charge on malice because it was burden-shifting. The Applicant stated trial counsel should have argued there was an abuse of discretion because his co-defendants made deals with the State to plead guilty to voluntary manslaughter and have other charges dismissed.

Trial counsel testified he met with the Applicant 8-10 times between August 2008 and February 2009. Trial counsel testified he filed discovery motions, received those materials, and reviewed them with the Applicant. Trial counsel testified they discussed the Applicants version of events, the elements of the charges, and the possible penalties. Trial counsel testified he did not believe a motion to quash the indictments would have been granted and that the late indictments did not prejudice the case. Trial counsel testified he had three statements from

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<sup>1</sup> Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Brooks in the discovery materials. Trial counsel testified he did not recall being surprised by Brooks' trial testimony that he saw the shooting because Brooks basically admitted to lying. Trial counsel testified there was no reason to argue the Applicant was treated unfairly in sentencing (relative to his co-defendants). Trial counsel testified the State offered a thirty-year recommendation for voluntary manslaughter and the Applicant rejected it.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court finds trial counsel met with the Applicant numerous times before trial and that they discussed the facts, evidence, elements of the charges, and potential penalties. This Court finds trial counsel's thorough competence is reflected in the jury's decision to acquit the Applicant of three out of the four original charges.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the indictment under Rule 3(c), SCRCrimP. This Court finds the late indictments in this case did not nullify the Applicant's prosecution. See State v. Culbreath, 282 S.C. 38, 40, 316 S.E.2d 681, 681 (1984) ("[T]he failure of the solicitor to act upon a warrant within ninety (90) days . . . does not within itself invalidate a warrant or prevent subsequent prosecution."). Further, this Court finds the Applicant failed to provide evidence of any prejudice that resulted from the delay. See, e.g., State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (noting one must prove prejudice in order to prevail on an allegation that one's speedy trial rights were violated).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have argued there was a Brady violation. The Applicant argues that Brooks' trial testimony differed from that in his statements and that the State failed to disclose this information. "A Brady claim is based upon the requirement of due process. Such a claim is complete if the

accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment.” Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999) (emphasis added). This Court finds the Applicant has failed to demonstrate the existence of an actual Brady violation. Further, this Court finds the Applicant has failed to demonstrate that trial counsel should have moved to suppress Brooks’ trial testimony. Trial counsel testified Brooks was clearly not credible. This Court agrees and notes trial counsel impeached Brooks with his prior statements to police. Regardless, the Applicant cannot prove he was prejudiced by Brooks’ testimony, as the State presented overwhelming evidence of guilt.<sup>2</sup> See Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the malice jury charge. The trial judge charged the jury on murder and malice. (Trial transcript, pp.428-30). This Court finds the Supreme Court’s ruling in Belcher v. State, 385 S.C. 597, 685 S.E.2d 802 (2009) is inapplicable. In Belcher, the Supreme Court held “the ‘use of a deadly weapon’ implied malice instruction had no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing.” Id. at 610, 685 S.E.2d at 809. The Court found this ruling was effective in “all cases which are pending on direct review or not yet final where the issue is preserved.” Id. The Court held further that “our ruling, however, will not apply to convictions

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<sup>2</sup> Brooks (the victim of the assault and battery with intent to kill charge) identified the Applicant as the shooter. The Applicant’s co-defendants – Frederick Irby, Mark Cureton, and John Michael Garrett – also witnessed the Applicant shoot the murder victim. Weston Booker saw the Applicant leave the murder victim’s apartment that night and Katrina Hayes testified the Applicant and the murder victim had a strained relationship.

challenged on post-conviction relief.” Id. Belcher was decided several months after the Applicant’s trial. Belcher was not retroactive because the issue was not preserved for appeal. Further, Belcher specifically prohibits the Applicant from asserting this claim in a PCR action.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have argued there was an abuse of discretion because the co-defendants received lesser sentences. This Court finds trial counsel did not have a valid basis to make such an argument. The Applicant’s assertion that he received an unfair sentence is not a basis for relief. The Applicant was sentenced within the statutory range for the offense. A judge has discretion in sentencing within statutory limits and a disparate sentence between co-defendants is not an abuse of discretion. See State v. Sidell, 262 S.C. 397, 205 S.E.2d 2 (1974).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

**CONCLUSION**

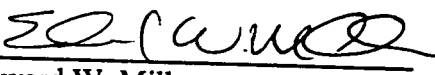
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 25 day of Mar, 2013.

  
Edward W. Miller  
Presiding Judge  
Thirteenth Judicial Circuit

, South Carolina.

CAROLINE M. HORLBECK

*Attorney At Law*

101 WHITSETT ST.  
GREENVILLE, SOUTH CAROLINA 29601



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