

VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

RECEIVED

JAN 13 2014

S.C. Supreme Court

DEMARCO JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000935

APPENDIX

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1 outcome of your trial?

2 A Yes, I do. For the first, I believe that if my
3 attorney would have effectively looked over the case as
4 far as dealing with the testimony that they're saying they
5 had a gun, took me to the weapon, and they used my brother
6 as the person who gave -- who I was -- who linked me to
7 the gun, and that she gave -- that she -- she could have
8 subpoenaed him to court in my defense proving that he
9 didn't receive a gun from this particular individual.

10 By her not doing that, it pretty much gave a
11 one-sided view to the jury. It could have been indicated
12 that I could have received the gun from my brother when I
13 didn't.

14 Q Well, let's go back and talk about a couple of other
15 things, okay?

16 A Okay.

17 Q The suggestion was that this was an attempt to rob
18 these people, that you took this man into his apartment
19 because you weren't satisfied with the \$10 he had on him
20 when you accosted him in the parking lot, right?

21 A Yes, ma'am.

22 Q At the time of your arrest, how much money did you
23 have on you?

24 A \$200.

25 Q Of your own money?

1 A Yes, ma'am.

2 Q And when you were arrested and booked at the Bluff
3 Road Detention Center, Alvin S. Glenn, was that \$200 taken
4 away from you?

5 A It was booked.

6 Q And it was put in your personal effects?

7 A Yes, ma'am.

8 Q Did you tell your defense attorney that prior to
9 trial?

10 A Yes, ma'am.

11 Q And did she bring that up at trial?

12 A Not that I could really read in the transcript.

13 Q Okay. And is it your belief that that might have
14 made the difference in the jury believing that you had any
15 real motive to rob someone if they had known you had your
16 own money in your pocket?

17 A Yes, ma'am, considering it was \$200 compared to a \$10
18 bill.

19 Q Pardon?

20 A Considering it was \$200 compared to a \$10 bill.

21 Q \$200 compared to a \$10 bill?

22 A Why would I have robbed for \$10 when I had \$200 in my
23 pocket? That would have gave a different perspective.

24 Q Now, they claimed that you had a \$10 bill on your
25 person that was folded in some kind of unique fashion,

1 didn't they?

2 A Yes, ma'am.

3 Q Would any of the other money in your pocket have been
4 folded similarly?

5 A Yes, ma'am.

6 Q And would that also have been another way in which
7 that cash might have contradicted the State's case?

8 A Yes, ma'am.

9 Q All right. And your lawyer didn't present that
10 evidence?

11 A No, ma'am.

12 Q Okay. Now, it was alleged that Van -- well, first
13 off, let me backtrack. The so-called victim in this case
14 was not the one that called the police, was he?

15 A No, ma'am.

16 Q Nor was his girlfriend?

17 A No, ma'am.

18 Q Somebody who had seen something they thought looked
19 suspicious called the police.

20 A Yes, ma'am.

21 Q Okay. And there was testimony from the so-called
22 victim himself that when the police arrived and beat on
23 the door --

24 A Uh-huh.

25 Q -- your codefendant handed him a loaded weapon.

1 A Uh-huh.

2 Q And said, "Here, hide this"?

3 A Uh-huh.

4 Q Correct?

5 A Yes, ma'am.

6 Q And do you believe that defense counsel -- I believe
7 you asserted to me that you believe defense counsel should
8 have highlighted that even stronger than she did --

9 A Yes, ma'am.

10 Q -- at trial?

11 A Yes, ma'am.

12 Q And should have perhaps cross-examined this gentleman
13 further as to why in the world somebody that was really
14 robbing him would have done that?

15 A Yes, ma'am.

16 Q Okay. Now, you know that she did sort of emphasize
17 that in her closing arguments.

18 A Yes, ma'am.

19 Q I've shown that to you, haven't I?

20 A Yes, ma'am.

21 Q Okay. But you just think that in cross-examining the
22 female victim and the male victim, she could have hammered
23 home that point a little more thoroughly?

24 A Yes, ma'am.

25 Q And that emphasizing that point might have made a

1 difference in what the jury believed?

2 A Yes, ma'am.

3 Q Okay. Now, ultimately -- and Your Honor, I'm looking
4 at page -- a moment's indulgence.

5 (pause).

6 Ultimately, on page 381, lines seven through 13,
7 Ms. Pellizari, after a little going back and forth on
8 direct and cross, brings out the fact that the weapon was
9 linked to Odell Johnson who was your brother.

10 A Yes.

11 Q And that it had been sold to him by Kengy (phonetic)
12 McQueen; is that correct?

13 A Yes, ma'am.

14 Q All right. Now, Investigator Smith is also
15 questioned, "Who had possession of that gun before Demarco
16 Johnson, that second gun?"

17 Do you see that?

18 A Yes, ma'am.

19 Q Whether it -- that gun was allegedly found in the
20 closet, right?

21 A Yes, ma'am.

22 Q And there was absolutely no independent proof of who
23 had that gun, was there?

24 A Yes, ma'am. It wasn't no proof.

25 Q Okay. Now, it was prior to your trial, or as your

1 trial was beginning, was it your understanding from
2 pretrial conferences that the State was not going to be
3 allowed to get into that?

4 A Yes, ma'am.

5 Q And if that ruling had not been made by the trial
6 judge pretrial, you would have known to be more insistent
7 about your brother Odell being there, wouldn't you?

8 A That's right.

9 Q But since the Judge and everybody had agreed that
10 that testimony wasn't coming in, you didn't think you need
11 Odell, did you?

12 A No, ma'am.

13 Q Okay. Once all of this happened, between about page
14 361 going on over to 381 or 2, let's highlight this. You
15 believe counsel should have moved to strike the damaging
16 testimony?

17 A Yes, ma'am.

18 Q If the motion to strike had been granted, you would
19 have wanted her to ask for a curative charge?

20 A Yes, ma'am.

21 Q First and foremost, though, you would have wanted her
22 to first ask for a mistrial, wouldn't you?

23 A That's what I'm charging.

24 Q And if the mistrial was denied, take a fallback
25 position of asking for the testimony to be stricken?

1 A No -- I mean yes.

2 Q Now, it's also your position that although the
3 testimony the State elicited cheated on the understanding
4 pretrial, it wasn't nearly as damaging as what your own
5 attorney ultimately opened the door to, right?

6 A Yes, ma'am.

7 Q And it's your allegation that that, despite the best
8 of intentions, was also ineffective assistance of counsel?

9 A Yes, ma'am.

10 Q You had a direct appeal, didn't you?

11 A Yes, ma'am.

12 Q And a number of issues relating to the L.W.O.P.
13 sentence were raised on your behalf.

14 A Uh-huh.

15 Q But you and I have discussed the fact that there
16 really wasn't an issue preserved with regard to this
17 weapon testimony, was there?

18 A There wasn't, that's right.

19 Q And you would have wanted defense counsel to have at
20 least handled this situation in a manner that preserved it
21 for appellate review; is that correct?

22 A Yes, ma'am.

23 Q Okay. I believe somewhere in your pleadings, I've
24 seen some reference to the adequacy of your indictment, as
25 well, didn't you?

1 A Uh-huh.

2 Q Okay. And once again, you're raising a pre-Gentry
3 issue because the indictment doesn't go into as much
4 detail as you believe it should have in some respects,
5 right?

6 A Yes, ma'am.

7 Q And you believe that since your case was pre-Gentry,
8 you should be able to raise that as subject matter
9 jurisdiction?

10 A Yes, ma'am.

11 Q But even if you can't, you believe that trial counsel
12 should have challenged it in a motion to quash the
13 indictment for insufficiency?

14 A Yes, ma'am.

15 Q Okay. Now, I'm a little confused, so I want you to
16 try to explain what it is exactly you think was wrong with
17 your indictments, because I confess that I don't really
18 see it.

19 If you'll explain to the Judge what you think was
20 wrong with your indictments, it might be helpful.

21 A Well, in the -- let me get the indictment.

22 Excuse me for a minute.

23 (Pause).

24 Q Mr. Johnson, would you like me to bring you my copies
25 of the indictments?

1 A Yes, ma'am. I'm following with the indictments, but
2 they are the old indictments.

3 Q That's okay. I've got them. Just a moment.

4 (pause).

5 Let's take a look, first, at indictment 47716 for
6 kidnapping. It shows that July 2000 there was a true bill
7 indictment for kidnapping. Can you tell me what you
8 believe was insufficient or inaccurate about that
9 indictment?

10 A Well, it's really on the back, but for one, as far as
11 the witness Kevin K. Burns, I feel as though he was
12 insufficient as being the witness when he wasn't able to
13 testify at trial due to his deceitful behavior in trying
14 to deceive my codefendant into a lie to -- to indicate
15 that I was a part of the crime.

16 So therefore, it was ruled that the Solicitor or this
17 investigator couldn't testify in my trial because of that
18 behavior, and I believe that it was -- it was insufficient
19 for him to be as a witness in this indictment if he was
20 excluded from testifying in trial.

21 Q So you believe that once he was found to have engaged
22 in some sort of inappropriate conduct, that counsel should
23 have then gone back and challenged the sufficiency of the
24 indictment if it rested on his assertions?

25 A Yes, ma'am.

1 Q Okay. And that would be the sole basis for your
2 challenge to the indictments?

3 A Yes, ma'am.

4 Q Okay. And that was on the first degree burglary, and
5 the two counts of kidnapping, as well?

6 A Yes, ma'am; that's right.

7 Q Another issue occurs to me. There was no allegation
8 of any sexual involvement or motivation, sexual misconduct
9 of any sort in this case, was there?

10 A None.

11 Q Did -- it may be a moot point since you got life
12 without parole, but did defense counsel ever request that
13 His Honor, the presiding trial judge make a finding on the
14 record that these were not sexually motivated kidnappings
15 for purposes of laying the groundwork for your not having
16 to register as a predator if you ever were released?

17 A No.

18 Q Did you ever discuss that?

19 A No, no one discussed that with me. I wasn't
20 informed of that.

21 Q Okay. Now, as I said, it may pretty much be a moot
22 point as long as you got an L.W.O.P. sentence, but you do
23 now know that you're listed as an individual who would
24 have to register as a sex offender if you were ever
25 released for any reason, correct?

1 A No, I don't know that. For what reason?

2 Q Because of the kidnapping conviction. You don't
3 understand that?

4 A No, ma'am.

5 Q Okay. And there wasn't ever a discussion between you
6 and your attorney about the fact that you could ask Judge
7 Westbrook to make a finding on the record these were not
8 sexually motivated kidnapping charges?

9 A I didn't know that then. If I had known that, I
10 would have asked for that.

11 Q Okay. Thank you. Have we covered everything you
12 wanted to raise, Mr. Johnson?

13 A Well, Your Honor, I want to present the -- I'm not
14 proficient in law. I'm trying to express to the best of
15 my ability so that you can see the concept that I was
16 wrongly convicted of these charges.

17 I believe that my lawyer was ineffective due to the
18 fact that she didn't effectively present my case to the
19 court so that they can see that I did not rob Norman
20 VanDorn (phonetic), nor did I break into this house, nor
21 that I kidnapped him or his girlfriend.

22 The proof of the robbery, that if -- if it is found
23 clear that I did not rob him, it wouldn't -- it wouldn't
24 be possible to -- to -- to convict me of the burglary.

25 It's because -- the reason why they got me on the

1 burglary, saying that I forced entry, which means I had.
2 him at gunpoint and I forced him into his home.

3 The reason why they got me on the kidnapping, is that
4 I held him hostage inside his home.

5 The reason why they say I got the woman is that she
6 came into the house, and I want to clarify that instance
7 that when she came into the house, no one told her to come
8 in, except that her boyfriend told her to come inside the
9 house.

10 She wasn't forced to stay there. She wasn't -- it
11 wasn't indicating, none of that, and when the police came
12 to the door, she left willfully. She left -- no one
13 forced her or at gunpoint.

14 I want to let it be known on the record that if my
15 lawyer would have presented this information, it would
16 have given a clear indication that it would have been --
17 it would have been impossible for me to have robbed Van
18 Dorn considering that I had \$200 on my person.

19 He always -- accused me of taking \$10 from his
20 person. It could have been clear that he was -- it was
21 more of a -- a -- a deal that was going on than a robbery.

22 And the reason why the robbery was accused upon me is
23 that maybe he didn't want to incriminate himself in the
24 process.

25 I feel as though I wasn't represented to the point to

1 where my lawyer could have proven that I didn't rob him,
2 and it was something else other than me robbing him. It
3 could have been a drug deal gone bad and that sort.

4 THE COURT: All right.

5 BY MS. SHURLING

6 Q Mr. Johnson, you have mentioned the drug deal gone
7 bad. In this case, the weapon found in the closet was
8 entirely missed by law enforcement when they searched the
9 premises, correct?

10 A Yes, ma'am.

11 Q And the fact that it was then found by the
12 complaining witness --

13 A Yeah.

14 Q -- you believe would have supported an argument that
15 there could have been other incriminating things in that
16 apartment that the police didn't find either?

