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COURT MEDIATOR



# BARNES ALFORD

Barnes Alford Stork & Johnson L.L.P.

ATTORNEYS AT LAW

OF COUNSEL  
WILLIAM C. STORK  
ALAN J. REYNER †  
ROGER A. WAY, JR. †

† CERTIFIED SPECIALIST  
IN TAXATION & MEMBER  
OF SEPARATE L.L.C.

RUDOLPH C. BARNES  
(1917-1995)  
JAMES W. ALFORD  
(1930-2008)

March 19, 2013

## HAND DELIVERED

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, SC 29201

Re: Thomas Reginald Brooks, Appellant v. State of South Carolina,  
Respondent  
Case No. 2011-CP-40-7395

Dear Ms. Kitchings:

Enclosed are the originals and one (1) copy each of the following documents in the above case:

1. Notice of Appeal.
2. Proof of Service of the Notice of Appeal on the Respondent.
3. Copies of the Orders which are to be challenged on appeal.

Please file the original documents and return the clocked-in copies with our courier.

I understand that because this is an appeal of a Post Conviction Relief (PCR) proceeding, no filing fee is required.

I was appointed by the Court of Common Pleas to represent the Appellant on his PCR Petition. Now that the Notice of Appeal has been filed, I understand the Office of Appellate Defense will assume the Appellant's representation, and I am automatically relieved. I am providing the Office of Appellate Defense with copies of the Notice of Appeal and other enclosures by copy of this letter.

The Notice of Appeal has also been forwarded to the clerk of the lower court for filing.

ROBERT T. STRICKLAND  
POST OFFICE BOX 8448 1613 MAIN STREET (29201) COLUMBIA, SC 29202  
OFFICE: 803.799.1111 FAX: 803.254.1335 TOM@BASJLAW.COM  
WWW.BARNESALFORD.COM

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MAR 19 2013

SC Court of Appeals

BARNES ALFORD STORK & JOHNSON L.L.P.

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
March 19, 2013  
Page 2

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Thank you for your assistance. With best regards, I am

Very truly yours,



Robert T. Strickland

RTS/ts  
Enclosures

cc: The Honorable J. Ernest Kinard, Jr. *(w/enclosures and via first class mail)*

Robert D. Corney, Esquire *(w/enclosures and via first class mail)*

The Honorable Jeanette W. McBride *(via hand delivery)*  
Clerk of Court, Richland County Court of Common Pleas

Ms. Lorie P. French *(w/enclosures and via first class mail)*  
Administrative Coordinator, Office of Appellate Defense

WELDON R. JOHNSON\*  
DAVID G. WOLFF  
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RUDOLPH C. BARNES  
(1917-1995)  
JAMES W. ALFORD  
(1930-2008)

March 19, 2013

## HAND DELIVERED

The Honorable Jeanette W. McBride  
Richland County Clerk of Court  
Richland County Judicial Center  
1701 Main Street  
Columbia, SC 29201

Re: Thomas Reginald Brooks, Appellant v. State of South Carolina,  
Respondent  
Case No. 2011-CP-40-7395

Dear Ms. McBride:

Enclosed are two copies of the Applicant's Notice of Appeal in this matter.  
Please file one copy and return the other clocked-in copy with our courier.

Thank you for your assistance. With best regards, I am

Very truly yours,

Robert T. Strickland

RTS/ts  
Enclosures

cc: The Honorable J. Ernest Kinard, Jr. (w/enclosures and via first class mail)

Robert D. Corney, Esquire (w/enclosures and via first class mail)  
Attorney for Respondent

Ms. Lorie P. French (w/enclosures and via first class mail)  
Administrative Coordinator, Office of Appellate Defense

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MAR 19 2013

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

---

Case No.: 2011-CP-40-7395

---

Thomas Reginald Brooks (Inmate No. 295842),..... Appellant,

v.

State of South Carolina,..... Respondent.

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**NOTICE OF APPEAL**

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Thomas Reginald Brooks (Inmate No. 295842), appeals the following Orders of the Honorable J. Ernest Kinard, Jr., presiding judge of the Richland County Court of Common Pleas:

1. Order of Dismissal of PCR Petition, dated December 31, 2012 (copy attached as Exhibit 1); and
2. Order Denying Rule 59(e), SCRCF, Motion to Alter or Amend Judgment, dated February 19, 2013 (copy attached as Exhibit 2).

