

# Lowcountry Law Office

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September 29, 2017

RECEIVED

OCT 03 2017

S.C. SUPREME COURT

The Honorable Daniel E. Shearhouse  
Clerk, Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

RE: Bryan M. Howell v. State of South Carolina; Case #: 2013-CP-18-02123  
Randal W. Benton v. State of South Carolina; Case #: 2014-CP-18-01001

Dear Mr. Shearhouse:

Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post-Conviction Relief (PCR) cases. Also enclosed are the following:

- (1) Proof of service of the Notice of Appeal on the Respondent;
- (2) The Order of Dismissal &
- (3) A Request for Representation on Appeal.

The Applicant(s)-Appellant(s) were represented by me as indigent, pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR cases. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

The Request for Representation on Appeal and the Affidavit in Support, thereof, are signed by me as attorney for Applicant(s)-Appellant(s). Should you need anything further, do not hesitate to contact me.

Thank you for your time and attention to this matter.

Sincerely,



Rodney D. Davis  
South Carolina Bar #: 12396  
4000 Faber Place Drive, Suite 300  
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(843) 323-4353  
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~~Enclosures: As stated above.~~  
RDD/mmt

cc: Ruston Neely, Assistant Attorney General  
Kimberly McCall, Appellate Division, SCCID

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

OCT 03 2017

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Benjamin H. Culbertson

Case #: 2014-CP-18-01001

Randal W. Benton,

Appellant.

v.

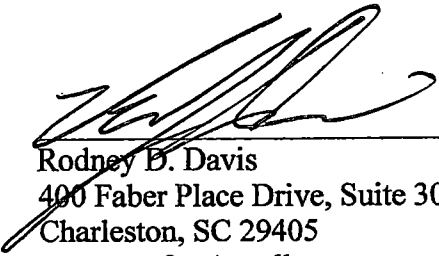
State of South Carolina,

Respondent.

NOTICE OF APPEAL

Randal W. Benton appeals the denial of his Post Conviction Relief (PCR) application in this case. The application for relief was denied following an evidentiary hearing before the Honorable Benjamin H. Culberston on May 18, 2016. Counsel for the Appellant received a copy of the filed Order of Dismissal on or about September 22, 2017.

September 28, 2017

  
Rodney B. Davis  
400 Faber Place Drive, Suite 300  
Charleston, SC 29405  
Attorney for Appellant

Other Counsel of Record:  
J. Clayton Mitchell, Assistant Deputy Attorney General  
State of South Carolina  
P.O. Box 11549  
Columbia, SC 29211-1549  
Attorney for Respondent

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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OCT 03 2017

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Benjamin H. Culbertson

Case #: 2014-CP-18-01001

Randal W. Benton,

Appellant.

v.

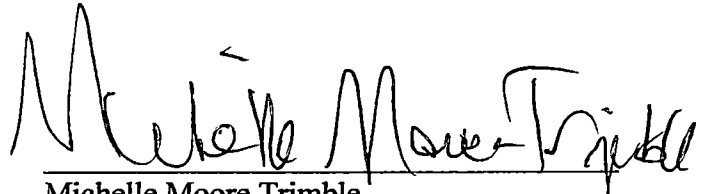
State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy, via US Mail, to the address of record, Ruston W. Neely, P.O. Box 11549, Columbia, South Carolina 29211-1549, on September 28, 2017.

