

# The Brooks Law Office, LLC

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October 23, 2015

**RECEIVED**

OCT 26 2015

**S.C. SUPREME COURT**

South Carolina Supreme Court  
PO Box 11330  
Columbia, SC 29211

RE: Andre Wallace, 346096 vs. State of South Carolina  
2013-CP-45-373

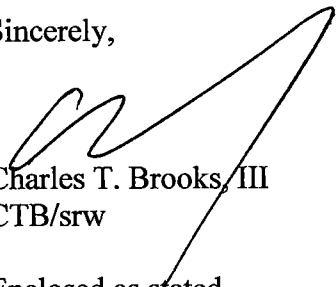
Dear Sir or Madam:

Enclosed herewith you will find the Notice of Appeal, Order of Dismissal, along with a Proof of Service in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,



Charles T. Brooks, III  
CTB/srw

Enclosed as stated

cc: Daniel Gourley, Office of Attorney's General  
South Carolina Office of Appellate Defense  
Andre Wallace, #346096

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY

Court of Common Pleas  
Honorable Steven H. John Circuit Court Judge

Case No: 2013-CP-45-373

**RECEIVED**

OCT 26 2015

Andre Wallace.....Appellant

S.C.D.C. 346096

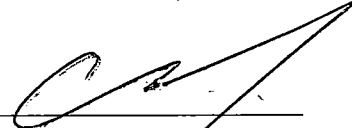
**S.C. SUPREME COURT**

v.

The State.....Respondent

NOTICE OF APPEAL

Andre Wallace, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable Steven H. John, August 4, 2015, which I, Charles T. Brooks, III, received on October 23, 2015.



Charles T. Brooks, III  
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Post Office Box 3512  
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(803) 418-5708  
Attorney for Appellant

Other Counsel on Record:  
Daniel Gourley, Esquire  
Assistant Attorney General  
Post Office Box 11549  
Columbia, SC 29211-1549  
(803) 734-3970

Dated: 10/23

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY

Court of Common Pleas  
Honorable Steven H. John Circuit Court Judge

Case No: 2013-CP-45-373

**RECEIVED**

OCT 26 2015

Andre Wallace.....Appellant

S.C.D.C. 346096

**S.C. SUPREME COURT**

v.

The State.....Respondent

**PROOF OF SERVICE**

I, the undersigned, do hereby certify that on this 23<sup>rd</sup> of October, 2015, I served the foregoing **Notice of Appeal, Order of Dismissal**, as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on October 23, 2015, addressed to the following as indicated below:


South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

South Carolina Office of Appellate Defense  
1330 Lady Street, Suite 401  
PO Box 11589  
Columbia, SC 29211-1589

Office of Attorney's General  
Attn: Daniel Gourley, Esquire  
Post Office Box 11549  
Columbia, South Carolina 29211-1549

Mr. Andre Wallace, 346096  
Lieber Correctional Institution  
PO Box 205  
Ridgeville, SC 29472

Dated: October 23, 2015

  
Charles T. Brooks, III  
Attorney for the Appellant  
309 Broad Street  
Sumter, South Carolina 29150  
(803) 418-5708

STATE OF SOUTH CAROLINA  
COUNTY OF WILLIAMSBURG

Andre Wallace #346096,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
FOR THE THIRD JUDICIAL CIRCUIT

2013-CP-45-373

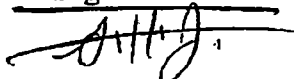
**ORDER OF DISMISSAL**

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This matter comes before the Court by way of a post-conviction relief (PCR) application filed on April 18, 2013. Respondent made its return on September 26, 2014. An evidentiary hearing into the matter was convened on July 14, 2015, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Charles Brooks, III, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

**PROCEDURAL HISTORY**

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 Williamsburg County Clerk of Court. Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. Applicant was true bill indicted at the May 2011 term of the Williamsburg County Grand Jury for Criminal Conspiracy, Burglary in the First Degree, Murder, and Possession of a Weapon during a violent crime. Jonathan M. Milling, Esquire, represented the Applicant. On September 11, 2012, Applicant pled guilty as indicted to Murder. The Honorable Clifton



Newman sentenced Applicant to a negotiated sentence of a thirty-five year term of imprisonment for Murder.<sup>1</sup>

### ALLEGATIONS

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

1. Ineffective Assistance of Counsel
2. Involuntary Guilty Plea
3. Due Process Violation
  - i. 6<sup>th</sup> and 14<sup>th</sup> amendments were violated.

### SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from Johnathan Milling, Esquire. (hereinafter "Plea Counsel"). This Court also had before it a copy of the plea transcript, the Williamsburg County Clerk of Court records, Applicant's South Carolina Department of Correction records, the PCR application, and return.

Applicant testified that Mr. Milling (Plea Counsel) was his appointed counsel. When testifying regarding his discussion with Plea Counsel, Applicant said "he told me I would get more time than I already had." Applicant testified that he met with Plea Counsel only two (2) times for about twenty (20) minutes a piece each time. When testifying about Plea Counsel, Applicant said that Plea Counsel never said they "couldn't bring up my previous charge[s] I was convicted of." Applicant also said he told Plea Counsel to file his appeal.

When asked about the contents of the discussion the Applicant and Plea Counsel had during their meetings, Applicant said of Plea Counsel "really only asked a couple of questions." However Applicant did agree that he and Plea Counsel reviewed possible defenses. Applicant

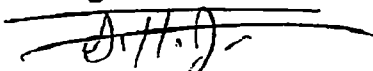
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<sup>1</sup> Applicant filed a Direct Appeal based on the results of his trial May 20, 2012, stemming from his Criminal Conspiracy, Burglary in First Degree, and Possession of a Weapon charges. Applicant has filed his Post-Conviction relief application (2013-CP-45-373) based solely on his guilty plea entered on September 11, 2012, to Murder.

said he accepted the plea deal to avoid the possibility of life in prison. When asked what specifically the Applicant wanted to appeal about his guilty plea, Applicant said that he wanted to appeal his guilty plea because he "already had three previous charges in appeal." When the question was rephrased, Applicant could not identify any specific part of the plea that he wanted to appeal. Applicant claimed that he pled guilty because he was afraid that if the jury knew about his previous convictions that they would convict him of another charge. Applicant said he was "scared they would tell me I was convicted."

Following both direct and cross examination, this Court asked if Applicant disputed any of the numerous details of the crime as relayed by the State at the time of the plea, the Applicant said he did not dispute the details. This Court and Applicant acknowledged that the Applicant did not dispute "word one" of the multiple page description.

Following Applicant's testimony, Plea Counsel was called to testify. Plea Counsel testified that this was a "retrial" and therefore it was a "unique situation." Plea Counsel testified that because this case had been heard one time that he had a lot of information; so much information that Plea Counsel testified he chose to hire an Investigator, Mr. Amos Jones, to help him go over what had already been presented in the first trial. Plea Counsel said that he did not recall specifically how many times he met with the Applicant. Plea Counsel reviewed the details of the case for the PCR Court by first saying that there were two females who were going to go into the victim's house. Plea Counsel continued by saying that he was not from Williamsburg County but that the victim's family (the Prosser Family) was known as a "well-to-do family" in the Williamsburg Community. Plea Counsel said that it was known that this family was wealthy and said that he believed the family owned a business. Plea Counsel said that it was the plan that after the two females were allowed into the victim's house, the males would go in and rob him.



Plea Counsel said he believed the two girls knew the victim and that he believed the victim was not as reputable as the rest of the family.

Plea Counsel said that afterward the Applicant acknowledged being with the girls the night of the murder and driving the girls around. However, Plea Counsel said that the Applicant denied going into the house. Plea Counsel said the females involved in the crime were sentenced the same day as Applicant was sentenced for the other charges but that the females negotiated a deal. Plea Counsel said that even though the previous convictions would not have been admissible in Applicant's new trial, the Applicant's statement would have been brought up in trial. Plea Counsel said that the previous trial had a hung jury of eleven jury members for the conviction of murder to one jury member against the conviction of murder. Plea Counsel said that there was a "substantial likelihood" that Applicant would have been convicted and received more time.

