



testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

*A. Allegations of Ineffective Assistance of Counsel.*

The Applicant alleges that he received ineffective assistance of counsel prior to and during his guilty plea and that Counsel's ineffectiveness rendered his plea involuntary. This Court finds these allegations to be without merit.

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, Id.

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

The courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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

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unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Applicant alleges that his trial counsel rendered ineffective assistance in several areas. They are each addressed separately below. None of the allegations require this Court to grant post-conviction relief.

1. Failure to call alibi witnesses. The Applicant testified that he had an alibi defense, and that he wanted witnesses to be called to verify this alibi. Trial counsel testified that he spoke with his client before trial and that his client had not informed him of any potential alibi witnesses. The Applicant's wife (Shawna Butler) and mother (Pauline Butler) testified to alibi defense.

This Court has heard the testimony and weighed the testimony of the witnesses. This Court finds that the Applicant did not inform his attorney of his desire to have any alibi witnesses subpoenaed. This Court finds that trial counsel's testimony is more credible than that of the Applicant and his witnesses. This Court notes that both the Applicant's witnesses were present at his trial and did not inform Mr. Rollins of their desire to testify. Further, this Court recognizes that a Defendant has a Constitutional right not to testify. However, the Applicant asserts that he had an alibi at his PCR hearing. This Court cannot consider his testimony to that effect since he waived his right to testify at trial.

2. Counsel failed to meet with his client. This claim is denied. This Court accepts trial counsel's testimony that he met and was prepared for trial. Further, the Applicant has failed to show this Court examples of how counsel was unprepared.

3. Counsel failed to retain an expert witness to refute the State's fingerprint expert. Initially, this Court finds that Counsel is not required to retain an expert witness to refute the State's witness. The

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refutation can occur through cross-examination. Further, the Applicant has the burden of proof in this matter and has failed to subpoena an expert witness on fingerprints. Therefore, this claim is denied. Further, Counsel has articulated legitimate reasons for not calling an expert witness. His trial strategy will not be grounds for a finding of ineffectiveness.

***Waived Allegations.***

As to any remaining grounds raised in his application, this Court finds that he failed to raise it/them at the hearing and has, thereby, waived it/them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address this/these issue(s) at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, this/these allegation(s) is denied and dismissed.

**CONCLUSION**

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Therefore, this Application for Post-Conviction Relief must be denied and dismissed with prejudice.

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. His attention is also directed to South Carolina Appellate Court Rule 227 for appropriate procedures after notice has been

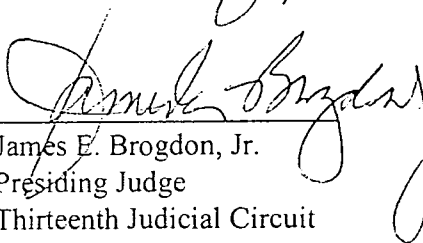
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timely filed.

**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 16 day of July, 2001.

  
James E. Brogdon, Jr.  
Presiding Judge  
Thirteenth Judicial Circuit

Mann, South Carolina.

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )  
 )  
Stanley L. Butler, #233704 )  
 )  
Applicant, )  
 )  
vs )  
 )  
State of South Carolina, )  
 )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

98-CP-23-2305

AFFIDAVIT OF SERVICE BY MAIL

PERSONALLY APPEARED before me SANDY L. BROWN, who being first duly sworn, states:

1. That I am an employee of the Respondent in the above-captioned action.
2. That regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. That I have this day served a copy of the Order of Dismissal in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

The Honorable Paul Wickensimer  
Greenville County Clerk of Court  
305 East North Street  
Greenville, SC 29601

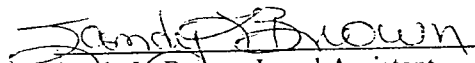
Jerry Merriam, Esquire  
(Service for W. G. Yarborough)  
P. O. Box 10828  
Greenville, SC 29603

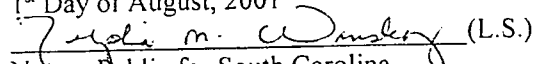
Honorable Robert M. Ariail  
Solicitor Thirteenth Judicial Circuit  
Courthouse Annex Suite 113  
Greenville, SC 29601

Victim Services  
SC Office of the Attorney General  
100 Assembly Street  
Columbia, SC 29201

Richard P. Stroker, Esquire  
Office of General Counsel SCDC  
P. O. Box 21787  
Columbia, SC 29211

DATED this 1<sup>st</sup> Day of August, 2001

  
Sandy L. Brown, Legal Assistant

SWORN TO before me this  
1<sup>st</sup> Day of August, 2001  
 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: 12/22/04