

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
HONORABLE G. EDWARD WELMAKER

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Case No.: 2012CP2303757

CHRISTOPHER JOHNSON, )  
 )  
 PETITIONER, )  
 )  
 vs. )  
 )  
 STATE OF SOUTH CAROLINA )  
 )  
 RESPONDENT. )  
 )

**NOTICE OF APPEAL**

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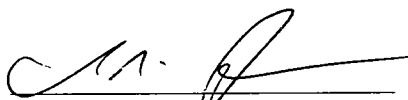
The Petitioner, Christopher Johnson, hereby appeals the Honorable G. Edward Welmaker's February 17, 2014, order denying post-conviction relief to the Petitioner. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

**RECEIVED**

MAR 20 2014

**S.C. SUPREME COURT**



Brian P. Johnson, Esq.  
522 North Church Street  
Greenville, SC 29601  
Attorney for Petitioner

Date: March 17, 2014  
Other counsel of record: Karen Ratigan  
P.O. Box 11549/Columbia, SC 29211

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**PROOF OF SERVICE**

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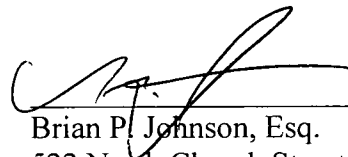
I, Brian P. Johnson, Esq., certify that I have today served the within notice of appeal upon the Respondent by depositing a copy in the United States Mail, postage prepaid, addressed to the attorney of record, Karen Ratigan, at P.O. Box 11549 Columbia, SC 29211.

Respectfully submitted,

**RECEIVED**

MAR 20 2014

**S.C. SUPREME COURT**



Brian P. Johnson, Esq.  
522 North Church Street  
Greenville, SC 29601  
Attorney for Petitioner

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

JUDGMENT IN A CIVIL CASE  
CASE NO: 2012CP2303757

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMER  
2012 FEB 17 AM 11:53

Christopher S Johnson vs. South Carolina State Of

**CHECK ONE:**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC:  Rule 41(a),  
SCRPC (Vol. Nonsuit):  Rule 43(k), SCRPC (Settled):  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC:  Bankruptcy:  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  
 Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order:  Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter: \_\_\_\_\_

\_\_\_\_\_  
PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

Brian P. Johnson 522 North Church Street  
Greenville, SC 29601

Karen Christine Ratigan PO Box 11549 Columbia,  
SC 29211

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

\_\_\_\_\_  
Paul B. Wickensimer Greenville County Clerk Of Court  
- Clerk of Court

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Christopher S. Johnson, )  
 S.C.D.C. No. 350430, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2012-CP-23-3757

**ORDER OF DISMISSAL**

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSIMMER  
 2014 FEB 17 AM 11 34

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 7, 2012. The Respondent made a return and partial motion to dismiss on August 31, 2012. An evidentiary hearing was held on December 18, 2013 at the Greenville County Courthouse. The Applicant was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, Christopher T. Posey, Esquire. The Court had before it the transcript of the guilty plea hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the August 2011 term of the Greenville County Grand Jury for trafficking heroin (2011-GS-23-0544) and possession with intent to distribute (PWID) methamphetamine (2011-GS-23-

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0545). He was represented by Christopher T. Posey, Esquire. -

On April 9, 2012, the Applicant pled guilty pursuant to North Carolina v. Alford.<sup>1</sup> The Honorable Letitia H. Verdin sentenced the Applicant to concurrent terms of fifteen years for trafficking heroin and fifteen years for PWID methamphetamine. The Applicant did not appeal.

### ALLEGATIONS

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

1. Ineffective assistance of counsel.
2. Prosecutorial misconduct.
3. Brady violation.
4. Invalid search and seizure.

At the PCR hearing, counsel for the Applicant stated they were proceeding solely upon the following issues:

1. Ineffective assistance of counsel:
  - a. Failed to subject the case to adversarial testing.
  - b. Failed to challenge evidence.
  - c. Failed to investigate the co-defendant.
  - d. Failed to challenge the search.
  - e. Misadvised about parole eligibility.
  - f. Interfered with the Applicant's statement at the plea hearing.
  - g. Failed to challenge selective prosecution.

### 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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by

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<sup>1</sup> 400 U.S. 25, 91 S. Ct. 160 (1970).

<sup>2</sup> 

S.C. Code Ann. § 17-27-80 (2003).

### Ineffective Assistance of Counsel

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

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel’s representation was below the standard of reasonableness and that, but for counsel’s unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The Applicant stated he fired his first attorney approximately fifteen months into his case and that plea counsel was appointed on March 16, 2012. The Applicant stated he met with plea counsel and discussed: the facts of the case, the issues the Applicant found relevant, the possible penalties, the types of pleas available, and whether the offenses were parole eligible. The Applicant stated he wanted plea counsel to look into whether there was selective prosecution in his case because, while he was arrested with a co-defendant, she was never prosecuted. The Applicant stated he told plea counsel that he wanted a Franks<sup>2</sup> hearing to determine if the search in his case was legal but that counsel said he would not receive such a hearing. The Applicant

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<sup>2</sup> Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978).

stated plea counsel told him that his trafficking charge would not be parole eligible if he went to trial, but would be parole eligible if he pled guilty. The Applicant stated he attempted to read a statement at the plea hearing but that the plea judge told him to shorten his statement.

