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Real Estate • Wills/Estate Planning • Family Law • Business Formation • Adoption • Plaintiff Foreclosure • Plaintiff Action to Quiet Title

June 29, 2015

FORM 8
LETTER TO THE APPELLATE COURT CLERK
FILING THE NOTICE OF APPEAL

Notice of Appeals
Loraine French
PO Box 11589
Columbia, South Carolina 29201-1589

The Honorable Edgar W. Dickson
Supreme Court for South Carolina
Supreme Court Building
P.O. Box 11330
Columbia, SC 29211

Re: William Cannon Gresham vs. State of South Carolina
Case Number 2012-CP-37-915

Dear Mrs. French:

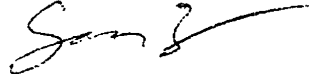
Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. Proof of service of the notice of appeal on the respondent.
2. A Copy of the order which is to be challenged on the appeal.

Tjay M. Bagwil, Contact Information
Phone: 864-71860777 • Fax: 864-718-0776
Email: tjay@bagwellcorley.com
Address: 603 W. Main Street, Walhalla, SC 29691

3. Under Rule 203(d)(2)(B)(iii), SCACR, a filing fee is not required if the appeal is from a criminal case including juvenile delinquency matters, or if the appeal is taken by the state of South Carolina, its departments or agencies. Further, no filing fees are required in post-conviction relief cases. Rule 240(d), ACACR
4. This appeal is being filed with the Supreme Court because this is an appeal of an order (judgment) of a Post-Conviction Relief case, which is to be appealed directly to the Supreme Court of South Carolina.

Sincerely,



Tjay M. Bagwell, Attorney at Law

cc: William Cannon Gresham

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2012-CP-37-915

William Cannon Gresham,

Appellant,

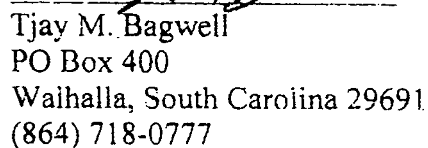
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

William Cannon Gresham appeals the Order of Dismissal of the Honorable Edgar W. Dickson dated June 5, 2015. Appellant received written notice of entry of this order on June 15, 2015.

Date: June 17, 2015



Tjay M. Bagwell
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Other Counsel of Record:
J. Walt Whitmire
Assistant Attorney General
PO Box 11549
Columbia, SC 29211-1549
Attorney for Respondent
(803) 734-3970

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
P 1: 38

FORM 7
PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
[In The Supreme Court]

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2012-CP-37-915

William Cannon Gresham, #349177 — Appellant,

v.

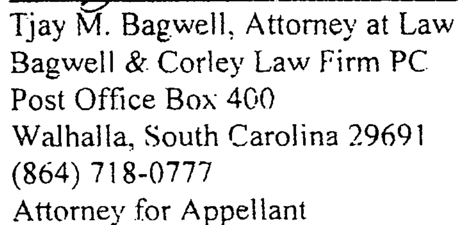
STATE OF SOUTH CAROLINA — Respondent,

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on, South Carolina Assistant Attorney General, by depositing a copy of it in the United States Mail, postage prepaid, on June 29, 2015, addressed as follows:

P.O. Box 11549
Columbia, S.C. 29211

June 29 2015



Tjay M. Bagwell, Attorney at Law
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Post Office Box 400
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(864) 718-0777
Attorney for Appellant

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE	) TENTH JUDICIAL CIRCUIT
William Cannon Gresham, S.C.D.C. No. 349177, Applicant, v. State of South Carolina, Respondent.	) **C.A. No. 2012-CP-37-915** **ORDER OF DISMISSAL**

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2015 [illegible] 15 A 10:51

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed October 16, 2012. Respondent subsequently filed its responsive pleadings. An evidentiary hearing into the matter was convened on July 28, 2014 at the Oconee County Courthouse. Applicant was present and was represented by Tjay Bagwell, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Oconee County. Applicant was indicted at the August 2010 term of the Court of General Sessions for Oconee County on two counts of murder (2010-GS-37-755; -756), two counts of kidnapping (2010-GS-37-757; -758), assault and battery with intent to Kill (ABWIK) (2010-GS-37-760), possession of a weapon during a violent offense (2010-GS-37-761) and grand larceny, < $5,000 (2010-GS-37-762). He was represented by Wilson Burr, Esq.

