

VOLUME THREE OF THREE

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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Berkeley County

Roger M. Young, Circuit Court Judge

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DERRICK GRANT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000563

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APPENDIX

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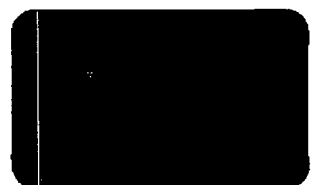
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Exhibit L

South Carolina Office of Appellate  
Defense Letter dated October 24,  
2005



## South Carolina Office of Appellate Defense

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October 24, 2005

Barbara W. Hinson  
Administrative Assistant  
SC Supreme Court  
Office of the Disciplinary Counsel  
PO Box 12159  
Columbia, SC 29211

Re: Complainant: Derrick Grant  
Case Number: 05-DE-L-1197

Dear Ms. Hinson:

Mr. Grant represented himself at his murder trial. He is serving a sentence of life imprisonment for that crime.

Within the past two weeks, we received the transcript of his waiver of counsel. I expect to begin working on his direct appeal within the next month.

Given the nature of the crime and the length of the transcript (700 + pages), the delay between trial (February 2004) and initial briefing is not unusually successive.

Obviously, Mr. Grant has more free time to write me than I him. In any case, I cannot speak intelligently about his case until I have finished reading the transcripts.

I regret that, because of the size of my caseload, I am unable to carry on a general correspondence with my clients. I feel my time is better spent trying to win their cases.

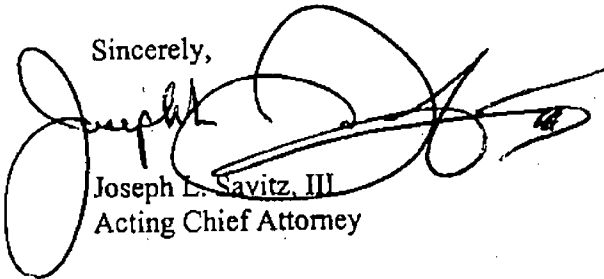
This is not to say that I do not wish we were able to maintain better client contact throughout the appellate process, but budget cuts forced us to cancel our 800 line and we have been unable to employ paralegals or law clerks for years. Now that Appellate Defense has merged with Indigent Defense, it is my hope that we will be able to make some improvements in this area shortly after the actual physical merger (which should take place early in 2006).

Barbara W. Hinson  
October 24, 2005  
Page 2

In conclusion, I do not believe that I have done anything to violate Disciplinary Rule 413 in connection with my representation of Mr. Grant and would ask that his complaint be dismissed pursuant to Rule 19(b)(2).

Do not hesitate to contact me if you have any questions or I may be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph L. Savitz, III". The signature is stylized with large loops and a long horizontal stroke extending to the right.

Joseph L. Savitz, III  
Acting Chief Attorney

JLS,III/kde

cc: Derrick Grant



Applicant's application, the Respondent's Return, the Applicant's appellate records, and one exhibit submitted by the Applicant<sup>2</sup>.

### PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Berkeley County Clerk of Court. The Applicant was indicted at the March 2003 term of the Berkeley County Grand Jury for murder (2003-GS-08-0499). Shortly after arrest, the Applicant moved to relieve counsel George Bishop, Esquire. Counsel was relieved and the Applicant proceeded *pro se*.

On February 23-27, 2004, the Applicant proceeded to trial without counsel and was found guilty<sup>3</sup>. The Applicant was sentenced by the Honorable R. Markley Dennis to confinement for life without parole.

A Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Joseph Savitz, Esquire of the South Carolina Office of the Appellate Defense perfected the appeal in the form of an Anders brief. After review of the record, the Court requested briefing on the issue of the Applicant's waiver to counsel. After briefing by both sides, the Court of Appeals affirmed the Applicant's conviction and sentence. State v. Grant, No. 2011-UP-495 (S.C. Ct. App. November 9, 2011). In an unpublished opinion, the Court of Appeals found "the record showed "Grant was knowingly and voluntarily exercising his informed free will" and "the record supports the finding Grant understood his right to counsel and the consequences of self-representation." The Remittitur was issued on November 27, 2011.

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<sup>2</sup> Applicant's Exhibit 1 was a letter from Joseph Savitz, Esquire, to Barbara Hinson from the Office of Disciplinary Counsel dated October 24, 2005.

<sup>3</sup> Patricia Kennedy, assistant public defender, was appointed as standby counsel to assist the Applicant at trial.

### ALLEGATIONS

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

1. Ineffective assistance of appellate counsel.
2. Denial of due process of laws.

At the hearing, the Applicant proceeded solely on the following allegations:

1. Ineffective assistance of appellate counsel.
  - a. Counsel failed to argue the waiver of counsel at the Applicant's pre-trial Schmerber hearing on appeal.
  - b. Counsel was not present at the Applicant's reconstruction hearing.

