

ROSS AND ENDERLIN, PA  
ATTORNEYS AT LAW

**RECEIVED**

MAY 04 2018

S.C. SUPREME COURT

May 2, 2018

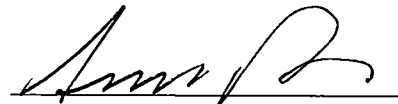
Mr. Daniel E. Shearouse  
Clerk, The S.C. Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: Jonathan A. Finney v. State  
2016-CP-37-706

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,



Susannah Ross  
Attorney at Law

enclosure

cc: Office of the Attorney General  
Office of Appellate Defense  
Oconee County Clerk of Court

330 E. COFFEE ST. • GREENVILLE/SC • 29601

PHONE: (864) 242-0029

E-MAIL: SUSANNAH@ROSSENDERLIN.COM

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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MAY 04 2018

APPEAL FROM OCONEE COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

J. Cordell Maddox, Jr., Circuit Court Judge

2016-CP-37-706

Jonathan A. Finney, ..... Appellant,

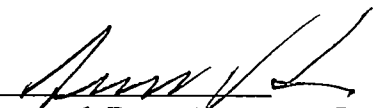
v.

The State, ..... Respondent.

NOTICE OF APPEAL

Jonathan A. Finney appeals the Honorable J. Cordell Maddox Jr.'s Order of Dismissal filed April 27, 2018.

This 2 day of May, 2018.

  
Susannah Ross, Attorney at Law  
330 E. Coffee St.  
Greenville, SC 29601  
(864) 242-0029  
Attorney for Appellant

Other Counsel of Record:  
DeShawn Mitchell, Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
(803) 734-3970  
Attorney for Respondent

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**MAY 04 2018**

**IN THE SUPREME COURT**

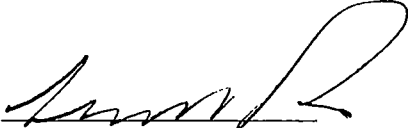
**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 JONATHAN A. FINNEY, )  
 APPELLANT, )  
 )  
 )  
 )  
 VS. )  
 )  
 )  
 )  
 THE STATE OF SOUTH CAROLINA, )  
 RESPONDANT. )  
 \_\_\_\_\_ )

**CERTIFICATE OF SERVICE  
BY MAIL**

1. I am the attorney for the Applicant in the above-captioned matter.
2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Notice of Appeal** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

**Ms. Kelly Oppenheimer**  
**Assistant Attorney General**  
**P.O. Box 11549**  
**Columbia, SC 29211**

  
 \_\_\_\_\_  
 Attorney for Defendant

This 2 day of May, 2018

STATE OF SOUTH CAROLINA )  
 COUNTY OF OCONEE )  
 )  
 Jonathan A. Finney, #360193, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE TENTH JUDICIAL CIRCUIT

Case No. 2016-CP-37-706

**ORDER OF DISMISSAL**

FILED OCONEE COUNTY, SC  
 BEVERLY H. WRIGHT, CLERK OF COURT  
 2018 APR 27 P 1:31

**PROCEDURAL HISTORY**

This matter comes before the Court by way of an application for post-conviction relief filed November 23, 2016. Respondent made its Return and Partial Motion to Dismiss and Motion for More Definite Statement on May 12, 2017, requesting an evidentiary hearing be held on Applicant's allegations of ineffective assistance of counsel and requesting Applicant's allegation of insufficient evidence be summarily dismissed. Thereafter, Applicant, through his counsel filed an amended application for post-conviction relief on February 20, 2018. An evidentiary hearing was convened on February 21, 2018, at the Anderson County Courthouse. Applicant was present at the hearing and was represented by Susannah C. Ross, Esquire. Respondent was represented by Assistant Attorney General Kelly Oppenheimer of the South Carolina Attorney General's Office.

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Oconee County Clerk of Court. During its December 2013 term, the Oconee County Grand Jury indicted Applicant for three counts of first-degree burglary (2013-GS-37-01115) and three counts of petit larceny \$2,000 or less (2013-GS-37-01118). Oconee County Chief Public Defender R. Daniel

Copies to:  
 Atty (P) Ross (D) McCallister  
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Day, Jr. of the Tenth Circuit Public Defender's Office represented Applicant on these charges. On May 27-30, 2014, Applicant proceeded to a jury trial before the Honorable R. Lawton McIntosh on one count of first-degree burglary and one count of petit larceny \$2,000 or less. The jury convicted Applicant as indicted, and Judge McIntosh sentenced him to a term of imprisonment for twenty years suspended on the service of sixteen years with five years' probation for first-degree burglary and to a concurrent term of imprisonment for thirty days for petit larceny.

