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June 23, 2014

The Honorable Daniel E. Shearouse  
Clerk of South Carolina Supreme Court  
Supreme Court Building  
1231 Gervais Street  
Columbia, South Carolina 29201

Re: *Kandy Gilliard v. State of South Carolina*  
Case No.s: 2005 CP-10-0619; 2012-CP-10-0383

Dear Mr. Shearouse:

Enclosed for filing, please find an original and two copies of Ms. Gilliard's Notice of Appeal the denial of her application for Post Conviction Relief. If you find everything in order, please file the original and return the clocked in copies in the enclosed self addressed envelope.

Please note I was appointed and copy the Office of Appellate Defense who will handle the appeal. Please call if you have any questions.

With kindest regards, I am

Sincerely,



Christopher L. Murphy

CLM:ah

Enclosures

c: Ms. Kandy Gilliard  
Robert M. Dudek, Esq.  
PO Box 11433  
Columbia, SC 29211-1433

**RECEIVED**

JUN 25 2014

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Roger Young, Stephanie McDonald and Markley Dennis Circuit Court Judges

Case Nos.: 2005 CP-10-0619; 2012-CP-10-0383

Kandy Gilliard ..... Appellant

v.

State of South Carolina ..... Respondent

NOTICE OF APPEAL

Kandy Gilliard was granted the right to file a belated appeal of the order the Honor Roger Young dated July 20, 2007 denying her PCR application. Attached is order of the Honorable Stephanie McDonald granting such a right and the denial of her second PCR application by the Honorable Markley Dennis. All orders are attached.

June 23, 2014



**CHRISTOPHER L. MURPHY**  
MURPHY LAW OFFICES, LLC  
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Other Counsel of Record

**Ashleigh R. Wilson**  
Assistant Attorney General  
South Carolina Office of the Attorney General  
1000 Assembly Street  
Columbia, SC 29201  
(803) 734-3737  
[ARWilson@SCAG.gov](mailto:ARWilson@SCAG.gov)

**RECEIVED**

JUN 25 2014

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY  
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Case Nos.: 2005 CP-10-0619; 2012-CP-10-0383

Kandy Gilliard .....Appellant  
v.  
State of South Carolina ..... Respondent

PROOF OF SERVICE

I CERTIFY that I have served PROOF OF SERVICE on counsel of record for Respondent by delivering a copy via U.S. Mail First-Class postage prepaid on the 24th day of June, 2014, addressed as follows:

Ashleigh R. Wilson  
Assistant Attorney General  
PO Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737  
ARWilson@SCAG.gov

Attorney for Respondent

  
APRIL JENNINGS

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STATE OF SOUTH CAROLINA )  
)  
COUNTY OF CHARLESTON )  
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)  
Kandy Gilliard, #275605, )  
)  
Applicant, )  
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vs. )  
)  
State of South Carolina, )  
)  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

2012-CP-10-0383

FILED  
2014 JUN 19 AM 9:45  
JULIE J. ROBERTSON  
CLERK OF COURT

**Order Granting State's Motion to Dismiss  
All Remaining Allegations**

Presiding Judge: The Honorable R. Markley Dennis  
Applicant's Attorney: Christopher L. Murphy, Esquire  
Respondent's Attorney: Ashleigh R. Wilson, Esquire  
Date of Hearing: April 15, 2014  
Court Reporter: Deborah Garrison

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 17, 2012. The Respondent made its Return on January 15, 2013. An evidentiary hearing on the matter was convened on November 21, 2013 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Christopher L. Murphy, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent. Also present was William Runyon, Esquire. At the November 21, 2013 hearing, the State and the Applicant's consented to the granting of an appeal pursuant to Austin v. State. A Consent Order was signed and filed by the Honorable Stephanie P. McDonald on January 15, 2014. In this Order, the Court directed the resolution of all the other allegations raised in the Applicant's application be addressed in a separate order.

A hearing was convened on April 15, 2014 at the Charleston County Courthouse to address the State's outstanding motion to dismiss the Applicant's remaining allegations. The

*Handwritten signature/initials*

Applicant was present at the hearing and represented by Christopher L. Murphy, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

### PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the April 2000 term of the Charleston County Grand Jury for murder (2000-GS-10-2467) and armed robbery (2000-CP-10-2468). Melissa Gay, Esquire, represented the Applicant. On June 1, 2001, the Applicant proceeded to trial and was found guilty as indicted. The Honorable James Lockemy sentenced him to confinement for life for murder and 10 years for armed robbery.