### 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. Sec. 17-27-80 (2003).

#### Summary of the Testimony

The Applicant was present and testified his first issue on post-conviction relief was that appellate counsel was ineffective for not arguing whether or not he waived his right to counsel at his Schmerber hearing. The Applicant testified counsel did not argue that he did not knowingly and intelligently waive his right to counsel at the pre-trial hearing. The Applicant testified he was initially represented by George Bishop, Esquire, but fired Bishop during a hearing on April 30, 2003. He testified the Court did not advise him of his right to counsel. He testified further he could only remember certain things from the hearing.



The Applicant testified at the June 11, 2003 Schmerber hearing before Judge Dennis he did not have an attorney. He testified the Court did not advise him of right to counsel. The Applicant testified he could not say whether or not the State would have obtained his DNA if he had been represented by counsel at the hearing. The Applicant testified the Court of Appeals did not find he freely and voluntarily waived his right to counsel at the pre-trial hearing. He also testified he spoke with Savitz about the June 11th hearing and Savitz did not argue the issue on appeal.

The Applicant also testified that counsel consented to a reconstruction hearing, but was not present for the hearing. He testified counsel had Patricia Kennedy, Esquire, sit with him at the reconstruction hearing. He testified Savitz was his attorney and should have been at the hearing. The Applicant testified had counsel been present at the reconstruction hearing he would have been able to put up a defense to the State's contention that he knowingly and intelligently waived his right to counsel.

Joseph Savitz, Esquire, was present to testify by phone. Savitz testified he worked as an appellate defender from January 1985 to January 2011. He testified he specialized in both death penalty and non-capital murder cases. He testified he was assigned to the Applicant's case. He testified when he is assigned a case, he orders the transcript and reads through the transcript to identify any meritorious issues which might warrant a new trial.

Savitz testified the only issue he saw was the waiver of the Applicant right to counsel. Counsel testified he was unable to find a transcript for the Applicant's waiver hearing. He testified the Applicant was not helpful because he said that the hearing never took place. Counsel testified he ultimately raised an issue with regard to jury instructions in an Anders brief. Counsel

testified the Court of Appeals ordered briefing on the issue of whether or not the Applicant freely and voluntarily waived his right to counsel.

Counsel testified the Applicant waived counsel at the April 2003 hearings that he was unable to obtain a transcript from. He testified that once the Applicant waived his right to counsel once, the right was waived. He testified the Applicant did not need to waive counsel at every single stage of his trial proceeding. Counsel testified further the Applicant's right to counsel was clearly waived at the Schmerber hearing if not before. Counsel testified he did not think the Applicant's waiver of counsel at the Schmerber hearing was a meritorious issue on appeal.

Savitz testified he did not recall the Applicant's January 2010 reconstruction hearing. He testified that at the time, the Applicant was telling him that no waiver hearing took place. He testified he had reason to believe that was not true and was not going to present any false testimony from the Applicant to the Court. Counsel testified further the October 24, 2005 letter submitted by the Applicant was sent after he received what he thought was the waiver hearing transcript. He testified he later learned the transcript he received was not the waiver hearing transcript. He testified he never received a transcript of the Applicant's waiver hearing.

Lastly, counsel testified he argued on Appeal in the brief requested by the Court that the Applicant did not waive his right to counsel and that since there was no transcript of the Applicant's waiver hearing the Applicant should be granted a new trial.

Also present to testify was Blair Jennings, Esquire. Jennings testified he was the prosecutor assigned to the Applicant's case. He testified at a hearing on April 30, 2003, the Applicant wanted to fire his attorney George Bishop. Jennings testified Judge Dennis reviewed for the Applicant the risks and dangers associated with proceeding without an attorney and asked

the Applicant if he wanted a public defender. Jennings testified that each time he was in Court with the Applicant, Judge Dennis reviewed with the Applicant the issues associated with self-representation.

Jennings testified police obtained the Applicant's blood at the time of arrest through a search warrant prior to the Applicant's Schmerber hearing. He testified he requested the hearing to make sure everything was done correctly and the language in the search warrant was sufficient. Jennings testified the waiver of counsel issue was addressed at several pre-trial hearings.

Jennings testified the State's evidence against the Applicant was as follows: a witness testified they gave the Applicant a ride home shortly after the murder, the Applicant had fresh lacerations on his hands and blood all over his clothing when arrested, the Applicant made statements to several witnesses implicating himself, DNA found in the victim's car placed the Applicant at the scene, and the Applicant was wearing a ring at the time of arrest that had the victim's blood on it.

#### Ineffective Assistance of Appellate Counsel

The Applicant alleges ineffective assistance of appellate counsel. As an initial matter, this Court finds credible the testimony of Joseph Savitz, Esquire, and Blair Jennings, Esquire. This Court finds not credible the testimony of the Applicant. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). "For judges to second-guess reasonable

professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy..." Jones, 463 U.S. at 754, 103 S.Ct. 3308.

