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June 10, 2014

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

RECEIVED

JUN 12 2014

**RE: Damon Jones v. State of South Carolina
CA No.: 2010-CP-42-06623**

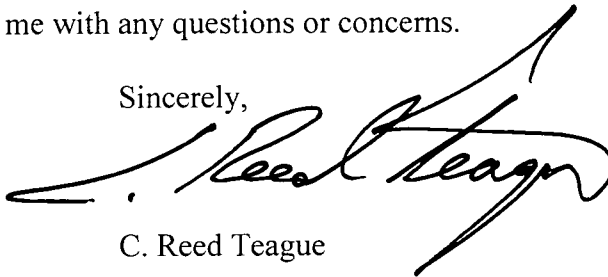
S.C. SUPREME COURT

Dear Mr. Shearouse:

Enclosed please find Applicant's, Damon Jones, Notice of Appeal concerning above referenced case. I was appointed to represent Mr. Jones in this matter. I request that a copy of this Appeal and all future correspondence concerning this Appeal be forwarded to The South Carolina Commission on Indigent Defense, Division of Appellate Defense.

This Notice of Appeal has been filed in accordance with the South Carolina Appellate Court Rules. Please contact me with any questions or concerns.

Sincerely,



C. Reed Teague

Enclosures

cc: Mr. Damon Jones
South Carolina Commission on Indigent Defense, Division of Appellate Defense
Suzanne White

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

JUN 12 2014

The Honorable R. Lawton McIntosh

S.C. SUPREME COURT

Case No. 2010-CP-42-6623

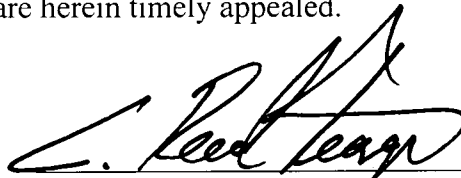
Damon Jones, #²50332, aka Damian Jones.....Appellant

v.

State of South Carolina.....Respondent

NOTICE OF APPEAL

The Appellant, Damon Jones appeals the decision of the Honorable R. Lawton McIntosh filed on March 4, 2014 (see: Exhibit "1"). Applicant received written notice of the entry of this Order on March 18, 2014. Upon receipt of the March 4, 2014 Order of Dismissal, Applicant timely filed a Rule 59(e), SCRCF Motion. By order filed June 2, 2014, the Honorable R. Lawton McIntosh denied the Applicant's Rule 59(e) Motion (see: Exhibit "2"). The Rule 59(e) Motion stayed the time to appeal and both orders are herein timely appealed.



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ATTORNEY FOR THE APPELLANT

June 10, 2014

OTHER COUNSEL OF RECORD:

Suzanne White, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh

Case No. 2010-CP-42-6623

^N
Damon Jones, #50332, aka Damian Jones.....Appellant

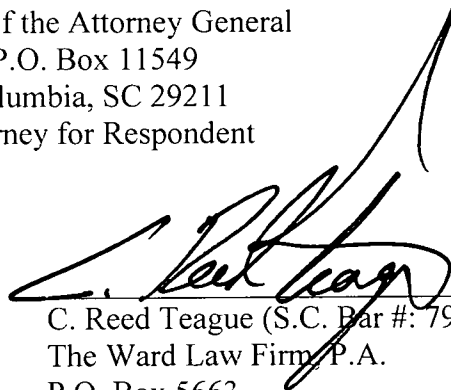
v.

State of South Carolina.....Respondent

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Respondent by depositing a copy of it in the United States Mail, postage prepaid on June 10, 2014 addressed as follows:

Ms. Suzanne White
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent



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Facsimile (864) 585-3090
ATTORNEY FOR THE APPELLANT

June 10, 2014

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

Damon Jones, #^N50332,
aka Damian Jones)

Applicant,)

vs.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2010-CP-42-6623

ORDER

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2014 JUN -2 AM 9:07
M. HOPE BLACKLEY

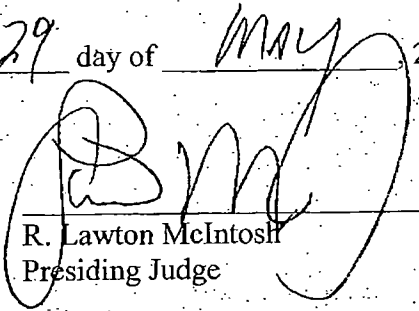
This matter comes before the Court by way of Applicant's Motion for Reconsideration pursuant to Rule 59(e), SCRPC. The Respondent made its Return to this response on April 1, 2014.

