

Law Office of Leah B. Moody, LLC

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August 19, 2014

Mr. Daniel E. Shearouse  
The Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29221

**RECEIVED**

AUG 29 2014

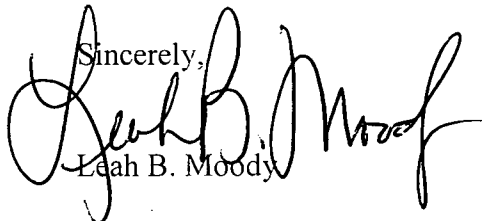
RE: David Carson v. State of South Carolina  
Case No.: 2012-CP-42-4880

**S.C. SUPREME COURT**

Dear Mr. Shearouse:

The York County Court of Common Pleas appointed my office to represent David Carson in his Post-Conviction Relief action. Please find enclosed for filing the original and two (2) copies of the Notice of Appeal, Proof of Service, and one (1) copy of the Order of Dismissal in the above-referenced case. Please return the clocked copies to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance with this matter.

Sincerely,  
  
Leah B. Moody

Enclosure

cc David Carson  
Suzanne White, Esquire  
Sharon Graham, SCCID  
Hope Blackley, Clerk of Court, Spartanburg County

IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. Derham Cole, Presiding in Spartanburg County

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Case No. 2012-CP-42-4880

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**RECEIVED**

David Carson, ..... Appellant,

AUG 29 2014

v.

**S.C. SUPREME COURT**

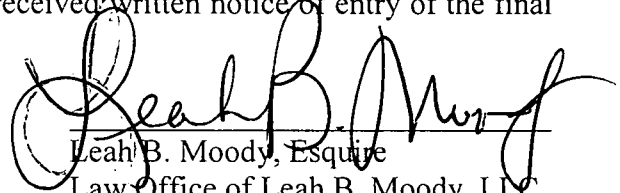
State of South Carolina, ..... Respondent.

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NOTICE OF APPEAL

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David Carson appeals the order of the Honorable J. Derham Cole, dated July 25, 2014 and mailed on July 28, 2014. Appellant received written notice of entry of the final order on July 30, 2014.



Leah B. Moody, Esquire  
Law Office of Leah B. Moody, LLC  
235 E. Main Street, Suite 115  
Post Office Box 1015  
Rock Hill, South Carolina 29731

Other Counsel of record:  
Suzanne White, SC Attorney General's Office  
Rembert C. Dennis Building  
Post Office Box 11549  
Columbia, South Carolina 29211-1549  
(803) 734-3970

IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. Derham Cole, Presiding in Spartanburg County

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Case No. 2012-CP-42-4880

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David Carson, ..... Appellant,

v.

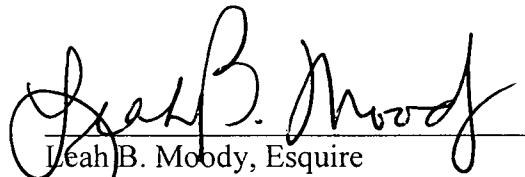
State of South Carolina, ..... Respondent.

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PROOF OF SERVICE

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I certify that I have served the Notice of Appeal on Suzanne White by depositing a copy of it in the United States Mail, postage prepaid, on 8/25, 2014 addressed to its attorney of record, Suzanne White, Post Office Box 11549, Columbia, South Carolina, 29211-1549.



Leah B. Moody, Esquire  
Law Office of Leah B. Moody, LLC  
235 E. Main Street, Suite 115  
Post Office Box 1015  
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August 19, 2014

cc David Carson  
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court  
Hope Blackley, Clerk of Court, Spartanburg County  
Sharon A. Graham, SCCID

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )  
 )  
 David C. Carson, #250533, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 SEVENTH JUDICIAL CIRCUIT

2012-CP-42-4880

**ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 28, 2012. The Respondent made its Return on or about October 3, 2013. An evidentiary hearing into the matter was convened on April 10, 2014, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Leah B. Moody, 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. Andrew Johnston, Esquire testified on behalf of the State. This Court also had before it a copy of the records of Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, trial transcript, and Applicant's appellate records.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. The Applicant was indicted at the July 2009 term of the Court of General Sessions for Spartanburg County for

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murder and accessory after the fact to a felony<sup>1</sup> (2009-GS-42-3379(A)). He was represented by Andrew Johnston, Esquire. On March 15 and 17, 2010, the Applicant proceeded to trial after which he was found guilty of murder. He was sentenced by the Honorable E.C. Burnett III, to confinement for a period of thirty (30) years.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. Following the submission of a brief pursuant by Elizabeth A. Franklin-Best, Esquire, the South Carolina Court of Appeals affirmed Applicant's sentence. State v. Carson, No. 2012-UP-243 (Ct. App. April 25, 2012). The Remittitur was issued on May 15, 2012.

