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January 20, 2016

**RECEIVED**

JAN 25 2016

Daniel E. Shearouse  
Clerk of Court – SC Supreme Court  
Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

**S.C. SUPREME COURT**

Re: Termain Cooper #286396 v. State of South Carolina  
2014-CP-26-1893

Dear Mr. Shearouse:

Enclosed please find the original Notice of Appeal in the above-entitled action and one copy. Please file and return the copy to me in the self addressed stamped envelope enclosed.

If you should have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Daniel A. Selwa, II

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

JAN 25 2016

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

**S.C. SUPREME COURT**

Honorable Thomas A. Russo, Circuit Court Judge

Case No.: 2014-CP-26-1893

Termain Cooper #286396,..... Petitioner,

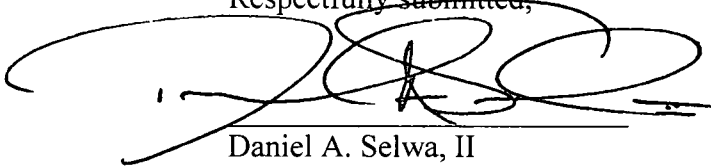
v.

State of South Carolina,..... Respondent.

**NOTICE OF APPEAL**

The Petitioner appeals the Honorable Thomas A. Russo, December 21, 2015, order, denying the Applicant's Petition for post-conviction relief. Undersigned counsel received notice of entry of the order on January 15, 2016. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Daniel A. Selwa, II  
1053 London Street, Suite A  
Myrtle Beach, SC 29577  
*Attorney for the PCR Applicant*

January 20, 2016

*Other counsel of record:*

Alan Wilson, Attorney General

Joshua L. Thomas, Assistant Attorney General

Post Office Box 11549

Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

JAN 25 2016

APPEAL FROM Horry COUNTY  
Honorable Thomas A. Russo, Circuit Court Judge

**S.C. SUPREME COURT**

Case No.: 2014-CP-26-1893

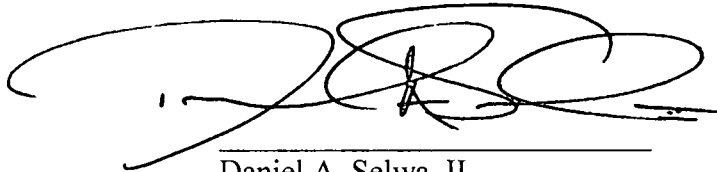
Termain Cooper #286396,..... Petitioner,

v.

State of South Carolina,..... Respondent.

**PROOF OF SERVICE**

I, Daniel A. Selwa, II, certify that I have served the within Notice of Appeal on the Respondent, the State of South Carolina, by depositing a copy of the same in the United States Mail, postage prepaid, addressed to his attorney of record, Alan Wilson, Attorney General, Post Office Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this 20th day of January, 2016.



Daniel A. Selwa, II  
1053 London Street, Suite A  
Myrtle Beach, SC 29577  
*Attorney for the PCR Applicant*

STATE OF SOUTH CAROLINA )  
 COUNTY OF HORRY )  
 Termain Cooper, #286396, )  
 Applicant, )  
 v. )  
 State of South Carolina, )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2014-CP-26-1893

**ORDER OF DISMISSAL**

HORRY COUNTY  
 2016 JAN -4 PM 2:29  
 MELANIE B. GIBBINS-THARRO  
 CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 27, 2014. Respondent made a timely Return on or about January 16, 2015. The Court convened an evidentiary hearing into the matter on November 9, 2015, at the Horry County Courthouse. Applicant was present at the hearing and represented by Daniel A. Selwa, II, Esquire. Jessica E. Kinard, Esquire of the South Carolina Attorney General's Office, represented Respondent.

Applicant and his trial counsel, Robert Paul Taylor, Esquire<sup>1</sup> testified at the hearing. Donna Elder, Esquire was originally subpoenaed for the hearing due to the allegations of potential prosecutorial misconduct; however, she was released from the subpoena due to a family emergency. The Court had before it a copy of the plea transcript, the records of the Horry County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In June 2008, the Horry County

<sup>1</sup> Applicant requested that the Court take judicial notice of Mr. Taylor's current suspension from the practice of law in the State of South Carolina. The Court takes note of this fact, yet finds it has no relevance to these proceedings.

copy

Grand Jury indicted Applicant for trafficking cocaine base, 10-28 grams (2008-GS-26-2197). R. Paul Taylor, Esquire represented Applicant. On March 9, 2010, Applicant proceeded to trial *in absentia* before the Honorable Edward B. Cottingham and a jury. The jury found Applicant guilty as indicted and Judge Cottingham issued a sealed sentence. On September 9, 2010, Applicant appeared before the Honorable Larry B. Hyman Jr., who unsealed and pronounced Judge Cottingham's thirty (30) year sentence.

Applicant filed a timely notice of appeal. Tristan M. Shaffer, Esquire and Wanda H. Carter, Esquire of the Office of Appellate Defense perfected the appeal with the filing of an Anders<sup>2</sup> brief. The South Carolina Court of Appeals dismissed Applicant's appeal on July 18, 2012. State v. Cooper, Op. No. 2012-UP-454 (S.C. Ct. App. filed July 18, 2012). The remittitur was returned to the circuit court on April 24, 2013.

