

**FOWLER**  
**Law Firm**

*Fowler Fights For You*

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November 28, 2017

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

**RECEIVED**

NOV 30 2017

S.C. SUPREME COURT

**RE: State v. Bell; 2016-CP-6088**

Dear Sir or Madam:

Enclosed is a copy of a notice of appeal on behalf of the above Defendant. Mr. Fowler was appointed to represent the Defendant in the Court of Common Pleas, however, he does not represent him on this appeal.

**FOWLER LAW FIRM**



Patricia F. Clapper  
Advanced Certified Paralegal  
NC Certified Paralegal

cc: Horry County Clerk of Court  
South Carolina Commission on Indigent Defense

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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NOV 30 2017

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY

Court of Common Pleas

The Honorable William H. Seals Jr., Circuit Court Judge

Case No. 2016-CP-26-6088

Kenneth Jordan Bell #,356689 ..... Petitioner,

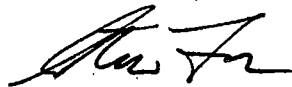
v.

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

NOTICE OF APPEAL

The Petitioner appeal the Honorable William H. Seals Jr 's Order dated November 6, 2017, denying post conviction relief to the Petitioner. The Order was received by the undersigned counsel on November 22, 2017 . A copy of the Order on appeal is attached to this notice.

Dated: 11 - 23 - 17



Steven W. Fowler  
Fowler Law Firm  
1019 Highway 17 South  
North Myrtle Beach, SC 29582  
843-663-0006  
SC Bar #69683

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF Horry	)	
Kenneth Jordan Bell,	)	Case No.: 2016-CP-26-06088
S.C.D.C. No. 356689,	)	
	)	
Applicant,	)	<b>ORDER OF DISMISSAL</b>
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

FILED  
 Horry County  
 Clerk of Court  
 09/19/17 PM 3:00  
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This matter comes before the Court by way of an application for post-conviction relief filed by Kenneth Jordan Bell (“Applicant”) on September 14, 2016. Respondent made its return on or about August 9, 2017. The Court convened an evidentiary hearing into the matter on September 18, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Steven W. Fowler, Esquire. Johnny E. James Jr., of the South Carolina Attorney General’s Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant’s trial counsel, M. Greg McCollum, Esquire (“Counsel”) also testified. The Court had before it Applicant’s records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant’s direct appeal records, and the pleadings. The Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the March 2013 term of the Horry County Grand Jury for burglary, first degree (2013-GS-26-01335), kidnapping

(2013-GS-26-01336), possession of a weapon during the commission of a violent crime (2013-GS-26-01337), armed robbery (2013-GS-26-01339), and criminal conspiracy (2013-GS-26-01340). M. Greg McCollum, Esq., represented Applicant, and Nancy Livesay, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to trial on August 12, 2013, before the Honorable Roger L. Couch and a jury. The jury found Applicant guilty as indicted on August 15, 2013. Judge Couch sentenced Applicant to imprisonment for concurrent terms of 15 years for burglary, 10 years for armed robbery, 10 years for kidnapping, 5 years for the weapon, and 5 years for conspiracy.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Carmen V. Ganjehsani, Esq., who raised two issues:

1. The Trial Court erred in instructing the jury that if the jury failed to reach a verdict on one of the charges against [Applicant], a mistrial would be declared, the case would be retried, and the parties would "go through this whole process again;" the Trial Court erred by not clarifying that the jury's failure to reach a verdict on any one indictment would necessitate a new trial on that particular indictment, not a new trial of the entire case.
2. The Trial Court erred in excluding evidence that one of the alleged victims and a co-defendant had entered into a previous drug transaction for which the alleged victim owed the co-defendant money and that the reason the co-defendant and [Applicant] went to the alleged victim's apartment was to collect money for this drug debt; the evidence was relevant and admissible because (1) it was part of the *res gestae* of the alleged crime; (2) it had bearing on the [Applicant's] intent in going to the alleged victim's apartment and whether [Applicant] had the required *mens rea* for the charges against him; and (3) it showed bias on the part of the alleged victim for which [Applicant] was entitled to confront him with on cross-examination. Furthermore, the probative value of this evidence was not substantially outweighed by any prejudicial effect to the State's case and to the alleged victim, especially where the Trial Court had already allowed the jury to hear that the alleged victim had previously been convicted of drug charges.