September 28, 2017



Michelle Moore Trimble  
Paralegal to Rodney D. Davis  
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(843) 323-4353  
Davis@LowcountryLawOffice.com  
Attorney for Appellant

Other Counsel of Record:  
J. Clayton Mitchell, Assistant Attorney General  
Office of the Attorney General, State of South Carolina  
P.O. Box 11549  
Columbia, SC 29211-1549  
Attorney for Respondent

STATE OF SOUTH CAROLINA  
COUNTY OF DORCHESTER

Randal William Benton, #349652,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL CIRCUIT

2014-CP-18-1001

**ORDER OF DISMISSAL**

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CLERK OF COURT  
DORCHESTER COUNTY

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed May 23, 2014. Respondent filed a Return on September 26, 2014, requesting an evidentiary hearing be convened. Rodney D. Davis was appointed by the Dorchester Clerk of Court. An evidentiary hearing was held on May 18, 2016, at the Dorchester County Courthouse. Applicant was represented by Counsel Davis. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's trial counsel John M. Loy, Esquire. This Court had before it the Dorchester County Clerk of Court records, Applicant's South Carolina Department of Corrections records, appellate records, the PCR application, the Return, and the transcript.

#### I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dorchester County Clerk of Court. Applicant was indicted during the January 2011 term of the Dorchester County Grand Jury for Murder (2010-GS-18-1675). Applicant was represented by John Loy, Esquire and Michelle Suggs, Esquire. Applicant

proceeded to trial where he was convicted as indicted on February 9, 2012. The Honorable Stephanie P. McDonald sentenced Applicant to a term of life imprisonment.

A notice of appeal was filed and an appeal perfected pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Benton, Op. No. 2013-UP-400 (filed October 30, 2013). The Remittitur was issued on November 18, 2013.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

- I. Ineffective assistance of trial counsel in:
  - a. Failing to effectively counsel Applicant with regards to pleading guilty;
  - b. Failing to suppress evidence seized in Alabama;
  - c. Failing to highlight inconsistencies in witness testimony; and
  - d. Failing to effectively argue for the lesser offense of manslaughter

## II. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the 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, 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, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use 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 prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). 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.

### III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

#### **Plea Offer and Negotiations**

Applicant first argues that Counsel was ineffective for failing to properly advise him regarding the State's plea offer. He argues that if he was properly advised, then the court would have accepted his guilty plea. Applicant attempted to enter a negotiated Alford plea of forty (40)

years before the Honorable Diane S. Goodstein on January 6, 2012. Judge Goodstein went through the routine questioning of Counsel. Then Judge Goodstein thoroughly went through the rights Applicant was waiving by pleading guilty. The issue arose just after the solicitor gave the factual recitation of the incident. When asked if he believed the State could produce sufficient evidence for the jury to convict him, Applicant responded, "I don't know, Your Honor." (Plea Tr. p. 26). Judge Goodstein inquired into that response and questioned if Applicant had reviewed every bit of evidence the State hoped to admit at a trial. Applicant responded, "No, ma'am, I wouldn't say every bit of it." (Plea Tr. p. 27). At that point, Judge Goodstein stated that she was not going to accept the plea because Applicant seemed unsure of the evidence and whether he would be convicted at trial.

Counsel testified that he agreed with Applicant that he should accept the plea because the State had a strong case. Counsel explained that Judge Goodstein was not happy with the plea and noted that it was an Alford plea to a murder charge. Counsel believed that Applicant likely did not agree with the State's reference to a broken photo frame of his wife. In the State's factual recitation, they alleged that Applicant "smashed" a picture of the victim, his wife, in a buildup of anger and violence over the victim's new relationship.

Counsel was not deficient because Applicant was unable to successfully enter a plea of guilty. This Court finds Counsel's testimony credible and persuasive on the issue. Applicant was unable to admit that certain facts set forth by the solicitor were accurate. This compounded with the fact that it seems Judge Goodstein was not in favor of an Alford plea where the facts set forth clearly show there was sufficient evidence for the jury to convict Applicant.

This Court further finds Applicant has failed to present any evidence to support a finding that he was prejudiced by the alleged deficiency. The plea judge will accept a plea if it is

intelligently and voluntarily made. In the plea attempt, Applicant did not agree with certain facts laid out by the State and that those facts would be sufficient for a jury to find him guilty. The court was correct in not accepting Applicant's plea. This allegation is denied and dismissed with prejudice.

