

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

 ORIGINAL

\_\_\_\_\_  
Certiorari to Greenville County  
D. Garrison Hill, Circuit Court Judge  
\_\_\_\_\_

RECEIVED

APR 30 2012

S.C. Supreme Court

ALLAN LEE HAWKINS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_  
PETITION FOR EXTENSION OF TIME  
IN WHICH TO FILE THE PETITION FOR  
WRIT OF CERTIORARI AND APPENDIX  
\_\_\_\_\_

(4)

Counsel for Allan Lee Hawkins respectfully petitions this Court for a **final 30 days, until May 30, 2012**, to file the petition for writ of certiorari and appendix on behalf of her client. In support of this petition, counsel shows:

1. The petition for writ of certiorari and appendix is due today. The Court has granted three previous extensions. **Counsel is leaving this office and the case will be reassigned.**
2. Counsel respectfully submits that good cause exists to warrant the granting of an additional extension of time.
3. Specifically, counsel, because of her substantial caseload, has not had the time to complete her client's case, consistent with her duty to provide effective assistance of

counsel as guaranteed by the U.S.C.A. 6, 14. *See* Evitts v. Lucey, 469 U.S. 387 (1985) (to be effective appellate counsel must give assistance of such quality as to make appellate proceedings fair). *See also* Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001); Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999); South Carolina Bar Ethics Advisory Committee, Advisory Op. 04-12 (2004) (citing the 2002 ABA maximum caseload standards of 25 appeals). *See generally* Polk County v. Dodson, 454 U.S. 312 (1981); Gideon v. Wainwright, 372 U.S. 335 (1963). Counsel has prioritized her caseload to complete the cases with the largest number of extensions first.

4. Counsel diligently works to keep up with her case load. Counsel filed brief of petitioner in Robert Anthony James v. State with this Court on April 19, 2012. Counsel also filed the initial brief of appellant and designation of matter in State v. Anthony Lounds with the Court of Appeals on April 19, 2012. Counsel had an oral argument in State v. K.C. Langford, III before this Court on April 18, 2012. Counsel filed the petition for rehearing in State v. George Salisbury with the Court of Appeals on April 12, 2012. Counsel filed the return to petition for writ of certiorari in Jeremiah Dicapua v. State with this Court on April 11, 2012.


5. In the month of April, counsel is assigned to file **24** briefs and writ of certioraris.

6. As indicated by the signature below, the Attorney General's Office does not oppose the request.

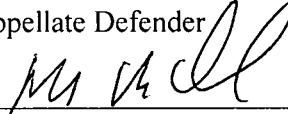
7. Counsel makes this request in good faith and not for purposes of delay.

Respectfully, counsel requests a **30 day extension, until May 30, 2012** in which to file her client's petition for writ of certiorari and appendix.

Respectfully submitted,

 For

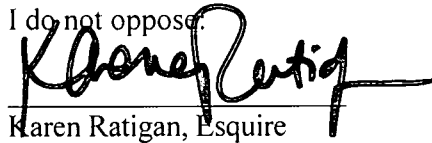
Elizabeth A. Franklin-Best  
Appellate Defender



Robert M. Dudek  
Chief Appellate Defender

April 30, 2012

I do not oppose.



Karen Ratigan, Esquire



 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

RECEIVED

MAR 28 2012

\_\_\_\_\_  
Certiorari to Greenville County  
D. Garrison Hill, Circuit Court Judge  
\_\_\_\_\_

S.C. Supreme Court

ALLAN LEE HAWKINS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_  
PETITION FOR EXTENSION OF TIME  
IN WHICH TO FILE THE PETITION FOR  
WRIT OF CERTIORARI AND APPENDIX  
\_\_\_\_\_

(3)

Counsel for Allan Lee Hawkins respectfully petitions this Court for a **final 30 days, until April 30, 2012**, to file the petition for writ of certiorari and appendix on behalf of her client. In support of this petition, counsel shows:

1. The petition for writ of certiorari and appendix is due **Friday, March 30, 2012**. The Court has granted two previous extensions.
2. Counsel respectfully submits that good cause exists to warrant the granting of an additional extension of time.
3. Specifically, counsel, because of her substantial caseload, has not had the time to complete her client's case, consistent with her duty to provide effective assistance of counsel as guaranteed by the U.S.C.A. 6, 14. *See Evitts v. Lucey*, 469 U.S. 387 (1985)

(to be effective appellate counsel must give assistance of such quality as to make appellate proceedings fair). *See also* Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001); Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999); South Carolina Bar Ethics Advisory Committee, Advisory Op. 04-12 (2004) (citing the 2002 ABA maximum caseload standards of 25 appeals). *See generally* Polk County v. Dodson, 454 U.S. 312 (1981); Gideon v. Wainwright, 372 U.S. 335 (1963). Counsel has prioritized her caseload to complete the cases with the largest number of extensions first.

4. Counsel diligently works to keep up with her case load. Counsel filed the initial brief of appellant and designation of matter in State v. Cedric Flood with this Court on March 27, 2012. Counsel also filed the petition for writ of certiorari in Reina Garrido v. State with the Supreme Court on March 27, 2012. Counsel filed the petition for writ of certiorari from the Court of Appeals in State v. Reico Lamont Welch with this Court on March 19, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Marquis Breeland with the Court of Appeals on March 14, 2012. Counsel also filed the initial brief of appellant and designation of matter in State v. Ervin Outz with the Court of Appeals on March 14, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Anthony Hackshaw, which included seven issues on appeal, with the Court of Appeals on March 8, 2012. Counsel had an oral argument before the Court of Appeals in State v. Nathaniel Murray on March 1, 2012. Counsel filed the petition for rehearing in State v. Jomar Antavis Robinson with the Court of Appeals on March 1, 2012. Counsel had an oral argument before the Court of Appeals in State v. Donna Buie on February 28, 2012. Counsel filed the five issue death penalty

brief in the case of State v. Steven Barnes with this Court on February 24, 2012. 5.

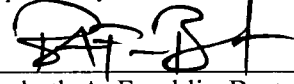
In the month of March, counsel is assigned to file 22 briefs and writ of certioraris.

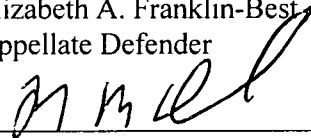
6. As indicated by the signature below, the Attorney General's Office does not oppose the request.

7. Counsel makes this request in good faith and not for purposes of delay.

Respectfully, counsel requests a **30 day extension, until April 30, 2012** in which to file her client's petition for writ of certiorari and appendix.

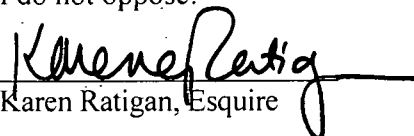
Respectfully submitted,

  
\_\_\_\_\_  
Elizabeth A. Franklin-Best  
Appellate Defender

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

March 28, 2012

I do not oppose:

  
\_\_\_\_\_  
Karen Ratigan, Esquire



STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Greenville County  
D. Garrison Hill, Circuit Court Judge  
\_\_\_\_\_

RECEIVED  
FEB 29 2012  
S.C. Supreme Court

ALLAN LEE HAWKINS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_  
PETITION FOR EXTENSION OF TIME  
IN WHICH TO FILE THE PETITION FOR WRIT  
OF CERTIORARI AND APPENDIX  
\_\_\_\_\_

(2)

Counsel for Michael Anthony Sarratt respectfully petitions this Court for an additional 30 days to file the petition for writ of certiorari and appendix on behalf of her client. In support of this petition, counsel shows:

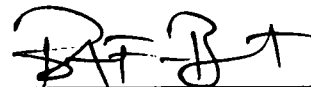
1. The petition for writ of certiorari and appendix is due today. The Court has granted one previous extension.
2. Counsel respectfully submits that good cause exists to warrant the granting of an additional extension of time.
3. Specifically, counsel, because of her substantial caseload, has not had the time to complete her client's case, consistent with her duty to provide effective assistance of

counsel as guaranteed by the U.S.C.A. 6, 14. See Evitts v. Lucey, 469 U.S. 387 (1985) (to be effective appellate counsel must give assistance of such quality as to make appellate proceedings fair). See also Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001); Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999); South Carolina Bar Ethics Advisory Committee, Advisory Op. 04-12 (2004) (citing the 2002 ABA maximum caseload standards of 25 appeals). See generally Polk County v. Dodson, 454 U.S. 312 (1981); Gideon v. Wainwright, 372 U.S. 335 (1963). Counsel has prioritized her caseload to complete the cases with the largest number of extensions first.