17 A Yes, ma'am, because they couldn't find a gun. They
18 definitely couldn't find everything else that was in
19 there.

20 Q So it's your position that -- that the argument could
21 have been made that if they missed the gun, what else
22 might they have missed that this gentleman is not wanting
23 you to know that?

24 A They could have missed drugs in the house.

25 Q Okay. Of course, you understand why it wasn't

1 possible for you to testify, don't you?

2 A Yes, ma'am.

3 Q Okay.

4 A Considering my history.

5 Q So you believe that since you couldn't testify,
6 counsel needed to seize on every available opportunity to
7 raise whatever inferences were available from the State's
8 testimony?

9 A Yes, ma'am.

10 Q Okay. All right. I think we've covered it all, Mr.
11 Johnson. Can you think of anything else?

12 A No, ma'am.

13 MS. SHURLING: Okay. Please answer Mr. Brown's
14 questions.

15 THE WITNESS: Yes, ma'am.

16 CROSS-EXAMINATION:

17 BY MR. BROWN

18 Q Were there drugs in the house?

19 A Yes, sir.

20 Q The testimony that came out was you went through the
21 entire house, and you weren't able to find them.

22 A I was --

23 Q How do you know?

24 A I wasn't looking through the house. That was their
25 statement. I didn't go through the entire house.

1 Q How do you know there were drugs in there?

2 A Well, because that's what we were going to do. It
3 was going to be a drug deal, and the drugs was there.

4 Q You never saw drugs?

5 A Yeah, I saw many.

6 Q You saw many drugs, but you didn't tell the police
7 where to find them?

8 A Well, I told them it was in the house.

9 Q You didn't tell them where?

10 A Well, I didn't tell them that.

11 Q Now, it's your allegation that trial counsel should
12 have objected about page 360 when the officer was
13 testifying about this gun, correct?

14 A Yes, sir..

15 Q On 383, Judge Westbrook says that he thought the
16 parameters of reasonableness had not been breached yet,
17 didn't he?

18 A Say it again.

19 Q On page 383, Judge Westbrook says that he didn't find
20 anything wrong with the officer's testimony, correct?

21 A Okay..

22 Q So even if your attorney had objected, she would have
23 been overruled, correct?

24 A Well, it's a possibly.

25 Q Okay. Now, you testified about this \$200 of your own

1 money being folded in a specific way.

2 A Yes, sir.

3 Q That money is not here today, though, is it?

4 A Well, the money is at the detention center, and it
5 could be proven that I had it that day.

6 Q Okay. And we've stipulated prior to this that we're
7 going to bring the contents of what was taken out of your
8 pockets, but are they going to bring that money over?

9 A They're not going to bring the money, but they're
10 going to be able to bring that I had the money.

11 Q Okay.

12 A This is so we don't get -- in many situations, it
13 could be a case of hearsay on my part and the so-called
14 victim's part.

15 Q And it's your allegation that because you had \$200,
16 you had no motive to rob for \$10?

17 A No. I was using that as an indication. I had no
18 motive to rob at all. It's clear that it's impossible for
19 me to rob the person of \$10 because I had \$200 in my
20 pocket.

21 Q So the only people that rob are people without money?

22 A Huh?

23 Q The only people that ever rob are people without
24 money?

25 A Only if they had a substantial amount. I mean, it

1 would be unsensible (sic) to rob a man who has less money
2 than you at that time.

3 Q But it's still possible, correct?

4 A Well, it's still possible in other situations.
5 That's a \$10 bill.

6 MR. BROWN: I have got no further questions, Your
7 Honor.

8 THE COURT: All right. Ms. Shurling?

9 REDIRECT EXAMINATION:

10 BY MS. SHURLING

11 Q If the issue had been addressed the way I have
12 suggested it should have been addressed at trial, the
13 Supreme Court could have reviewed Judge Westbrook's
14 rulings in this matter, correct?

15 A Yes, ma'am.

16 Q And as it is, the issues were not preserved for the
17 Supreme Court to review, were they?

18 A You're going to have to explain that again.

19 Q Okay. None of -- none of the problems your attorney
20 had with the way the evidence had come out and the way the
21 door had allegedly been opened in the view of Judge
22 Westbrook, those issues were not really preserved in the
23 form of any specific request or motion, were they?

24 A Not that I seen.

25 Q Pardon?

1 A Not that I seen, no, no.

2 Q Okay. And you understand that absent some specific
3 request or some specific motion, there was no real issue
4 preserved for appellate review?

5 A Yes, ma'am.

6 Q Okay. And you would have wanted Ms. Mims to raise
7 her challenge to what was happening in a manner that
8 allowed you to have that issue reviewed by an appellant
9 court after your conviction?

10 A Yes, ma'am.

11 Q And you would have wanted the Supreme Court to decide
12 whether or not Judge Westbrook's conclusions were
13 accurate, correct?

14 A Yes, ma'am. If it had to go to that point, yes,
15 ma'am.

16 MS. SHURLING: Thank you. No further questions.

17 MR. BROWN: No questions, Your Honor.

18 THE COURT: All right. Thank you. You may step
19 down.

20 MS. SHURLING: No further witnesses, Your Honor.

21 THE COURT: All right.

22 MR. BROWN: The State calls Sheila Mims.

23 (pause).

24 THE COURT: Oh, I'm sorry.

25 SHEILA MIMS, after being duly sworn,

1 testified as follows:

2 THE COURT: All right. Let him get...

3 (pause).

4 THE WITNESS: Sheila Mims.

5 DIRECT EXAMINATION:

6 BY MR. BROWN

7 Q Good afternoon, Ms. Mims.

8 A Good afternoon.

9 Q Do you recall your representation of Mr. Johnson in
10 this case?

11 A I do.

12 Q How did you come to represent him?

13 A He was appointed to me when I was a Public Defender
14 here in Richland County.

15 Q Had you represented him along with April Sampson?

16 A That's correct.

17 Q What was your role in the representation?

18 A I was the lead attorney.

19 Q Okay.

20 A She was my second seat.

21 Q As lead attorney, what were some of your primary
22 responsibilities?

23 A To investigate the case, meet with the client, get a
24 trial strategy together. Actually, you know, in every
25 case try to get the best alternative or deal that you can

1 for your client. That was always my position.

2 Q And did you have the opportunity to meet with him?

3 A I did, several times.

4 Q Throughout the meetings, what types of things did you
5 all discuss?

6 A It ran the gamut. We -- we had issues -- we knew he
7 was eligible for L.W.O.P. early on because of the prior
8 record, and one of the first things that I went after was
9 a plea deal.

10 He had already been served L.W.O.P. papers, I think.
11 I think he had already been served life without parole
12 papers, and I approached Johnny Gasser, who was number two
13 at the Solicitor's Office at the time, trying to procure
14 some type of plea for Demarco, just to see if we couldn't
15 work something out to avoid life because he was only like
16 19.

17 Q Did you receive a plea offer in this case?

18 A I did.

19 Q Do you recall what it was?

20 A At first it was 50 years nonviolent, and I got him
21 down to 38 years nonviolent.

22 Q Did you convey that to Mr. Johnson?

23 A I did convey that to Mr. Johnson. I also had his
24 grandmother -- I talked to his grandmother on the phone
25 and tried to get her to -- you know, her opinion was yes,

1 plea, plea. I talked to Demarco about that, and he didn't
2 want to.

3 Q Okay. Now, there's been several allegations, but the
4 primary allegation was that of the door being opened
5 regarding this gun testimony. Do you remember that
6 situation in the trial?

7 A I do, uh-huh.

8 Q And how do you -- in hindsight -- have you had a
9 chance to read the transcript?

10 A I read it last week.

11 Q And what do you think as far as Ms. Shurling's
12 allegations go?

13 A I think that Ms. Shurling has a good point. That was
14 a very difficult moment in the trial. I was blind sided
15 by a very, very talented witness. I say talented because
16 he is. He's testified a lot.

17 I'm alluding to Investigator Stan Smith. He's a
18 professional witness, if you will. He knew exactly what
19 he was doing. He sat here through pretrial motions.

20 We very clearly had an order saying the State could
21 not go into a certain area regarding the gun and ownership
22 of the weapon. He was able to get right into it.

23 I'm -- I'm not exactly sure of what happened and what
24 was going on, but we were completely blind sided. It took
25 me a minute, and I was late making an objection.

1 Q And you later did make the objection?

2 A I did. I did make the objection.

3 Q What did Judge Westbrook say about that objection and
4 about that prior testimony?

5 A You know, my recollection is that Judge Westbrook
6 said, "Hey, good job today. You know, they just were able
7 to fly it in on you."

8 I'm not saying anything, of course, against him. He
9 just said, "They were able to get it in on you in a crafty
10 way, albeit, but they did it according to the rules, and
11 it's okay." He let it in.

12 Q Okay. So essentially, he said they had -- well, I
13 take that back. I apologize.

14 Had you made that objection at that time based on
15 Judge Westbrook's later statement, how do you think he
16 would have ruled?

17 A Based on his later statement, I -- I guess he would
18 have probably, you know, overruled my objection. I don't
19 know. I don't know.

20 Q But the issue is whether or not it would have been
21 preserved for appellate review, correct?

22 A Right, and I don't know what the Court of Appeals
23 said about that. I didn't read -- I read the opinion a
24 long time ago from the Court of Appeals, and I don't know
25 what happened with that, but I don't know if it was even

1 brought up from there.

2 I would have assumed that I would have preserved it
3 better had I objected timely. However, I did object, and
4 he did say, "Harmful but within the rules. They slipped
5 it in on you, too bad."

6 I just don't know how the Court of Appeals would have
7 dealt with that, I'm sorry.

8 Q Have you ever had an opportunity to review a record
9 where the issue wasn't preserved but still raised before
10 the appellate courts? Does that ever occur?

11 A Yeah, it does, I think.

12 Q And the appellate court at that time can rule whether
13 or not it's preserved --

14 A Yeah.

15 Q Correct?

16 A That's right.

17 Q And in your review of the opinion, it doesn't appear
18 that this issue was even raised?

19 A I don't think so. I don't recall. It's been a
20 while, but I don't think so.

21 Q Do you recall whether any issues were raised?

22 A By me?

23 Q At the appellant level.

24 A I don't. I don't. I read that a long time ago on
25 the advance sheets, but it's been awhile.

1 Q I would just ask His Honor to take judicial notice
2 that there were issues raised and ruled upon --

3 A There were and an opinion was issued. I just don't
4 recall --

5 Q Okay.

6 A -- what that was.

7 Q Now, let me ask you this: Taking this gun testimony
8 aside, the page 360 to page 380, what was the other
9 evidence against Mr. Johnson in this case?

10 A The other evidence were the two -- mainly the two
11 statements of the victims, Norman VanDorn and Keidra HERNs
12 (phonetic) and -- Which was, you know, Norman saying, "I
13 was going to play basketball, and these two men approached
14 me with guns, and they told me to give them money. They
15 took me back into my apartment, and they were searching
16 all over the house trying to find money." That was Norman
17 VanDorn.

18 His girlfriend said that she came home from taking an
19 exam, opened the door, he said, "Come in, have a seat."
20 She came in, had a seat, and they had guns drawn, and
21 Norman told her, "We're being robbed."

22 Q Okay. Based on the testimony that's presented at
23 trial, were the elements of kidnapping satisfied as to the
24 female victim?

25 A Based on the allegations, yes.

1 Q Okay. Now, where was Mr. Johnson found when he was
2 arrested?

3 A He was inside the apartment.

4 Q Okay. So he was found inside the apartment that was
5 being robbed?

6 A Yes.

7 Q And this was contemporaneous to the robbery and the
8 burglary?

9 A Yes.

10 Q Okay. Was there an eyewitness identification made to
11 the two defendants in this case?

12 A By the victims. By Keidra and Norman VanDorn.

13 Q Did you attempt to challenge those at all? Was there
14 any way to challenge them?

15 A I don't know if there -- I -- there really wasn't. I
16 mean, they arrested him in the apartment with Keidra and
17 Norman. That was kind of it.

18 I mean, I didn't do any type of Biggers hearing or
19 anything like that, no.

20 Q Now, was it the allegation that both of these
21 individuals had guns in the apartment?

22 A Yes, there were two victims, according to the victim.

23 Q And one of the guns was immediately...

24 A Found.

25 Q Beg the Court's indulgence. Let me make sure I

1 phrase this correctly.

2 (pause).

3 Without this gun evidence, could there have been an
4 allegation under the hand of one is the hand of all with
5 him being present?

6 A Oh yes, absolutely.

7 Q Any chance that the mere presence charge would have
8 been appropriate in that situation?

9 A Oh absolutely. All they needed was one gun.

10 Q Could it have been asserted as a defense in light of
11 the allegations, though, that Mr. Johnson was in no way
12 involved?

13 A Not really. It was -- yeah, not really.

14 Q Okay. Beg the Court's indulgence.

15 (pause).

