



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

July 7, 2014

**RECEIVED**

JUL - 7 2014

The Honorable Daniel E. Shearouse  
Clerk, S.C. Supreme Court  
PO Box 11330  
Columbia, SC 29211

**S.C. Supreme Court**

Re: Kenneth W. Workman v. State of South Carolina

Dear Mr. Shearouse:

Enclosed are an original and six copies of the Motion for Appointment of Outside Counsel in the above-captioned case. Thank you for your assistance in this matter.

Sincerely,

David Alexander  
Appellate Defender

DAA/mpm

Enclosure

cc: Karen Ratigan, Esquire  
Mr. Kenneth W. Workman

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge  
\_\_\_\_\_

**RECEIVED**

JUL - 7 2014

**S.C. Supreme Court**

KENNETH W. WORKMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

\_\_\_\_\_  
MOTION FOR APPOINTMENT  
OF OUTSIDE COUNSEL  
\_\_\_\_\_

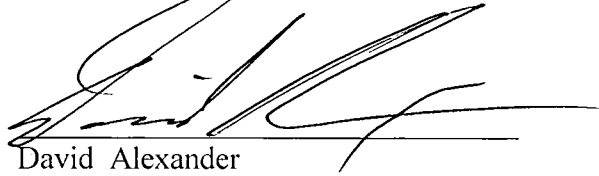
The undersigned respectfully shows the Court:

1. Petitioner is indigent, incarcerated, and currently represented by Appellate Defense. Petitioner's case was assigned by the Chief Appellate Defender, Robert M. Dudek, to the undersigned ("Appellate Counsel").
2. Petitioner is currently serving a twenty-five year sentence for armed robbery. Scott D. Robinson represented petitioner during his trial.

3. Petitioner was represented by Appellate Defender LaNelle DuRant on direct appeal. His appeal was dismissed by the Court of Appeals after an Anders brief was filed by Ms. DuRant.
4. Petitioner's PCR application was denied by the Honorable Edward W. Miller on November 26, 2013. Susannah C. Ross represented petitioner at his PCR hearing.
5. One of the grounds raised by petitioner in his PCR application was that Ms. DuRant was ineffective in handling his appeal. Ms. DuRant did not testify at the PCR hearing. Judge Miller's Order of Dismissal specifically addressed and denied petitioner's allegation of ineffective assistance of appellate counsel. A copy of Judge Miller's Order is attached as Exhibit A.
6. Petitioner very much desires that the issue of Ms. DuRant's effectiveness be raised in his petition for certiorari to this Court. At this time and pending further research, Appellate Counsel believes there is at least one issue of merit for appeal unrelated to Ms. DuRant, but cannot promise petitioner that he will raise the issue related to Ms. DuRant.
7. Petitioner perceives this to be a conflict of interest and does not consent to waive such perceived conflict to allow Appellate Counsel to represent him.
8. Appellate Counsel therefore files this motion requesting that the Court, in its discretion, appoint petitioner an attorney from outside the Office of Appellate Defense and relieve Appellate Counsel as petitioner's attorney.

9. Appellate Counsel requests that the deadlines for submitting the petition for certiorari be held in abeyance until the Court issues its decision on this motion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander  
Appellate Defender

Attorney for Petitioner

This 7<sup>th</sup> day of July, 2014

# EXHIBIT A

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Kenneth Workman, )  
 S.C.D.C. No. 332705, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2012-CP-23-2386

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSIMMER  
 2013 NOV 26 PM 2 33

**ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed April 5, 2012. The Respondent made its return on August 13, 2012. An evidentiary hearing into the matter was convened on October 23, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Susannah C. Ross, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Scott D. Robinson, Esquire. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, the appellate records, and the Applicant's Exhibits 1-4.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the August 2008 term of the Greenville County Grand Jury for assault and battery of a high

and aggravated nature (2008-GS-23-5528), conspiracy (2008-GS-23-5529), armed robbery (2008-GS-23-5530, count 1), and possession of a weapon during the commission of a violent crime (2008-GS-23-5530, count 2). Scott D. Robinson, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On January 15, 2009, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to concurrent terms of thirty days for simple assault, five years for conspiracy, twenty-five years for armed robbery, and five years for possession of a weapon during commission of a violent crime.