## **II. ALLEGATIONS**

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

1. "Violation of Miranda rights by the 5<sup>th</sup> and 14<sup>th</sup> Amendments"
  - a. "Appellant's confession should've been suppressed because it was made while he was in custody and he was not Mirandized"
2. "Violation of 6<sup>th</sup> Amendment right to counsel"
  - a. "Appellant's constitutional right to an attorney of his choice was undisputably denied"
3. "Due process violation by the 5<sup>th</sup>, 6<sup>th</sup>, and 15<sup>th</sup> Amendments"
  - a. "Prosecution violated the Brady v. Maryland rule (5) disclosure"

At the evidentiary hearing, Applicant proceeded on the allegations of a sixth amendment violation because he was denied his right to choice of counsel, and that Mr. Taylor was ineffective.

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<sup>2</sup> Anders v. California, 386 U.S. 738 (1967).

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

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The 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.

#### **A. Ineffective Assistance of Plea Counsel**

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, Applicant must prove trial 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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures trial counsel's performance by its

“reasonableness under prevailing professional norms.” Id. (citing Strickland, 466 U.S. at 688). Second, counsel’s deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 117-18, 386 S.E.2d at 625.

The Court finds Applicant failed to meet his burden of proof to demonstrate trial counsel was ineffective in any manner. Mr. Taylor testified he met with Applicant multiple times, and at least once a week in the months leading up to trial. Additionally, Taylor had represented Applicant on multiple charges, so an existing relationship existed. He testified Applicant never appeared to have any difficulty understanding their conversations. Taylor testified that he had negotiated a lesser sentence if Applicant cooperated with investigations, but Applicant refused this deal. Taylor then negotiated an agreement for ten (10) years, which was offered to the Applicant at arraignment the week before trial was scheduled.

Taylor testified that Applicant was cooperative in preparing for trial until the weekend before trial was set to begin on Monday. The two met on Saturday to prepare, but Applicant did not arrive for their scheduled meeting on Sunday. Taylor was contacted by another attorney, Cezar McKnight, Esquire, on Sunday, and he notified Mr. McKnight that trial was scheduled for the next day. McKnight informed Taylor that he had been retained, but had an existing order of protection and was on his way out of the country. The transcript reflects that this specific issue was taken in front of Judge Larry B. Hyman, who ruled that the trial would go forward the next day, whether with Taylor, McKnight, or with the Applicant appearing *pro se*. At a hearing later that day, the Honorable Edward B. Cottingham was informed that the Applicant had not appeared as directed, and a bench warrant was issued. Judge Cottingham ordered Taylor to proceed as the Applicant’s attorney at trial, and that it would go forward the next day, with or

without the Applicant. Applicant did not appear for trial, and the Court proceeded with a trial *in absentia*.

The Court finds Applicant failed to demonstrate that trial counsel was deficient in any way. The Court finds very credible Taylor's testimony that he had been preparing for trial, continued to prepare for trial after Applicant attempted to relieve him, and even conducted a trial in absentia when Applicant failed to appear, thus satisfying his duty of representation to the Applicant. The Court also finds persuasive and credible Taylor's testimony that he met with Applicant multiple times, negotiated several plea offers, and prepared this case to the best of his ability. The Court also finds persuasive Applicant's testimony at the PCR hearing that he and Taylor had appropriate and adequate time to prepare for trial and that nothing was wrong with Taylor's representation<sup>3</sup>.

The Court further finds Applicant failed to demonstrate that he was prejudiced by Taylor's representation or, alternatively, by not having counsel of his choice. First, Applicant presented no evidence of Taylor representing him in a manner that was anything but professional and beneficial. Second, Applicant presented no evidence that another attorney would have performed any differently, especially considering his own lack of cooperation in the matter. Therefore, Applicant has not demonstrated that a different attorney would have changed the result of his proceedings.

#### **B. 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 any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any

such allegations.

#### **IV. 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. There is nothing in this record to show that trial counsel was anything but prepared, and this is particularly proven in the fact that he proceeded to trial without the Applicant. Everyone has the right to counsel, but not counsel of their choice; therefore, Applicant did not have the right to delay his trial by attempting to retain an attorney that was not ready to proceed at the time of trial. Nothing in the record indicates that the Applicant's fifth, sixth, or fourteenth amendment rights were violated. 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), SCRCR, 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.

**Signature follows.**

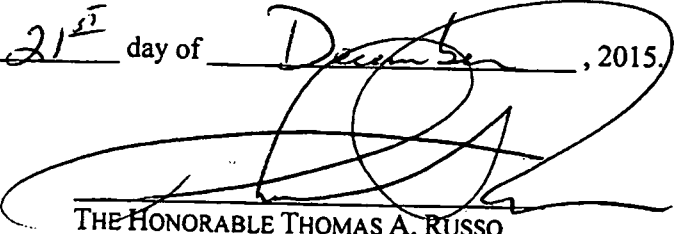
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<sup>3</sup> This is in contradiction to Applicant's testimony that he felt the outcome would have different if he had been represented by the attorney he attempted to retain because he was panicked and did not have faith in Taylor. Based

**IT IS THEREFORE ORDERED THAT:**

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 21<sup>st</sup> day of December, 2015.

  
THE HONORABLE THOMAS A. RUSSO  
Presiding Judge

Florence, South Carolina

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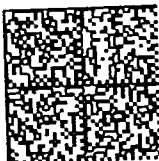
on the cumulative evidence presented, the Court finds more persuasive the testimony in Taylor's favor.



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