

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE COUNTY OF Marion

Court of Common Pleas

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

Case No. 2016-CP-28-04592

Craig Austin Livingston, SCDC # 304858 Petitioner,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

The Petitioner appeal the Honorable William H. Seals Jr.'s Order filed on March 13 2018, 2018, denying post conviction relief to the Petitioner.

The Order was received by the undersigned counsel on March 21, 2018. A copy of the said Order on appeal is attached to this Notice.

This is the 24th day of March, 2018.



Steven W. Fowler  
Fowler Law Firm  
730 Main Street, Unit 237  
North Myrtle Beach, SC 29582  
Telephone: 843-663-0006  
Fax: 843-280-0003  
myfowlerlaw@gmail.com  
SC Bar #69683

RECEIVED

MAR 26 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE COUNTY OF Horry

Court of Common Pleas

The Honorable Circuit Court Judge, William Seals

Case No. 2016-CP-26-04592

Craig Austin Livingston, SCDC # 304858..... Petitioner,

v.

State of South Carolina, .....Respondent

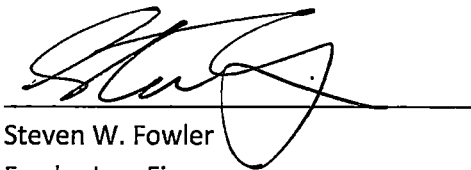
**PROOF OF SERVICE**

I, Steven W. Fowler, court-appointed attorney for Petitioner, certify that I have today served within Notice of Appeal and Copy of the Order signed by the presiding Judge upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the following:

- 1) Assistant Attorney General, PO Box 11549, Columbia, SC 29211 and
- 2) Clerk of the South Carolina Supreme Court, 1231 Gervais St, Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served on this below named date.

This is the 24th day of March, 2018.



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**RECEIVED**  
 MAR 26 2018  
 S.C. SUPREME COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
Craig Austin Livingston,	)	Case No.: 2016-CP-26-04592
S.C.D.C. No. 304858,	)	
	)	
Applicant,	)	<b>ORDER OF DISMISSAL</b>
v.	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Horry County  
 Clerk of Court  
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This matter comes before the Court by way of an application for post-conviction relief filed by Craig Austin Livingston ("Applicant") on July 12, 2016. Respondent made its return on or about March 28, 2017. The Court convened an evidentiary hearing into the matter on Wednesday, November 29, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Steven W. Fowler, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Johnny Gardner, Esq. ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Horry County Clerk of Court regarding the subject convictions, 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 May 2015 term of the Horry County Grand Jury for two counts of felony DUI resulting in death (2015-GS-

26-01840, -01841). Johnny Gardner, Esq. represented Applicant, and George H. Debusk, Jr., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On April 18, 2016, Applicant pled guilty as indicted. The Honorable Steven H. John sentenced Applicant to imprisonment for concurrent terms of 20 years for each count. Applicant did not appeal his plea or sentence.

### **Present Application**

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

1. Ineffective assistance of counsel, in that:
  - a. "Counsel was ineffective for not investigating the case."
  - b. "Counsel was ineffective for unprofessional errors."
  - c. "Counsel was ineffective for not objecting to the state withholding evidence."

## **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.

### **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), 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." 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)).

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.E.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.E.2d at 625 (citing Strickland at 694). With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged

errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

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.

### ***1. Failure to Investigate***

Applicant alleges Counsel was ineffective for failing to investigate the facts of his case. In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

At the plea proceeding, the State set forth an exhaustive recitation of facts to show Applicant was heavily intoxicated on the date of the collision, refused at least one offer to drive

from a sober passenger, and ultimately swerved into oncoming traffic. (Tr. 8-12.) One vehicle swerved and avoided Applicant's truck, but Applicant struck the next vehicle head-on, resulting in death of the victims, brothers.<sup>1</sup> (Tr. 9-11.) Applicant clarified to the Court that he only swerved into traffic because the front-seat passenger grabbed the steering wheel, but otherwise affirmed in no uncertain terms that he was driving the vehicle, it was under his control, and that he was under the influence of alcohol. (Tr. 12-13.) Applicant stated he had enough time to speak with Counsel, declined any additional time, and confirmed his satisfaction with Counsel's representation. (Tr. 7-8.)

