

# The Supreme Court of South Carolina

Andre D. Johnson, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Roger L. Couch  
Spartanburg County  
Trial Court Case No. 2010-CP-42-00803

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## ORDER

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The request for an extension until May 9, 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



Clerk

Columbia, South Carolina

April 10, 2012

cc: Appellate Defender Susan B. Hackett  
Assistant Attorney General Suzanne H. White

ORIGINAL



# 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

April 9, 2012

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S.C. Supreme Court

Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: Andre D. Johnson v. State of South Carolina

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix in the above-referenced case are due to be served and filed today. Because of my present workload, I respectfully request a thirty-day extension of this deadline. No prior extensions have been requested in this case.

By copy of this letter, I am informing Suzanne H. White, Esquire, of the Office of the Attorney General, of this extension request.

Thanking you for your cooperation and assistance in this matter.

Sincerely,

Susan B. Hackett  
Appellate Defender

SBH/kam

cc: Suzanne H. White



# SCCID

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

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S.C. Supreme Court

February 7, 2012

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

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.

Andre D. Johnson v. State of South Carolina

2/7/2012

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,

Sharon A. Graham  
Administrative Coordinator



# SCCID

YOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

December 8, 2011

Ms. Pamela E. Green  
Circuit Court Reporter  
121 Bradford Crossing Drive  
Roebuck, SC 29376

Dear Ms. Green:

Please provide us with the following transcript:

Andre D. Johnson v. State of South Carolina      Case #:      10-CP-42-00803

County: Spartanburg      Date of Trial: June 13, 2011

Presiding Judge: Roger L. Couch

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,

  
Lorie French  
Legal Services Coordinator

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

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S.C. Supreme Court



# The Brough Law Firm



Christopher D. Brough  
175 Magnolia Street, Suite 202  
Spartanburg, SC 29306

Phone: 864-585-3088  
Fax: 864-585-3058  
www.broughlaw.com

November 9, 2011

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

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S.C. SUPREME COURT

RE: THE STATE VS. ANDRE D. JOHNSON, #321191


Dear Mr. Shearouse:

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

- (1) Original Proof of Service upon opposing counsel.
- (2) Order of Dismissal.

If I can be of any further assistance please feel free to call me.

Sincerely,



Christopher D. Brough

Enclosure

cc: South Carolina Office of the Attorney General  
Andre D. Johnson

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

Case No. 2010-CP-42-0803

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S.C. SUPREME COURT

The State,

Respondent,

v.

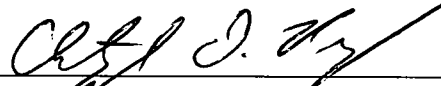
Andre D. Johnson,

Appellant.

**NOTICE OF INTENT TO APPEAL**

Andre D. Johnson appeals the denial of his application for Post-Conviction Relief in this case. The Order of Dismissal was imposed by the Honorable Roger L. Couch on November 1, 2011. Appellant received notice of the same on that date.

November 9, 2011

  
CHRISTOPHER D. BROUGH  
175 Magnolia St., Suite 202  
SPARTANBURG, SC 29306  
(864) 585-3088  
ATTORNEY FOR APPELLANT

Other Counsel of Record:  
Suzanne H. White  
Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211-11549  
(803) 734-3737

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

Case No. 2010-CP-42-0803

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S.C. SUPREME COURT

The State,

Respondent,

v.


Andre D. Johnson,

Appellant.

PROOF OF SERVICE

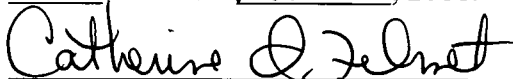
The undersigned, Kirby Lanford, hereby certifies that she is a person of such age and discretion as to be competent to serve papers and that a copy of the **Notice of Intent to Appeal**, was served upon the following person(s) on the State, by depositing copies of the same in the United States Mail, with sufficient postage affixed thereto, on November 16, 2011, addressed as follows:

The Honorable Alan Wilson  
SC Attorney General  
Rembert Dennis Building  
1000 Assembly Street, Room 519  
Columbia, S.C. 29201

  
Kirby Lanford

SWORN BEFORE ME THIS

16 DAY OF November, 2011.



NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: Aug. 3, 2019

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STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )  
 )  
 Andre D. Johnson, #321191, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
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IN THE COURT OF COMMON PLEAS  
 SEVENTH JUDICIAL CIRCUIT

2010-CP-42-0803

**ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 12, 2010. The Respondent made its Return on or about August 25, 2010. An evidentiary hearing into the matter was convened on June 13, 2011, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Christopher D. Brough, 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. Applicant also called Jennifer Shuler, Jennifer Clayton from SLED, and Elliott Anderson to testify. Also testifying was E. Joshua Schultz, Esquire, and James E. Hatcher, Esquire. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's Appellate records, and the State's Return.

