

# FALK LAW FIRM, LLC.

James K. Falk

(843) 606-6007

(843) 972-9005 Fax Admitted to practice: KY(1984) S.C. (2010) jfalklaw@gmail.com

---

December 11, 2017

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

RECEIVED

DEC 14 2017

S.C. SUPREME COURT

Re: Eric Wright 348455

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, Eric Wright 348455.

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED  
DEC 14 2017

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Honorable Thomas A Russo, Jr. Circuit Judge

Case No.: 2015-CP-07-01982

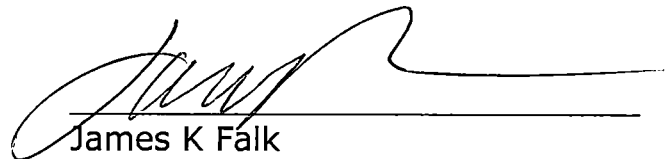
Eric Wright 348455.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Eric Wright appeals the Honorable Thomas A Russo's November 20, 2017 Order of Dismissal. Undersigned counsel received notice of entry of the order on December 11, 2017. A copy of the order on appeal is attached hereto.



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

December 11, 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

RECEIVED

DEC 14 2017

S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Honorable Thomas A Russo, Circuit Judge

Case No.: 2015-CP-07-1982

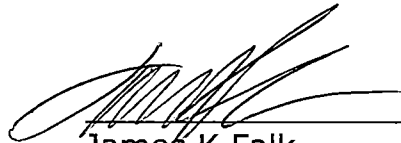
Eric Wright 348455.....PETITIONER

V.

State of South Carolina.....RESPONDENT

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, 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 December 11, 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  
) FOURTEENTH JUDICIAL CIRCUIT

Eric Wright, #348455,

2017 DEC 26 PM 3:42  
) Case No. 2015-CP-07-1982

Applicant,

JERRI ADIN ROSENEAU  
BEAUFORT COUNTY, S.C.  
CLERK OF COURT

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before the court by a post-conviction relief (PCR) application filed by Eric Wright on August 17, 2015. This Court convened an evidentiary hearing into the above-captioned matter on October 12, 2017, 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, Ian Deysach, Esquire, (Counsel) and Applicant were present and testified. This Court also had the opportunity to listen to their testimony and rule on their credibility. This 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.

**I. PROCEDURAL HISTORY**

Applicant was indicted by the July 2009 term of the Beaufort County Grand Jury for one count of assault and battery with intent to kill (ABWIK) and one count of possession of a weapon during a violent crime (2009-GS-07-1405; 1406). On October 24, 2011, Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable Carmen T. Mullen sentenced Applicant to confinement for eighteen years for ABWIK and five

years for the count of possession of a weapon during the commission of a violent crime. The sentences were ordered to be run concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to Anders v California, 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Wright, Op. No. 2014-UP-091 (filed on March 5, 2014). The remittitur was issued on June 2, 2015. A petition for certiorari to the South Carolina Supreme Court was also filed on Applicant's behalf. On November 20, 2014, the South Carolina Supreme Court denied certiorari.

## **II. ALLEGATIONS**

Applicant alleged the following grounds in his amended application:

### **I. Ineffective Assistance of Counsel**

1. Allegations concerning Applicant's alias of "Bo."
  - a. Counsel failed to have the indictment amended to delete all references to the defendant's alleged alias as "Joseph Bo Derrick Wright."
  - b. Counsel failed to make a motion *in limine* to preclude either the State or the Court from including defendant's alleged "Bo" alias in the presence of the jury.
  - c. Counsel's cross examination of Alexis Green was ineffective by not establishing whether the witness had any independent knowledge that the defendant was called "Bo."
  - d. Counsel failed to object to Alexis Green's testimony that "we saw Bo got out of the car."
2. Counsel failed to have Alexis Green's testimony redacted when a recording of it was replayed to the jury.
3. Counsel failed to provide expert testimony to refute the testimony of the State's expert, Dr. Richard Hussong.

### III. SUMMARY OF FACTS

Prior to any testimony, Applicant's trial counsel sought to prohibit testimony from possible witnesses to the shooting that they heard the shooter called "Bo," Applicant's nickname.

R. 61-62. The trial court stated:

If they can ID him at the scene, and I don't know where these people were, then they can ID him through his photograph, they can ID him and say this is him. I would agree that if they don't know his name is Bo and they can't look at him and say, that's Bo, by their acknowledgement, they can't say it.

R. 62-63.

The trial court's ruling seems to require only that witnesses testify from personal knowledge, which is always the requirement; She did not rule that testifying that they know someone by their nickname instead of their real name was impermissible. During her testimony, Alexis Green, a witness to the shooting, testified "I don't know his real name, but I know they call him Bo." App. 91. Counsel objected and the trial court sustained the objection and issued a curative instruction. R. 91. Counsel later moved for a mistrial. R. 91; 99-100.