16 Did you investigate the \$200, or were you aware that
17 Mr. Johnson had \$200 on his person when he was arrested?

18 A I just don't remember. He may have told me that, and
19 I just don't remember. I did not -- I did not ask for the
20 records from Richland County. I did not do that.

21 Q Had you known that, would that have been something
22 you would have asserted?

23 A You know, I would have hoped I would have. It's been
24 about five years. I would have hoped I would have gone
25 into that. I just don't recall if he brought it up to me.

1 Q Is it possible, however, that just because he had
2 \$200, there's no way he could have robbed somebody?

3 A No. I mean, in my opinion, no. I would have brought
4 it up.

5 MR. BROWN: Okay. I have no further questions at
6 this time, Your Honor.

7 CROSS-EXAMINATION:

8 BY MS. SHURLING

9 Q Do you have a copy of the transcript?

10 A Not in front of me, no.

11 Q Okay. Do you have an extra copy?

12 MR. BROWN: I do not.

13 MS. SHURLING: Okay.

14 THE WITNESS: No, I'm sorry.

15 MS. SHURLING: That's okay. I'll...

16 THE COURT: You can have mine. What page do you
17 want?

18 MS. SHURLING: Your Honor, starting -- I think we'll
19 start our discussion...

20 THE COURT: Page three...

21 BY MS. SHURLING

22 Q On page 384.

23 A 384?

24 Q I'd ask you to look during the remarks of the
25 presiding judge found at lines nine through 15. The Judge

1 directly notes, "I know you didn't object at that time."

2 A Yes.

3 Q Okay. And then your response, "The question was
4 already out there, Your Honor."

5 The Court says, "Well," and Ms. Pellizari responds,
6 "You could have objected." Do you see that?

7 A Uh-huh.

8 Q Okay. Now, if we go back to where there's a bench
9 conference called at page 381 at line 16. You go in
10 camera, or out of the presence of the jury rather, and you
11 do certainly go on and on, on page 382, line one on over
12 through -- it's still being discussed on 384 and parts of
13 385 and 6.

14 You go over in a fairly detailed fashion your
15 displeasure with how they've sneaked this evidence in,
16 right?

17 A I was -- I was furious, yes.

18 Q And it's pretty obvious you were upset about it.

19 A Yes, uh-huh.

20 Q But in fairness, can you show me where in here you
21 make any specific objection, motion, request other than
22 venting about what you think they've done wrong?

23 A I thought I had already made the objection.

24 Q Well, can you show it to me, because I don't see an
25 objection on the record.

1 A I don't know. If you don't see it, Ms. Shurling, I'm
2 assuming it's not there. I would rather not sit here and
3 take up the Court's time looking for it.

4 Q Okay.

5 A If you haven't seen it, then I'm assuming you are
6 correct.

7 Q Unless I'm overlooking it, what I see happening is
8 that you asked to approach the bench, and there is a long
9 colloquy about what has happened, but there's no specific
10 motion for a mistrial. There's no motion to strike --

11 A No. There should have been a motion for a mistrial.
12 There was not.

13 Q And there was no motion to strike, nor a motion for a
14 curative charge?

15 A No. I felt --

16 Q Not a specific objection.

17 A Right. And for some reason I thought that objection
18 had been made. I thought that's how I stopped court. I
19 thought that I had made an objection, and I don't really
20 understand why it's not there.

21 I guess my "May we approach" and I never got the
22 objection on the record. I'm just stunned by that, but I
23 guess that's what happened.

24 Q And let's go back and take a look, closer look, at
25 what actually happened, okay, because on page 385 when

1 Ms. Pellizari is arguing that they came real close to the
2 edge of the envelope, but they didn't cross it or they
3 didn't go too far, rather. I'm mixing my metaphors here.

4 She says, and I'm looking at line 21, "I did not get
5 into that. The only thing I asked that officer is, do you
6 know where the gun came from, was it linked to the victim?
7 No, it's not, and that was the end of it. I didn't open
8 any doors, any burglaries."

9 Let's go back to 360. 360, she gets into a
10 discussion with Sergeant Smith about, "You have worked
11 several armed robbery cases, I guess, throughout your
12 career, quite a few." I'm starting at line 14 on 360.

13 "Would you say more often than not you recover
14 weapons that are used in those armed robberies?"

15 "More often we do not."

16 "Do not, okay. Through the course of your
17 investigation, did you learn where the nine millimeter,
18 the Baretta that was found later on by Van, did you learn
19 where that gun came from?"

20 "Yes, ma'am, I did."

21 "And can you exclude Van as being the owner of that
22 gun?"

23 "Yes, ma'am."

24 "Can you exclude Demarco Johnson from possessing that
25 gun?"

1 "No, I cannot."

2 Doesn't that, in fact, go beyond what

3 Ms. Pellizari --

4 A Absolutely.

5 Q -- represented to the court?

6 A Yes, yes.

7 Q And should you have objected at that juncture?

8 A Yes, I should have objected, yes.

9 Q And did that not at least by inference raise matters
10 that had been mutually agreed upon pretrial would not be
11 raised?

12 A It sure did.

13 Q Okay. And in response to that, in an effort to try
14 to clear it up, you end up bringing out yourself the fact
15 that you -- the source of the gun had ultimately been
16 concluded to be from a burglary, correct?

17 A That didn't come out in front of the jury

18 Ms. Shurling:

19 Q Well, let's go to page 380, "Cross by Ms. Mims".

20 A I didn't think.

21 Q Okay. Let's look starting at line two.

22 A I see it.

23 Q "Yes. I'm not spitting it out very well. Did you --
24 and you did that for this particular weapon, as well?"

25 "Which one?"

1 "The second one that Mr. Dorn" --

2 "Yes, ma'am, I did."

3 "Found; is that right? I'm sorry. I'm not being
4 clear, and on that, you had traced that to a gun that had
5 been stolen?"

6 "That's correct."

7 "From a burglary?"

8 "Yes, ma'am."

9 "Okay."

10 That's during your questioning, isn't it?

11 A Right, and knowing what I know now, I was -- I was --
12 this is five years ago as a Public Defender.

13 Q Oh, I understand.

14 A Now, what I -- I know what I was trying to do. What
15 I was trying to do was just try to say okay, you -- this
16 gun came from a burglary. Demarco Johnson had nothing to
17 do with a burglary. I was trying to kill it but not
18 thinking ahead of where this -- especially with Stan
19 Smith, where this was going to go.

20 Q And my --

21 A I was letting it dry. I was scared to leave it
22 dangling there, so I was trying to loop it and bring it
23 back around, and it just didn't do it.

24 Q And by doing that, you unwittingly were found to have
25 owned the door for Ms. Pellizari to specifically introduce

1 hearsay testimony to the effect that the gun had been sold
2 to Odell Johnson.

3 Your Honor, I'm looking at 381, lines six through 13.

4 A I've got his copy.

5 Q Investigator Smith is allowed to say, "We were able
6 to link the weapon to Odell Johnson, who is Demarco's
7 brother" --

8 THE COURT: I've read --

9 BY MS. SHURLING

10 Q -- "Sold it to him" --

11 THE COURT: I've read all of that two or three times.

12 MS. SHURLING: Sir?

13 THE COURT: I've read it all.

14 MS. SHURLING: Okay.

15 THE COURT: I know exactly where you are.

16 BY MS. SHURLING

17 Q You know where that is, okay.

18 Now, specifically -- going back just real quickly to
19 where this problem kind of had its origin when judge --
20 pardon me, when Detective Smith, as you say very
21 skillfully got into this area, he's not talking about
22 checking registration numbers on weapons, or at least he's
23 mixing his methods of investigation in his testimony,
24 isn't he?

25 A Absolutely.

1 Q Okay.

2 A Absolutely.

3 Q And by saying, "Can you exclude Van as being the
4 owner of that gun?"

5 "Yes, ma'am."

6 Now, the jury doesn't know whether he's talking about
7 that he ran the serial number, and it didn't show up as
8 belonging to him or what. They don't know what method has
9 been used to exclude Van as the owner, do they?

10 A No.

11 Q And when they take that next step and say, "Can you
12 exclude Demarco Johnson from possessing that gun?"

13 "No, I cannot."

14 Then that's going into hearsay -- testimony that
15 doesn't sound like hearsay, but it is in a very real way.
16 It's referring to matter that you all had agreed to
17 exclude from evidence, right?

18 A Uh-huh.

19 Q And would you agree with me that's the juncture at
20 which, rather than try to clear it up yourself with later
21 testimony, you should have interjected a motion for a
22 mistrial right then and there?

23 A Oh, I should have interjected it earlier even, yeah.

24 Q Okay. And -- or at least beginning over on 360,
25 somewhere in there you should have --

1 A Yeah.

2 Q -- made a motion for a mistrial, and if the motion
3 for a mistrial had not been granted, at minimum sought to
4 strike the offensive testimony and request a curative
5 charge?

6 A Yes.

7 Q And do you believe that might have affected the
8 outcome of the trial?

9 A Yeah.

10 Q Because it clearly portrayed your client as the
11 brother of someone involved in the burglary of that
12 weapon, prejudicial testimony, in your view.

13 A I don't know if it would have --

14 Q Right.

15 A I mean to me, it was clearly prejudicial.

16 Q Okay. And if -- on the facts of this case, Van's own
17 admission that when the police came, your client's
18 codefendant handed him a gun --

19 A Uh-huh.

20 Q -- to do something with?

21 A Uh-huh.

22 Q That in and of itself, all by itself, opened the door
23 for you to argue that, "Ladies and gentlemen, use your
24 common sense. This isn't what it's being portrayed as.
25 Something funny is going on"?

1 A Uh-huh.

2 Q Okay.

3 A Uh-huh.

4 Q So any effort by the State to --

5 THE COURT: Is this a question?

6 MS. SHURLING: Sir?

7 THE COURT: Is this a question or an argument?

8 BY MS. SHURLING

9 Q Okay. Didn't -- you're right. I apologize, Your
10 Honor.

11 But didn't this testimony open the door for the State
12 to sort of close that window of opportunity by directing
13 tying your client to another burglary, by inference
14 anyway?

15 A Absolutely.

16 MS. SHURLING: Thank you. No further questions.

17 MR. BROWN: No questions, Your Honor.

18 THE COURT: All right. Let me ask you something
19 Ms. Mims. Not contemporaneously with the question being
20 asked but almost immediately thereafter, you asked to
21 approach the bench, if I remember correctly.

22 THE WITNESS: Yes, sir.

23 THE COURT: You thought at that point in time you
24 were making an objection?

25 THE WITNESS: I did, and I was surprised I didn't

1 until Ms. Shurling brought it to me.

2 THE COURT: And the court then went on, if I read it
3 correctly, the Court went on to say that, "What was done
4 was done appropriately. They were smart in how they did
5 it, but still it was legitimate and within the bounds of
6 reasonableness"?

7 THE WITNESS: That's what the Judge ruled at the
8 time.

9 THE COURT: I mean, basically, the Judge ruled that
10 your motion, if it was, was not going to prevail, correct?

11 THE WITNESS: That was my understanding at the time.

12 THE COURT: And then you asked questions after that
13 hoping to --

14 THE WITNESS: Hoping to close it up, Your Honor.

15 THE COURT: That was the strategy you adopted at that
16 time.

17 THE WITNESS: Yes, sir. It may not have been the
18 best one, but that's the one I did at that time.

19 THE COURT: All right. Thank you. You may step
20 down.

21 THE WITNESS: Thank you.

22 MS. SHURLING: Your Honor, I didn't hear that last
23 little bit clear, but I think what's important to note is
24 that Judge Westbrook specifically noted that she had not
25 objected.

1 THE COURT: Look, I understand that.

2 MS. SHURLING: And that the colloquy --

3 THE COURT: Ms. Shurling, I've read it --

4 MS. SHURLING: Okay.

5 THE COURT: -- three or four times. I know what it
6 says.

7 MS. SHURLING: Okay. Thank you.

8 THE COURT: All right. Anything further?

9 MR. BROWN: That's it for the day.

10 THE COURT: Anything further?

11 MS. SHURLING: The only last point that I would make,
12 Your Honor, is regardless of whether Judge Westbrook
13 specifically referenced it or not, Ms. Pellizari was
14 tenaciously arguing that the defense had opened the door
15 for what additional testimony -- that she had not done
16 anything improper and that anything that had come out had
17 come out through the door being further opened by the
18 State. We have no way of knowing to what extent that
19 argument by Ms. Pellizari influenced Judge Westbrook's
20 rulings.

21 THE COURT: Okie-doke. Thank you all.

22 MS. SHURLING: Thank you, sir.

23 MR. BROWN: Thank you, Judge.

24 (The proceedings were concluded pending receipt of
25 previously mentioned exhibit.)

1 (Later in the week Applicant Plaintiff's Exhibit
2 number 1 was marked for identification and received
3 into the record.)