Applicant filed a timely notice of appeal, and Appellate Defender LaNelle Cantey DuRant of the South Carolina Commission on Indigent Defense, Office of Appellate Defense perfected an appeal on Applicant's behalf. Following the submission of an *Anders*<sup>1</sup> brief, the South Carolina Court of Appeals dismissed Applicant's appeal and granted counsel's request to withdraw by Order dated November 25, 2015. *State v. Finney*, Op. No. 2015-UP-544 (S.C. Ct. App. Filed November 25, 2015). The Remittitur was issued on December 22, 2015.

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

1. Ineffective assistance of counsel for failing to convey a plea offer to Applicant;
2. Ineffective assistance of counsel for having a conflict of interest; and
3. Insufficient evidence.

In his amended application, Applicant raised the following allegations:

1. Ineffective assistance of counsel for failing to investigate the Applicant's assertion that another person, Josh Burrell, had committed the burglary; and
2. Due process violation because the lead investigator on the case, David McMahan, had a conflict of interest because his father was the owner of the house that was burglarized on McMahan Rd.

At the hearing, Applicant proceeded forward on the claims of ineffective assistance of counsel

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<sup>1</sup> *Anders v. California*, 386 U.S. 738 (1967).

raised in his original application, as well as the grounds raised in his amended application for post-conviction relief.

#### STATEMENT OF FACTS ADDUCED AT TRIAL

On August 10, 2013, Joseph Giordano arrived at his family's weekend home in Oconee County (hereinafter "the Giordano home"). Tr. 143; 160. Mr. Giordano's wife, Mary Jane Giordano, owns the home, which is located on McMahan Road; and her brother, Sergeant David McMahan, has a right of first refusal in the home. Tr. 150, 158, 210-11. While at the Giordano home, Mr. Giordano discovered the locked door to the screened-in porch leading into the home had been broken open and the lock on the porch door leading outside was open and the screen was cut. Tr. 143-44, 150, 160; 161. The house was in total disarray, and a 12-gauge shotgun, keys to various vehicles, and liquor were missing. Tr. 143-44, 145, 154, 161. Later, Mr. and Mrs. Giordano discovered an airsoft rifle and BB gun were also missing. Tr. 153, 154.

Although the investigation into the burglary at the Giordano home was assigned to Sergeant Scott Arnold, Sergeant Arnold asked Sergeant McMahan for his assistance because Sergeant McMahan grew up in the neighborhood where the house was located. Tr. 189, 233, 234. As a result, Sergeant McMahan canvassed the neighborhood. Tr. 189. In canvassing the neighborhood, he talked to two individuals: Randy Allsep and David Duncan. Tr. 168, 170, 190. Mr. Allsep lives on McMahan Road, about one-quarter of a mile up the road from the Giordano home. Tr. 167. During the first week of August, Mr. Allsep saw a slim, white male with dark hair carrying a bag on his back, which had something sticking out of it. Tr. 167-68. Mr. Duncan lives off of Jennings Road, which is across the street from McMahan Road. Tr. 169. During the first week of August, Mr. Duncan saw a slim, white male with tattoos down his arm pacing on Jennings Road in front of Mr. Duncan's home. Tr. 169-70. The man told Mr. Duncan

he was staying in a trailer on Jay Jay Road, which is about one-quarter of a mile from the Giordano home. Tr. 170.

After talking to Mr. Allsep and Mr. Duncan, Sergeant McMahan went to a mobile home on Jay Jay Road, where he spoke to Dia Roberts. Tr. 173-74, 190. Sergeant McMahan described the man for whom he was looking to Ms. Roberts, who she identified as Applicant. Tr. 173-74, 190. Ms. Roberts indicated Applicant and her mother, Tia Chapman Finney, had been staying with her for about two to three weeks in early August. Tr. 172-73, 191. She also told Sergeant McMahan Applicant and Mrs. Finney left her home around August 10, 2013, with Tina Elrod, who lived on Return Church Road. Tr. 173, 174, 175, 176, 192.