The Order of Dismissal in this matter was signed by me on February 26, 2014. Based upon careful reconsideration of all the evidence in this case and upon full consideration of Applicant's response and objections, this Court is not persuaded to alter or amend the judgment.

~~This Court further finds that oral argument would not aid in the reconsideration of the original judgment.~~ *RUB after hearing oral Argument,* Therefore, this Court finds that the Order of Dismissal, which was signed on February

26, 2014, shall stand as it was written.

AND IT IS SO ORDERED this 29 day of May, 2014.


R. Lawton McIntosh
Presiding Judge

Wohaller South Carolina



STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG)	
)	
Damon Jones, # ^N 350332,)	2010-CP-42-6623
aka Damian Jones)	
Applicant,)	
)	
v.)	ORDER OF DISMISSAL
)	
State of South Carolina,)	
)	
Respondent.)	
)	

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 15, 2011, and amended application filed March 9, 2012. The Respondent made its Return on or about February 16, 2012. An evidentiary hearing into the matter was convened on June 25, 2013, and concluded on June 26, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by C. Reed Teague, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Sandra McGraw, Officer Ila Simmons of SLED, Atiba Long, Mignon Williams, Solicitor Barry J. Barnette, Officer Robert Talanges, and Christopher D. Brough, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, the trial transcript, and exhibits presented during the hearing.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Applicant was

CLERK OF COURT
 SPARTANBURG COUNTY
 2014 MAR 15 - 4 PM
 J. HOE BLANKENHORN

indicted at the August 2005 term of the Spartanburg County Grand Jury for murder (2005-GS-42-3371). Christopher D. Brough, Esquire, represented the Applicant. On November 30, 2005, the Applicant was convicted of the charge by a jury. The Honorable Paul M. Burch sentenced the Applicant to confinement for life without parole.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Jones, Op. No. 2008-UP-424 (filed July 23, 2008). A Petition for Rehearing was filed by the Applicant and denied by the Court on September 23, 2008. The Applicant then filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, which was granted on December 2, 2009. The South Carolina Supreme Court affirmed the decision of the Court of Appeals. State v. Jones, Memo. Op. No. 2010-MO-020 (filed August 23, 2010). A Petition for Rehearing was filed by the Applicant and denied by the Court on September 22, 2010. The Remittitur was returned on September 22, 2010.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons (listed as numbered in application):

Issue #1

- Prosecution and Counsel made concerted effort to withhold exculpatory evidence from Applicant (Atiba Long's first written statement, blood analysis report, fingerprint analysis report, signed coroner's report, all Spartanburg Police Department investigative and supplemental reports), violating Applicant's due process right.

Issue #2

- Prosecution and Counsel violated Applicant's due process rights when "aiding state's witness, Atiba Long, in construction of a second written statement which is falsified evidence," and Applicant was in possession of second written statement only.

Issue #3

- Prosecution argued that the evidence indicated that the victim had been shot at a 45 degree angle while kneeling behind Applicant's car, while

Applicant was standing on a brick wall in his grandmother's yard, but there was blood on the driver's side roof of Applicant's car, which makes this argument impossible. Counsel failed to object to this testimony and false evidence.

Issue #4

- Prosecution and Counsel worked in concert to ensure Applicant's conviction when Prosecution argued there was no blood at the driver's side door, but photos taken by Officer Talanges indicate that there were blood smears on the driver's side of Applicant's car.

Issue #5

- Counsel failed to introduce and argue Sigida Long's lengthy criminal record.

Issue #6

- Counsel failed to enter and argue Mignon Williams' written and verbal statement for impeachment purposes.

Issue #7

- Counsel failed to inform Applicant that the jury sent four notes to the court and failed to ensure that Applicant was present or waived his right to be present when the notes were received and read.

Issue #8

- Trial court abused its discretion and violated Applicant's due process rights when it failed to give modified version of the Allen charge to an obviously deadlocked jury.

Issue #9

- Counsel failed to request a mistrial or request that the jury be sent home to reconvene the following day, where the jury had been deliberating for more than six hours.

