

1/18/11

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS  
7<sup>TH</sup> JUDICIAL CIRCUIT

COUNTY OF SPARTANBURG )

Joshua Ray Greer  
Applicant # 311472

CA: 08 -CP-42- 4438

Vs )

CERTIFICATE OF SERVICE

Greer  
Respondent )

I certify that, on this date, I served a copy of the Ord. Dismissal  
in this action dated 7-24-09 on 7-28-09

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in  
and envelope with sufficient postage affixed, addressed as follows:

Michelle Kelly  
Joshua Greer  
Franklin Lane

7-28-09

(DATE)

Cornie Fey

(SIGNATURE)

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SPARTANBURG )  
 )  
Joshua Ray Greer, )  
S.C.D.C. No. 311472, )  
 )  
Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

2008-CP-42-4438

**ORDER OF DISMISSAL**

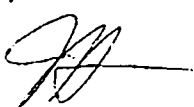
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This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 21, 2008. The Respondent made its return on February 20, 2009. An evidentiary hearing into the matter was convened on May 26, 2009 at the Spartanburg County Courthouse. The Applicant was present at the hearing and represented by Franklin M. Mann, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Jason S. Chehoski, Esquire. The Court had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the Respondent's return, and the appellate records.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court. The Applicant was indicted at the November 2002 term of the Spartanburg County Grand Jury for murder

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(2002-GS-42-5209) and at the June 2003 term for armed robbery (2003-GS-42-2201). He was represented by Jason S. Chehoski, Esquire.

After the State called the case to trial, the Applicant was found guilty. On September 20, 2005, the Applicant was sentenced by the Honorable Wyatt T. Saunders to consecutive terms of thirty (30) years for murder and twenty (20) years for armed robbery.

A notice of appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Joseph L. Savitz, III, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Greer, Op. No. 07-UP-512 (S.C. Ct. App. filed November 7, 2007).

### ALLEGATIONS

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

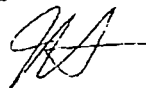
1. Ineffective assistance of counsel:
  - a. Failure to conduct pre-trial investigation.
  - b. Failure to provide expert witnesses in preparation of defense:
    - i. DNA expert.
    - ii. Psychiatric expert.
    - iii. Crime scene and fingerprint expert.
    - iv. Private investigator.
2. Newly- or after-discovered evidence.
3. Denial of fundamental fairness and equal protection due to the court's failure to instruct the jury on a lesser included offense or a defense of actual innocence.

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At the evidentiary hearing, the Applicant testified about whether trial counsel should have argued third-party guilt at trial. The Applicant stated he wanted to dismiss all other issues.

### 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 71.1(e), SCRPC).

For an 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, 104 S. Ct. 2052 (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 “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, 117-18, 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, 104 S. Ct. 2052).

The Applicant stated he discussed with trial counsel that he believed Butch Green may have committed the murder. The Applicant stated he told trial counsel the bloody shoeprint at the scene was not his. The Applicant stated he found out after the appeal that trial counsel did not argue third-party guilt and that he now believes trial counsel should have made this


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argument.

Trial counsel testified he filed appropriate discovery motions in this case and reviewed those materials. Trial counsel testified there was no physical evidence linking the Applicant to the crime scene, but that the Applicant had given a confession to police. Trial counsel testified the Applicant's confession was the prime evidence against his client. Trial counsel stated there was a pre-trial motion to suppress the confession but that the trial judge ruled it was admissible. Trial counsel stated he mentioned in his opening argument that only two people knew what happened that day and that neither were in the courtroom. Trial counsel stated the solicitor made a motion in limine to preclude third-party guilty evidence. Trial counsel testified the trial judge ruled he could not introduce evidence of third-party guilt. Trial counsel testified, however, that he was not attempting to argue third-party guilt but to argue the Applicant was innocent and his confession was not credible. Trial counsel admitted that, when he caught Butch Green in an inconsistency, he did not argue third-party guilt because he was instead arguing the inconsistent testimony went to Green's credibility.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have argued third-party guilt at trial. This Court finds trial counsel made a strategic decision not to argue third-party guilt and instead argue the Applicant was innocent of the crimes. This Court finds this was a legitimate trial strategy because, as the Applicant gave a confession to police, it would have been extremely difficult for trial counsel to also present a third-party guilt analysis to

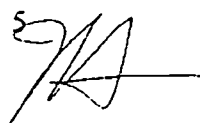
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the jury. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (holding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel). This Court notes trial counsel faced an uphill battle at the Applicant's trial because of the confession; however, this Court finds trial counsel did an excellent job of pursuing his trial strategy by attempting to have the confession suppressed in a pre-trial hearing. (Trial transcript, pp.9-105). This Court also notes trial counsel attempted to attack Green's credibility. (Trial transcript, pp.583-84). This Court further notes trial counsel's closing argument in which he attacked the State's witnesses, stated there was no physical evidence linking the Applicant to the crime scene, and challenged the veracity of the Applicant's confession. (Trial transcript, pp.612-23). This Court concludes that, based on the Applicant's confession and counsel's trial strategy, trial counsel was not ineffective in choosing not to argue third-party guilt. See, e.g., State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000) (holding evidence of third-party guilt is limited to facts that are inconsistent with the defendant's guilt).

This Court notes the Applicant abandoned the issue from his PCR application regarding trial counsel's failure to hire defense experts. Regardless, this Court finds the Applicant could not have prevailed upon this issue because he did not have any expert witnesses testify at the PCR hearing. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative").

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence



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that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

**All Other Allegations**

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.


**CONCLUSION**

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel’s representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

This 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 also 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

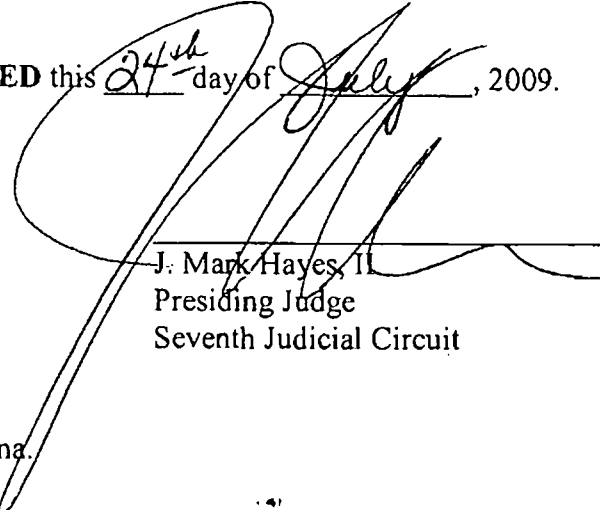


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dismissed with prejudice; and

2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 24<sup>th</sup> day of July, 2009.

  
J. Mark Hayes, II  
Presiding Judge  
Seventh Judicial Circuit

Spartanburg, South Carolina.

A CERTIFIED COPY

Marc Kitchens

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BY: Marc Kitchens D.C.  
DATED 7-29-09

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