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ATTORNEY AT LAW

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February 15, 2016

**RECEIVED**

FEB 19 2016

**Via US Mail**

Daniel Shearouse  
Clerk of Court  
South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**S.C. SUPREME COURT**

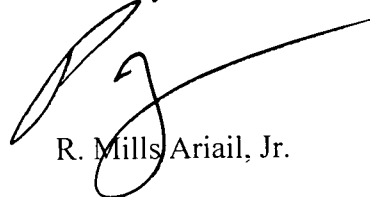
***Re: Notice of Intent to Appeal from Doyle Marion Garrett v. State of South  
Carolina C.A. No.: 2014-CP-23-7030***

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable Perry H. Gravely's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,  
LAW OFFICE OF R. MILLS ARIAIL, JR.  
Attorney at Law



R. Mills Ariail, Jr.

RMAjr/dl  
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No. 2014-CP-23-7030

**RECEIVED**

FEB 19 2016

**S.C. SUPREME COURT**

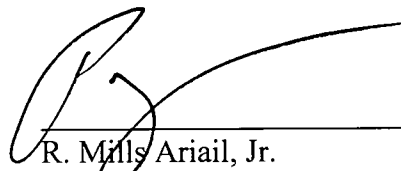
Doyle Garrett,..... Appellant,

v.

State of South Carolina ..... Respondent.

**NOTICE OF APPEAL**

Appellant appeals the Honorable Perry H. Gravely's Order of Dismissal dismissing Appellant's application for post-conviction relief. On January 29, 2016, the Honorable Perry H. Gravely signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on February 5, 2016. A copy of the Honorable Perry H. Gravely's Order of Dismissal is attached.



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Facsimile (864) 232-9392  
Attorney for Doyle Garrett

Greenville, South Carolina  
February 15, 2016

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

**RECEIVED**

FEB 19 2016

Perry H. Gravely, Circuit Court Judge

**S.C. SUPREME COURT**

Case No.2014-CP-23-7030

Doyle Garrett,..... Appellant,

v.

State of South Carolina ..... Respondent.

**CERTIFICATE OF SERVICE**

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this February 16, 2016, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

**Karen C. Ratigan, Esq.**  
**Assistant Attorney General**  
**PO Box 11549**  
**Columbia, SC 29211**  
**Attorney for the State of South Carolina**

**Greenville County Clerk's Office**  
**Greenville County Courthouse**  
**305 East North Street**  
**Greenville, SC 29601**

**Doyle Garrett SCDC# 131847**  
**Perry Correctional Institution**  
**430 Oaklawn Road**  
**Pelzer, SC 29669**

**SC Commission of Indigent Defense**  
**Division of Appellate Defense**  
**PO Box 11433**  
**Columbia, SC 29211-1433**

*Denise Tanner LaBeck*  
Denise Tanner LaBeck

February 16, 2016

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

JUDGMENT IN A CIVIL CASE  
CASE NO: 2014CP2307030

Doyle Marion Garrett vs. South Carolina State Of

ENTERED COMPUTER

FILED-CLERK OF COURT  
GREENVILLE, S.C.  
PAUL B. WICKENSIMER  
2016 APR 2 PM 2:15

**CHECK ONE:**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  
SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Rule 12(b), SCRPC;  Rule 41(a),  
 Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other: \_\_\_\_\_  
 Rule 40(j) SCRPC;  Bankruptcy;
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  
 Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order;  Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

**PRESIDING JUDGE - Perry H Gravely**

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

R. Mills Ariail Jr. 11 North Irvine Street, Suite 11  
Greenville, SC 29601

Karen Christine Ratigan PO Box 11549 Columbia,  
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court  
- Clerk of Court

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Doyle Marion Garrett, )  
 S.C.D.C. No. 131847, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2014-CP-23-7030

**ORDER OF DISMISSAL**  
**ENTERED COMPUTER**

FILED - CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSIMMER  
 2016 FEB 2 PM 2 15

