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September 24, 2012

The Honorable Daniel E. Sherouse  
Clerk of Court  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

Re: **Jonathan Byers #324474 v. State of South Carolina**  
C.A. No.: 2011-CP-11-0147

Dear Mr. Sherouse:

Enclosed for filing are the original and two (2) copies of the Notice of Appeal in a Civil Case in the above-referenced matter. Please return clocked copies to me in the enclosed self-addressed envelope.

With kind regards, I am

**RECEIVED**

OCT 01 2012

Yours truly,

S.C. SUPREME COURT



Alexander P. Lewis

APL/crs  
Enclosures

cc: Jonathan Byers #324474

**NOTICE OF APPEAL IN A CIVIL CASE**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM CHEROKEE COUNTY  
Court of Common Pleas

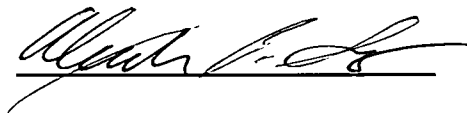
Case No. 2011-CP-11-0147

State of South Carolina .....Respondent,  
Jonathan Byers #324474 .....Appellant.

Jonathan Byers #324474 appeals the order of the Honorable Roger L. Couch dated August 9, 2012. Appellant received written notice of entry of this order on August 16, 2012.

Additionally, Jonathon Byers #324474 appeals the order filed on September 21, 2012 denying Application's Motion to Reconsider.

September 24, 2012



Max T. Hyde, Jr.  
Alexander P. Lewis  
517 E. St. John Street  
Spartanburg, South Carolina 29302  
(864) 804-6330  
Attorneys for Appellant

Other Counsel of Record:  
  
Suzanne H. White  
Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211-1549

**RECEIVED**  
OCT 01 2012  
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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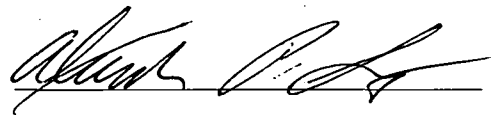
State of South Carolina, .....Respondent,  
vs.  
Jonathan Byers #324474 .....Appellant.

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PROOF OF SERVICE

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I certify that I have served the Notice of Appeal of Jonathan Byers #324474 by depositing a copy of it in the United States Mail, postage prepaid, on September 24, 2012 addressed to the Office of the Attorney General, Suzanne H. White, P. O. Box 11549, Columbia, South Carolina 29211.



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Attorneys for Appellant

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

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2012 SEP 21 PM 1 17

**JUDGMENT IN A CIVIL CASE**  
**CASE NO: 2011CP1100147**

**BRANDY W. MCBEE**  
**Jonathon Byers #324474 vs. State Of South Carolina**

**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):**
  - Rule 12(b), SCRPC;
  - Rule 41(a), SCRPC (Vol. Nonsuit);
  - Rule 43(k), SCRPC (Settled);
  - Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**
  - Rule 40(j) SCRPC;
  - Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
  - Other: \_\_\_\_\_
- 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:

**Order**

Dated at Gaffney, South Carolina, this the 21st day of September, 2012.

Court Reporter:

s/ Roger L. Couch

**PRESIDING JUDGE - Roger L. Couch**

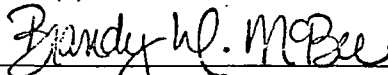
This judgment was entered on the the 21st day of September, 2012, and a copy mailed first class this the 21st day of September, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

**Max Thomas Hyde Jr.** 517 E. Saint John St.  
Spartanburg, SC 29302

**Office of Attorney General,** PO Box 11549  
Columbia, SC 29211

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**ATTORNEY(S) FOR THE DEFENDANT(S)**



Brandy W. McBee - Clerk of Court

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHEROKEE )  
 )  
 Jonathan Byers, #324474, )  
 )  
 Applicant, )  
 )  
 vs. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 SEVENTH JUDICIAL CIRCUIT

2011-CP-11-0147

**ORDER**

BRANDY W. MCREE

2012 SEP 21 AM 10 29

FILED IN OFFICE OF  
 CLERK OF COURT  
 CHEROKEE COUNTY, S.C.

This matter comes before the Court by way of Applicant's Motion to Reconsider. The Respondent made its Return to this response on September 13, 2012.

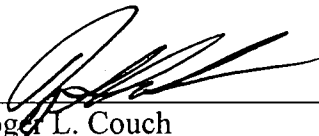
The Order of Dismissal in this matter was signed by me on August 1, 2012. This Court finds that as it relates to all issues, other than the claim that Counsel was ineffective for failing to properly address Applicant's desire for either a new attorney or to represent himself at trial, this Order contains the required findings of facts and conclusions of law as required by S.C. Code Ann. §17-27-80 (1976), and Rule 52(a) SCRPC. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991).

