

LAW OFFICE OF
Kristy Grafton Goldberg, LLC
ATTORNEY AT LAW

PCR

March 18, 2014

RECEIVED

MAR 21 2014

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

S.C. SUPREME COURT

RE: Jerene Hayward, SCDC # 314451, vs. State of South Carolina
Appeal of Case No. 2008-CP-40-00780 and 03854
Authorization for Appeal pursuant to Austin v. State Case No. 2013-CP-40-4135

Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service, a copy of the original court order which is to be challenged on appeal, and a copy of the court order granting an appeal pursuant to Austin v. State. Please note that the order granting the appeal states that an appeal may proceed for case 2008-CP-40-0780, but as the body of the order clarifies, this case was merged with case 2008-CP-40-03854 and the order being appealed disposed of both cases.

I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal so that they may begin representation of Mr. Hayward. I am also hereby requesting that Appellate Defense obtain a copy of the court transcript within the time required by this court.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,



Kristy Goldberg

CC: Megan Harrigan
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Jerene Hayward, SCDC 314451
Lieber Correctional Institution
136 Wilborn Avenue
P.O. Box 205
Ridgeville, SC 29472

Jeanette McBride, Clerk of Court
1701 Main Street, Room 205
Post office Box 2766
Columbia, South Carolina 29202

Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
Columbia, SC 29211-1433

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2008-CP-40-00780, 2008-CP-40-03854

Jerene Hayward, #314451, Appellant

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

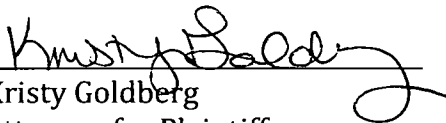
Applicant Jerene Hayward hereby appeals from the Order of the Honorable Alison Renee Lee presiding Judge for the 5th Judicial Circuit, filed April 9, 2010 in the matter of Jerene Hayward v. State of South Carolina, Case No. 2008-CP-40-3854 and 2008-CP-40-780 which were merged. This Notice of Appeal is filed under the authority of the Consent Order Granting an Appeal Pursuant to Austin v. State, signed by the Honorable Robert E. Hood on March 4, 2014 and received by counsel for the Applicant on or about March 13th, 2014 in the matter of Jerene Hayward v. State of South Carolina, Case No. 2013-CP-40-04135.

March 18, 2014

RECEIVED

MAR 21 2014

S.C. SUPREME COURT


Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 301
Columbia, SC 29201
Phone (803) 252-2299

kristy@kristygoldberglaw.com

Other Counsel of Record:

Assistant Attorney General, Megan Harrigan
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2008-CP-40-00780, 2008-CP-40-03854

Jerene Hayward, #314451, Appellant

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes
and states:

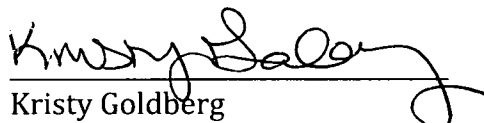
She is the counsel of record for Applicant;

Service by mail is proper in this instance; and

She has served the NOTICE OF APPEAL on the following party on March 18, 2014 by
depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Megan Harrigan
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

March 18, 2014


Kristy Goldberg

Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 301
Columbia, SC 29201
Phone (803) 252-2299
kristy@kristygoldberglaw.com

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
))
Jerene Hayward, #314451,)
Applicant,)
))
v.)
))
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

2013-CP-40-4135

**CONSENT ORDER GRANTING AN
APPEAL PURSUANT TO AUSTIN V.
STATE¹**

RICHLAND COUNTY
FILED
2014 MAR -4 PM 1:38
JEANETTE V. HARRIGAN
C.C.P. & G.S.