Plea counsel testified he was appointed to the Applicant's case less than one month before the plea hearing. Plea counsel testified he received the discovery material from the Applicant's prior attorney and reviewed it with the Applicant. Plea counsel testified they also reviewed: the elements of the offenses, the sentencing ranges, possible defenses, and the Applicant's version of events. Plea counsel testified they also discussed the co-defendant and that she would testify against him at trial. Plea counsel testified they discussed the case thoroughly and that the Applicant never asked him to investigate anything. Plea counsel testified they discussed entering a guilty plea at their first meeting and that the Applicant decided to enter an Alford plea (after he explained the concept to him). Plea counsel testified it was not proper to argue selective prosecution in this case and that he explained this to the Applicant. Plea counsel testified they discussed the warrantless search and that a Franks motion would be something argued before a trial. Plea counsel testified it is clear from the record that the Applicant understood the trafficking charge was a no parole offense. Plea counsel testified the Applicant never said he was pleading guilty because of parole eligibility. Plea counsel testified that, while the Applicant had prepared a statement to read at the plea hearing, he did not realize how long of a statement. Plea counsel testified he told the Applicant to shorten his statement because it was clear the plea judge had heard all that she wanted to hear. Plea counsel testified that truncating the Applicant's statement did not affect the outcome of the case.


Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds the Applicant's testimony is

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not credible, while also finding plea counsel's testimony is credible. This Court further finds plea counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation. The Applicant did not dispute the State's recitation of facts at the guilty plea hearing. The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced. (Plea transcript, pp.6-8).

This Court finds the Applicant failed to meet his burden of proving plea counsel should have argued selective prosecution in his case. The Applicant stated at the PCR hearing that, while he and his co-defendant were similarly situated, the case against her "evaporated." Plea counsel testified there was no basis to pursue this claim because he could find there was no evidence that the prosecutorial discretion was based upon bias. This Court notes that, in order to prevail on a claim for selective prosecution at trial, the movant must show not only that he "had been singled out for prosecution, but that the decision to prosecute was based on unconstitutional considerations . . . such as race, religion, or his exercise of his [F]irst [A]mendment right to free speech." State v. Geer, 391 S.C. 179, 194, 705 S.E.2d 441, 449 (Ct. App. 2010). This Court finds the Applicant failed to meet his burden of proving either that there was selective prosecution or that it was incumbent upon plea counsel to argue this issue.

This Court finds the Applicant failed to meet his burden of proving plea counsel should have contested the warrantless search in his case by moving for a Franks hearing. Plea counsel testified he had explained to the Applicant that a Franks hearing would take place immediately before trial as a pre-trial motion. This Court finds plea counsel is credible on this point. This Court finds the Applicant knowingly waived the right to challenge the search in a Franks hearing when he chose to plead guilty. See State v. Tucker, 376 S.C. 412, 417, 656 S.E.2d 403, 406 (Ct.

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App. 2008) (noting “[g]uilty pleas generally act as a waiver of all non-jurisdictional defects and defenses”).

This Court finds the Applicant failed to meet his burden of proving plea counsel misadvised him about parole eligibility. Plea counsel testified he discussed the nature of the charges against the Applicant, including the meaning of a statutorily violent offense. Plea counsel also testified he had no reason to believe the Applicant pled guilty for the sole reason of being parole eligible. This Court finds plea counsel’s testimony is more credible than that of the Applicant. This Court finds the Applicant was properly advised about parole eligibility in this case and has presented no credible evidence that this guilty plea was premised upon being parole eligible. This Court notes the Applicant answered “[a]bsolutely not” when the plea judge asked if he had been made any promises in exchange for his guilty pleas. (Plea transcript, p.6).

This Court finds the Applicant failed to meet his burden of proving plea counsel improperly handled his allocution. The Applicant argues plea counsel: (1) should have contested the plea judge’s decision to shorten his allocution statement and (2) not told him to shorten his statement. Plea counsel testified he had no idea how long the Applicant’s statement was going to be and that he did not believe the shortened statement affected the outcome at sentencing. At the plea hearing, plea counsel offered mitigation on his behalf. (Plea transcript, pp.11-12). The Applicant then began to read his statement and, at one point, the plea judge stated “[t]his is probably the stuff we can kind of pare down a little bit there” and plea counsel told the Applicant “I would do about a minute more.” (Plea transcript, pp.13-21). The Applicant stated he would hand his written statement to the plea judge after he concluded and then resumed reading his statement. (Plea transcript, pp.21-30). Initially, this Court notes the Applicant cannot argue the plea judge erred in this matter, as allegations of plea court error are not

cognizable in PCR. See Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997). Regardless, this Court does not find plea counsel was deficient in objecting to the plea judge's request to shorten the statement. This Court also does not find plea counsel was deficient in himself advising the Applicant to be briefer. Further, the Applicant cannot prove he was prejudiced by giving a shortened version of his allocution statement. It is clear the plea judge had the Applicant's statement before her and was adequately apprised of his mitigation argument. This Court finds the Applicant has failed to demonstrate the outcome of his plea hearing would have been different if he had been allowed to recite his entire statement to the plea judge.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by plea counsel's performance.

This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### All Other Allegations

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

#### CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not



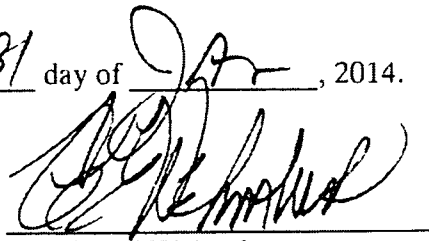
established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

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

**IT IS THEREFORE ORDERED:**

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

AND IT IS SO ORDERED this 31 day of Jan, 2014.

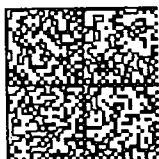


G. Edward Welmaker  
Presiding Judge  
Thirteenth Judicial Circuit

Fickes, South Carolina.

Law Office of Brian P. Johnson, LLC  
522 North Church Street  
Greenville, SC 29601

Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211



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