Issue #10

- Juror #86 committed juror misconduct when she failed to reveal during voir dire that she was a victim of a violent crime, which would have led to Counsel striking her from the jury.

Issue #11

- Prosecution "failed miserably to prove its murder case, despite all of the conspiring with the defense counsel to withhold, falsify and alter evidence."

Issue #12

- Court reporter Mike Watts inaccurately recorded Applicant's trial for murder where there are numerous inaccuracies and fabricated testimony.

Issue #13

- Trial counsel had a conflict of interest and mishandled Applicant's case, leading Applicant to believe that Counsel was conspiring with the Prosecution to secure Applicant's conviction.

The Applicant informed this Court that he was proceeding on the allegations as detailed in the amended application filed March 9, 2012, and as represented above, but voluntarily abandoned issues #7, 8, 9, 11, and 12. The Applicant also orally amended the application to include an allegation of ineffective assistance of appellate counsel for failure to make a motion to stay the appeal and remand to the circuit court for a hearing on the juror misconduct issue.

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 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) (citing Rule 71.1E, SCRPC). 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 v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (*citing* Strickland).

Issue #1

- Prosecution and Counsel made concerted effort to withhold exculpatory evidence from Applicant (Atiba Long's first written statement, blood analysis report, fingerprint analysis report, signed coroner's report, all Spartanburg Police Department investigative and supplemental reports), violating Applicant's due process right.

Applicant claimed that the prosecution and Counsel made a concerted effort to withhold documents from him, including those listed above. However, Applicant acknowledged that although he did not have the documents, he did not know if Counsel had them in his possession. In support of this claim, Applicant entered into evidence Exhibit #4, Officer Talanges' supplemental report; Exhibit #5, a photo of the car entered as Exhibit #13 at trial; and Exhibit #6, Lt. Lamb's supplemental report. Applicant also entered the latent print analysis as Exhibit #9, the coroner's report as Exhibit #10, and the SLED reports as Exhibit #11. The State objected to the introduction of Applicant's personal notes regarding various issues as evidence and the objection was sustained.

As to claims that the Prosecution or Counsel withheld exculpatory information from the Applicant, this Court finds that the Applicant has failed to meet his burden of proof. This Court found the testimony of Counsel and Solicitor Barnette to be more credible than Applicant's testimony. In evaluating post-trial Brady claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268.

This Court finds that the Applicant's Brady rights were not violated. This Court finds that Counsel was aware of and had received the blood analysis report, fingerprint analysis report, signed coroner's report, as well as all investigative and supplemental reports by the Spartanburg Sheriff's Office. This Court finds that there was no second statement of Mr. Atiba Long and Applicant received the only written statement Long provided the police. Furthermore, the reports entered into evidence which Applicant claimed to have been withheld from him contained no material, exculpatory evidence that would have changed the result of the proceeding. Therefore, this allegation is dismissed.

Issue #2

- Prosecution and Counsel violated Applicant's due process rights when "aiding state's witness, Atiba Long, in construction of a second written statement which is falsified evidence," and Applicant was in possession of second written statement only.

Atiba Long, the victim's brother, testified that he gave a written statement to police as a witness to the shooting. He testified that he did not recall ever giving a second or different

statement and never made any changes to the initial statement he gave to police. Both Solicitor Barnette and Counsel testified that there was not a second statement by Mr. Long to their knowledge. The Applicant entered Atiba Long's written statement into evidence as Exhibit #11.

This Court finds that the Applicant has failed to meet his burden of proof as to this claim. This Court finds the testimony of Mr. Long, Solicitor Barnette, and Counsel to be credible on this issue. There is nothing to support the Applicant's claim that the victim's brother provided police with a second statement and the testimony provided directly contradicts that claim. Therefore, this claim is denied and dismissed.

Issue #3

- Prosecution argued that the evidence indicated that the victim had been shot at a 45 degree angle while kneeling behind Applicant's car, while Applicant was standing on a brick wall in his grandmother's yard, but there was blood on the driver's side roof of Applicant's car, which makes this argument impossible. Counsel failed to object to this testimony and false evidence.

