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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**

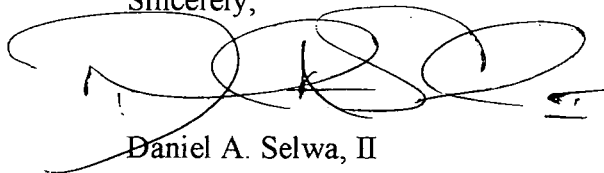
Re: Tyrone Beaty v. State of South Carolina, Case No.: 2013-CP-26-5929; John Elvis Bostic vs. State of South Carolina, Case No.: 2012-CP-26-7917; Keion Griffin vs. State of South Carolina, Case No.: 2011-CP-26-10757; Lorenzo Cross vs. State of South Carolina, Case No.: 2013-CP-26-3958; Nelson H. Castro 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

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Honorable John C. Hayes, III, Circuit Court Judge

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Case No.: 2013-CP-26-5929

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Tyrone Beaty, #191955, ..... Petitioner,

v.

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

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**NOTICE OF APPEAL**

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The Petitioner appeals the Honorable John C. Hayes', III, November 17, 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*

January 5, 2015

*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  
In The Supreme Court

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APPEAL FROM HORRY COUNTY  
Honorable John C. Hayes, III, Circuit Court Judge

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Case No.: 2013-CP-26-5929

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Tyrone Beaty, #191955 ..... Petitioner,

v.

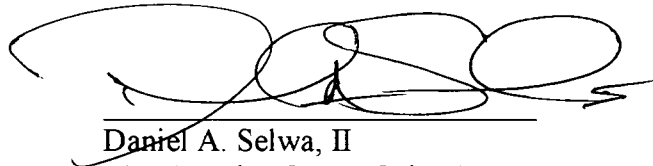
State of South Carolina, ..... Respondent.

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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*



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

1. "Ineffective assistance of counsel"
  - a. Failure to object to officer's testimony before grand jury.
  - b. Failure to sufficiently argue a directed verdict.
  - c. Failure to properly argue for a new trial.
  - d. Failure to request a charge lesser included offenses as to both counts.
  - e. Failure to object to the charge on the felony murder doctrine.
  - f. Failure to object to the charge on inferred malice.
  - g. Failure to object to the charge on unanimity of the verdict.
2. "Prosecution Misconduct"
  - a. Solicitor knowingly used perjured testimony.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the applicant. *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, 2064, 80 L.Ed.2d 674, 692 (1984); *Butler*, 334 S.E.2d 813.

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*, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C.115, 386 S.E.2d 624 (1989).

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 attorney's performance by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625, citing *Strickland*. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a

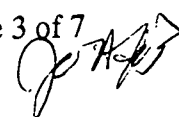
reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.E. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984)).

Applicant alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b). Post-conviction relief is not a substitute for an appeal. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised the issue of prosecutorial misconduct on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is Applicant's burden to prove actual prosecutorial misconduct. *Alabama v. Smith*, 490 S.C. 794 (1989).

Herein below the court will fully address the particulars regarding Applicant's ineffective assistance of counsel grounds for post-conviction relief.

As to 1(a), trial counsel could not appear at the grand jury proceeding and therefore could not object to the presentation of evidence at the grand jury proceeding. Particular 1(a) is without merit on its face.

As to 1(b) and 1(c), trial counsel, Scott Bellamy, testified he made timely motions for a directed verdict and a new trial. The record reflects trial counsel moved for a directed verdict at the close of the State's case based on insufficient evidence. (TR p. 504 LL 19-20). The motion was denied by the trial judge who stated there was more than sufficient evidence. (TR p. 508 LL



12-19). Trial counsel renewed the motion for directed verdict after the defense rested and the motion was again denied by the trial judge. (TR p. 506 LL 1-8). Trial counsel made a motion to set aside the verdict and for a new trial after the jury returned its verdict. (TR p. 595 L 23 through p. 596 L 2). This motion was denied. (TR p. 596 LL 3-17).

As to particulars 1(b) and 1(c), Applicant has failed to carry his burden of proof. He has failed to show that in regard to the motion trial counsel's performance fell below the reasonable attorney standard of *Cherry*, supra.

As to particular 1(d) trial counsel testified he did not request a charge on a lesser included offense as the State's case was in trouble and he felt it was best to just allow the jury to consider all (guilty of murder) or nothing (not guilty). Trial counsel testified that not asking for a charge as to a lesser included offense was not, standing alone, a trial strategy but where trial counsel's testimony is reviewed in its totality on this issue the decision regarding a lesser offense request was part and parcel of trial counsel's trial strategy. I find trial counsel had a valued reason for employing the trial strategy he testified to in Applicant's case. *Rice v. State*, 2014 WL 5280546 (Ct. App. 2014). This particular is without merit.

As to particular 1(e), trial counsel did object to the trial judge's charge of felony murder doctrine. (TR p. 496 L 21 through p. 497 L 17). As to particular 1(f), the trial judge denied the State's request to charge inferred malice. (TR p. 498 LL 17-20). These particulars are without merit.