4 (Whereupon, the proceedings were concluded.)
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541

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

2003-CP-40-5842

Demarco Johnson, 214138,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

FILED
2007 MAR - 7 PM 4:29
RICHLAND COUNTY
CLERK OF COURT
TARA D. SHURLING

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 5, 2003. The Respondent made its Return on July 13, 2004. An evidentiary hearing into the matter was convened on February 26, 2007, at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Tara D. Shurling, Esquire. The Respondent was represented by Robert L. Brown of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. This Court also had before it the records of the Richland County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant was indicted at the July 2000 term of the Richland County Grand Jury for two counts of kidnapping (00-GS-40-47716,47717) and first degree

burglary (00-GS-40-47718). He was represented by Sheila Mims and April Sampson, Esq. On February 7, 2001, the Applicant proceeded to trial and was found guilty. He was sentenced by the Honorable Marc Westbrook to confinement for Life without parole. The Applicant filed a timely Notice of Appeal and the appeal was perfected. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Johnson, Op. No. 3501 (S.C. Ct. App. filed May 28, 2002). The South Carolina Court of Appeals issued its remittitur on February 27, 2003.

The Applicant alleges that he is being held in custody unlawfully for the following reasons:

- 1) "The conviction and sentence was in violation of the Constitution of the United States and the Constitution of the laws of South Carolina for each of the following reasons":
 - a. "The sentence and the conviction of the Defendant was obtained through prosecutorial misconduct in that each and every witness of the State presented false testimony against the defendant;"
 - b. "Defendant was deprived of his Constitutional right's when the State failed to obtain the victim's desires for Defendants punishment;"
 - c. "The defendant was denied his Constitutional right to due process when the State secured defendants detention upon faulty warrants;"
 - d. "The defendant was denied his Constitutional right to present mitigating evidence prior to sentencing under the "Future Dangerousness" doctrine;"
 - e. "The Defendant's rights to a fair trial, due process and fundamental fairness were violated when the trial court failed to charge the jury with the lesser included offenses, to include Burglary 2nd," and
 - f. "The defendant's right to a fair trial, fundamental fairness and due process was violated when he was tried for both kidnapping charges, and burglary 1st, in the same trial."
- 2) "The Court was without jurisdiction, and Defendant was denied his right to due process and fundamental fairness, because the warrants furnished the Defendant were not secured in or under oath sworn to before issuance and trial. The Defendant was not brought before a magistrate after his arrest was secured in order to procure the warrant of his arrest upon the notice of a sworn affidavit

before trial. The warrants omit whether they were sworn to under oath, and a issuing judges signature showing proof of oath”

- 3) “The exist evidence of material facts, not previously presented and heard that requires vacation of the conviction and sentence in the interest of judgment in that there are facts that will show that the witnesses against the Defendant presented false testimony. This false testimony goes to discovery of the Defendant on the premises, the actions of the Defendant while on the premises, and the physical motive of the Defendant.”
- 4) “The defendant received ineffective assistance of counsel in each of the following particulars:”
 - a. “Counsel was ineffective for failing to request the Court to charge the lesser offense of Burglary 2nd,”
 - b. “Counsel was ineffective for failing to explore the possibility of a plea negotiation with the victims in opposition to the “Two Strikes Law;”
 - c. “Counsel was ineffective for failing to request that the charges of burglary 1st, and kidnapping be separated and tried separately;”
 - d. “Counsel was ineffective for failing to obtain jail documents that showed Defendant to have \$203.00 dollars upon his arrest and booking, which would have shown that witnesses James Standin Smith, and Dennis Dodge gave false testimony;”
 - e. “Counsel was ineffective for not moving to request evidence of affidavit of arrest showing the warrants to be procured under sworn oath;”
 - f. “Counsel was ineffective for failing to object and ask for a mistrial when the state tried to introduce evidence concerning statements, made by uncalled witnesses prejudicing the Defendant’s right to a fair trial in solicitor’s closing arguments;” and
 - g. “Counsel failed to object or move for a mistrial when the prosecutor argued that in opening statements that the defendant was guilty of burglary 1st degree because he escorted someone to their apartment at gunpoint and having them let you in was burglary first. These arguments were improper and prejudicial in that the defendant was indicted for committing burglary 1st, based upon the possession of a handgun. Furthermore, he was not indicted for burglary 1st, while in the commission of kidnapping which is exactly what the prosecutor described as Burglary 1st.”

At the evidentiary hearing, Applicant proceeded on a general allegation of ineffective assistance of counsel focusing primarily on counsel's failure to object to the prosecutor's introduction of the origin of a gun used in the crime, when the solicitor had been warned not to introduce the origins. Applicant also alleged that counsel was ineffective in failing to move for a mistrial when the origin of the gun was introduced into evidence.

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).

At the hearing, Applicant focused on the issue of whether counsel should have objected to testimony presented by Stan Smith regarding the origin of the gun used in the crime. Prior to trial, the parties agreed that the solicitor would not mention that the gun was linked to a burglary committed by Odel Johnson, the Applicant's brother. At trial, the solicitor asked Investigator Smith whether the gun could be linked to the victim, to which he replied it could not. Tr. P. 360, ln. 25 – p. 361, ln. 2. Investigator Smith could not exclude Applicant as the possessor of the gun. Tr. P. 361, ln. 3 – 5. Investigator Smith did not testify about the prior burglary committed by Applicant's brother. On cross-examination, Ms. Dukes-Mims attempted to clear up questions presented by Investigator Smith's prior testimony by asking if Applicant was the person arrested for the burglary linked to the gun. Tr. P. 380, ln. 20 – p. 381, ln. 2. On redirect, Investigator Smith explained the connection between the burglary and how Applicant received the gun used in the current crime. Tr. P. 381, ln. 8-13. When Investigator Smith testified to this, Ms. Dukes-

Mims objected and asked to approach the bench at which time the jury was excused and a colloquy occurred concerning the testimony. Tr. P. 382, ln. 1 – p. 387, ln. 8. During this colloquy, Judge Westbrook explained why he did not feel the testimony was improper. Applicant alleges that counsel was ineffective for failing to object to the first mention of the gun being linked to Applicant. This Court is not persuaded by Applicant's argument. Upon review of the transcript, it is clear that counsel did not object when Investigator Smith testified that he could not exclude Demarco Johnson from possessing the gun in question. Tr. P. 361, ln. 3-5. However, this Court finds that counsel's failure to object is not ineffective because Judge Westbrook later states on the record that the testimony was appropriate. Under the Strickland analysis, it may be determined that counsel was deficient however, Applicant has not met the second prong of the analysis and has failed to show 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. 115 at 117-18, 386 S.E.2d 624 at 625.

Applicant additionally asserts that counsel's failure to preserve the issue is *per se* ineffective because it prevented the appellate court from reviewing whether Investigator Smith's statements were improper. Again, this Court disagrees and finds that Applicant must show that had the issue been preserved, that the appellate court would have granted Applicant a new trial based on the error. This Court finds that, in light of the overwhelming evidence including Applicant being found in the apartment, Applicant being positively identified by both victims as well as being in possession of a ten dollar bill, that the court would not have granted Applicant a new trial on appeal. Accordingly, this allegation is denied and dismissed.

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), 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, 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, 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). 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.

As to the allegation that the sentence and the conviction of the Defendant was obtained through prosecutorial misconduct in that each and every witness of the State presented false testimony against the defendant, this Court finds this claim is without merit. Applicant has

presented no evidence that the State's witnesses perjured themselves and therefore this allegation is denied and dismissed.

As to the allegation that Applicant was deprived of his Constitutional rights when the State failed to obtain the victim's desires for Defendants punishment, this Court finds this claim is without merit. Applicant was sentenced under the State's mandatory two-strikes Life Without Parole statute which takes sentencing discretion out of the judge's hands. Accordingly, this allegation is denied and dismissed.

As to the allegation that Applicant was denied his Constitutional right to due process when the State secured his detention upon faulty warrants, this Court finds that this issue has been waived. Applicant presented no testimony or evidence concerning this allegation and it is therefore waived.

As to the allegation that Applicant was denied his Constitutional right to present mitigating evidence prior to sentencing under the "Future Dangerousness" doctrine, this Court finds this claim is without merit. Applicant was sentenced under the State's mandatory two-strikes Life Without Parole statute which takes sentencing discretion out of the judge's hands. Accordingly, this allegation is denied and dismissed.

As to the allegation that Applicant's rights to a fair trial, due process and fundamental fairness were violated when the trial court failed to charge the jury with the lesser included offenses, to include burglary – second degree, this Court finds this claim is without merit. The facts must support a jury instruction for it to be proper. State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (S.C. 2003). Here, the evidence supports that Applicant forced his way into the victims' home with a weapon with the intent to commit a crime which satisfied the elements of burglary – first degree. No evidence presented supports a charge of burglary – second degree.

As to the allegation that Applicant's right to a fair trial, fundamental fairness and due process was violated when he was tried for both kidnapping and burglary – first degree in the same trial, this Court finds this allegation has been waived. Applicant presented no testimony regarding this issue and has therefore waived his right to proceed on this issue. Accordingly, this allegation is denied and dismissed.

As to the allegation that the trial court was without jurisdiction based on Applicant not being brought before a magistrate after his arrest was secured in order to procure the warrant of his arrest upon the notice of a sworn affidavit before trial, this Court finds this claim has been waived due to Applicant's failure to present evidence in support of his claim. Accordingly, this allegation is denied and dismissed.

As to the allegation that there exists evidence of material facts, not previously presented and heard that requires vacation of the conviction and sentence in the interest of judgment in that there are facts that will show that the witnesses against the Defendant presented false testimony, this Court finds this claim is waived. Applicant did not present any testimony regarding the veracity of the witnesses presented by the state. Accordingly this allegation is denied and dismissed.

As to the allegation that counsel was ineffective for failing to request the Court to charge the lesser offense of burglary – second degree, this Court finds this claim is without merit. As discussed above, the facts must support a jury instruction for it to be proper. State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (S.C. 2003). Here, the evidence supports that Applicant forced his way into the victims' home with a weapon with the intent to commit a crime which satisfied the elements of burglary – first degree. No evidence presented supports a charge of burglary – second degree.

As to the allegation that counsel was ineffective for failing to explore the possibility of a plea negotiation with the victims in opposition to the two-strikes law, this Court finds this claim is waived. Applicant presented no testimony regarding the availability of plea negotiations. Accordingly, this allegation is denied and dismissed.

As to the allegation that counsel was ineffective for failing to request that the charges of burglary – first degree and kidnapping be separated and tried separately, this Court finds this allegation has been waived. Applicant presented no testimony regarding this issue and has therefore waived his right to proceed on this issue. Accordingly, this allegation is denied and dismissed.

As to the allegation that counsel was ineffective for failing to obtain jail documents that showed Defendant to have \$203.00 upon his arrest and booking, which would have shown that witnesses James Standin Smith, and Dennis Dodge gave false testimony, this Court finds this claim is without merit. Applicant provided this court with a copy of records indicating he had \$200.00 in his possession when arrested which Applicant claims negated his motive. This Court does not find how counsel was ineffective in failing to present this evidence to the jury given the overwhelming evidence in this case. Further, Applicant has failed to demonstrate that someone with \$200.00 is incapable of committing burglary. Accordingly, this allegation is denied and dismissed.

As to the allegation that counsel was ineffective for not moving to request evidence of affidavit of arrest showing the warrants to be procured under sworn oath, this Court finds this claim is waived. Applicant presented no testimony or evidence regarding this allegation. Accordingly, this allegation is denied and dismissed.

As to the allegation that counsel was ineffective for failing to object and ask for a mistrial when the state tried to introduce evidence concerning statements, made by uncalled witnesses prejudicing the Defendant's right to a fair trial in solicitor's closing arguments, this Court finds that Applicant has failed to meet his burden of proof. Accordingly, this allegation is denied and dismissed.

As to the allegation that counsel failed to object or move for a mistrial when the prosecutor made improper opening statements, this Court finds this claim is waived. Applicant has failed to put forth any testimony or evidence regarding this claim and it is therefore waived. Accordingly, this allegation is denied and dismissed. As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

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.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App.

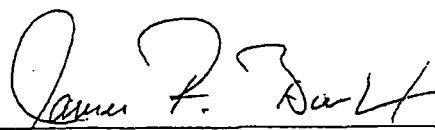
1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) 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 PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 227 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 7th day of March, 2007.



James R. Barber, III
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina.

DOCKET NO. W0063-46-4-1717

WITNESSES

F. BARNES, RCSD

F. Barnes

The State of South Carolina,

RICHLAND

County of

COURT OF GENERAL SESSIONS

#104 JULY TERM 2000

THE STATE

vs.

DEMARCO JOHNSON

ACTION OF GRAND JURY

TRUE BILL

Verdict & Return
Return of Grand Jury

VERDICT

Guilty

Indictment for

KIDNAPPING

S. C. Code Section 16-3-910 Class A-Felony
0095

ATTEST
A TRUE COPY

Barbara G. Scott

C. C. C. P. & G. S.

Wm. C. Henderson 2-7-01
Members of Petit Jury
5 Date:

WITNESSES

P. Barnes, RCSD

P. Barnes

The State of South Carolina,

RICHLAND

County of

COURT OF GENERAL SESSIONS

#104 JULY TERM 2000

THE STATE

vs.