A notice of appeal was filed at the South Carolina Court of Appeals. LaNelle C. DuRant, Esquire of the South Carolina Commission on Indigent Defense perfected the appeal in the form of an Anders<sup>1</sup> brief. The Court of Appeals dismissed the appeal. State v. Workman, Op. No. 2012-UP-048 (S.C. Ct. App. filed Jan. 25, 2012).

### ALLEGATIONS

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

1. Ineffective assistance of trial counsel:
  - a. Failed to investigate.
  - b. Failed to object to the jury instructions on armed robbery.
  - c. Failed to object pre-trial to Brady violations.
  - d. Failed to object to indictments being obtained through false affidavits.
2. Ineffective assistance of appellate counsel:
  - a. Failed to present all preserved issues.
3. Due process and Equal protection violations.
4. Insufficient evidence.

In an "Application Addendum" filed by PCR counsel on June 20, 2013, the following issues were alleged:

1. Ineffective assistance of trial counsel:

---

<sup>1</sup> Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

- a. Failure to join in the co-defendant's motion to fully cross-examine the State's witness on the incentives he was given in exchange for his testimony.
- b. Failure to object to the Allen charge.

### **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 Trial Counsel**

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

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "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 v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated trial counsel represented him at both of his trials (the first of which was a mistrial). The Applicant stated he met with trial counsel once or twice before each trial. The Applicant stated they reviewed the evidence and his version of events. The Applicant stated trial counsel did not investigate the case. The Applicant stated that, while the jury heard about the height and weight differences regarding the suspect description, trial counsel failed to argue it with specificity. The Applicant stated trial counsel failed to argue the following things in closing argument: Timothy Wright's deal with the State, the lack of evidence, and the height and weight discrepancies. The Applicant stated trial counsel should have objected to the Allen<sup>2</sup> charge.

Trial counsel testified he was retained in this matter and represented the Applicant at both the first trial (that ended in a mistrial) and the trial at issue in this case. Trial counsel testified he filed discovery materials and reviewed the evidence with the Applicant. Trial counsel testified the Applicant had a joint trial with his co-defendant. Trial counsel testified he did not move to quash the indictments under Rule 3(c), SCRCrimP. Trial counsel confirmed there was a discrepancy between the victim's description of the suspect and the Applicant's description in the supplemental report. Trial counsel testified he made a pre-trial motion to suppress the identification because a news story included the Applicant's name and picture. Trial counsel stated he did not renew his objection when the victim identified the Applicant at trial. Trial counsel testified he did not join the co-defendant's motion to reveal to the jury the full extent of Wright's deal with the State. Trial counsel testified he did not address the height and weight discrepancies during his closing argument and instead focused on what he thought was important

---

<sup>2</sup> Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896).

in the case. Trial counsel testified he did not object to the Allen charge.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the indictment under Rule 3(c), SCRCrimP. This Court finds the late indictments in this case did not nullify the Applicant's prosecution. See State v. Culbreath, 282 S.C. 38, 40, 316 S.E.2d 681, 681 (1984) (“[T]he failure of the solicitor to act upon a warrant within ninety (90) days . . . does not within itself invalidate a warrant or prevent subsequent prosecution.”). Further, this Court finds the Applicant failed to provide evidence of any prejudice that resulted from the delay. See, e.g., State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (noting one must prove prejudice in order to prevail on an allegation that one's speedy trial rights were violated).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have specifically pointed out discrepancies to the jury. The Applicant argues the victim's identification of the gunman was drastically different from the Applicant description at the time of his arrest. This Court finds the Applicant cannot prove any prejudice on this issue, as the co-defendant's attorney pointed out these discrepancies during his cross-examination of the victim. (Trial transcript, pp.98-99). See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. This information was before the jury, who weighed it in their deliberations. See State v. Pipkin, 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct. App. 2004) (noting the jury is “the finder of fact and weigher of credibility”).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to when the victim identified the Applicant. Before trial, the trial counsel argued the identification should be suppressed because the victim identified the Applicant after a news

