

Court
Copy

Mr. Alan L. Burns , # 143218
Broad River C.I. , Moultrie 1103
4460 Broad River Road
Columbia , SC 29210 - 4047

Office of the Clerk
South Carolina Supreme Court
Post Office Box 11330
Columbia , SC 29211 - 1330

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MAR 11 2019
S.C. SUPREME COURT

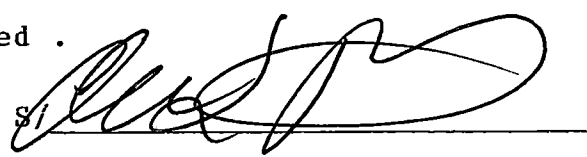
MARCH 05 , 2019

Re. : BURNS , ALAN L. vs. STATE OF S.C. , C/A No.:
2017 -- CP -- 10 -- 0271
(APPEAL OF POST - CONVICTION RELIEF)

Dear Clerk :

Enclosed for filing is a notice of appeal in the above case .
Also enclosed are the following :

- (1) Proof of service of the notice of appeal on the respondent ;
- (2) Proof of service of the notice of appeal on the lower court ;
- (3) Copy of the order being appealed .



ALB/alb

Enclosures

cc : Hon. Julie J. Armstrong , Clerk of Court
Megan H. Jameson, Esq., Senior Assistant Attorney General

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAR 11 2019

APPEAL FROM CHARLESTON COUNTY
Court Of Common Pleas
Honorable G. Thomas Cooper , Circuit Court Judge

S.C. SUPREME COURT

PCR Case No. : 2017 - CP - 10 - 0271

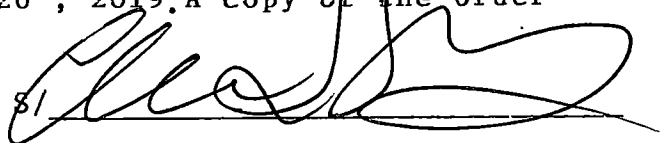
BURNS , ALAN L., Appellant ,

vs.

STATE OF SOUTH CAROLINA, Respondent .

NOTICE OF APPEAL

Alan L. Burns appeals the order of the Honorable G. Thomas Cooper dated February 20 , 2019 . Appellant received written notice of the order on February 26 , 2019. A copy of the order attached herewith .



Alan L. Burns , # 143218
Broad River C.I. , Moultrie 1103
4460 Broad River Road
Columbia , SC 29210 - 4047

Other Counsel of Record :
Megan Harrigan Jameson, Esq.
Senior Assistant Deputy Attorney General
Office of SC Attorney General
Post Office Box 11549
Columbia , SC 29211 - 1549

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAR 11 2019

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court Of Common Pleas

Honorable G. Thomas Cooper , Circuit Court Judge

PCR Case No. : 2017 - CP - 10 - 0271

BURNS , ALAN L. , Appellant ,

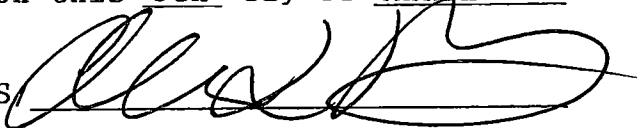
vs.

STATE OF SOUTH CAROLINA , Respondent .

PROOF OF SERVICE

I hereby certify that a true copy the herewith Notice of Appeal was served on the opposing Counsel of Recod , by placing same in the U.S. Mail , postage prepaid addressed to Megan H. Jameson, Esq., Senior Assistant Deputy Attorney General P.O.Box 11549 Columbia , SC 29211 - 1549 , on this 5th day of MARCH 2019 .

S


Alan L. Burns, # 143218

Broad River C.I., Moultrie 1103
4460 Broad River Road
Columbia , SC 29210 - 4047

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court Of Common Pleas

Honorable G. Thomas Cooper , Circuit Court Judge

PCR Case No. : 2017 -- CP - 10 - 0271

BURNS , ALAN L. ,Appellant ,

vs.