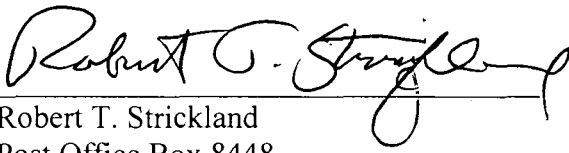
Appellant received written notice of the entry of the Order of Dismissal on January 11, 2013 and timely filed and served his Motion to Alter or Amend Judgment on January 17,

**RECEIVED**  
MAR 19 2013

**SC Court of Appeals**

2013. Appellant received written notice of the entry of the Order Denying Rule 59(e), SCRCF, Motion to Alter or Amend Judgment on March 4, 2013.

BARNES, ALFORD, STORK & JOHNSON, LLP

By:   
Robert T. Strickland  
Post Office Box 8448  
Columbia, SC 29202  
(803) 799-1111

Attorneys for Appellant

March 19, 2013

Columbia, South Carolina

Other Counsel of Record:

Robert D. Corney  
Assistant Attorney General  
Post Conviction Relief Section  
S.C. Attorney General's Office  
Post Office Box 11549  
Columbia, SC 29211-1549  
(803) 734-3970

Attorney for the State of South Carolina

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

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Civil Action No.: 2011-CP-40-7395

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Thomas Reginald Brooks (Inmate No. 295842) ..... Appellant,

v.

State of South Carolina, ..... Respondent.

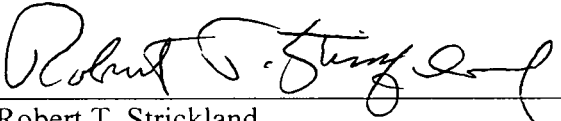
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**PROOF OF SERVICE**

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I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States mail, postage prepaid, on March 19, 2013, addressed to its attorney of record:

Robert D. Corney, Esquire  
Assistant Attorney General  
Post Conviction Relief Section  
S.C. Attorney General's Office  
Post Office Box 11549  
Columbia, SC 29211-1549



---

Robert T. Strickland  
Post Office Box 8448  
Columbia, SC 29202  
(803) 799-1111

Attorney for Appellant

**RECEIVED**  
MAY 19 2013

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS  
Thomas Reynold #295842 Brooks

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2011CP4007395

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  Affirmed;  Reversed;  Remanded;  Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

**ORDER INFORMATION**

This order  ends  does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

**INFORMATION FOR THE PUBLIC INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: \_\_\_\_\_

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date \_\_\_\_\_

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 9 January 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Thomas Reynold #295842 Robert T. Strickland Brooks

Robert Daniel Corney

**RECEIVED**

MAR 19 2013

Thomas Reynold #295842 Brooks

**SC Court of Appeals**

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court

*Jeanette W. McBride*

STATE OF SOUTH CAROLINA )  
 COUNTY OF RICHLAND )  
 Thomas Brooks, #295842, )  
 Applicant, )  
 v. )  
 State of South Carolina, )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE FIFTH JUDICIAL CIRCUIT

2011-CP-40-07395

**ORDER OF DISMISSAL**

RICHLAND COUNTY  
 FILED  
 2013 JAN -7 PM 12:12  
 JEANETTE W. McBRIDE  
 C.C.P. & G.S.

**PROCEDURAL HISTORY**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed September 23, 2011, and amended August 23, 2012. An evidentiary hearing into the matter was convened on Friday, September 14, 2012, at the Richland County Courthouse. The Applicant was present at the hearing with counsel, Robert T. Strickland, Esquire. The Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Also testifying were Applicant's former plea counsel, J. Rhodes Bailey, Esquire (hereafter "counsel"), and the prosecuting solicitor in the matter, Dolly Justice Garfield, Esquire. This Court also had before it a copy of the transcript of the proceedings against Applicant, the records of the Richland County Clerk of Court, and Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the May 2009 term of the Richland County Grand Jury for Armed Robbery (2009-GS-40-01154). On September 22, 2010, Applicant

appeared with counsel before the Honorable R. Lawton McIntosh where he pled guilty pursuant to North Carolina v. Alford<sup>1</sup> to the lesser included Strong Arm Robbery and was sentenced to twelve (12) years imprisonment, suspended to service of seven (7) years imprisonment and three (3) years probation. No direct appeal was filed.

