



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

February 14, 2012

RECEIVED

FEB 14 2012

S.C. Supreme Court

Ms. Rema Gantt Thomas  
Circuit Court Reporter  
806 Yacht Club Pointe  
Chapin, SC 29036-9998

Dear Ms. Thomas:

Please provide us with the following transcript:

Rico Hickman v. State of South Carolina                      Case #:                      09-CP-32-04560

County: Lexington                      Date of Trial: February 3, 2011

Presiding Judge: R. Lawton McIntosh

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

  
Lomene French  
Legal Services Coordinator

cc: S.C. Supreme Court  
Attorney General's Office

# The South Carolina Court of Appeals

Rico Hickman, #297987,

Appellant,

v.

State of South Carolina,

Respondent.

The Honorable R. Lawton McIntosh  
Lexington County  
Trial Court Case No. 2009-CP-32-04560

**RECEIVED**

JAN 28 2012

**S.C. SUPREME COURT**

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## ORDER

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The appeal in the above captioned matter is transferred to the South Carolina Supreme Court under the filing provisions of Rule 243 of the South Carolina Appellate Court Rules.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE  
For The Court

BY *V. Claire Allen, Deputy*  
CLERK

Columbia, South Carolina

cc: D. Ryan McCabe, Esq.  
Chief Appellate Defender Robert M. Dudek  
Assistant Attorney General Kaerlon May  
The Honorable Daniel Shearouse

**RECEIVED**

JAN 23 2012

**S.C. Supreme Court**

**FILED**

*1/20/12*

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JAN 23 2012

S.C. Supreme Court

January 10, 2012

The Honorable Tanya A. Gee  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

**Re: Rico Hickman v. State of South Carolina**  
**C/A No.: 2009-CP-32-4560**  
**RTT File No.: 15202.1**

N.O.A.  
-012  
1 Appeals

Dear Ms. Gee:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Proof of service of the notice of appeal on the respondent;
- (2) A copy of the order which is to be challenged on appeal; and
- (3) A check in the amount of \$100.00 for the applicable filing fee.

Please feel free to contact me should you have any questions or require any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Shon L. Dentley".

Shon L. Dentley  
Paralegal to D. Ryan McCabe

cc: Kaerlon, May, Esq.

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

The Honorable R. Lawton McIntosh

Case No.: 2009-CP-32-4560

RECEIVED

JAN 23 2012

S.C. Supreme Court

Rico Hickman, #297987,

Appellant,

v.

State of South Carolina,

Respondent.

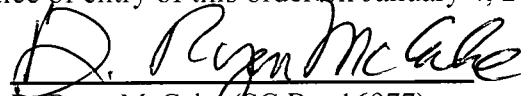
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**NOTICE OF APPEAL**

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Rico Hickman, #297987, appeals the order of the Honorable R. Lawton McIntosh dated December 22, 2011. Appellant received written notice of entry of this order on January 4, 2012.

January 10, 2012



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Attorney for Appellant

Other Counsel of Record:

Kaerlon May, Esq.  
SC Attorney General's Office  
P.O. Box 11549  
Columbia, SC 29211-1549

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JAN 13 2012  
SC SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

RECEIVED

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

JAN 23 2012

Honorable R. Lawton McIntosh

S.C. Supreme Court

Case No.: 2009-CP-32-4560

Rico Hickman, #297987,

Appellant,

v.

State of South Carolina,

Respondent.

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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, by depositing a copy of it in the United States Mail, postage prepaid, on January 10, 2012, addressed to its attorney of record, Kaerlon May, Esq., SC Attorney General's Office, P.O. Box 11549, Columbia, SC 29211-1549

January 10, 2012



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Attorney for Appellant

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JAN 13 2012  
SC COURT OF APPEALS

15202122

STATE OF SOUTH CAROLINA )  
 COUNTY OF LEXINGTON )  
 )  
 Rico Hickman, # 297987, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE ELEVENTH JUDICIAL CIRCUIT