At the evidentiary hearing, Applicant testified he told the Multi-disciplinary Accident Investigation Team (MAIT) that another passenger in the vehicle grabbed the steering wheel, causing him to lose control. Applicant noted investigators did not take fingerprints of the steering wheel, and argued that print testing would have shown another person grabbed the wheel. Applicant testified he told Counsel to test for prints, but that Counsel only responded that the wheel had been contaminated at the scene. Applicant testified he and Counsel needed more time.

Counsel testified he received discovery pursuant to Rule 5 and Brady, and reviewed it. Counsel indicated he had plenty of time and got everything he needed, including witness statements, a letter from Applicant to the victims, the blood-alcohol report, and the MAIT report. Counsel testified he went over the discovery page-by-page with Applicant. Counsel concluded the witnesses at the scene would deny Applicant's claim that somebody grabbed the wheel, and further concluded there was no doubt that: (1) Applicant was the driver; (2) Applicant was intoxicated; (3) Applicant's vehicle crossed the line into oncoming traffic; and (4) open

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<sup>1</sup> Victim Christopher Waddell died that day either in route or shortly after reaching Grand Strand Hospital. Victim Miles Waddell was recovered from the wreckage and perished at Grand Strand Hospital after a week. (Tr. 10.)

containers of alcohol were present and visible in the vehicle. Counsel did not hire an investigator or an independent toxicologist, due to the high quality of the MAIT report and the severity of Applicant's intoxication, respectively. Counsel testified he never discussed testing for fingerprints with Applicant, and further noted that the deployment of the airbag would make testing for fingerprints impossible. Counsel did recall explaining to Applicant his story didn't matter—even if it were true, but for the impairment, he could have corrected for the interference. Counsel did not seek the toxicology of the victims because he did not believe it was relevant; Counsel concluded the victims had "zero culpability." Counsel noted Applicant never wanted a trial, but wanted a plea from the outset.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. Counsel demonstrated considerable familiarity with the facts of the case and provided compelling reasons why he did not seek to test the steering wheel for fingerprints—it was impossible and irrelevant. This Court agrees, and further notes that Applicant did not present to this Court any testing or results that such testing would have produced. Consequently, the Court is left with mere speculation as to how the proposed investigation would have impacted Applicant's case. For these reasons, Applicant's request for relief by way of this allegation is **DENIED**.

## ***2. Failure to Suppress Warrant***

Applicant alleges Counsel committed "unprofessional errors" by failing to suppress the warrant permitting law enforcement to draw blood from him after the collision. "A law enforcement officer can order a person suspected of Felony DUI to submit to any chemical test without first offering a breath test." State v. Long, 363 S.C. 360, 364, 610 S.E.2d 809, 812 (2005); see also S.C. Code Ann. § 56-5-2946.

At the evidentiary hearing, Applicant argued the warrant permitting a blood draw stated to take one vial of blood, but the State took two at the hospital. Applicant contended the return was never executed to show the blood was taken, but also complained the vials of blood taken were used to find his BAC. Reviewing the toxicology report, Applicant argued there was a chain of custody issue due to the listed custodian names of "refrigerator" and "safe." Applicant complained Counsel never filed any suppression motions.

Counsel testified he reviewed the warrant and found no deficiencies in it. Counsel noted in addition to the warrant, the State had a statutory right and that, because this was a case of a felony DUI, no consent on the part of Applicant was necessary. Counsel indicated he found no deficiencies in the chain of custody and testified to the typical chain of custody process in a DUI case. Counsel noted the witnesses present at the scene uniformly agreed that Applicant was intoxicated.

The Court finds no deficiency on the part of Counsel, nor prejudice therefrom. Counsel, by good professional judgment, concluded there were no grounds upon which to challenge the blood draw, which returned a BAC of .182 at the time of the draw, *well* in excess of the legal limit. Indeed, in light of the great bodily injury and ultimate death of two individuals, law enforcement was absolutely justified in seeking a blood draw. Counsel demonstrated familiarity with the chain of custody and found no basis for challenge. Further, this Court finds no reason it should permit Applicant to derivate from his explicit admission of intoxication made at the plea proceeding. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

### ***3. Failure to Object to Withheld Evidence***

Applicant alleges Counsel was ineffective for failing to object to the State's failure to provide any toxicology report of the victims. During the recitation of facts at the plea

proceeding, the State indicated: "An autopsy was done on the [victim] driver, Christopher. During the course of that autopsy, they did toxicology. He had no drugs or alcohol in his system." (Tr. 11, ll. 1-3.)

