



RECEIVED

SEP 18 2014

S.C. Supreme Court

ALAN WILSON  
ATTORNEY GENERAL

September 18, 2014

The Honorable Daniel E. Shearouse  
Clerk of Court, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

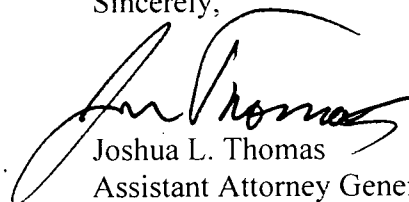
**Re:** Gary W. Bennett, Respondent v. State of South Carolina, Petitioner  
Civil Action No. 2008-CP-26-5031

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. Correspondence with the court reporter regarding the transcript.

Sincerely,



Joshua L. Thomas  
Assistant Attorney General

JLT/jlt

Enclosures

CC: Charles T. Brooks, III, Esquire  
South Carolina Department of Corrections  
The Honorable Melanie Huggins-Ward, Horry County Clerk of Court  
The Honorable Jimmy A. Richardson, Fifteenth Circuit Solicitor  
Office of Appellate Defense  
Ms. Trisha Allen, Victim Services

STATE OF SOUTH CAROLINA  
In The Supreme Court

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SEP 18 2014

S.C. Supreme Court

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

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Case No. 2008-CP-26-05031

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Gary W. Bennett, #276951, .....Respondent,

v.

State of South Carolina, ..... Petitioner.

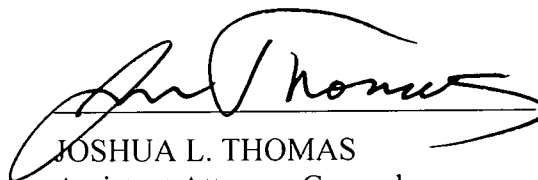
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**NOTICE OF APPEAL**

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The State of South Carolina appeals the order of the Honorable Benjamin H. Culbertson, dated August 14, 2014, and filed August 19, 2014. Petitioner received written notice of entry of this order on August 25, 2014.

September 18, 2014



JOSHUA L. THOMAS  
Assistant Attorney General  
S.C. Bar No. 100777

Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

Other Counsel of Record:

Charles T. Brooks, III, Esquire  
309 Broad Street  
Sumter, South Carolina 29150

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**S.C. Supreme Court**

STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Case No. 2008-CP-26-05031

Gary W. Bennett, #276951, Respondent,

v.

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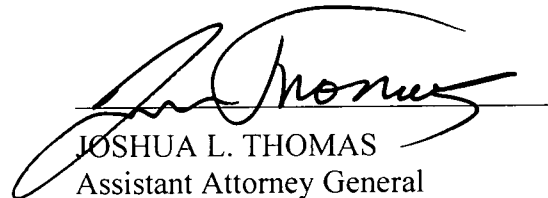
**PROOF OF SERVICE**

I, Joshua L. Thomas, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Charles T. Brooks, III, Esquire  
309 Broad Street  
Sumter, South Carolina 29150

I further certify that all parties required by Rule to be served have been served.

September 18, 2014

  
JOSHUA L. THOMAS  
Assistant Attorney General  
S.C. Bar No. 100777

Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

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FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2008-CP-26-5031

Gary Wayne Bennett, #276951  
PLAINTIFF(S)

State of South Carolina  
DEFENDANT(S)

|   |  |
|---|--|
| Submitted by: Benjamin H. Culbertson, Presiding Judge | Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant |
|   | or<br><input type="checkbox"/> Self-Represented Litigant                             |

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other  
 NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

14 AUG 14 AM 8:45  
CLERK OF COURT  
WARD

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.  
Additional Information for the Clerk : \_\_\_\_\_

| INFORMATION FOR THE JUDGMENT INDEX   |  |  |
|--|--|--|
| Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below. |  |  |
| Judgment in Favor of<br>(List name(s) below)   | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
| N/A  | N/A                                      | \$ N/A   |
| If applicable, describe the property, including tax map information and address, referenced in the order:  |  |  |

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

*Benjamin H. Culbertson*  
Benjamin H. Culbertson, Circuit Court Judge

2148  
Judge Code

August 14, 2014  
Date



STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CASE NUMBER: 2008-CP-26-5031

Gary Wayne Bennett, #276951 )  
 )  
Applicant, )  
 )  
vs. )  
 )  
State of South Carolina, )  
 )  
Respondent. )  
\_\_\_\_\_ )

ORDER GRANTING  
POST-CONVICTION RELIEF

14 AUG 19 AM 8:45  
CLERK OF COURT  
WYANDOTTE

HEARING DATE ..... June 19, 2014  
PRESIDING JUDGE ..... Benjamin H. Culbertson  
APPLICANT'S ATTORNEY ..... Charles T. Brooks, III, Esq.  
RESPONDENT'S ATTORNEY ..... Joshua L. Thomas, Esq.  
COURT REPORTER ..... Grace Hurley

In this case, the applicant ("Bennett") seeks post-conviction relief ("PCR") from his convictions for murder and armed robbery. Bennett alleges that he is entitled to relief due to ineffective assistance of counsel.

Based upon a preponderance of the evidence presented at the PCR hearing, I do hereby find the following salient facts:

FINDINGS OF FACT

1. On August 14, 2002, Bennett was convicted of murder and armed robbery. He was convicted by a jury trial and received two concurrent sentences of life without parole. Both crimes occurred in 2000.