When Ms. Elrod picked Applicant and Mrs. Finney up from Ms. Roberts's home, Applicant had a blue bag, which contained a shotgun and two BB guns. Tr. 177. Applicant indicated to Ms. Elrod he was supposed to sell the shotgun and divide the money between him and another individual, Josh Burrell, so Ms. Elrod took him to a park in Walhalla to sell the shotgun. Tr. 178, 185-86. While there, Applicant sold the shotgun in exchange for meth. Tr. 178, 181-82. Applicant resided with Ms. Elrod for approximately three months. Tr. 176.

On August 28, 2013, Sergeant McMahan and Sergeant Arnold went to Ms. Elrod's home, where she gave them consent to search. Tr. 179-80, 193, 194, 234. In Ms. Elrod's home, they found an airsoft rifle, a blue bag, which was large enough to carry a shotgun with part of the gun sticking out, a pocketknife, a pellet rifle, and a BB gun. Tr. 194-95, 196. The airsoft rifle and BB gun belonged to the Giordanos. Tr. 195. During their initial search, Applicant was not at Ms. Elrod's home, but she later called Sergeant Arnold and informed him Applicant was returning to her home. Tr. 180, 196. When Sergeant Arnold and Sergeant McMahan made contact with Applicant that evening, Applicant agreed to return to the sheriff's office and gave a

statement to Sergeant Arnold. Tr. 201, 234-37. In that statement, Applicant indicated Josh Burrell broke into the Giordano home. Tr. 235-37.

Sergeant Arnold and Sergeant McMahan continued their investigation and obtained information connecting the airsoft rifle and the BB gun to Applicant. Tr. 204, 237-38. On August 30, 2013, Sergeant Arnold and Sergeant McMahan confronted Applicant with this new information. Tr. 201, 223-24, 238. During that conversation, Applicant admitted his involvement in this crime, as well as Josh Burrell's involvement, and agreed to cooperate with law enforcement. Tr. 204-05, 239.

Later, on September 4, 2013, Applicant offered to take Sergeant Arnold and Sergeant McMahan to the location of the burglary. Tr. 205, 239. As they drove around the county, Applicant gave them directions. Tr. 207-08, 224, 240. Applicant's directions led them to the Giordano home. Tr. 208, 240. When they arrived at the Giordano home, Applicant got out of the car, pointed to the house, and told Sergeant Arnold and Sergeant McMahan that was the house he burglarized. Tr. 240.

#### **TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING**

At the evidentiary hearing, Applicant testified on his own behalf and presented the testimony of Tia Chapman Finney. Respondent presented testimony from trial counsel, Oconee County Chief Public Defender R. Daniel Day, Jr. (hereinafter "Counsel"). This Court also had before it a copy of Applicant's trial transcript, the records of the Oconee County Clerk of Court, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified Counsel told him about a plea offer for ten years, which he was never previously offered, at his trial. He further testified Counsel

told him he should have taken the offer, but it was too late at that time. Applicant elaborated, however, that he would not have taken the plea because he wanted to fight these charges, and he maintained his innocence.

Applicant testified he met with Counsel two or three times for a bond hearing. He testified he did not recall reviewing discovery with Counsel, and they did not review his statements to law enforcement. Applicant also testified he did not discuss any possible defenses with Counsel. Applicant testified he told Counsel to investigate Josh Burrell and other witnesses.

Applicant also testified he gave a statement to law enforcement, which he signed. In this statement, he testified he told law enforcement that he and his wife were staying with his stepdaughter at the time, and Josh Burrell and his girlfriend were also staying there at that time. He elaborated in his statement, he told law enforcement that Josh Burrell came into his stepdaughter's house with a blue bag, which made him think Mr. Burrell had burglarized the home. He further testified after he gave this statement, law enforcement came to get him and took him to the Giordano home, which was about 200 to 300 yards from where they were staying at the time. Applicant denied giving law enforcement directions to the Giordano home and denied being the lookout at the home while Josh Burrell burglarized the home. He further testified his oral statements, to which witnesses at trial testified, were not true. He testified had he testified at trial, he would have testified his first statement was true, but the other statements were not.

Next, Applicant presented testimony from Tia Chapman Finney, who is Applicant's wife. She testified Josh Burrell was living with a woman who she considers her daughter, and Josh Burrell and this woman stayed with her and Applicant at her daughter's house for a few days

until her daughter kicked all of them out. She testified Josh Burrell came into the house carrying snacks, change, and some bags. She testified Josh Burrell called Applicant into the back room with him. She further testified Applicant had not been with Josh Burrell before Mr. Burrell returned to her daughter's home. She also testified she never talked to Counsel, but she did talk to an investigator. She elaborated the investigator did not ask her anything about this case. She testified that she would have testified at trial.