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

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
  - (a) 1<sup>st</sup> Amendment
  - (b) 14<sup>th</sup> Amendment
  - (c) Involuntary guilty plea
  - (d) Ineffective assistance of counsel
  - (e) Prosecutorial misconduct
  
10. State concisely and in the same order the facts which support each of the grounds set out in (9):
  - (a) Counsel failed to investigate adequately
  - (b) Counsel failed to properly challenge unduly suggestive identification
  - (c) Counsel failed to properly investigate and establish Petitioner's alibi
  - (d) Counsel failed to properly advise Petitioner as to the weaknesses of the case against him. Had Petitioner been properly advised, he would not have agreed to the plea.
  - (e) In her Order dated April 15, 2009, Judge Michelle Childs ordered that the 911 tapes regarding the arrest of the Petitioner by the Richland County Sheriff's Department and all 911 calls made in reference to the case on February 6, 2009 be preserved and placed into evidence. The Petitioner maintains the State violated this Order by only preserving the 911 call for the robbery for which he was charged and not the 911 calls for the altercation that is the basis for his alibi.
  - (f) The file of the Richland County Solicitor's Office included a medical record of a T. Thompson, the individual involved in the altercation with the Petitioner that is the basis for Petitioner's alibi. This medical record establishes the time of the altercation between the Petitioner and T. Thompson and supports the Petitioner's alibi. On information and belief, this exculpatory evidence was not made available to the Public Defender after the Defendant's request that the Solicitor produce all evidence potentially favorable to the Defendant under Brady v. Maryland, 373 U.S. 83 (1963).

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<sup>1</sup> North Carolina v. Alford, 400 U.S. 91, S.Ct. 160, 27 L.Ed.2d 162 (1970).

(g) At the plea hearing, the Assistant Solicitor responded to a question posed by the court as follows:

Question: But was the ID – was the description of the clothing worn by the defendant the same as what he had on the night in question?

Answer: Yes, sir. Yes, sir.

According to the victim's statement, the suspect was reportedly wearing a black hoodie and dark pants. At the time of his arrest, the Petitioner was wearing a grey t-shirt and blue jeans.

### 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).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the 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 (1985). 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. 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 pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

#### *Failure to Investigate and Establish Alibi Defense*

Applicant alleges counsel was ineffective for failing to sufficiently investigate and establish an alibi for the armed robbery charge which Applicant contends would have shown he could not have been the robbery suspect.

#### Factual Background

As a brief background, the current robbery charge challenged stems from the February 5, 2009, robbery of a Pop's Pizza delivery driver in downtown Columbia.<sup>2</sup> While attempting to deliver a pizza to 1427 Maple Street off of Millwood Avenue, James Franklin League (hereafter "victim") was robbed of thirty-nine (\$39) dollars in cash at gun point by a suspect he would later

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<sup>2</sup> The times set forth in this factual summary are taken from the record before this Court, but do not represent a factual determination or specific finding as to the accuracy of the times set forth therein or the harmonization of the times set forth therein. This Court would specifically note that many of the times listed in the record are either vague estimations from witnesses, or otherwise come from various agencies which have in no way been shown to operate under a uniform, synchronized clock.

describe to police as a six-foot three-inch (6'3") or six-foot four-inch (6'4") black male wearing a black "hoodie" sweatshirt and dark jeans. After the suspect fled the scene, victim drove roughly one and a third (1.38) miles back to the Pop's Pizza restaurant where a co-worker was able to call the police to report the robbery. According to the records and audiotape introduced at the evidentiary hearing, that phone call was placed at roughly 10:54 pm; during the call, victim's coworker relayed to the dispatcher the robbery had occurred "probably" ten to fifteen minutes prior.

At 10:59 or 11:00 pm, a 911 phone call was placed from Suds Laundromat at 2559 Millwood Avenue, alleging a black male wearing a gray tank top was involved in a physical altercation in the parking lot. Upon their arrival at the laundromat at roughly 11:05 pm, officers observed Applicant run into his home directly across the street from Suds (2546 Millwood Avenue). Applicant was detained by officers at that time. Because Applicant fit the description of the suspect in the earlier armed robbery and was detailed in such close proximity to the robbery, victim was driven to the arrest location by investigators. Upon viewing Applicant, victim identified Applicant as the man who had robbed him, specifically saying "after seeing [Applicant's] face, [he] was 100% sure [Applicant] was the guy".

#### Specific Findings of Fact and Conclusions of Law

At the PCR hearing, Applicant testified he was at his house on Millwood Avenue directly across the street from Suds on the night in question, where he drank nine (9) beers. He stated he walked across the street to Suds at "about 10:50" pm that night, but was unable to purchase a beer from the bartender because of his intoxication. He went on to say he gave some cash to a girl outside of Suds to have her purchase a beer for him, and after doing so she failed to return Applicant's change to him. After exchanging words with her, Applicant said, he and a man she

was with named Terrance Thompson got into a physical altercation. Applicant testified the fight occurred at about 10:55 pm. Applicant stated he relayed all of this information to counsel during their pretrial meetings and asked counsel to prepare an alibi defense for trial based on this series of events at Suds. Applicant said counsel ultimately told him the alibi did not "check out". Applicant conceded he told the judge at the plea hearing under oath he was entering the plea freely and voluntarily, and counsel had done everything necessary to prepare the case, but testified it was counsel's "continued coercion" and failure to properly prepare the alibi defense that made him enter the plea rather than proceed to trial.

