

**EXHIBIT 1: WAIVER OF INEFFECTIVE
ASSISTANCE OF APPELLATE COUNSEL**

1 original complaint, they are somewhat shorter and similar
2 in nature to those on the amended application.

3 THE COURT: All right.

4 MR. SMITH: And I would just direct the Court's
5 attention to those. I think that those are mostly
6 incorporated by the amended application anyway, but I
7 would just ask the Court in light of the extensive issues
8 raised in the case previously that we kind of narrow down
9 the issues before we begin as much as possible and so I
10 would ask that Mr. McCants specify what are the issues
11 that we will be hearing about today.

12 THE COURT: Mr. Thompson.

13 MR. THOMPSON: Thank you, Judge. Judge, I have met
14 with Mr. McCants at Allendale Correctional three times
15 and gone over this. We are using the amended application
16 for post conviction relief that was filed in the initial
17 action. Items 1 through 12 which deal with ineffective
18 assistance of trial counsel, he does intend to go forward
19 on those. We have talked in the past. Last week after I
20 left him I wasn't sure of the status of our conversation
21 concerning appellate counsel. I have talked with him
22 this morning. He does tell me he is willing to withdraw
23 and not go forward on appellate counsel issues.

24 THE COURT: Which is in essence number 13?

25 MR. THOMPSON: Number 13, yes, sir.

**EXHIBIT 2: ORDER OF DISMISSAL PAGE
OMITTING REFERENCE TO DIRECT APPEAL
RECORDS**

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 at the evidentiary hearing, 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, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution, 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). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he 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, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, 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 v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “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). Applicant must



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EXHIBIT 4: EMAIL EXCHANGE

Gilliam, Taylor

From: Gilliam, Taylor
Sent: Wednesday, October 7, 2020 4:28 PM
To: Taylor Smith
Subject: RE: [External] Request for a supplemental appendix.
Attachments: McCants, Quincy 2019-001436 Supplemental Appendix.pdf

Good afternoon,

Thanks for your response. I've put together a supplemental appendix containing the four items mentioned in my e-mail yesterday. It's attached and will be filed, along with a motion to supplement, momentarily. I'm glad we're on the same page about the ROA- after all, this was a case where an Anders brief was filed so the ROA is presumably identical to the trial transcript already included in the Appendix. A few additional points in reply-

Your third paragraph contains a misrepresentation of both our conversation yesterday as well as my follow-up e-mail. As clearly stated on the telephone as well as in the e-mail, in cases where there can be no doubt that the documents were before the PCR court, as evidenced by either the PCR hearing transcript or the Order of Dismissal, I **have been including them in the appendix**. During our phone call, I even referenced a recent filing by name where I included the briefs and opinion.

As unequivocally stated yesterday, however, neither you nor I could locate a specific reference to the direct appeal documents in either of those items for the current appeal in McCants. They were not made an exhibit at the hearing or listed on page 899 of the Appendix where the items before the PCR court are customarily laid out. Notably, they were not uploaded to the Lexington County Public Index. I've searched again but cannot locate them on the Case Records Search at sccourts.org for Case No. 2009-CP-32-4236. Additionally, the claims of ineffective assistance of appellate counsel were waived at the PCR evidentiary hearing. App. 741 ll. 13 – 23.

The way I see it, there are two paths forward. First, as I've repeatedly stated, I'll consent if you wish to file a supplemental appendix with the appellate court documents. This ensures that these documents are before the Supreme Court. The second option is the one you reference in your e-mail earlier this morning- a motion to compel. The former strikes me as the more efficient use of both our times as well as taxpayer money. If you truly want the direct appeal documents before the Court, I do not oppose you filing a supplemental appendix. That's likely the most expedient route and requires the least Court involvement. I leave to your discretion which option the state wishes to pursue.

As to your reference to Rule 243(d), SCACR, in Freeman v. State, Appellate Case No. 2018-001958, you filed a Motion to File A Second Supplemental Appendix on December 10, 2019. Many of your colleagues have filed supplemental appendices before; there can be no doubt that you have that capability. This is a matter wherein I dispute that that these documents were definitively before the PCR court. You disagree, and I've offered a convenient path forward- you may file a supplemental appendix containing the direct appeal documents in this case with my consent.

-Taylor

From: Taylor Smith <taylor-smith@scag.gov>
Sent: Wednesday, October 7, 2020 10:56 AM
To: Gilliam, Taylor <tgilliam@sccid.sc.gov>
Subject: RE: [External] Request for a supplemental appendix.

Taylor,

I have put some more thought into our phone call last night and talked it over with my supervisor. Rule 243(f) requires that the appendix includes the entire lower court record. It sounds like we both agree that that includes those things referenced in the first paragraph of your email. I looked back at the record on appeal in this case and see that it does not contain anything that the appendix you've already filed already contained, meaning that there probably is no need to supplement the appendix to include it.

I think, though, that Rule 243(f) also requires the inclusion of Mr. McCants' direct appeal records. West Lee's return specifically references them as attachments to his return and incorporates them into the return. I also included them in the packet of documents that I submitted to Judge Goldsmith at the start of the PCR hearing, without any objection from Don Thompson, who represented Mr. McCants at the time. I know that the direct appeal records were included in the things I submitted to the judge because I go through all of those myself before each PCR hearing and insist that the direct appeal records be included every time. Frequently, I pull late hours and work the weekends before court to make sure that everything is included.

I believe that I did say that we had a good faith disagreement about whether the inclusion of the direct appeal records is required. Please let me clarify. I think you genuinely believe that the rule does not require that they be included. I genuinely believe that it does. When you say that that is your position, I take you at your word. In this case, we disagree about what the rule requires. I don't think there can be a good faith disagreement about whether the direct appeal records were before Judge Goldsmith, though. Not only were they explicitly included with and incorporated into the return that was before him, but I am affirmatively telling you that I personally would have ensured that they were in the packet before him.

Rule 243(d) places the duty upon you, as attorney for Mr. McCants, to put together the appendix. Since we don't seem to be able to agree on this issue, I will file a motion to compel you to supplement the appendix with all of the things identified in this email if you don't agree to do so voluntarily today. Frankly, that is not something that I am enthusiastic about doing and I hope that you will supplement the appendix. I am giving you notice before taking any action as a professional courtesy and because you asked that I do so.

Can you please let me know what you want to do? I will need to take an extension either way because my return is due to be filed and served tomorrow.

Thanks,
Taylor



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From: Gilliam, Taylor <tgilliam@sccid.sc.gov>
Sent: Tuesday, October 6, 2020 5:19 PM
To: Taylor Smith <taylorsmith@scag.gov>
Subject: Re: [External] Request for a supplemental appendix.

Thanks for chatting. Sorry I waited until late in the day to call. Based on our conversation, I've offered to file a supplemental appendix to include the NOA filed by Tricia, Kelly Oppenheimer's February 2019 letter, the appointment letter, and the continuance order.

Like you said, we have a "good faith disagreement" about the direct appeal documents. I didn't see them specifically referenced in the PCR transcript or Order of Dismissal, but I'm more than happy to consent if you'd like to file a supplemental appendix including those documents. I understand that's something you're able to do, and I think that may be the smoothest course of action moving forward. As discussed, I've begun looking at cases individually to determine if the direct appeal documents are referenced in the PCR transcript and/or OOD, so hopefully this won't have to be a conversation we have frequently.

Regardless, good to talk to you. Thanks for agreeing to keep me in the loop, especially before filing a motion to compel or including a footnote about this in your return. Hope you have a great rest of the week.

-Taylor

From: Taylor Smith <taylor.smith@scag.gov>
Sent: Monday, October 5, 2020 11:27 AM
To: Gilliam, Taylor <tgilliam@sccid.sc.gov>
Subject: RE: [External] Request for a supplemental appendix.

That would be great. I'll be working from home so use that cell number.

Thanks,
Taylor

From: Gilliam, Taylor <tgilliam@sccid.sc.gov>
Sent: Monday, October 5, 2020 11:07 AM
To: Taylor Smith <taylor.smith@scag.gov>
Subject: Re: [External] Request for a supplemental appendix.

I'm working on a deadline today but can call you tomorrow if that's all right.

-Taylor

From: Taylor Smith <taylor.smith@scag.gov>
Sent: Monday, October 5, 2020 11:06 AM
To: Gilliam, Taylor <tgilliam@sccid.sc.gov>
Subject: [External] Request for a supplemental appendix.

Taylor,

I hope you are doing well. I have been working on my return to you petition for a writ of certiorari in Quincy McCants' PCR appeal. There are some things not included in the appendix that you filed that I think should be included due to Rule 243(f). Those are the direct appeal records, which I think included a notice of appeal, an Anders brief, a record on appeal, Mr. McCant's pro se response to the Anders brief, and appellate opinion or order. There was a notice of appeal filed by Tricia Blanchette after Judge Dickson issued the order of dismissal in the initial PCR action.

Also, there was a letter for Kelley Oppenheimer filed with the Lexington County Clerk of Court on February 11, 2019, an order appointing Don Thompson to represent Mr. McCants filed on February 7, 2019, and an order of continuance

issued by Judge and then filed on March 29, 2019; I think these last three especially belong in the appendix because one of the issues you raised was whether it was improper that the remanded PCR hearing for Mr. McCants was not conducted within sixty days of the Supreme Court's remand order. The continuance order specifically shows that Don Thompson did not object to the State's motion for a continuance, which explains why the hearing was not held within sixty days.

Will you file a supplemental appendix with these documents? Please let me know as soon as you can because I'll need to take a third extension so that you can do that and so that I can draft a return to your petition for a writ of certiorari based off a complete record. I meant to touch base with you about this last week but was out of town from Friday morning until last night, so I apologize for that. If you want to talk about it by phone, please call me at (843) 307-5049. I'm working from home today and probably will be until Thursday morning.

Thanks,
Taylor



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**EXHIBIT 5: RECORD FROM LEXINGTON
COUNTY CLERK OF COURT SHOWING
DIRECT APPEAL RECORDS NOT RECIEVED**

CASE # 2009-CP-32-04236

DOCUMENTS NOT SCANNED

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**GENERAL SESSIONS FILE &
COPY OF TRANSCRIPT OF
RECORD**