

# The Brooks Law Office, LLC

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*pcn*

October 28, 2014

**RECEIVED**

OCT 30 2014

**S.C. SUPREME COURT**

South Carolina Supreme Court  
PO Box 11330  
Columbia, SC 29211

RE: Terrell Chandler, 300938 v State of South Carolina  
2012-CP-10-5037

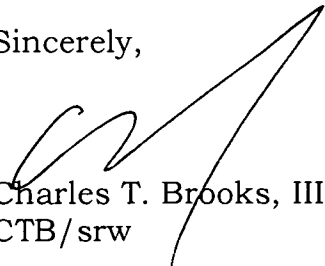
Dear Sir or Madam:

Enclosed herewith you will find the **Notice of Appeal, Order of Dismissal**, along with a **Proof of Service** in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,

  
Charles T. Brooks, III  
CTB/srw

Enclosed as stated

cc: Ashleigh R. Wilson, Office of Attorney's General  
South Carolina Office of Appellate Defense  
Terrell Chandler, 300938

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
Honorable Stephanie P. McDonald, Circuit Court Judge

Case No: 2012-CP-10-5037

Terrell Chandler.....Appellant  
S.C.D.C. 300938

v.

The State..... Respondent

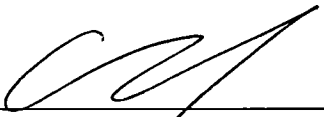
NOTICE OF APPEAL

Terrell Chandler, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable Stephanie P. McDonald, October 27, 2014, which I, Charles T. Brooks, III, received on October 28, 2014.

**RECEIVED**

OCT 30 2014

**S.C. SUPREME COURT**

  
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Attorney for Appellant

Other Counsel on Record:  
Ashleigh R. Wilson, Esquire  
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THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
Honorable Stephanie P. McDonald, Circuit Court Judge

Case No: 2012-CP-10-5037

Terrell Chandler.....Appellant  
S.C.D.C. 300938  
v.  
The State.....Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 29<sup>th</sup> day of October, 2014, I served the foregoing **Notice of Appeal, Order of Dismissal**, as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on October 29, 2014, addressed to the following as indicated below:

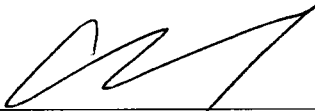
South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

South Carolina Office of Appellate Defense  
1330 Lady Street, Suite 401  
PO Box 11589  
Columbia, SC 29211-1589

Office of Attorney's General  
Attn: Ashleigh R. Wilson, Esquire  
Post Office Box 11549  
Columbia, South Carolina 29211-1549

Terrell Chandler, 300938  
Lieber Correctional Institution  
PO Box 205  
Ridgeville, SC 29472

Dated: October 29, 2014

  
Charles T. Brooks, III  
Attorney for the Appellant  
309 Broad Street  
Sumter, South Carolina 29150  
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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
 )  
Terrell Chandler, #300938, )  
 )  
Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
2012-CP-10-5037

**ORDER OF DISMISSAL**

Presiding Judge:	The Honorable Stephanie P. McDonald
Applicant's Attorney:	Charles T. Brooks, III
Respondent's Attorney:	Ashleigh R. Wilson, Esquire
Trial Counsel:	Waring S. Howe, Jr. Sam M. Slade, Jr.
Date of Hearing:	November 18, 2013
Court Reporter:	Sharon L. Vizer

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 1, 2012. The Respondent made its Return on June 26, 2013. An evidentiary hearing on the matter was convened on November 18, 2013, at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Charles T. Brooks, III. Ashleigh R. Wilson, Esquire, of the South Carolina Office of the Attorney General represented the Respondent.

Also present testifying were Waring S. Howe, Jr., Esquire, and Sam (Mitch) Slade Jr., Esquire. The Court had before it the trial transcript, the Charleston County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's Return, and Applicant's appellate records.

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## PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Applicant was indicted at the November 2008 term of the Charleston County Grand Jury for murder (2008-GS-10-8361) and possession of a weapon during the commission of a violent crime (2008-GS-10-8359). He was represented by Sam (Mitch) Slade, Jr., and Waring Howe, Jr.

The Applicant proceeded to trial and was found guilty as indicted. On June 11, 2010, the Applicant was sentenced by the Honorable Roger M. Young to confinement for 45 years for murder and 5 years for possession of a weapon during the commission of a violent crime. The sentences are to be served consecutively.

A notice of appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Tristan Shaffer, Esquire, of the South Carolina Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Chandler, Op. No. 2012-UP-313 (S.C. Ct. App. May 23, 2012). The Remittitur was issued on September 25, 2012.

