

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Honorable Kristi Lea Harrington, Circuit Court Judge

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Case No.: 2013-CP-26-5292

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Jeffrey Riebe #177357,..... Petitioner,

v.

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

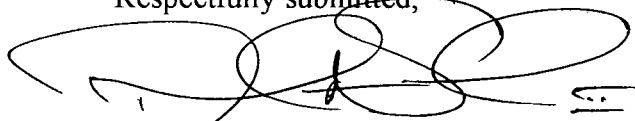
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**NOTICE OF APPEAL**


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The Petitioner appeals the Honorable Kristi Lea Harrington, November 19, 2014, order, denying the Applicant's Petition for post-conviction relief. Undersigned counsel received notice of entry of the order on December 9, 2014. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Daniel A. Selwa, II  
1053 London Street, Suite A  
Myrtle Beach, SC 29577  
*Attorney for the PCR Applicant*

  
December 5, 2015  
*January*

*Other counsel of record:*

Alan Wilson, Attorney General

Joshua L. Thomas, Assistant Attorney General

Post Office Box 11549

Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA  
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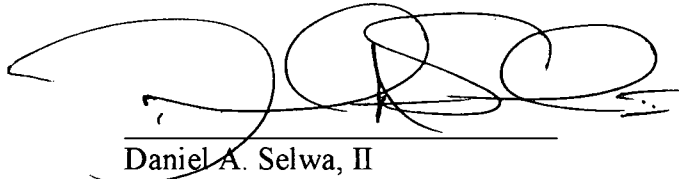
State of South Carolina,..... Respondent.

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**PROOF OF SERVICE**

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I, Daniel A. Selwa, II, certify that I have served the within Notice of Appeal on the Respondent, the State of South Carolina, by depositing a copy of the same in the United States Mail, postage prepaid, addressed to his attorney of record, Alan Wilson, Attorney General, Post Office Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this 5<sup>th</sup> day of January 2015.



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Daniel A. Selwa, II  
1053 London Street, Suite A  
Myrtle Beach, SC 29577  
*Attorney for the PCR Applicant*

STATE OF SOUTH CAROLINA )  
COUNTY OF Horry )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Jeffrey Riebe, #177357, )

Case No. 2013-CP-26-5292

Applicant, )

v. )

**ORDER OF DISMISSAL**

State of South Carolina, )

Respondent. )

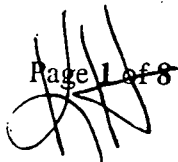
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MELANIE HIGGINS-WARD  
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed August 5, 2013. Respondent made a timely Return on or about June 3, 2014. The Court convened an evidentiary hearing into the matter on August 26, 2014, at the Horry County Courthouse. Applicant was present at the hearing and represented by Daniel A. Selwa II, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Brana J. Williams, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the return, and the exhibits introduced at the hearing. The Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In October 2008, the Horry



County Grand Jury indicted Applicant for murder (2009-GS-26-1053). Brana J. Williams, Esquire ("trial counsel"), represented Applicant. In May 2011 Applicant proceeded to trial before Judge John and a jury. The jury found Applicant guilty as indicted. On May 31, 2011, Judge John sentenced Applicant to forty (40) years in the State Department of Corrections.

Applicant filed a timely notice of appeal. Reid T. Sherard, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on June 26, 2013. *State v. Riebe*, Op. No. 2013-UP-278 (S.C. Ct. App. filed June 26, 2013). The remittitur was sent to the Circuit Court on July 15, 2013.

## **II. ALLEGATIONS**

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

1. "Ineffective Assistance of counsel for failure to object to expert testimony and court not recognizing as expert."
2. "Ineffective Assistance of counsel for failure to object to closing statement by state"
3. "Ineffective Assistance of counsel for failure to object to trial under one indictment then sentence under another"
4. "Ineffective Assistance of counsel for failure to defects in the indictment."
5. "Ineffective Assistance of counsel for failure to bring up meritorious issue to Appeal court."
6. "Ineffective Assistance of counsel for fail to bring up plain erro issue before the appeals court"

At the evidentiary hearing, Applicant proceeded on only the allegations of ineffective assistance of trial counsel for failing to move to quash the indictment and for failing to object to the solicitor's closing argument.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

#### **A. Summary of Testimony**

Applicant testified his indictment was amended during trial. Applicant stated the State presented evidence during trial that differed from the information in the indictment. Specifically, Applicant alleged the State presented evidence the victim died from strangulation and blunt force trauma, but the indictment only listed strangulation. Applicant believes this is a change in the State's theory of the case. Applicant testified trial counsel, Brana Williams, never reviewed the elements of murder or the State's evidence with him. He believes trial counsel should have moved for a directed verdict when the State failed to present evidence consistent with the allegations in the indictment.

