

# FALK LAW FIRM, LLC.

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August 30, 2017

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

RECEIVED

SEP 05 2017

S.C. SUPREME COURT

Re: Senior Jenkins, 2015-CP-10-02152

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Horry 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: Judah VanSyckle, Esq.; Senior Jenkins 341212.

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

SEP 05 2017

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Honorable William H. Seals Jr., Circuit Judge

Case No.: 2015-CP-10-02152

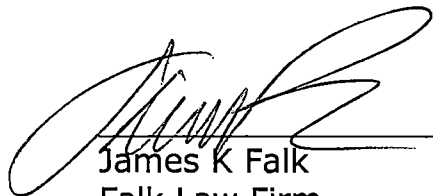
Senior Jenkins 341212.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Senior Jenkins appeals the Honorable William H. Seals, Jr's. July 27, 2017 Order of Dismissal. Undersigned counsel received notice of entry of the order on August 28, 2017. A copy of the order on appeal is attached hereto.



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

August 30, 2017

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

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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SEP 05 2017  
S.C. SUPREME COURT

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

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Case No.: 2015-CP-10-02152

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Senior Jenkins 341212.....PETITIONER

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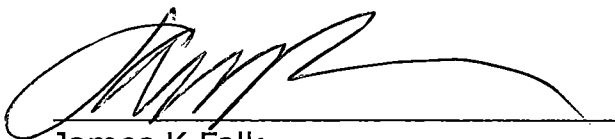
State of South Carolina.....RESPONDENT

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PROOF OF SERVICE

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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, Judah Vansyckle, Esq. 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 August 30, 2017.



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

cc  
AG  
AT  
GS  
SOC

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )  
 )  
Senior Jenkins, #341212, )  
 )  
Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2015-CP-10-2152

**ORDER OF DISMISSAL**

FILED  
2017 AUG 24 PM 12:02  
JULIE J. [unclear]  
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed April 13, 2015, by Senior Jenkins (Applicant). Respondent made its Return on November 24, 2015, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened January 9, 2017, at the Charleston County Courthouse. Applicant was present at the hearing and represented by James K. Falk, Esquire. Assistant Attorney General Alicia Olive from the South Carolina Attorney General's Office appeared on behalf of the State. At the conclusion of the hearing, this Court denied the application from the bench. This order follows.

**PROCEDURAL HISTORY**

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its April 2013 term of court, the Charleston County Grand Jury indicted Applicant for distribution of cocaine base (third offense) (2013-GS-10-1996). Donna K. Taylor, Esquire, represented Applicant. Assistant Solicitor Kelley Young prosecuted the case.

On August 28, 2014, Applicant appeared in the Charleston County Court of General Sessions before the Honorable Donald B. Hocker, circuit court judge, and pled guilty to the

lesser-included offense of distribution of cocaine base (second offense) without negotiations or recommendations. Judge Hocker sentenced Applicant to seven years imprisonment. Applicant did not appeal his guilty pleas or sentences.

### **FACTUAL HISTORY ADDUCED AT THE GUILTY PLEA**

These charges arise from an undercover drug transaction conducted by the City of Charleston Police Department on December 1, 2012. (Plea Tr. p. 5-6). During this transaction, an undercover office in the area of Rutledge Avenue and Congress Street exchanged pre-recorded U.S. currency in exchange for approximately 0.2 grams of cocaine base. (Plea Tr. p. 6). The entire transaction was recorded. (Plea Tr. p. 6).

At his plea proceeding, the plea court inquired as to whether Applicant agreed with these facts and Applicant stated he did. (Plea Tr. p. 6). Applicant stated he understood the court could sentence him to up to thirty years imprisonment. (Plea Tr. p. 7). Applicant also stated he was aware of his constitutional rights and wanted to waive them to enter his guilty plea. (Plea Tr. p. 7-9). Applicant stated he had not been threatened or promised anything to induce his guilty plea. (Plea Tr. p. 5). He stated he was satisfied with his attorney's services. (Plea Tr. p. 9-10). Applicant also stated he understood he had ten days to appeal his guilty plea. (Plea Tr. p. 10).