Counsel testified he was appointed to represent Applicant on February 11, 2009, when he was assigned to Applicant's representation by Chief Public Defender Doug Strickler. He s met with Applicant for the first time "within three to five days" of his appointment, at which time Applicant told counsel he was not guilty of the crime. Counsel recalled Applicant saying he had been involved in a fight at Suds on the night of the robbery, which counsel said he then undertook an extensive investigation into. Counsel said his private investigator (McNeily) spoke with several potential witnesses of the Suds fight in an effort to help create a timeline of the night. Several of those witness statements were introduced into the record by Applicant at the PCR hearing for this Court's review. Counsel also noted he had law enforcement's incident reports from the robbery and the subsequent Suds fight, as well as the audio tape of the 911 phone call placed by victim from Pop's Pizza. Counsel obtained a copy of Terrance Thompson's EMS report showing Thompson was transported to the hospital after being injured in a fight with Applicant at Suds. Counsel said he was able to review all of these items and the entirety of the discovery file, which included victim's written statement to law enforcement, with Applicant during their meetings.

Counsel said he reviewed and noted the discrepancies in the clothing worn by the suspect of the robbery as detailed by victim and the clothes in which Applicant was arrested later that night. He also testified he was well aware of law enforcement's failure to obtain any evidence linking Applicant to the robbery from Applicant's house upon execution of the search warrant. These issues would have helpful been in "driving home" the existence of reasonable doubt at trial, counsel said, but were not insurmountable for the prosecution as robbers generally "get rid" of evidence linking them to a robbery after it is complete. Counsel said he was very familiar with the area in which the robbery and subsequent fight occurred, and said he mapped the locations of each incident to help further develop an accurate timeline. Counsel also said he filed a notice of alibi with the state in anticipation of potentially using the defense at trial.

Counsel went on to say after reviewing the EMS report, statements from multiple witnesses, Applicant's work/job application records, 911 audio tape, incident reports, victim's statement to police and other relevant evidence, he was able to produce a detailed timeline of the evening to help evaluate the strength of Applicant's alibi. He said he and the prosecuting solicitor were in frequent contact during the development of the case, during which they "debated the timeline" constantly as to whether Applicant could have committed the robbery and been in the subsequent fight at Suds. Counsel explicitly testified that after conducting the aforementioned investigation, he did not believe the fight with Thompson at Suds served as a "particularly strong" alibi for Applicant. While the timeline was "very close", counsel said, Applicant lived directly across the street from Suds and one-half (1/2) of a mile from the scene of the robbery making it entirely possible for Applicant to have been in both places at the times alleged by the state. He also noted repeated inconsistencies and unreliability in the timeline with

the witnesses statements, and stated even Applicant initially said he was at Suds at 8:00 pm and only changed his timing later once more information was uncovered during their investigation.

Ultimately, counsel said, there were enough discrepancies in the facts and timeline for the state to make a “convincing case” Applicant had committed the robbery *and* been in the fight at Suds, thereby rendering the alibi defense less than airtight. He also noted it would not have been ideal for the jury to be hear Applicant’s alibi was based on him having assaulted a female and seriously injured Thompson during a fight, but said he would have gladly gone to trial to present the alibi defense if Applicant had wished to do so. However, counsel said, as the investigation continued, Applicant’s conversations slowly shifted from creating an alibi defense to inquiring about potential plea options. In fact, counsel said by the time the plea hearing occurred, Applicant was “pretty adamant” he wanted to enter a guilty plea. Counsel specifically noted he did advise Applicant that by pleading guilty he would be waiving his right to present any alleged alibi defense, which Applicant said he wanted to do.

Based on a thorough review of the record and the testimony presented at the PCR hearing, this Court finds counsel was not ineffective in this regard. First, this Court finds Applicant’s testimony as to his whereabouts on the night in question to be **not** credible. Further, this Court finds counsel’s testimony to be **very** credible. It is clear counsel undertook a diligent, thorough and objectively reasonable investigation into Applicant’s alleged alibi defense throughout the course of his representation. Counsel’s inability to establish a complete alibi for Applicant was not based on any failure to conduct a meticulous investigation; rather, the existing evidence does not provide a timeline sufficient to cover Applicant’s whereabouts at the time of the robbery. Counsel informed Applicant of the inability to create an absolute alibi, but advised Applicant the evidence could still be used to call reasonable doubt into question at trial.