The Applicant filed a timely Notice of Appeal. The Applicant's appellate counsel Robert Dudek, Esquire, petitioned to be relieved as counsel and filed an Anders brief with the Court. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Gilliard, Op. No. 2004-UP-296 (S.C. Ct. App. filed May 5, 2004). The Applicant subsequently filed a Petition for Writ of Certiorari, which was denied by the South Carolina Supreme Court on July 8, 2004. On August 19, 2004, the South Carolina Supreme Court denied the Applicant's Petition for Rehearing.

The Applicant subsequently filed an application for post-conviction relief (PCR) on February 15, 2005. In her application for PCR, the Applicant requested relief on the following grounds:

1. "Trial counsel was ineffective in preparing and representing me at trial."
2. "Lackadaisical effort by Appellate Defender Attorney Robert M. Dudek."

The Respondent made its Return on August 16, 2005. An evidentiary hearing into the matter

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was convened on March 14, 2007 and reconvened on June 14, 2007 at the Charleston County Courthouse. The Applicant was present at the hearing and was represented by William Runyon, Jr., Esquire. Jeanette Van Ginhoven, Esquire, of the South Carolina Attorney General's Office represented the Respondent. The Honorable Roger M. Young denied and dismissed the application with prejudice by written Order filed July 23, 2007.

### **ALLEGATIONS**

In her current application, the Applicant alleges that she is being held in custody unlawfully for the following reasons:

1. Subject Matter Jurisdiction
2. "Dismissal of indictment, pre-indictment delay 18 USCA"
3. Entrapment
4. "Nolle Pross. 5<sup>th</sup> Amendment USCA"
5. "Self-Incrimination"
6. Ineffective Assistance of Counsel
  - a. "Attorney failed to charge jury on Nolle Poss. an indictments."

On January 15, 2013, the Respondent submitted a Return and Motion to Dismiss the application as successive and filed outside of the statute of limitations. The Honorable Roger Young, Sr. signed an Conditional Order of Dismissal on January 17, 2013. In response to the Conditional Order of Dismissal signed by Judge Young, the Applicant alleges that she was denied the right to appeal the dismissal of her previous post-conviction relief application. An evidentiary hearing was held on November 21, 2013 to solely address whether or not the Applicant freely and voluntarily waived her right to appeal the denial of her application for post-conviction relief.

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

By Order filed on January 15, 2014, the parties have agreed to the granting of an appeal of the dismissal of the Applicant's first post-conviction relief application pursuant to Austin v.

State. The only issue still before this Court is the State's Motion to Dismiss all allegations other than the Applicant's claim challenging the voluntary waiver of her right to appeal the denial of her first application for post-conviction relief. In the State's "Amended Partial Return and Motion to Dismiss" filed June 7, 2013, the State argued these allegations should be summarily dismissed with prejudice because the application is successive and was filed outside the statute of limitations. The Honorable Roger M. Young, Sr. signed a Conditional Order of Dismissal on January 17, 2013 conditionally dismissing these allegations.

This Court finds all remaining allegations in the Applicant's current application for post-conviction relief are dismissed because this Application is successive to her prior applications for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

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

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the remaining allegations presented by the Applicant were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. The

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Applicant has failed to establish sufficient reason why she could not have raised these allegations in her previous application for post-conviction relief; therefore, she has failed to meet the burden imposed upon her. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

This Court also finds that this Application for Post-Conviction Relief is dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

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

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offenses she challenges in this Application on June 1, 2001. This Application was filed on January 17, 2012, which was almost 10 years after the statutory filing period had expired.