On March 31, 2011, Applicant entered a guilty plea, as indicted, pursuant to the written plea agreement with State; the Honorable R. Lawton McIntosh accepted the plea. Applicant did not appeal his sentence or conviction.

On January 6, 2012, the State called Applicant's case for a sentencing hearing. The Honorable G. Edward Welmaker sentenced Applicant to two terms of life imprisonment for murder, two terms of thirty (30) years imprisonment for kidnapping, a term of thirty (30) years imprisonment for burglary, a term of twenty (20) years imprisonment for ABWIK, and a term of ten (10) years imprisonment for grand larceny. Applicant did not appeal his sentences or convictions.

At the PCR hearing, Applicant proceeded on the limited allegations of ineffective assistance of counsel in his assertion that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
   a. failure to provide physical copies of discovery materials to Applicant;
   b. failure to apprise and discuss the co-defendant's statements with Applicant;
   c. failure to investigate and pursue a duress defense theory of the case;
   d. failure to submit Applicant for a competency evaluation;
   e. failure to object to the solicitor's purported violation of the plea agreement to make a recommendation to the mandatory minimum term of imprisonment for murder.

Summary of Evidence and Testimony presented at the PCR Hearing

At the PCR hearing, Applicant testified in support of his Application. He testified that counsel never provided him with copies of his co-defendant's statements. He testified that counsel did not discuss the State's evidence with him during their consultations. Applicant

testified that he requested copies of the State's discovery disclosures from his attorney during the pendency of his case but was denied by counsel. Since entering the Dept. of Corrections, Applicant testified that he discovered purportedly critical evidence that would have altered his decision to plead guilty. He further explained that the co-defendant admitted to striking the ultimate blows that caused the deaths of both deceased victims. Applicant partially protested his admissions of guilt for murder by claiming he was still guilty, but less culpable. Applicant testified that he told his attorney his version of the facts: that co-defendant threatened to kill him if he did not strike one of the victims in the head with a hammer. Applicant also testified that counsel should have further investigated his competency.

Applicant testified he pled guilty in part to avoid the death penalty; and in part because the Solicitor promised to recommend a circuit court judge sentence him to the mandatory minimum sentences of thirty (30) years on the murder charges. He recalled the plea and sentencing hearings but testified that he did not remember if either Judge McIntosh or Judge Welmaker apprised him that he faced LWOP on the murder charges.

Counsel testified to his course of conduct during the representation. He provided the Court a brief summary of his extensive experience as a criminal defense attorney. Counsel explained that Applicant had provided the police three detailed confessions. Counsel opined that Applicant solicited the interviews with police. At the outset of the representation, counsel almost immediately received the first of many discovery disclosures from the State. He met with Applicant numerous times before the sentencing hearing. Counsel did not provide Applicant physical copies of discovery materials. He noted that his course of conduct here is the same in all of his cases when the client is confined in pre-trial detention. He explained that risk of "snitches" obtaining the discovery far outweighs the benefits of client having the physical copy. However,

counsel was adamant that he evaluated and then reviewed all of the State's evidence, including the autopsy reports, with Applicant.

Counsel testified that a defense theory of duress was not viable to Applicant's case. He noted that Applicant's confessions alone negated this defense theory. Also, counsel explained that Applicant demonstrated significant remorse during the representation. Counsel explained that Applicant's remorseful posture remained even after the co-defendant's plea. Counsel retained one of the premier forensic mental health experts for Applicant's case. Ultimately, counsel utilized all of Dr. Schwartz-Watts' favorable findings concerning Applicant's minor psychological deficits in his mitigation case at the sentencing hearing. Counsel had Dr. Schwartz-Watts evaluate Applicant on criminal responsibility and capacity; he noted that Applicant never demonstrated any indicators that he was incompetent during the representation or during the commission of the offense.