On July 28, 2008, Troy Jinks (Jinks) was shot in the leg. R. 70. He was treated in the emergency room for a "couple of hours" and then released the same day. R. 174. The shooting took place in a neighborhood in Beaufort County called Pinckney Hill. R. 81. This neighborhood is called "Pinckney Hill" because only the Pinckney family lives there. R. 81. Applicant was indicted for the shooting as "Eric Wright aka Joseph Bo Derrick Wright." R. 459. The case was called before the entire jury panel as "State versus Erick Wright; also known as Joseph Bo Derrick Wright." R. 4. The trial judge repeated the name, including the a/k/a "Bo." R. 4. During the trial, a recording from a tip line was played in which Applicant denied committing the crime. R. 291.

Alexus Green was visiting her grandmother on Pinckney Hill and witnessed the shooting. R. 81. At the back of Pinckney Hill is the Chicken Shack. R. 84. Green saw a car drive onto the hill towards the Chicken Shack. R. 84. The car then turned around and came back from the Chicken Shack. R. 86. Green saw four people in the car. R. 86. She only knew two of the people in the car, Monique Johnson (Monique) and Octavia Scott (Octavia). R. 87. Green also saw a young lady in the front passenger seat and a man sitting in the back. R. 87. Both Jinks and Octavia knew and identified Applicant as the man in the vehicle who shot Jinks. App. 142-143; 216. As the car returned, Jinks pointed at the car, yelled, and made hand gestures. R. 87. Jinks said, "what's he in the car for?" R. 88. Applicant got out of the car, said "what you say," pulled out a gun, and shot twice. R. 88.

#### **IV. SUMMARY OF TESTIMONY AT PCR HEARING**

Counsel testified he met with Applicant a number of times. His theory for Applicant's defense at trial was based on the assertion the witnesses misidentified Applicant. Counsel testified he was not concerned about crossing the medical examiner further or hiring his own medical examiner because Applicant's defense was identity, not the lack of injury. Counsel testified he and Applicant discussed the strategy and Applicant agreed it was their best argument. Counsel stated Applicant's story to Counsel was consistent, claiming he was not the shooter.

Applicant testified he spoke with Counsel two or three times and he told Counsel he wasn't at the incident. He testified Counsel shared and spoke about the discovery evidence with him. He testified he does not go by the nickname, Bo, but his middle name is Bo Derrick. Applicant testified his alibi witnesses died, but he was in Savannah, Georgia when the attempted murder happened.

## V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that Applicant has failed to satisfy his burden to prove that Counsel ~~were~~<sup>was</sup> deficient or that he was prejudiced by Counsel's alleged deficiencies. 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). 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 [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984). The proper measure of performance is whether Counsels provided representation within the range of competence required in criminal cases. Id.

This Court finds Applicant's testimony lacked credibility and Counsel's testimony was credible. This Court finds that Applicant has failed to satisfy his burden to prove that Counsel's actions were deficient. Applicant also failed to prove he was prejudiced by Counsel's alleged deficiencies. This Court finds Counsel properly prepared for Applicant's trial. This Court finds Counsel elucidated valid trial strategies in defending Applicant and preparing for trial. This Court finds Counsel rendered adequate assistance and exercised professional judgment in his decisions at trial. This Court dismisses Applicant's application for the reasons set out below:

### Ineffective Assistance of Counsel

In evaluating allegations of ineffective assistance of counsel, the court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. at 669. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases.

Butler, 286 S.C. at 442, 334 S.E.2d at 814: “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsel’s 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. “[E]very effort <sup>[must]</sup> be made to eliminate the distorting effects of hindsight” and to evaluate counsel’s decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel’s tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 1992.

1. Allegations concerning Applicant’s nickname.

This Court finds the State’s use of Applicant’s alias, Bo, in the indictment and throughout the trial, was lawful. Jinks identified Applicant at trial and testified he went by the nickname of “Bo.” App. 148. Octavia testified to the same effect. App. 212.

a. Trial Counsel failed to have the indictment amended to delete all references to Applicant’s alleged alias of Bo.

“The indictment is a notice document. A challenge to the indictment on the ground of insufficiency must be made before the jury is sworn as provided by § 17–19–90. If the objection is timely made, the circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.” State v. Gentry, 363 S.C. 93, 102–03, 610 S.E.2d 494, 500 (2005). The indictment properly identified Applicant by his given name as well as his alias. There was testimony given that ‘Bo’ was Applicant’s alias. This

Court finds Applicant was properly informed by the indictment that he was charged with the offenses listed therein. This Court also finds the alias in the indictment was proper and Counsel's failure to object to the indictment was neither deficient nor would the trial court have sustained such an objection.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for failing to object to the indictment. This Court also finds Applicant failed to prove he was prejudiced by Counsel's lack of objection such that there was a reasonable probability the result of the trial would have been different. Accordingly, this Court denies and dismisses this allegation.

- b. Counsel failed to make a motion *in limine* to preclude either the State or the Court from including defendant's alleged Bo alias in the presence of the jury.