### **ALLEGATIONS RAISED**

In his application, Applicant alleged he is being held in custody unlawfully based on the following allegations:

1. "PWID, 2<sup>nd</sup> offense is not a lesser included offense of PWID, first offense"
  - a. "SC Code Ann. 44-53-375 (b)(2) is not lesser included offense of 375(B)(1)

2. "Violation of Notice requirement guaranteed by U.S & S.C. Const. & statutes"
  - a. "There is no indictment alleging a violation of S.C. Code 44/53/375(b)(2)"
3. "Breach of the plea agreement"
  - a. "The offense in which Applicant pled guilty is not a lesser included offense"

At the start of the evidentiary hearing, the State moved to dismiss these allegations a direct appeal issues that cannot be raised in a post-conviction relief action. (PCR Tr. p. 3-4). Applicant, through counsel, responded Applicant would be proceeding forward on the allegation plea counsel was ineffective for failing to advise the plea court that the underlying indictment failed to allege it was a second or third offense and the allegation that counsel was ineffective for failing to investigate whether Applicant's prior drug offense should have been treated as one offense for enhancement purposes. (PCR Tr. p. 4-5).

#### **SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING**

At the evidentiary hearing, Applicant testified on his own behalf. Applicant testified he was represented by a public defender on his original 2010 drug charges that were used to enhance this charge. (PCR Tr. p. 6). He testified he asked counsel why he had been indicted for a third offense when he only had one prior drug offense. (PCR Tr. p. 7-8). Applicant testified counsel advised him that because the 2010 offenses occurred on two separate dates (January 20, 2010 and January 22, 2010) they could be considered separate offenses. (PCR Tr. p. 9, 12-13). He testified counsel did not explain why they could be considered separate offenses and he repeatedly told her the new charges should not be considered a third offense. (PCR Tr. p. 9). Applicant acknowledged these offenses happened on separate dates. (PCR Tr. p. 17). Applicant

testified the State allowed him to plead to a lesser-included offense in exchange for his guilty plea, but he does not think possession with intent to distribute cocaine base is a lesser-included offense of distribution of cocaine base. (PCR Tr. p. 10, 18-19). Applicant testified he only spoke with counsel for 40-45 minutes throughout her entire representation of him. (PCR Tr. p. 11). He testified he knew he had prior drug convictions and understood he should be facing a second offense for the charge subject to this application. (PCR Tr. p. 14). He acknowledged he ultimately pled guilty to a second offense drug crime. (PCR Tr. p. 15).

He also testified the State failed to put him on notice that this was a second or third offense because the indictment did not provide this information. (PCR Tr. p.10-11, 15-16). However, Applicant testified he assumed it was a second offense based on his prior drug convictions. (PCR Tr. p. 16). Applicant acknowledged he also has a possession of cocaine conviction from 2001. (PCR Tr. p. 16). Applicant acknowledged he did not raise any of the issues concerning his indictments or the lesser-included offenses at his guilty plea proceeding. (PCR Tr. p. 19-20). Applicant also testified he informed the plea court he was satisfied with counsel's representation. (PCR Tr. p. 20).

Plea counsel Donna K. Taylor (Counsel) testified next. She testified she became involved in Applicant's case when she was contacted by Applicant's brother, a long term client of hers who asked that she contact him. (PCR Tr. p 21). She testified Applicant had previously been represented by a public defender followed by a retained attorney. (PCR Tr. p. 21). Counsel testified she met with Applicant and his wife on at least four different occasions. (PCR Tr. p. 25). Counsel testified she reviewed Applicant's prior record, which included 2006 drug convictions and 2010 drug convictions. (PCR Tr. p. 21-22). Counsel testified she also reviewed Applicant's

prior record with the prosecutor, who believed this current charge was a third offense based on Applicant's prior drug convictions. (PCR Tr. p. 22).

Counsel testified the offer had already been made while Applicant was represented by former counsel. (PCR Tr. p. 22-23). She testified when Applicant's family contacted her because they were displeased with Applicant's current counsel, she made it very clear to Applicant and his family that she was not going to take the case if Applicant wanted to proceed to trial. (PCR Tr. p. 23). She elaborated:

And I was clear with him and his wife and his brother that if he wanted a trial, there was nothing I could do for him. This was an undercover buy to a police officer. There's audio. There's an informant tape. There's video of the transaction. If he wanted to go to trial, I was not going to ride that pony for him.

But if he wanted me to see if I could help get him a better offer, and specifically get him into either drug court or mental health court, which was the primary goal, that I would do that and I would be happy to then take the case, if he wanted me to try to do that with the understanding that he would, one way or the other, be entering a plea, because he never denied the transactions, any of them.