Final Brief of Appellant at 3. By unpublished opinion decided September 2, 2015, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Bell, Op. No. 2015-UP-447 (S.C. Ct. App. 2015). The Remittitur was issued on September 28, 2015.

### Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:<sup>1</sup>

1. "Ineffective assistance by trial counsel;"
  - a. "for one instance, counsel failed to [appropriately] protect the trial record when the court gave a charge to the jury in a matter which necessitated an Allen Charge."
  - b. "failure to properly investigate"

### II. 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 records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

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<sup>1</sup> Additionally, Applicant testified at the evidentiary hearing to two allegations neither raised in his application nor amended into his application at any stage of the proceedings: (1) Counsel was ineffective for failing to move for a mistrial after a cartridge was found in a black folio in evidence after it was sent to the jury for deliberations, and (2) Counsel was ineffective for failing to object to erroneous statements by a victim that a plea offer of two years was at some point offered to Applicant.

The Court finds that these allegations are not properly before the Court for consideration. In most PCR cases, there is no justification to excuse the pleading requirements that apply in all civil cases. Mangal v. State, Op. No. 27726 (S.C. Sup. Ct. refiled October 4, 2017) (Shearouse Adv.Sh. No. 38 at 12, 20). While the interests of justice may, on rare occasion, require flexibility in the pleading requirements set forth in the rules of civil procedure, given the overwhelming evidence against Applicant sufficient to foreclose a finding of prejudice, the Court can find no reason to excuse the pleading requirements. See Id., (quoting Simmons v. State, 416 S.C. 584, 788 S.E.2d 220 (2016)). Accordingly, the Court declines to consider these allegations.

### A. 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), SCRPC; 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.” Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (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 an 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; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). “Moreover, no prejudice occurs, despite trial counsel’s deficient performance, where there is otherwise overwhelming evidence of the defendant’s guilt.” Id., 386 S.C. at 566, 689 S.E.2d at 631.

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 at 117, 386 S.F.2d at 625 (citing Strickland at 688). 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 at 117-18, 386 S.F.2d at 625 (citing Strickland at 694). The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

***IAC Allegation #1 – Failure to Object to Allen Charge***

Applicant alleges trial counsel was ineffective by failing to timely object and preserve for appeal the issue of whether the Allen<sup>2</sup> charge delivered by the Court was so confusing as to be constitutionally defective. "The trial judge has a duty to urge the jury to reach a verdict, but he may not coerce it." State v. Pauling, 332 S.C. 95, 99, 470 S.E.2d 106, 108-09 (1996). "Whether an Allen charge is unconstitutionally coercive must be judged 'in its context and under all the circumstances.'" Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002) (quoting Tucker v. Catoe, 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001)).

At trial, upon inquiry by the jury about what happens in the event of a deadlock, the Court drew them back to the courtroom and delivered the following Allen charge:

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<sup>2</sup> Allen v. U.S., 164 U.S. 492 (1896).

Now, ladies and gentlemen, you've stated to me that you've been unable to reach a verdict as to one of the charges in this case and as I instructed you earlier, *a verdict in any of the charges must be unanimous*. I'll tell you that when a matter is in dispute, it isn't always easy for even two people to agree. So when twelve people must agree, it becomes even more difficult to reach agreements. In most cases, absolute certainty cannot be reached or even expected. However, you have a duty to make every reasonable effort to reach a unanimous verdict. In doing this, you should consult with one another, express your own views and listen to the opinions and views of your fellow jurors. Tell each other how you feel and why you feel that way. Discuss the differences you have with open minds. Although the verdict of the Jury must be unanimous, every one of you has a right to follow your own opinion. The verdict you agree to must be your own verdict in the final analysis. The result of your own convictions and you should not give up your firmly held beliefs merely to be in agreement with your fellow jurors. I would ask that the majority should consider the minority's position. I would also ask the minority to consider and reflect upon the majority's opinion or position. You should carefully consider and respect the opinions of each other and re-evaluate your position for reasonableness, correctness and impartiality. You should lay aside all outside matters and re-examine the questions before you based upon the law and the evidence presented in this case.