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**PROCEDURAL HISTORY**

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. Applicant was indicted by the Spartanburg County Grand Jury at the November 2006 term of General Sessions

*PSL*  
*PI*

for murder (06-GS-42-4722). Mr. James E. Hatcher, Esquire, and Mr. E. Joshua Schultz, Esquire, represented the Applicant. On April 13, 2007, a jury convicted the Applicant of this charge. The Honorable J. Cordell Maddox, Jr. sentenced the Applicant to confinement thirty years.

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. Johnson, Op. No. 2009-UP-468 (filed October 13, 2009). The Remittitur was sent on October 29, 2009.

### ALLEGATIONS

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

1. "I did not want to commit murder;"
  - a. "Victim shot at me first,"
2. "My life was at risk;"
  - a. "Witnesses testify to what happen," and
3. "My trial was not fair;"
  - a. "Trial errors are abundant."

The Applicant also alleged, in responses filed following the State's original Return and Motion to Dismiss and proposed Conditional Order of Dismissal and at the hearing, that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of Counsel, in that;
  - a. Counsel failed to request a jury charge of involuntary manslaughter,
  - b. Counsel failed to move for a change of venue,
  - c. Counsel failed to properly conduct a Jackson v. Denno hearing,
  - d. Counsel failed to properly object or strike jurors who had relationships with witnesses, including Dr. Wren and Elliott Anderson.

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## 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) (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." 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

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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).

In regards to Applicant's claim that Counsel was ineffective for failing to request a change of venue in the case, this Court finds that the Applicant has failed to meet his burden of proof. Applicant testified that he believed Counsel should have made a Motion before the Court. Applicant did recall that the judge went over things with the jury regarding whether they had seen things in the media and whether it had affected them or not. Mr. Hatcher testified that the issue of a potential change of venue came up abruptly because of some stories that appeared on the radio and internet before trial. However, Mr. Hatcher testified that the judge addressed that with the jury pool and then singled out those jurors who had been exposed to media coverage and excused them from serving. Mr. Schultz testified that he felt comfortable with the judge's handling of the media issue with the jury.

Exposure to pretrial publicity does not automatically disqualify a prospective juror. Instead, an Applicant must show that the jury was unable to lay aside any impressions or opinions and could not render a verdict based on the evidence presented at trial. "The relevant question is not whether the community remembered the case, but whether the jurors...had such fixed opinions that they could not judge impartially the guilt of the defendant." Patton v. Yount, 467 U.S. 1025, 1035, 104 S. Ct. 2885, 2891, 81 L.Ed.2d 847, 856 (1984). The defendant bears the burden of showing actual prejudice. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). This Court finds that the Applicant has failed to demonstrate that Counsels' failure to make a

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Motion to change venue, if deficient, would have affected the outcome of his trial in any way. This Court also finds that even if a Motion was made, it would have likely been denied, in that the judge was able to sanitize the jury by removing jurors who indicated that they had been exposed to any media coverage. Therefore, this claim is denied and dismissed.

In regards to Applicant's claim that Counsel was ineffective for failing to effectively conduct the Jackson v. Denno hearing, this Court finds that Applicant has failed to meet his burden of proof. Applicant testified that he gave both an oral and two written statements to police without asking for an attorney. The record reflects that Counsel did request and a Jackson v. Denno hearing was held prior to trial regarding the voluntariness of Applicant's statements. Although Applicant testified at the hearing that the Miranda warnings given were not complete, Counsel both testified that they had no concerns with the warnings as they were given. The record reflects that Counsel cross-examined the State's witnesses at the hearing and argued on behalf of the Applicant that his statements, in particular the second written statement in which the Applicant admits the shooting, should be excluded because he did not provide the statement voluntarily. This Court finds that the Applicant has failed to meet his burden of proof as to this claim. Counsel raised and argued the motion to the court, effectively cross-examining the State's witnesses with the information and facts they had available. The Applicant failed to produce any other questions that Counsel should have asked or witnesses that Counsel should have called on Applicant's behalf at the Jackson v. Denno hearing. This Court finds no deficient performance on Counsels' behalf; therefore, this claim is denied and dismissed.