(PCR Tr. p. 23). She elaborated there was overwhelming evidence of Applicant's guilt and that Applicant never wanted to go to trial. (PCR Tr. p. 26-27, 29). She testified Applicant is a veteran with a history of mental health problems and drug abuse. (PCR Tr. p. 26). She testified she wanted to get him into a treatment program, but he continued to use drugs and the State would not agree to any mental health court or drug court due to his non-compliance and that this case involved a distribution. (PCR Tr. p. 26).

Counsel testified she never had to tell Applicant it was his third drug offense because he was aware of it the first time they met. (PCR Tr. p. 23). She testified Applicant's prior counsel

had already reached an agreement with the State to allow Applicant to plead to a second offense because of the tiny amount of crack cocaine that was involved in this case. (PCR Tr. p. 24). She testified she explained to Applicant that the State was allowing him to plead to a second offense as a lesser-included offense. (PCR Tr. p. 24). She testified she tried to get the State to reduce the charge to possession, but the State refused. (PCR Tr. p. 28-29). She testified she explained this to Applicant. (PCR Tr. p. 29).

Counsel testified she filed a motion to reconsider following Applicant's guilty plea and had a telephone conference with the plea court, but that he would not change or otherwise reduce Applicant's sentence. (PCR Tr. p. 27-28).

#### **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 at the post-conviction relief hearings. 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. This Court finds Counsel's testimony credible and finds Applicant's testimony not credible. 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).

#### ***Ineffective Assistance of Counsel***

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689.

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 unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed

to carry his burden in this action in regards to his allegations of ineffective assistance of counsel and that these allegations are without merit. The Court finds plea counsel adequately conferred with Applicant and members of his family, investigate his prior record to determine whether his current charge was correctly enhanced, and attempted numerous times to negotiate a plea sentence that would allow Applicant to avoid prison. Ultimately, this Court finds plea counsel was thoroughly competent in her representation of Applicant and in her advice to Applicant that a guilty plea was in his best interest.

Applicant alleges plea counsel was ineffective for failing to advise the plea court that the underlying indictment failed to establish this was a third drug offense. Applicant testified he was unaware he was charged with an enhanced drug offense based on his prior record until he pled guilty. However, counsel's credible testimony reveals Applicant was aware this offense was a third offense based on his two prior drug convictions from 2006 and 2010. This Court finds Applicant has failed to meet his burden as to this allegation.

Additionally, Applicant alleges plea counsel was ineffective for failing to investigate whether Applicant's prior drug offenses should constitute one offense for enhancement purposes since they were close in time. In support of this allegation, Applicant testified his 2010 drug convictions stemmed from conduct that was two days apart, and due to short time span, should have been considered one offense for enhancement purposes. However, this argument is without merit, as it completely ignores Applicant's other prior drug conviction from 2006. Counsel testified she investigated Applicant's prior record and the current offense qualified as a third offense and that the prosecutor also believed it to be a third offense. Moreover, Counsel testified

Applicant understood it was a third offense. This allegation must be denied and dismissed with prejudice.

### CONCLUSION

Based on all the foregoing, this 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.

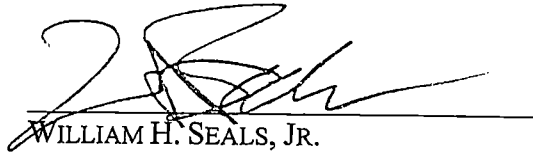
This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

#### **IT IS THEREFORE ORDERED:**

1. This application for post-conviction relief must be denied and dismissed with prejudice; and
2. Applicant La'Quan Bryan shall remain in the custody of the State.

**AND IT IS SO ORDERED** this \_\_\_\_\_ day of July, 2017.

**[Signature Block Follows on Next Page]**



WILLIAM H. SEALS, JR.  
Presiding Judge  
Ninth Judicial Circuit

July 27, 2017

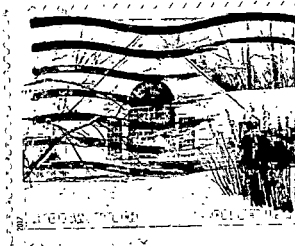
Marion, South Carolina

Last Page – Order of Dismissal  
Senior Jenkins, #341212 v. State of South Carolina  
Docket No. 2015-CP-10-2152

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