This matter comes before the Court by way of an application for post-conviction relief filed July 17, 2013. Respondent made its Return on September 26, 2013, requesting an evidentiary hearing solely on the issue of whether Applicant was entitled to an appellate review of his first post-conviction relief action pursuant to Austin. An evidentiary hearing on the matter was convened on November 20, 2013, at the Richland County Courthouse. Applicant was present at the hearing and represented by Kristy G. Goldberg, Esquire. Assistant Attorney General Megan E. Harrigan of the South Carolina Office of the Attorney General represented the Respondent. Also present was Charlie J. Johnson, Jr., Esquire.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the April 2005 term of the Richland County Grand Jury for Burglary in the First Degree (2005-GS-40-2824), Petit Larceny (2005-GS-40-2825), Kidnapping (2005-GS-40-5072), Assault and Battery with Intent to Kill (2005-GS-40-5073), and Possession of Marijuana (2005-GS-40-4570). He was represented by Jeanette Van Ginhoven, Esquire, and Lauren Mobley, Esquire. Applicant proceeded to a jury trial before the Honorable James W. Johnson, Jr., where

¹ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

he was convicted of burglary in the first degree, the lesser-included offense of assault and battery of a high and aggravated nature, petit larceny, and possession of marijuana. Judge Johnson sentenced Applicant to thirty years imprisonment for burglary in the first degree, ten years imprisonment for assault and battery of a high and aggravated, to be served consecutively, and to concurrent terms of thirty days for the larceny and possession charges.

A timely Notice of Appeal was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Hayward, No. 2008-UP-088 (Ct. App. February 8, 2008). The Remittitur was issued on February 26, 2008.

Applicant subsequently filed for post-conviction relief on February 1, 2008 (2008-CP-40-0780). Following the denial of the direct appeal, Applicant filed a second application on May 29, 2008 (2008-CP-40-3854). In his application, Applicant asserted:

1. Ineffective Assistance of Counsel.
2. Prosecutorial Misconduct.

The State made its Return on March 25, 2009, asking the two post-conviction relief applications be merged. The applications were subsequently merged. An evidentiary hearing was convened on May 13, 2009, at the Richland County Courthouse before the Honorable Alison R. Lee. Applicant was present at the hearing and was represented by Charlie J. Johnson, Jr., Esquire. Judge Lee dismissed the application with prejudice by written Order dated and filed April, 9, 2010. No direct appeal was taken.

ALLEGATIONS

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

1. Belated Austin Appeal
2. Ineffective Assistance of PCR, Trial, and Appellate Counsel

Respondent made its Return on September 26, 2013, requesting an evidentiary hearing solely on the issue of whether Applicant was entitled to an appellate review of his first post-conviction relief action pursuant to Austin. An evidentiary hearing was held to solely address whether or not the Applicant freely and voluntarily waived his right to appeal the denial of his application for post-conviction relief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his prior application.

After review of the facts and circumstances surrounding the waiver of the Applicant's right to appeal the denial of allegations in the Applicant's post-conviction relief application, both parties have consented to the granting of an appeal pursuant to Austin v. State of the Applicant's first post-conviction relief application. The parties agree that the Applicant did not voluntarily waive his right to appeal the post-conviction relief court's denial and dismissal of the Applicant's application for post-conviction relief. Counsel for the Applicant has indicated the Applicant did not freely and voluntarily waive the right to appeal his first application for post-conviction relief and that Counsel failed to file a timely Notice of Appeal of the application.

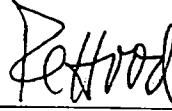
Based upon the foregoing, this Court finds that the granting of an appeal of the Applicant's first post-conviction relief action pursuant to Austin v. State is warranted.

IT IS THEREFORE ORDERED:

1. That the Applicant be granted an appeal of case 2008-CP-40-0780 pursuant to Austin v. State;

2. Counsel for Applicant, Kristy G. Goldberg, Esquire, shall file and serve the Notice of Appeal on all necessary parties; and
3. That the Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 4th day of March, 2014.



Robert E. Hood
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina.

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

JERENE HAYWARD, #314451,

Applicant,

v.

