

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

JUN 20 2016

Deadra L. Jefferson, Circuit Court Judge

S.C. SUPREME COURT

Case No.: 2013-CP-08-0204

George Salisbury,

Appellant,

v.

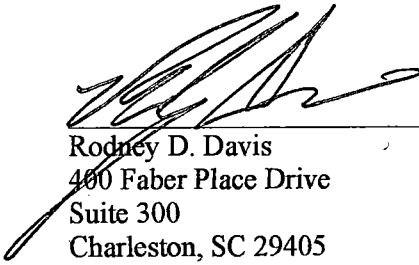
State of South Carolina,

Respondent.

NOTICE OF APPEAL

George Salisbury appeals the denial of his Post Conviction Relief (PCR) application in this case. The application for relief was denied, following an evidentiary hearing before the Honorable Deadra L. Jefferson on December 18, 2015.

May 31, 2016.


Rodney D. Davis
400 Faber Place Drive
Suite 300
Charleston, SC 29405
Attorney for Appellant

Other Counsel of Record:
J. Rutledge Johnson, Assistant Attorney General
Office of the Attorney General, State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

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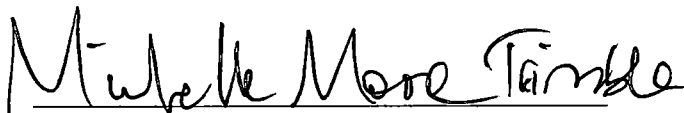
State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy of it to the address of record, J. Rutledge Johnson, P.O. Box 11549, Columbia, South Carolina 29211-1549, on June 3, 2016.

June 3, 2016



Michelle Moore Trimble
Paralegal to Rodney D. Davis
Lowcountry Law Office
400 Faber Place Drive, Suite 300
Charleston, SC 29405

Other Counsel of Record:
J. Rutledge Johnson, Assistant Attorney General
Office of the Attorney General, State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS)
FOR THE NINTH JUDICIAL CIRCUIT)

George Salisbury, #263724,)

2013-CP-08-0204)

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

Presiding Judge:
Applicant's Attorney:
Respondent's Attorney:
Trial Counsel:

Hon. Deadra L. Jefferson
Rodney D. Davis, Esquire
J. Rutledge Johnson, Esquire
Chad Shelton, Esquire
Patricia Kennedy, Esquire
December 18, 2015
Denise Lauder

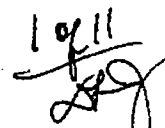
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

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FILED

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 25, 2013. The State made its Return on October 10, 2013 and filed on October 15, 2013. An evidentiary hearing into this matter was convened on December 18, 2015. The Applicant was present and was represented by Rodney D. Davis, Esquire. The Respondent was represented by J. Rutledge Johnson, Esquire Assistant Deputy Attorney General.

At the hearing, Applicant testified. Chad Shelton, Esquire, and Ann Williams, Esquire, also testified. This Court had before it a transcript of the trial, a copy of the briefs filed on direct appeal, a copy of the Court of Appeals' opinion on direct appeal, a copy of the records of the Berkeley County Clerk of Court regarding the subject conviction, the Applicant's PCR Application, the State's Return, and a copy of the Applicant's records with the South Carolina Department of Corrections.

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PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. The Applicant was indicted at the September 2008 term of the Berkeley County Grand Jury for Prisoner/Taking of Hostage by Inmate¹ (2008-GS-08-1074), Criminal Sexual Conduct, 1st Degree² (2008-GS-08-1687), and Assault on a Correctional Officer³ (2008-GS-08-1688). Applicant was represented by Chad Shelton, Esquire, lead counsel and Patricia Kennedy, Esquire, second chair.

The Applicant proceeded to trial and was found guilty of all charges on January 29, 2009. The Applicant was sentenced by the Honorable Kristi L. Harrington to confinement for a period of life without parole (LWOP) for Criminal Sexual Conduct and Prisoner/Taking of Hostage by Inmate and five (5) years for Assault on a Correctional Officer. The sentences are to be served concurrently

¹ "An inmate of a state correctional facility, a local detention facility, or a private entity that contracts with a state, county, or city to provide care and custody of inmates, including persons in safekeeper status, acting alone or in concert with others, who by threats, coercion, intimidation, or physical force takes, holds, decoys, or carries away any person as a hostage or for any other reason is guilty of a felony and, upon conviction, must be imprisoned for a term of not less than five years nor more than thirty years. This sentence must not be served concurrently with any sentence being served at the time the offense is committed." S.C. CODE ANN. § 24-13-450 (2012).

² "(1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:

(a) The actor uses aggravated force to accomplish sexual battery.

(b) The victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, trafficking in persons, robbery, extortion, burglary, housebreaking, or any other similar offense or act.