The Applicant argued that Counsel failed to object to testimony and evidence presented by the prosecution regarding the angle of the gunshot and the position of both the Applicant and victim at the time of the shooting. This Court finds that the Applicant has failed to meet his burden of proof as to this claim. As the record reflects, Counsel cross-examined Dr. Wren regarding his testimony of a 45 degree angle and pointed out the fact that this measurement was simply an estimate. (Tr. p. 141). Counsel testified that he did not hire anyone to analyze the angle of the gunshot and does not know if someone could have been hired to make that determination. However, Counsel testified that he thought that he called that testimony into question when Dr. Wren admitted during cross-examination that he used no measuring device to make his determination.

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing the witnesses' answers at trial would have been different in response to different questions or because of objections. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense.

This Court finds that the Applicant failed to present any specific evidence or testimony that was legally objectionable, rather, Applicant appears to want Counsel to object generally to the prosecution's case. This Court finds that Counsel utilized cross-examination of Dr. Wren, as well as testimony from the defense expert, to draw attention to the alleged inaccuracies of the measurements and State's position. Therefore, this claim is denied and dismissed.

Issue #4

- Prosecution and Counsel worked in concert to ensure Applicant's conviction when Prosecution argued there was no blood at the driver's side door, but photos taken by Officer Talanges indicate that there were blood smears on the driver's side of Applicant's car.

Solicitor Barry Barnette testified that he prosecuted the case along with Assistant Solicitor Jennifer Jordan. Barnette testified that he received and reviewed all reports from the investigation. Barnette testified that he did review Officer Talanges' report that indicated there was a drop of blood on the roof of the car on the driver's side and no blood splatter inside the vehicle. Barnette testified that he does not usually enter a black and white photocopy of a photo, but will enter the actual picture of the crime scene into evidence, so the photo which was entered

at trial of the car, would have been a color copy. Following his review of Applicant's Exhibit #5, Barnette testified that he could not make a determination if the spot seen on the photo is blood. Barnette testified that the victim was found lying at the back of the Buick with a large amount of blood as a result of his head wound. Barnette also testified that Officer Talanges testified that there was no blood found in the car. (Tr. p. 81) (emphasis added).

Officer Robert Talanges testified that he responded to the location and was responsible for photographing the scene and collecting all of the evidence at the scene. Talanges testified that his only analysis experience was in latent print analysis, so all other evidence would have been sent to SLED for analysis. Talanges testified that he submits whatever information to SLED that the investigator wants him to submit, which sometimes includes submitting a victim's clothing for gunshot residue analysis. Talanges testified that he completed his report following the investigation. Following his review of Exhibit #5, Talanges testified that he saw the spot on the top of the car, but could not state whether it was blood or not. Further, Talanges testified that he made a diagram referencing dots on the windshield of the car, hood, and roof of the car. The Applicant introduced Exhibit #12, the diagram produced by Talanges; Exhibit #13, the evidence sheet indicating there was no blood found on the back of the car; and Exhibit #14, a photo of the victim at the back of the car. Additionally, Talanges testified that he has expertise in latent prints, but not crime scene reconstruction. Talanges testified that he has never been qualified as an expert in crime scene reconstruction and cannot testify as to the possible location of the shooting versus where the body was found.

Counsel testified that he was aware of the fact that the investigative report indicated droplets of blood on the car at the front, but did not believe that information was necessary for trial because of Jeff Hollifield, the defense expert in gunshot residue. Counsel testified that

Hollifield's testimony regarding possible gunshot residue on the victim's hands supported the defense that he was in close proximity to the Applicant at the time of the shooting, especially in light of the fact that the victim did not have a gun. Counsel testified that a couple of droplets of blood could be splatter from the shooting and did not necessarily support the claim of self-defense. Counsel testified that he believed the important facts were that the victim approached the Applicant and that forensic evidence indicated that the victim and Applicant were in close proximity. Counsel testified that he did not cross-examine Talanges about blood found on the Applicant's shoe because he did not want Talanges to try and explain it away.

Further, Counsel testified that the photos of the car, including Exhibit #5, did not really show blood on the car, so it was difficult to cross-examine Talanges about any blood found on the car. Counsel testified that he felt the point was more that the altercation occurred at the car, not necessarily whether it occurred at the front or back of the car.

Again, this Court finds the testimony of Solicitor Barnette, Officer Talanges, and Counsel to be more credible than the testimony of Applicant. In so much as the Applicant is alleging a Brady violation, this Court finds that the Applicant failed to meet his burden of proof. As evidenced by the introduction of Exhibit #5, the photo of the front of the car and the small drop on the roof of the car was entered at trial and presented to the jury. Because there is no indication that any evidence was withheld by the Prosecution, this claim is denied and dismissed.

