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February 14, 2018



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

Re: Kashaun Banks 355175 v. State of South Carolina

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Charleston 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: Megan Jameson, Kashaun Banks 355175


Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Michael G. Nettles, Circuit Judge

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Case No.: 2015-CP-10-3849

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Kashaun Banks 355175.....PETITIONER

V.

State of South Carolina.....RESPONDENT

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NOTICE OF APPEAL

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The Petitioner Kashaun Banks appeals the Honorable Michael G. Nettles' January 26, 2018 Order of Dismissal. Undersigned counsel received notice of entry of the order on February 14, 2018. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
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February 14, 2018

Megan Harrigan Jameson, 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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S.C. SUPREME COURT

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CERTIFICATE 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, Megan Jameson, 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 February 14, 2018.

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

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| STATE OF SOUTH CAROLINA<br>COUNTY OF CHARLESTON | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE NINTH JUDICIAL CIRCUIT |
| Kashaun Banks, SCDC # 355175,<br>Applicant, | ) | Case No.: 2015-CP-10-3849 |
| v. | ) | **ORDER OF DISMISSAL** |
| State of South Carolina,<br>Respondent. | ) | |

This matter comes before the Court by way of an application for post-conviction relief filed July 10, 2015, by Kashaun Banks (Applicant). The State (Respondent) made its Return on February 23, 2016, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened December 7, 2017, at the Charleston County Courthouse. Applicant was present at the hearing and represented by James K. Falk, Esquire. Senior Assistant Deputy Attorney General Megan Harrigan Jameson from the South Carolina Attorney General's Office appeared on behalf of the State. Following the evidentiary 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 December 2011 term, the Charleston County Grand Jury indicted Applicant for armed robbery (2011-GS-10-8069) for following the October 15, 2011, robbery at gun point of an Exxon gas station in North Charleston. Applicant was represented by Andrew Grimes[1] and Megan Ehrlich of the Charleston County Public Defender's Office. The case was

[1] Grimes, who was lead counsel for Applicant, passed away in September of 2014.

prosecuted by Assistant Solicitor E. Culver Kidd, IV, of the Ninth Circuit Solicitor's Office prosecuted the case.

On April 22, 2013, Applicant proceeded to a jury trial in the Charleston County Court of General Sessions before the Honorable Kristi L. Harrington, circuit court judge.[2] At the conclusion of the trial, the jury convicted Applicant as indicted. Judge Harrington sentenced Applicant to twelve years imprisonment.

A notice of appeal was filed on Applicant's behalf and an appeal perfected by Blakely Lynn Molitor, Esquire. On appeal, Applicant challenged an unadmitted statement that was not introduced at trial, arguing it was not freely and voluntarily given to law enforcement. Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Banks, 2014-UP-479 (filed on December 23, 2014). The Remittitur was issued on January 7, 2015.

## ALLEGATIONS RAISED

In his application, Applicant alleged trial counsel was ineffective for failing to move to be relieved due to a serious medical issue, for failing to fully investigate his case, and failing to be prepared and adequately litigate his case.

At the evidentiary hearing, Applicant proceeded forward on allegations that trial counsel was ineffective for failing to move to be relieved due to a serious medical issue, failing to adequately argue for the suppression of his statement to law enforcement, and failing to object to the trial court's instruction regarding "seeking the truth."

[2] Applicant originally proceeded to a jury trial before the Honorable Stephanie P. McDonald, at that time a circuit court judge, on July 18, 2012. However, the trial ended in a mistrial.

## SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant called Assistant Public Defender Megan Ehrlich, who assisted lead counsel Andrew Grimes with Applicant's case and acted as a second chair at both of his trials, to testify. Ehrlich testified she has been practicing law since 2006 ad her entire career has been with the public defender's office. She testified Grimes was appointed to represent Applicant in October of 2011 and he asked her to assist with the case before Applicant's first trial in 2012. She testified she had tried numerous cases with Grimes before. She testified she met with Applicant several times and her main role was to work with Applicant and prepare him to testify at the Jackson v. Denno[3] hearing and during trial. She testified the State alleged Applicant had robbed a gas station, which was captured on video surveillance, and then was arrested two blocks away eighteen minutes later with a backpack that contained the distinctive gloves and a BB gun that were seen in the surveillance video. Additionally, she testified a trained canine and his handler tracked Applicant from the gas station to where he was arrested. Ehrlich testified Applicant gave a statement to law enforcement implicating himself in the robbery.

Ehrlich testified she and Grimes discussed the elements of armed robbery with Applicant, as well as the potential sentences of ten to thirty years imprisonment. She testified they used the public defender's office's investigator, Lee Jean, to assist with this case. She testified the defense team visited the crime scene, took pictures, and attempted the interview the two clerks who were working at the time of the robbery. She testified they requested and received records on the

[3] 378 U.S. 368 (1964).

canine and his handler, which amassed more than a thousand pages, and Grimes reviewed all these records in the hope of finding anything useful to attack the canine's track of Applicant.