STATE OF SOUTH CAROLINA,


Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Consent Order Granting an Appeal Pursuant To Austin v. State** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:


**Kristy G. Goldberg, Esquire
Law Office of Kristy Goldberg, LLC
1720 Main Street, Suite 301
Columbia, South Carolina 29201**

This 13th day of March, 2014.



MEGAN E. HARRIGAN
ATTORNEY FOR RESPONDENT

SWORN to before me this 13th day of March, 2014.



Notary Public for South Carolina.
My Commission Expires: 5/11/2014

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013CP4004135

Jerens S #314451 Hayward

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (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 (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 6 March 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Jerens S #314451 Hayward

Kristy Grafton Goldberg

Megan E. Harrigan

Jerens S #314451 Hayward

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Jerene Hayward, 00314451,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

DOCKET NO. 2008-CP-40-00780

3854

ORDER OF DISMISSAL

JEANETTE W. McBRIDE
C.C.P. & S.S.

2010 APR -9 PM 3:16

RICHLAND COUNTY
FILED

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 1, 2008 (2008-CP-40-00780). Following the denial of the direct appeal, Remittitur date February 26, 2008, the Applicant filed a second PCR Application on May 29, 2008 (2008-CP-40-03854). The Respondent made its Return on March 25, 2009.¹ An evidentiary hearing into the matter was convened on May 13, 2009 at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Charlie J. Johnson, Jr., Esquire. Brian T. Petrano of the South Carolina Attorney General's Office represented the Respondent.

At the hearing, the Applicant testified on his own behalf. The Applicant's trial counsel, Jeanette Van Ginhoven is, according to the Respondent, currently living in Europe and was not available for the hearing. This Court had before it the records of the Richland County Clerk of Court, the transcript of the proceedings against the Applicant, the records from the direct appeal, and the Applicant's records from the South Carolina Department of Corrections.

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. Applicant was indicted by the Richland County Grand Jury during the April or the June 2005 term for first-degree burglary (Indictment No. 05-GS-40-2824), petit larceny (Indictment No. 05-GS-40-2825), kidnapping (Indictment No. 05-GS-40-5072), assault and battery with intent to kill

¹ In their Return, the Respondent suggested that because counsel has been appointed for the second PCR, the first PCR should be merged into the second PCR with the second PCR (2008-CP-40-03854) being the surviving action. The Respondent filed a Return and Motion to Dismiss the original PCR on February 7, 2008. This Court agrees.

Handwritten initials/signature

(Indictment No. 05-GS-40-5073), and possession of marijuana (Indictment No. 05-GS-40-4570)². The Applicant was represented by Jeanette Van Ginhoven and Lauren Mobley. On March 16, 2006, after a jury trial with the Honorable James W. Johnson Jr., the jury found Hayward guilty of first-degree burglary, the lesser-included offense of ABHAN, petit larceny, and possession of marijuana. The trial court sentenced Hayward to consecutive terms of thirty years (30) for first-degree burglary and ten (10) years for ABHAN, plus concurrent terms of thirty days (30) each for the remaining convictions. He was found not guilty of the kidnapping charge.

A timely Notice of Appeal was filed on Applicant's behalf, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Jerene Markwell Hayward, No. 2008-UP-088 (S.C. Ct. App. filed February 8, 2008). The Court of Appeals recited the facts as follows:

Hayward was accused of burglarizing the home of Jeffrey Connell and assaulting Connell's domestic employee on April 13, 2004. On that same afternoon, Ronald Cowart, a landscaper, was in route to Crescent Lake Subdivision when Hayward ran out in front of Cowart's truck, exclaiming two people were in pursuit of him. Cowart talked with Hayward and gave him a ride. Cowart observed Hayward was a tall, slender black male, with close-cut hair and a mark or tattoo on his neck. Hayward was wearing baggy blue jeans and a dark, long-sleeved shirt. He was carrying a backpack. Hayward eventually left Cowart's vehicle to find a store and a phone. Cowart alerted the police in response to conduct he believed was "out of the ordinary" and the noticeable police activity in the area.