As to the claim that Counsel acted in concert with the prosecution to not draw the jury's attention to this alleged drop of blood, this Court finds that the Applicant has also failed to meet his burden of proof. First, this Court finds no evidence that Counsel was attempting to assist the prosecution in the presentation of their case. Second, where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective

assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Counsel articulated valid strategic reasons for not focusing on the small spots on the vehicle. The Applicant has not shown that counsel was deficient in that choice of tactics. Therefore, this claim is denied and dismissed.

Issue #5

- Counsel failed to introduce and argue Sigida Long's lengthy criminal record.

The Applicant claims that Counsel was ineffective for failing to enter the victim's criminal record into evidence at trial. In support of this claim, Applicant moved to introduce the victim's, Sigida Long, criminal record at this hearing. This Court sustained the State's objection to that evidence, but allowed Applicant's Counsel to proffer the criminal record.

The Applicant testified that he had previously been threatened and assaulted by the victim and his brother and thought that if Counsel had attempted to enter into evidence the victim's criminal record, it would support Applicant's claim of self-defense. Counsel testified that he felt that the prior threats made by the victim to the Applicant were sufficiently presented to the jury through the Applicant's testimony. (Tr. p. 181, lines 11-25; p. 182, lines 1-16, lines 20-25; p. 183, lines 1-6). As a rule, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion," including the character traits of the victim. Rule 404(a)(2), SCRE.

This Court finds that the Applicant has failed to meet his burden of proof as to this claim. This Court finds that Counsel presented the alleged altercations with the victim and the Applicant to the jury through the Applicant's testimony and any prior criminal record of the

victim would not have been admissible to support Applicant's defense. Therefore, this claim is denied and dismissed.

Issue #6

- Counsel failed to enter and argue Mignon Williams' written and verbal statement for impeachment purposes.

Applicant testified that Counsel was ineffective for failing to impeach Mignon Williams, neighbor and witness to the shooting, with her prior written statement to police. Ms. Williams testified that she provided the police with a written statement and testified at trial. Ms. Williams acknowledged that her statement mentions a second person who was with her at the time of the shooting; however, she testified that the other witness' back was to the shooting. Ms. Williams testified that no one ever contacted her for the name of the other woman. Applicant entered Ms. Williams' written statement into evidence as Exhibit #7.

Counsel testified that Mignon Williams testified that the Applicant was in the yard of the home when he shot the victim. Counsel testified that he felt he sufficiently cross-examined Williams about her ability to accurately perceive everything. Counsel testified that he did not ask her about the distance between victim and Applicant because Solicitor Barnette had already asked that question on direct and she indicated that the distance was the same distance between her and Solicitor Barnette at that time in the courtroom, which was not helpful for the defense. Counsel testified that he did make contact with the additional witness mentioned by Ms. Williams, but that witness indicated that she did not see anything.

This Court finds that the Applicant failed to meet his burden of proof as to this claim. As Rule 613, SCRE, indicates, the only time extrinsic evidence of a prior inconsistent statement by a witness is admissible, is if the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and does not admit that he has

made the prior inconsistent statement. Rule 613, SCRE. Applicant failed to provide any specific instances of testimony inconsistent with the statement. As the transcript reflects, Ms. Williams did not testify inconsistently with her written statement to police. (Tr. p. 123-132). Therefore, this Court finds that Counsel could not have introduced her written statement as evidence at trial and is not ineffective for failing to attempt to do so.

As to any allegation that Counsel was ineffective for failing to call the woman mentioned in Ms. Williams' statement as a witness, this Court finds that the Applicant has failed to meet his burden of proof. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Although the Applicant had Ms. Williams present to testify, her testimony offered no additional information and provided nothing that was not already testified to at trial. Furthermore, although the Applicant alleged that Counsel failed to contact the other woman with Ms. Williams, Counsel testified that he did speak with that witness. This Court finds both Ms. Williams' and Counsel's testimony credible as to this issue. Counsel testified that the witness indicated that she had seen nothing and would not have been helpful at trial. Therefore, this

Court finds that the Applicant has failed to meet his burden of proof as to this claim and it is denied and dismissed.

Issue #10

- Juror #86 committed juror misconduct when she failed to reveal during voir dire that she was a victim of a violent crime, which would have led to Counsel striking her from the jury.