## ALLEGATIONS

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

1. Ineffective assistance of counsel.

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

1. Ineffective assistance of counsel.
  - a. Failure to have removed from the jury a juror who was related to one of the State's witness.
  - b. Failure to investigate.
  - c. Failure to properly advise the Applicant regarding his right to testify at trial.

This Court finds that the Applicant failed to present any testimony or evidence in support of any claims other than the allegations addressed in this Order. This Court finds that any other allegations raised in his application and not addressed in this Order are deemed abandoned by the Applicant.

### **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 he was represented at trial by Waring Howe. He testified he met with counsel two or three times and did not review discovery or discuss possible defenses with counsel. He testified counsel never asked him for any leads or potential witnesses to investigate.

The Applicant testified that on the second day of trial, Juror Odessa Brown wrote a note to the Court stating that she just realized she was related to one of the State's witnesses. The Applicant testified that the Court asked Juror Brown if her relationship to the witness would affect her verdict. He testified that Juror Brown being on the jury harmed his case and argues that counsel should have had her removed from the jury.

The Applicant also testified that his co-defendant gave many statements prior to trial. He testified his lawyer should have better impeached his co-defendant on cross-examination. The

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Applicant testified that he did not take the stand to testify at his trial, but that he told trial counsel he wanted to testify if it would be helpful. The Applicant testified he told counsel his version of the facts and counsel advised him not to testify. The Applicant testified that he told the Court during his trial that he would testify, but changed his mind. He testified he was given additional time to think about the decision during trial and ultimately told the Court that he did not want to testify. Applicant now believes that he should have testified.

Waring Howe, Esquire, was present and testified that he was appointed to represent the Applicant in June 2008. Howe has been practicing law for twenty-nine years and represented the Applicant for at least two years prior to his trial. Counsel testified that he visited the Applicant in the jail at least twelve to fifteen times. He testified that Applicant called his office at least twice a week and that he often spoke with the Applicant's brother about the case by phone. Counsel testified he readily received the Applicant's phone calls from the jail and could accomplish many things with the Applicant by phone.

Counsel testified that he filed Brady and Rule 5 motions on the Applicant's behalf. He testified he reviewed all the significant discovery materials he received with the Applicant, including witness statements. Counsel testified he discussed with the Applicant the elements of the charges he was facing and what the State was required to prove. He testified that they also discussed potential sentences.

Counsel's investigation of the case involved going to speak to witnesses who were willing to talk, trying to track down the Applicant's roommate, going to the scene several times to see if any changes were made to the neighborhood, talking to men in the area, and photographing the scene. Counsel testified that the State was also very forthcoming about the evidence and its investigation of the case.

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Prior to trial, counsel and the Applicant discussed Applicant's version of facts. Counsel testified that Applicant's version of facts was at odds with prior statements made by the Applicant. Counsel testified that he and Applicant discussed Applicant's right to testify at trial and that Applicant always concurred with his advice not to testify at trial. Counsel testified that it was a strategic decision to not have Applicant testify at trial and that Applicant agreed it was not in his best interest to testify.

Counsel testified that in September or October of 2009, he brought in Sam Slade, Esquire, to assist with Applicant's trial. He testified he spoke with Slade about evidence and trial strategy. Counsel testified he vaguely recalls an issue with a juror during Applicant's trial and he recalled that the court questioned the juror about her ability to be impartial. Counsel testified that Applicant was offered a plea of thirty years mid-way through his trial. Applicant rejected the plea offer.

Counsel testified that prior to trial he reviewed the statements of and went to speak to Cherelle Anderson, the victim's girlfriend. He testified that he felt adequately prepared to cross-examine her on her prior statements at trial and that he thought her testimony at trial was a little more disadvantageous to Applicant than her prior statements had been.

Sam (Mitch) Slade, Esquire, was present and testified that he was brought in by Waring Howe to assist with Applicant's case. Slade has been practicing law since 1982. Slade testified that he never met with Applicant prior to trial, but that Howe spoke with Applicant frequently by phone.

Counsel testified that Applicant was accused of shooting the victim in a car in front of an apartment building during a drug deal. He further testified that the evidence against Applicant included letters written by Applicant to one of the witnesses; testimony from a witness that

Applicant called her and gave her a gun to hide in her car; testimony from several girls who were in the breezeway of the apartment that Applicant told them not to come around the area on the night of the shooting; testimony from a man sitting outside of the apartments who heard Applicant say shots would be fired the night of the murder; testimony from Stephen Green who testified that he saw the Applicant firing into the victim's car; and testimony from Applicant's co-defendant identifying Applicant as the shooter.