STATE OF SOUTH CAROLINA ,Respondent .

PROOF OF SERVICE

I hereby certify that the Lower Court was serve with an original copy of the Notice of Appeal , by placing same in the U.S. Mail, postage prepaid addressed to Hon. Julie J. Armstrong, Clerk of Court Charleston County 100 Broad Street , Suite 106 Charleston , SC 29401 - 2258 , on this 5th day of MARCH 2019 .



Alan L. Burns, # 143218
Broad River C.I., Moultrie 1103
4460 Broad River Road
Columbia , SC 29210 -- 4047

Mr. Alan L. Burns , # 143218
Broad River C.I. , Moultrie 1103
4460 Broad River Road
Columbia , SC 29210 - 4047

Hon. Julie J. Armstrong
Clerk Of Court , C.P. & G.S.
Charleston County Courthouse
100 Broad Street , Suite 106
Charleston , SC 29401 - 2258

MARCH 05 , 2019

Re.: BURNS, ALAN L. vs. STATE OF S.C., C/A No.: 2017-CP-10-0271
(APPEAL OF POST - conviction relief)

Dear Ms. Armstrong :

Enclosed for filing is a notice of appeal in the above case .

Sincerely,

S/

A handwritten signature in black ink, appearing to read "Alan L. Burns", written over a horizontal line. The signature is cursive and somewhat stylized.

ALB/alb

Enclosures

cc : Hon.

Megan H. Harrigan, Esq., Senior Assistant Attorney General

copy - not filed with
clerk of court

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Alan L. Burns, SCDC #143218)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2017-CP-10-0271

ORDER OF DISMISSAL

This matter comes before this Court by way of an application for post-conviction relief filed by Alan L. Burns (Applicant) on January 18, 2017, alleging ineffective assistance of appellate counsel, territorial jurisdiction violations, and failure of the State to provide grand jury empanelment documentation. The State of South Carolina (Respondent) served its return and motion for a more definite statement on July 19, 2017, requesting an evidentiary hearing solely on Applicant's claims of ineffective assistance of appellate counsel and seeking summary dismissal of Applicant's other two claims as improper for post-conviction relief and barred by the doctrine of res judicata. Thereafter, on December 15, 2017, Applicant filed an amended application.

An evidentiary hearing was held on December 4, 2018, before this Court at the Charleston County Courthouse. Applicant was present and appeared *pro se* with the assistance of stand-by counsel Christopher L. Murphy. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson. At the hearing, testimony was taken from appellate counsel Susan B. Hackett and prosecutor Deborah Herring-Lash.

Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations and denies this application with prejudice.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections (SCDC) following multiple convictions in Charleston County for Applicant's sexual molestation and assault of various minor relatives of his in the 1980s and 1990s that were not disclosed to law enforcement until 2010. During its June 2011 term, the Charleston County Grand Jury indicted Applicant for two counts of first-degree criminal sexual conduct with a minor (2011-GS-10-3390, -3391), two counts of second-degree criminal sexual conduct with a minor (2011-GS-10-3387, -3388), and two counts of lewd act upon a minor (2011-GS-10-3389, -3392). In August, 2011, the Charleston County Grand Jury indicted Applicant for two additional counts of first degree criminal sexual conduct with a minor (2011-GS-10-4776, -4777) and two additional counts of lewd act upon a minor (2011-GS-4778, -4779). In May 2012, the Charleston County Grand Jury indicted Applicant for an additional count of first-degree criminal sexual conduct (2012-GS-10-3172) and an additional count of lewd act upon a minor (2012-GS-10-3173).

Applicant was appointed counsel to represent him on these indictments, but moved to relieve counsel and proceeded *pro se* with the assistance of stand-by counsels Lorelle Proctor and Ted Smith from the Charleston County Public Defender's Office. Following various pre-trial hearings before the Honorable Deadra L. Jefferson, circuit court judge, and Stephanie P. McDonald, circuit court judge, Applicant proceeded to a jury trial *pro se*, with standby counsel present, before the Honorable R. Markley Dennis, Jr., on August 6, 2012. Assistant Solicitors Debbie Herring-Lash and Randall Stoney of the Ninth Circuit Solicitor's Office prosecuted the case. On August 10, 2012, the jury convicted Applicant as indicted on all offenses. Judge Dennis sentenced Mr. Burns to an aggregate sixty-year term of imprisonment.