Ehrlich testified she and Grimes moved to suppress Applicant's statement in a pre-trial Denno hearing, arguing the statement was involuntarily given based on a variety of factors, including he: (1) was a minor; (2) had a tenth grade education and suffered from learning disabilities; (3) his mother was not present, and his request to call his "sister[4]" was refused; (4) was induced by misrepresentations regarding Applicant's future ability to join the military; and (5) he invoked his right to remain silent. She testified the defense called Applicant and Monica Tudder, the Director of Programs for Exceptional Children for Dorchester 4 School District, who testified Applicant was in special education classes and received services from the school district for learning disabilities. She testified following the hearing and argument from defense counsel and the State, the trial court denied the motion to suppress. She testified this was different than Applicant's first trial, where Judge McDonald granted the motion to suppress his statement. However, she testified the State never introduced Applicant's statement during the trial.

Ehrlich testified the defense also moved to suppress the evidence obtained from the search of Applicant, arguing it was obtained following an illegal detention in violation of Applicant's constitutional rights. She testified the trial court denied this motion. She testified defense counsel also moved to suppress identifications made by the store clerk. She testified the trial court granted this motion, finding the identification was unduly suggestive and not so reliable as to have no substantial likelihood of misidentification.

[4] During the hearing, Applicant testified that although he requested to call his sister, his intention and desire was to contact his fiancé.

Ehrlich testified the defense strategy was that law enforcement had arrested and charged the wrong person with the robbery. She testified the defense team highlighted the difference in the clothing of the person and the surveillance video and Applicant when he was arrested, as well as a Sprite bottle in Applicant's possession that was not shown with the robber. She testified the defense team also highlighted inconsistences in the description of the suspect and Applicant, including height and weight differences. She testified the defense also tried to present testimony to the jury regarding Applicant's IQ and learning disabilities, but the trail court refused to allow such testimony.

Ehrlich testified Grimes had chronic health issues during the last few years of his life, including during this trial. She elaborated the issues involved chronic immune deficiencies, swelling and pain in his legs, and overall pain and chills throughout his body. She testified he passed away in September of 2014 following a severe car accident, but thinks his pre-existing medical conditions contributed to his death. She testified she recalled Grimes feeling particularly bad one day during the trial (April 23, 2013), when he spent the lunch break on the couch of a fellow public defender wrapped in blankets. She testified the trial court ended court early that day to allow Grimes to go to the doctor. She testified she had exchanged emails with Grimes's girlfriend during the trial about Grimes's health. She testified this is the worst she can recall Grimes feeling during a trial, but could not testify that it impacted his performance. However, she testified that it was not uncommon for Grimes to feel ill immediately before and during a trial, which she acknowledged is a taxing experience for any lawyer.

Ehrlich testified the defense team requested a jury instruction on the lesser-included offense of strong arm robbery, which was denied by the trial court. She testified the trial court

gave an instruction on a trial being a search for the truth, which is objectionable based on current law but was not objectionable at the time of Applicant's trial.

Following Ehrlich's testimony, Applicant testified on his own behalf. He testified that his current medical condition has changed since his trial He elaborated that he no longer has the use of his legs and is wheelchair bound, as well as stuffers from a stammer and stutter problem that significantly impacts his speech. Applicant testified that following his trial but prior Grimes's death, Grimes sent him a letter on July 8, 2014, in reply to his inquiry as to whether it would be appropriate for Applicant to file a PCR action alleging Grimes was ineffective due to his medical condition. (A copy of this letter was attached to Applicant's filed PCR application). Applicant testified he thinks Grimes performed differently, and worse, at his second trial due to his poor health. He elaborated that Grimes made different legal arguments at his second trial that were not successful and cited to the trial court's denial of his motion to suppress his statement where the first trial court (Judge McDonald) had granted his motion to suppress. Applicant also cited to questioning about a cellular phone from the first trial to the second trial.

## 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. 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).

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).

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.

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. Below are the findings in regards to each specific allegation of ineffective assistance of counsel raised by Applicant.

*Allegation: trial counsel was ineffective for failing to move to be relieved due to a serious medical issue*

Applicant asserts trial counsel was ineffective for failing to move to be relieved based on a serious medical condition, which he alleges impaired his ability to represent Applicant diligently and directly resulted in his conviction. This Court finds this allegation is without merit and that the health of Grimes, his lead trial counsel, did not affect his performance in any way. This Court has reviewed the record from Applicant's trial and finds that the case was excellently tried, with the defense team raising numerous motions that were all effectively argued to the trial court (some of which were successful, such as the suppression of the identification of Applicant). Counsel also properly preserved issues for appeal and vigorously cross-examined all of the State's witnesses. This Court notes trial counsel also fully investigated the case, used an investigator, and went to the scene of the crime. Overall, the Court finds counsel's performance not only met but exceeded the professional standards required of defense counsel. This Court finds Applicant has failed to establish trial counsel performed deficiently.

Moreover, this Court finds Applicant has failed to establish any resulting prejudice from trial counsel's alleged deficient performance due to his health. This Court finds it was not the health of trial counsel that resulted in Applicant's conviction, but rather, the overwhelming evidence of Applicant's guilt presented by the State at trial that led to his conviction, including the canine track of Applicant from the crime scene, Applicant's arrest in close proximity to the scene following his arrest, and his possession of a weapon and gloves. Because there is overwhelming evidence of Applicant's guilt, he cannot establish any prejudice. See Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009) (finding no prejudice occurs, despite trial

counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt). This Court finds this allegation must be denied and dismissed.