Applicant further alleged his indictment was not true billed by a legally constituted grand jury. Applicant testified the grand jury was not authorized to meet on the date listed on his indictment. Applicant also testified trial counsel should have objected to the indictment because the indictment number indicates he was indicted in 2008, but was actually true billed in 2009. He recalled the trial judge amending the indictments at trial to reflect the correct year. Applicant further testified the difference in dates on the front and back of the indictment should have been objected to. Applicant also testified trial counsel should have objected to the solicitor's closing argument that called Applicant guilty and said his experts were lying.

Trial counsel testified she has been practicing law for over twenty (20) years, and has

been employed in private practice and as an Assistant Solicitor. She testified she did not object to the indictment. Trial counsel also testified she recalled the difference in dates on the indictment, but did not think it was prejudicial. She testified she had no questions about whether the grand jury met and considered Applicant's indictment. Trial counsel testified she reviewed the State's evidence with Applicant prior to trial, and was not surprised by the medical evidence the State presented regarding the victim's cause of death. She testified she understood what the State was alleging in the indictments. Trial counsel also recalled the Solicitor's closing argument, and testified she would have objected if the Solicitor had said anything objectionable. She recalled no objectionable material in the closing. She also recalled Judge John instructing the jury it was the judge of the facts and that the attorney's arguments were not evidence.

#### **B. Ineffective Assistance of Trial Counsel**

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing *Griffin v. Martin*, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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." *Id.* at 442, 334 S.E.2d at 814 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Id.* (citing *Strickland*, 466 U.S. at 687; *Turner v. Bass*, 753 F.2d 342 (4th Cir. 1985); *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions

in the exercise of reasonable professional judgment. *Id.* (citing *Strickland*, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. *Id.* at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. *Id.* Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." *Id.* (citing *Strickland*, 466 U.S. at 688). Second, any 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." *Id.* at 117-18, 386 S.E.2d at 625.

The Court finds Applicant failed to meet his burden of showing trial counsel was ineffective. The Court further finds trial counsel conducted a proper investigation, adequately communicated with Applicant, and was competent in her representation.

The Court finds the indictments provided sufficient notice of Applicant's charges. *State v. Gentry*, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005) ("The indictment is a notice document."). The evidence presented at trial was consistent with the allegations in the indictment. Thus, this is not a case where "the indictment facially charges a complete offense and the State presents evidence which convicts under a different theory than that alleged." *Bailey v. State*, 392 S.C. 422, 433, 709 S.E.2d 671, 677 (2011) (quoting *Thomason v. State*, 892 S.W.2d 8 (Tex. Crim. App. 1994)). The Court finds trial counsel was not deficient in failing to object to the indictment on the grounds it was not consistent with the State's evidence.

Applicant's allegation the grand jury was improperly empaneled is without merit. A grand jury may meet at any time ordered by a circuit judge. See S.C. Code Ann. §§ 14-5-910 to -940 (allowing for terms of court not provided for by law). Applicant presented evidence Judge John, as Chief Administrative Judge, issued an order directing the grand jury to meet on the date it true billed Applicant's indictment. (Applicant's Ex. no. 4). A grand jury is not unlawfully empaneled simply because it does not meet during a term of court as provided for in sections 14-5-620 to -820. See *State v. Jeffcoat*, 26 S.C. 114, 1 S.E. 440, 441 (1887) (“[M]erely changing the time for holding the court did not make the grand jury illegal.”). There is no evidence the grand jury was not authorized to meet and consider Applicant's indictment.

A presumption of regularity attaches to proceedings in the Court of General Sessions. *Pringle v. State*, 287 S.C. 409, 411; 339 S.E.2d 127, 128 (1986) (citing *State v. Britt*, 235 S.C. 395, 111 S.E.2d 669 (1959); *State v. Jones*, 211 S.C. 319, 45 S.E.2d 29 (1947); *State v. Waring*, 109 S.C. 52, 95 S.E. 143 (1918)). Absent evidence to the contrary, the court must presume that a properly returned indictment is valid. *State v. James*, 321 S.C. 75, 472 S.E.2d 38, 40 (Ct. App. 1996) (citing *Weathers v. State*, 319 S.C. 59, 459 S.E.2d 838 (1995); *State v. Thompson*, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991)). Applicant's indictment is valid on its face because it states all the necessary elements of the crime, the date of the offense, and the name of the accused. *Id.* at 75, 472 S.E.2d at 40. The indictment is stamped “True Billed” and signed by the foreman. *Pringle*, 287 S.C. at 410, 339 S.E.2d at 128. The Court finds trial counsel was not ineffective for failing to object to the indictment.