Plea Counsel said that he tried to dismiss the charge based on the destruction of evidence (destruction of tapes) and that he made arguments about the Applicant's due process being violated. However, Plea Counsel said he lost the Motion. Plea Counsel said that there "was a lot of evidence against [the Applicant]." Plea Counsel said that the plea deal was that the thirty-five year sentence for Murder would start at the same time as the recently reduced thirty-five year sentence for the other charges. Plea Counsel said that when they received that offer the Court recessed. Plea Counsel said the Applicant "slept on it" before choosing to take the deal. Plea Counsel said that Charles Barr had tried the case the first time and was possibly retained as counsel. Plea Counsel said that he (Plea counsel) and the Applicant "discussed everything" including the Applicant testifying and the evidence from the last trial, as they knew what witnesses were going to say. Plea Counsel said they had picked a jury and were in opening

statements when they received the plea offer. Plea Counsel said that this offer was the first plea deal for less than forty (40) years. Plea Counsel said that if the Applicant "would have told [him] at any time to file an appeal" that he would have; Plea Counsel reasoned that to file an appeal is a "simple form." Plea Counsel also said that he and the Applicant discussed the parolability of the charge.

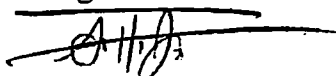
### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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).

### **INEFFECTIVE ASSISTANCE OF COUNSEL**

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, (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



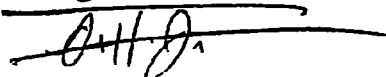
overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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 (1985).

### ALLEGATIONS

#### 1. Ineffective assistance of counsel for failing to investigate.

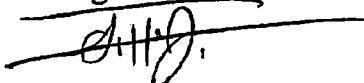
Applicant alleges that he received ineffective assistance of counsel due to plea counsel's failure to investigate and meet with him enough. This Court finds Applicant's allegation is meritless. The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). First, this Court finds credible Plea Counsel's testimony that he reviewed the evidence presented at the Applicant's first trial. Plea Counsel testified that he retained an investigator to sort out all of the evidence presented at his first trial. Plea Counsel stated that he filed a motion to dismiss the charges based off of the destruction of evidence. This Court notes Plea Counsel was able to recall the facts of the case with vivid detail. This Court finds the Applicant has failed to present



sufficient evidence to prove the first prong of the Strickland test – that Plea Counsel failed to render reasonably effective assistance under prevailing professional norms.

Furthermore, this Court notes Applicant did not offer any evidence or credible argument as to how Plea Counsel's alleged lack of preparation prejudiced him. See Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (noting mere speculation and conjecture on the part of respondent is insufficient to substantiate allegation that counsel's deficient performance was prejudicial to respondent).

Finally, this Court notes, Applicant had no objection to the recitation of facts outlining his involvement in the murder of the victim. (Pl. p. 8 line 16—p. 13 line 20). Furthermore, Applicant failed to present any evidence or credible argument regarding how the outcome of his plea would have been different had Plea Counsel spent more time with him. See Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (finding PCR judge erred in finding counsel ineffective in preparing respondent's case where respondent failed to show how his counsel's lack of preparation prejudiced him given respondent did not “present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial”); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (holding record did not support PCR judge's conclusion that counsel's deficient performance was prejudicial to respondent given respondent did not show how additional preparation would have resulted in a different outcome); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997) (finding applicant was not entitled to post-conviction relief where there was no evidence presented at the PCR hearing to show how additional preparation would have had any possible effect on the result of the trial). Based off of the foregoing, this Court finds Applicant has failed to present specific and compelling evidence that Plea Counsel



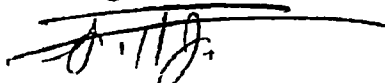
committed either errors or omissions to prove the second prong of Strickland – that he was prejudiced by Plea Counsel’s performance. This Court finds Applicant’s allegation should be denied and dismissed with prejudice.