The Applicant alleged that his right to a fair trial was violated because juror Sandra McGraw failed to disclose the fact that she had been a victim of a violent crime during jury voir dire. Provided a claim of juror misconduct is timely raised, “a new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's preemptory challenge.” McCoy v. State, 401 S.C. 363, 371, 737 S.E.2d 623, 627 (2013).

This allegation was based upon a letter written by another juror following the jury trial. Respondent objected to any testimony regarding statements allegedly said during jury deliberations based upon Rule 606, SCRE, and hearsay. For the purposes of determining if any testimony could be presented in support of this claim, this Court took testimony initially from Ms. Sandra McGraw, juror #86 from trial. Richard Kershner and Investigator Smith were present, under subpoena, and prepared to testify if necessary and Robert Dudek was prepared to testify via telephone.

McGraw testified that she did not recall a jury voir dire question regarding whether or not she had ever been a victim of a violent crime. However, McGraw testified that she had never said in the jury room that her ex-husband had held a .357 to her head and did not consider herself to have been a victim of a violent crime. Following her testimony, this Court held that the Applicant could not proceed with its claim of juror misconduct because any other testimony to

support this allegation would be purely hearsay. The South Carolina Supreme Court has held that "a defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial" on those grounds. Shumpert v. State, 378 S.C. 62, 67, 661 S.E.2d 369, 371 (2008). Because this Court finds Ms. McGraw's testimony to be credible, this Court found that the Applicant failed to meet his burden of proof as to this claim and it is denied and dismissed.

The Applicant then, to preserve for appellate purposes, proffered the Investigator Skip Smith, who intended to testify that he approached Ms. McGraw about the incident of her telling the jurors that her ex-husband held a .357 to her head and she refused to sign an affidavit. Investigator Smith also intended to testify that he approached Ms. McGraw upon the request of Robert Dudek, the attorney representing Applicant on appeal. The Applicant also proffered the intended testimony of Richard Kershner, the juror who allegedly overheard the remark about the .357 being held to McGraw's head. In support of these claims, the Applicant proffered the following exhibits: Exhibit #1 – affidavit from Richard Kershner, Exhibit #2 – current affidavit from Investigator Smith, and Exhibit #3 – affidavit from Smith dated July 23, 2008.

Issue #13

- Trial counsel had a conflict of interest and mishandled Applicant's case, leading Applicant to believe that Counsel was conspiring with the Prosecution to secure Applicant's conviction.

In support of his claim that Counsel was ineffective for failing to address the distance between the victim and Applicant at the time of the shooting and in support of his claim that Counsel operated under a conflict of interest, Applicant called Officer Ila Simmons of SLED to testify over the State's objection. Simmons, who also testified at trial, testified that she analyzed two gunshot residue kits that were submitted to her at SLED, for the Applicant and the victim. However, she was not provided with the clothing of the victim, the gun used in the shooting or rounds of ammunition used in the shooting. Simmons testified that had she been provided with

those items, she could have completed an analysis to try and determine the distance from the shooter to the victim. The analysis looks for gun powder on the victim's clothing. Simmons testified that at the trial, she testified that the victim was within five feet of the shooter. However, on cross-examination, Simmons testified that had she completed the analysis of the victim's clothing, she could have determined the distance within three to four feet, but could not have determined an exact distance.

Officer Robert Talanges testified that he responded to the location and was responsible for photographing the scene and collecting all of the evidence at the scene. Talanges testified that his only analysis experience was in latent print analysis, so all other evidence would have been sent to SLED for analysis. Talanges testified that he submits whatever information to SLED that the investigator wants him to submit, which sometimes includes submitting a victim's clothing for gunshot residue analysis.

Counsel testified that he did not ask an expert to conduct any testing on the victim's clothing because it could have possibly hurt their case if it indicated the distance was further away than Applicant claimed. Counsel also testified that the expert could not have provided an exact distance and the only difference might have been one or two feet.

This Court finds that although Officers Simmons and Talanges, as well as Counsel, are credible, the Applicant has failed to meet his burden of proof as to this claim. As testified by Officer Simmons, the exact distance could not have been determined even with additional examination of the victim's clothing. There was no evidence or testimony presented that convinced this Court that had this analysis been done and testimony been presented, the outcome of the proceedings would have changed. Therefore, this claim is denied and dismissed.

