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REPLY TO THE CHARLESTON OFFICE  
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May 21, 2018

**VIA U.S. MAIL**

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

**RECEIVED**  
MAY 24 2018  
S.C. SUPREME COURT

Re: Joe L. Bailey, #273714 v. State of South Carolina  
Civil Action No.: 2017-CP-10-1917

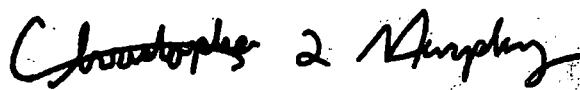
Dear Mr. Shearhouse:

Enclosed for filing, please find an original and two copies of Appellant's Notice of Appeal of the denial of his application for Post-Conviction Relief, and a Proof of Service regarding same. If you find everything in order, please file the original and return the clocked-in copies in the enclosed self-addressed envelope.

Please note, I was appointed to this and case and have copied the Office of Appellate Defense on this who will handle the appeal. Please call if you have any questions.

With kindest regards, I am

Sincerely,



Christopher L. Murphy, Esq.  
For the Firm

CLM/jh

Enclosures

cc (w/ encls.): Mr. Joe Bailey  
Rasheeda Cleveland, Asst. AG  
Robert M. Dudek, Esquire, Off of Appellate Defense  
The Honorable Maite D. Murphy  
The Honorable Julie J. Armstrong, Clerk, 9th Jud. Cir.

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

RECEIVED

MAY 24 2018

APPEAL FROM CHARLESTON COUNTY S.C. SUPREME COURT  
Court of Common Pleas

Maite D. Murphy, Circuit Court Judge

Case No.: 2017-CP-10-1917

Joe L. Bailey, #273714 ..... Appellant

v.

State of South Carolina ..... Respondent

NOTICE OF APPEAL

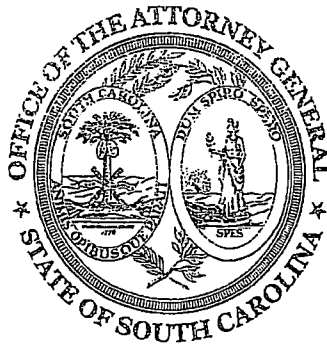
Appellant appeals the Court's denial of his application for post-conviction relief.  
Attached is the order from the court dated April 9, 2018 and received April 26, 2018.

May 21, 2018



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MAY 24 2018

S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

April 24, 2018

Christopher L. Murphy, Esquire  
Murphy Law Offices, LLC  
234 Seven Farms Drive, Suite 128  
Charleston, SC 29492

**Re: Joe L. Bailey, #273714 v. State of South Carolina**  
**2017-CP-10-1917**

Dear Mr. Murphy:

Enclosed is a copy of the **Order of Dismissal** in the above-captioned case signed by The Honorable Maite Murphy and filed with the Charleston County Clerk of Court.

Sincerely,

Rasheeda Cleveland  
Assistant Attorney General

RC/jaj  
Enclosure(s)



STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )  
) )  
Joe L. Bailey, )  
S.C.D.C. No. 273714, )  
Applicant, )  
) )  
v. )  
) )  
STATE OF SOUTH CAROLINA, )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2017-CP-10-1917

**ORDER OF DISMISSAL**

FILED  
2018 APR 18 AM 9:55  
JULIE J. ARMSTRONG  
CLERK OF COURT

This matter is before the Court by way of an application for post-conviction relief filed on April 17, 2017 by Joe L. Bailey (“Applicant”). Respondent submitted its Return on June 20, 2017. An evidentiary hearing was convened on February 1, 2018 at the Charleston County Courthouse. Applicant was present and represented by Christopher L. Murphy, Esquire. Rasheeda Cleveland, Esquire of the South Carolina Attorney General’s Office, represented the State.

Before the Court were the records of the Charleston County Clerk of Court regarding the subject convictions, Applicant’s records from the South Carolina Department of Corrections, and the application.

**I. PROCEDURAL HISTORY**

Joe L. Bailey (“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 October 2015 term, the Charleston County Grand Jury indicted Applicant for first-degree burglary (2015-GS-10-5566). The Charleston County Grand Jury subsequently indicted Applicant for another charge of first-degree burglary (2016-GS-10-3772) during its June 2016 term of court. Assistant Public Defender Luke Malloy, Esquire, represented Applicant on both charges. Assistant Solicitor Charles Condon prosecuted the case.