4. Counsel diligently works to keep up with her case load.
5. In the month of February, counsel is assigned to file **24** briefs and writ of certioraris.
6. Counsel makes this request in good faith and not for purposes of delay.

Respectfully, counsel requests a 30 day extension in which to file her client's petition for writ of certiorari and appendix.

Respectfully submitted,



---

Elizabeth A. Franklin-Best  
Appellate Defender

February 29, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

D. Garrison Hill, Circuit Court Judge

RECEIVED  
FEB 29 2012  
S.C. Supreme Court

ALLAN LEE HAWKINS,

PETITIONER,

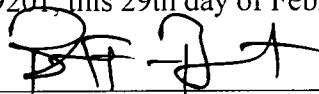
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the petition for extension of time in which to file the petition for writ of certiorari and appendix in the above referenced case has been served upon Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of February, 2012.



Elizabeth A. Franklin-Best  
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me  
this 29th day of February, 2012.

 (L.S.)

Notary Public for South Carolina  
My Commission Expires: October 2, 2013.

# The Supreme Court of South Carolina

Allan Lee Hawkins, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable D. Garrison Hill  
Greenville County  
Trial Court Case No. 2010-CP-23-03719

---

## ORDER

---

The request for an extension until February 29, 2012 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Suzanne J. Sheely*  
Clerk

Columbia, South Carolina *Chief Deputy*

January 31, 2012

cc: Appellate Defender Elizabeth A. Franklin-Best  
Assistant Attorney General Karen C. Ratigan



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1343  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

January 30, 2012

The Honorable Daniel E. Shearouse  
Clerk, S.C. Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

RECEIVED

JAN 30 2012

S.C. Supreme Court

C

Re: Allan Lee Hawkins v. State

Dear Mr. Shearouse:

The Petition for Writ of Certiorari from the Court of Appeals and accompanying appendix are due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting a thirty day extension in which to serve and file the petition.

By copy of this letter, I am informing Karen Ratigan, Esquire, of the Attorney General's Office, of my request.

Sincerely,

Elizabeth A. Franklin-Best  
Appellate Defender

EAF/cms

cc: Karen Ratigan, Esquire



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1343  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

November 30, 2011

The Honorable Daniel E. Shearouse  
Clerk, S.C. Supreme Court  
Post Office Box 11330  
Columbia, SC 29211

RECEIVED

NOV 30 2011

S.C. Supreme Court

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

Allan Lee Hawkins v. State of South Carolina

11/30/2011

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Loriene French  
Legal Services Coordinator



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

October 3, 2011

RECEIVED

OCT - 3 2011

Ms. Hollie M. Jenkins  
Circuit Court Reporter  
P O Box 16506  
Greenville, SC 29606

S.C. Supreme Court

Dear Ms. Jenkins:

Please provide us with the following transcript:

Allan Lee Hawkins v. State of South Carolina      Case #:      10-CP-23-03719

County: Greenville      Date of Trial: August 2, 2011

Presiding Judge: D. Garrison Hill

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

  
Lorlene French  
Legal Services Coordinator

cc: S.C. Supreme Court  
Attorney General's Office

# The South Carolina Court

(Supreme Court)

Allan Lee Hawkins, #290682,

Appellee

v.

State of South Carolina,

Respondent.