*Allegation: trial counsel was ineffective for failing to adequately argue for the suppression of Applicant's statement to law enforcement*

Applicant asserts trial counsel was ineffective for failing to adequately argue for the suppression of his statement. In support of this allegation, Applicant argues the trial judge from his first trial (which resulted in a mistrial) suppressed his statement, but the trial judge for his second trial denied his motion to suppress. However, this statement was never introduced into evidence during Applicant's trial, and therefore, had absolutely no effect on the outcome of his trial. This Court finds this allegation is without merit and must be denied and dismissed with prejudice.

*Allegation: trial counsel was ineffective for failing to object to the trial court's jury instruction regarding "seeking the truth"*

Applicant asserts trial counsel was ineffective for failing to object to the trial court's instruction to the jury during its opening charge that a trial is a search for the truth. The pertinent part from the trial court's opening charge is as follows:

> Ladies and gentlemen of the jury, the case that we are about to try is the case of the State versus Kashaun Shed Christian Banks. Before we begin this trial, I want to tell you that this trial probably will be different from what you might expect. Most people don't have the opportunity to come to court as you are doing now. And most people think, from watching television and reading books and watching movies, that the courtroom is a place of high drama, intense action, and riveting circumstances. While all of these things may be true at times, please remember this trial is not for entertainment. It is a fundamental part of our democracy. ***It is a search for the truth*** in an effort to make sure that justice is done between the parties before you here today.

> Please remember ***searching for the truth*** and making sure that justice is done is often slow, deliberate, and repetitive, the opposite of what you may have seen on television or in movies or read in books. This courtroom is a place of honor. It is dedicated to the protection and preservation of citizens' rights through what many have called the greatest justice system ever created.

Trial Tr. P. 213-214 (emphasis added). Applicant argues this language these opening remarks by the trial court were impermissible because it improperly shifted the burden of proof. In support of this argument, Applicant cites to State v. Beaty, a recent South Carolina Supreme Court case where the Court reviewed the circuit court's "truth seeking" language in its preliminary jury remarks. Op. No. 27693, — S.C. ——, —S.E.2d ——, 2016 WL 7474479 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse Adv. Sh. No. 1 at 13–14), reh'g granted Mar. 24, 2017.[5] In Beaty, which came our more than ***three years after*** Applicant's trial, our supreme court explained,

> [A] trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt.

Id. at 15–16. Nevertheless, the supreme court held the defendant was unable to show prejudice from the comments sufficient to warrant reversal. Id. at 16.

This Court finds this allegation is without merit and must be denied and dismissed with prejudice. This Court finds that at the time of Applicant's trial in 2013, the jury instruction given

[5] As of the time of this order, the Supreme Court has yet to issue a new opinion or order following its grant of rehearing in Beaty. Therefore, the opinion is not final.

by the trial court was widely-used by the bench and was similar to the approved charges as prepared by the Supreme Court and given to the bench for reference. Therefore, as this charge was commonly used and was proper at the time of Applicant's trial, this Court finds trial counsel was not deficient for failing to object to this charge.

Finally, this Court finds the Supreme Court's recent decision of Beaty is not controlling on this case for several reasons. Initially, the Beaty decision, which was decided more than three-and-a-half years after Applicant's trial, represents a change from longstanding precedent in South Carolina that had approved of such a jury instruction. Because the Supreme Court in Beaty has adopted a new standard that such truth seeking language was improper for a jury instruction and this opinion comes more than three-and-a-half years after Applicant's trial, this Court cannot conclude, and refuses to conclude, that it can be used to hold Applicant's counsel deficient in the present case. See Frierson v. State, 417 S.C. 287, 299 n. 7, 789 S.E.2d 762, 768 n. 7 (Ct. App. 2016) (quoting Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454 (1994) overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) ("Our courts have 'never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial.' "; see also Robinson v. State, 308 S.C. 74, 77–78, 417 S.E.2d 88, 91–92 (1992) (holding defense counsel was not ineffective in failing to present evidence of battered woman's syndrome in support of wife's self-defense claim where trial took place six years before our supreme court recognized battered woman's syndrome as relevant to a claim of self-defense)).

Second, this Court finds reliance on Beaty would be imprudent at this time as it is not a final decision. On March 24, 2017, the Court granted both parties' petitions for rehearing and

held additional oral argument. However, as of the date of this order, the Supreme Court has not issued a new opinion or order. Because Beaty is not yet final, this Court finds reliance on it in Applicant's case would be misplaced. This Court finds 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 is 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), SCRCP, 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 shall remain in the custody of the State.

**AND IT IS SO ORDERED** this 26 day of January, 2018.

MICHAEL G. NETTLES
Presiding Judge - Ninth Judicial Circuit

Florence, South Carolina


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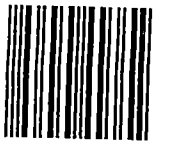

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