Counsel testified that the defense filed several pre-trial motions at the start of Applicant's trial. The strategy going into trial was to show that the initial identification of Applicant's co-defendant as the shooter was correct. He testified that the defense wanted to point out to the jury that the victim's girlfriend initially identified Applicant's co-defendant in a photo line-up and only later identified the Applicant as the shooter after Applicant's co-defendant was arrested. Counsel testified that they also argued to the jury that the victim's girlfriend's statement changed to implicate the Applicant after she was coached by law enforcement.

Counsel testified that he recalls questioning Cherelle Anderson, the victim's girlfriend, on cross-examination. He reviewed Anderson's statements prior to trial and attempted to bring out every inconsistency in her statements on cross-examination. He testified he wanted Anderson to stick to her multiple statements.

Counsel testified that he recalls the issue with the juror being related to one of the State's witnesses. He testified he recalls the Court questioning the juror. He testified that he discussed the issue with Howe and Applicant and that they decided to proceed with the juror. Counsel testified that it is his general practice to bring to the Court's attention any questions regarding a juror's impartiality.



Counsel testified that Applicant told Howe his version of the facts and that it was Applicant's decision not to testify at trial. Counsel testified that at the start of the trial, the defense did not plan for the Applicant to testify. He testified that he did not think anything could be gained from the Applicant's testimony and they did not want to present the Applicant's pre-trial version of the facts to the jury. Counsel testified that based on the Applicant's testimony at an evidentiary hearing, he would not have wanted the Applicant to take the stand.

### **Ineffective Assistance of Counsel**

The Applicant alleges that he received ineffective assistance of counsel. In a PCR action, "the 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 the 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 (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 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, 300 S.C. 115, 117-118, 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).

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

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rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

As an initial matter, this Court that finds the Applicant's testimony was not credible. This Court further finds that the testimony provided by Applicant's trial counsel was credible. Both attorneys representing the Applicant at trial have extensive experience in the practice of criminal law and both have been practicing law for over twenty years. Attorney Howe met with Applicant numerous times prior to trial and fully investigated the Applicant's case. Counsel filed Brady and Rule 5 motions on Applicant's behalf and reviewed the received discovery with the Applicant. This Court finds that counsel discussed with the Applicant the elements of the charges against him and what the State was required to prove. Counsel also discussed Applicant's version of the facts and possible defenses with the Applicant.

The Applicant alleges that counsel was ineffective in failing to have removed from the jury a juror who was related to one of the State's witnesses. The Court finds that Applicant has failed to carry his burden of proving that counsel provided ineffective assistance of counsel in this regard. The record reflects that on the second day of trial, Odessa Brown, juror number 304, wrote a note to the Court indicating that she thought she knew the State's witness Patrice Smalls. (T.112:9-15). Juror Brown told the Court that when she went home the day prior she received a phone call from her cousin. Juror Brown told the Court that she learned from her cousin that her cousin's daughter was also in court the same week. Juror Brown told the Court that she asked her cousin what her daughter's real name was and learned that it was Patrice or Latrice. (T. 113:11-21). Juror Brown told the Court that she did not have any other discussions with her cousin about the case (T. 113:22-25) and that her knowing Smalls would not affect her ability to be a fair and

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impartial juror for or against the State or for or against the defense. (T.114:1-5). Juror Brown also told the Court that she did not mention knowing one of the State's witnesses to any of her fellow jurors. (T. 114:16-19). The record reflects that after the Court questioned Juror Brown, the defense was given time to discuss the juror issue, and ultimately the defense told the Court that it had no objection to Juror Brown remaining on the jury. (T. 114:24-115:6).

A defendant has a constitutional right to be tried by competent jurors, which implies a tribunal both impartial and mentally competent to afford a hearing. State v. Bell, 374 S.C. 136, 646 S.E.2d 888 (Ct. App. 2007). There is no rule of the common law, nor statute, per se disqualifying a juror on account of his relationship to a witness, either by affinity or consanguinity, within any degree. State v. Hilton, 87 S.C. 434, 69 S.E. 1077, 1078 (1911). The Court finds that counsel was not ineffective for failing to object to Juror Brown remaining on the jury after disclosing her relationship to one of the State's witnesses. The Court finds that counsel provided credible testimony that he discussed the removal of the juror with the Applicant during trial. (T. 114:24-115:6). Counsel's decision to not request that the juror be removed does not constitute deficient performance.