The Honorable D. Garrison Hill  
Greenville County  
Trial Court Case No. 2010-CP-23-03719

RECEIVED

SEP 19 2011

S.C. Supreme Court

ORDER

The appeal in the above captioned matter is transferred to the South Carolina Supreme Court under the filing provisions of Rule 243 of the South Carolina Appellate Court Rules.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE  
For The Court

BY V. Claice Allen, Deputy  
CLERK

Columbia, South Carolina

cc: Hal W. Roach, Esq.  
Chief Appellate Defender Robert M. Dudek  
Assistant Attorney General Karen Ratigan  
The Honorable Daniel Shearouse

FILED

*[Handwritten signature]*

# Roach Law Firm

11 North Irvine Street, Suite 1  
Greenville, SC 29601  
(864) 991-8500  
FAX: (864) 991-8508  
h.roach@roachlawfirmssc.com

Hal W. Roach  
Member of SC and KY Bars

September 12, 2011

The Hon. Tanya Gee  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

The Hon. Paul B. Wickensimer  
Greenville County Clerk of Court  
305 East North Street  
Greenville, SC 29601

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SEP 19 2011

S.C. Supreme Court

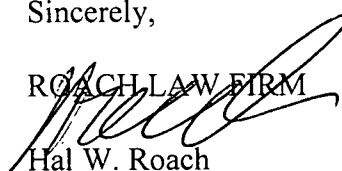
**Re: Notice of Appeal from Allan Lee Hawkins v. State of South Carolina  
CA No.: 2010CP-23-3719**

Dear Ms. Gee and Mr. Wickensimer:

I represented Mr. Hawkins in the above-referenced matter as an appointed attorney. I anticipate Appellate Defense to handle the appeal. Pursuant to Rule 203, SCACR, please find enclosed a Notice of Appeal and a Proof of Service on the South Carolina Attorney General. A copy of the judgment is also enclosed for the Court of Appeals.

Sincerely,

ROACH LAW FIRM

  
Hal W. Roach

Enclosures (as stated)

cc: S.C. Attorney General  
South Carolina Appellate Defense  
Allan L. Hawkins

RECEIVED  
SEP 15 2011  
SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2010-CP-23-3719

**RECEIVED**

SEP 19 2011

**S.C. Supreme Court**

Allan Lee Hawkins, ..... Appellant,

v.

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

Notice of Appeal

Allan Lee Hawkins appeals the decision of the Honorable D. Garrison Hill dated August 24, 2011 and received August 25, 2011.

**RECEIVED**

SEP 15 2011

**SC Court of Appeals**

**Roach Law Firm**



Hal W. Roach (I.D. No. 062986)  
11 N. Irvine St., Suite 1  
Greenville, South Carolina 29601  
Tel: (864) 991-8500  
Fax: (864) 991-8508  
E-mail: hroach@roachlawfirmssc.com  
APPOINTED ATTORNEY FOR APPELLANT

Other Counsel of record:  
Karen Christine Ratigan  
S.C. Atty. General  
P.O. Box 11549  
Columbia SC 29211  
803-734-3970

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2010-CP-23-3719

**RECEIVED**

SEP 19 2011

**S.C. Supreme Court**

Allan Lee Hawkins, ..... Appellant,

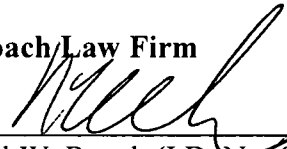
v.

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

Proof of Service

I certify that the foregoing was served on the persons listed below by placing same in the  
U.S. Mail postage prepaid this day, September 12, 2011.

**Roach Law Firm**



Hal W. Roach (I.D. No. 062986)  
11 N. Irvine St., Suite 1  
Greenville, South Carolina 29601  
Tel: (864) 991-8500  
Fax: (864) 991-8508  
E-mail: hroach@roachlawfirmssc.com  
APPOINTED ATTORNEY FOR APPELLANT

**RECEIVED**

SEP 15 2011

**SC Court of Appeals**

Other Counsel of record:  
Karen Christine Ratigan  
S.C. Atty. General  
P.O. Box 11549  
Columbia SC 29211

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

JUDGMENT IN A CIVIL CASE  
CASE NO: 2010CP2303719

Allan Lee Hawkins vs. South Carolina State Of

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:

Dated at Greenville, South Carolina, this 24th day of August, 2011.