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 22, 2014. The Respondent made its return on June 2, 2015. An evidentiary hearing was held on December 16, 2015 at the Greenville County Courthouse. The Applicant was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Brian T. Smith, Esquire. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application and amendment, the return, the appellate records, Applicant's Exhibit 1, and Respondent's Exhibit 1.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the December 2009 term of the Greenville County Grand Jury for resisting arrest (2008-GS-23-5728), grand larceny (2008-GS-23-5729), armed robbery (2008-GS-23-5730), assault and

*PWC*

battery of a high and aggravated nature (ABHAN) (2008-GS-23-5731), and kidnapping (2008-GS-23-5732). He was represented by Brian T. Smith, Esquire.

After the State called the case to trial, the Applicant was found guilty of all charges but kidnapping. On February 4, 2010, the Honorable Edward W. Miller sentenced the Applicant to concurrent terms of 1 year for resisting arrest, 10 years for grand larceny, life without parole for armed robbery, and 10 years for ABHAN.

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Garrett, Op. No. 2012-UP-330 (S.C. Ct. App. filed May 30, 2012). The South Carolina Supreme Court denied the Applicant's subsequent petition for writ of certiorari on January 8, 2014. The remittitur was sent on January 31, 2015.

### **ALLEGATIONS**

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:<sup>1</sup>

1. Ineffective assistance of counsel.
2. Judicial misconduct/vindictiveness.
3. Miranda/self-incrimination.

### **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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

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<sup>1</sup> PCR counsel filed a pro se amendment on the Applicant's behalf on December 9, 2015.

*PKK*

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

### Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated his Miranda<sup>2</sup> warnings were improper. The Applicant stated he disagreed with the trial judge’s finding that his statements were voluntary. The Applicant stated trial counsel should not have advised him to avoid telling the jury about his prior arrest by Investigator Harris. The Applicant stated Nancy Weston recanted her testimony at trial and that trial counsel should have obtained a statement from her. The Applicant stated trial counsel should not have allowed a 27-year old offense to be used against him at trial. The Applicant

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

*PNK*

stated trial counsel should have objected during the assistant solicitor's closing statement when she implied Fred Walker had a criminal record.

Trial counsel testified he had meetings with the Applicant at the detention center and they reviewed the elements and sentence ranges for the charges and that the State could opt to serve notice of intent to seek life imprisonment without parole. Trial counsel testified he filed discovery motions and that he received these materials and reviewed them with the Applicant. Trial counsel testified they discussed the Applicant's version of events. Trial counsel testified they also discussed the Applicant's contention that there was a witness named "City" but noted his investigator (Silvaggio) could not find this individual. Trial counsel testified his trial strategy was to attack the State's case and witnesses' credibility and to make arguments about the burden of proof. Trial counsel confirmed he told the Applicant not to mention his prior encounter with Investigator Harris during his testimony because he wanted to minimize a risk to the Applicant's credibility. Trial counsel confirmed Nancy Weston was a defense witness and noted he called Silvaggio in order to refute some of her testimony. Trial counsel testified he had the Applicant's prior criminal record and stated he had offenses from 1990 and 1999. Trial counsel testified there was nothing objectionable in the assistant solicitor's closing argument and noted he was careful to avoid making too many objections during closing argument.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly handle the issue regarding the voluntariness of his statements. This Court has examined the trial transcript and notes a through Jackson v. Denno<sup>3</sup> hearing was held prior to the Applicant's trial, at the conclusion of which the trial judge denied trial counsel's motion to suppress statements the Applicant made to Investigator Harris and Investigator Owens. (Trial

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<sup>3</sup> 378 U.S. 368, 84 S. Ct. 1774 (1964).

transcript, pp.39-50). While the Applicant disagrees with the trial judge's ruling, he has failed to articulate another argument trial counsel could have made that may have yielded a different result. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). This Court finds the Applicant has failed to prove either error or resulting prejudice.