The Court also finds Applicant has not demonstrated trial counsel should have objected to the Solicitor's closing arguments. The Court has reviewed the Solicitor's closing argument

and agrees with trial counsel's assessment that the Solicitor said nothing objectionable. *State v. Caldwell*, 300 S.C. 494, 505, 388 S.E.2d 816, 822 (1990) ("A solicitor has the right to state his version of the testimony and to comment on the weight to be given such testimony." (citing *State v. Allen*, 266 S.C. 468, 224 S.E.2d 881 (1976))), *overruled on other grounds by State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006). The Court finds trial counsel articulated a strategic reason for not objecting. See *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992))).

The propriety of a closing argument must be reviewed "in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." *Brown v. State*, 383 S.C. 506, 516, 680 S.E.2d 909, 914-15 (2009) (citing *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). Here, Judge John instructed the jury it was not to consider closing arguments as evidence. See *Smith v. State*, 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007) (trial judge's instructions can cure any objectionable material in Solicitor's arguments (citing *Simmons*, 331 S.C. at 338, 503 S.E.2d at 166)). The Court finds Applicant has not shown any objection to the Solicitor's closing argument would have changed the outcome of his trial.

#### **IV. CONCLUSION**

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

**IT IS THEREFORE ORDERED THAT:**

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 17<sup>th</sup> day of October, 2014.

  
\_\_\_\_\_  
THE HONORABLE KRISTI LEA HARRINGTON  
Presiding Judge

Charleston, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF Horry )  
 )  
JEFFREY RIEBE, #177357 )  
 )  
vs )  
 )  
STATE OF SOUTH CAROLINA, )  
 )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

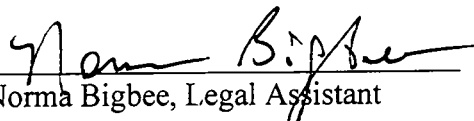
2013-CP-26-5292

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a filed copy of the Order of Dismissal the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Daniel A. Selwa, II, Esquire**  
**1053 London St., Suite A**  
**Myrtle Beach, SC 29577**

DATED this 8<sup>TH</sup> day of December, 2014.

  
Norma Bigbee, Legal Assistant  
For Respondent



**DANIEL A. SELWA, II**  
Attorney at Law, L.L.C.

LITIGATION OFFICE  
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**RECEIVED**

January 5, 2015

JAN 08 2015

Daniel E. Shearouse  
Clerk of Court – SC Supreme Court  
Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

**S.C. SUPREME COURT**

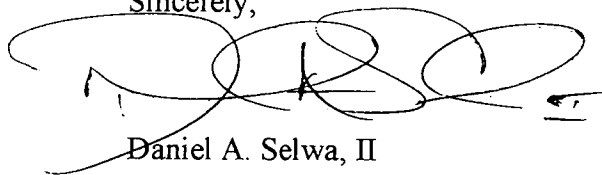
Re: Tyrone Beaty v. State of South Carolina, Case No.: 2013-CP-26-5929; John Elvis Bostic vs. State of South Carolina, Case No.: 2012-CP-26-7917; Keion Griffin vs. State of South Carolina, Case No.: 2011-CP-26-10757; Lorenzo Cross vs. State of South Carolina, Case No.: 2013-CP-26-3958; Nelson H. Castro vs. State of South Carolina, Case No.: 2013-CP-26-1591; Jeffrey Riebe vs. State of South Carolina, Case No.: 2013-CP-26-5292; Shannon T. Parker vs. State of South Carolina, Case No.: 2013-CP-26-2547; and Nearim Blackwell-Selim vs. State of South Carolina, Case No.: 2013-CP-26-6066.

Dear Mr. Shearouse:

Enclosed please find the original Notice of Appeal in each of the above-entitled actions and two copies for each. Please file and return one copy to me in the self addressed stamped envelope enclosed.

If you should have any questions or concerns, please do not hesitate to contact me.

Sincerely,



Daniel A. Selwa, II



DANIEL A. SELWA, II  
ATTORNEY AT LAW, L.L.C.

1053 London Street, Ste. A  
Myrtle Beach, S.C. 29577

The Honorable Daniel E. Shearouse  
Clerk of Court, South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC 29211