Counsel also testified that he was appointed in 2005 to represent the Applicant. Counsel testified that he shared all discovery materials with the Applicant, including any discovery materials that were received directly prior to trial. Counsel testified that the witnesses gave many different stories, including the defense's witnesses.

Counsel testified that he drafted a specific jury instruction for self-defense. Counsel testified that he did discuss a possible plea to voluntary manslaughter with the Applicant. Counsel testified that he tried to point out the lack of credibility of various witnesses during his closing argument. Counsel testified that there was nothing to support any claim that the victim's body had been moved before the police arrived. Counsel testified that he did not consider the statement made by the State during the closing to be improper and did not think that there was any basis for objection. (Tr. p. 274)

The mere possibility of a conflict of interest is insufficient to challenge a criminal conviction. Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993). "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809 (1984). The Applicant must show that his attorney actually owed duties to a party whose interests were adverse to the Applicant. Id; Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001).

As to any allegations of Counsel operating under a conflict of interest, this Court finds that the Applicant has failed to meet his burden of proof. There was no evidence presented that supported the claim that Counsel was not zealously advocating for Applicant and instead, was supporting the prosecution's theory and actively working to thwart Applicant's defense. Instead, Counsel testified as to the work he did in support of Applicant's defense, including research,

interviewing witnesses, utilizing expert testimony, and much more. Therefore, this Court finds that this claim is denied and dismissed.

Summary

This Court finds in regards to the allegations of ineffective assistance of counsel, prosecutorial misconduct or a conflict of interest, the Applicant's testimony is not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that 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 Counsel's performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra.

CONCLUSION

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

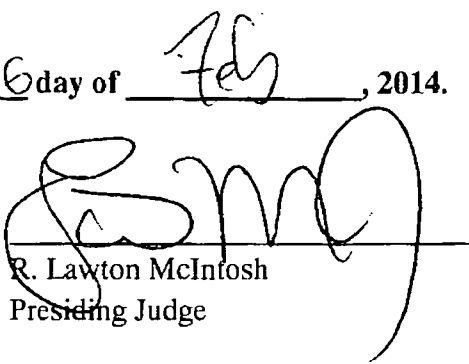
This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the

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 243 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 26 day of Feb, 2014.


R. Lawton McIntosh
Presiding Judge

CLERK OF COURT
SPARTANBURG COUNTY
2014 MAR -4 PM 1:20
M. HOPE BLACKLEY



State of South Carolina
The Circuit Court of the Tenth Judicial Circuit

R. Lawton McIntosh
Judge

February 27, 2014

Post Office Box 8002
100 South Main Street
Anderson, SC 29622-8002
Phone: (864) 260-4059
Fax: (864) 224-6320
lmcintoshj@sccourts.org

The Honorable M. Hope Blackley
Post Office Box 3483
Spartanburg, South Carolina 29304-3483

RE: Damian Jones v. State of SC
CA No. 2010-CP-42-6623

Dear Madame Clerk:

Relative to the captioned matter, please find enclosed an original Order which has been signed by Judge McIntosh. Please file this in your office and provide certified copies as appropriate to the attorneys of record pursuant to your customary procedure.

Thank you for your assistance in this matter.

Sincerely,

Susan Stanfield, Admin Assistant to
R. Lawton McIntosh, Judge
Tenth (10th) Judicial Circuit

sfs

Enclosure

CLERK OF COURT
SPARTANBURG COUNTY
2014 MAR -4 PM 11:00
M. HOPE BLACKLEY

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O Box 3483
Spartanburg, SC 29304-3483



Phone (864) 596-2591
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

March 5, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7TH JUDICIAL CIRCUIT

Namon Jones # 350332

CASE # 2010.CP.426623

Applicant

CERTIFICATE OF SERVICE

Steel^{VS}

Respondent

I certify that, on this date, I served a copy of the

Order of Admissal

In this action dated 2-26 2014 on 3-5-14

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Ann Muller

Suzanne White

Namon Jones

Carl Teague

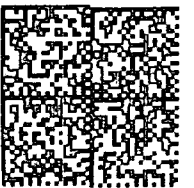
3-5-14


(Date)

Corie Sany
(Signature)

The Ward Law Firm, P.A.
P.O. Box 5663
Spartanburg, SC 29304

The Honorable Daniel F. Shearcuse, Clerk of
Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211



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