Regarding the issue of two jurors who might have had previously knowledge of or working relationships with State witnesses, this Court finds that the Applicant has failed to meet his burden of proof. Applicant presented testimony that a juror, Juan Williams, might have

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known witness Elliott Anderson previously and did not disclose that knowledge. Mr. Anderson testified that the Mr. Williams' sister dated Mr. Anderson's brother on and off years ago, but Mr. Anderson and Mr. Williams never socialized. Mr. Anderson also testified that he never brought the fact that he recognized Mr. Williams to the attention of either of Counsels' attention. Applicant presented no testimony that Counsel was deficient in any way for failing to question this particular juror. Any argument that the juror purposefully failed to disclose any knowledge of Mr. Anderson would be speculative, as even Mr. Anderson acknowledged that he and Mr. Williams did not socialize and it had been years since they had seen each other.

Applicant also testified that a juror sent out a note, which was made a Court's Exhibit at trial, indicating that he had worked previously with Dr. Wren while employed at Spartanburg Regional Medical Center. Neither Counsel recalled the incident of the juror sending out a note. Counsel testified that at the time neither of them considered it to be a problem or they would have offered some sort of objection to that juror serving on the jury; however, Mr. Schultz testified that he never would have requested a mistrial because of that. Applicant failed to demonstrate that Counsel was ineffective for failing to ask for that juror to be removed or that the juror demonstrated any bias or prejudice because of his knowledge of Dr. Wren from a past working relationship. Therefore, this claim is denied and dismissed.

Finally, the Applicant claimed that Counsel was ineffective for failing to request the lesser-included jury charge of voluntary manslaughter. Applicant testified that this was a case of self-defense and he believes that the jury should have had that option of voluntary manslaughter; however, he also acknowledged that he never discussed the option of voluntary manslaughter with Mr. Hatcher or Mr. Schultz prior to trial or at the time of trial. Mr. Hatcher testified that he and Mr. Schultz did discuss voluntary manslaughter with the Applicant prior to trial, but that the

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Applicant did not want any other options for the jury other than not guilty of murder. Mr. Hatcher testified that he felt they had established a defense of self-defense by arguing that the gun found under the master bed was the victim's and the judge did charge self-defense. Mr. Hatcher testified that he had material on the gun tested, but it was determined to not be human blood. Mr. Hatcher also testified that a voluntary manslaughter jury charge was discussed with the Applicant in the holding area outside of the courtroom and again at the defense table in the courtroom prior to closing. Mr. Schultz concurred with Mr. Hatcher and recalled that the Applicant wanted only a guilty or not guilty option for murder. Mr. Schultz testified that he felt that the Applicant understood all of their discussions regarding the options.

This Court finds that the Applicant has failed to meet his burden of proof as to the allegation that Counsel was deficient for failing to request a jury instruction of voluntary manslaughter. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds Mr. Hatcher and Mr. Schultz's testimonies to both be very credible at to this matter. Counsel both articulated valid strategic reasons for requesting only the self-defense charge. The Applicant has not shown that Counsel was deficient in that choice of tactics. Therefore, this claim is denied and dismissed.

This Court finds Counsels' testimony on all matters to be more credible than Applicant's testimony. This Court did not find Sonja Shuler's testimony to be credible, especially in light of the fact that she offered some testimony which directly contradicted earlier testimony and apparently contradicted previous statements given at the time of the incident. Although this



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Court does not doubt the credibility of the other witnesses, this Court found that the information they provided offered no support for Applicant's claims.

*Summary*

This Court finds in regards to the allegations of ineffective assistance of counsel, the Applicant has failed to meet his burden of proof. This Court further finds both trial counsels adequately conferred with the Applicant, conducted a proper investigation, were thoroughly competent in their representation, and that trial counsels' 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 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 their 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 counsels' 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 this 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



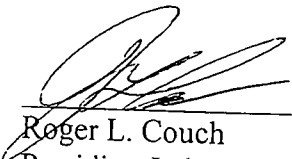
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appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant 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.

**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 November, 2011.

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

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175 Magnolia Street, Suite 202  
Spartanburg, SC 29306

*Andre R. Johnson*

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

**RETURN RECEIPT  
REQUESTED**