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APR 07 2017  
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April 5, 2017

S.C. SUPREME COURT

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

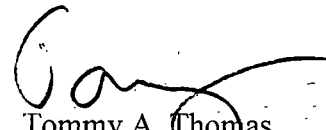
RE: John Jabbar Greene #219696 v. State of South Carolina  
Docket No.: 2012-CP-22-0164 & 2015-CP-22-0949

Dear Sir or Madam:

Enclosed please find an Original and a copy of a Notice of Appeal, along with a Certificate of Service and attachments. I have been retained to represent Mr. Greene in this Appeal. I have also enclosed a transcript request that was sent to the Court Reporter.

Kindly return a clocked copy to me in the enclosed envelope. Thank you and should you have any questions, or need any additional information, please do not hesitate to contact me.

Yours truly,

  
Tommy A. Thomas,  
Attorney at Law

TAT/jem

cc: Johnny James, Jr., Esq.  
John J. Greene #219696

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas  
Post Conviction Relief

John C. Hayes, Circuit Court Judge

Docket No.: 2012-CP-22-0164  
2015-CP-22-0949

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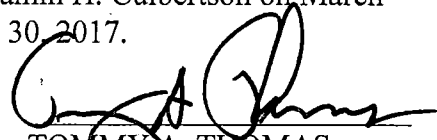
John Jabbar Greene #219696,..... Appellant,

vs.

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

NOTICE OF APPEAL

John Jabbar Greene appeals the Order of Dismissal from the Honorable John C. Hayes dated November 16, 2014, pursuant to a Consent Order Granting an Appeal Pursuant to Austin v. State, signed by the Honorable Benjamin H. Culbertson on March 24, 2017, filed on March 28, 2017 and received on March 30, 2017.



TOMMY A. THOMAS  
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Other Counsel of Record:

Johnny James, Jr., Esq.  
Assistant Attorney General  
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Columbia, SC 29211  
Attorney for Respondent

Irmo, South Carolina  
April 5, 2017

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas  
Post Conviction Relief

John C. Hayes, Circuit Court Judge

Docket No.: 2012-CP-22-0164  
2015-CP-22-0949

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S.C. SUPREME COURT

John Jabbar Greene #219696,..... Appellant,

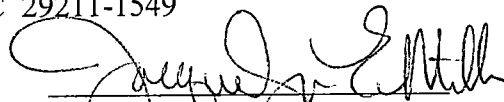
vs.

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

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant hereby certify that I placed in the United States Mail, a copy of a Notice of Appeal , with postage prepaid and the return address clearly shown on said envelope to Valerie Garcia Giovanoli, Esq. of the Attorney General's Office, at:

Johnny James, Jr., Esq.  
Attorney General's Office  
P.O. Box 11549  
Columbia, SC 29211-1549



Jacquelyn E. Miller  
Secretary to Tommy A. Thomas  
Attorney for Applicant  
P.O. Box 88  
Irmo, SC 29063  
(803) 732-5507

April 5, 2017

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GEORGETOWN )

John Jabbar Greene, #219696 )

Applicant, )

v. )

State of South Carolina, )

Respondent. )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT

C.A. No.: 2012-CP-22-164

**ORDER**

This is a Post-Conviction Relief Proceeding

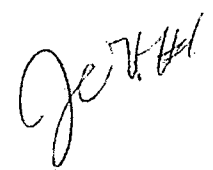
FILED  
GEORGETOWN COUNTY, SC  
2014 DEC -5 PM 3:52  
AOMAY WHITE  
CLERK OF COURT

Applicant filed his application for Post-Conviction Relief (PCR) on February 21, 2012

The case was heard by the undersigned on the 27th day of October 2014. The State of South Carolina was represented by Josh Thomas, Esquire, and the Applicant was represented by Eric Fox, Esquire.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. Applicant was indicted at the May 2008 term of the Georgetown County Grand Jury for two counts of kidnapping (2008-GS-22-456 and 457) and two counts of armed robbery (2008-GS-22-458 and 459) and burglary second (2008-GS-22-460).