Police arrested Hayward, informed him of his Miranda rights, and summoned Cowart several hours later to identify Hayward. At the site of arrest Hayward was handcuffed and surrounded by police cars and uniformed officers. Cowart positively identified Hayward as the man he had spoken with and picked up earlier. He testified, "I said yes this is him, I know him."

Eric Barnes, an investigator with Richland County Sheriff's Department, was responsible for directing the investigation. As he arrived on the scene where Hayward was detained, he recalled Hayward was shouting that he was innocent. Barnes introduced himself to Hayward and looked at Hayward's shoeprint to determine if it was similar to one left at the crime scene. Barnes observed what he thought was blood on Hayward's shoes, removed them, and secured them as evidence.

Barnes continued talking with Hayward, commenting that Hayward "was going to have a hard time explaining how the victim's blood got on the shoe."

² Applicant was also indicted for unlawful possession of a pistol (Indictment No. 05-GS-40-5074) which was quashed by the trial court and pointing and presenting a firearm (Indictment No. 05-GS-40-2802) upon which the trial court directed a verdict at the conclusion of the State's case at trial.

RICHLAND COUNTY
FILED
JANETTE W. JOHNSON
MAY 16 2006
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Hayward said "he was in the house but it was the other guy that kicked her or hit the lady, not him."

At headquarters, Barnes verbally informed Hayward of his Miranda rights, asked Hayward if he understood, and attempted to obtain information from him. Barnes testified Hayward denied he made the statement at the arrest site claiming he was not the one who kicked the lady. Hayward continued to deny everything about the case at that point, becoming louder and louder as the discussion progressed. When Barnes realized it was futile to continue, he decided to adjourn the session, concluding, "It became apparent in my mind that [Hayward] didn't want to give a statement."

...
In a hearing pursuant to Jackson v. Denno, 378 U.S. 368, (1964), Hayward challenged the suggestiveness of Cowart's identification of him at the arrest site. The trial court ruled Cowart's identification was admissible.

Additionally, Hayward moved for a mistrial on the ground Barnes impermissibly commented on Hayward's constitutional right to remain silent. The trial court denied Hayward's motion and ruled Hayward had not invoked his right to remain silent at the time Barnes decided it was futile to continue the session. Therefore, Barnes' comment that Hayward's statement was not forthcoming did not reflect on Hayward's invocation of his Fifth Amendment right.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons: "Trial counsel was ineffective when she failed to object at crucial points in trial, failed to explore defenses, failed to challenge indictments, failed to suppress evidence. Trial counsel also failed to strike jurors or bring to court attention that the jurors was bias and unsuitable for case.[sic] Counsel, also failed to challenge 85% law truth in Sentencing Bill 3096, that violates the single subject clause also enacted statue by legislature." Additionally, Applicant alleges prosecutorial misconduct.

At the evidentiary hearing, Applicant proceeded only on the allegations of ineffective assistance of counsel stated in the application. No evidence was presented regarding allegations of prosecutorial misconduct. Those claims are therefore waived or abandoned.

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 (Rev. 2003).

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The Applicant testified that he was represented by Lauren Mobley and Jeanette Van Ginhoven, and that Ms. Van Ginhoven represented him at trial. He met with his attorney(s) every two (2) months for approximately two (2) years leading up to the trial. Trial counsel was easy to deal with and he had no problems communicating with her. Applicant testified that he never received a copy of the discovery, but he did review it with trial counsel. His defense was that he was falsely identified. Applicant testified that if anything he was only guilty of possession of a firearm because he bought it from the people who must have done this crime. He testified that he was improperly identified out of a photographic lineup by the victim. In the photographic lineup the Applicant was wearing different clothing. The Applicant testified that trial counsel was ineffective because a juror was a member of the same country club as the owner of the property that was burglarized. The State claimed during the trial that Applicant had the victim's blood on his shoes; however, the Applicant claimed that was erroneous because "SLED cleared me."