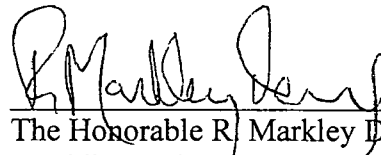
The Applicant also claims the Court lacked subject matter jurisdiction to accept her guilty plea because her co-defendant entered a plea of guilty for murder in exchange for agreeing to testify against her at trial. An Applicant may challenge the subject matter jurisdiction of the trial court and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). This Court finds the Applicant has failed to show that her case is of some class over which the circuit court does not have authority to preside. "Circuit courts obviously have subject matter jurisdiction to try criminal cases." Gentry, 363 S.C. 93; See also S.C. Const. Art. V, § 7. The Applicant was indicted by the Charleston County Grand Jury for the criminal offenses for which

she was convicted at trial. Since the Applicant's conviction involved a criminal charge in General Sessions Court, the circuit court had subject matter jurisdiction. This Court also finds the resolution of the Applicant's co-defendant's charges had no bearing on the Court's subject matter jurisdiction over the Applicant's charges. This Court finds this allegation is without merit and is dismissed with prejudice.

**IT IS THEREFORE ORDERED:**

1. That the State's Motion to Dismiss all claims alleged in this application for post-conviction relief other than the Applicant's claim regarding her right to appeal the denial of her first application is GRANTED; and
2. That the Applicant remain in the custody of the South Carolina Department of Corrections and/or the South Carolina Parole and Community Corrections Department if under the supervision of either agency.

AND IT IS SO ORDERED this 13<sup>th</sup> day of June, 2014.

  
The Honorable R. Markley Dennis  
Presiding Judge  
9<sup>th</sup> Judicial Circuit

Thonoko Corner, South Carolina

SC  
AG  
AT

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
 )  
Kandy Gilliard, #275605, )  
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Applicant, )  
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vs. )  
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State of South Carolina, )  
 )  
Respondent. )  
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IN THE COURT OF COMMON PLEAS

2012-CP-10-0383

FILED  
2014 JAN 15 AM 11:38  
JULIE J. ANDERSON  
CLERK OF COURT  
BY

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

Presiding Judge: The Honorable Stephanie P. McDonald  
Applicant's Attorney: Christopher L. Murphy, Esquire  
Respondent's Attorney: Ashleigh R. Wilson, Esquire  
PCR Counsel: William Runyon, Esquire  
Date of Hearing: November 21, 2013  
Court Reporter: Sharon Vizer

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 17, 2012. The Respondent made its Return on January 15, 2013. An evidentiary hearing on the matter was convened on November 21, 2013 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Christopher L. Murphy, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent. Also present was William Runyon, Esquire.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the April 2000 term of the Charleston County Grand Jury for murder (2000-GS-10-2467) and armed robbery (2000-CP-10-2468). Melissa Gay, Esquire, represented the Applicant.

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On June 1, 2001, the Applicant proceeded to trial and was found guilty as indicted. The Honorable James Lockemy sentenced him to confinement for life for murder and 10 years for armed robbery.

The Applicant filed a timely Notice of Appeal. Applicant's appellate counsel Robert Dudek, Esquire, petitioned to be relieved as counsel and filed an Anders brief with the Court. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Gilliard, Op. No. 2004-UP-296 (S.C. Ct. App. filed May 5, 2004). The Applicant subsequently filed a petition for writ of certiorari, which was denied by the South Carolina Supreme Court on July 8, 2004. On August 19, 2004, the South Carolina Supreme Court denied the Applicant's petition for rehearing.

Applicant subsequently filed an application for post-conviction relief (PCR) on February 15, 2005. In his application for PCR, the Applicant requested relief on the following grounds:

1. "Trial counsel was ineffective in preparing and representing me at trial."
2. "Lackadaisical effort by Appellate Defender Attorney Robert M. Dudek."

The Respondent made its Return on August 16, 2005. An evidentiary hearing into the matter was convened on March 14, 2007 and reconvened on June 14, 2007 at the Charleston County Courthouse. The Applicant was present at the hearing and was represented by William Runyon, Esquire. Jeanette Van Ginhoven, Esquire, of the South Carolina Attorney General's Office represented the Respondent. The Honorable Roger M. Young denied and dismissed the application with prejudice by written Order filed July 23, 2007.

#### ALLEGATIONS

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

1. Subject Matter Jurisdiction

2. "Dismissal of indictment, pre-indictment delay 18 USCA"
3. Entrapment
4. "Nolle Pross. 5<sup>th</sup> Amendment USCA"
5. "Self-Incrimination"
6. Ineffective Assistance of Counsel
  - a. "Attorney failed to charge jury on Nolle Pross. and indictments."