Applicant filed a timely notice of appeal and was represented by Appellate Defender



Susan B. Hackett of the South Carolina Commission on Indigent Defense—Division of Appellate Defense, who submitted a merits brief on Applicant’s behalf, alleging the trial court erred in denying Applicant’s request for grand jury documents. Following briefing, the South Carolina Court of Appeals affirmed Applicant’s convictions and sentences, finding the issue was not preserved for appellate review. State v. Alan L. Burns, Unpublished Op. No. 2016-UP-287 (Ct. App. filed June 15, 2016). Applicant then attempted to petition for certiorari on his own through the filing of various *pro se* documents. By order dated July 1, 2016, the South Carolina Supreme Court dismissed Applicant’s *pro se* notice of intent to seek certiorari. The remittitur was returned to the circuit court on the same date.

ALLEGATIONS RAISED IN THE APPLICATION AND AT THE HEARING

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

1. “Was Not Indicted By Legally Constituted Grand Jury” in that the Applicant asked for and did not receive empanelment documentation for the Charleston County Grand Jury from the State;
2. “Gross Territorial Jurisdiction Violation” in that police officers from the Mount Pleasant Police Department went outside their territorial jurisdiction to investigate the case; and
3. “Ineffective Assistance of Counsel,” in that Appellate Counsel “intentionally and for purpose of retaliation, failed and refused to file for rehearing and /or reinstatement following the Court of Appeals denial of Applicant’s direct appeal” and refused to raise the territorial jurisdiction issue on appeal as requested by Applicant.

Respondent served a return and motion for more definite statement on July 19, 2017, seeking an evidentiary hearing solely on the allegation that appellate counsel was ineffective and seeking summary dismissal of the two remaining arguments as direct appeal issues not proper for post-conviction relief and as barred by res judicata as these issues were already raised to and ruled upon by the trial court and the appellate court (as to the grand jury issue).



On December 15, 2017, Mr. Burns filed an amended PCR application, stating he was seeking a belated appeal to allow him to raise the territorial jurisdiction issue on appeal.

At the start of the evidentiary hearing, Respondent renewed its motion to dismiss the allegations pertaining to the grand jury empanelment documents and territorial jurisdiction as improper for post-conviction relief and barred by the doctrine of res judicata because both issues had already been raised and denied by previous courts. Applicant responded that both issues would be raised as to appellate counsel's performance and her failure to properly raise these issues on his direct appeal.

At the hearing, Applicant presented testimony from the prosecutor, Assistant Solicitor Deborah Herring-Lash and his appellate counsel, Susan B. Hackett, as well as presented four exhibits. Respondent did not call any witnesses but did cross-examine both witnesses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented, which allowed the Court to scrutinize the credibility of all witnesses presented. 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).

Applicant has alleged his appellate counsel, Susan B. Hackett, was ineffective in three ways: first, for failing to raise his territorial jurisdiction issue on appeal despite his insistence that she do so; second, for failing to properly raise the issue pertaining to the empanelment documents for the grand jury issue; and third, for failing to petition for rehearing following the Court of Appeals opinion affirming his convictions and ultimately failing to seek certiorari from the South Carolina Supreme Court. Each allegation is addressed fully below.



Ineffective Assistance of Appellate Counsel

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985); Rule 71.1(e), SCRPC. When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Post-conviction relief courts are required to employ a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the court must find the applicant has established his or her 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, the court must find that counsel's deficient performance 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.



While the post-conviction relief court must analysis both deficiency and prejudice, there are no mechanical rules requiring the court to analyze deficiency of counsel first then undertake a prejudice analysis. Rather, the ultimate focus of the post-conviction relief court's inquiry must be on the fundamental fairness of the proceeding that is being challenged. The post-conviction relief court need not first determine whether counsel's performance was deficient before examining the whether there is any prejudice suffered by the applicant 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. 668.