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 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,

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but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

This Court finds Applicant's testimony is not credible and that he has not carried his burden of proof. Accordingly, this Court finds that his applicant must be denied and dismissed.

Regarding the jury note, this Court finds no arguable claim for relief. Specifically, during the trial a note from the jury indicated that a juror was a member of the same county club as the owner of the property that was burglarized. The property owner also testified as a witness for the State. The trial court inquired if this would affect the juror's ability to be fair and impartial in the case. The juror informed the court that it would not. The juror indicated that he did not know the witness. (Trial transcript p. 222). Presumably, the Applicant's claim is that trial counsel should have objected and/or moved for a mistrial regarding the jury note. This court finds that the Applicant failed to demonstrate how the note from the juror warranted such a response by trial counsel. "The trial court has broad discretion in assessing allegation of juror misconduct The determination of whether extraneous material received by a juror during the course of the trial is prejudicial is a matter for determination by the trial court." State v. Sparkman, 358 S.C. 491, 596 S.E.2d 375 (2004).

Regarding the photographic lineup and the difference in clothing, this Court finds that the Applicant's claim that trial counsel failed to challenge the photographic line-up is without merit. The record reflects that during pretrial, trial counsel specifically challenged the identification by the victim and pointed out that the Applicant's clothing was different. (Trial transcript p. 93, p. 152-156, p. 161-162). Also, during the victim's testimony before the jury, trial counsel again challenged her identification and the photographic lineup. (Trial transcript p. 285-286). Accordingly, this Court finds that the Applicant has failed to satisfy his burden of proof and demonstrate the trial counsel failed to challenge the photographic lineup.

Regarding the blood on the Applicant's shoes, the Applicant claims that SLED analysis results cleared him. Trial counsel was able to bring out during cross examination that the Applicant's shoe tread did not match the bloody shoeprint found at the scene. (Tr. pp. 680-681). While this evidence appears to clear Applicant, the serological expert from SLED who performed the chemical tests on the swabs testified that there was blood on the shoe and it matched the victim's. Trial counsel thoroughly challenged the State's witness regarding the blood matching. (Trial transcript p. 711-719). In addition, trial counsel challenged the blood

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matching and serology during her closing arguments. (Trial transcript p. 774-776, 780-782). Accordingly, this Court finds that the Applicant has failed to satisfy his burden of proof and demonstrate trial counsel was ineffective – the Applicant made only general allegations, nothing specific was presented to criticize trial counsel performance and the Applicant failed to demonstrate any resulting prejudice.

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. Counsel was not deficient in any manner, nor was Applicant prejudiced by counsel's representation. 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. Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice. 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 issues 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), SCRCR, 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. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate


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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 must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.
3. The Applicant's second PCR Application, filed on May 29, 2008 (2008-CP-40-03854) is merged into the original PCR Application (2008-CP-40-00780). The surviving case number is 2008-CP-40-00780.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge
Fifth Judicial Circuit

April 9, 2010
Columbia, South Carolina.

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2008CP4003854

Jerene Markwell #314451 Hayward

vs.

State of South Carolina

Plaintiff

Defendant

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;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____

JEANETTE W. McBRIDE
 CLERK OF COURT
 2010 APR 9 PM 3:31
 RICHLAND COUNTY
 FILED

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 Columbia, South Carolina, this ____ day of _____, 2010.

PRESIDING JUDGE

This judgment was entered on the ____ day of _____, 2010, and a copy mailed first class this ¹²/₁₀ day of April, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Jerene Markwell #314451 Hayward
Bryan S. Jeffries
Jerene Markwell #314451 Hayward

State of South Carolina
Brian T Petrano
State of South Carolina

ATTORNEY(S) FOR THE PLAINTIFF(S)

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