On January 15, 2013, the Respondent submitted a Return and Motion to Dismiss the application as successive and filed outside of the statute of limitations. The Honorable Roger Young, Sr. signed an Conditional Order of Dismissal on January 17, 2013. In response to the Conditional Order of Dismissal signed by Judge Young, the Applicant alleges that she was denied the right to appeal the dismissal of his previous post-conviction relief application. An evidentiary hearing was held to solely address whether or not the Applicant freely and voluntarily waived her right to appeal the denial of her application for post-conviction relief.

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

The Applicant alleges that she was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their 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, the parties below have consented to the granting of an appeal pursuant to Austin v. State of the Applicant's first post-conviction relief application (2005-CP-10-0619). The parties agree that the Applicant did not voluntarily waive her 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 her first application for post-conviction relief and that he failed to file a timely Notice of Appeal of the

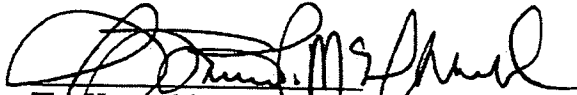
application.

Based upon the foregoing, this Court finds that the granting of an appeal of the Applicant's first PCR (2005-CP-10-0619) pursuant to Austin v. State is warranted. It is appearing the below listed individuals all consent to the granting of a PCR appeal in this matter. This Court also finds that all other allegations raised in this application will be addressed in a separate order.

IT IS THEREFORE ORDERED:

1. That the Applicant remain in the custody of the South Carolina Department of Corrections and/or the South Carolina Parole and Community Corrections Department if under the supervision of either agency; and
2. That the Applicant be granted an appeal of case 2005-CP-10-0619 pursuant to Austin v. State.

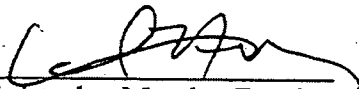
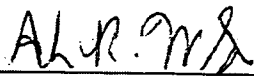
AND IT IS SO ORDERED this 9 day of January, 2014.



The Honorable Stephanie P. McDonald  
Presiding Judge  
9th Judicial Circuit

Charleston, South Carolina.

I CONSENT:

  
Christopher Murphy, Esquire  
Attorney for Applicant  
Ashleigh R. Wilson, Asst. Attorney General  
Attorney for Respondent

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C... ..

STATE OF SOUTH CAROLINA )

COUNTY OF CHALRESTON )

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

2005-CP-10-0619

Kandy Gilliard,  
SCDC No. 275605,

Applicant,

v.

State of South Carolina,

Respondent.

**ORDER OF DISMISSAL  
WITH PREJUDICE**

FILED  
2007 JUL 23 PM 1:02  
CLERK OF COURT

*William Runyon, Esq. appearing for the Applicant.*

*Jeanette Van Ginhoven, Esq., Assistant Attorney General, appearing for the Respondent.*

This is a post-conviction relief (PCR) matter. The Applicant alleges in her PCR application filed February 15, 2005, that she is being held in custody unlawfully due to the ineffective assistance of trial counsel. An evidentiary hearing was convened at the Charleston County Courthouse on March 14, 2007.

**I. PROCEDURAL BACKGROUND**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the April 2000 term of the Charleston County Grand Jury for murder (00-GS-10-2467) and strong arm robbery (00-GS-10-2468). She was represented by Melissa Gay, Esquire. On June 1, 2001, the Applicant proceeded to trial after which she was found guilty as indicted. She was

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sentenced by the Honorable James E. Lockemy to confinement for a period of her natural life and ten years concurrent.

A timely notice of appeal was filed on Applicant's behalf. Applicant's appellate counsel, Robert Dudek, Esquire, petitioned to be relieved as counsel and filed an Anders brief with the Court. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Gilliard, Op. No.2004-UP-296 (S.C. Ct. App. filed May 5, 2004). The Applicant subsequently filed a petition for writ of certiorari, which was denied by the South Carolina Supreme Court on July 8, 2004. On August 19, 2004, the South Carolina Supreme Court denied the Applicant's petition for rehearing.