This Court also finds that Applicant has failed to show that any prejudice resulted from Juror Brown remaining on the jury. The record reflects that Judge Young properly questioned the juror about her ability to be fair and impartial despite her familial relationship to the State's witness. The record further reflects that Juror Brown told the Court that she could be fair and impartial despite having what appeared to be a distant relationship with the State's witness Latrice Smalls. (T. 114:1-5). Juror Brown also told the Court that she had not discussed her relationship to Smalls with any of the other jurors. (T. 114:16-19). This Court finds that counsel's performance was not ineffective based on the Court's thorough inquiry of the juror

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regarding her ability to be fair and impartial. Applicant has presented no evidence to show bias or lack of impartiality by Juror Brown. Thus, this allegation is without merit.

The Applicant alleges that counsel was ineffective for failing to investigate his case. This Court finds that Applicant has failed to carry his burden of proving counsel was ineffective for failing to investigate. “[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.” Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

This Court finds that counsel thoroughly investigated all facts and circumstances surrounding the Applicant's case. Counsel provided credible testimony that his investigation of Applicant's case involved going to speak to witnesses who were willing to talk, trying to track down Applicant's roommate, going to the scene several times to see if any changes were made to the neighborhood, talking to men in the area, and photographing the scene. This Court finds that Applicant has failed to specify exactly what counsel failed to investigate. This Court finds further that Applicant has failed to show what any additional investigation by counsel might have yielded. Counsel's performance was not deficient in this regard and no prejudice resulted from counsel's performance. Thus, this allegation is without merit.

The Applicant alleges that counsel provided improper advice regarding his right to testify at trial. The Court finds that Applicant has failed to carry his burden of proving that counsel improperly advised him regarding his right to testify at trial. Under the United States and South Carolina Constitutions, a criminal defendant has a right to remain silent and to not testify during his trial. State v. Weaver, 361 S.C. 73, 88, 602 S.E.2d 786, 794 (Ct. App. 2004) aff'd as modified, 374 S.C. 313, 649 S.E.2d 479 (2007).

Here, counsel properly advised the Applicant regarding his right to testify at trial. This Court finds that counsel provided credible testimony that he discussed with the Applicant his right to testify. The Court also finds credible counsel's testimony that since the Applicant's version of facts was at odds with the Applicant's previous statement, the Applicant agreed with the defense strategy to not have him testify at trial. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

This Court finds further that Applicant was well advised of his right to testify by the Court during his trial proceeding. The record reflects that Applicant was advised by the Court of the following prior to waiving his right to testify: the State had the burden of proving his guilt beyond a reasonable doubt; he did not have to testify; it was ultimately his decision whether or not to testify; he had a constitutional right to testify or to not testify; the Court would instruct the jury not to hold it against him in any way if he chose not to testify; the State would have the opportunity to cross-examine him if he decided to testify; and if Applicant had prior convictions the Court would determine if they could be used to impeach his character if he took the stand to testify. (T. 948:6-949:14). Applicant told the Court that he understood his rights and had spoken

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with counsel about whether or not he wanted to testify. (T. 949:17-950:4). Applicant told the Court that when he changed his mind and decided that he would testify at trial, he was given the opportunity to speak further with counsel about his decision to testify at trial. (T. 950:13-951:5). The record reflects the Applicant returned from a brief recess and told the court that it was his decision not to testify. (T. 951:5-14). The Court finds that Applicant freely and voluntarily waived his right to testify at trial. Counsel's advice to the Applicant regarding his right to testify was an appropriate strategic decision and in no way resulted in ineffective assistance of counsel. Thus, this allegation is without merit.

Accordingly, the Court finds that Applicant failed to prove the first prong of the Strickland test- that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in their representation of the Applicant. The Court also finds that Applicant has failed to prove the second prong of Strickland - that he was prejudiced by trial counsel's performance. The Court concludes that Applicant has not met his burden of proving that counsel failed to render reasonably effective assistance.

#### **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, the Court finds that Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds that Applicant has abandoned any such allegations. Therefore they are hereby dismissed.

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**CONCLUSION**

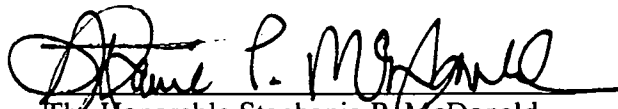
Based on the forgoing, this Court finds and concludes that Applicant has not established that any constitutional violation or deprivation occurred before or during his trial and sentencing proceedings. Counsel was not deficient and Applicant was not prejudiced by counsel's representation. Therefore,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

The 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 27<sup>th</sup> day of October, 20 14

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

Charleston, South Carolina.

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