(c) The actor causes the victim, without the victim's consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance, a controlled substance analogue, or any intoxicating substance.

(2) Criminal sexual conduct in the first degree is a felony punishable by imprisonment for not more than thirty years, according to the discretion of the court." S.C. CODE ANN. § 16-3-652 (2012).

³ "An inmate, a detainee, a person taken into custody, or a person under arrest, who attempts to throw or throws body fluids including, but not limited to, urine, blood, feces, vomit, saliva, or semen on an employee of a state correctional facility or local detention facility, a state or local law enforcement officer, a visitor of a state correctional facility or local detention facility, or any other person authorized to be present in a state correctional facility or local detention facility in an official capacity is guilty of a felony and, upon conviction, must be imprisoned not more than fifteen years." S.C. CODE ANN. § 24-13-470 (2012).

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to each other, but consecutively to a prior Criminal Sexual Conduct with a Minor conviction and sentence (2001-GS-08-0928).

A timely Notice of Appeal was filed on behalf of the Applicant. Elizabeth A. Franklin, Esquire, of South Carolina Division of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Salisbury, Op. No. 2012-UP-214, (S.C. Ct. App. March 28, 2012). The Remittitur was issued on June 28, 2012.

ALLEGATIONS

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

1. Ineffective Assistance of Counsel in that:
 - a. Counsel failed to investigate.
 - b. Counsel failed to disclose factual mitigation evidence.
 - c. Counsel failed to subpoena Tyrone Oliver to testify at trial.
 - d. Counsel failed to challenge the chain of custody for State's Ex. 1.
2. Prosecutorial Misconduct
 - a. State obtained personal writing of the Applicant's to deceive the jury and destroy his character.
 - b. State illegally presented State Ex. 27 to attack his character.
 - c. Solicitor committed misconduct in error of Rule 3(c)(i) of the S.C. Rules of Criminal Procedure.
3. Subject Matter Jurisdiction
 - a. Indictments failed to show the action of the grand jury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court has also read the trial transcript, all of which assists the Court in judging their credibility. The Court finds Counsel's testimony persuasive and very credible, while also finding the Applicant's testimony not credible.

Set forth below are the relevant findings of facts and conclusions of law as required pursuant

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to S.C. Code Ann. §17-27-80 (2003).

SUMMARY OF TESTIMONY

At the evidentiary hearing, Counsel Chad Shelton testified he was appointed and was the lead attorney on this case. Counsel also testified the State was seeking life without parole and he received the LWOP notice in November 2008. This was based on Applicant's prior conviction for Criminal Sexual Conduct in the First Degree. Counsel was prepared for trial in January 2009 and received notice of the other charges which were directly indicted on January 6, 2009; after this, Counsel had to change his trial strategy. The first strategy focused on the criminal sexual conduct charge, but then Counsel had to focus also on the hostage taking charge and life without parole notice. Applicant was directly indicted for hostage taking and assault on a correctional officer.

Counsel testified this was his first most serious offense trial and had seven (7) months to prepare for this case. Counsel also testified he was the lead attorney the entire case, but was assisted by Patricia Kennedy, Esquire. Counsel stated the facts of the case included one (1) eyewitness to the crime, which was the Victim; however, crucial information provided by the Victim could be corroborated by other witnesses many of whom were fellow inmates. Counsel stated the trial strategy was that the criminal sexual conduct charge was impossible based on the allegation of digital penetration, the time frame, and the clothing that the Victim was wearing. Counsel also stated that once the hostage taking charge came about, the case going forward was to disprove the Victim's credibility. Counsel stated he only had twenty (20) days to investigate the new charges, and that the witnesses in the case were helpful to the State. Counsel then testified, in his opinion, the witnesses' testimony were not credible because they were not in the closet during the incident.

Counsel did not recall any difficulties getting the witness list. Counsel requested a

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continuance and requested a motion to compel; however, the State filed a written response, as there was a dispute over the witness list. Counsel stated he went to McDougall Correctional Institution to interview witnesses. Counsel stated he had a list from the discovery and police reports of potential witnesses; however, Witness Simmons was not on the list, but Counsel received his name before trial. Counsel also stated he investigated the SLED report and waived a preliminary hearing after talking with Applicant. Counsel stated there was not much outside investigation done because all of the information was provided in discovery. Counsel also stated there were notes attributed to Applicant which were provided by the State in a continuous process of receiving discovery.

Counsel testified he received information of a black inmate running from the scene; this turned out to be Witness Simmons. Another witness was Tyrone Oliver, but Counsel did not remember this witness taking evidence from the crime scene. Counsel then stated that the credibility of the inmate witnesses was crucial in this case. Counsel also stated he knew about these inmates prior to the trial, but did not have a chance to fully investigate. Counsel, however, admitted that he had a one day extension to interview these inmates, received continuous responses to discovery requests by the State, and was able to visit McDougall Correctional Institution. Counsel testified he did not recall receiving evidence after the trial started, but received a letter from the Assistant Solicitor concerning discovery after the case was called. Counsel stated he had two (2) hearings on a continuance to interview witnesses: the first request was granted for two (2) weeks by Judge Harrington, but was denied a second request by Judge Harrington.