On October 17, 2016, Applicant appeared in the Charleston County Court of General Sessions before the Honorable Deadra Jefferson, circuit court judge, and commenced with a jury trial. Following pre-trial motions and the selection of a jury, Applicant elected to forgo his jury trial and entered guilty pleas to two counts of the lesser-included offenses of second-degree burglary (violent). Pursuant to negotiations with the State, Judge Jefferson sentenced Applicant to two concurrent terms of fifteen years' imprisonment. Applicant did not appeal his guilty pleas or sentences.

## **II. ALLEGATIONS**

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

1. "The courts erred in finding Applicant guilty of burglary second degree in case # 2016-GS-10-03772, in violation of the Double Jeopardy Clause pursuant to the Fifth Amendment of the U.S. Constitution."
2. "Applicant's convictions were obtained by the state/county assistant solicitor and/or solicitor's office vindictiveness in the malicious prosecution of case number(s) 2015-GS-105566 and 2016-GS-10-3772."
3. "That the indictments of burglary first degree in case numbers 2015GS-10-05566 and 2016-GS-10-03772 were obtained due to police misconduct and perjured statements in affidavits to support the warrants and with the testimony in preliminary hearing."
4. "Applicant's conviction and sentence was obtained due to ineffective assistance of defense counsel pursuant to U.S.C.A. Const. Amend. 6."

## **III. SUMMARY OF RELEVANT TESTIMONY**

During the hearing, Applicant testified that he talked with Plea Counsel a lot before trial, and that Plea Counsel told him that he would get ten years, if he pleaded guilty. He further testified that he did not remember exactly what Plea Counsel said recalls being told it was best for him to plead. Applicant recalled that he did not know

what a negotiated plea was, and thought he would get ten years but instead got a fifteen year sentence.

On cross-examination, Applicant testified that he met with his plea counsel thirteen or fourteen times before trial. He also recalled that there was a ten year offer on the table but did not recall the State saying there was a recommendation of fifteen years. He further recalled that Plea Counsel told him to plead because it would be best for him. Applicant also testified that he told the Court that he was guilty and was pleading on his own free will, and that he was testifying truthfully.

On direct-examination by the State, Plea Counsel testified that he has been practicing law for over six years and was at the Public Defender's Office for over five and half years. He recalled that he was appointed to represent Applicant while employed as a public defender. He further recalled the charges against Applicant, and that the burglary charge was enhanced to a burglary 1<sup>st</sup> degree based on Applicant's priors. Plea Counsel testified that he thoroughly discussed the enhancement, and the penalty ranges with Applicant.

Plea Counsel testified that he entered into plea negotiations with the State, and was offered burglary 3<sup>rd</sup>, second offense with a sentence range of zero to ten years. However, Plea Counsel recalled that Applicant rejected this plea offer on the record. Plea Counsel further testified that on the day of trial for the burglary 2<sup>nd</sup> he again entered into plea negotiations with the State, and negotiated a sentencing range of ten to fifteen years. He also recalled moving to bifurcate the other motions, and explained to Applicant that he would automatically get ten years and could get ten to fifteen.

Plea Counsel recalled Applicant asking him how could he stop this, and he replied there was no way to stop it. Plea Counsel stated that he spoke with the Solicitor and told him that Applicant would take a ten year offer. However, the Solicitor responded that he could offer a ten to fifteen year deal and negotiate the burglary 3<sup>rd</sup> to a burglary 2<sup>nd</sup> (violent). Plea Counsel testified that he communicated the offer to Applicant and made it clear that he could receive a ten to fifteen year sentence, and that there was no promise of ten years.

Regarding Applicant's allegations of double jeopardy, Plea Counsel testified that he researched the issue and there was no double jeopardy argument.

On cross-examination by PCR Counsel, Plea Counsel testified that he had Applicant evaluated based on communication difficulties because Applicant would get upset whenever they discussed the case. The result of the evaluation was that Applicant was competent to stand trial. Plea Counsel further testified that he filed a motion to reconsider but it was denied. He recalled that as a part of his investigation he consulted with an identification expert and hired an investigator to speak with witnesses. He also visited the scene and mapped out Applicant's pathed on Applicant's recollection of the events.

Lastly, Plea Counsel testified that he did not discuss a possible appeal with Applicant because he saw no basis for an appeal.

#### **IV. APPLICABLE LAW**

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (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 [it] cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, the applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced 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, the 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 (1985).