2009-CP-32-4560

**ORDER OF DISMISSAL**

**PROCEDURAL HISTORY**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 8, 2009. The Respondent made its Return on January 7, 2010. An evidentiary hearing into the matter was convened on February 3, 2011, at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by Ryan McCabe, Esquire. The Respondent was represented by A. West Lee of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying were Applicant's trial counsel, Elizabeth Fullwood, Esquire. This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Lexington County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the August 2008 term of the Lexington County Grand Jury for two (2) counts of Assault and Battery with Intent to Kill, Pointing and Presenting a Firearm, Possession of a Weapon During the Commission of a Violent Crime,

BOX 72

Criminal Conspiracy, Burglary – Second Degree, Kidnapping, Armed Robbery While Armed with a Deadly Weapon (2008-GS-32-2860/2861/2862/2863/2864/2865/2866/2867). He was represented by Elizabeth Fullwood, Esquire. On January 28, 2009, Applicant appeared before the Honorable R. Knox McMahon where he pled guilty to one (1) count of Assault and Battery with Intent to Kill and Armed Robbery, and was sentenced to twenty-five (25) years imprisonment for Armed Robbery with a concurrent twenty (20) year term for ABWIK. Applicant did not appeal his conviction or sentence.

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

1. Ineffective assistance of counsel.
  - i. "Counsel failed to inform me of my right to appeal."
  - ii. "Counsel failed to file motion for appeal."
  - iii. "Counsel did not successful try and get in touch with my witness to show up in court on my behalf..."
  - iv. "DNA analysis was submitted to the SLED forensic services laboratory which came back negative on my behalf, but seemed as if it was overlooked."
  - v. "Not enough time to put in on the case."
  - vi. "Did not object to improper relationship between judge and his daughter, who had worked for solicitor's office."
2. Involuntary Guilty Plea.

#### **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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their

testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985):

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; 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 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, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use 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, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 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.C. at 117-18, 386 S.E.2d at 625.

With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4<sup>th</sup> Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4<sup>th</sup> Cir. 1976).

#### *Ineffective Assistance of Counsel*

##### Failure to Call Potential Alibi Witness to Testify at Trial

Applicant's first allegation raised at the PCR hearing is counsel was ineffective in failing to investigate and call as a witness Takemia Wilson ("Wilson"), Applicant's girlfriend, who Applicant alleges would have provided an alibi for him on the night of the alleged crimes. Applicant testified he gave counsel a list of potential witnesses, including Wilson, for counsel to interview and prepare for trial, but said counsel never contacted Wilson prior to trial. He also

stated he gave Wilson's phone number to counsel and that Wilson came to visit him in prison roughly two (2) times a week leading up to trial. Applicant went on to say on the first day of trial, counsel told Applicant she was sorry she was unable to contact any of his potential witnesses.

Wilson also testified at the PCR hearing, confirming that she had been Applicant's girlfriend during the time that the crimes occurred, although they were no longer together, nor had they been since Applicant's arrest. She went on to say she was "most likely" with Applicant on the date in question (January 17, 2008) at the Executive Inn in West Columbia, South Carolina because she "used to always want to be with him". Wilson testified the hotel room was checked out in a friend's name and she did not have any receipts or other documentation to prove they were in fact at that hotel on the night in question, but stated that she and Applicant stayed "every other day" together until the time he was arrested.

Counsel testified the public defender's office was appointed to represent Applicant in February of 2008 on a set of unrelated charges when Applicant was arrested for the charges contained in this application, and in May of 2008 she took over representation of Applicant on both sets of charges. Counsel stated she met with Applicant six (6) times in preparation for exclusively the second set of charges, during which she and Applicant reviewed his version of the facts leading to the charges, the discovery materials, and potential witnesses Applicant could call at trial. Counsel said Applicant alleged he was in Columbia meeting his probation officer until roughly four forty-five (4:45) in the afternoon on the day in question, and was accompanied by his girlfriend Alexis McCoy. Counsel went on to say her investigator spoke with Applicant's probation officer and subpoenaed the records from the probation office, both of which reflected that the Applicant was only at the office around ten o'clock (10:00) that morning. Counsel

testified she searched vigorously for Alexis McCoy's contact information including contacting Applicant's mother (Trina Hickman), but was unable to get any useful contact information. Counsel went on to say Applicant never mentioned any other potential alibi witnesses, including Takemia Wilson, and in fact Wilson's name was never mentioned by Applicant regarding this set of charges. Counsel testified during a meeting with Applicant on December 8, 2008, Applicant admitted to counsel he had known about the plan to commit the robbery and had provided the gun used in the robbery to three men, including his two co-defendants and one person whose name Applicant refused to disclose to counsel. Further, Applicant told counsel he and his two co-defendants were friends, and never mentioned gang rivalry issues between he and his co-defendants as Applicant now alleges.