2. Attorney Thomas Floyd was Bennett's original criminal attorney. However, approximately five months prior to trial, attorney Johnny Gardner ("Attorney Gardner") substituted attorney Thomas Floyd as Bennett's criminal trial attorney.

*THC*

3. Attorney Gardner corresponded with Bennett on several occasions prior to trial but never met with Bennett personally until the day of trial. He never showed Bennett any of the discovery produced by the State and never discussed that discovery with Bennett. Attorney Gardner never conducted any investigation into the case and did not try to locate or talk to any alibi witnesses that Bennett provided to him.

4. Attorney Gardner's entire trial strategy was that the crimes were not committed by Bennett but, rather, by the State's key witness, Andrew Lindsay ("Lindsay"). Lindsay was originally charged with the murder in this case but, entered into a plea bargain with the State wherein he pled guilty to accessory after the fact in exchange for testifying against Bennett. Lindsay had a prior conviction for second degree murder and Attorney Gardner sought to impeach Lindsay's testimony with that prior conviction. However, at trial, the court limited Attorney Gardner's cross examination of Lindsay and would not allow the introduction of Lindsay's conviction for second degree murder except for being convicted of "a felony."

Even though Attorney Gardner's sole trial strategy was to impeach Lindsay's testimony, he did not object to the State's introduction of the victim's phone records into evidence even though the State had failed to produce the phone records during pre-trial discovery. These records corroborated Lindsay's testimony.

5. At this PCR hearing, Attorney Gardner testified that he was shocked by the criminal trial judge's ruling that he could not introduce Lindsay's conviction for second degree murder into evidence at Bennett's criminal trial.<sup>1</sup> Because his entire trial strategy had been to shift the blame for these crimes from Bennett to the State's key witness, Attorney Gardner never conducted any investigation into the case, never contacted any of Bennett's alibi witnesses and

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<sup>1</sup> The criminal trial judge's ruling was affirmed by unpublished opinion of the South Carolina Supreme Court in *State v. Bennett*, Memorandum Opinion No. 2007-MO-040 (Filed June 25, 2007).

never prepared a defense. Consequently, at the criminal trial, Attorney Gardner did not present a defense for Bennett.

#### LAW AND DISCUSSION

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, 80 L.Ed.2d 674 (1984); *Butler, id.*

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. *Strickland, supra*. The applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

In PCR cases, the reviewing court applies 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, the court measures an attorneys' performance by its "reasonableness under professional norms." *Cherry, supra*. 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, supra*.

In the case at hand, Attorney Gardner never met with Bennett personally until the day of trial. He never conducted any investigations into the case, never contacted any alibi witnesses provided to him by Bennett, and never reviewed pre-trial discovery with Bennett. Further, he

never sought suppression of the phone records introduced into evidence by the State even though the State failed to produce the records in pre-trial discovery. Attorney Gardner's entire strategy was to impeach the State's key witness with the witness' prior criminal record. This performance as Bennett's attorney fell well below the "professional norms." Attorneys have a duty to make reasonable investigations or make reasonable decisions that make particular investigations unnecessary. *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014), citing *Strickland, supra*. One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable. *Walker, id.* Therefore, I find as a matter of law that Attorney Gardner was deficient in his representation of Bennett.

The more difficult question before the court is whether a reasonable probability exists that the results of Bennett's criminal trial would be different but for Attorney Gardner's deficient performance. At the PCR hearing, Attorney Gardner testified that he did not object to the introduction of the victim's phone records because he felt they were admissible, thus rendering any objection futile. He further testified that he corresponded with Bennett several times prior to trial and never felt the need to meet with Bennett personally until the day of trial. He also testified that he did not conduct any investigations or present any defenses because the State's key witness was not credible. Even though he was shocked that the court limited his cross examination of Lindsay, he still felt that a jury would not convict Bennett. As to the potential alibi witnesses, none testified at this PCR hearing.<sup>2</sup> However, Bennett's uncontested testimony at the PCR hearing was that the alibi witnesses would verify that he was somewhere else when the crimes were committed. Attorney Gardner testified that he did not know whether or not the

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<sup>2</sup> The court notes that the crimes giving rise to this case occurred twelve years prior to this PCR hearing. In fact, this PCR case has been pending for six years. Locating alibi witnesses to events occurring over a decade ago may be difficult if not impossible.

alibi witnesses would have been beneficial because he never contacted them. Be that as it may, this court is convinced that Attorney Gardner's performance as Bennett's criminal trial attorney so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.

NOW, THEREFORE, based upon the above findings of fact and conclusions of law, it is hereby

ORDERED, that the application of Gary Wayne Bennett for post-conviction relief in this case is GRANTED; it is further

ORDERED, that the Applicant's convictions for murder<sup>3</sup> and armed robbery<sup>4</sup> are set aside and these cases are remanded for a new trial.

AND IT IS SO ORDERED.



Benjamin H. Culbertson  
Presiding Judge

August 14, 2014  
Georgetown, SC

<sup>3</sup> Indictment No. 2002-GS-26-772.

<sup>4</sup> Indictment No. 2002-GS-26-2765.



ALAN WILSON  
ATTORNEY GENERAL

September 18, 2014

The Honorable Melanie Huggins-Ward  
Horry County Clerk of Court  
Post Office Box 677  
Conway, South Carolina 29528

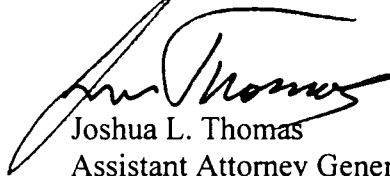
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Assistant Attorney General

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