Counsel testified that he conveyed the plea offer to Applicant and reviewed the written agreement with him. Counsel was adamant that the State's only promise to Applicant was taking the death penalty off of the table. Upon Applicant's cross-examination, counsel reiterated that the State made no sentencing promises beyond the written agreement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject's convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents, including Court's Exhibit 1, the written plea agreement from the General Sessions Records, and legal arguments of counsel.

Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds that Applicant was not deprived of effective assistance of counsel. Defense counsel's pre-trial investigation and discussions with Applicant were reasonable in the circumstances, and did not fall below professional norms. This Court finds that counsel competently advised Applicant of the charges and possible sentences. This Court finds that counsel's performance did not fall below professional standards of reasonableness. This Court finds that there is no evidence that counsel was ineffective. This Court finds that there is no evidence on the record to indicate Applicant was promised a sentence of 30 years. The Court finds defense counsel's testimony regarding communications with Applicant credible, and does not find Applicant's testimony credible. Therefore, the court is denying the application

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their 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 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 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. at 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, *supra*. 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.

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. Kolle v. State, 386 S.C. 578, 588, 690 S.E.2d 73, 78 (2010).

A.

Applicant failed to meet his burden to prove that counsel's performance was either deficient or ineffective for failing to purportedly apprise Applicant of the co-defendant's statements. "From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Strickland, 466 U.S. at 688 (1984). "There is no claim of deficient consultation without a showing of prejudice from the deficiency." U.S. v. Mealy, 851 F.2d 890, 908 (7th Cir. 1988).

This Court finds counsel's rationale to safeguard Applicant's discovery materials from the prying eyes of opportunistic inmates in county detention to be a valid reason not to leave copies of the State's discovery with Applicant. See Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel). Furthermore, this Court is convinced that counsel discussed all of the State's evidence and the statements with Applicant during their consultations. Counsel's convincing testimony on the matter was supported by his experience and by the significant attention he paid to this case. In comparison, Applicant's contrary representations were incredible. This Court finds it significant that Applicant suffered "convenient amnesia" when questioned on matters harmful to his allegations. Therefore, this allegation is denied and dismissed with prejudice.

Similarly, Applicant fell well short to meet his burden to prove counsel's performance was either deficient or ineffective for failing to pursue a defense theory of duress. "Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). In State v. Robinson, 294 S.C. 120, 363 S.E.2d 104 (1987), the South Carolina Supreme Court explained the defense of coercion:

> To excuse a criminal act, the degree of coercion must be present, imminent, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. Coercion is no defense if there is any reasonable way, other than committing the crime, to escape the threat of harm. The fear of injury must be reasonable.

Id. at 121–22, 363 S.E.2d at 104 (citations omitted). "Coercion and duress envision a third person compelling another by threat of immediate physical violence to commit a crime against

someone else or someone else's property." State v. Crawford, 362 S.C. 627, 646, 608 S.E.2d 886, 896 (S.C. Ct. App. 2005). This Court finds counsel's testimony on the matter credible. Counsel testified that a defense theory of duress was not viable in Applicant's case because he had at one time during the murders separated from the co-defendant. Furthermore, the Record shows that he also had numerous other instances to reasonably disengage from the brutal murders. See Gumangan v.U.S., 254 F.3d 701, 705 (8th Cir. 2001) (defense of coercion by co-defendant was unlikely to succeed at trial). Regardless, a defense theory of duress was not possible as a matter of law. See State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (holding duress is not a defense to murder). Applicant wholly failed to produce any competent evidence or testimony that showed counsel's rationale here was defective. Counsel has dual investigative responsibilities to investigate possible defenses and then to select the most appropriate one. Mickey v.Ayers, 606 F.3d 1223, 1236-37 (9th Cir. 2010). Therefore, this allegation is readily denied and dismissed with prejudice.

Applicant failed to meet his burden to prove that counsel's performance in failing to submit him for a competency evaluation was either deficient or ineffective. Counsel's testimony was convincing on the matter; furthermore, counsel's impressions of Applicant's competency were also shared by Dr. Schwartz-Watts. Regardless, Applicant has presented no credible evidence or testimony to undercut counsel's sound performance here. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (applicant's allegations, alone, will not support a finding of prejudice when applicant claims counsel was ineffective for failing to investigate witnesses; instead, applicant must show the results of an investigation would have resulted in a different outcome at trial). Therefore, this allegation is denied and dismissed with prejudice.