Just as a defendant is entitled to affective representation during his general sessions proceeding, a defendant is also entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999)). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice as outlined above. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

Although ineffective assistance of appellate counsel claims for failure to raise a particular issue on direct appeal can be successful, the United States Supreme Court has reiterated that it is "difficult to demonstrate that counsel was incompetent." Smith v. Robbins, 528 U.S. 259, 288 (2000). While appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift

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v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). “For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would dissuade the very goal of vigorous and effective advocacy . . .” Jones, 463 U.S. at 754. Additionally, our South Carolina Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167. “Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” Smith, 528 U.S. at 288 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

Accordingly, in order to meet his burden of proof, Applicant must establish a reasonable probability that, but for appellate counsel Hackett’s failure to raise a specific issue on appeal, he would have prevailed on his appeal. Smith, 528 U.S. at 285-86. Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations against appellate counsel. Each allegation is addressed fully below:

Allegation: Failure to Raise the Territorial Jurisdiction Issue on Appeal

Applicant alleges appellate counsel was ineffective for failing to raise the issue of territorial jurisdiction, and more specifically, that the Mount Pleasant Police Department exceeded their jurisdiction in investigating his case because the location of some of the sexual assaults was not part of the Town of Mount Pleasant at the time of the offenses in the 1980s and 1990s.

At the evidentiary hearing, Assistant Solicitor Deborah Herring-Lash testified the area where some of the sexual assaults occurred was located within a small, doughnut-hole type area of unincorporated Charleston County that is entirely surrounded by Mount Pleasant but is not

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part of the Town of Mount Pleasant. She identified these areas on a large map, admitted as Applicant's Ex. No. 3 (previously Defendant's Ex. No. 12 from trial). She testified that while working on this case, she recognized the potential jurisdictional issues pertaining to the crimes and was able to obtain contracts between Charleston County and the Town of Mount Pleasant to allow Mount Pleasant to provide police, water, fire, and other similar services to these small, doughnut-hole areas. She identified two of these contracts, which were admitted as Applicant's Ex. Nos. 1 and 2 at the hearing (previously State's Ex. No. 22 from trial), from 1933 and 1998 respectively, which explicitly provided for law enforcement services in those areas to be conducted by the Town of Mount Pleasant. She testified the contracts were automatically renewed on an annual basis, as well as signed and authorized by the Mayor of the Town of Mount Pleasant and either the Chairman or Vice Chairman of the Charleston County Council. She testified that based on these contracts, the Town of Mount Pleasant, including the Mount Pleasant Police Department, had jurisdiction to handle all law enforcement matters within the subject area, including to investigate these sexual assaults, during the period of the contracts. However, because some of the sexual assaults occurred in the 1980s before the contracts, she sought and obtained involvement from the Charleston County Sheriff's Department to investigate these assaults from the 1980s, including interviewing these witnesses. The record reflects that the Charleston County Sheriff's Department did investigate and handle those assaults, as reflected by the testimony of Detective Rita Avila of the Charleston County Sheriff's Department. She testified, and the record reflects, that Applicant raised this territorial jurisdiction issue at trial, and in response, the State presented these contracts and called witnesses to testify about these contracts. She testified the trial court ultimately denied Applicant's motions based on jurisdictional challenges.



Appellate counsel Hackett testified she did not raise the issue of territorial jurisdiction on appeal because she did not believe it was meritorious. She elaborated that she reviewed case law and statutes related to the issue, but ultimately determined the trial court properly denied Applicant's motion pertaining to territorial jurisdiction because there was evidence in the record to support the trial court's ruling. Based on her research, review of the record, and appellate experience, she ultimately decided not to raise this issue on appeal and instead raised the issue pertaining to the grand jury empanelment documents, which had more merit in her opinion. She identified a copy of Applicant's *pro se* brief, admitted as Applicant's Ex. No. 4, addressing the jurisdictional issue and acknowledged Applicant indicated he wanted the issue raised on appeal. She testified it was ultimately her decision whether to raise a particular issue and did not raise this one because she did not believe it was meritorious.