Court Reporter:

\_\_\_\_\_  
**PRESIDING JUDGE - D Garrison Hill**

This judgment was entered on the 24th day of August, 2011, and a copy mailed first class this 24th day of August, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Hal W. Roach Roach Law Firm 11 N. Irvine St.,  
Suite 1 Greenville, SC 29601

Karen Christine Ratigan Attorney Generals Office  
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 )  
 )  
 Allan Lee Hawkins, )  
 S.C.D.C. No. 290682, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2010-CP-23-3719

**ORDER OF DISMISSAL**

CLERK OF COURT  
 GREENVILLE SO. CAR.  
 2011 AUG 24 P 2:32

2011 AUG 24 P 2:32

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 10, 2010. The Respondent made its return on September 15, 2010. An evidentiary hearing into the matter was convened on August 2, 2011 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Hal W. Roach, 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, R. Mills Ariail, Jr., Esquire. The Court had before it the trial transcript, the records of the Greenville County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the Respondent's return, and the appellate records.

**PROCEDURAL HISTORY**

The Applicant is presently 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 April 2006 term of the Greenville County Grand Jury for murder (2006-GS-

# 1 & 8  
 414

23-3511), armed robbery (2006-GS-23-3512, count 1), and possession of a weapon during commission of a violent crime (2006-GS-23-3512, count 2). He was represented by R. Mills Ariail, Jr., Esquire.

After the State called the case to trial, the Applicant was found guilty. On January 17, 2008, the Honorable Deadra L. Jefferson sentenced the Applicant to concurrent terms of thirty (30) years for murder, ten (10) years for armed robbery, and five (5) years for possession of a weapon during commission of a violent crime.

A notice of appeal was filed at the South Carolina Court of Appeals. Joseph L. Savitz, III, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders<sup>1</sup> brief. The Court of Appeals dismissed the appeal. State v. Hawkins, Op. No. 2010-UP-065 (S.C. Ct. App. filed January 28, 2010). The Court of Appeals denied the Applicant's pro se "Notice of Reconsideration of Appeal" on March 18, 2010. The Applicant filed a pro se petition for writ of certiorari at the South Carolina Supreme Court. By order dated April 21, 2010, the Supreme Court dismissed the matter pursuant to State v. Lyles, 381 S.C. 442, 673 S.E.2d 811 (2009).

### ALLEGATIONS

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

1. Ineffective assistance of trial counsel:
  - a. Failed to object to erroneous malice instruction.
  - b. Failed to ask for manslaughter charge after jury asked if they could deliberate on a lesser charge.
  - c. Failed to ask for a mistrial after consecutive hung jury statements.
  - d. Failed to object when the trial judge refused to give the jury the option of deliberating on the lesser offense of manslaughter.

---

<sup>1</sup> Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

# 2 & 8  
JH

2. Ineffective assistance of appellate counsel:
  - a. Failed to raise and brief the preserved felony question that swayed the decision of the jury.

### 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 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).

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The Applicant stated trial counsel failed to address the trial judge's improper malice instruction. The Applicant stated that, as trial counsel did not object to the instruction, he could not make a State v. Belcher<sup>2</sup> argument on appeal. The Applicant stated trial counsel should have requested a jury charge on the lesser-included offense of voluntary manslaughter. The Applicant stated the charge would have been appropriate because: (1) the shooting occurred during an altercation with the victim and (2) the jury asked for it during deliberations. The Applicant stated the only plea offer in this case was presented prior to trial and that, if there had been a plea offer during jury deliberations, he would have accepted it if advised to do so. The Applicant stated trial counsel should have moved for a mistrial because the jury stated they were hung on three (3) occasions. The Applicant stated that, while the trial judge asked the parties if they preferred to declare a mistrial or instead provide the jury with further instructions, he did not know why trial counsel did not choose the mistrial option.