B.

Applicant has failed to meet his burden to prove his guilty plea was rendered involuntary by counsel's performance on failing to ensure the Solicitor honored a purported promise to recommend the mandatory minimum on the murder charges. "When a defendant agrees to [a] plea bargain, the Government takes on certain obligations. If those obligations are not met, the defendant is entitled to seek a remedy which might in some cases be rescission of the agreement, allowing him to take back the consideration he has furnished, i.e., to withdraw his plea." Puckett v. United States, 556 U.S. 129 (2009). This Court finds that the allegation's underlying assertion is incredible. This Court finds Applicant's testimony on the matter to be not credible and facially dubious. The Court finds counsel's testimony that the Solicitor did not depart from the executed plea agreement to be dispositive. Missouri v. Frye, 132 S. Ct. 1399, 1408-09, 182 L. Ed. 2d 379 (2012) (emphasis added) ("The prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims").

Alternatively, Applicant has provided this Court no competent reason why he should be able to depart from the assurances and statements that he made to Judge McIntosh and to Judge Welmaker. See Wyatt v. U.S., 574 F.3d 455 (7th Cir. 2009) (transcript shows he said decision to plead was not tied to any particular sentence and sentence possibilities were explained). Therefore, this allegation is denied and dismissed with prejudice.

C.

Except as discussed above, this Court finds that the Applicant affirmatively abandoned the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the

doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these 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.

CONCLUSION

Based on all the forgoing, 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 for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

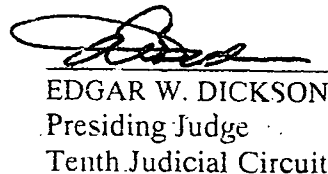
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

1. That the Application for Post-Conviction Relief be, and hereby is, denied and dismissed with prejudice; and

2. Applicant be, and hereby is, remanded to the custody of Respondent

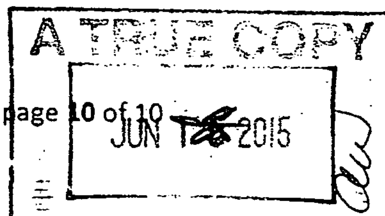
AND IT IS SO ORDERED this 5th day of June, 2015.



EDGAR W. DICKSON
Presiding Judge
Tenth Judicial Circuit

Orangeburg, South Carolina

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2015 JUN 15 A 10 51



STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

William Cannon Gresham,
Plaintiff(s),
-vs-
State of South Carolina,
Defendant(s).

IN THE COURT OF (*Select one.*)
☒ COMMON PLEAS ☐ FAMILY COURT
TENTH JUDICIAL CIRCUIT
CASE NO.: 2012CP3700915
APPOINTMENT OF COUNSEL OR GAL
(*Select one.*)
☒ ORDER
☐ AMENDED ORDER

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 NOV -1 P 3:23

TYPE OF CASE/PROCEEDING: (*Check one.*)

☒ Post-Conviction Relief (PCR)/habeas case ☐ Adoption ☐ Juvenile
☐ SVP case ☐ Custody and/or Visitation ☐ Abuse and Neglect
☐ Minor Name Change ☐ Other:

It appears that **William Cannon Gresham**, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (*Select only one.*)

☒ counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.

☐ counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on: _____

☐ counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.

☐ court appointed counsel has obtained , Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.

☐ Other:

☒ counsel ☐ lead counsel (*if capital PCR case*) ☐ guardian ad litem

Therefore, it is ordered that **Tjay Bagwell, P.O. Box 238, Walhalla, S.C. 29691 phone 864-638-5134,** hereby is appointed as (*Select one.*)
for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

☐ (*If Death Penalty PCR Case*) It is further ordered that , Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED THIS 1 DAY OF November, 2012.

Beverly H. Whitfield

☐ Circuit Judge ☒ Clerk of Court

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.