## V. 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).

### ***Double Jeopardy***

Applicant argues that the Plea Court erred in finding him guilty of burglary 2nd degree, and that this was a violation of his the Double Jeopardy Clause. However, this Court finds his claim to be without merit. The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense. State v. Easler, 327 S.C. 121 (1997).

Blockburger v. U.S., 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), remains the test for determining whether there has been a double jeopardy violation. In Blockburger, the United States Supreme Court held that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test is to determine whether each statute requires proof of a fact the other does not.

Here, Applicant was charged with and pled guilty to Petit Larceny, which requires taking and carrying away the property of another without their consent. 1st degree burglary requires entering a dwelling without consent and with the intent to commit crime in the dwelling. His 3rd degree burglary was enhanced based on two prior convictions. Looking at the elements of both, each requires something that the other does not. Plea Counsel also testified that he researched the double jeopardy issue and was unable to find any defense in this case. PCR Counsel in his closing argument conceded that the issue was without merit but wanted to preserve the issue for appeal. Therefore, there is no double jeopardy violation.

### *Ineffective Assistance of Counsel*

Applicant alleged his plea counsel was ineffective because he “told him he would get ten years’ if he pleaded guilty. However, this claim is also without merit. In order to establish a claim of ineffective assistance of plea counsel, Applicant was required to show that there was a reasonable probability that, but for counsel’s alleged errors, he would not have pleaded guilty and would have insisted on going to trial. See Hill v. Lockhart, 474 U.S. 52 (1985). This Court finds Applicant failed to show that plea counsel was deficient in any way or that he would not have otherwise pleaded guilty.

Pre-trial the State offered Applicant a ten year deal, which he declined. Prior to jury selection and on the record, Applicant objected to a plea offer of burglary second (with a negotiated range of 10-15 years). Following jury selection, Applicant decided to plea to two counts of second degree burglary. Judge Jefferson sentenced him to 15 years on each to run concurrently. Applicant argues that he was told by his attorney that he would get 10 years if he pled. However, it is noted on the record that the range was 10-15 years and that the State asked for 15 years. Mr. Malloy testified that he told Applicant that the Judge does not have to accept a recommendation and can sentence anywhere within the range stated in the statute. In closing arguments, PCR Counsel stated that he does not believe the record supports that a ten year offer was ever made. Therefore, after hearing oral argument and reviewing all documentation provided, this Court finds no deficiency on the part of counsel.

### **VI. 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

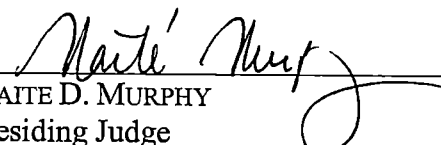
application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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 9 day of April, 2018.

  
MAITE D. MURPHY  
Presiding Judge  
Ninth Judicial Circuit

St. Gray, South Carolina

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

JOE L. BAILEY, #273714

Applicant,

v.

STATE OF SOUTH CAROLINA,

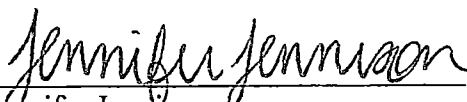
Respondent.

CERTIFICATE OF SERVICE

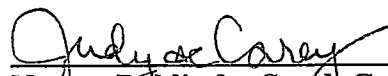
The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

**Christopher L. Murphy, Esquire  
Murphy Law Offices, LLC  
234 Seven Farms Drive, Suite 128  
Charleston, SC 29492**

This 24<sup>th</sup> day of April, 2018.

  
\_\_\_\_\_  
Jennifer Jennison  
Legal Assistant for Respondent

SWORN to before me this 24<sup>th</sup> day of April, 2018.

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

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MAY 24 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Maite D. Murphy, Circuit Court Judge

Case No.: 2017-CP-10-1917

Joe L. Bailey, #273714 ..... Appellant

v.

State of South Carolina ..... Respondent

PROOF OF SERVICE

I certify that I have served APPELLANT'S NOTICE OF APPEAL by delivering a copy via U.S. Mail First-Class postage prepaid on the 21st day of May, 2018, on the following:

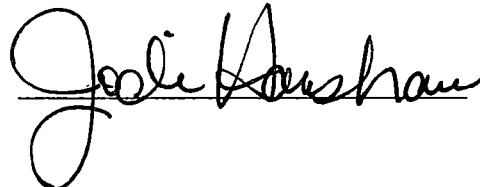
Rasheeda Cleveland, Esquire  
Assistant Attorney General  
SC Office of the Attorney General  
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The Honorable Maite D. Murphy  
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The Honorable Julie J. Armstrong  
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