If you do not agree on a verdict in this case, *on one of the charges in that case*, it would be my duty to declare what is referred to as a mistrial. In that case, it does not mean that anybody wins; it just means that at some future time either I or some other judge will try this case with some other jury sitting where you now sit. The same participants will come, perhaps the same lawyers will ask basically the same questions and get basically the same answers and we will then go through this whole process again.

Now, you were selected in the same manner and from the same source as any future jury in this case would be chosen and there's no reason for me to believe or suppose that the case will ever be submitted to twelve more intelligent or impartial or conscientious or competent jurors than you, or that any more clearer evidence will be produced by one side or the other. So, what I'm going to ask you to do is return to your deliberations. Consider what I've just said to you and again re-examine the positions in light of my charge in this matter. So I'm gonna ask you to return to the jury room and continue your deliberations. Thank you very much.

Tr. 503-05 (emphasis added). The jury returned to deliberations and, upon prompt from the Court, Counsel raised the question of whether the charge was confusing in light of the multiple indictments:

Mr. Bell is subject to multiple indictments. If the Jury reaches verdicts, whether they be guilty or not guilty, on all those indictments with the exception of the one they seem to be referring to, could the Defendant be tried again?

Tr. 505, ll. 16-19. After further discussion, the Court concluded the totality of its instructions to the jury clearly indicated that each indictment should be decided separately and it did not further instruct the jury. Tr. 506-07.

At the evidentiary hearing, Applicant argued the Allen charge was confusing to the point of being prejudicial. Counsel testified he raised the issue of the Allen charge to the Court, but further admitted he could have sought a mistrial. On cross-examination, Counsel testified that he did not review any Allen charge before trial, did not discuss the concept with Applicant before trial, and did not object—Counsel did not consider the conversation with the Court an objection.

The Court finds that Counsel's conversation with the Court did operate as an objection and that Applicant has demonstrated neither any deficiency on the part of counsel nor any prejudice therefrom. Applicant explicitly raised on appeal the question of the Allen charge's validity and the South Carolina Court of Appeals affirmed the conviction on the merits. As the Court of Appeals has already determined that the charge was valid as a matter of law, and did not reject the appeal for want of adequate preservation, this Court cannot find any deficiency on the part of Counsel in protecting the record. Counsel's recollection of how his objection was framed is of no concern where the appellate courts have already clearly proceeded upon the issue as properly preserved. Accordingly, this Court finds no deficiency on the part of Counsel, and Applicant's request for relief by way of this allegation is **DENIED**.

***IAC Allegation #2 – Failure to Investigate and Prepare***

Applicant alleges that Counsel failed to adequately investigate his case and prepare for trial. The scope of a reasonable investigation depends upon a number of issues, but “at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (quotation omitted). “Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.” Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

At the evidentiary hearing, Applicant testified to his belief that Counsel did not have enough time to prepare after he was retained, and that Counsel should have sought more time to prepare for trial. Counsel testified that he had enough time to prepare for trial. Counsel indicated that most of his case was oriented toward mitigation. When pressed on cross-examination about conducting research on the Allen charge in the courtroom, Counsel testified he lacked the capacity to in-court research at the time of trial of the like and kind now possible, and he did not have any associates or assistants to whom he could have assigned a rapid research task. Counsel could not recall if discovery materials were sent to Applicant and indicated he did not keep any records to indicate as much, but that failure to do so would violate the standard practices and policy of his office.

The Court finds that Counsel’s testimony and the trial record demonstrate Counsel adequately investigated Applicant’s case and was prepared for trial. The underlying facts of Applicant’s conviction are straightforward and overwhelming—after breaking into an apartment

and holding its occupants against their will by gunpoint, Applicant was immediately captured outside, matching the descriptions provided by the victims, and in possession of materials stolen from the residence. Counsel's advocacy at trial in opposition to the State's motion to suppress evidence of prior drug dealings between the victim and a co-defendant shows his thorough preparation and investigation of the victim's backgrounds for the purposes of determining the best trial strategy. Tr. 34-42. Counsel wisely executed a strategy of mitigation in the face of evidence against his client that was impossible to overcome. Furthermore, in light of the overwhelming evidence, Applicant cannot demonstrate prejudice. See Smith, 386 S.C. at 566, 689 S.E.2d at 631. Accordingly, the Court finds no deficiency or prejudice on the part of Counsel, and Applicant's request for relief by way of this allegation is **DENIED**.

### III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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 notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**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 South Carolina Department of Corrections.

AND IT IS SO ORDERED this 6 day of Nov., 2017.



WILLIAM H. SEALS JR.  
Presiding Judge  
Fifteenth Judicial Circuit

Marie, South Carolina

STATE OF SOUTH CAROLINA )

COUNTY OF HORRY )

Kenneth Jordan Bell, #356689 )

Plaintiff )

v. )

State Of South Carolina )

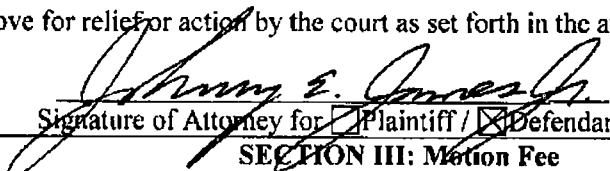
Defendant. )

IN THE COURT OF COMMON PLEAS

CASE NO. 2016-CP-266088

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

FILED  
NOV 13 PM  
Horry County

Plaintiff's Attorney: Steven W. Fowler, Bar No. 69683 Address: 1019 Hwy 17 South N. Myrtle Beach, SC 29582 phone: fax: e-mail: other:	Defendant's Attorney: Johnny E. James Jr, Bar No. 101260 Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
<b>SECTION I: Hearing Information</b>	
Nature of Motion: Estimated Time Needed: Court Reporter Needed: <input type="checkbox"/> YES / <input type="checkbox"/> NO	
<b>SECTION II: Motion/Order Type</b>	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	November 1, 2017 Date submitted
<b>SECTION III: Motion Fee</b>	
<input type="checkbox"/> PAID - AMOUNT: <input checked="" type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
<b>JUDGE'S SECTION</b>	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	JUDGE: _____ CODE: _____ Date: _____
<b>CLERK'S VERIFICATION</b>	
Collected by: _____ <input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	Date Filed: _____



ALAN WILSON  
ATTORNEY GENERAL

November 9, 2017

FILED  
PROPERTY  
NOV 13 PM 1:50  
CLERK OF COURT  
Horry County, SC

The Honorable Renee N. Elvis  
Clerk of Court, Horry County  
Post Office Box 677  
Conway, SC 29528-0677

Re: **Kenneth Jordan Bell, #356689 v. State of South Carolina**  
**2016-CP-26-6088**

Dear Ms. Elvis:

Enclosed please find the original **Order of Dismissal** signed by the Honorable William H. Seals, Jr., in the above-captioned case, for filing in your office.

Pursuant to Rule 71.1(l), of the South Carolina Rules of Civil Procedure, please "provide notice of entry of judgment and serve a copy of the order or judgment to the parties as provided in Rule 77(d), SCRPC."

In addition, please forward proof of service and a time stamped copy back to our office for our file.

Should you have any questions, please do not hesitate to call me at (803) 734-3737.

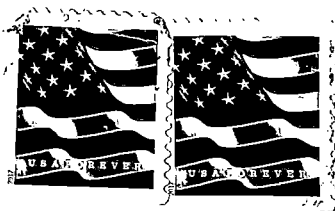
Sincerely,

Johnny Ellis James Jr.  
Assistant Attorney General

JFJ/mm

Enclosure

Fowler Law Firm  
1019 Highway 17 South  
North Myrtle Beach, SC 29582



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

2921181330 8099