On cross-examination, Counsel admitted he was prepared for a trial and ready to try this case with a potential life without parole sentence for Applicant. While Counsel stated the hostage taking charge changed his trial strategy, he admitted that he knew the facts of the case before the charge

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ever arose. Counsel also stated that it would be hard to disprove Victim's credibility when the other witnesses/inmates testified as to Victim's condition after the incident. Applicant also admitted the testimony of a Witness describing Inmate Simmons as the "small black male" that ran from the incident was excluded from the testimony at trial. Counsel also admitted that he was able to cross-examine each inmate/witness. Counsel lastly admitted he did not ask certain questions of the inmate/witnesses, as he did not know what the response would be because this could ultimately harm the Applicant's case.

On redirect examination, Counsel testified that if a continuance had been granted, he would have investigated more facts and witnesses in preparation to attack Victim's credibility.

On re-cross examination, Counsel admitted that if he had been granted a continuance and the further investigation proved fruitless, he would have been back to square one. Counsel also admitted that hindsight is always 20/20.

Upon questioning by this Court, Counsel testified that he was appointed on May 13, 2008 and met with Applicant on June 4, 2008; he also met with Applicant around four (4) times in prison or jail. Counsel stated he allowed the Assistant Solicitor to speak with Applicant because the appointment paperwork had not become official at that time. Counsel also stated he discussed discovery with Applicant and gave Applicant a copy of the discovery during their meetings; he also discussed all of the discovery and witnesses prior to trial with Applicant.

Applicant testified he was aware that Counsel attempted to obtain a continuance in his trial and that Applicant agreed with the continuance requests. However, the State objected to this testimony, as it was the subject of Applicant's direct appeal. This Court sustained the objection. Applicant then testified that he received information concerning Tyrone Oliver. The State objected to

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this testimony as well, as Mr. Oliver was not present in the courtroom to testify on Applicant's behalf. This Court also sustained this objection. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial).

Applicant then stated that before trial he met with Counsel three (3) to four (4) times and met with Patricia Kennedy once. Applicant testified that Counsel's opinion was to pursue a trial and that he was notified of life without parole prior to trial, as he was personally served with the notice from the State. Applicant admitted he discussed the charges of criminal sexual conduct in the first degree and the elements thereof; however, Applicant claimed Counsel did not explain the charges of hostage taking and the assault charge to him. Applicant then testified that the only defense Counsel had pertained to the criminal sexual conduct charge. Applicant admitted that it was his decision to go to trial. Applicant lastly stated his other complaints concerned information about contamination of the crime scene and the clothing items removed from the scene.

Assistant Solicitor Ann Williams testified that the letter Counsel mentioned concerning evidence produced after the trial had begun was written because Judge Harrington ordered that the inmate witnesses' files be turned over to Applicant upon Counsel's request. Ms. Williams testified that she did not have possession of these files prior to trial or she would have turned them over pursuant to the discovery request.

Ineffective Assistance of Counsel

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."

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Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. See Strickland at 690, 104 S. Ct. at 2066. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. See Id. at 117-18, 386 S.E.2d at 625. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052). 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." Id. at 117-18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

This Court finds Counsel's representation of Applicant in this case well above the

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professional norms. Counsel fully investigated this case and assisted Applicant in his defense. Counsel explained and discussed the elements of each charge with Applicant. Counsel, quite properly, based his investigation on information relayed to him by Applicant and on the facts of the case. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066 (1984). Further, Counsel based his trial strategy on the information supplied to him through discovery, namely the witness statements to law enforcement and Victim's statement. Counsel also testified that he was able to cross-examine each witness and did not ask questions he did not know the answer to, as this could potentially harm Applicant's case. "Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel." Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Further, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Butler v. State, 286 S.C. 441, 445, 334 S.E.2d 813, 815 (1985). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls

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[Signature]

within the range of reasonable professional assistance.” *Id.* at 445, 334 S.E.2d at 815-16.

While Counsel testified had he been given another continuance, he could have potentially investigated more evidence and witnesses; this Court finds this speculative at best. Applicant provided no evidence or other testimony from witnesses which show that Counsel failed to fully investigate this case. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (“Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result”). Therefore, this Court finds the Applicant has failed to meet his burden of proving Counsel’s performance was deficient or that he was prejudiced thereby. Accordingly, this allegation is denied.