story included the name and photograph of him. The trial judge denied the motion. (Trial transcript, pp.10-19). While trial counsel did not object when the victim identified the Applicant at trial, this Court finds there was no prejudice. The issue about the news story was brought up to the victim on cross-examination, presented to the jury and referenced by both trial counsel and the co-defendant's attorney in closing arguments. This Court finds there is no reasonable probability the result of the trial would have been different if the objection had been made. See Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have joined the co-defendant's motion to reveal Wright's deal. At the start of trial, the co-defendant's attorney moved "to have the State reveal to me any deals that have been made between the State and Mr. Timothy Wright." (Trial transcript, pp.9-10). The co-defendant's attorney asked to be able to mention that Wright had charges dismissed and the State was offering a twenty-year recommendation. (Trial transcript, p.24). The trial judge ruled that Wright could be questioned about negotiations but not the sentence recommendation. (Trial transcript, p.24). This Court finds there was no prejudice resulting from the fact that trial counsel did not join this motion because the Court of Appeals affirmed the trial judge's ruling in the co-defendant's direct appeal. State v. Robinson, Op. No. 12-UP-042 (S.C. Ct. App. filed Jan. 25, 2012).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have made different points during his closing argument. While the Applicant argued trial counsel should have made more specific mention of the height and weight discrepancies and Wright's deal with the State, trial counsel testified he focused his closing argument upon what he believed were the important points. This Court notes information about both the discrepancies

and Wright's deal were before the jury. This Court also notes co-defendant's attorney addressed these issues in his closing argument. Therefore, there was no prejudice from trial counsel's decision not to argue these points with specificity in his closing argument. See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the Allen charge. The trial judge issued an Allen charge in this case. (Trial transcript, pp.252-56). The Applicant argues the charge improperly spoke to the minority. (Trial transcript, p.254). This Court finds the trial judge's statement to the jury did not involve the type of language usually seen in an improper Allen charge. This Court finds the trial judge's statement cannot be considered to be unduly coercive in nature. Cf. Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001) (granting habeas relief after finding a defendant's due process rights were violated by an unduly coercive Allen charge).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial 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 trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### **Ineffective Assistance of Appellate Counsel**

This Court finds the Applicant's allegation that appellate counsel was ineffective is without merit. The Applicant appeared to argue that his appellate counsel should not have filed

an Anders brief. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). In analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009); Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Appellate counsel, however, is not required to raise every non-frivolous claim, but instead may select among them in order to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000). This Court finds all preserved issues were reviewed pursuant to the Anders procedure and the Applicant has failed to demonstrate that counsel was deficient in perfecting the appeal pursuant to Anders. See State v. McKennedy, 348 S.C. 270, 279, 559 S.E.2d 850, 855 (2002) (“The purpose of filing a brief under Anders is to ensure the merits of the appeal are not overlooked. The court has to conclude independently, regardless of counsel’s conclusion, whether or not the appeal has merit before it can dismiss the appeal.”).

#### All Other Allegations

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

#### CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel’s

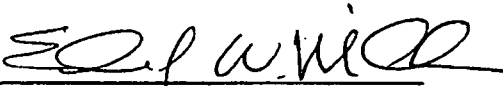
representation. Therefore, this PCR application must be denied and dismissed with prejudice.

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

**IT IS THEREFORE ORDERED:**

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

**AND IT IS SO ORDERED** this 25 day of November, 2013.

  
Edward W. Miller  
Presiding Judge  
Thirteenth Judicial Circuit

, South Carolina.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

---

KENNETH W. WORKMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

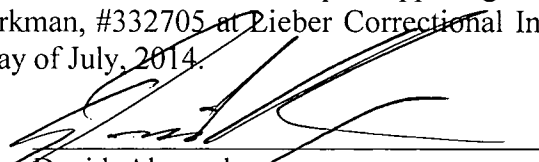
RESPONDENT.

---

CERTIFICATE OF SERVICE

---

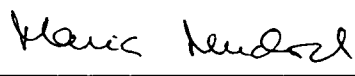
The undersigned attorney hereby certifies that a true copy of the Motion for Appointment of Outside Counsel in the above referenced case has been served upon opposing counsel, Karen Ratigan, Esquire and Mr. Kenneth W. Workman, #332705 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 7<sup>th</sup> day of July, 2014.



David Alexander  
Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me  
this 7<sup>th</sup> day of July, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.