On May 1, 2009, Applicant pled guilty as indicted. The Honorable W. Jeffrey Young sentenced Applicant to thirty years imprisonment on each of the armed robbery charges, to thirty years imprisonment on each kidnapping charge, and fifteen years imprisonment on the burglary second charge, with all charges to run concurrently. Applicant filed timely notice of intent to appeal, and his conviction and sentence were affirmed by order dated November 15, 2011 in unpublished opinion No. 2011-UP-507.



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

1. "ineffective assistance of trial counsel; Appellate counsel;"
2. "conflict of interest; judicial bias; defective chain of custody;"
3. "fourth amendment violation; fifth amendment violation."

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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*, 334 S.E.2d 813.

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. *Strickland*, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C.115, 386 S.E.2d 624 (1989).

The reviewing court applies 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, the court measures an attorney's performance by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 386 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 unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.E. 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*

*John A. Z*

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 (1984)).

The Applicant contends his appointed appellate attorney was ineffective for failing to raise as an appellate issue counsel's failure to request that Judge Young recuse himself from Applicant's trial. This allegation is without merit.

Appellate counsel appointed to represent an indigent defendant in his appeal from a criminal conviction does not have a constitutional duty to raise every non-frivolous issue requested by the defendant. *Jones v. Barnes*, 463 U.S. 745 (1983). Indeed, an indigent defendant has no constitutional right to compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points. *Id.* Appellant counsel's representation will not be deemed ineffective if he makes an informed decision based on reasonable professional judgment not to pursue a particular issue on appeal. *Griffin v. Aiken*, 775 F.2d 1226 (4th Cir. 1985). Furthermore, under the two prong test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), an Applicant must show not only that counsel's performance was deficient, but that this deficiency prejudiced his defense. Therefore, the Applicant's appellate counsel's performance was not deficient and the Appellant was not prejudiced by his appellate counsel's performance.

The Applicant contends that the trial counsel failed to make objections as to the introduction of evidence regarding Applicant's statements and the taking of buccal swab. This court finds that objections were timely made by trial counsel and ruled on by the trial judge (TR p. 39 L 21 through p. 40 L 3). Also, the appellate court heard and affirmed the trial court's rulings regarding these objections.

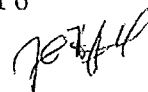
*J. H. H. 7*

The Applicant contends that the Applicant's statements should have been suppressed from trial because he invoked his Fifth Amendment rights. However, in the Court of Appeals unpublished opinion, No. 2011-UP-507, the appellate court affirmed the trial court's ruling allowing the State to introduce these statements. Thus, there is no merit to this claim since the appellate court has already ruled on this issue. Similarly, the Applicant contends that the DNA evidence should be suppressed because he did not consent to the search, therefore the search constitutes a violation of the Applicant's Fourth Amendment rights. Again, in the unpublished opinion, No. 2011-UP-507, the appellate courts affirmed the trial court's ruling. Additionally, there is no evidence of the consent form the Applicant signed because the file has been lost. The court can only review that which is produced.

The Applicant contends that the shotgun used in the crime should have been sent from the Georgetown Police Department to South Carolina Law Enforcement Division (SLED). There is nothing requiring local law enforcement to send any evidence to SLED for testing. Additionally, Applicant acknowledges having handled the shotgun prior to the robbery at issue. Therefore, this contention is without merit.

While not alleging it as ineffective assistance of counsel, Applicant expresses fault on law enforcement for taking buccal swabs for DNA testing when the State had Applicant's DNA from prior run-ins with the law. This is not an issue cognizable under an Applicant's post-conviction relief application.