DEMARCO JOHNSON

ARREST WARRANT NO. G246915

ACTION OF GRAND JURY

TRUE BILL

Henry P. Allen
Man of Grand Jury

Henry P. Allen

VERDICT

Guilty

Henry P. Allen
Man of Petit Jury Date: *2-20-01*

554

Indictment for Burglary

(Dwelling)

FIRST DEGREE

S. C. Code Section 16-11-311 Felony
0079

* T T E S T *
A TRUE COPY

Barbara G. Scott
10.8.03

C. C. C. P. & C. B.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT FOR BURGLARY
(DWELLING)
FIRST DEGREE

At a Court of General Sessions, convened on July 12, 2000,
the Grand Jurors of RICHLAND County present upon their oath:

COUNT ONE — BURGLARY IN THE FIRST DEGREE

(DWELLING)

That DEMARCO JOHNSON
did in Richland County on or about December 14, 1999,
willfully and unlawfully enter the dwelling of Norman Dorn
without consent and with the intent to commit a crime therein and the defendant
while therein was armed with a ~~shotgun~~ ^{WEAPON MTH 2/5/01} and did commit an armed robbery
upon Norman Dorn

COUNT TWO — BURGLARY IN THE SECOND DEGREE

(DWELLING)

That _____
did in _____ County on or about _____,
willfully and unlawfully enter the dwelling of _____
without consent and with the intent to commit a crime therein.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Warren B. Geese
SOLICITOR

DOCKET NO. 2000-53-40-4 17116

WITNESSES

F. Barnes, RCSD

Dr. E. W. Barnes

The State of South Carolina,

RICHLAND

County of

COURT OF GENERAL SESSIONS

#104 JULY TERM 2000

THE STATE

vs.

DEMARCO JOHNSON

ACTION OF GRAND JURY

ARREST WARRANT NO. G246914

TRUE BILL

Henry R. Miller
Foreman of Grand Jury

VERDICT

Guilty

Indictment for

KIDNAPPING

S. C. Code Section 16-3-910 Class A-Felony
0095

ATTEST
A TRUE COPY

Barbara A. Scott
12-8-03

CLERK OF COURT

George C. Henderson 2-7-01
Foreman of Petit Jury
15 Date:

558 STATE OF SOUTH CAROLINA)
 COUNTY OF Richland)
 STATE VS.)
Demarco Johnson)
 AKA:)
 Race: B Sex: M Age: 21)
 DOB: 7 SS#: _____)
 Address: _____)
Columbia, SC)
 DL# _____ SID#: 8C00913437)

IN THE COURT OF GENERAL SESSIONS)
 INDICTMENT/CASE#:)
00 -GS- 40 - 47716)
 A/W#: 3246914)
 Date of Offense: 12-14-99)
 S.C. Code §: 16-3-910)
 CDR Code #: 0101915)
 CASE RESTORED)
 SENTENCE)
 PLEA TRIAL)

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS TO: Kidnapping
 in violation of § 16-3-910 of the S.C. Code of Laws, bearing CDR Code # 0101915
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS 17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury.
 The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.
 ATTEST:
Dana Pellizz _____
 Solicitor Defendant Attorney for Defendant

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center for a determinate term of _____ days/months/years or under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference. LIFE WITHOUT PAROLE.

The Defendant is to be given credit for _____ days/months jail time.
 CONCURRENT or CONSECUTIVE to sentence on: 2/7/01
 SPECIAL CONDITIONS:

RESTITUTION: Heard, Waived, Ordered
 Total: \$ _____ plus 20% fee: \$ _____
 Payment Terms: _____
 set by SCDPPPS _____
 Recipient: _____
 *Fine:\$ _____
 §14-1-206 (Assessments 100%)....\$ _____
 §14-1-211(A)(1) (Surcharge)\$ _____
 §14-1-211(A)(2) (Surcharge)\$ _____
 §56-5-2995 (DUI Assessment).....\$ _____
 3% to County (if paid in installments)...\$ _____
 TOTAL\$ _____

PTUP _____
 _____ days/hours Public Service Employment
 Obtain GED _____
 Attend Voc Rehab. or Job Corps _____
 May serve W/E beginning _____
 Substance Abuse Counseling _____
 Random Drug/Alcohol Testing _____
 Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund.
 Other: _____

ATTEST
 TRUST COPY
Barbara DeFrees
 Clerk of Court/ Deputy Clerk
 Court Reporter: R. DeFrees Barbara DeFrees
 White - Clerk Green - Corrections G. C. Connor - Probation S. _____
 PRESIDING JUDGE Maatjick
 Judge Code: 010116
 Sentence Date: 2/7/01
 Pink - Defendant

560 STATE OF SOUTH CAROLINA)
 COUNTY OF Richland)
 STATE VS.)
Demarco Johnson)
 AKA:)
 Race: B Sex: M Age: 21)
 DC 9 SS#: 111)
 Address: Columbia, SC)
 DL# SC00913437)

IN THE COURT OF GENERAL SESSIONS)
 INDICTMENT/CASE#:)
00 -GS- 40 - 47717)
 A/W#: G246913)
 Date of Offense: 12-14-99)
 S.C. Code §: 16-3-910)
 CDR Code #: 01 01 915)
 CASE RESTORED)
 SENTENCE)
 PLEA TRIAL)

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS TO: Kidnapping
 in violation of § 16-3-910 of the S.C. Code of Laws, bearing CDR Code # 01 01 915
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS 17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury.
 The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Dana Bellizzi Solicitor _____ Defendant _____ Attorney for Defendant _____

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center for a determinate term of _____ days/months/years or under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____ provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference. LIFE WITHOUT PAROLE

The Defendant is to be given credit for _____ days/months/jail time.
 CONCURRENT or CONSECUTIVE to sentence on: 2/7/01

SPECIAL CONDITIONS:

RESTITUTION: Heard, Waived, Ordered
 Total: \$ _____ plus 20% fee: \$ _____
 Payment Terms: _____
 set by SCDPPPS _____

PTUP _____
 _____ days/hours Public Service Employment
 Obtain GED _____
 Attend Voc Rehab. or Job Corps _____
 May serve W/E beginning _____
 Substance Abuse Counseling _____
 Random Drug/Alcohol Testing _____
 Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund.
 Other: _____

Recipient: _____
 *Fine:\$ _____
 \$14-1-206 (Assessments 100%).....\$ _____
 \$14-1-211(A)(1) (Surcharge).....\$ _____
 \$14-1-211(A)(2) (Surcharge).....\$ _____
 \$56-5-2995 (DUI Assessment).....\$ _____
 3% to County (if paid in installments)...\$ _____
 TOTAL\$ _____

ATTEST: _____
 A TRUE COPY
Barbara H. Scott Clerk of Court/ Deputy Clerk Barbara H. Scott Judge Order 12/8/03 Sentence Date: 2/7/01
 Court Reporter: R. DeFusse 12-8-03
 White - Clerk Green - Corrections G.S. G.C. P. & G.S. S. Pink - Defendant

91 G-246913

STATE OF SOUTH CAROLINA
 County/ Municipality of
RICHLAND COUNTY

THE STATE
against

DEMARCO JOHNSON

Address: ALBURN SC 29203 - 0000
COLUMBIA

Phone: SS
Race: B Height: 5 9 Weight: 170
DL #:

Agency ORI #: RICHLAND COUNTY SHERIFF'S

Investigating Officer: ERIC K. BARNES

Offense: KIDNAPPING/KIDNAPPING

Offense Code: 0095

Code/Ordinance Sec. 16-03-0910

This warrant is CERTIFIED FOR SERVICE in the
 County/ Municipality of

The accused
to be arrested and brought before me to be
bail with according to law.

Signature of Judge (L.S.)

RETURN

copy of this arrest warrant was delivered to
affiant DEMARCO JOHNSON

12-15-99
Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:
RICHLAND COUNTY BOND COURT
101 JOHN MARK DIAL DRIVE
COLUMBIA SC 29209 - 0000

County/ Municipality of
RICHLAND COUNTY

AFFIDAVIT
L. Ross for

Form Approved by
South Carolina
July 28, 1990
SCCA 518

Personally appeared before me the affiant ERIC K. BARNES who
being duly sworn deposes and says that defendant DEMARCO JOHNSON
did within this county and state on 12/14/99 violate the criminal laws of the
State of South Carolina (or ordinance of County/ Municipality of)

In the following particulars:
DESCRIPTION OF OFFENSE: KIDNAPPING/KIDNAPPING

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:
THAT ON DECEMBER 14, 1999 WHILE AT 107 CONNIE DRIVE IN THE
DUTCH FORK MAGISTERIAL DISTRICT OF RICHLAND COUNTY, ONE
DEMARCO JOHNSON DID COMMIT THE CRIME OF KIDNAPPING IN THAT
HE DID ALONG WITH CODEFENDANTS UNLAWFULLY SEIZE AND CONFINED
NORMAN DORN AT GUNPOINT, WHILE IN THE COMMISSION OF AN ARMED
ROBBERY. THE DEFENDANT WAS CAUGHT AT THE SCENE AND STATEMENTS
FROM WITNESSES AND CODEFENDANTS PROVE THE SAME.
AFFIANT AND OTHERS ARE WITNESS TO PROVE THE SAME.
RCSO CASE NUMBER: 99121634

Sworn to and subscribed before me
on 12/14/99

Signature of Issuing Judge
[Signature] (L.S.)

Signature of Affiant
Affiant's Address: SHERIFF'S DEPARTMENT
COLUMBIA
Affiant's Telephone: 803 691-9000

STATE OF SOUTH CAROLINA
 County/ Municipality of
RICHLAND COUNTY

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY COUNTY OF THIS STATE
It appearing from the above affidavit that there are reasonable grounds to believe that
on 12/14/99 defendant DEMARCO JOHNSON
did violate the criminal laws of the State of South Carolina, (or ordinance of County/ Municipality of) as set forth below:
DESCRIPTION OF OFFENSE: KIDNAPPING/KIDNAPPING

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before
me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the
defendant at the time of its execution, or as soon thereafter as is practicable.

Signature of Issuing Judge
[Signature] (L.S.)
Judge's Address: 400 HUGER ST
COLUMBIA SC 29202 - 0000
Judge's Telephone: 803 748-4746
Issuing Court: Magistrate Municipal Circuit

ORIGINAL

RECEIVED
CLERK OF COURT
RICHLAND COUNTY
DEC 29 1999

STATE OF SOUTH CAROLINA
 562 COUNTY OF Richland
 STATE VS.
Demarco Johnson
 AKA:
 Race: B Sex: M Age: 21
 DOE _____ SS#: _____
 Address: _____ Ave
Columbia, SC
 DL# _____ SID#: SC00913437

IN THE COURT OF GENERAL SESSIONS
 INDICTMENT/CASE#: _____
00 -GS- 40-47718
 A/W#: G246915
 Date of Offense: 12-14-99
 S.C. Code §: 16-11-311
 CDR Code #: 0101719
 CASE RESTORED
 SENTENCE
 PLEA TRIAL

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS

TO: Burglary 1st
 in violation of § 16-11-311 of the S.C. Code of Laws, bearing CDR Code # 0101719
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS 17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury.
 The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST:
Dana Pellizz _____
 Solicitor Defendant Attorney for Defendant

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
 for a determinate term of _____ days/months/years or under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference. LIFE WITHOUT PAROLE

The Defendant is to be given credit for _____ days/months jail time.
 CONCURRENT or CONSECUTIVE to sentence on: 2/7/01
 SPECIAL CONDITIONS:

RESTITUTION: Heard, Waived, Ordered
 Total: \$ _____ plus 20% fee: \$ _____
 Payment Terms: _____
 set by SCDPPPS _____
 Recipient: _____
 *Fine:\$ _____
 §14-1-206 (Assessments 100%)\$ _____
 §14-1-211(A)(1) (Surcharge)\$ _____
 §14-1-211(A)(2) (Surcharge)\$ _____
 §56-5-2995 (DUI Assessment)\$ _____
 3% to County (if paid in installments)\$ _____
 TOTAL\$ _____

PTUP _____
 _____ days/hours Public Service Employment
 Obtain GED _____
 Attend Voc Rehab. or Job Corps _____
 May serve W/E beginning _____
 Substance Abuse Counseling _____
 Random Drug/Alcohol Testing _____
 Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund.
 Other: _____

Barbara Speer _____
 Clerk of Court/ Deputy Clerk
 Court Reporter: _____
 PRESIDING JUDGE David Turk
 Judge Code: 0101612
 Sentence Date: 2/7/01
 White - Clerk Green - Corrections Blue - Probation Pink - Defendant

93 G-246915

STATE OF SOUTH CAROLINA
[X] County/ [] Municipality of
RICHLAND COUNTY

THE STATE
against

DEMARCO JOHNSON

address: COLUMBIA SC 29203 - 0000

home: [] DL # [] SSN []
Race: B Height: 5 9 Weight: 170

OB: [] Agency ORI #: []
Prosecuting Agency: RICHLAND COUNTY SHERIFF'S
Prosecuting Officer: ERIC K. BARNES
Offense: BURGLARY - 1ST DEGREE

Offense Code: 0079
Code/Ordinance Sec. 16-11-0311

This warrant is CERTIFIED FOR SERVICE in the
[] County/ [] Municipality of []
The accused
to be arrested and brought before me to be
halt with according to law.