#### **Failing to Suppress Evidence**

Next, Applicant argues that Counsel was ineffective for failing to suppress evidence seized in Alabama where Applicant was apprehended. At the pre-trial hearing, Counsel made a motion to suppress the results of the DNA swab taken in Alabama pursuant to a search warrant issued by an Alabama judge. Also during pre-trial, Counsel filed a written motion challenging the Applicant's arrest, the seizure of his truck and the gun inside the truck, but then withdrew those motions "unless something comes up in the testimony they may be renewed." (Trial Tr. p. 43). When the evidence collected in Alabama was offered, Counsel made no objection. (Trial Tr. p. 215; 218-23).

Counsel gave some factual background to the Court. Applicant was apprehended in Alabama after allegedly murdering his wife and fleeing the scene. Applicant stopped at a gas station in Alabama and used the telephone to call his mother while he stopped to purchase snacks. It was there that he was apprehended after a panic alarm was set off. Counsel explained that it was not likely that these motions would have been successful if made. He also testified that the strategy was not that he did not commit the murder but that he was intoxicated and lacked the *mens rea* to be convicted of murder.

This Court finds Counsel was not deficient in his handling of the evidence collected in Alabama. Counsel made the strategic decision not to challenge that evidence because any objection and challenge was without merit. See Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d

62, 67 (1999) (attorney not deficient for failing to make futile arguments). Applicant was unable to show any of Applicant's rights were violated in the search and seizures.

Counsel also credibly testified that the defense strategy was to argue that Applicant did not have the required mental state to be convicted of murder. He noted that he thought the best case scenario was to hope for a hung jury or to get a voluntary manslaughter conviction. A challenge to this evidence would not be consistent with that strategy because they were not challenging the fact that Applicant actually killed his wife and that identification was not an issue in this case. Further, as the trial judge noted, it is very likely that the good faith exception to the warrant requirement would apply and the results of the DNA test would be admitted. Finally, Applicant has not presented this Court with an objection that would have likely been successful. This allegation is denied and dismissed.

#### **Failing to Highlight Inconsistencies in Testimony**

Applicant next argues that Counsel was ineffective for failing to highlight inconsistent testimony given by witnesses. Specifically, Applicant argues Counsel should have highlighted various witnesses' testimony regarding how many shots Applicant fired. Applicant noted that it was the State's position that eight (8) shots were fired. Counsel testified that his overall defense strategy was not consistent with whether Applicant actually killed his wife. This Court finds Counsel proceeded with a reasonable strategy under the prevailing professional norms. While Counsel could have pointed out that different witnesses testified to a varying number of shots being fired, that does not go to the heart of the State's case. Therefore, Applicant was not prejudiced in any way by Counsel's failure to raise these minor points. This allegations is denied and dismissed.

### **Failing to Argue for the Lesser Offense of Voluntary Manslaughter**

Finally, Applicant alleges Counsel was ineffective in failing to argue for the lesser offense of voluntary manslaughter. Specifically that Counsel should have argued for voluntary manslaughter during opening statements. During closing arguments, the State and Counsel both discussed voluntary manslaughter extensively. Counsel was sure to argue for voluntary manslaughter during closing as that was the broader defense strategy. Counsel's testimony that the identification of the shooter was not an issue and that the State was certainly going to be able to prove that Applicant killed the victim is credible and persuasive. Counsel was not deficient in any regard with his representing, especially in crafting the overall strategy. Furthermore, Applicant has not proven he was prejudiced by Counsel's failure to discuss voluntary manslaughter in opening statements. This allegation is denied and dismissed.

### **All Other Allegations**

As to any and all allegations that were raised 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**

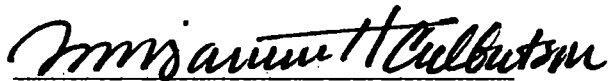
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). 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 PCR counsel's 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, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is 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 shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 5<sup>th</sup> day of September, 2017.



