

**RICHEY AND RICHEY**  
ATTORNEYS AT LAW

*A PROFESSIONAL ASSOCIATION*

RODNEY W. RICHEY  
LOLA S. RICHEY

POST OFFICE BOX 10916  
GREENVILLE, SOUTH CAROLINA 29603

(864) 467-0503  
(864) 467-0646 FAX

April 2, 2018

The Honorable Daniel E. Shearouse  
Clerk of Court  
The Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, SC 29211

RECEIVED

APR 05 2018

Re: David W. Chiles v. State of South Carolina  
Case No: 2017-CP-23-1521

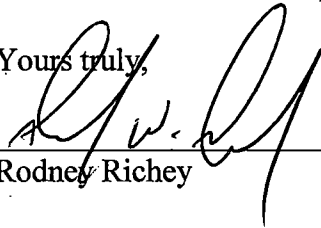
S.C. SUPREME COURT

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,

  
\_\_\_\_\_  
Rodney Richey

RWR/  
enclosures

cc: DeShawn H. Mitchell, Esquire

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2017-CP-23-1521

RECEIVED

APR 05 2018

S.C. SUPREME COURT

DAVID W. CHILES, SCDC# 362035

APPELLANT,

against

STATE OF SOUTH CAROLINA,

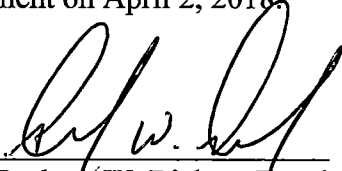
RESPONDENT.

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**NOTICE OF APPEAL**

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David W. Chiles appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Robin B. Stilwell, Circuit Judge on December 15, 2017 an Order issued on March 21, 2018 and filed on March 26, 2018. The Appellant received notice of the judgment on April 2, 2018.

  
Rodney W. Richey, Esquire  
Attorney for the Appellant  
33 Market Point Drive  
Post Office Box 10916  
Greenville, South Carolina 29603  
(864) 467-0503  
Attorney for Applicant

Other Counsel of Record:  
DeShawn H. Mitchell, Esquire  
Office of Attorney General State of SC  
Post Office Box 11549  
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2017-CP-23-1521

DAVID W. CHILES, SCDC# 362035

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

RECEIVED

APR 05 2018

S.C. SUPREME COURT

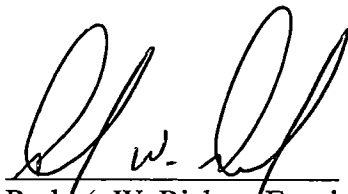
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**AFFIDAVIT OF SERVICE**

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I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on April 2, 2018, addressed to their attorney of record, DeShawn Mitchell, Esquire Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: April 2, 2018



Rodney W. Richey, Esquire  
Attorney for the Appellant  
33 Market Point Drive  
Post Office Box 10916  
Greenville, South Carolina 29603  
(864) 467-0503  
Attorney for Applicant

STATE OF SOUTH CAROLINA )  
 COUNTY OF GREENVILLE )  
 )  
 David W. Chiles, #362035, )  
                                   Applicant, )  
                                   ) )  
                                   v. )  
                                   ) )  
 State of South Carolina, )  
                                   Respondent. )

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IN THE COURT OF COMMON PLEAS  
 THIRTEENTH JUDICIAL CIRCUIT

2017-CP-23-1521

**ORDER OF DISMISSAL**

ENTERED COMPUTER

FILED-CLERK OF COURT  
 PAUL B. WILSON, CLERK  
 GREENVILLE, SOUTH CAROLINA  
 2019 MAR 26 PM 1:11  
*JW*

This matter comes before the Court by way of an application for post-conviction relief filed on March 7, 2017 by David W. Chiles (Applicant) and an amended application on May 22, 2017. Respondent made its Return on or about November 3, 2017. An evidentiary hearing into the matter was convened on December 15, 2017, at the Greenville County Courthouse in Greenville, South Carolina. Applicant was present and represented by Rodney W. Richey, Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General’s Office.