At the evidentiary hearing, Applicant testified he asked for the victim's toxicology, but that Counsel replied he never got it. Counsel testified he never sought the victim's toxicology, notwithstanding his receipt of discovery. Counsel couldn't recall the victim's toxicology, but testified it wasn't relevant to the charges.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. The toxicology report was not submitted to this Court and Applicant offered no other evidence to show how it would have been in any way relevant to his defense. No evidence was introduced to show any Brady violation on the part of the State. Nor did Applicant offer any reason why this Court should permit him to derivate from his explicit admission of intoxication made at the plea proceeding. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

*[Conclusion and signature on following page]*

### 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), SCRCR 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 March, 2018.

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

  
\_\_\_\_\_, South Carolina

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY )

Craig A. Livingston, #304858 )

CASE NO.

Plaintiff )

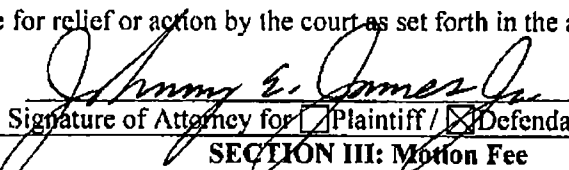
2016-CP-26-4592

v. )

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

State Of South Carolina )

Defendant. )

Plaintiff's Attorney: Steven W. Fowler, Bar No. 69683 Address: 730 Main St., Unit 237 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	
<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: _____

2018 MAR 13 PM 1:02  
 CLERK OF COURT  
 HORRY COUNTY, SC



ALAN WILSON  
ATTORNEY GENERAL

March 9, 2018

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

Re: Craig A. Livingston, #304858 v. State of South Carolina  
2016-CP-26-4592

2018 MAR 13 PM 1:02  
CLERK OF COURT  
HORRY COUNTY, SC

Dear Ms. Elvis:

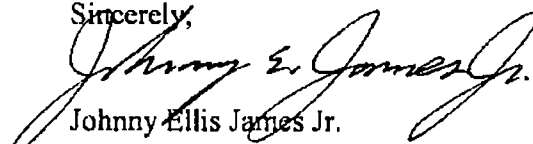
Enclosed please find the original **Order of Dismissal** signed by the Honorable William H. Seals, Jr., in the above-captioned case, for filing in your office.

Pursuant to Rule 71.1(f), 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.

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

Sincerely,

  
Johnny Ellis James Jr.  
Assistant Attorney General

JEJ/mm

Enclosure

STATE OF SOUTH CAROLINA  
COUNTY OF Horry  
IN THE COURT OF COMMON PLEAS

---

CRAIG A. LIVINGSTON, #304858,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**CERTIFICATE OF SERVICE**

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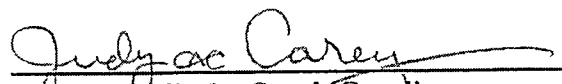
The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Steven W. Fowler, Esquire  
Fowler Law Firm  
730 Main Street, Unit 237  
North Myrtle Beach, SC 29582

This 15<sup>th</sup> day of March, 2018.

  
MALLORY MORRIS  
LEGAL ASSISTANT FOR RESPONDENT

SWORN to before me this 15<sup>th</sup> day of March, 2018.

  
Notary Public for South Carolina.  
My Commission Expires: 5/14/2024



ALAN WILSON  
ATTORNEY GENERAL

March 15, 2018

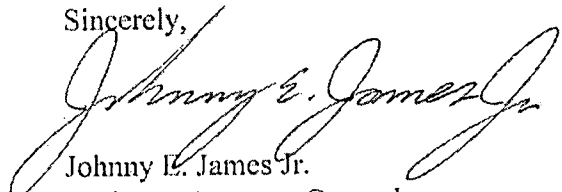
Steven W. Fowler, Esquire  
Fowler Law Firm  
730 Main Street, Unit 237  
North Myrtle Beach, SC 29582

**Re: Craig A. Livingston, #304858 v. State of South Carolina  
2016-CP-26-4592**

Dear Mr. Fowler:

Enclosed please find a copy of the **Order of Dismissal** for the above-captioned post-conviction relief application; signed by the Honorable William H. Seals, Jr., Presiding Judge for the Fifteenth Judicial Circuit.

Sincerely,



Johnny E. James Jr.  
Assistant Attorney General

JEJ/mm  
Enclosure

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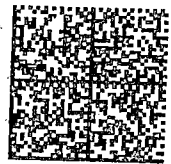


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Fowler Law Firm  
730 Main Street  
Unit 237  
NMB, SC 29582



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