Signature of Judge (L.S.)

RETURN

copy of this arrest warrant was delivered to
defendant DEMARCO JOHNSON

Signature of Constable/Law Enforcement Officer

TURN WARRANT TO:
RICHLAND COUNTY BOND COURT
01 JOHN MARK DIAL DRIVE
COLUMBIA SC 29209 - 0000

STATE OF SOUTH CAROLINA)
[X] County/ [] Municipality of) AFFIDAVIT
RICHLAND COUNTY) L. Ross For
Personally appeared before me the affiant ERIC K. BARNES
being duly sworn deposes and says that defendant DEMARCO JOHNSON
did within this county and state on 12/14/99 violate the criminal laws of the
State of South Carolina (or ordinance of [] County/ [] Municipality of [])
In the following particulars:
DESCRIPTION OF OFFENSE: BURGLARY - 1ST DEGREE

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

THAT ON DECEMBER 14, 1999 WHILE AT 107 CONNIE DRIVE IN THE
DUTCH FORK MAGISTERIAL DISTRICT OF RICHLAND COUNTY, ONE
DEMARCO JOHNSON DID COMMIT THE CRIME OF BURGLARY 1ST IN THAT
HE DID, ALONG WITH CODEFENDANTS, UNLAWFULLY ENTER THE DWELLING
OF NORMAN DORN, WHILE ARMED WITH A HANDGUN, WITH THE INTENT TO
COMMIT THE CRIME OF ARMED ROBBERY. THE DEFENDANT WAS CAUGHT
AT THE SCENE AND STATEMENTS FROM WITNESSES AND CODEFENDANT PROVE
THE SAME.
AFFIANT AND OTHERS ARE WITNESS TO PROVE THE SAME.
RCSO CASE NUMBER: 99121634
Sworn to and subscribed before me
on 12/14/99
Signature of Affiant [Signature]
Affiant's Address: SHERIFF'S DEPARTMENT
COLUMBIA SC 29225
Affiant's Telephone: 803 691-9000

Signature of Issuing Judge [Signature]
(L.S.)

STATE OF SOUTH CAROLINA)
[X] County/ [] Municipality of)
RICHLAND COUNTY)

ARREST WARRANT

CLERK OF COURT
CRIMINAL RECORDS
DEC 29 1999

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY COUNTY
It appearing from the above affidavit that there are reasonable grounds to believe that
on 12/14/99 defendant DEMARCO JOHNSON
did violate the criminal laws of the State of South Carolina (or ordinance of []) as set forth below:
DESCRIPTION OF OFFENSE: BURGLARY - 1ST DEGREE

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before
me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the
defendant at the time of its execution, or as soon thereafter as is practicable.

Signature of Issuing Judge [Signature]
Judge Code: GS
Judge's Telephone: 803 748-4746
Issuing Court: [X] Magistrate [] Municipal [] Circuit

ORIGINAL

STATE OF SOUTH CAROLINA

REC'D

IN THE COURT OF GENERAL SESSIONS

INDICTMENT#:

564 - Richland

FILED

96 GS- 40 12219

VS.

CM#: W-40A-01-06

De Marco Johnson

FEB 9 AM 10:06

Name of Original Offense: ABWIK

AKA:

Conviction S.C. Code §: 16-3-620

Race: B Sex: M

BARBARA A. SCOTT
C.C.C. & G.S.

Conviction CDR Code #: 0, 0, 1, 4

DOB:

Date of Original Offense: 6-16-95

SSN:

Original Sentence: 12 yrs SS on serving

SID#: 913437

ORDER 5 yrs ord
3 yrs Probation

The above named defendant has been charged with violating the conditions of probation ordered on 3/21/97 in the Court of General Sessions of Richland County as set forth in the attached warrant or citation. After hearing the evidence and being duly advised, in the (presence/absence) of the defendant, I find that the above named defendant has violated the following condition(s) of probation: (List by number or indicate special condition as provided in the affidavit)

Therefore, IT IS ORDERED that:

- the suspended sentence be revoked and the above named defendant be required to serve 4 years, the remainder of the original sentence, and/or pay \$ //////////
- the suspended sentence be revoked and the above named defendant be required to serve _____ months/years of the original sentence and/or pay \$ _____; thereupon to be reinstated on probation, subject to the conditions set forth in the attached order and not inconsistent with this order.
- the above named defendant is continued on probation as provided for in the original sentence, subject to the conditions set forth therein and not inconsistent with this order.
- probation is reduced to time served under supervision and the defendant is discharged from supervision on this date.
- Additional Conditions ordered by the Court:

- Credit for pre-trial detention time on current probation violation: _____
- The defendant has previously served 8 years on this sentence.
(split sentence time and/or prior partial revocation time)

is 8 day of February, 2001
Columbia, SC.

Marc H. Westbrook
Presiding Judge
5th Judicial Circuit
S/MARC H. WESTBROOK

are hereby advised that under the law the Court may at any time revoke or modify any condition of this probation; impose any lawful conditions it deems or, or extend your period of probation not to exceed five (5) years. At any time within the period of your probation, the Court may require you to serve any of the original sentence imposed.

is to certify that I have read, or have had read to me, the order and the conditions set out therein, I agree to comply with such conditions and the conditions of attached probation order during the period of my probation. I have received a copy of this Court's order and all attachments.

Defendant's Signature
De Marco Johnson

Witnessed by
T.B. DeMaine

signed this 7 day of Feb, 2001 at Columbia, SC

County of Richland
STATE VS.

FILED

96-GS-40-12224

Demarco Johnson

CW#: W-40 A-01-06

AKA: _____

Name of Original Offense: Attempted Armed Robbery

Race: B Sex: M

Conviction S.C. Code §: 16-11-330 (B)

DOB: _____

Conviction CDR Code #: 2, 1, 2, 1, 6

SSN: _____

Date of Original Offense: 6/18/95

SID#: 913437

Original Sentence: 12 yrs 55 on serving 8 yrs

ORDER and 3 years Probation

The above named defendant has been charged with violating the conditions of probation ordered on 3/21/97 in the Court of General Sessions of Richland County as set forth in the attached warrant or citation. After hearing the evidence and being duly advised, in the (presence/absence) of the defendant, I find that the above named defendant has violated the following condition(s) of probation: (List by number or indicate special condition as provided in the affidavit)

Therefore, IT IS ORDERED that:

- the suspended sentence be revoked and the above named defendant be required to serve 4 ~~years~~ years, the remainder of the original sentence, and/or pay \$ /////////.
- the suspended sentence be revoked and the above named defendant be required to serve _____ months/years of the original sentence and/or pay \$ _____; thereupon to be reinstated on probation, subject to the conditions set forth in the attached order and not inconsistent with this order.
- the above named defendant is continued on probation as provided for in the original sentence, subject to the conditions set forth therein and not inconsistent with this order.
- probation is reduced to time served under supervision and the defendant is discharged from supervision on this date.
- Additional Conditions ordered by the Court:

- Credit for pre-trial detention time on current probation violation: _____
- The defendant has previously served 8 ~~years~~ years on this sentence.
(split sentence time and/or prior partial revocation time)

this 8th day of February 2001
Columbia, SC.

[Signature]
Presiding Judge
v 5th
Judicial Circuit
S/ MARC H. WESTBROOK

You are hereby advised that under the law the Court may at any time revoke or modify any condition of this probation; impose any lawful conditions it deems proper, or extend your period of probation not to exceed five (5) years. At any time within the period of your probation, the Court may require you to serve any part of the original sentence imposed.

I am hereby advised that I have read, or have had read to me, the order and the conditions set out therein. I agree to comply with such conditions and the conditions of the attached probation order during the period of my probation. I have received a copy of this Court's order and all attachments.

Defendant's Signature: Demarco Johnson
Witnessed by: T.B. LeMone
Signed this 7 day of Feb. 2001 at Columbia, SC

STATE OF SOUTH CAROLINA
County of Richland
STATE VS.

IN THE COURT OF GENERAL SESSIONS
INDICTMENT#:
96-GS-410-12220

Demarco Johnson
AKA:
Race: B Sex: M
DOB: 11-11-1971
SSN: 210-11-200-
SID#: 913437

FILED
01 FEB - 9
Name of Original Offense: Attempted Armed Robbery
S.C. Code §: 16-11-330(B)
Revocation CDR Code #: Q, O, Z, G
Date of Original Offense: 6/16/95
Original Sentence: 12 yrs SS on serving
ORDER 8 yrs and 3 yrs Probation

The above named defendant has been charged with violating the conditions of probation ordered on 3/21/97 in the Court of General Sessions of Richland County as set forth in the attached warrant or citation. After hearing the evidence and being duly advised, in the (presence/absence) of the defendant, I find that the above named defendant has violated the following condition(s) of probation: (List by number or indicate special condition as provided in the affidavit)

Therefore, IT IS ORDERED that:

- the suspended sentence be revoked and the above named defendant be required to serve 4 ~~years~~ years, the remainder of the original sentence, and/or pay \$ ////////
- the suspended sentence be revoked and the above named defendant be required to serve _____ months/years of the original sentence and/or pay \$ _____; thereupon to be reinstated on probation, subject to the conditions set forth in the attached order and not inconsistent with this order.
- the above named defendant is continued on probation as provided for in the original sentence, subject to the conditions set forth therein and not inconsistent with this order.
- probation is reduced to time served under supervision and the defendant is discharged from supervision on this date.
- Additional Conditions ordered by the Court:

- Credit for pre-trial detention time on current probation violation: _____
- The defendant has previously served 8 ~~years~~ years on this sentence.
(split sentence time and/or prior partial revocation time)

s. 8th day of February, 2001
Columbia SC.
Presiding Judge: W. Westbrook
5th Judicial Circuit

are hereby advised that under the law the Court may at any time revoke or modify any condition of this probation; impose any lawful conditions it deems ar, or extend your period of probation not to exceed five (5) years. At any time within the period of your probation, the Court may require you to serve any of the original sentence imposed.

s to certify that I have read, or have had read to me, the order and the conditions set out therein. I agree to comply with such conditions and the conditions of tached probation order during the period of my probation. I have received a copy of this Court's order and all attachments.

der's Signature: Demarco Johnson
Witnessed by: TR L. Moore
ted this 7 day of Feb., 2001 at Columbia SC

CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 12/22/03
 OMCOMITA RELEASE DATE SCREEN SUMMELI
 SCDC# > 241438 LOC: LEE
 JOHNSON, DEMARCO SCDC CLASSIFICATION...: VIOLENT

OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL PREDATOR...: NOT APP
 DNA STATUS...: COMPLETED
 TOTAL SENTENCE...: LIFE CONSECUTIVE SENTENCE ...:
 CURRENT SENTENCE: CURRENT SENT START DATE: 12/14/1999
 PROJECTED COMPLETION DATES
 MAXOUT DATE: 99/99/9999 CURRENT EWC ..:
 YOA SIX YEAR DATE: CURRENT EEC ..:
 INITIAL PAROLE DATE: 00/00/0000 NEXT PAROLE HEARING DATE: 00/00/0000

TOTAL GT DAYS EARNED: 000000 LABOR CREW/WORK PROG DATE: 99/99/9999
 TOTAL EARNED WORK CREDITS ...: 000000 LABOR CREW DISQ REASON:
 TOTAL EDUCATION CREDITS: 000000 CURRENT OR PRIOR SEX CONDUCT CONVICT
 TOTAL EXTRA EARNED CREDITS ..: 000
 TOTAL SERVICE TIME EARNED ...: 000000

PFKEYS: 5:HISTORY OF DATE CHANGES

4-0 1 Sess-1 167.7.50.33 TNET0544 3/11

07-19-04P12:29 RCVD

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
RECORD SUMMARY REPORT DATED 12/22/03

SUMME

JOHNSON, DEMARCO - FBI # 730866EB5 SID# SC00913437 SCDC # 241438

OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE

INSTITUTION ... LEE CORR INST

SECURITY/CUST.: 3 MINIMUM IN

TOT INCARC SENT....: 999 YRS 0 MOS 0 DYS

CENTRAL MONITORING.: YES STG-SUSPECT

SOCIAL SECURITY #...