**2. Ineffective assistance of counsel for failing to advise that his prior convictions would not be admissible at trial if he did not testify.**

This Court notes Applicant argues that Plea Counsel was ineffective in failing to advise him that his prior convictions were not admissible if he proceeded to trial and did not testify. This Court finds Applicant’s allegation is meritless. First, this Court finds credible, Plea Counsel’s testimony that he advised Applicant that his prior convictions were inadmissible. Plea Counsel further advised Applicant that his statement would have been admissible at trial. This Court notes Applicant had already proceeded to trial and was convicted guilty on all charges except for his murder charge. This Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that Plea Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, this Court finds Applicant has failed to present specific and compelling evidence that Plea Counsel committed either errors or omissions to prove the second prong of Strickland – that he was prejudiced by Plea Counsel’s performance. This Court finds Applicant’s allegation should be denied and dismissed with prejudice.

**3. Ineffective assistance of counsel for failing to file an appeal.**

This Court finds Applicant’s allegation that he received ineffective assistance of counsel for failing to file an appeal stemming from his guilty plea to be wholly meritless. The United States Supreme Court has rejected a “bright-line rule that counsel must always consult with the defendant regarding an appeal.” Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036,

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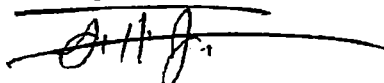
145 L. Ed. 2d 985 (2000). They instead held that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Id. "[A]lthough not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." Id.

This Court finds that this allegation is without merit and the Applicant has failed to carry his burden of proving trial counsel failed to file an appeal on his behalf. This Court finds credible Plea Counsel's testimony that Applicant never requested him to file an appeal. Plea Counsel testified that he would have filed a notice of appeal on Applicant's behalf if Applicant requested him to file one. This Court notes Applicant was advised of the ten day time period to file an appeal by the plea court. (Pl. p. 6 lines 11-14). This Court notes Applicant received a negotiated thirty five year sentence for murder. This Court finds that there is no evidence that a rational defendant would want to appeal or that the Applicant indicated he wanted to appeal.

#### **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 testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

#### **CONCLUSION**

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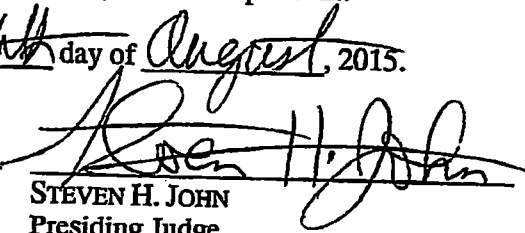
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

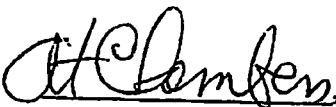
This Court notes that that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right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

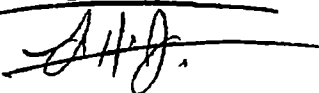
**IT IS THEREFORE ORDERED:**

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 4th day of August, 2015.

  
STEVEN H. JOHN  
Presiding Judge  
Third Judicial Circuit

 South Carolina



STATE OF SOUTH CAROLINA  
COUNTY OF WILLIAMSBURG  
IN THE COURT OF COMMON PLEAS

ANDRE WALLACE, #346096

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**CERTIFICATE OF SERVICE**

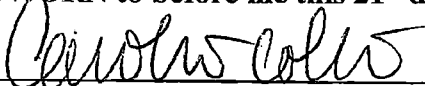
The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

**Charles Thomas Brooks, III, Esquire  
Law Office of Charles T. Brooks, III  
309 Broad St.  
Sumter, SC 29150**

This 21<sup>st</sup> day of October, 2015.

  
\_\_\_\_\_  
DANIEL GOURLEY  
Attorney for Respondent

**SWORN to before me this 21<sup>st</sup> day of October, 2015.**

  
\_\_\_\_\_  
Notary Public for South Carolina.

My Commission Expires: 5/20/2025