### ALLEGATIONS

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

1. Ineffective assistance of counsel.
2. Ineffective assistance of appellate counsel.

### 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,

<sup>1</sup> This count was *not* proessed after the trial had concluded.

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SCRCP). 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).

Applicant testified that Counsel was ineffective for failing to make a pre-trial motion to sever Applicant and his co-defendant's trials or alternatively, Counsel should have objected to the State proceeding on both offenses and requested they choose between the two. However, Applicant testified that he never discussed the possibility of a severance with Counsel. Applicant testified that he only met with Counsel twice for approximately one and a half hours.

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Applicant testified that he was originally charged with murder, but did not find out about count 2 until the day of trial. Applicant testified that he informed Counsel that he was willing to plead to accessory after the fact, but never heard from Counsel if there was an offer. Applicant acknowledged that the jury was charged that they could find Applicant guilty of either charge, but not of both. (Tr. p. 280). Applicant testified that Counsel never informed him of any plea offers made by the State. Applicant testified that he never discussed any possible defenses with Counsel. Applicant testified that Counsel made a directed verdict motion at the close of the State's case, but failed to present any evidence in support of the motion. Applicant also testified that Counsel failed to object to the jury charge regarding "hand of one, hand of all."

Counsel testified that he had no specific recollection of reviewing all of the discovery materials with the Applicant; however, his normal practice is to read discovery materials to his client. Counsel testified that he did review all of the witness statements with the Applicant. Counsel testified that the Applicant was aware of count 2 - accessory after the fact, prior to the trial and waived arraignment on the charge at trial. In fact, Counsel testified that according to the record, Applicant was directly indicted for accessory after the fact in July 2009 and the trial was in March 2010.

Counsel testified that the State never made any plea offers in this case or approached the Applicant about testifying against Leon Jones, co-defendant. Counsel testified that the trial strategy was to show that Applicant was guilty of accessory after the fact, not of murder. Counsel testified that each of the three statements Applicant provided to police and his actions appeared to be consistent with the accessory after the fact charge. Counsel testified that he did discuss possible defenses and trial strategy with the Applicant. Further, because Jones made several statements to others claiming he killed the victim, Counsel made a strategic decision to

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proceed with the joint trial. Counsel testified that none of the evidence for murder pointed to Applicant, but rather it pointed to Jones. However, Counsel did testify that Applicant would never make the statement that Jones was the killer; rather, Applicant stated it was an unknown person.

Counsel testified that he did not object to the jury charge for "hand of one, hand of all" because not only was it a correct statement of law, but there was circumstantial evidence presented which placed Jones and the Applicant with the victim directly prior to his disappearance and murder. Counsel testified that he did not renew his directed verdict motion because there was no evidence presented by the defense, so that was not necessary. Additionally, Counsel testified that he did not file a motion for reconsideration or motion for new trial because he was not aware of any legal ground for either. Counsel testified that he did file a notice of appeal, but never spoke with appellate counsel.

This Court finds that the Applicant has failed to meet his burden of proof as to this claim. Counsel's testimony was more credible than Applicant's testimony. Our courts are understandably wary of second-guessing defense counsel's trial tactics. 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) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Counsel articulated valid strategic reasons for not making a motion to sever the trials and proceeding with the strategy that Applicant was only guilty of accessory after the fact. The Applicant has not shown that Counsel was deficient in that choice of tactics. This Court finds that Counsel reviewed materials with the Applicant and discussed both trial strategy and possible defenses. This Court finds no merit to the claims that Counsel was ineffective for

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failing to object to the jury charges, properly argue the directed verdict motion, or file a motion for a new trial. As Counsel testified, this Court also finds that there was no legal basis for these objections or motions. Therefore, the Applicant has failed to establish any deficient behavior on Counsel's behalf. Because the Applicant has failed to meet the first prong of establishing ineffective assistance of counsel, this claim is denied and dismissed.

### Ineffective Assistance of Appellate Counsel

Applicant testified that appellate counsel raised an issue regarding the introduction of improper character evidence, but the issue was unpreserved. In order to establish ineffective assistance of appellate counsel, the Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

This Court finds that the Applicant has failed to meet his burden as to this claim. This Court notes that the South Carolina Court of Appeals, although affirmed based upon issue preservation, also addressed the merits of the argument and indicated it would have affirmed the conviction even if the issue was considered properly preserved based upon State v. Faulkner, 274 S.C. 619, 621, 266 S.E.2d 420, 421 (1980). Therefore, the Applicant can establish no prejudice. This claim is denied and dismissed.

### CONCLUSION

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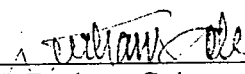
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

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), SCRPC, 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 25<sup>th</sup> day of July, 2014.

  
\_\_\_\_\_  
J. Derham Cole  
Presiding Judge

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## Law Office of Leah B. Moody, LLC

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August 19, 2014

Suzanne White, Esquire  
South Carolina Attorney General's Office  
Post Office Box 11549  
Columbia, South Carolina 29211

RE: David Carson v. State of South Carolina  
C.A. No.: 2012-CP-11-4880

Dear Ms. White:

The Spartanburg County Court of Common Pleas appointed my office to represent David Carson in his Post-Conviction Relief action. Please find enclosed a copy of the Notice of Appeal and Proof of Service in this matter.

If you have any questions or concerns, please feel free to contact my office. Thank you.

Sincerely,



Leah B. Moody

LBM/res

Enclosures

Cc David Carson  
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court  
Hope Blackley, Clerk of Court, Spartanburg County  
Sharon Graham, SCCID

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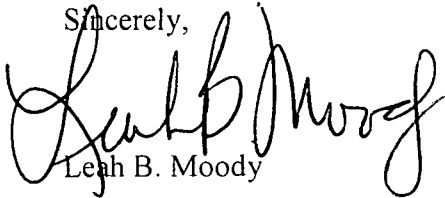
The Honorable Hope Blackley  
Spartanburg County Clerk of Court  
Post Office 3483  
Spartanburg, South Carolina 29304

RE: David Carson v. State of South Carolina  
Case No.: 2012-CP-42-4880

Dear Ms. Blackley:

Please find enclosed the Notice of Appeal and the Proof of Service in the above-referenced matter.

Sincerely,



Leah B. Moody

Enclosures

cc David Carson  
Suzanne White, Assistant Attorney General  
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court  
Sharon Graham, SCCID

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August 19, 2014

Ms. Sharon A. Graham  
SC Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11433  
Columbia, South Carolina 29211-1433

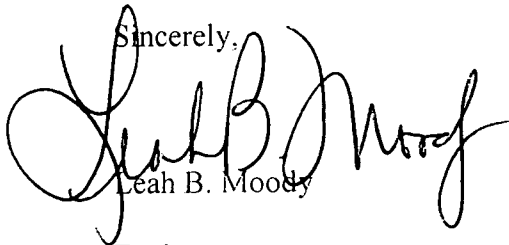
RE: David Carson v. State of South Carolina  
Case No.: 2012-CP-42-4880

Dear Ms. Graham:

The York County Court of Common Pleas appointed my office to represent David Carson in his Post-Conviction Relief action. Please find enclosed the Notice of Appeal and Proof of Service the above-referenced matter.

Thank you for your attention in this matter.

Sincerely,

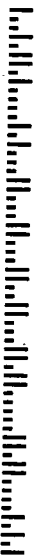


Leah B. Moody

Enclosures

cc David Carson  
Suzanne White, Esquire  
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court  
Hope Blackley, Clerk of Court, Spartanburg County

LAW OFFICE OF LEAH B. MOODY, LLC  
235 E MAIN ST STE 115  
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Daniel E. Shearouse  
The Supreme Court of South Carolina  
PO Box 11330  
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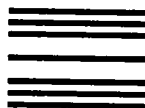
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