DORM.....: RIA0258T

RACE....: B SEX...: M

PROJ MAXOUT DATE: 99/99/9999

PROJ PAROLE DATE: 00/00/0000

EWC JOB...: MACHINE OPERATOR

EDUC PGM.: NO CURR EDUC PROGRAM

EWC LEVEL: 3F5 EEC LEVEL:

ASSIGNMENT...: PRISON INDUSTR

CURRENT PROGRAM...: NO CURRENT PROGRAM

AGE...: 24 DATE OF BIRTH...:

PREVIOUS NUMBERS:

** NO PREVIOUS NUMBERS **

CURRENT OFFENSES	SENTENCE			COUNTY	SENTENCE			V/NV	CATEGORY
	YRS	MOS	DYS		START				
ATTEMPTED ARMED ROBBERY	4	0	0	RICHLAND	2/ 8/20	1	V	4	
ATTEMPTED ARMED ROBBERY	4	0	0	RICHLAND	2/ 8/20	1	V	4	
ASSLT & BATT W/INTNT KILL	4	0	0	RICHLAND	2/ 8/20	1	V	4	
BURGLARY-1ST DEGREE	999	99	999	RICHLAND	12/14/1999		V	4	
KIDNAPPING	999	99	999	RICHLAND	12/14/1999		V	5	
ARMED ROBBERY	999	99	999	RICHLAND	12/14/1999		V	4	
ATTEMPTED ARMED ROBBERY	8	0	0	RICHLAND	6/20/1995		V	4	
ATTEMPTED ARMED ROBBERY	8	0	0	RICHLAND	6/20/1995		V	4	
ASSLT & BATT W/INTNT KILL	8	0	0	RICHLAND	6/20/1995		V	4	

PRIOR COMMITMENTS OVER 90 DAYS:

INMATE HAS NO PRIORS

DETAINERS (HOLD,WANTED,NOTIFY):

NO DETAINERS

ESCAPES:

NO ESCAPE HISTORY

CRIMINAL CHARGES:

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

NO ASSAULTIVE DISCIPLINARY HISTORY

NON-ASSAULTIVE DISCIPLINARIES:

8/27/ 1 REFUSING OR FAILING OBEY	OTHER
7/ 8/ 1 REFUSING OR FAILING OBEY CONVICTED	MINOR
4/ 1/99 REFUSING TO ATTEND COMPU CONVICTED	MINOR

HISTORY OF MOVEMENTS:

10/17/ 2	LEE	INCARCERATED	ADMINISTRATIVE
3/ 8/ 1	KERSHAW	INCARCERATED	ADMINISTRATIVE
2/12/ 1	KIRKLAND	INCARCERATED	PROBATION VIOLATOR
10/23/99	RICHLAND CO	PROBATION	RELEASED TO PROBATION
6/14/99	TRENTON	INCARCERATED	ADMINISTRATIVE
1/28/99	WATEREE RIVER	INCARCERATED	ADMINISTRATIVE
1/27/99	KIRKLAND	INCARCERATED	MEDICAL
4/14/97	WATEREE RIVER	INCARCERATED	ADMINISTRATIVE
3/25/97	BROAD RIVER R&E	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

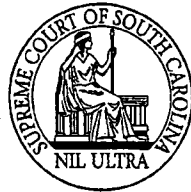
JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
MACHINE OPERATOR	01/23/03	0/ 0/ 0		YF5
SENIOR CUSTODIAN	10/22/02	1/21/ 3	INMATE REQUEST	YF5
SHIP & RECEIVING CLK	09/11/01	10/17/ 2	INSTIT TRANSFER	YF5
FOOD SERVICE AIDE	03/14/01	9/10/ 1	INMATE REQUEST	YF5
SENIOR BINDARY OPERA	10/04/99	10/23/99	RELEASED/PAROLED	YF5
SENIOR BINDARY OPERA	10/01/99	10/ 3/99	COMPLETED EDUC PROGRAM	YF5
SENIOR BINDARY OPERA	07/27/99	9/30/99	MI ELIGIBLE FOR LEVEL 2	YF5

JOHNSON, DEMARCO - FBI # 730866EB5 SID# SC00913437 SCDC # 241438 (CONTINUED)
 LAUNDRY HELPER 06/15/99 7/26/99 LATERAL TRANSFER YPS
 LAUNDRY ROOM ATTENDA 05/03/99 6/14/99 INSTIT TRANSFER YFS
 CONSTRUCTION TRAINEE 04/16/99 4/22/99 INMATE REQUEST YFS
 CONSTRUCTION TRAINEE 04/16/97 4/15/99 CUSTODY REVIEW YFS

HISTORY OF EARNED EDUCATION CREDITS:

EEC DESCRIPTION	START DATE	END DATE	TERMINATION REASON
BONUS 15 OR MORE	06/18/99	10/ 4/99	COMPLETED EDUC PROGRAM
BONUS 4-7 HRS/WK	02/20/98	6/14/99	INSTIT TRANSFER
BONUS 4-7 HRS/WK	05/12/97	1/ 5/98	INMATE REQUEST

***** END OF REPORT *****



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 26, 2008

Appellate Defender Robert M. Pachak
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: Johnson, Demarco v. The State

Dear Counsel:

The Court has issued the following Order on your Petition for a Writ of Certiorari in the above entitled matter:

“Petition for Writ of Certiorari Denied.

s/ Jean H. Toal C.J.
For the Court

June 26, 2008.”

The remittitur will be sent to the lower court as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

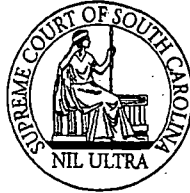
Very truly yours,



CLERK

DES/jj

cc: Assistant Attorney General Brian T. Petrano



0749-03

Closed

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

July 14, 2008

REMITTITUR

The Honorable Barbara A. Scott
1701 Main St
PO Box 2766
Columbia, SC 29202-2766

Re: Johnson, Demarco v. The State – 2003-CP-40-05842

Dear Ms. Scott:

The above-referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

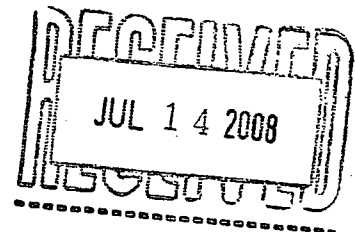
Very truly yours,



CLERK

DES/jj

cc: Appellate Defender Robert M. Pachak
Assistant Attorney General Brian T. Petrano



STARC

FORM 5

2012 CP 4007764

STATE OF SOUTH CAROLINA)
)
County of RICHLAND)

IN THE COURT OF COMMON PLEAS

Demarco Johnson -#241438)
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)
)
)
)
)

APPLICATION FOR
POST-CONVICTION RELIEF

2012 NOV 21 AM 11:37
JEANNETTE W. MERIDIE
C.C.R. & G.E.
RICHLAND COUNTY
FILED

INSTRUCTIONS B READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Institution
4460 Broad River Rd. Columbia S.C. 29210
2. Name and location of Court which imposed sentence Richland County
General Sessions
3. Name(s) of co-defendant(s) (if any) Terrell Lyde, Cyrus Tucker
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2000-GS-40-47718 First Degree Burglary, 2000-

- (b) GS-40-47714 Armed Robbery, 2000-GS-40-47716 Kidnapping
- (c) 2000-GS-40-47717 Kidnapping
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) Feb. 7th, 2001; sentences were imposed upon all counts.
- (b) Under S.C. Codes § 17-25-45.
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty NOT GUILTY
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES / Direct Appeal
8. If you answered Ayes@ to (7), list:
- (a) the name of each Court to which you appealed:
- i. Appellant Court of Appeals
- ii. South Carolina Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Sentence Affirmed
- ii. S Sentence Affirmed
- iii. _____
- (c) the date of each such result:
- i. Rehearing denied June 13, 2002.
- ii. P.C.R. denied March 7, 2007
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Opinion No: 3501
- ii. NA
- iii. _____
9. If you answered Ano@ to (7), state your reasons for not so appealing:
- (a) NA

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) SEE ATTACHMENT

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) SEE ATTACHMENT.

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? YES

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? YES

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO

(d) any other petitions, motions or applications in this or any other Court? YES

13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Direct Appeal

ii. Rehearing, Certiorari

iii. P.C.R. Hearing

iv. _____

(b) the name and location of the Court in which each was filed:

i. Court Of Appeals, Appellant

ii. S.C. Supreme Court

iii. _____

ATTACHMENT 10 (a)

1. The conviction and sentence was in violation of the Constitution of the United States and the Constitution and laws of South Carolina.
2. That the Defendant received ineffective assistance of counsel.
3. The state was in violation of the Separation of Power Doctrine.

ATTACHMENT 11 (a)

1. The conviction and sentence was in violation of the Constitution of the United States and the Constitution and laws of South Carolina.

(a) According to the recent decision in Miller V. Alabama, the Defendant was denied his constitutional right to due process and cruel and unusual punishment when the state did not consider the fact that the Defendant's first crime was committed while he was only a juvenile. According to Miller v. Alabama the culpability of a child is not the same as an adult. Therefore in sentencing me under 17-25-45 was not constitutional.

2. That the Defendant received ineffective assistance of counsel.

(a) Counsel was ineffective for failing to explore reasonable and realistic plea negotiations with the solicitor for a more just outcome as mentioned in Lafner.

3. The State was in violation of the Separation of Power Doctrine.

(a) The Defendant's right to a fair trial, fundamental fairness and due process was violated when the sentencing judge at the Defendant's trial was not allowed to mitigate the circumstances and judge appropriately as he understood the case at hand.

- iv. _____
- (c) the disposition thereof:
 - i. Affirmed
 - ii. _____
 - iii. _____
 - iv. _____

- (d) the date of each such disposition:
 - i. Direct Appeal; State v. Johnson, 567 S.E.2d 486(2002)
 - ii. _____
 - iii. _____
 - iv. _____

- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. Direct Appeal; State v. Johnson, 567 S.E.2d 486(2002)
 - ii. _____
 - iii. _____
 - iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

Yes

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:
 - i. _____
 - ii. _____
 - iii. _____

- (b) the proceedings in which each ground was raised:
 - i.
 - ii. _____
 - iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) SEE ATTACHMENT - 10(A), under Section 17-27-45 (b)
- (b) I am filing this Application respectfully under
- (c) Miller v. Alabama and Laine?

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? YES
- (b) your trial, if any? YESYES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

18. If you answered Ayes@ to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. Sheilla Duke Mims / Trial sentencing
 - April Woodard Sampson / Trial sentencing
 - Catherine C. Link / Direct Appeal; Appointed
 - ii. _____
 - iii. Tara Shurlin/ P.C.R. Appointed
- (b) the proceedings at which each such attorney represented you:
 - i. S.Mims/ Trial sentencing
 - April Sampson/ Trial sentencing
 - ii. C.C.Link/ Direct Appeal
 - iii. T.Shurling/ P.C.R.

NOV 13 2012

- 19. State clearly the relief you seek in filing this application:
Vacation of sentence/ Time reduction
New Trial
- 20. Are you now under sentence from any other court that you have not challenged?
No

Revised 3/2003

STATE OF SOUTH CAROLINA)
)
 County of RICHLAND)

VERIFICATION

I, Demarco Johnson # 241438, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Demarco Johnson 241438

SWORN to and subscribed before me this 13th day of November, 2012.

Susan H. Joye (L.S.)
 Notary Public My Commission Expires

March 5, 2018

My Commission Expires: _____

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Demarco Johnson # 241438, hereby apply for leave to
proceed in this action without prepayment of fees or costs or security therefor. In support of my
application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Demarco Johnson 241438
Applicant

SWORN or affirmed to and subscribed before me this
17th day of November, 2012

Susan N. Frye
Notary Public

My Commission Expires: March 2, 2016

RICHLAND COUNTY
FILED
2012 NOV 21 AM 11:37
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

subsequent Petition for Writ of Certiorari was denied by the South Carolina Supreme Court on February 24, 2003. The remittitur was issued February 27, 2003.

Applicant thereafter filed an application for PCR on December 5, 2003 (2003-CP-40-05842). He was represented by Tara Shurling, Esquire, on the action. On February 26, 2007, the matter was called for evidentiary hearing before the Honorable James R. Barber, III, at which Applicant was present and testified. By order filed March 7, 2007, Judge Barber denied and dismissed the application with prejudice. A notice of appeal was filed and a Petition for Writ of Certiorari submitted on Applicant's behalf for review of the PCR court's denial. The South Carolina Supreme Court denied the petition by order dated June 26, 2008. The remittitur was issued July 14, 2008.

Attached herewith and incorporated herein are the records of the Richland County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections and/or the relevant documents from Applicant's unsuccessful direct appeal. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. The conviction and sentence was in violation of the Constitution of the United States and the Constitution and laws of South Carolina.
2. That the Defendant received ineffective assistance of counsel.
3. The state was in violation of the separation of power Doctrine.

1. The conviction and sentence was in violation of the Constitution of the United States and the Constitution and laws of South Carolina.

(a) According to the recent decision in *Miller v. Alabama*, the Defendant was denied his constitutional right to due process and cruel and unusual punishment when the state did not consider the fact that the Defendant's first crime was committed while he was only a juvenile. According to *Miller v. Alabama* the culpability of a child is not the same as an adult. Therefore in sentencing me under 17-25-45 was not constitutional.

2. That the Defendant received ineffective assistance of counsel.

(a) Counsel was ineffective for failing to explore reasonable and realistic plea negotiations with the solicitor for a more just outcome as mentioned in Lafner.