This Court finds the Applicant failed to meet his burden of proving trial counsel erred in advising him not to mention his prior history with Investigator Harris. The Applicant argued trial counsel should not have told him to avoid testifying about his involvement with Investigator Harris in a prior arrest. Trial counsel confirmed this, stating this type of testimony could damage the Applicant's credibility. This Court agrees and finds trial counsel was not deficient in providing this advice and that the Applicant has failed to prove either error or resulting prejudice.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly handle Nancy Weston's testimony. The Applicant argued Weston changed her testimony at trial. Trial counsel testified he called Silvaggio, his investigator, as a witness in order to rebut some of Weston's testimony. This Court finds there was no error in trial counsel not procuring a statement or affidavit from Weston prior to trial – especially since Weston was a defense witness. Trial counsel called Weston as witness and then acted to mitigate some potential harmful testimony by calling Silvaggio to the witness stand. The Applicant has failed to demonstrate that impeachment with a prior statement would have had a more beneficial effect on his case than Silvaggio's testimony. This Court finds the Applicant has failed to prove either error or resulting prejudice.

This Court finds the Applicant failed to meet his burden of proving trial counsel should

have objected to the State impeaching him with his prior armed robbery conviction. This Court has examined the trial record and finds there was a lengthy discussion between the parties about which of the Applicant's prior convictions could be used for impeachment. (Trial transcript, pp.147-52). The trial judge determined the Applicant could be impeached with a prior armed robbery conviction because he finished serving the sentence in 2002 (and this trial was in 2010). (Trial transcript, pp.149-50). The trial judge then advised the parties they could not mention it was an armed robbery, only that it was a felony conviction. (Trial transcript, p.151). The assistant solicitor referred to this as a felony conviction during her cross-examination of the Applicant. (Trial transcript, p.274). This Court finds the Applicant failed to prove trial counsel was deficient because he failed to provide any documentation to support his claim that this conviction was improperly used for impeachment purposes. Regardless, even assuming arguendo there was error, this Court finds the Applicant failed to demonstrate prejudice because the State presented overwhelming evidence of the Applicant's guilt. See Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009) (holding no prejudice occurs, even if trial counsel was deficient, where there is otherwise overwhelming evidence of the defendant's guilt).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to comments about Walker during the assistant solicitor's closing argument. This Court has examined the trial transcript and finds there was no basis to object to the assistant solicitor's comments. (Trial transcript, p.306). "A solicitor's closing argument is not evidence." State v. Charping, 333 S.C. 124, 133 n. 7, 508 S.E.2d 851, 856 n. 7 (1998). A solicitor is allowed to state her version of the testimony and to comment on the weight to be given to such testimony. State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999). This Court finds the Applicant has failed to prove either error or resulting prejudice. See United States v. Mullins,

446 F.3d 750, 758 (8th Cir. 2006) (holding a fleeting comment that passed without objection during the rough-and-tumble of closing argument in the trial court should not be unduly magnified when the printed transcript is subjected to painstaking review in the reflective quiet of an appellate judge's chambers).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### Vindictive Prosecution

The Applicant argued the assistant solicitor reiterated an issue about pills and that this was vindictive prosecution.<sup>4</sup> To establish vindictive prosecution a defendant must prove “that (1) the prosecutor acted with genuine animus toward the defendant and (2) the defendant would not have been prosecuted but for that animus.” United States v. Wilson, 262 F.3d 305, 314 (4th Cir. 2001). This Court finds the Applicant has failed to meet his burden of proving the existence of vindictive prosecution in his case.

#### 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

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<sup>4</sup> The Applicant originally phrased this issue as judicial conduct or vindictiveness.

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

**CONCLUSION**

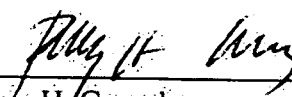
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 29<sup>th</sup> day of January, 2016.

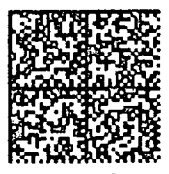
  
\_\_\_\_\_  
Perry H. Gravely  
Presiding Judge  
Thirteenth Judicial Circuit

Greenville, South Carolina.

R. MILLS ARIAIL, JR.

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