On March 14, 2007, this Court started the Applicant's PCR hearing. The Applicant called Melisa Gay as a witness. After Ms. Gay's testimony, PCR counsel stated that the Applicant was crying and that he was not sure if she was competent to go forward. By Order dated March 29, 2007, this Court ordered that the Applicant be evaluated by the South Carolina Department of Mental Health. The Applicant was evaluated on May 22, 2007, by Dr. Michael Cross. Dr. Cross found that the Applicant possessed the capacity to understand the proceedings against her and to assist in her appeal. This Court continued the Applicant's PCR hearing on June 14, 2007. The Applicant and State did not present witnesses at this hearing but did introduce Dr. Cross' evaluation as part of the record.

## II. APPLICABLE LAW

### a. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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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 (1984); Butler v. State.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler v. State. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The 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 v. State, 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 v. State; Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

**III. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR EVIDENTIARY HEARING**

The only witness called during the PCR hearing was trial counsel. The Applicant did not testify. The Applicant claims trial counsel was ineffective for failing to bring to the trial court's attention that the Applicant had a mental break and was no longer assisting in her own defense during the trial. The Applicant fully admits that trial counsel adequately prepared for trial and

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that her performance was reasonable under professional norms except for the fact that she did not bring to the trial court's attention that the Applicant could not assist in her own defense because she was tired after the three day trial.

Trial counsel testified that she has practiced law for sixteen years. Trial counsel testified that the Applicant was difficult to communicate with because she did not seem to grasp the seriousness of her charges. Trial counsel had the Applicant evaluated by Dr. Wong. Dr. Wong performed a psychological exam. Dr. Wong found that the Applicant was competent to understand the proceedings and assist in her own defense. Dr. Wong found that the Applicant did not suffer from a mental disorder. Trial counsel testified that she did not have a basis to assert a mental defense. Trial counsel testified that the Applicant's behavior was bizarre before and during trial. Trial counsel testified that after the co-defendant testified, that the Applicant was no longer able to assist in her own defense. Trial counsel testified that she was tired after this three day trial which is why she did not bring this fact to the trial court's attention.

#### IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the testimony presented at the evidentiary hearing, observed the witness presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the transcripts. Pursuant to S.C. Code Ann. § 17-27-80 (1985), this Court makes the following findings of fact based upon all of the probative evidence presented.

To be competent to stand trial or continue trial, a defendant must have "a rational, as well

as a factual, understanding of the proceedings against him and the ability to consult with his lawyer with a reasonable degree of rational understanding. Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). A defendant must prove that he is incompetent to stand trial by a preponderance of the evidence. Id. The Supreme Court of South Carolina has found that a PCR judge erred in granting relief on the basis that the defendant was not competent to stand trial when: (1) counsel testified at the PCR hearing that he had no trouble communicating with the defendant; (2) the trial transcript showed that the defendant clearly understood the questions asked and responded in an appropriate manner; and (3) a forensic psychiatrist evaluated the defendant prior to trial and found the defendant's medical conditions did not affect his mental state. Id.

In this case, trial counsel testified that she could communicate with the Applicant but that she did not seem to appreciate the seriousness of the charges. Trial counsel later testified that at some point after the co-defendant testified, the Applicant had a "mental break" and could no longer assist in her own defense. However, the trial transcript refutes this assertion.

The trial court questioned trial counsel and the Applicant as to whether they had discussed the Applicant testifying at trial, plea negotiations and sentence exposure. (T. pp. 576-582). The Applicant understood the questions and responded in an appropriate manner. The trial judge instructed trial counsel to advise the Applicant regarding her right to testify a second time. (T. p. 582). Trial counsel then informed the trial court that the Applicant wished to testify but told the trial court they would discuss it again during the lunch break. (T. p. 663). The trial court again went over the Applicant's right to testify and the Applicant again understood the questions and answered in an appropriate manner. (T. pp. 691-693). The Applicant testified during the trial informing the jury of her involvement in the murder. The Applicant testified



during trial that the co-defendant came to the store but she did not know why. She let the co-defendant into the store and he said he was going to rob the store and that she was going to help him. She testified that he had a monkey wrench and she was afraid if she didn't help him that he would harm her. Throughout the Applicant's testimony during trial, she is appropriately answering trial counsel's questions and the State's questions.