Applicant, having full knowledge of the strengths and weaknesses of his case and having personally reviewed the entirety of the evidence, made the informed and voluntary decision to enter a beneficial guilty plea to a lesser included offense in an effort to avoid a much harsher potential sentence at trial. Applicant readily admitted he believed the state would be able to prove his guilt beyond a reasonable doubt, but was able to maintain his innocence by entering his plea under the standards set forth in North Carolina v. Alford. Applicant has failed to show how counsel's conduct was deficient or otherwise objectively unreasonable in this regard.

Further, this Court finds Applicant has failed to establish resulting prejudice from counsel's alleged deficient performance. Applicant has failed to prove, but for counsel's alleged deficient investigation, a complete alibi defense could have been developed with which Applicant would have insisted on proceeding to trial.

“[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all.” State v. Robbins, 275 S.C. 373, 377, 271 S.E.2d 319, 321 (1980). Further, an alibi which makes it only *less likely* the accused is the guilty party is no alibi. See Walker v. State, 397 S.C. 226, 723 S.E.2d 610 (Ct. App. 2012). Applicant has failed to provide this Court with sufficient evidence to establish a *physical impossibility* that he both committed the robbery *and* was involved in a fight with Terrance Thompson.

First, this Court would note the method through which Applicant sets forth the so-called alibi is entirely unreliable and subject to this Court's skeptical scrutiny. Applicant has attempted to create one, all-inclusive timeline based on the inconsistent temporal approximations of

witnesses/victim as set forth in their statements to law enforcement and a private investigator<sup>3</sup>, the computer automated records of several state agencies, the incident reports of several different law enforcement officers conducting investigations at differing crime scenes, and the estimated commuting time between two points when traveled by paved road and calculated using an undisclosed “average” walking pace. The times set forth in each of the documents have not been shown to be synchronized with each other in any way to provide a cohesive minute-by-minute timeline. Therefore, the evidence obviously establishes only an approximation of Applicant’s alleged movements on the night in question and have been analyzed by this Court accordingly.

Regardless, even if taken as entirely accurate and consistent, Applicant has failed to prove a complete alibi defense existed. According to the recorded 911 phone call from victim placed at 10:54 pm from Pop’s Pizza, the robbery occurred “probably ten or fifteen minutes” prior thereto. Interpreting that evidence in the light most favorable to Applicant, the robbery occurred at 10:44 pm. At 10:59 pm, the first 911 phone call is made from Suds alleging a physical altercation is on-going. With this timeline in mind, it is clear Applicant cannot prove physical impossibility of committing both offenses. Even assuming the accuracy of the evidence in the most favorable light to Applicant, there was at least a fifteen (15) minute window for Applicant to commute one-half (½) mile on foot from the robbery location to Suds, discard his sweatshirt and the gun, and enter into an altercation with Thompson’s crowd of friends standing in the Suds parking lot. Accordingly, Applicant cannot prove resulting prejudice as there is no complete alibi defense which counsel could have developed based on the evidence.

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<sup>3</sup> Respondent timely objected to the introduction of the witness statements on grounds of hearsay; therefore, the documents were introduced for the purpose of this Court analyzing the reasonableness of counsel’s actions resulting from his review of the statements and not for the truth of the matter asserted in the statements.

*Failure to Challenge Unduly Suggestive Identification by Victim*

Applicant also alleges counsel was ineffective for failing to challenge victim's identification of him as it was obtained by an unduly suggestive show-up procedure. Upon Applicant's arrest for the Suds fight, victim was driven by Officer Myers to Applicant's location where victim was able to see Applicant sitting in a police car. Victim, upon seeing Applicant's face, identified him as the robbery suspect, saying he was "100% sure" Applicant was the robber.

Counsel testified at the PCR the show-up identification by victim was conducted while Applicant was handcuffed in the back of a police car. Counsel noted such an identification, in his opinion, was "not good" and he would have argued a motion to suppress any identifications "vigorously" at trial had Applicant decided to proceed. Counsel went on to say based on his experience as a public defender in Richland County, it is doubtful such a motion would have been successful at trial as it is rare to suppress such a certain identification, especially in the Richland County circuit courts. He also noted he discussed the potential suppression with Applicant, but said Applicant "did not seem like he wanted to go down that road" because he was more interested in getting a plea offer for a lesser charge carrying a lesser sentence.

This Court finds counsel was not ineffective in this regard. Applicant was fully aware of the ability to challenge the show-up identification through pretrial motion and that he would waive that challenge by pleading guilty. Applicant made the voluntary and informed decision to forego that pretrial challenge in order to enter an advantageous guilty plea to a lesser offense. It was that decision that foreclosed counsel's ability to present such a motion to the court. Therefore, counsel's performance in failing to challenge the identification was not objectively unreasonable.

Further, this Court finds no resulting prejudice as there is no reasonable probability that had such a motion been presented, it would have been successful in suppressing victim's identification. "Notwithstanding the inherent suggestiveness and general disfavoring of one-on-one show-up identifications, they may be proper where they occur shortly after the alleged crime, near the scene of the crime, as the witness's memory is still fresh, where the suspect has not had time to alter his looks or dispose of evidence, and the show-up may expedite the release of innocent suspects and enable the police to determine whether to continue searching." State v. Govan, 372 S.C. 552, 558 – 559, 643 S.E.2d 92, 95 (Ct. App. 2007). "The closer in time and place to the scene of the crime, the less objectionable a showup is." State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct. App. 2000). Additionally, a "showup may be proper even though the police refer to the suspect as a suspect, and even though the suspect is handcuffed or is in the presence of police." Id.

Victim's identification of Applicant occurred within forty-five minutes of the robbery and roughly half (½) of a mile from the location it occurred. During the robbery, victim spent several minutes within just a few feet of Applicant and was able to observe Applicant's fully exposed face without any mask or covering. Victim provided a brief physical description of the suspect saying he was a 6'3" or 6'4" black male wearing a black "hoodie" sweatshirt and jeans. At the time of his arrest, Applicant was wearing jeans and a tank top, and he is listed in the booking report as 6'3" tall. Further, victim explicitly told officers in his written statement "after seeing [Applicant's] face" at the show-up, he "was 100% sure it was the guy who held [him] up." Based on the above, this Court can find no reasonable probability that, had counsel presented a pretrial motion to suppress the out-of-court identification of Applicant based on an unduly suggestive show-up procedure, the motion would have been successful.

Finally, even if the motion were successful in suppressing victim's out-of-court identification of Applicant, there is still a high likelihood victim would have been able to make an in-court identification of Applicant during the course of his testimony at trial. An "in-court identification is admissible if the state can prove by clear and convincing evidence that the identification is reliable based on information independent of the out-of-court procedure." Govan, *supra* at 559, 643 S.E.2d at 95 – 96. Therefore, if the trial court were to find victim's identification reliable based on the several factors set forth in State v. Brown<sup>4</sup>, victim would still have been allowed to identify Applicant at trial before the jury.

For the foregoing reasons, this Court finds Applicant has failed to prove counsel was ineffective in this regard. Therefore, this allegation is denied.

#### *Brady Violation*

Applicant asserts the state committed a Brady violation in failing to disclose a copy of the EMS report for Terrance Thompson issued hours after the robbery took place. Applicant contends the report is not contained in counsel's paper file from the public defender's office and, therefore, it must not have been turned over. He alleges the report goes to bolster his alibi defense as it proves Thompson was taken to the hospital following a fight at Suds Laundromat on the night in question, which Applicant alleges he was involved in.

Counsel testified that in his investigation and preparation of the alibi defense for Applicant, he sought to obtain Thompson's EMS records and contacted the prosecuting solicitor about them. Counsel noted under Brady, only evidence "in the possession of or known by the prosecution" must be turned over, and in this particular case the solicitor likely didn't have any reason to know Terrance Thompson was involved in any way in Applicant's case. Counsel went on to say after their discussion about the report, the solicitor was able to obtain a copy of the

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<sup>4</sup> State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (Ct. App. 2003).

report from EMS, which she promptly turned over to counsel. Counsel said while there may not currently be a hard copy of the report in his old paper file from the public defender's office, he often saved documents that were e-mailed to him on the hard drive of his computer, which was what he did with this report.

The prosecuting solicitor, Dolly Justice Garfield (hereafter "solicitor"), testified at the PCR hearing that she remembered discussing the EMS report with counsel and turning a copy of it over to the defense via e-mail once she received it. The solicitor said the same was noted on the "discovery request list" kept in her file, which explicitly showed the report was e-mailed to counsel on May 25, 2009. A copy of that list was made part of the record in this case.

This Court finds Applicant has failed to demonstrate any alleged Brady violation on the part of the state as the credible testimonies of counsel and the solicitor indicate the report was turned over to counsel as soon as it was received by the state. In fact, this Court would not the solicitor acted in an extremely professional and admirable fashion by readily assisting counsel's efforts to obtain the report upon the matter being brought to her attention. "An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching." Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (S.C. 2006), *citing* Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995). Applicant has failed to establish each of the four criteria set forth above, most notably that the State suppressed the evidence. Accordingly, this allegation is denied and dismissed.

#### *Failure to Preserve Audio of 911 Phone Calls*

Applicant alleges the state impermissibly violated the terms of Judge Childs's order by allowing the audio tape of the 911 phone calls to be destroyed prior to the PCR hearing.

Specifically, Applicant contends despite an order to preserve audio tapes having been issued, the tape related to the Suds Laundromat incident is not contained in counsel's defense file and is no longer available through the City of Columbia's Central Dispatch. Therefore, Applicant contends, the state violated the terms of the order.

Counsel testified that prior to his involvement on Applicant's case, he had run into situations where he was unable to obtain tapes of 911 phone calls when requested as they had already been destroyed by Central Dispatch. He noted it is Central Dispatch's policy to destroy their audio tapes from 911 calls sixty (60) days after their recording of not otherwise ordered to be preserved. Because of this experience, counsel said, he filed an *ex parte* motion on Applicant's behalf to preserve the tapes past the sixty (60) day time limit to ensure their availability at trial if need be. According to the records before this Court, the Honorable J. Michelle Childs issued an *ex parte* order on April 15, 2009, granting that motion. Counsel said he didn't recall requesting the 911 audio from the Suds fight in that motion, but likely didn't know enough about that incident at the time he filed the motion to have intended to preserve those tapes. Counsel noted, however, that if he had wanted the Suds tape preserved in addition to the Pop's Pizza 911 call, he would have specifically noted such in his motion. Counsel agreed the Suds 911 tape did not appear to be in his old paper file, but again said he saved many items he received in discovery to the hard drive of his computer during his time with the public defender's office, which potentially could explain their absence had he ever received them.

On cross-examination, counsel noted his intention in filing the motion was only to preserve the audio tapes of the 911 call for the robbery to assist in his preparation for trial and for their potential use at trial, but said he never intended to have the tapes preserved indefinitely for Applicant's use on direct appeal or collateral attack years later.

The solicitor testified she was never asked to produce the 911 audio tape from the Suds altercation prior to trial and noted she had, in fact, never seen Judge Childs's April 2009 order to preserve the robbery tape until reviewing it at the PCR hearing, as it was issued *ex parte*. She went on to say it is the City of Columbia's duty to ensure such tapes are preserved and the solicitor's office plays no part in those issues. In fact, the solicitor said, 911 audio tapes are rarely part of the discovery materials the solicitor's office receives from law enforcement so she likely never had possession of any audio tapes in this case until counsel obtained them.

This Court finds this allegation to be without merit. First, it is clear counsel's intention in filing the motion for preservation, as well as Judge Childs's intention in issuing the order to preserve the tapes, was limited in scope to Applicant's pending criminal prosecution. Applicant's contention that the audio tapes should have been indefinitely preserved by Central Dispatch for his use in the current collateral action is erroneous. The order issued by Judge Childs specifically found the tapes were to be preserved because they were "material and necessary to the Defense" in the criminal case. Counsel credibly testified he filed the motion to preserve the tapes to assist in the preparation of Applicant's defense and to be available for use at trial. Upon Applicant's entry of the guilty plea and conclusion of the matter in General Sessions court, preservation of the tapes was no longer necessary, nor required. Therefore, this court finds no impropriety in the City of Columbia's destruction of the tapes.

Further, and perhaps more importantly, Applicant is in *actual possession* of a copy of the tape ordered to be preserved. Applicant was able to uncover a copy of a tape in counsel's defense file containing victim's 911 phone call from Pop's Pizza following the robbery. It is the audio from the calls placed later that night from Suds which Applicant seeks to obtain, which were not the basis of the order issued by Judge Childs. Counsel credibly testified he had no reason to

request those tapes be preserved at the time he filed the motion; further, Judge Childs's order makes no mention of the Suds phone calls or otherwise signifies those tapes were to be preserved. In fact, the order simply mandated "911 tapes regarding the arrest of [Applicant] by the Richland County Sheriff's Department and all 911 calls made in reference to the aforementioned case...be preserved". The phone calls from Suds were made in reference to an on-going physical altercation in the parking lot and in no way were made "in reference" to the robbery which served as the exclusive basis of Applicant's 2009 criminal case. Accordingly, the audio tapes from the 911 calls placed from Suds were not part of the order to preserve and their current unavailability is no violation of Judge Childs order. Additionally, this Court finds Applicant failed to prove that the state acted improperly in any way. Accordingly, this contention must be denied.

*Failure to Object to Solicitor's Remarks During Plea*

Finally, Applicant contends counsel was ineffective for failing to object or otherwise correct a statement during the plea hearing regarding the accuracy of victim's description of the suspect to Applicant's appearance.

Specifically, during the plea hearing, Judge McIntosh inquired whether "the description of the clothing worn by [Applicant] the same as what he had on the night in question", to which the solicitor responded, "[y]es, sir". Immediately thereafter, counsel was given the opportunity to speak to the court at which time he challenged those statements from the solicitor, saying he "would disagree a little bit" as "there might have been some discrepancies" in the clothing described and the clothing worn by Applicant upon his arrest.

Based on the record, this Court finds counsel was objectively reasonable in correcting the solicitor's alleged misstatement as he did. Therefore, counsel was not deficient in his

performance in this regard. Further, this Court finds Applicant cannot prove resulting prejudice under Strickland v. Washington based on the alleged misstatement. Applicant entered his guilty plea under the mandates of North Carolina v. Alford, thereby maintaining his ability to contest the state's version of facts and his actual innocence on the charges. Whether his clothing matched that of the suspect was of little consequence to his decision to plead guilty; rather, Applicant accepted the benefit of the state's plea offer to avoid encountering a much harsher sentence on an Armed Robbery charge. Therefore, it cannot be said that but-for counsel's failure to object to this discrepancy, Applicant would not have pled but rather would have insisted on proceeding to trial. Additionally, Applicant has failed to prove that but-for the solicitor's alleged misstatement, there is a reasonable likelihood the sentence imposed would have been lighter. Accordingly, this allegation is denied and dismissed.

### 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 with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations raised in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The

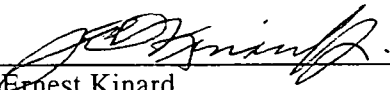
Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court notes Applicant 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), SCRCP, 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 Respondent.

AND IT IS SO ORDERED this 31 day of Dec, 2012.

  
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J. Ernest Kinard  
Presiding Judge  
Fifth Judicial Circuit

Camden, South Carolina.



STATE OF SOUTH CAROLINA )  
 COUNTY OF RICHLAND )  
 )  
 Thomas Reginald Brooks, #295842, )  
 )  
 Applicant, )  
 )  
 vs. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE FIFTH JUDICIAL CIRCUIT

2011-CP-40-07395

ORDER DENYING RULE 59(e) SCRCPP  
 MOTION TO ALTER OR AMEND

**RECEIVED**

MAR 19 2013

**SC Court of Appeals**

This matter comes before this Court by way of Rule 59(e), SCRCPP, Motion to Alter or Amend Judgment filed January 17, 2013. An evidentiary hearing was convened before this Court on September 14, 2012, at the Richland County Courthouse, at which Applicant was present with counsel, Robert T. Strickland, Esquire. The state was represented by Robert D. Corney of the South Carolina Attorney General's Office. By order filed January 7, 2013, this Court denied Applicant's request for relief with prejudice. The current post-hearing motion followed.

After a thorough review of the record and Applicant's contentions, this Court finds the current motion to alter or amend must be denied as the January 7, 2013, order of dismissal previously entered by this Court contains all of the required findings of facts and conclusions of law required by S.C. Code § 17-27-80 and Rule 52(a), SCRCPP. See also Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007). Further, the current order of dismissal makes accurate, complete and appropriate findings based upon the testimony and arguments presented at the PCR hearing. Therefore, Applicant's Rule 59(e), SCRCPP, motion to alter or amend must be denied.

Therefore, based upon a careful reconsideration of all of the evidence in this case and upon full consideration of Applicant's motion, this Court is not persuaded to alter or amend the judgment. This Court further finds that oral argument would not aid in the reconsideration of the original


judgment.

It is further noted that this application is from a plea, not a trial, and any alleged discrepancies in identification of clothing, timelines, etc. were minor and did not impact the voluntariness of the plea or demonstrate lawyer incompetence.

IT IS THEREFORE ORDERED:

1. That the Applicant's Rule 59(e) Motion to Alter or Amend is DENIED and DISMISSED.

AND IT IS SO ORDERED this 19 day of Feb, 2013

  
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J. ERNEST KINARD, JR.  
Presiding Judge  
Fifth Judicial Circuit

Camden, South Carolina