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March 3, 2016

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Kenneth Williams, 2014-CP-07-01841

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Beaufort County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc: Ruston Neely, Esq.; Kenneth Williams 140886.

Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Honorable Michael G. Nettles, Circuit Judge

Case No.: 2014-CP-07-01841

Kenneth Williams 140886.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Kenneth Williams appeals the Honorable Michael G. Nettles December 20, 2016, Order of Dismissal. Undersigned counsel received notice of entry of the order on January 4, 2017. A copy of the order on appeal is attached hereto.

James K Falk
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Charleston, SC 29402

January 30, 2017

Ruston Neely, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Honorable Michael G Nettles, Circuit Judge

Case No.: 2014-CP-07-01841

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PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Ruston Neely, Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this January 30, 2017.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

STATE OF SOUTH CAROLINA) COUNTY OF BEAUFORT)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
Kenneth Williams, #140886,)) Applicant,)) v.)) State of South Carolina,)) Respondent.))	Case No. 2014-CP-07-1841 **ORDER OF DISMISSAL**

This Court convened an evidentiary hearing into the matter on October 17, 2016, at the Beaufort County Courthouse. Applicant was present at the hearing and represented by James Falk, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant's trial counsel Gene Hood, Esquire (hereinafter "trial counsel") was present and testified. Testimony was elicited from Applicant. The Court had before it a copy of the trial transcript, the records of the Beaufort County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the direct appeal records, and the pleadings in this matter. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Beaufort County Clerk of Court's orders of commitment. Applicant was indicted by the October 2007 term of the Beaufort County Grand Jury for Burglary, 1st degree (2007-GS-07-1920), Murder (2007-GS-07- 1918) and Strong Arm Robbery (2007-GS-07- 1919). Gene Hood, Esquire represented him. On July 29, 2010, the Applicant proceeded to a jury trial pursuant to which he was found guilty of all charges as indicted. The Honorable G. Thomas Cooper Jr.

sentenced the Applicant to confinement of thirty (30) years for Murder; thirty (30) years, concurrent, for Burglary, 1st degree; and fifteen (15) years, concurrent, for Strong Arm Robbery.

A notice of appeal was filed on Applicant's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Williams. 2012-UP-573 (filed October 24, 2012). The Applicant appealed this Order to the South Carolina Supreme Court, but certiorari was denied on June 1 1, 2014. The Remittitur was issued on June 26, 2014.

II. ALLEGATIONS

In his application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Failure of trial counsel to object to the trial judge's jury instruction regarding witness credibility.
2. Failure of trial counsel to object to DNA results, for which the examiner was not available to testify.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court reviewed the record in its entirety, listened to the testimony given, and heard the arguments presented at the evidentiary hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their 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).

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of plea counsel as a ground for relief, Applicant must prove plea counsel's "conduct so undermined the proper functioning of the adversarial process" that the plea proceedings

"cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this first prong, the proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S.at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). Second, any deficient performance must have prejudiced 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 688.

This Court begins with a strong presumption trial counsel made all significant decisions in the exercise of reasonable professional judgment. Applicant has not overcome this presumption. Therefore, this application is dismissed for the reasons laid out hereafter:

A. Burden Shifting Jury Instruction

Applicant contends trial counsel was ineffective for failing to object to the trial judge's instructions to the jury on how to evaluate the credibility of witnesses. The charge in question is located on page 117 of the trial transcript:

> It is a simplistic example, and I use it perhaps not meaning to demean anything that will go on in this courtroom because the issues here are far

> more important than this example suggests. But if any of you have more than one child, or if you've got more than one grandchild, you know exactly what I mean when the two of them come to you and one of them says he hit me, and the other says no, she hit me first. Well, you've got to make a decision somehow or another. And somehow or another you do it. You put the question in your mind, you let them run through the machinery of your common sense, and you reach a decision as to where the truth lies.

The Court finds the charge in question does not improperly shift the burden of proof to the defense. "There is not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt. The trial court's instructions concerning seeking the truth were given in the context of the jury's role in determining the credibility of witnesses." State v. Aleksey, 343 S.C. 20, 28–29, 538 S.E.2d 248, 252 (2000). In this case, the charge merely explains in layman's terms how a jury can address direct conflict in witness testimony. This charge, in conjunction with the reasonable doubt and burden of proof charges, is an adequate and fair statement of the law. Applicant contends trial counsel should have objected to the charge set forth above and should have filed an appeal; However, the charge was proper. Therefore, this contention is without merit. This allegation is dismissed.

B. Failure to Object to DNA Evidence

Applicant contends trial counsel committed prejudicial error by failing to object to the testimony of the SLED forensic expert who introduced the DNA results. The DNA results established that the Applicant was at the scene of the crime. The majority of the DNA results submitted were not analyzed by the SLED forensic expert who admitted the results. Applicant is correct in that the admission of the DNA samples not personally examined by testifying SLED forensic expert violated Crawford.[1] Applicant was not able to cross-examine the forensic expert

[1] Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)

who actually tested the various samples, which were used for testimonial purposes. However, in this circumstance, it was a legitimate trial strategy not to object to the DNA results under the defendant's theory of the case. When counsel focuses on some issues to the exclusion of others, there is a strong presumption of doing so for tactical reasons rather than sheer neglect, Yarborough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1,5, 157 L.Ed.2d 1 (2003). The defense theory of the case was:

1. Applicant was present and confessed to law enforcement that his blood was at the scene of the crime;
2. However, Applicant was cut in his efforts to rescue the deceased from the attacker. This was the story that Applicant told trial counsel.

Applicant verified his attorney's recounting of that story and reasserted the same story at the evidentiary hearing.

Furthermore, no prejudice resulted from trial counsel's lack of objection. Applicant gave a full statement to law enforcement admitting he bled at the scene of the crime. Witnesses placed Applicant at the scene of the crime. There was DNA evidence, personally tested by the testifying forensic analysist, placing Applicant in the vehicle with the witnesses before the crime. The objectionable DNA evidence that was introduced was merely confirmation of a part of Applicant's story and corroborated part of the witness's testimony. Neither the State nor Applicant received a substantial benefit from the introduction of the DNA evidence. Therefore, there was no error when trial counsel chose not to object to the DNA evidence and there was no prejudice by the introduction thereof. This allegation is dismissed.

C. 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, the Court finds Applicant failed to present any

evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 20 day of December, 2016.

MICHAEL G. NETTLES
Presiding Judge
Fourteenth Judicial Circuit

Florence, South Carolina

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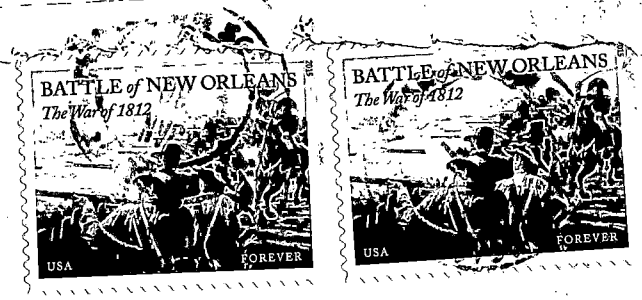

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