3. The State was in violation of the Separation of Power Doctrine.

(a) The Defendant's right to a fair trial, fundamental fairness and due process was violated when the sentencing judge at the Defendant's trial was not allowed to mitigate the circumstances and judge appropriately as he understood the case at hand.

III.

Timeliness – S.C. Code §17-27-45(a)

The Respondent submits that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160.

S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). For the purposes of this Return, the Applicant's conviction/sentence was finalized on the date of his conviction or the date of the Remittitur from any direct appeal, whichever was later, i.e. February 27, 2003. Adding one (1) year per S.C. Code § 17-27-45(a) and one (1) day per Rule 6(a), SCRPC means that this PCR application had to be filed by February 28, 2004. **This Application was filed on November 21, 2012, which was well beyond the statutory time for filing.**

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent requests that this Court summarily dismiss the application for post-conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

SUCCESSIVE

The application should be summarily dismissed because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are

disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90

(1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." [Emphasis in original]. Id., 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980).

The Applicant could have raised the new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications.

IV.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

V.

WHEREFORE, Respondent moves to summarily dismiss the application because it was filed after the statute of limitations had expired and for any other reasons as explained above.

Respectfully submitted,

ALAN WILSON
Attorney General

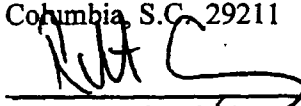
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Senior Assistant Deputy Attorney General

ROBERT D. CORNEY
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for the Respondents

December 17, 2012

STATE OF SOUTH CAROLINA
 COUNTY OF RICHLAND

JOHNSON Demarco, 241438,
 Applicant,

v.

State of South Carolina,
 Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT

) 2012CP4007764

) **CONDITIONAL ORDER OF DISMISSAL**

RICHLAND COUNTY
 FILED
 2014 JAN -4 PM 2:23
 JEANETTE W. McBRIDE
 C.C.P. & J.S.

This matter comes before this Court by way of an application for post-conviction relief filed November 21, 2012.¹

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Applicant was true bill indicted at the July 2000 term of the Richland County Grand Jury for Burglary 2nd Degree, Armed Robbery, and two (2) counts of Kidnapping (200-GS-40-47718). He was represented by attorneys April Sampson, Esquire, and Sheilla Duke Mims, Esquire, on the charge(s). The Applicant proceeded to jury trial before The Honorable Marc H. Westbrook, and on February 7, 2001, was found guilty and sentenced to life imprisonment without parole.

A Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. By order filed May 28, 2002, the South Carolina Court of Appeals affirmed the convictions and sentences. State v. Johnson, Op. No. 3501 (S.C. Ct. App. filed May 28, 2002). Applicant's subsequent Petition for Writ of Certiorari was denied by the South Carolina Supreme Court on February 24, 2003. The remittitur was issued February 27, 2003.

¹<http://www4.rcgov.us/publicindex/PICaseDetails.aspx?County=40+&Casenum=2012CP4007764&CourtType=G&CaseType=Civil&CourtAgency=40002>

Applicant thereafter filed an application for PCR on December 5, 2003 (2003-CP-40-05842). He was represented by Tara Shurling, Esquire, on the action. On February 26, 2007, the matter was called for evidentiary hearing before the Honorable James R. Barber, III, at which Applicant was present and testified. By order filed March 7, 2007, Judge Barber denied and dismissed the application with prejudice. A notice of appeal was filed and a Petition for Writ of Certiorari submitted on Applicant's behalf for review of the PCR court's denial. The South Carolina Supreme Court denied the petition by order dated June 26, 2008. The remittitur was issued July 14, 2008.

In making its decision, the Court had before it the available records of the Richland County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the relevant documents from Applicant's unsuccessful direct appeal and/or the *Respondent's Return and Motion to Dismiss*.

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

1. The conviction and sentence was in violation of the Constitution of the United States and the Constitution and laws of South Carolina.
2. That the Defendant received ineffective assistance of counsel.
3. The state was in violation of the Separation of Power Doctrine.

1. The conviction and sentence was in violation of the Constitution of the United States and the Constitution and laws of South Carolina.

(a) According to the recent decision in Miller V. Alabama, the Defendant was denied his constitutional right to due process and cruel and unusual punishment when the state did not consider the fact that the Defendant's first crime was committed while he was only a juvenile. According to Miller v. Alabama the culpability of a child is not the same as an adult. Therefore in sentencing me under 17-25-45 was not constitutional.

2. That the Defendant received ineffective assistance of counsel.

(a) Counsel was ineffective for failing to explore reasonable and realistic plea negotiations with the solicitor for a more just outcome as mentioned in Lafner.

3. The State was in violation of the Separation of Power Doctrine.

(a) The Defendant's right to a fair trial, fundamental fairness and due process was violated when the sentencing judge at the Defendant's trial was not allowed to mitigate the circumstances and judge appropriately as he understood the case at hand.

Findings of Fact and Conclusions of Law

Timeliness – S.C. Code §17-27-45(a)

This Court agrees with the Respondent that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160.

S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). For the purposes of this Order, the Applicant's conviction/sentence was "finalized" on the date of his conviction or the date of the Remittitur from any direct appeal, whichever was later, i.e. February 27, 2003. Adding one (1) year per S.C. Code § 17-27-45(a) and one (1) day per Rule 6(a), SCRCF means that this PCR application had to be filed by February 28, 2004. **This Application was filed on November 21, 2012, which was well beyond the statutory time for filing.**

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, this Court shall summarily dismiss the application for post-conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act. **SUCCESSIVE**

The application should be summarily dismissed because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." [Emphasis in original]. *Id.*, 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. *Id.* The Applicant bears the burden of showing that the allegations could not have been raised previously. *Land*, 274 S.C. 243, 262 S.E.2d 735 (1980).


The Applicant could have raised the new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consolidated School District of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. §17-27-70(c) (1985) authorizes the Court to "grant a motion by either

party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for the reasons explained above.

Based upon its review of the pleadings in this matter, this Court does not see the need to appoint counsel to represent the Applicant and expresses its intent to summarily dismiss this matter unless the Applicant advises this Court with specific reasons, factual or legal, why it ~~should not dismiss the matter in its entirety. The Applicant is granted thirty (30) days from the~~ date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the Richland County Clerk of Court and shall serve opposing counsel at the following address:

Assistant Attorney General
Robert D. Corney
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 2 day of February, 2012.


The Honorable James R. Barber, III
Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
 Demarco Johnson, #241438,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

2012-CP-40-07764

FINAL ORDER

2013 MAR 27 PM 2:00
 JEANETTE W. McBRIDE
 C.C.P. & G.S.
 RICHLAND COUNTY
 FILED

This matter comes before this Court by way of an application for post conviction relief (PCR) filed November 21, 2012. The Respondent made its Return and Motion to Dismiss on December 19, 2012, requesting that the Application be summarily dismissed as untimely filed and impermissibly successive in nature. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, the Honorable James R. Barber, III, in his then capacity as Chief Administrative Judge for the Court of Common Pleas for the Fifth Judicial Circuit, issued a Condition Order of Dismissal on January 4, 2013, provisionally denying and dismissing this action, while giving the Applicant thirty (30) days from the date of said Order in which to show why the dismissal should not become final.

Copied below and incorporated herein is an Affidavit of Service signed by Applicant and dated January 22, 2013, confirming personal service of the Conditional Order upon Applicant at the South Carolina Department of Corrections.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2), SCBCP, the Director of the South Carolina Department of Corrections has designated [Signature] (Server) as his duly authorized agent for the purpose of making service of the signed Conditional Order of Dismissal on the below named individual.

STATE OF SOUTH CAROLINA) AFFIDAVIT OF PERSONAL SERVICE
COUNTY OF Richland)

On this 22nd day of January, 2013, I served the signed Conditional Order of Dismissal on Jamarcus Demarco Johnson SCDC Inmate No. 241438, by delivering personally and leaving a copy of the same at Broadview Correctional Institution, Columbia, South Carolina. Deponent is not a party to this action.

[Signature]

SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME

this 22 day of January, 2013
[Signature] (I.S.)
Notary Public for South Carolina
My Commission Expires: 3/15/16

ADMISSION OF SERVICE

Service of a copy of the signed Conditional Order of Dismissal is admitted at the S.C. Department of Corrections, Broadview Correctional Institution, Columbia, Richland County, South Carolina, this 22nd day of January, 2013.

[Signature]

Inmate Signature
SCDC No. 241438

Case number here
2012-CP-40-7764

Applicant responded to the Court's Conditional Order by way of one *pro se* filing dated January 30, 2013, entitled "Motion Responding to Conditional Order of Dismissal". In it,

Applicant set forth the following objections to this Court's proposed summary dismissal¹:

Applicant in the present case as indicated in his Post-conviction Relief Application (2012-CP-4007764), pursues this current (PCR) action pursuant to newly established Constitutional Substantive Standards announced by the United States Supreme Court, not previously recognized that are intended to be applied retroactively, holding, "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it, if the right is denied, prejudice can be shown, under the prejudice prong of the Strickland test for ineffective assistance of counsel, if loss of the plea opportunity led to trial resulting in a conviction on more serious charges or imposition of a more severe sentence. U.S.C.A., Const. Amend.6. Lafley v. Copper, 132 S.Ct. 1387(2012), and further the companion case to Lafley holding, "Defense counsel has the duty to communicate formal offers from the prosecution, and to accept a plea on terms and conditions that may be favorable to the accused. Missouri v. Frye, 132 S.Ct. 1399 (2012).

Further, applicant pursues this action pursuant to Miller v. Alabama, 567 U.S.(2012), Holding, "The Eighth (8th) and Fourteenth(14th) Amendments to the United States Constitution forbids life without parole for defendants below eighteen (18) at the time of their crimes.

¹ This is not an exhaustive or all-inclusive list of the objections contained in the document submitted by Applicant. This Court had the entirety of the file before it and undertook a thorough review of the documents contained therein prior to making a final determination of the current summary dismissal.

Respondent alleges that applicant had the opportunity to litigate all allegations in his prior (PCR). Apparently, Respondent misapprehends or overlooks the fact that applicant's recent (PCR) action:(2012-CP-4007764) is entirely a derivative of newly declared Constitutional Substantive Standards announced by the United States Supreme Court in: Lafler, Frye, and Miller.

After conducting a thorough review of the entirety of the record, all relevant documents contained therein, and the entirety of the *pro se* packet submitted by Applicant, this Court finds no sufficient reason has been set forth why the Conditional Order should not become final, dismissing the current action with prejudice.

In his response, Applicant contends the current allegation was timely filed and appropriately raised through this PCR action as it hinges on a "newly established Constitutional Substantive Standard" set forth in the United States Supreme Court cases of Lafler v. Cooper and Missouri v. Frye. This argument fails to overcome the untimely and successive nature of the current application as Applicant has failed to set forth any sufficient reason why he could not have raised such an allegation within the one year statute of limitations or in his prior PCR action, regardless of the subsequent holdings in Lafler and Frye. Applicant contends his application was timely filed as he filed it within one year of the decisions in Lafler v. Cooper and Missouri v. Frye; however, there is nothing set forth in those cases or in any other relevant materials before this Court to indicate that those cases are to apply retroactively. Regardless, Applicant has failed to establish any reason he could not have raised the claim in his prior PCR action. Accordingly, this Court finds summary dismissal of that allegation to be well founded.

Additionally, Applicant contends he is basing the second portion of his action of the holding set forth in Miller v. Alabama, 132 S.Ct. 2455 (U.S. filed June 25, 2012). After a review

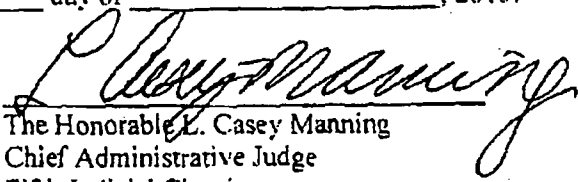
of the pleadings and documents, this Court is satisfied this claim is wholly without merit and fails to set forth any genuine issue of material fact for this Court to consider. See S.C. Code § 17-27-80(b) & (c). In Miller v. Alabama, the United States Supreme Court held that mandatory life imprisonment without the possibility of parole for offenders under the age of eighteen (18) at the time the crime(s) was committed violates the Eighth Amendment prohibition on cruel and unusual punishment. Based solely upon the pleadings and documents before this Court, it appears Applicant was born September 25, 1979 (*see sentencing sheet 2000-GS-40-47718*); the indictment references the incident date as December 14, 1999, which would have made Applicant twenty (20) years old at the time of the crime that he now seeks to challenge his life sentence on (*see indictment 2000-GS-40-47718*). Accordingly Miller v. Alabama is wholly inapplicable to Applicant's case and this Court is satisfied there is no *genuine* issue of material fact for this Court to consider. Therefore, this Court finds Respondent's motion to dismiss is well founded and must be granted.

Accordingly, for all of the reasons set forth herein, as well as those in the previous Conditional Order, this Court must summarily dismiss the action with prejudice.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal as well as herein, the application for PCR is hereby denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 26 day of March, 2013.


The Honorable L. Casey Manning
Chief Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina.