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April 8, 2015

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

RECEIVED  
APR 13 2015  
S.C. Supreme Court

Re: Case No. 2012-CP-26-4207  
Michael Livingston v. State of South Carolina

Dear Mr. Shearouse,

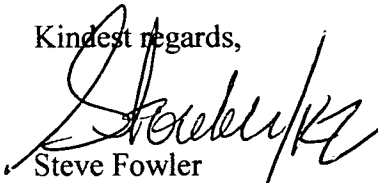
Enclosed for filing are two (2) copies of a Notice of Appeal in the above referenced Post-Conviction Relief case. Also enclosed are the following:

1. Proof of service of the notice of appeal on the respondent.
2. A copy of the order denying the application for Post-Conviction Relief.

Please return a clocked copy of the notice to my office in the self-addressed stamped envelope provided.

Thank you for your cooperation in this matter. Please feel free to contact my office if you have any questions or concerns.

Kindest regards,

  
Steve Fowler

Cc: Joshua Thomas, Assistant Attorney General

Enclosures: As stated

SF/kz

**NOTICE OF APPEAL FROM COMMON PLEAS REGARDING A  
POST CONVICTION RELIEF (PCR) ACTION**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals  
[In The Supreme Court]

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

John C. Hayes III, Circuit Court Judge

Case No. 2012-CP-26-4207

**RECEIVED**

APR 13 2015

**S.C. Supreme Court**

The State of South Carolina, Respondent,

v.

MICHAEL LIVINGSTON, Appellant.  
#330593,

**NOTICE OF APPEAL**

Michael Livingston appeals the order of the Honorable John C. Hayes, III dated November 10, 2014, which denied and dismissed his Post-Conviction Relief application. The Appellant has the right to appeal pursuant to South Carolina Appellate Court Rules 203, 206, and 227(b).

April 4, 2015



Steven W. Fowler  
1019 Highway 17 South  
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(843) 663-0006  
Attorney for Appellant

Other Counsel of Record:  
Joshua L. Thomas  
Assistant Attorney General  
S.C. Attorney General's Office  
Rembert C. Dennis Building  
Post Office Box 11549  
Columbia, South Carolina 29211  
Attorney for Respondent

**PROOF OF SERVICE OF A NOTICE OF APPEAL**

APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

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Case No. 2011-CP-22-614

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The State of South Carolina,

Respondent,

v.

Michael Livingston, #330593,

Appellant.

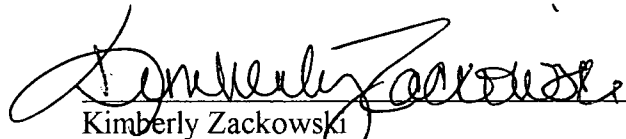
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**PROOF OF SERVICE**

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I certify that I have served the Notice of Appeal on The State of South Carolina, via the Attorney General's office, by depositing a copy of it in the United States Mail, postage prepaid, on April 10, 2015, addressed to the attorney of record, Joshua Thomas, Assistant Attorney General, SC Attorney General's Office, Rembert C. Dennis Building, 1000 Assembly St., Columbia, SC 29201.

April 10, 2015



Kimberly Zackowski  
Paralegal to Steven W. Fowler  
Attorney for Appellant  
1019 Highway 17 South  
North Myrtle Beach, SC 29582  
(843)663-0006

**RECEIVED**

APR 13 2015

**S.C. Supreme Court**

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STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF HORRY )  
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 Michael Livingston, <sup>330593</sup> )  
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 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FIFTEENTH JUDICIAL CIRCUIT

C.A. No.: 2012-CP-26-4207

**ORDER**

This is a Post-Conviction Relief Proceeding

HORRY COUNTY  
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 MELVIN B. BARNES, CLERK OF COURT

This is an Application for post-conviction relief (PCR) filed May 25, 2012. The undersigned heard this case on October 28, 2014. Steven Willard Fowler, Esquire, represented the Applicant. The State was represented by Josh Thomas, Esquire.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the May 2008 term of the Horry County Grand Jury for murder (2008-GS-26-2912), armed robbery (2008-GS-26-2658), and possession of a weapon during the commission of a violent crime (2008-GS-26-2659). Scott Joye, Esquire, represented Applicant.

On August 13, 2009, Applicant was tried and found guilty as indicted before the Honorable Larry B. Hyman Jr., who sentenced Applicant to life imprisonment on the murder charge, thirty years imprisonment for armed robbery, five years imprisonment on the weapon charge, with all charges running concurrently. Applicant appealed and his conviction and sentence were affirmed on February 29, 2012.

Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel

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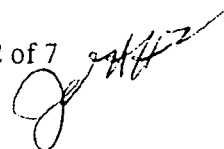
In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on 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.

Applicant alleges three issues in his Application for post-conviction relief and by way of his testimony has addressed an additional issue (gunshot residue).

As to issues number 2 and 3 both related to trial counsel's alleged failure in respect to interviewing and subpoenaing witnesses. There is no evidence in the record to support either of these issues. Applicant presented no testimony of any of the witnesses he proposes should have



been interviewed or subpoenaed.<sup>1</sup> Without evidence as to what these witnesses had to offer as testimony the court cannot find trial counsel ineffective in these two issues.

Applicant's first issue is that trial counsel was ineffective for not impeaching the State testimony at trial. The undersigned has to admit being completely baffled by this issue. The "State testimony" mentioned seems to be that of Kalamison Hill. This is based on the portion of the transcript relied on by Applicant of Hill's testimony at page 191-196 of the transcript. What is baffling is that all of the effort to prove this issue seems to revolve around two letters to Applicant from a co-defendant named Chadd Wilson. Wilson is a cousin to Applicant. Neither of these letters mentions Hill. The letters contents which deal, arguably, with the offense for which Applicant was on trial are rank hearsay. This hearsay is basically in the vernacular that "word on the street is that 'C' was the trigger man in the murder" Applicant was on trial for. Neither letter exonerates applicant.

The undersigned, after several readings of the letters and Hills trial testimony, cannot relate the letters issue to Hill's testimony. Hill's testimony at issue is regarding an incident which occurred, according to him, three days before the murder. He testified that three guys pointed a gun to his head. He did not name all three but did name Applicant (by his nickname Amp) and Chadd (presumably Chadd Wilson). At this point in the trial, the transcript reads as though trial counsel was unaware Hill would testify to this threat by Applicant three days prior to the murder. The two Chadd Wilson letters are not mentioned. Trial counsel related to the court that he was unaware that Hill would testify about any threat and that trial counsel did not even have a single piece of paper suggestion such testimony from Hill.

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<sup>1</sup> There is an issue regarding trial counsel's failure to interview Kalamison Hill. This is addressed hereinafter.

The trial judge denied trial counsel's motions (2) for mistrial. The trial judge appears to base his ruling on the availability of Hill for an interview by trial counsel prior to trial. (TR p. 194 L 14 through p. 146 L 17).

Trial counsel testified at the PCR hearing that he did not interview Hill as he had all of the State's discovery including witness statements, relied on the solicitor's memorandum as to what the State's witness would testify to and Applicant's assurance that Hill would not testify.

I find trial counsel's testimony as to being in possession and being aware of the letters to be credible. I find his failure to use the letters at trial were not ineffective using the reasonable attorney standard. The letters contents were as stated above littered with rank hearsay and did not exonerate Applicant. Interestingly, Applicant does not assert the letters had any impeachment value as to the writer, Chadd Wilson, but rather that the letter would have "contradicted" co-defendant, Coaty Deas, nicknamed "C." Coaty Deas testified for the State. ~~The letters from Wilson~~ based on street talk had no impeachment value to Coaty Deas and as stated elsewhere do not appear to constitute admissible evidence nor relevant evidence.

The issue regarding Hill is not the letters, but whether or not trial counsel was ineffective for not interviewing Hill, a witness he was aware of, prior to trial. This boils down to whether or not trial counsel had the right to rely on what the State provided during discover and what the State told trial counsel to expect as witnesses testimony. Reliance on Applicant's opinion as to whether or not Hill would testify does not meet the reasonable attorney standard.

In a nutshell, the question becomes, is trial counsel effective when trial counsel relies solely on information provided by the State regarding expected witness testimony?<sup>2</sup> The answer

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<sup>2</sup> The subject testimony from Hill raised both a prior bad act and applicant's character.

is no. Failure to interview a witness, particularly an eye-witness does not meet the reasonable attorney test of *Strickland*.

Having found the above, the court must look to the second prong set forth in *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (Sup. Ct. 1989). The court must examine the record to determine whether or not the results of Applicant's trial would have been different but for counsel's failure to interview Hill.

Before proceeding with the prejudice prong the court should point out that when confronted with Hill's testimony regarding a prior criminal incident involving Applicant trial counsel acted reasonable and took the only course available, a motion for a mistrial.

The State offered four eye-witnesses to the shooting of the victim, Ervin Graham (who is also known as "Fido"). The witnesses were Tony Angelo Wilson (a cousin of the Applicant, TR p. 97 LL 14-15); Coaty Deas (who calls the Applicant "homeboy," TR p. 237 LL 13-18); Chadd Wilson (Applicant's cousin, TR p. 410 LL 23-25); and Kalamison Hill (a neighbor of Applicant's, TR p. 162 LL 12-14).

With limited reference to page and line, the court will go through each of the witnesses' relevant testimony.

Tony Wilson testified the victim and Applicant met for a drug deal and Applicant got into the back seat of the victim's car and "shot him," (TR p. 104 LL 2-3) and then shot the victim a second time (TR p. 105 LL 11-25).

Coaty Deas testified that Applicant and the victim were his drug suppliers and he was at the scene of the shooting to buy drugs (TR p. 238 L 20 through p. 239 L 6), and that Applicant told Deas he was going to shot the victim (TR 239 L 14 thought p. 240 L 9).

*J. H. 5*

Chadd Wilson testified the victim was a drug supplier (TR p. 413 L 17 through p. 414 L 13) and that Applicant shot the victim (TR p 417 LL 3-6).

Kalamison Hill testified that Applicant shot the victim (TR p. 163 L 7 through p. 164 L 2, p. 164 L 20 through 165 L 11), and that Applicant stated prior to shooting the victim that he was going to "kill somebody" (TR p. 164 L 20 through p. 165 L 11).

Based on the overwhelming testimony regarding Applicant's murder of the victim from witnesses Tony Wilson, Coaty Deas, and Chadd Wilson the undersigned finds trial counsel's failure to interview Kalamison Hill did not in any way prejudice Applicant and such failure does not indicate to any degree that absent such failure the result of Applicant's trial would have been different.

As to the gunshot residue issues, Applicant presents no evidence on this issue other than his own testimony. Therefore, there is nothing before the court of substance on the issue. There is no evidence any gunshot residue evidence would be of value or would even exist at the time of Applicant's arrest, some eight (8) or more days after the crime.

As to the issue regarding what caliber bullet would fit what caliber handgun or pistol the court finds no issue raised by Applicant to which this issue even remotely relates.




The Court finds that motions counsel's representation of Applicant was effective.

Therefore, Applicant's Application for Post-Conviction Relief is denied and dismissed with prejudice.

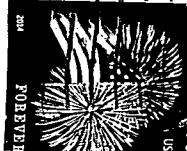
Applicant is hereby placed on notice that any petition for certiorari to the South Carolina Supreme Court must be filed within thirty (30) days. See Appellate Court Rules 203, 206, and 227(b).

IT IS SO ORDERED.

  
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John C. Hayes, III  
Presiding Judge

November <sup>10</sup> 2014  
Conway, South Carolina

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The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
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