Trial counsel testified the defense theory of the case was that the Applicant went to the victim's home to buy pills (and had no intent to kill him) but that the Applicant shot the victim after the victim pulled out a weapon. Trial counsel testified the SLED gunshot residue expert stated there was gunshot residue on the victim's hand and that this corroborated the defense case. Trial counsel testified he did not perceive a problem with the malice instruction. Trial counsel testified that, based on the Applicant's statement and testimony, the defense case was that the jury would either find self-defense or murder. Trial counsel testified he discussed this with the Applicant, who understood the all-or-nothing approach. Trial counsel stated that, at one point during jury deliberations, the State made an offer of fifteen (15) years in exchange for a plea to voluntary manslaughter. Trial counsel stated he discussed the offer with the Applicant and

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<sup>2</sup> 385 S.C. 597, 685 S.E.2d 802 (2009).

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recommended the Applicant accept it. Trial counsel stated, however, that the Applicant wanted the jury to return a decision. Trial counsel stated the jury deliberated for more than nine (9) hours and sent out numerous notes. Trial counsel stated the jury had decided two charges but were deadlocked on the third. Trial counsel stated he and the Applicant discussed whether to ask for a mistrial or ask for further jury instructions, and that the Applicant stated he wanted the jury to make the decision. Trial counsel stated he would have moved for a mistrial if the Applicant had wanted to do so.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the trial judge's jury instruction regarding malice. At the time of the Applicant's trial, this was a proper instruction. (Trial transcript, pp.521-22). More than twenty (20) months later, the South Carolina Supreme Court found this instruction was improper. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). The South Carolina Supreme Court has long held that counsel cannot be expected to be clairvoyant about changes in the law. See State v. Gilmore, 314 S.C. 453, 445 S.E.2d 454 (1994). As such, there was no error in trial counsel failing to object to the malice instruction. Further, this Court notes Belcher was decided three (3) months before the Applicant's appeal was dismissed and, while the Applicant raised the applicability of Belcher in his pro se "Notice of Reconsideration of Appeal" at the South Carolina Court of Appeals, that petition was denied.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have requested a jury charge for the lesser-included offense of voluntary manslaughter. Trial counsel testified the defense strategy was for all-or-nothing and that either the jury would accept the self-defense argument or they would not. Trial counsel also testified this matter was discussed with the Applicant, who agreed to proceed with only a jury charge of murder. This Court finds trial counsel is credible and that he articulated a valid strategic decision why he did not request a manslaughter charge.<sup>3</sup> See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel).

This Court finds the Applicant failed to meet his burden of proving trial counsel did not convey a plea offer from the State that was made during jury deliberations. Trial counsel testified he conveyed the fifteen (15) year offer to the Applicant and that they discussed it. Trial counsel testified that, while he believed it was a good offer and advised the Applicant to accept it, the Applicant wanted the jury to make a determination of his guilt or innocence. This Court finds trial counsel's testimony is credible. This Court finds trial counsel fulfilled his responsibilities in conveying the plea recommendation to the Applicant and that the Applicant simply chose to leave his fate to the jury. See Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have moved for a mistrial. After the jury had deliberated several hours and sent numerous notes

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<sup>3</sup> The trial judge even noted that both the State and the defense had made strategic decisions not to request the lesser-included charge of voluntary manslaughter. (Trial transcript, p.599).

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to the trial judge, the jury's sixth note stated they were "still hung, maybe irreparably so at this time." (Trial transcript, p.552). The trial judge asked each party if they preferred a mistrial or further jury instructions. Trial counsel stated he preferred further instructions. (Trial transcript, p.552). Trial counsel testified he made this decision after speaking to the Applicant and that the Applicant remained strong in his opinion that this jury should decide the case. This Court finds trial counsel's testimony is credible and notes that the Applicant did not object when trial counsel elected for further jury instructions. This Court finds the Applicant failed to prove trial counsel erred in making this choice, especially as it was at the Applicant's direction.

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.

#### 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 present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

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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 22<sup>nd</sup> day of August, 2011.



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D. Garrison Hill  
Presiding Judge  
Thirteenth Judicial Circuit

Greenville, South Carolina.

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