



**ANDERSON  
LAPHAM  
& MOORE, LLC**

ATTORNEYS AT LAW

W. Sterling Anderson II  
Candice K. Lapham  
J. Patrick Anderson  
Travis A. Moore

**RECEIVED**

*PC*

April 22, 2013

APR 24 2013

South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

**S.C. SUPREME COURT**

**Re: Notice of Intent to Appeal from Fredrick E. Johnson, #163457, v. State of South Carolina, Civil Action No. 2011-CP-42-1788**

To Whom It May Concern:

Please find enclosed the original and two copies of our Notice of Appeal, proof of service on the Attorney General, and the Order of Dismissal in the above-referenced case. Please note that I was Court Appointed on this case, I have spoken with the Division of Appellate Defense of the South Carolina Commission on Indigent Defense (whom I have carbon copied as noted below), and I expect them to handle the appeal. By copy of this letter, I am also serving Ms. Suzanne H. White, Counsel for the State. I would further appreciate your returning to me a clocked copy in the envelope provided for my records.

Thank you for your assistance in this matter, and in the meantime, please do not hesitate to contact me if you have questions or concerns.

Sincerely,

W. Sterling Anderson II

Enclosures

cc: Ms. Suzanne H. White (via mail and E-mail to [swhite@scag.gov](mailto:swhite@scag.gov))  
South Carolina Attorney General's Office, P.O. Box 11549, Columbia, SC 29211

Ms. Lorie French, South Carolina Appellate Defense (via mail and E-mail to [Lfrench@sccd.sc.gov](mailto:Lfrench@sccd.sc.gov)) P.O. Box 11589, Columbia, SC 29211

Mr. Fredrick E. Johnson, SCDC ID #: 163457  
McCormick Correctional Inst., 386 Redemption Way, McCormick, SC 29899

THE SOUTH CAROLINA SUPREME COURT

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. Durham Cole, Jr., Judge

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Case No.  
(2011-CP-42-1788)

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Fredrick E. Johnson, #163457 ..... Appellant

v.

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

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NOTICE OF INTENT TO APPEAL

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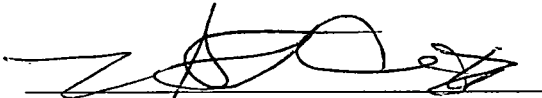
Appellant appeals the decision of the Honorable Judge signed April 2, 2013 and filed in the Spartanburg County Clerk's Office on April 12, 2013, which was received by appellant's counsel via U.S. Mail on April 18, 2013.

Counsel for applicant received written notice of the Order on April 18, 2013, and files this Notice by regular mail today, April 22, 2013.

**RECEIVED**

APR 24 2013

**S.C. SUPREME COURT**



W. STERLING ANDERSON II, ESQUIRE  
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ACTING APPOINTED ATTORNEY FOR PCR PETITIONER

Other Counsel of record:  
Ms. Suzanne White, Esquire  
Office of the Attorney General  
1000 Assembly Street  
Columbia, South Carolina 29201

THE SOUTH CAROLINA SUPREME COURT

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APPEAL FROM SPARTANBURG COUNTY  
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Case No.  
(2011-CP-42-1788)

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Fredrick E. Johnson, #163457 .....Appellant

v.


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

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PROOF OF SERVICE

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I certify that the foregoing was served on the persons listed below by placing same in the U.S. Mail postage prepaid this day, April 22, 2013.



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ACTING APPOINTED ATTORNEY FOR PCR PETITIONER

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Office of the Attorney General  
1000 Assembly Street  
Columbia, South Carolina 29201

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By: RW

B/D

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SPARTANBURG )  
 )  
Frederick E Johnson, #163457 )  
 )  
Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT

2011-CP-42-1788

**ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 21, 2010. The Respondent made its Return on or about July 17, 2012. An evidentiary hearing into the matter was convened on January 8, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by W. Sterling Anderson II, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Andrea Price, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, and the trial/plea transcript.