The Applicant contends that the trial judge, the Honorable William Jeffrey Young, had an interest in the outcome of the case because Judge Young knew one of the victims in this case. However, the trial judge properly disclosed that he had no professional connection with one of the victims, Mr. Moses; but rather, Judge Young explains that he had known Mr. Moses for



many years. (TR p. 40-41 LL 14-5). Additionally, Mr. Andrew, trial attorney for the State, asked Judge Young if he could be "fair and impartial." (TR p. 41 LL 8-9). Judge Young answered that he could be fair and impartial. (TR p. 41 LL 10). Neither counsel objected to Judge Young's familiarity with Mr. Moses. Trial counsel could have asked the judge to recuse himself and for a continuance but I find failure to do so under these facts does not constitute ineffective assistance of counsel under the *Strickland* test. Trial counsel acted reasonably under professional norms as to the recusal of Judge Young issue.

Applicant's issue about a lack of evidence regarding the perpetrator's height is on its face without merit.

Applicant's post-conviction relief counsel, through cross examination explored additional issues not raised with particularity in Applicant's applicant for post-conviction relief. None of these issues have any merit. They are, no motion for a change of venue based on Applicant's criminal past, no attack on the consent warrant, no attack on the presence of shotgun shells, no attack on the State's failure to link a footprint to Applicant, no recovery of the stolen goods or gloves, no request for a *Jackson v. Denno* hearing,<sup>1</sup> and no attack on the reliability of dog tracking evidence.

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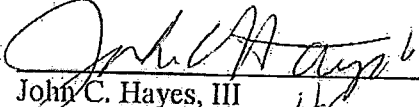
<sup>1</sup> *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).

*JCH*

The Court finds that trial counsel's representation of Applicant was effective. Additionally, the court finds an absence for any grounds of relief which the Applicant seeks. Therefore, Applicant's Application for Post-Conviction Relief is denied and dismissed with prejudice.

Applicant is hereby placed on notice that any petition for certiorari to the South Carolina Supreme Court must be filed within thirty (30) days. See Appellate Court Rules 203, 206, and 227(b).

IT IS SO ORDERED.

  
\_\_\_\_\_  
John C. Hayes, III  
Presiding Judge #16

November 16<sup>th</sup>, 2014  
Conway, South Carolina

STATE OF SOUTH CAROLINA )  
COUNTY OF GEORGETOWN )

IN THE COURT OF COMMON PLEAS  
OF THE FIFTEENTH JUDICIAL CIRCUIT

Case No.: 2015-CP-22-00949

John Jabbar Greene, )  
S.C.D.C. No. 219696, )

Applicant, )

v. )

State of South Carolina, )

Respondent. )

**CONSENT ORDER GRANTING  
AN APPEAL PURSUANT TO  
AUSTIN V. STATE<sup>1</sup>**

ALMA Y. WHITE  
CLERK OF COURT

2017 MAR 28 AM 8:37

FILED  
GEORGETOWN COUNTY, S.C.

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed October 20, 2015. Respondent made its Return on February 17, 2016.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to the Georgetown County Clerk of Court's orders of commitment. The Georgetown County Grand Jury indicted Applicant at the May 2008 term for two counts of kidnapping (2008-GS-22-0456; -0457), two counts of armed robbery (2008-GS-22-0458; -0459), and second-degree burglary (2008-GS-22-0460). J. Eric Fox, Esquire, represented Applicant.

Applicant proceeded to a jury trial and was convicted as indicted. On May 1, 2009 the Honorable W. Jeffery Young sentenced Applicant to thirty (30) years' imprisonment for kidnapping, thirty (30) years' imprisonment for armed robbery, and fifteen (15) years' imprisonment for second-degree burglary, to be served concurrently.

A notice of appeal was filed at the South Carolina Court of Appeals. Kathryn Hudgins, Esquire, with the Office of Appellant Defense perfected the appeal. The Court of Appeals

<sup>1</sup> Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

affirmed the Applicant's conviction and sentence by order dated November 15, 2011. State v. John Jabbar Greene, No. 2011-UP-507 (S.C. Ct. App., filed November 15, 2011).