**As to the Applicant's allegation that Counsel was ineffective for failing to properly address the Applicant's attempts to relieve him as Counsel and either obtain new counsel or represent himself, this Court finds that the Order should be amended to reflect that the Court finds the Applicant's testimony and allegation to lack credibility, and as such, finds that the claim lacked merit and is therefore denied and dismissed.**

Based upon careful reconsideration of all the evidence in this case and upon full consideration of Applicant's Motion, this Court is not persuaded to alter or amend the judgment as it relates to any other allegation or issue. This Court further finds that oral argument would

not aid in the reconsideration of the original judgment. Therefore, this Court finds that the Order of Dismissal, which was served on August 14, 2012, shall only be amended by this Order to reflect the dismissal of Applicant's allegation regarding Counsel's ineffectiveness for failing to address Applicant's desire for new counsel or to proceed pro se. This Order shall be incorporated as part of the Order of Dismissal in this matter.

AND IT IS SO ORDERED this 18<sup>th</sup> day of September, 2012.

  
\_\_\_\_\_  
Roger L. Couch  
Presiding Judge  
Seventh Judicial Circuit

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

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.

**JUDGMENT IN A CIVIL CASE**  
CASE NO: 2011CP1100147

2012 AUG 14 AM 10 13  
**Jonathon Byers #324474 vs. State Of South Carolina**  
BRANDY W. MCBEE

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);  Other: \_\_\_\_\_  
 Rule 12(b), SCRPC;  Rule 41(a),
- 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:

**Order of Dismissal**

Dated at Gaffney, South Carolina, this the 9th day of August, 2012.

Court Reporter: \_\_\_\_\_ s/ Roger L. Couch  
**PRESIDING JUDGE - Roger L. Couch**

This judgment was entered on the 1st day of August, 2012, and a copy mailed first class this the 14th day of August, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

**Max Thomas Hyde Jr.** 517 E. Saint John St.  
Spartanburg, SC 29302  
\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

**Office of Attorney General,** PO Box 11549  
Columbia, SC 29211  
\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)  
*Brandy W. McBee*  
\_\_\_\_\_  
Brandy W. McBee - Clerk of Court

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF CHEROKEE ) SEVENTH JUDICIAL CIRCUIT  
FILED IN OFFICE OF  
CLERK OF COURT

Jonathan Byers, #324474,

2011-CP-11-0147

CHEROKEE COUNTY, S.C.

2012 AUG 9 PM 3 37

Applicant,  
BRANDY W. MCBEE

v.

**ORDER OF DISMISSAL**

State of South Carolina,

Respondent.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 7, 2011. The Respondent made its Return on or about February 15, 2012. An evidentiary hearing into the matter was convened on June 11, 2012, at the Spartanburg County Courthouse. The Applicant was present and represented by Alexander P. Lewis, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Don A. Thompson, Esquire, also testified. This Court also had before it a copy of the records of the Cherokee County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the trial transcript, and Applicant's appellate records.

**PROCEDURAL HISTORY**

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Cherokee County Clerk of Court's orders of commitment. The Applicant was indicted at the June 2007 term of the Cherokee County Grand Jury for three counts of burglary - 1<sup>st</sup> degree (2007-GS-11-0851, -0852, -0853) and three counts of criminal sexual conduct - 1<sup>st</sup> degree (2007-GS-11-0854, -0855, -0856). He was also indicted in August 2007 for armed

robbery (2007-GS-11-0970) and possession of a weapon during commission of a violent crime (2007-GS-11-0971, -0972, -0973). Don A. Thompson, Esquire, represented the Applicant at trial. On October 10, 2007, the Applicant was convicted of all charges by a jury. The Honorable J. Derham Cole presided over the Applicant's trial and sentenced him to confinement for life on each burglary – 1<sup>st</sup> degree charge, concurrent terms of thirty years for each criminal sexual conduct -1<sup>st</sup> degree and armed robbery, and consecutive terms of five years for each charge of possession of a weapon during the commission of a violent crime. The three consecutive five year sentences were later vacated pursuant to §16-23-490.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Byers, Op. No. 2010-UP-139 (filed February 22, 2010). The Remittitur was returned on March 10, 2010.

### **ALLEGATIONS**

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

1. Ineffective assistance of trial counsel, in that;
  - a. Counsel failed to see Applicant more than three times when Applicant was facing serious charges,
  - b. Counsel failed to adequately investigate the case,
  - c. Counsel failed to do things Applicant requested.

### **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. Set forth below are the relevant

*PSL*  
*12*

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) (citing Rule 71.1(e), SCRPC). 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. “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).