Applicant's 1(g) is a *non sequitur*. Jury unanimity is required in the State of South Carolina. (S.C. Constitution Art. V, Section 22).

Applicant's allegation of prosecutorial misconduct is based on the State's calling a co-defendant, Corey Smalls, to testify against Applicant. Applicant testified that Corey Smalls

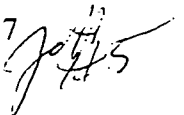
testified for the State based on a deal between Smalls and the State. Corey Smalls testifies at Applicant's hearing that he had testified against Applicant at trial based on coercion from the solicitor and the promise of a deal. Smalls testified that at the time of Applicant's trial he was "weak" and just wanted to get home to his new baby. Smalls testified of an unknown Jamaican<sup>1</sup> man actually shot the victim. Smalls testified he sent two letters to the State wanting to recant his testimony against Applicant.

On cross examination, Smalls testified he never told his trial counsel of State's coercion, that he testified truthfully as to the drug deal which lead to the shooting but denied Applicant shot the victim. Smalls testified he was present at the pre-arranged drug deal. Smalls denied writing a letter to the solicitor who prosecuted Applicant claiming Applicant threatened him. When shown what purported was the letter, Smalls said it was not his handwriting and it was not notarized. Smalls testified he has all of letters notarized. The State offered the letter into evidence and the undersigned ruled the letter inadmissible as it had not been authenticated and in fact been denied by Smalls to be his work product.

Heather von Herrman, Esquire, testified that she was the solicitor that prosecuted the murder case against Applicant and his three co-defendants, one of whom was Corey Smalls. She denied ever offering Smalls any deal in exchange for his testimony against Applicant. She testified that whenever she met with Smalls, his trial counsel Ronald W. Hazzard was always present. She testified Smalls' story was consistent with the versions of events given by Applicant's other co-defendants. She testified that Smalls' testimony was consistent with the facts and the evidence.

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<sup>1</sup> At Applicant's trial, Smalls testified Jamaican was a "made up image." (TR p. 175 L 20 through p. 176 L 5).



Mr. Smalls has now testified twice under oath relative to Applicant's murder charge. He now says he lied when he testified at trial and was coerced into testifying. At trial, Smalls testified that the solicitor and he, through his attorney, had reached an agreement and he had entered into a proffer agreement. (TR p. 123 L 19 through p. 124 L 11). Smalls testified at trial that while he hoped to get some benefit from testifying there were no secret agreements nor any promises relative to his testimony at trial. (TR p. 125 LL 3-25). At Applicant's trial on cross examination, Smalls testified he was to plead to armed robbery. (TR p. 126 L 21 through p. 127 L 14). On cross examination at the PCR hearing, he testified that he was not being honest and truthful as to what Applicant did in regard to the murder for which Applicant was on trial.

I find Corey Smalls' testimony at the post-conviction relief hearing is not credible. I find Heather von Herrmann's testimony credible. I find Corey Smalls' testimony at Applicant's trial was not the product of any prosecutorial misconduct. I specifically find, Smalls was not offered any deal in exchange for his testimony other than that reflected in the trial record regarding a proffer agreement for his being allowed to plead to armed robbery rather than murder. To the extent this proffer constituted a "deal" such was laid before the jury in its entirety for the jury to consider in assessing Smalls' credibility and Applicant's trial.


I find Applicant has failed to carry his burden of proof and failed to prove either ineffective assistance of counsel or prosecutorial misconduct.

I find trial counsel's representation meets the reasonable attorney standard of *Cherry*, supra.

The Court finds that trial counsel's representation of Applicant was effective. Additionally, the court finds an absence for any grounds of relief which the Applicant seeks. Therefore, Applicant's Application for Post-Conviction Relief is denied and dismissed with prejudice.

Applicant is hereby placed on notice that any petition for certiorari to the South Carolina Supreme Court must be filed within thirty (30) days. See Appellate Court Rules 203, 206, and 227(b).

IT IS SO ORDERED.

  
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John C. Hayes, III  
Presiding Judge *jd 7*

November *16<sup>th</sup>*, 2014  
Conway, South Carolina

STATE OF SOUTH CAROLINA )  
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COUNTY OF Horry )  
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 )  
TYRONE BEATY, #191955 )  
 vs )  
 )  
STATE OF SOUTH CAROLINA, )  
 )  
 Respondent. )  
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IN THE COURT OF COMMON PLEAS

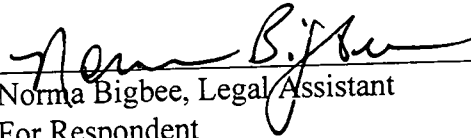
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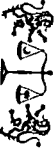
AFFIDAVIT OF SERVICE BY MAIL

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 in 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 3<sup>rd</sup> day of December, 2014.

  
Norma Bigbee, Legal Assistant  
For Respondent



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



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