Based on the testimony presented at the hearing and a thorough review of the record, I find Applicant has failed to prove counsel was ineffective in this regard. First, I find counsel's testimony to be credible, while conversely finding Applicant's testimony to not be credible. Further, I find counsel's performance was not deficient as she carried out her duties within the objective standard of reasonableness demanded of attorneys under the circumstances. Counsel's conduct was reasonable in not contacting or calling Takemia Wilson to provide alibi witness testimony at trial as Applicant never once mentioned Wilson to counsel as a potential alibi. (*A court's measurement of reasonableness may be determined or substantially influenced by defendant's own statements or actions... Counsel's actions are usually based on informed strategic choices made by a defendant and on information supplied by defendant. What investigation decisions by counsel are deemed reasonable depends critically on such information.* Strickland v. Washington, *supra*.) In fact, Applicant had provided a different woman's name to counsel as his "girlfriend" who had accompanied him to Columbia, Alexis

McCoy, who counsel made diligent efforts to contact. Additionally, Applicant's alibi defense revolving around a late afternoon meeting with Applicant's probation officer proved to be useless when the officer told counsel Applicant's only meeting was early in the day, as confirmed by the probation office's appointment records. I find counsel was not deficient in this regard.

Further, Applicant failed to prove prejudice resulting from Wilson not testifying at trial as an alibi witness, as Wilson was unable to provide a credible and airtight alibi for Applicant based on her testimony. *(since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all. State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980).)* Wilson was only able to say she "thought" she was "most likely" with Applicant on the day in question, basing that assumption on the fact that she "used to always want to be with" Applicant when they were dating. Wilson went on to plainly state she had no physical evidence that she and Applicant had in fact checked into a hotel room in Columbia that night, and said she only spent roughly "every other" night with Applicant, leaving plenty of opportunity for Applicant to have been physically present during these crimes. Therefore, I find Wilson's testimony has failed to establish that, had she been called at trial, she would have provided an alibi sufficient to change the outcome of Applicant's trial. Applicant has failed to establish both deficiency and resulting prejudice, and accordingly this allegation is without merit.

#### Involuntary Guilty Plea – Counsel Unprepared for Trial

Applicant's second allegation is he was forced to involuntarily enter this plea because counsel was unprepared to proceed to trial on the date the case was called and counsel told him to take the plea. First, it is important to note that a defendant who enters a plea on the advice of

counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Therefore, this allegation is actually one of ineffective assistance of counsel which will be analyzed as such herein.

Applicant testified repeatedly throughout the hearing that he entered this plea because counsel told him if he proceeded to trial and was convicted, he would receive a life without parole sentence. Applicant went on to say he felt forced to enter his plea because he believed counsel was not prepared for trial after hearing her motion the court for a continuance to have more time to prepare. Applicant contends these concerns, coupled with his above allegation that counsel did not contact his alibi witness for trial, rendered his plea involuntary.

Counsel testified she met with Applicant six (6) times during the course of her representation during which time she reviewed with Applicant his version of the facts, the entirety of the discovery file, the potential sentences he was facing, and potential defenses to be used at trial. Counsel stated Applicant was served with the state's Notice of Intent to Seek Life Without Parole which she reviewed with him, so there was no doubt if he was convicted at trial he would receive a life sentence. Counsel went on to say the crux of the case was the co-defendants' credibility as that was the only evidence against Applicant. Based on this belief, counsel said she investigated the two co-defendants in depth and prepared a strategy to impeach their credibility at trial, which she believed would have been fairly easy to do. Counsel testified Applicant knew of the trial date well in advanced, and stressed that she never told Applicant he would be found guilty at trial.