2012-CP-22-0164

Applicant filed his first application for PCR on February 21, 2012, in which he alleged the following grounds for relief:

1. Ineffective assistance of trial counsel.
  - a. "Prior post-conviction relief counsel failed to file an appeal from Judge Hayes order."
2. Ineffective assistance of appellate counsel.
  - a. "Appellate counsel never try to appell [sic] the trial courts denial of directed verdict.
3. Conflict of Interest/Judicial Bias
  - a. "Trial counsel refuse to recuse trial judge because trial judge stated that he knew one of the victims [sic] for year's."
4. Defective Chain of Custody
  - a. "The gun never made it to (S.L.e.d.) as the source of the samples."
5. Fourth and Fifth Amendment Violation
  - a. "The intrusions into my body without probale [sic] cause; Miranda violation, officer testified that he continued to question me when I invoked fifth amendment right to remain quiet."

An evidentiary hearing was convened on October 27, 2014 before the Honorable John C. Hayes, at which Applicant was represented by Robert Mason, Esquire. Relief was denied and the matter was dismissed by an order dated November 16, 2014 and filed December 5, 2014. Applicant did not appeal.

#### Current Application (2015-CP-22-0949)

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

1. Ineffective assistance of PCR counsel.
  - a. "Prior post-conviction relief counsel failed to file an appeal from Judge Hayes order."

Before this Court are the records of the Georgetown County Clerk of Court regarding Applicant's convictions, the records from the South Carolina Department of Corrections, Applicant's prior PCR application and the corresponding Order of Dismissal, and the obituary of Applicant's prior PCR counsel.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application because his prior PCR counsel, Robert C. Mason, Esquire, passed away shortly after the service of the order of dismissal in Applicant's prior PCR action. Pursuant to Austin v. State, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his prior application.

Respondent consents to allow Applicant a belated review of the denial of his PCR application (2012-CP-22-0164). After review of the facts and circumstances surrounding the waiver of Applicant's right to appeal the denial of his post-conviction relief application, this Court finds that Applicant did not knowingly and voluntarily waive his right to appeal his first PCR application. Accordingly, this Court grants Applicant a belated review of the denial of post-conviction relief pursuant to Austin v. State, in which he may raise on appeal any issues that were raised and ruled upon in his prior application. In order to secure this review, however, Applicant must appeal from this Order.

### CONCLUSION

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and

Rule 243 of the South Carolina Appellate Court Rules for the appropriate procedures for filing a belated appeal.

**IT IS THEREFORE ORDERED:**

1. That Applicant be granted an appeal of case 2012-CP-22-0164 pursuant to Austin v. State;
2. That all other PCR allegations are waived and dismissed with prejudice;
3. That Applicant remain in the custody of the South Carolina Department of Corrections.


AND IT IS SO ORDERED this 24 day of March, 2017.



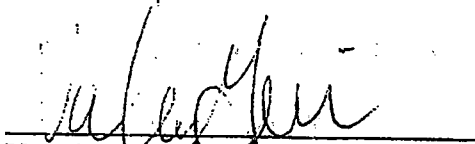
BENJAMIN H. CULBERTSON  
Chief Administrative Judge  
Fifteenth Judicial Circuit

Georgetown, South Carolina

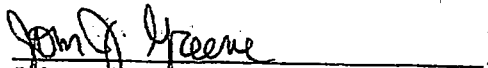
**We Consent:**



Tommy A. Thomas, Esquire  
Attorney for the Applicant

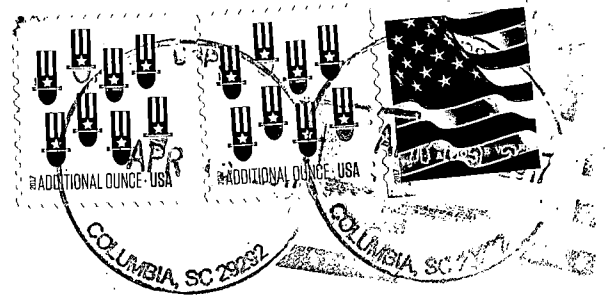


Valerie Garcia Giovanoli, Esquire  
Assistant Attorney General  
Attorney for the Respondent



John Jabbar Greene, #219696  
Applicant

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