Trial counsel testified that prior to the trial, she had the Applicant evaluated by Dr. Wong. Dr. Wong found that the Applicant's mental health issues did not affect her competency. Dr. Cross, who evaluated the Applicant, after the first PCR hearing, diagnosed the Applicant with depressive disorder, not otherwise specified. Dr. Cross also found that there was no evidence that the Applicant had significant problems with her mood, thinking, reality testing, communication, or behavior.

I find the Applicant has failed to prove by a preponderance of the evidence that she lost competency to stand trial during her trial. It is clear from the trial transcript that trial counsel was adequately prepared for trial. In fact, the Applicant admits that trial counsel was not ineffective in preparing for trial or actually conducting the trial except for failing to bring to the trial court's attention that the Applicant could not assist in her own defense. I believe that counsel's testimony at the post-conviction relief hearing is an attempt to "fall on the sword" for a young client who received a life sentence. However, the trial record, viewed as a whole and with an objective eye finds that at no point did the Applicant act in such a way as to indicate a lack of cognitive or volitional abilities during the course of her trial such that indicates she lacked capacity to understand what was going on or to assist her attorney. Therefore, this Court finds that trial counsel was not ineffective.

The State argues that even if trial counsel was ineffective, the Applicant has failed to

carry his burden in this action and cannot show prejudice. I disagree. If the Applicant became incompetent during trial, the court should have continued the trial or declared a mistrial until such time as Applicant became competent. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). However, because I find that Applicant failed to show her counsel was ineffective, this cannot be considered the basis for a grant of relief.

### CONCLUSION

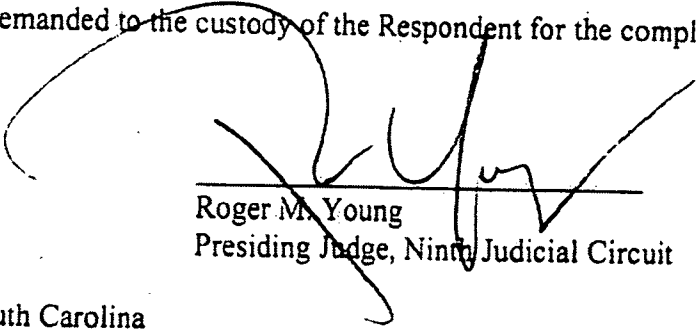
Based on the specific findings above, this Court concludes that the Applicant failed to carry her burden of proof to show that her trial counsel's representation fell below reasonable professional norms. The Applicant's former trial counsel rendered reasonably effective assistance under prevailing professional norms and demonstrated a normal degree of skill, knowledge, and professional judgment that is expected of an attorney in a criminal case. Strickland v. Washington; Cherry v. State.

As to any and all allegations which were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds that the Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that the Applicant waived such allegations and failed to meet her burden of proof regarding them. Accordingly, they are denied and dismissed with prejudice.

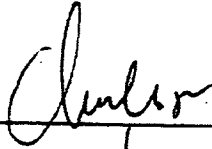
IT IS THEREFORE ORDERED THAT:

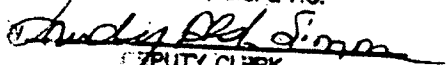
1. The post-conviction relief application is **DENIED AND DISMISSED WITH PREJUDICE**.
2. The Court advises the Applicant and his attorney of record that any Notice of Appeal must be filed within thirty (30) days of service of the signed copy. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures on appeal.

3. The Applicant is remanded to the custody of the Respondent for the completion of her sentence.



Roger M. Young  
Presiding Judge, Ninth Judicial Circuit

  
\_\_\_\_\_, South Carolina  
7/20, 2007

WITNESSE A TRUE COPY  
JULIE J. ARMSTRONG (SEAL)  
CLERK, C.P., G.S. & FC.  
  
DEPUTY CLERK

Christopher L. Murphy  
PO Box 2008  
Mount Pleasant, SC 29465



The Honorable Daniel E. Shearouse  
Clerk of South Carolina Supreme Court  
Supreme Court Building  
Columbia, South Carolina 29201