At the hearing, Applicant testified on his own behalf. Applicant’s Trial Counsel Marcus L. Smith, Esquire also testified as did Applicant’s mother. This Court had before it a copy of the records of the Greenville County Clerk of Court regarding the Applicant’s convictions, the transcript from Applicant’s trial, the PCR application, Respondent’s Return, Applicant’s records from the Department of Corrections and Applicant's appellate records. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In April 2012, the Greenville

County Grand Jury indicted Applicant for conspiracy (2012-GS-23-0965), armed robbery and possession of a weapon during the commission of a violent crime (2012-GS-23-0966). Marcus L. Smith, Esquire represented Applicant. Assistant Solicitor Jeff Weston, Esquire prosecuted the case. On November 5, 2014, Applicant proceeded to trial before the Honorable Alexander S. Macaulay and a jury. The jury found Applicant guilty as indicted. Judge Macaulay sentenced Applicant to imprisonment for fifteen years for armed robbery, five years for conspiracy and five years for possession of a weapon during the commission of a violent crime.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal in the form of an Anders<sup>1</sup> brief. The Court of Appeals dismissed the appeal. State v. Chiles, Op. No. 2016-UP-108 (S.C. Ct. App. filed March 2, 2016). The Remittitur was sent on March 18, 2016.

### **FACTUAL HISTORY**

Applicant, his girlfriend Precious Harris, and his brother, Keith Williams, were charged with robbing the McDonald's on Old Spartanburg Road on June 26, 2011. Harris was a manager at the McDonald's and on duty at the time of the robbery. Williams pled guilty to the charge and was called as a State's witness at trial. Upon his arrest Williams made a statement implicating himself, Appellant and Harris in the robbery. Appellant and Harris were tried at the same time. At trial, Williams denied making the statement. The jury found Applicant guilty while finding Ms. Harris not guilty. (ROA p.83-89).

### **ALLEGATIONS**

In his application, Applicant alleges he is being held in custody unlawfully for the following reasons:

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<sup>1</sup> Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

1. "Ineffective Assistance of Counsel"

- a. Counsel acts and omissions during trial fell below the standard required by law.

In his amended application for post-conviction relief filed on May 22, 2017, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"

- a. Counsel failed to conduct an appropriate investigation, review case files, and prepare for trial in a timely manner. Coles v. Payton, 393 U.S. 894 (4th cir 968). Counsel's Failure to abide by these requirements deprived the jury of critical information relevant to an accurate assessment of the Applicant's guilt or innocence. See Wiggins v. Smith 539 U.S. 510 (2003).
- b. Counsel failed to timely subpoena witness(s), preventing mitigating evidence to be submitted into the record, due to S.C.R Evi. 801 (c).
- c. Counsel failed to motion to suppress evidence, that was going to be recanted at trial, as well as failed to investigate the possibility that evidence was procured by unlawful means.

**SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING**

Applicant's Testimony

Applicant testified Trial Counsel did not properly investigate his case. Applicant testified Trial Counsel did not sit down and discuss the facts of his case with him. Applicant testified Trial Counsel did talk to him about the elements of the crime he was charged with and the sentences he was facing. Applicant testified there was a statement given by his brother, his co-defendant in the case. He testified he did not testify at trial but that he wanted to. Applicant testified he did not know anything about the case because of Trial Counsel but that he could have brought witnesses to help at trial. Applicant testified he was with his mother when this incident happened.

On cross-examination Applicant testified he met with Trial Counsel a couple of times and reviewed the discovery with him.

### Applicant's Mother's Testimony

Applicant's mother testified she could not remember if Applicant was with her at the time of the incident. She testified Trial Counsel never contacted her about testifying at Applicant's trial concerning his whereabouts the night of the incident.