BENJAMIN H. CULBERTSON  
Presiding Judge

Georgetown, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF DORCHESTER )  
 )  
 )  
 RANDAL W. BENTON, )  
 )  
 Applicant. )  
 )  
 -versus- )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 Respondent. )

IN THE SUPREME COURT OF SOUTH CAROLINA **RECEIVED**

Case #: 2014-CP-18-01001

OCT 03 2017

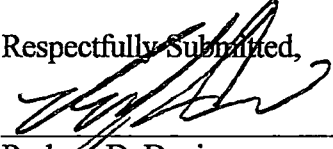
S.C. SUPREME COURT

REQUEST FOR REPRESENTATION ON APPEAL

On behalf of the request of the above-named Applicant, to be represented by the South Carolina Commission of Indigent Defense, Appellate Division (SCCID), the undersigned attorney would show unto this Honorable Court that:

1. He is the attorney for the Applicant-Appellant in the above captioned case. The Applicant-Appellant was in custody during and taken into custody immediately following the Post Conviction Relief (PCR) hearing and was not available to personally sign this request;
2. The Applicant-Appellant was represented by the undersigned attorney as an indigent, pursuant to a contract with the SCCID;
3. The Applicant-Appellant has been informed that he may request assistance from the SCCID Appellate Division in perfecting his appeal;
4. A timely Notice of Intent to Appeal has been filed on the Applicant-Appellant's behalf;
5. The Applicant-Appellant has been informed that nothing requires SCCID Appellate Division to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

At this time, the Applicant-Appellant requests the aid of the SCCID Appellate Division in perfecting her appeal to the South Carolina Court of Appeals.

Respectfully Submitted,  
  
 \_\_\_\_\_  
 Rodney D. Davis  
 South Carolina Bar #: 12396

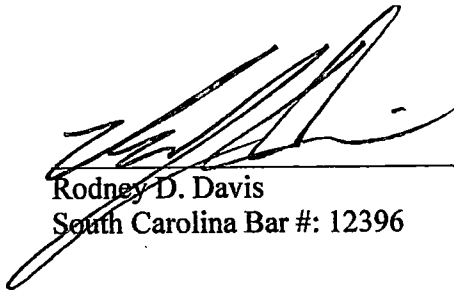
Charleston, South Carolina.  
 September 28, 2017

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF DORCHESTER )  
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CASE NO: 2014-CP-18-01001

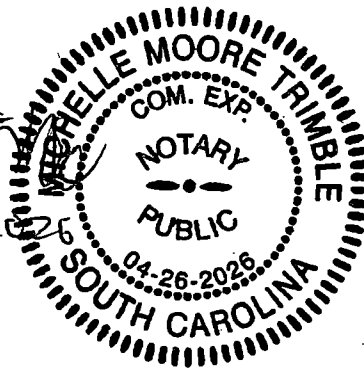
VERIFICATION

PERSONALLY appeared before me, Rodney D. Davis, being first duly sworn, deposes and says that he has read the foregoing *Request for Representation on Appeal* to be filed on behalf of the Applicant-Appellant, **Randal W. Benton**, and the same is true of his knowledge except those matters alleged on information and belief, and as to those matters, he believes them to be true.

  
Rodney D. Davis  
South Carolina Bar #: 12396

SWORN to and subscribed to me  
this 25 day of Sept, 2017.

  
Notary Public for South Carolina  
My Commission expires 4/26/2026



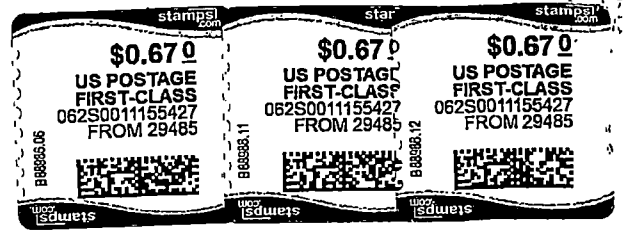
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S.C. SUPREME COURT

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