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**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the August 2010 session of the Spartanburg County Grand Jury for murder (10-GS-42-4671). He was represented by Andrea Price, Esquire. On October 13, 2010, following the beginning of a trial for murder, the Applicant pled guilty to the lesser-included offense of

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voluntary manslaughter and was sentenced by the Honorable Roger L. Couch to a sentence of thirty years, set to run consecutive to the SCDC sentence the Applicant was currently serving. The Applicant did not appeal his conviction or sentence.

### ALLEGATIONS

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

1. Ineffective assistance of counsel; and
2. "Because the State failed to comply with Rule 5 Motion."

### 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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

#### Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). 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 v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant testified that he was currently service a thirty year sentence for voluntary manslaughter, which was set to run consecutive to the sentences totaling twenty-five years. Applicant had previously received for charges of common law robbery and assault and battery of a high and aggravated nature. Applicant testified that Counsel failed to provide discovery materials to him in a timely manner. Applicant submitted copies of jail requests to Counsel for discovery materials as Exhibits #1 and #2. Applicant testified that he received discovery only one to two weeks prior to the trial, but acknowledged that Counsel did review the discovery materials with him at that time. However, Applicant testified that he did not receive the discovery regarding the DNA results until trial. Overall, Applicant testified that he met with Counsel two or three times. Applicant testified that Counsel did advise him to plead guilty, but

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acknowledged that he pled guilty without any threats or coercion.

Counsel testified that she met with the Applicant approximately three times. Counsel testified that she has notes in her file indicating that on April 11, 2010, she delivered discovery materials to the Applicant and personally reviewed them with him. Counsel noted that sometime in spring of 2010 was when the Applicant pled to the prior unrelated charges. Counsel acknowledged that the DNA matching results were not provided by the State until it was mentioned during testimony at trial. In fact, as the record reflects, Counsel objected and there were numerous discussions before the bench about the revelation of those results. Counsel testified that once the DNA report from SLED came back with a match to the Applicant, she did recommend that Applicant consider pleading guilty to the lesser-included charge. The State was willing to offer a plea to voluntary manslaughter at that time. Counsel testified that she had the opportunity to meet with the Applicant to explain the options and differences between a murder conviction and voluntary manslaughter. Counsel also testified that during the meeting she reviewed the DNA report with the Applicant.

This Court finds the testimony of Counsel to be more credible than the testimony of the Applicant. The Applicant's allegations that Counsel did not provide discovery materials or meet with him enough are without merit. Following testimony and review of the transcript, it is clear that Counsel did review the discovery materials she had been provided with the Applicant. The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210,

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481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must also show specific prejudice resulting from counsel's alleged lack of time to prepare. United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). The Applicant failed to point to any specific matters Counsel failed to discover, or any defenses that could have been pursued had Counsel been more fully prepared. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequate preparation or lack of meetings. Accordingly, this allegation is dismissed.

#### Rule 5 Violation

This Court finds that this allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The record reflects that the jury was removed from the room and discussions were held at the bench, once the testimony about the DNA results was presented. The remedies for a failure to comply with the requirements of the rule are: "the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances." Rule 5(d)(2), SCRCrimP. As testimony reflects, Counsel had the opportunity to review the document and discuss with the Applicant, which led to the Applicant choosing to plead guilty. The Applicant had the opportunity to

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request a continuance, continue with the trial and raise this issue through an objection at trial and then on appeal. His failure to do so has waived this allegation as a ground for relief. Furthermore, the record fully supports the knowing and voluntary nature of the Applicant's plea. Accordingly, this Court finds that the Applicant has failed to meet his burden of proof as to this claim. Therefore, this claim is denied and dismissed.

### *Summary*

This Court finds in regards to the allegation of ineffective assistance of counsel, the Applicant's testimony is not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in her representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in her representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

### **CONCLUSION**

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed.

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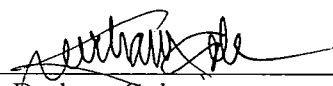
with prejudice.

This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 2nd day of April, 2013.

  
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J. Derham Cole  
Presiding Judge

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**ANDERSON  
LAPHAM  
& MOORE, LLC**

ATTORNEYS AT LAW

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DO NOT FORWARD  
ADDRESS SERVICE REQUESTED

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E. Johnson*

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