This Court finds Applicant has failed to meet his requisite burden of proof as to this allegation. Initially, this Court notes appellate counsel was not deficient in electing not to raise the issue of territorial jurisdiction, which she believed lacked merit, and instead, raise a meritorious issue pertaining to grand jury empanelment documentation. This decision clearly rested within counsel's discretion and her strategic decision as to which issues to raise on appeal do not render her performance deficient. Thrift, 302 S.C. at 539, 397 S.E.2d at 526; see also Jones, 463 U.S. at 754 ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy.")

Moreover, this Court finds Applicant cannot establish any resulting prejudice as there is no reasonable likelihood this issue would have been successful on appeal. The convictions resulting from Applicant's conduct in the 1980s were properly investigated by the Charleston County Sheriff's Department, not the Mount Pleasant Police Department, and therefore, there is



no territorial jurisdiction issue that could have been raised. The convictions from the 1990s were properly investigated by the Mount Pleasant Police Department in accordance with valid agreements signed by the Mayor of the Town of Mount Pleasant and the Chairman or Vice Chairman of the Charleston County Council, and Applicant has failed to establish any irregularity or impropriety with these contracts. Applicant contends the Agreement between the Charleston County and the Town of Mount Pleasant was not properly effectual under sections 23-20-10 et seq. or 23-1-210 of the South Carolina Code of Laws (Supp. 2002). The Agreement was in place prior to July 2000 and, therefore, did not have to be ratified by the County Council for to remain in effect.

Section 23-1-210 of the South Carolina Code (Supp. 2002), entitled "Temporary transfer of law enforcement officer; written agreement; compensation" provides as follows:

A) Any municipal or county law enforcement officer may be transferred on a temporary basis to work in law enforcement in any other municipality or county in this State under the conditions set forth in this section, and when so transferred shall have all powers and authority of a law enforcement officer employed by the jurisdiction to which he is transferred.

(B) Prior to any transfer as authorized in subsection (A), the concerned municipalities or counties shall enter into written agreements stating the conditions and terms of the temporary employment of officers to be transferred.

Further, section 23-20-30 of the South Carolina Code (Supp. 2002) provides:

A) The General Assembly recognizes the need to promote public safety and further recognizes that there may be situations where additional law enforcement officers are needed to maintain the public peace and welfare. Therefore, the General Assembly authorizes a law enforcement agency of this State to enter into contractual agreements with other law enforcement providers as may be necessary for the proper and prudent exercise of public safety functions. Public safety functions include traditional public safety activities which are performed over a specified time period for patrol services, crowd control and traffic control, and other emergency service situations.

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Pursuant to section 23-20-50 of the South Carolina Code (Supp. 2002):

(A) An agreement entered into pursuant to this chapter on behalf of a law enforcement authority must be approved by the appropriate state, county, or local law enforcement authority's chief executive officer. A state law enforcement authority must provide a copy of the agreement to the Governor and the Executive Director of the State Budget and Control Board no later than one business day after executing the agreement. An agreement entered into with a local law enforcement authority pursuant to this chapter must be approved by the governing body of each jurisdiction. For agreements entered into prior to June 1, 2000, the agreement may be ratified by the governing body of each jurisdiction.

The Agreement in this case allows for the transfer of law enforcement services from Charleston County to the Town of Mount Pleasant for the specific areas listed in the agreement, including the area where some of the sexual assaults occurred. It was properly authorized by the Charleston County Council through the signature of the Chairman or Vice Chairman of the Charleston County Council and by the Town of Mount Pleasant through the signature of the Mayor. Accordingly, Mount Pleasant law enforcement was properly within its authority to investigate and handle the sexual assault allegations from the 1990s.