*Dee*  
*p 3*

The Applicant testified that he tried several times to relieve counsel and obtain new counsel or to represent himself and he was not allowed. Applicant testified that Counsel did nothing for him, only met with him twice for ten to fifteen minutes in ten (10) months, and only discussed plea bargains with Applicant when they met. Applicant testified that Counsel did not give him the motion of discovery, request a preliminary hearing, or tell him how to behave in front of a jury. Applicant also testified that Counsel allowed the jury to see him during trial in shackles. Counsel testified that they met more than twice and he did review the discovery materials with the Applicant and discussed how to behave at trial. Counsel acknowledged that he did not go over how to behave on the stand because the decision for Applicant to testify was made during trial. Applicant testified that Counsel never made a motion to have shackles removed during the trial. Counsel testified that he did not recall the Applicant wearing shackles, but would have made a motion to have them removed prior to trial if he were. Counsel further testified that he specifically recalled the Applicant wearing a red suit when he took the stand.

Counsel testified that he became a member of the South Carolina Bar in 1980, tries generally criminal cases, and had tried five (5) death penalty cases prior to the time of Applicant's trial. Counsel testified that the State had DNA evidence against the Applicant, from condoms used in the attacks. Counsel hired a DNA expert and attempted to "muddy the water" during his cross-examination of the SLED DNA expert. Counsel testified that the Applicant wanted to proceed with a defense of consensual sex; however, the stories of the different witnesses were never inconsistent and each victim claimed she did not know the Applicant, so he believed that defense would be unsuccessful. Counsel testified that this trial strategy was to focus on attacking the DNA evidence. Counsel also testified that he asked the Applicant whether there were any witnesses that could be called on his behalf and the Applicant told him there were not.

Further, Counsel testified that he objected when the Solicitor violated a motion in limine and made a motion for mistrial. Counsel believed he should have won the motion, but the Court denied it.

This Court finds Counsel's testimony to be more credible than the Applicant's. This Court finds that Counsel met with Applicant and thoroughly reviewed the discovery materials and potential trial strategy. As it relates to the claim that Counsel failed to spend sufficient time with Applicant in preparation for trial, this Court finds that the Applicant has failed to meet his burden of proof. 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). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from counsel's alleged lack of time to prepare. United States v. Cronin, 466 U.S. 648 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). Here, the Applicant could not point to any specific matters that Counsel failed to discover which would have affected the outcome of his trial.

The Applicant failed to offer any additional witnesses or evidence that Counsel could have presented during trial in support of Applicant's case. Rompilla v. Beard, 125 S.Ct. 2456 (2005)(emphasizing that the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste).

In regards to the claim that Counsel failed to do the things that the Applicant wanted, this Court finds that the Applicant has failed to prove that Counsel was deficient in his strategy or that Applicant was prejudiced as a result of that strategy. The Applicant made the decision to testify during the trial; therefore, Counsel had no opportunity to prepare him for taking the

witness stand. This Court does not find it credible that the Applicant was wearing shackles during the trial. This Court finds that based upon Counsel's testimony and his years of experience, Counsel would have made a motion to remove the shackles had they been present.

Additionally, this Court finds that Respondent was not prejudiced by any alleged deficient representation because there was overwhelming evidence of the Respondent's guilt. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991). In Ford, trial counsel failed to request an alibi instruction and his representation was found deficient as a result. However, the evidence of the applicant's guilt in Ford was overwhelming and this Court held that the applicant failed to prove the second prong of Strickland, which requires that an Applicant show prejudice by the deficient representation.

This Court finds that Counsel is an experienced attorney who was prepared for and effectively represented Applicant at his trial. This Court can find no proof of any deficient performance by Counsel in this matter and finds that the Applicant has failed to meet his burden of proof as to all claims of ineffective assistance of counsel. Therefore, this claim is denied and dismissed.

*Summary*

This Court finds counsel adequately conferred with the Applicant, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing

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professional norms. The Applicant failed to present specific and compelling evidence that 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 Counsel’s performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

### CONCLUSION

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 cautions Applicant that he must file and serve a notice of appeal within thirty (30) 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 PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant’s behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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**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 1<sup>st</sup> day of August, 2012.

  
\_\_\_\_\_  
Roger L. Couch  
Presiding Judge

Hyde Law Firm, P.A.  
517 E. St. John Street  
Spartanburg, SC 29302

*Jonathan Byers*

**First Class Mail**

**HYDE LAW FIRM, P.A.**  
517 East St. John Street  
Spartanburg, SC 29302

**To:**  
*The Honorable Daniel E. Sherause  
Clerk of Court  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211*