Applicant asserts Counsel should have made a motion *in limine* to restrict the use of Applicant's testified to alias. This Court finds any such motion *in limine* by Counsel would have been denied. Certainly witnesses are allowed to testify to a defendant's alias if it is within their personal experience and knowledge, as is required for all witness testimony. This Court finds Counsel's failure to make a motion *in limine* to restrict the use of Applicant's alias was not deficient, nor would such a motion have been granted.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for failing to make a motion *in limine* to restrict use of Applicant's alias. This Court also finds Applicant failed to prove he was prejudiced such that there was a reasonable probability the result of the trial would have been different. Accordingly, this Court denies and dismisses this allegation.

- c. Counsel's cross-examination of Alexis Green was ineffective by not establishing whether the witness had any independent knowledge that the defendant was called Bo.

Applicant's assertion Alexis Green claimed independent knowledge of Applicant's alias is false. Applicant asserts Counsel should have cross-examined Green's assertion she had

independent knowledge of Applicant's alias. Green testified, "I don't know his real name, but I know they call him Bo." App. 91. Green's statement merely shows how she came to know Applicant as Bo. This Court finds the statement was not hearsay. Green's statement was based on her personal experience and was explained as such. Thus, this Court finds Counsel was not deficient for failing to cross-examine Green on this statement, nor was Applicant prejudiced thereby.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for failing to more thoroughly cross-examine Green. This Court also finds Applicant failed to prove he was prejudiced such that there was a reasonable probability the result of the trial would have been different. Accordingly, this Court denies and dismisses this allegation.

d. Counsel failed to object to Alexis Green's testimony that "we saw Bo got out of the car."

Applicant asserts Counsel should have objected to Green's statement, "We saw Bo got out of the car." This Court finds Green's assertion "we" saw Bo get out of the car was not prejudicial because of the testimony of other witnesses. Jinks and Octavia both testified Applicant got out of the vehicle. Further, this statement is a mere colloquialism for what Green saw while with a group of people.

Accordingly, this Court finds Applicant failed to prove Counsel should have objected to Green's statement. This Court also finds Applicant has failed to prove he was prejudiced by Counsel's failure to object such that there was a reasonable probability the result of the trial would have been different. Accordingly, this Court denies and dismisses this allegation.

2. Counsel failed to have Alexis Green's testimony redacted when a recording of it was replayed to the jury.

Applicant asserts Counsel was deficient for failing to redact the court reporter's tape of Green's testimony, which was played back to the jury during deliberations. Applicant asserts the testimony, on which the trial judge sustained Counsel's objection, should have been redacted to prevent the jury from hearing inadmissible testimony a second time. However, the trial judge's curative instruction was also played for the jury as Green's testimony was played in full. "A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Cl. App. 2006). This Court finds Counsel was not deficient nor was Applicant prejudiced where the jury heard the trial judge sustain Counsel's objection and give the curative instruction.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for failing to have the tape redacted. This Court also finds Applicant has failed to prove he was prejudiced by the testimony on the tape such that there was a reasonable probability the result of the trial would have been different had Counsel objected. Accordingly, this Court denies and dismisses this allegation.

3. Counsel failed to provide expert testimony to refute the testimony of the State's expert Dr. Richard Hussong.

Applicant failed to call an expert to provide evidence of testimony that would have been helpful to Applicant's case. Without an expert's testimony at the hearing, this Court can only speculate as to whether the testimony would have been helpful at trial. "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 669. By failing to call an expert witness at his PCR hearing, Applicant failed to show how an expert’s testimony would have benefited Applicant at trial. “The applicant’s mere speculation what the witnesses’ testimony would have been cannot, by itself, satisfy the applicant’s burden of showing prejudice.” State v. Glover, 318 S.C. 496, 498–499, 458 S.E.2d 538, 540 (1995). Further, Counsel testified Applicant’s defense at trial was mistaken identity. The victim’s injuries were of no consequence regarding this strategy. Any attempt by Counsel to argue that if Applicant was the shooter the jury should find him guilty of a lesser-included offense would only confuse the jury and deprive Counsel’s arguments of credibility. Further, Applicant fired a shotgun at the victim. This Court finds attempted murder was the correct charge and any request by Counsel for a lesser-included offense would have been properly denied. Accordingly, Applicant has failed to prove deficiency or prejudice under Strickland.

Accordingly, this Court finds Applicant failed to prove Counsel should have hired a medical expert or that Applicant was prejudiced by Counsel’s failure to hire an expert. Accordingly, this Court denies and dismisses this allegation.

## **VI. CONCLUSION**

Based on 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.

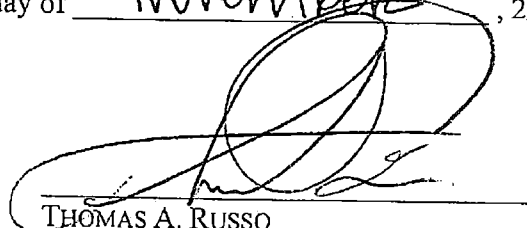
This Court notes Applicant must file and serve a notice of appeal within thirty 30 days from receipt of written notice of entry of judgment to secure the appropriate appellate review.

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 71.1g, SCRCR, 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<sup>th</sup> day of November, 2017.



THOMAS A. RUSSO  
Presiding Judge  
14<sup>th</sup> Judicial Circuit

Fionenu, South Carolina