Regarding Applicant's allegation that counsel requested a continuance at the start of trial because she was unprepared, counsel said this was not exactly the case. While she did request a continuance at the start of trial, she stated she did so because the state had redacted all witness contact information from its discovery file and she was therefore unable to interview the state's witnesses prior to the start of trial. Counsel went on to say she requested the contact information from the state numerous times prior to trial, but only received such the Friday before the case was convened for trial on a Tuesday. Although the court denied her motion, counsel stated she was able to sufficiently interview all eight (8) of the state's witnesses at the courthouse the following morning before the trial began, thereby eliminating her need for the continuance requested. Further, counsel stated she would have proceeded to trial with Applicant had he not made the voluntary decision to plea, and went on to say she was fully prepared for trial after completing the interviews of the state's witnesses.

I find Applicant has failed to carry his burden in proving counsel was ineffective in this regard. Clearly, based on counsel's credible testimony, she was fully prepared for trial having done extensive preparations to organize a defense strategy based on impeachment of Applicant's co-defendants. I also find Applicant made the voluntary and intelligent decision to enter this plea after being fully and adequately advised by competent counsel of all relevant matters. Applicant's apprehension regarding counsel's advice concerning the realistic potential sentence Applicant was facing at trial (life without parole) is not tantamount to coercion rendering Applicant's plea involuntary. (*pleading guilty to avoid a possibly greater sentence, without more, does not render a guilty plea involuntary.* Brady v. United States, 397 U.S. 742, S.Ct. 1463, 25 L.Ed.2d 747 (1970); Wicker v. State, 310 S.C. 8, 425 S.E.2d 25 (1992).) Further, the overwhelming evidence in the record and presented through the testimony of the witnesses at the

hearing reflects that the plea was knowingly and voluntarily entered. Boykin v. Alabama, 395 U.S. 238 (1969); Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972). Therefore, I find this allegation to be without merit. Accordingly, it must be denied and dismissed.

Failure to Request Recusal of Trial Judge Based on Conflict of Interest

Applicant's final allegation is counsel was ineffective in failing to request the trial judge, the Honorable R. Knox McMahon, recuse himself from hearing Applicant's case where the judge's daughter had a relationship with the solicitor's office. Based on a review of the trial transcript, it appears counsel did in fact make such a motion before the court, which was denied by the court upon a finding that his daughter had no involvement in Applicant's case whatsoever. Therefore, I find counsel did present this objection and, therefore, was not deficient in this regard. Further, Applicant has failed to prove that an actual conflict did exist or that such a conflict affected his decision to enter a guilty plea rather than proceed to trial. This allegation is also denied and dismissed.

Based on the facts above, I find that Applicant did not prove by a preponderance of the evidence that counsel was ineffective. Further, I find that counsel at all times during his representation of Applicant acted within the range of competence demanded of attorneys in criminal cases, and Applicant was unable to establish resulting prejudice from any alleged deficiency. Therefore, these allegations of ineffectiveness are without merit and must be denied.

**CONCLUSION**

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

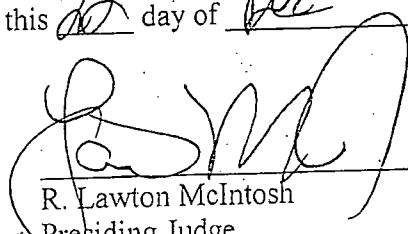
Except as discussed above, this Court finds that the Applicant failed to raise any other allegations cognizable in PCR at the hearing and has, thereby, waived them. Specifically, Applicant failed to address his allegation regarding "prosecutorial misconduct" as set forth in his PCR application. The Applicant's failure to address this and any additional issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

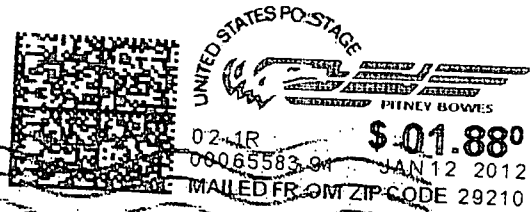
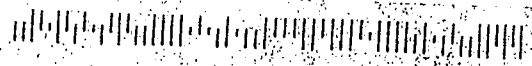
**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 20 day of Dec, 2011.

  
\_\_\_\_\_  
R. Lawton McIntosh  
Presiding Judge  
Eleventh Judicial Circuit

Anderson, South Carolina.



Happy Holidays  
COLUMBIA SC 292  
THRU 12 JAN 2012

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*Rico  
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 **ROGERS TOWNSEND**  
ATTORNEYS AT LAW