Following Applicant's case, Respondent presented testimony from Counsel. He testified he has been practicing law for forty years and is approaching his tenth year at the Tenth Circuit Public Defender's Office in July of this year. He testified he was appointed to represent Applicant right immediately his arrest, and he met with Applicant several times at both the detention center and at court. He testified he filed Rule 5, SCRCrimP, and *Brady* motions and reviewed all discovery items with Applicant. He elaborated he reviewed the photographs from the scene and the various statements from witnesses with him, including Applicant's statements to law enforcement, Tia's statements, Josh Burrell's statements, and officer statements.

Counsel testified the State alleged Applicant had committed several burglaries around the area, including the burglary at the Giordano home. He elaborated Applicant admitted being involved in these burglaries with Josh Burrell. He further testified Applicant had possession of some of the stolen items from the burglarized homes, including a shotgun, BB gun, and coins, which Applicant had brought into the home at which he was staying. He elaborated some witnesses said Josh Burrell brought those items, whereas others said Applicant brought them.

Counsel also testified he argued the suppression of Applicant's statements at a *Jackson v. Denno*<sup>2</sup> hearing prior to trial. He elaborated Applicant gave one written statement and two oral statements to law enforcement, which were admitted into evidence. He further testified he

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<sup>2</sup> 378 U.S. 368 (1964).

argued the bias of the investigator because the property belonged to his family, which could have tainted the statements, at this hearing. Counsel testified, however, he was unsuccessful in arguing the suppression of Applicant's statements. He testified Applicant took law enforcement to Giordano home and identified the house as being that which he and Josh Burrell burglarized. Counsel elaborated the law enforcement officers testified Applicant admitted his involvement in this crime.

Counsel testified his only possible defense at trial was to attack the credibility of the officers. He testified he did not like the idea that the indictment named a victim who had no connection to the property burglarized, which he argued at trial. Counsel testified based on this, he moved to dismiss the case. He further testified he argued officer conflict at trial. Counsel explained this was his main strategy at trial. He elaborated the indictment named Mr. Giordano, who was Sergeant McMahan's brother-in-law. He further testified the house that was burglarized was in Sergeant McMahan's father's estate and had been left to Sergeant McMahan's sister. He explained Sergeant McMahan had a right of first refusal in the property and, therefore, Sergeant McMahan still had an interest in the property. He testified he made this argument on the record and cross-examined Sergeant McMahan as to his interest in the property.

Counsel testified Josh Burrell and Mrs. Finney were on the witness list for trial. He testified he did not speak to the witnesses directly but could not recall whether or not he could get in touch with them. He elaborated he had statements from these witnesses, what law enforcement indicated what they would testify to, and what Applicant said these witnesses would testify to in support of his story. He explained, however, with every one beneficial thing for Applicant's case, there were ten harmful things. He further elaborated all of the witness statements implicated Applicant, and he did not want to bolster these statements by calling them

as witnesses. He explained the witnesses cut both ways regarding this burglary but also brought in issues from other cases, and he was concerned everything beneficial for this case would open the door for the witnesses to testify about other burglaries in which Applicant was involved. He further testified he explained to Applicant that acting as the lookout was synonymous with going into the house himself. He testified once the State presented all of its evidence, he wanted to maintain the last argument in order to highlight the weaknesses in the State's case. He elaborated he explained this strategy to Applicant.

Counsel testified the State made a plea offer on February 6, 2014, for a reduction to second-degree burglary on all charged burglaries with a sentence of fifteen years suspended to ten years and restitution. He testified he reviewed this offer with Applicant.

Counsel testified he does, in fact, know Josh Burrell because he represented Mr. Burrell on other charges. He explained these charges on which he represented Mr. Burrell were well after Applicant's trial. He further testified he undertook representation of Mr. Burrell from another attorney who had left his office.

Counsel also testified he objected to a hand of one, hand of all charge but did not request a charge of third party guilt based on Applicant's first statement. He elaborated there was evidence of third party guilty, but that was not his theory of the case. He further testified he did not request a lesser-included offense charge. He elaborated, however, he did ask the trial court for a finding that this was not a first-degree burglary because the Giordano home was not a residence. He testified the trial court ruled against him on this argument.

#### **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 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).

### *Ineffective Assistance of Counsel*

In a post-conviction relief action, an applicant has the burden of proving the allegations in the 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, 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. 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 that 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 based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

*Counsel's alleged failure to convey a plea offer*

Applicant alleges Counsel was ineffective for failing to convey a plea offer from the State. In order to prevail on a claim counsel was ineffective for failing to convey a plea offer, the applicant must show: (1) plea counsel's failure to communicate the State's initial plea offer constituted deficient performance and (2) the applicant was prejudiced by the deficient performance, in other words there was a reasonable probability that but for this deficient performance, the applicant would have accepted the original plea offer. *Davie v. State*, 381 S.C. 601, 675 S.E. 416 (2009).

Here, Applicant testified Counsel did not convey a plea offer for a term of imprisonment of ten years. Specifically, Applicant alleges Counsel told him of the ten year offer when it was "too late." Applicant testified, however, he would not have accepted the plea offer because he maintained his innocence. By contrast, Counsel testified the State made an offer on February 6, 2014, for a reduction to second-degree burglary on all charged burglaries with a sentence of fifteen years suspended to ten years and restitution. He testified he conveyed and thoroughly reviewed this offer with Applicant. This Court finds Counsel's testimony with regards to this allegation very credible, whereas Applicant's testimony is not credible. Furthermore, because Counsel did indeed convey the State's offer to Applicant, this Court finds Applicant has failed to establish any deficiency on the part of Applicant.

Moreover, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. Applicant specifically testified he would not have accepted the plea offer

because he wanted to fight these charges. He further asserted he would not have accepted the offer because he maintained his innocence. Therefore, Applicant has wholly failed to establish despite Counsel's alleged deficiencies, he would have accepted the plea offer. This Court finds this allegation must be denied and dismissed with prejudice.

*Counsel's alleged conflict of interest*

Applicant alleges Counsel was ineffective for having a conflict of interest between Applicant and Josh Burrell. "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." *Staggs v. State*, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). Furthermore, a conflict of interest occurs when "a defense attorney places himself in a situation inherently conducive to divided loyalties." *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). "Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation." *Langford v. State*, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." *State v. Gregory*, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005). Here, Counsel testified he represented Josh Burrell on other charges. He explained the charges on which he represented Mr. Burrell were well after Applicant's trial. He further explained he undertook representation of Mr. Burrell from another attorney who had left his office. As Counsel's representation of Mr. Burrell was well after Applicant's trial and had no relation to Applicant's charges, this Court finds Counsel did not have a conflict of interest and, therefore, Applicant has failed to establish any deficiency or resulting prejudice. This Court further finds this allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to investigate*

Applicant alleges Counsel was ineffective for failing to investigate. Specifically, Applicant alleges Counsel was ineffective for failing to investigate Applicant's assertion that Josh Burrell committed the burglary. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Walker v. State*, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014)). Moreover, "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)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." *Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008).

Applicant testified he gave a statement to law enforcement, which he signed. In this statement, he told law enforcement that Josh Burrell came into his stepdaughter's house with a blue bag, which made him think Mr. Burrell had burglarized the home. Applicant denied giving law enforcement directions to the Giordano home and denied being the lookout at the home while Josh Burrell burglarized the home. He further testified his oral statements, to which

witnesses at trial testified, were not true. In further support of this allegation, Applicant presented the testimony of Tia Chapman Finney. She testified Josh Burrell came into the house in which they were staying carrying snacks, change, and some bags. She further testified Applicant had not been with Josh Burrell before Mr. Burrell returned to her daughter's home.

On the other hand, Counsel testified Josh Burrell and Mrs. Finney were on the witness list for trial. He testified he did not speak to the witnesses directly but could not recall whether or not he could get in touch with them. He elaborated he had statements from these witnesses, what law enforcement indicated what they would testify to, and what Applicant said these witnesses would testify to in support of his story. He further elaborated all of the witness statements implicated Applicant, and he did not want to bolster these statements by calling them as witnesses. This Court finds Counsel's testimony concerning this allegation very credible, whereas Applicant's and Mrs. Finney's testimony is not credible.

Counsel articulated a specific trial strategy when deciding not to call Mr. Burrell and Mrs. Finney as witnesses at trial. Specifically, Counsel indicated based on the information provided to him, he wanted to avoid opening the door for these witnesses to implicate Applicant in other burglaries with which he was originally charged and also wanted to maintain the last argument in order to emphasize the weaknesses in the State's case. Moreover, Counsel indicated each witness who Applicant believed would be a helpful witness ultimately implicated Applicant in this burglary in some manner. Based on the foregoing, this Court finds Counsel's conduct was reasonable under professional norms; and therefore, Applicant has failed to establish any deficiency.