Applicant also alleged prosecutorial misconduct in this case. This Court finds no evidence of this allegation whatsoever. Assistant Solicitor Ann Williams testified the inmate/witness files were turned over to the defense after Applicant’s trial began on the order of the trial judge. Assistant Solicitor Williams also testified she did not have possession of these files before the trial or she would have turned them over to Counsel. This Court finds this testimony credible and finds that Applicant has failed to meet his burden of proof as to this allegation. Accordingly, this allegation is also denied.

This Court notes that Applicant alleges that the trial court lacked subject matter jurisdiction. No evidence was presented to prove this allegation. Therefore, this Court deems this allegation abandoned.

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

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[Signature]

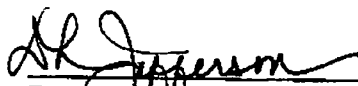
application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the 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. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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!



Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

May 16, 2016
Charleston, South Carolina

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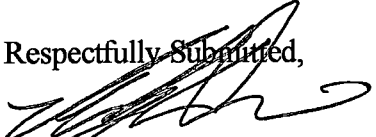
STATE OF SOUTH CAROLINA) IN THE SUPREME COURT OF SOUTH CAROLINA
)
 COUNTY OF BERKELEY) CASE NO.: 2013-CP-08-0204
)
 GEORGE SALISBURY,)
)
 Applicant.) REQUEST FOR REPRESENTATION ON APPEAL
)
 -versus-)
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)

On behalf of the request of the above-named Applicant, to be represented by the South Carolina Commission of Indigent Defense, Appellate Division (SCCID), the undersigned attorney would show unto this Honorable Court that:

1. He is the attorney for the Applicant-Appellant in the above captioned case. The Applicant-Appellant was in custody during and taken into custody immediately following the Post Conviction Relief (PCR) hearing and was not available to personally sign this request;
2. The Applicant-Appellant was represented by the undersigned attorney as an indigent, pursuant to a contract with the SCCID;
3. The Applicant-Appellant has been informed that he may request assistance from the SCCID Appellate Division in perfecting his appeal;
4. A timely Notice of Intent to Appeal has been filed on the Applicant-Appellant's behalf;
5. The Applicant-Appellant has been informed that nothing requires SCCID Appellate Division to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

At this time, the Applicant-Appellant requests the aid of the SCCID Appellate Division in perfecting his appeal to the South Carolina Court of Appeals.

Respectfully Submitted,


 Rodney D. Davis
 South Carolina Bar #: 12396

Charleston, South Carolina

6/31, 2016.

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)
)

CASE NO: 2013-CP-08-0204

VERIFICATION

PERSONALLY appeared before me, Rodney D. Davis, being first duly sworn, deposes and says that he has read the foregoing *Request for Representation on Appeal* to be filed on behalf of the Applicant-Appellant, **George Salisbury**, and the same is true of his knowledge except those matters alleged on information and belief, and as to those matters, he believes them to be true.



Rodney D. Davis
South Carolina Bar #: 12396

SWORN to and subscribed to me
this 31 day of May, 2016.

Michelle Mace Trimble
Notary Public for South Carolina
My Commission expires 5/26/2026



Lowcountry Law Office

4000 Faber Place Drive, Suite 300

Charleston, SC 29405

Phone: 843-323-4353 Fax: 843-323-4101

E-Mail: Davis@LowcountryLawOffice.com

June 14, 2016

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

RE: George Salisbury v. State of South Carolina; Case No.: 2013-CP-08-0204

Dear Mr. Shearhouse:

Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post Conviction Relief (PCR) case. Also enclosed are the following:

- (1) Proof of service of the Notice of Appeal on the respondent;
- (2) The Order of Dismissal &
- (3) A Request for Representation on Appeal.

The Applicant-Appellant was represented by me as an indigent pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR cases. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

The Request for Representation on Appeal and the Affidavit in Support thereof are signed by me as attorney for Applicant-Appellant. If you need anything further, do not hesitate to contact me. Thank you for your time and attention to this matter.

Sincerely,



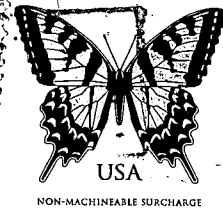
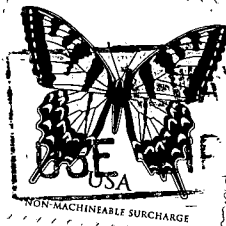
Rodney D. Davis
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4000 Faber Place Drive, Suite 300
Charleston, SC 29405
(843) 323-4353
Davis@LowcountryLawOffice.com

Enclosure(s). As stated above.
RDD/mmt

cc: J. Rutledge Johnson, Assistant Attorney General
Kimberly McCall, Appellate Division, SCCID

Lowcountry Law Office

Rodney D. Davis
4000 Faber Place Drive, Suite 300
Charleston, SC 29405



The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
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