### Trial Counsel's Testimony

Trial Counsel testified he was appointed to represent Applicant and that he was not Applicant original counsel. Trial Counsel testified once he was appointed he requested discovery. He testified there was not a lot of evidence in Applicant case other than the statement given by Applicant's brother. Trial Counsel testified he believed the statement which implicated Applicant was extremely damaging to Applicant's case. Trial Counsel testified he met with Applicant and relayed a plea offer to him but Applicant did not want to take it. Trial Counsel testified he discussed with Applicant whether he should testify at trial and that he met with Applicant family to keep them informed. Trial Counsel testified he also talked to Applicant's brother who was his co-defendant and Applicant's brother told him he would probably testify to something different at trial from what he said in his statement to the police. Trial Counsel testified he discussed the discovery in the case with Applicant and talked to him about his charges and the sentences he was facing.

### **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 hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth

below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

In a post-conviction relief action, the 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, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel’s performance was deficient. Id. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Id. (quoting Strickland v. Washington, 466 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, 300 S.C. at 117-18, 386 S.E.2d at 625. 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, 106 (1985).

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel discussed below.

**Failure to investigate**

Applicant failed to present any evidence in support of this allegation. To show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had he more fully investigated. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) (“Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial.”). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to 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)). Applicant has failed to show what beneficial information could have been discovered had Counsel done more investigation. Even so, Trial Counsel testified credibly that not only did he review all of the discovery with Applicant but he spoke to Applicant’s brother, the co-defendant in this case regarding his statement implicating his brother. This Court finds Counsel’s investigation was beyond reasonable. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

**Failure to subpoena/call witnesses**

Applicant alleged Trial Counsel failed to subpoena witnesses. Applicant testified he did not know anything about the case because of Trial Counsel but that he could have brought

witnesses to help at trial. Applicant testified he was with his mother when this incident happened. The Applicant has failed to demonstrate by a preponderance of the evidence that Trial Counsel's performance was deficient or that he was prejudiced by any deficiency. The Applicant contends his mother should have been called to testify as an alibi witness. This Court finds Applicant's mother's testimony at the hearing in this Post-Conviction Relief Application was, at best, equivocal. She would not say clearly and with any certainty that Applicant was with her at the date and time of the offense. Furthermore, this Court finds she failed to state under oath that she disclosed any alibi evidence to Trial Counsel. Therefore, Applicant's contention that the failure to call his mother as an alibi witness was deficient performance by trial counsel is without merit. Further, Applicant presented no other witnesses to testify at his evidentiary hearing. This Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. Applicant has failed to show the outcome of his trial would have been different had Trial Counsel called his mother to the stand as her testimony at the PCR hearing was not convincing. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

#### **Failure to suppress evidence**

Applicant alleged in his application Trial Counsel failed to motion to suppress evidence that was going to be recanted at trial, specifically his brother's statement. Trial Counsel testified he talked to Applicant's brother who was his co-defendant and Applicant's brother told him he

would probably testify to something different at trial than what he said in his statement to the police. After a review of the trial transcript, this Court finds Applicant had failed to show Trial Counsel was deficient for failing to motion to suppress this evidence. This Court finds that a motion to suppress the statement of Applicant's brother would have been unsuccessful and that there were no reasonable grounds for suppression. This Court finds the jury clearly believed Applicant's brother's original statement and relied upon the same, at least in part, to convict the Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This allegation is denied and dismissed with prejudice.

#### **Advice not to testify**

Applicant presented testimony in a cursory fashion concerning Trial Counsel's advice not to testify. Out of an abundance of caution, this Court addresses the merits of this allegation. Applicant has failed to show deficiency or prejudice with respect to this allegation. The trial judge fully advised Applicant of his right to testify at trial. The record indicates clearly that Applicant made a choice, of his own free will and volition, not to testify after having been fully advised of his rights and ramifications of testifying or, in the alternative, not testifying. Applicant chose not to testify. Accordingly, he has also failed to show prejudice with respect to this allegation, and it is denied and dismissed.

#### **CONCLUSION**

Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations 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 Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCR. Refer to Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED THAT:**

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 21st day of March, 2018.



ROBIN B. STILWELL  
Presiding Judge  
Thirteenth Judicial Circuit

Greenville, South Carolina