Further, the Agreement in this case was entered into in before June 2000. As a result, section 23-20-50 does not require it be approved by the governing bodies of each county in order for it to remain in effect. The section states: "For agreements entered into prior to June 1, 2000, the agreement may be ratified by the governing body of each jurisdiction." S.C. Code Ann. § 23-20-50 (Supp. 2002). The section clearly presupposes written agreements existed between counties prior to the enacting of the section. Further, it assumes those agreements will continue in effect and uses the permissive "may," indicating the agreements were not required to be ratified by the governing body of each county.

Accordingly, because Charleston County and the Town of Mount Pleasant operated under a properly authorized Agreement allowing Mount Pleasant to provide law enforcement services

for the limited areas enumerated in the agreement, there is no territorial jurisdictional violation in this case. Therefore, Applicant cannot establish that appellate counsel was ineffective for failing to raise this issue as it patently lacks merit and would not have been successful on appeal.

Allegation: Failure to Properly Raise the Issues Pertaining to the Grand Jury Empanelment

Applicant alleges appellate counsel was ineffective in her handling of the grand jury empanelment issue on appeal. However, the record clearly refutes this allegation, as appellate counsel properly submitted an appellate brief to the Court of Appeals on this issue based on the arguments presented to the trial court. This Court finds Applicant failed to establish how appellate counsel performed deficiently or how raising the arguments differently would have yielded a different result. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

Allegation: Failure to Seek Rehearing or Certiorari before the South Carolina Supreme Court

Finally, Applicant alleges appellate counsel was ineffective for failing to file a petition for rehearing and ultimately failing to file a petition for certiorari to the South Carolina Supreme Court. However, Applicant had no right to seek discretionary review, and therefore, no right to effective representation when seeking discretionary review. See Douglas v. State, 369 S.C. 213, 216, 631 S.E.2d 542, 543–44 (2006) (“We find that the decision whether to pursue certiorari is a matter left solely to the appellant’s attorney’s professional discretion.”) Cf. Jones v. Barnes, 463 U.S. 745 (1983) (Appellate counsel must be allowed to exercise reasonable professional judgment in determining which non-frivolous issues to raise on direct appeal). Appellate counsel testified she did not seek certiorari because she did not think it was warranted based on her professional discretion. Therefore, Applicant cannot establish any constitutional ineffectiveness in appellate counsel’s decision not to seek certiorari in his case once the Court of Appeals affirmed his convictions.

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CONCLUSION

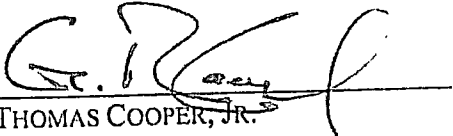
Based on all the foregoing, this Court finds Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203 and 243, 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), SCRPC, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

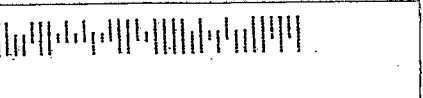
IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

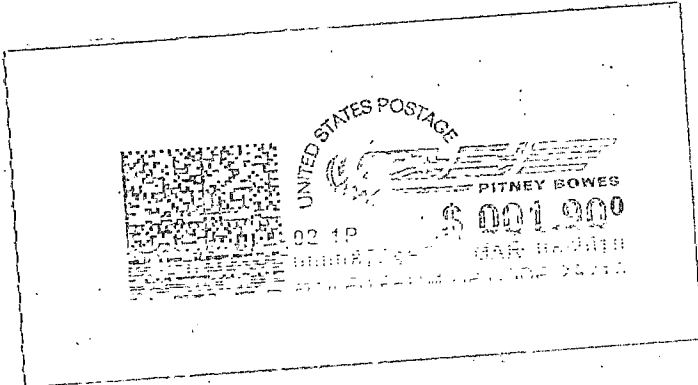
AND IT IS SO ORDERED this 20th day of FEBRUARY, 2019.


G. THOMAS COOPER, JR.
Presiding Judge
Ninth Judicial Circuit

CAUSED, South Carolina



iver C.F. , ROUTE 1103 B
oad River Road
a , South Carolina 29210 - 4047



Office of the Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
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