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JAN 08 2016

**SC SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM LANCASTER COUNTY  
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Civil Action Number: 2014-CP-29-1049

CHARLES HENRY DAVIS  
#299511,

Petitioner,

v.

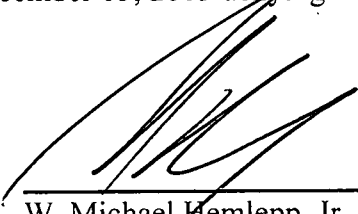
STATE OF SOUTH  
CAROLINA,

Respondent.

NOTICE OF APPEAL

The Petitioner above appeals the order of the Honorable DeAndrea G. Benjamin, dated November 30, 2015, received by me on December 15, 2015 denying his application for Post-Conviction Relief.

January 8, 2016



W. Michael Hemlepp, Jr.  
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Attorney for Appellant

Other Counsel of Record:  
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OFFICE OF THE ATTORNEY GENERAL  
1000 Assembly Street, Suite 518  
Columbia, South Carolina 29201  
803-734-1867

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM LANASTER COUNTY  
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

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Civil Action Number: 2014-CP-29-1049

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Charles Henry Davis,

Petitioner,

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 in the above captioned case on the following individuals by depositing a copy of it in the United States Mail, postage prepaid, on January 4, 2016, addressed to:

Jeff Hammond, Clerk of Court  
Lancaster County Court of Common Pleas  
1904 North Main Street  
Lancaster, South Carolina 29720

Croom Hunter, Esq.  
Office of the Attorney General  
1000 Assembly Street, Suite 518  
Columbia, South Carolina 29201

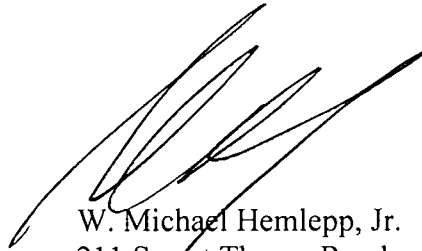
Charles Davis #299511  
4460 Broad River Road  
Columbia, SC 29210

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JAN 08 2016

SC SUPREME COURT

January 8, 2016

A handwritten signature in black ink, appearing to read 'W. Michael Hemlepp, Jr.', written over the printed name.

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Attorney for Appellant

STATE OF SOUTH CAROLINA )  
COUNTY OF LANCASTER )  
Charles H. Davis, #299511, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE SIXTH JUDICIAL CIRCUIT

Case No. 2014-CP-29-1049

**RECEIVED**  
JAN 08 2016  
SC SUPREME COURT

**ORDER OF DISMISSAL**

2015 JAN 30 PM 12:57  
CLERK OF COURT  
LANCASTER, SC

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on August 5, 2014. Respondent made its return on December 31, 2014. An evidentiary hearing into the matter was convened on February 3, 2015, at the Lancaster County Courthouse. Applicant was present at the hearing and was represented by W. Michael Hemlepp, Jr., Esquire. Respondent was represented by Assistant Attorney General J. Croom Hunter of the South Carolina Attorney General's Office.

**PROCEDURAL HISTORY**

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Lancaster County Clerk of Court's orders of commitment. Applicant was indicted at the February 2013 term of the Lancaster County Grand Jury for assault and battery of a high and aggravated nature (ABHAN) (2007-GS-29-0867) and burglary, first degree (2007-GS-29-0866). Applicant was represented by Mark Grier, Esquire.

On February 13, 2013, Applicant was tried and convicted in absentia. The Honorable Brooks P. Goldsmith sealed the sentencing sheets after sentencing Applicant to concurrent terms of ten (10) years imprisonment for ABHAN and twenty (20) years imprisonment for burglary.

Applicant was eventually apprehended, and the sentences were unsealed by the Honorable J. Ernest Kinard, Jr., on June 18, 2013. Judge Kinard reduced Applicant's sentence from twenty (20) years to fifteen (15) years imprisonment on the burglary charge.

Applicant filed a timely notice of appeal. Applicant was represented on appeal by Lara M. Caudy of the South Carolina Office of Appellate Defense, who filed an Anders brief on his behalf. The appeal was denied and dismissed. The Remittitur was sent on August 4, 2014.

### **ALLEGATIONS**

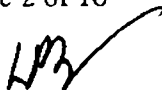
At the post-conviction relief hearing, Applicant proceeded to argue his confinement is unlawful based upon the following grounds:

1. Ineffective assistance of counsel.
  - a. Counsel was ineffective for failing to inform Applicant of the date of his trial.

### **SUMMARY OF TESTIMONY PRESENTED**

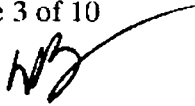
At the evidentiary hearing, Applicant testified on his own behalf. Respondent also presented testimony from trial counsel, Mark Grier, Esquire. This Court also had before it a copy of the trial transcript, the Lancaster County Clerk of Court's records, the Applicant's South Carolina Department of Corrections records, the PCR application, the appellate records, and the return.

During the evidentiary hearing, Applicant testified that he was represented at trial by Mark Grier (Counsel). Applicant testified Counsel represented him on these charges since 2007. Applicant testified he was unaware his case had been called for trial and did not become aware until the police arrested him at his job, after he had already been convicted in his absence. Applicant testified he had been working at a detail shop since his previous release from prison. Applicant testified after he was initially arrested on the current charges, it took him about a



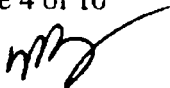
month to bond out. He testified he spoke with Counsel once or twice. Applicant testified he could not recall whether he and Counsel discussed any potential defenses, although he testified he did tell Counsel he was given a key to the residence by the victim. Applicant testified he is guilty of the ABHAN but not the burglary. Applicant testified Counsel also represented him on a failure to stop charge, to which he pled guilty and received eight and a half months in prison. Applicant testified that after he was sentenced on the failure to stop charge, the victim of the burglary, who was the mother of his child, told him the burglary and ABHAN charges had been dropped. Applicant testified he was not on the run when he was tried in absentia, but he thought the charges against him were no longer pending. Applicant testified he told Counsel how to get in touch with him after he was released from prison after serving time on his drug charges. Applicant testified Counsel sent letters to Applicant's sister's house, but he testified he did not notify Counsel when he moved to a different address on Santa Barbara Drive. Finally, Applicant testified he would have come to court and pled guilty to ABHAN but not burglary.

On cross-examination, Applicant testified Victim gave him a key to her home, and he had permission to be there. Applicant testified he did not know why Victim moved a stove against her door, blocking entry, but he had permission to enter the home. Applicant disputed testimony put forth at trial that he was supposed to call before coming over. Applicant testified he did not force the door open and disputed trial testimony that the door appeared to have been kicked in. Applicant testified he entered the home without any intention of harming the second victim who was laying on the couch, but "they fought." Upon further questioning, Applicant would not specify whether he attacked second victim, only saying "they fought." Applicant testified he only spoke with Counsel once or twice at roll call, and three or four other times. Applicant testified he did not speak with Counsel after 2007 because he thought the charges he is challenging in this



Application were disposed of as part of the disposition of his earlier charges. However, upon further questioning, Applicant admitted he did speak with Counsel after he was released from prison in 2012 regarding these charges that he was still facing. Applicant testified he only attempted to see Counsel one time after he was released from prison in 2012. Applicant testified he did not update his mailing address with Counsel when he moved to Santa Barbara Drive. Applicant once again testified he believed his charges were no longer pending; however, when questioned whether he attempted to recover his bond money, Applicant testified he did not know he could get that money back. Applicant further testified that he turned down a four (4) year plea offer, yet he still believed the State had dropped the charges against him. Applicant testified he thought the charges just went away. Applicant did acknowledge that Counsel was successful in having Applicant's sentence reduced from twenty (20) years to fifteen (15) years when Applicant was apprehended and the sentences were unsealed.

Following Applicant's testimony, Counsel testified. Counsel testified he has been practicing law since 1990. Counsel testified he was appointed to Applicant's case in 2007 because he had a contract with the Public Defender's Office. Counsel testified that although Applicant was arrested in 2007, and he was not tried until 2013, such a delay is not uncommon. Counsel testified Lancaster has an old docket. Counsel testified it is not uncommon for his clients to be transient or for their contact information to change. Counsel testified that as a public defender, he currently has 835 cases assigned, and some of those cases are ten or eleven years old. Counsel testified he represented Applicant for a number of years on these charges, along with other charges Applicant had pending. Counsel testified that in the time period from 2007, when Applicant was initially arrested on the instant charges, through 2013, when he was convicted in his absence, Counsel also represented Applicant on charges for distribution of crack

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cocaine, criminal domestic violence, firearm and cocaine charges, and a failure to stop. Counsel testified he could not definitively recall how many times he met with Applicant to discuss the instant charges, but he did not dispute Applicant's claim that it was only a handful of times. Counsel testified he filed the proper Brady and Rule 5 motions and had no trouble obtaining discovery. Counsel further testified he went over discovery with Applicant and discussed Applicant's potential defenses. Counsel testified Applicant was adamant he was innocent of the burglary because he had a key to the home however, Counsel testified Applicant admitted to him he was guilty of the ABHAN. Counsel testified he took a "wait and see" approach with Applicant's case. Counsel testified the State initially extended a plea offer of a cap of five (5) years in 2008. Counsel testified the State offered a second deal in 2012 of ten (10) years suspended upon the service of four (4) years in prison. Counsel testified he was certain he discussed the second offer with Applicant, but his notes did not reflect whether he discussed the first offer with Applicant. However, Counsel did testify it is his standard practice to convey all plea offers, and he had no reason to believe he did not convey the first offer to Applicant. Counsel testified he extended the offer of ten (10) years suspended to four (4) years in prison in October of 2012, when Applicant was in prison for failure to stop, to which he pled guilty. Counsel testified he had no documentation to prove the offer was conveyed, but he recalled the conversation because Applicant was a cooperative client, and he liked him. Counsel testified it is not always possible to make notes every time a plea offer is conveyed. Counsel testified Applicant understood he was facing significant prison time, but he did not want to plead guilty. Counsel testified he also represented Applicant on some unrelated drug charges, and Applicant was tried in his absence on those charges as well. Counsel testified he succeeded in having those charges dismissed on a directed verdict motion, even though Applicant failed to appear. Counsel

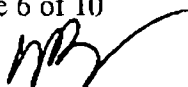


testified he is generally alerted by an assistant in his office that a case is being called, and he usually gets the trial list one (1) day before the ten (10) day notice period begins. Counsel testified his office sends out letters to affected clients once the office receives the trial list. Counsel testified that when the charges Applicant is currently challenging came up for trial, he sent letters to the address Applicant gave him, notifying him that his case was set for trial. Counsel testified he sent Applicant a letter on December 17, 2012, notifying him his drug case was on the trial list, and he sent Applicant another letter on January 4, 2013 requesting that he contact Counsel's office. Counsel testified he sent letters to Applicant on January 25, 2013 and February 11, 2013, stating this case was coming up for trial. Counsel testified he sent a separate letter on January 28, 2013, notifying Applicant his drug charges had been dismissed in his absence, but he still needed to contact Counsel regarding the instant charges. Counsel testified he moved for a continuance when Applicant did not appear on the date of his trial. Counsel testified he had ample time to prepare for trial and was ready to go forward and try Applicant's case, even though Applicant failed to appear. Finally, Counsel reiterated that he represented Applicant on two separate sets of charges where Applicant failed to appear for trial.

#### **INEFFECTIVE ASSISTANCE OF COUNSEL**

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. 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.

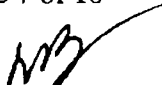
The proper measure of performance is whether the attorney provided representation



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, 466 U.S. 668. 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 plea 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.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).

This Court finds Applicant failed to demonstrate that Counsel's performance was deficient in any way. This Court further finds that Applicant presented no evidence to show any prejudice resulting from Counsel's representation. Additionally, this Court finds Counsel's testimony credible and Applicant's testimony not credible.

This Court finds Counsel met with Applicant an adequate number of times prior to trial. This Court further finds Counsel obtained discovery from the solicitor and went over it with Applicant. This Court further finds that Counsel thoroughly investigated and prepared Applicant's case. This Court finds Counsel conveyed the State's plea offers to Applicant, but Applicant elected not to take the deals. The evidence before this Court clearly indicates

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Applicant was intimately familiar with the criminal justice system, and for reasons known only to Applicant, he decided not to appear for trial, not once, but on two (2) separate occasions. This Court finds Counsel made multiple attempts to notify Applicant his case was set for trial. This Court notes it was not incumbent on Counsel to keep up with his client's whereabouts; rather, it was incumbent on Applicant to keep Counsel informed and apprised of up to date contact information. Applicant was not incarcerated in the months leading up to his trial, and all evidence indicates Applicant was living and working in Lancaster. Accordingly, this Court finds Applicant had ample opportunity to maintain communication with Counsel and stay apprised of his situation. This Court rejects Applicant's assertion that he believed the charges, to which he had rejected a plea offer of four (4) years in prison, had simply been dropped and finds such testimony to be not credible. Evidence before this Court indicates Applicant had no reasonable reason to believe his charges were no longer pending, and there is no evidence Counsel made any such representations. Additionally, this Court finds Applicant's conflicting testimony regarding the dates he spoke with Counsel about these charges further weakens Applicant's credibility. Applicant initially testified he had not spoken with Counsel since 2007; however, upon questioning by the State, Applicant indicated he was in contact with Counsel through 2012. As such, Applicant's argument that he was unaware of the pendency of the charges is further weakened. Furthermore, the fact that Applicant elected not to appear for two (2) separate trials further highlights Applicant's apparent indifference and failure to take the charges against him seriously. Accordingly, this Court finds Counsel took all reasonable steps to ensure Applicant was notified of his trial date, and any prejudice that resulted from Applicant's failure to appear for trial is the consequence of Applicant's behavior, not any alleged deficiency on the part of Counsel. Finally, this Court finds Counsel's representation of Applicant and handling of this case

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were well within the standards required for effective representation.

Accordingly, this Court finds Applicant did not demonstrate any deficiencies in Counsel's representation. This Court finds that because Counsel's representation was well within the range of competence required in criminal cases, Applicant has further failed to make any showing that but for Counsel's alleged deficiencies, the result of Applicant's case would have been any different.

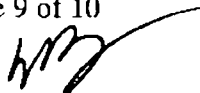
### **ALL OTHER ALLEGATIONS**

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, the Court finds Applicant failed to present sufficient evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

### **CONCLUSION**

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Trial counsel rendered effective assistance in regard to the claims raised by Applicant. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on 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 23 day of Nov, 2015.

  
\_\_\_\_\_  
THE HONORABLE DEANDREA G. BENJAMIN  
Presiding Judge  
Sixth Judicial Circuit

Columbia, South Carolina