Generally, 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 Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

This Court finds appellate counsel was not ineffective for failing to argue the Applicant did not freely and voluntarily waive his right to counsel at a pre-trial Schmerber hearing held on June 11, 2003. Appellate counsel is not required to raise every non-frivolous issue that is presented in the record on appeal. This Courts finds after review of the record, appellate counsel properly concluded that waiver of the Applicant's right to counsel at his Schmerber hearing was not a meritorious issue for appeal. This Court finds counsel's conclusion was particularly persuasive in light of the fact that the issue on appeal was whether or not counsel freely and voluntarily waived his right to counsel at the April 2003 hearing which was held before the Applicant's Schmerber hearing.

This Court finds further the Applicant has failed to carry his burden of proving prejudice resulted from appellate counsel's failure to raise this issue. Specifically, this Court finds the Applicant has failed to show that based on this issue the Applicant would have prevailed on

appeal. On appeal, the Court of Appeals found the Applicant freely and voluntarily waived his right to counsel and was reminded of the dangers of self-representation during several pre-trial hearings leading up to trial. This Court finds since the appellate court found the Applicant freely and voluntarily waived his right to counsel, it unlikely the Court would find the Applicant did not freely and voluntarily waive his right to counsel at his Schmerber hearing. This Court also finds that once waiver of counsel is established, waiver is not required at every subsequent court proceeding. This Court finds the Applicant has failed to carry his burden of proving ineffective assistance of appellate counsel.

This Court also finds counsel was not ineffective for not being present at the Applicant's reconstruction hearing. This Court finds appellate counsel adequately secured another attorney-Patricia Kennedy, Esquire, to sit in his place during the Applicant's June 29, 2010 reconstruction hearing. This Court finds and the record reflects Kennedy spoke on the Applicant's behalf and assisted the Court with any procedural questions with regard to the Applicant case on appeal. The record also reflects the Applicant was given several opportunities to present to the Court his recollection of the April 30<sup>th</sup> waiver hearing. This Court finds the Applicant has failed to carry his burden of proving any prejudice from counsel's absence. The Applicant has also failed to show what appellate counsel's presence would have added to the reconstruction hearing. Appellate counsel was neither present at the Applicant's pre-trial waiver hearing or at trial and it is unlikely he would have had anything to put on the record with regard to what took place at the waiver hearing. This Court finds the Applicant failed to carry his burden of proving counsel was ineffective for being absent from the Applicant's reconstruction hearing.

**All Other Allegations**

As to any and all allegations that were raised in the application in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence or testimony regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations. Therefore they are hereby denied and dismissed.

**CONCLUSION**

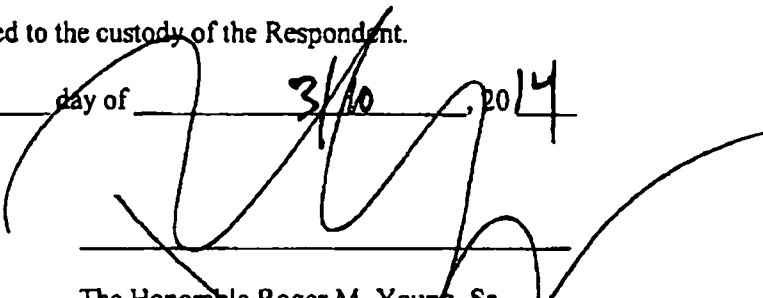
Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

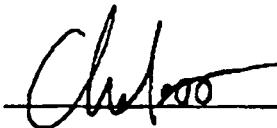
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate 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 \_\_\_\_\_ day of 3/10, 2014

  
 \_\_\_\_\_  
 The Honorable Roger M. Young, Sr.  
 Presiding Judge  
 9th Judicial Circuit

  
 \_\_\_\_\_, South Carolina.

03-01-BJ-0017

BCSO, Piltisch

*H. Maslin*

DOCKET NO. 2003-GS-08-0499

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

MARCH TERM 2003

ARREST WARRANT NUMBER

H-330660

DERRICK M. GRANT

THE STATE

VS.

ACTION OF GRAND JURY

*Travis*

*Julia P.*

Foreperson of Grand Jury

VERDICT

Indictment for

MURDER

Foreperson of Petit Jury

Date:

*PS*

*58*

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF BERKELEY )

INDICTMENT FOR  
MURDER

At a Court of General Sessions, convened on March 12, 2003 the Grand Jurors of Berkeley County present upon their oath:

That Derrick M. Grant did in Berkeley County on or about the 26th day of December, 2002, willfully and unlawfully with malice aforethought kill and murder Rachel Sottile by means of an incision wound to her neck and/or blunt force trauma to the head and that Rachel Sottile did die in Berkeley County as a proximate result thereof on December 26, 2002. This action being in violation of Section 16-3-10, South Carolina Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Blair C. Jones  
Assistant Solicitor