Moreover, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. Under the hand of one, hand of all theory, "one who joins with another

to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.” *State v. Langley*, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999). In his statement to law enforcement, Applicant indicated he acted as lookout while Josh Burrell burglarized the Giordano home. Specifically, Applicant told law enforcement Mr. Burrell had the keys, went into the home, took the gun, and Applicant acted as lookout. Tr. 239. Applicant also indicated to law enforcement both he and Mr. Burrell drank the liquor in the Giordano home. Tr. 239. Applicant, therefore, was an active participant in the burglary of the Giordano home. Based on the foregoing, Applicant cannot establish any resulting prejudice from Counsel’s alleged deficiency, as his own statement not only put him in the Giordano home but also implicated him as an active participant in the burglary. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

#### *Due Process*

Applicant alleges a due process violation based on a perceived conflict of interest of the lead investigator on the case, Sergeant David McMahan, because his father was the owner of the Giordano home. “No state shall . . . deprive any person of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1, S.C. Const. Art I, § 3. Specifically, substantive due process protects against the arbitrary infringement of “‘fundamental rights that are so ‘implicit in the concept of ordered liberty’ that neither liberty nor justice would exist if they were sacrificed.” *State v. Dykes*, 398 S.C. 351, 357, 728 S.E.2d 455, 458 (2012) (quoting *Doe v. Moore*, 410 F.3d 1337, 1343 (11th Cir. 2005) (internal citations omitted)). Interests that fall within the meaning of liberty or property in the Due Process Clause “attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law.” *Paul v. Davis*, 424 U.S. 693, 710 (1976) (holding when state law does not extend a legal

guarantee of present enjoyment of reputation; the interest in reputation alone does not implicate any liberty or property interest required to invoke the Due Process Clause). Moreover, the procedural protections guaranteed by the Fourteenth Amendment will "apply whenever the State seeks to remove or significantly alter that protected status." *Id.* Such an alteration must equate to an official removal of the interest from the recognition and protection previously afforded by the State. *Id.* A due process violation resulting from law enforcement conduct must be conduct which offends more than "some fastidious squeamishness or private sentimentalism about combatting crime too energetically." *Rochin v. California*, 342 U.S. 165, 172 (1952). Rather, it must be conduct that shocks the conscience. *Id.*; see also *Hampton v. United States*, 425 U.S. 484 (1976) (holding the conduct of an undercover law enforcement during a controlled buy of illegal substances did not deprive the defendant of any constitutional right); *United States v. Goodwin*, 854 F.2d 33 (4th Cir. 1988) (holding a program implemented by the United States Postal Inspection Service to identify and prosecute those who received child pornography through the mails was neither shocking nor offensive to fundamental fairness). Here, the State of South Carolina does not extend to Applicant the present enjoyment of having a law enforcement officer who is not in some manner related to the victims of the underlying crime not investigate that crime. Furthermore, Applicant has wholly failed to identify any instance of malfeasance or impropriety resulting from Sergeant McMahan's investigation of the burglary occurring at the Giordano home. Therefore, the potential threat of bias in an investigation alone is neither liberty nor property sufficient to invoke the procedural protection of the Due Process Clause, and Sergeant McMahan's conduct in investigating the crime neither deprived Applicant of any constitutional right nor was shocking or offensive to fundamental fairness. This Court finds this allegation must be denied and dismissed with prejudice.

**CONCLUSION**

Based on all the foregoing, this Court finds and concludes that the 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 that Applicant must file and serve a notice of appeal within thirty 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 post-conviction relief. Rule 71:1(g), SCRCP, provides that 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:**

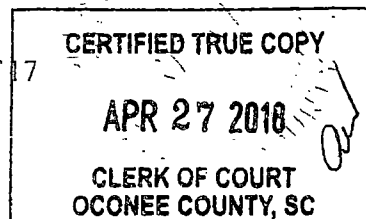
1. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State

AND IT IS SO ORDERED this 11 day of April, 2018.



J. CORDELL MADDOX, JR.  
Presiding Judge  
Tenth Judicial Circuit

Anderson, South Carolina



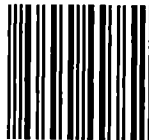
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