

The Supreme Court of South Carolina

Todd Michael Sowell, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Clifton Newman
Richland County
Trial Court Case No. 2009-CP-40-02686

ORDER

The request for an extension until April 25, 2012 to serve and file the Return to the Petition for Writ of Certiorari is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Arenda J. Shealy*
Clerk

Columbia, South Carolina *Chief Deputy*

March 27, 2012

cc: Appellate Defender Kathrine H. Hudgins
Assistant Attorney General Robert Corney



ALAN WILSON
ATTORNEY GENERAL

March 23, 2012

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

RE: Todd M. Sowell, 238581 v. State of South Carolina
2009-CP-400-02686

Dear Mr. Shearouse:

The Return to Petition for Writ of Certiorari in the above appeal is due to be served and filed on today. However, this is to respectfully request a 30-day extension until April 25, 2012 in which to serve and file this Return.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a heavy workload.

Sincerely,

Robert D. Corney
Assistant Attorney General

RDC:jri

cc: Kathrine H. Hudgins; SC Office of Appellate Defense

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Clifton Newman, Circuit Court Judge

ORIGINAL

RECEIVED

JAN 11 2012

S.C. Supreme Court

TODD MICHAEL SOWELL,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR WRIT OF CERTIORARI
AND ACCOMPANYING APPENDIX

(4)

Counsel for Todd Michael Sowell petitions the Court for a **final thirty day extension, until February 10, 2012** in which to file the petition for writ of certiorari and accompanying appendix in this case. In support of this petition, counsel shows:

1. The petition for writ of certiorari and accompanying appendix are due to be filed with the Court today.
2. Counsel for Mr. Sowell respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required.
3. Counsel filed the initial brief of appellant and designation of matter in State v. Craig Keeling on January 9, 2012. Counsel filed the petition for rehearing in Lorenzo R. Nicholson v. State on January 5, 2011. Counsel filed the petition for rehearing in State v. Tawanda Williams on December 22, 2011. The initial brief of appellant and designation of matter in State v. Jeffrey Herrmann was filed on December 21, 2011. The petition for writ of certiorari and accompanying appendix in Troy Goffe v. State were filed on December 16, 2011. Counsel filed the initial brief of appellant and designation of matter in State v. Travis Teasley on December 15, 2011. Counsel had two oral arguments in the Court of Appeals on the week of December 5, 2011. On December 6, 2011 had an oral argument in the case

of State v. Daniel Jenkins. On December 7, 2011, counsel argued the case of State v. Robert Phipps. Counsel was in Dorchester County on November 30, 2011 to testify in a Post-Conviction Relief hearing. Counsel filed the petitions for writ of certiorari and accompanying appendices to the Court of Appeals in State v. Eric Dantzler and State v. Bobby Lee Burdine and filed the initial brief of appellant and designation of matter in State v. Michael Watson on November 22, 2011. Counsel filed the petition for rehearing in Karen D. Lee v. State on November 17, 2011.

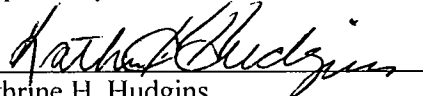
4. Counsel has not had time to complete the petition for writ of certiorari in this case. As a result, counsel respectfully asks this Court for a **final thirty day extension, until February 10, 2012** in which to file the petition for writ of certiorari and accompanying appendix. Counsel is striving to limit the number of extensions requested. Counsel is attempting to complete the cases with the most number of extensions first.

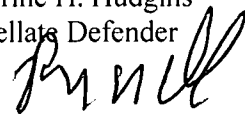
5. As indicated by signature below, Brian Petrano, of the South Carolina Attorney General's Office, does not oppose this request

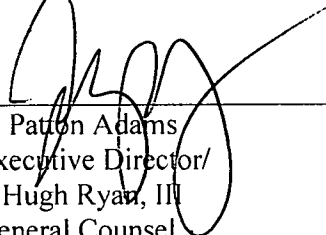
6. Counsel makes this request in good faith and not for purposes of delay.

Counsel respectfully requests a **final thirty day extension, until February 10, 2012** in which to file the petition for writ of certiorari and accompanying appendix in this case based upon the above circumstances.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender


Robert M. Dudek
Chief Appellate Defender


T. Patton Adams
Executive Director/
J. Hugh Ryan, III
General Counsel

January 11, 2012

I do not oppose:


Brian Petrano

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Clifton Newman, Circuit Court Judge

TODD MICHAEL SOWELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Original

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S.C. Supreme Court

(3)

PETITION FOR EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR WRIT OF CERTIORARI
AND ACCOMPANYING APPENDIX

Counsel for Todd Michael Sowell petitions the Court for a thirty day extension in which to file the petition for writ of certiorari and accompanying appendix in this case. In support of this petition, counsel shows:

1. The petition for writ of certiorari and accompanying appendix are due to be filed with the Court today.
2. Counsel for Mr. Sowell respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required.
3. Counsel had two oral arguments in the Court of Appeals on the week of December 5, 2011. On December 6, 2011 had an oral argument in the case of State v. Daniel Jenkins. On December 7, 2011, counsel argued the case of State v. Robert Phipps. Counsel was in Dorchester County on November 30, 2011 to testify in a Post-Conviction Relief hearing. Counsel filed the petitions for

writ of certiorari and accompanying appendices to the Court of Appeals in State v. Eric Dantzler and State v. Bobby Lee Burdine and filed the initial brief of appellant and designation of matter in State v. Michael Watson on November 22, 2011. Counsel filed the petition for rehearing in Kareem D. Lee v. State on November 17, 2011. Counsel had oral argument in this Court in the case of State v. John Jabar Greene on November 1, 2011.

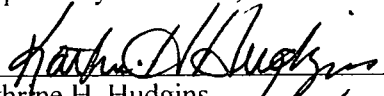
4. Counsel has not had time to complete the petition for writ of certiorari in this case. As a result, counsel respectfully asks this Court for a thirty day extension in which to file the petition for writ of certiorari and accompanying appendix. Counsel is striving to limit the number of extensions requested. Counsel is attempting to complete the cases with the most number of extensions first.

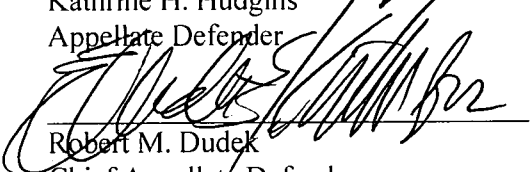
5. As indicated by signature below, Brian Petrano, of the South Carolina Attorney General's Office, does not oppose this request

6. Counsel makes this request in good faith and not for purposes of delay.

Counsel respectfully requests a thirty day extension in which to file the petition for writ of certiorari and accompanying appendix in this case based upon the above circumstances.

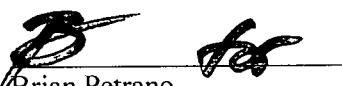
Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender


Robert M. Dudek
Chief Appellate Defender

December 12, 2011

I do not oppose:


Brian Petrano

The Supreme Court of South Carolina

Todd Michael Sowell, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Clifton Newman
Richland County
Trial Court Case No. 2009-CP-40-02686

ORDER

For good cause shown, the request for an extension until December 12, 2011 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

November 14, 2011

cc: Appellate Defender Kathrine H. Hudgins
Assistant Attorney General Brian T. Petrano

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Clifton Newman, Circuit Court Judge

TODD MICHAEL SOWELL,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR WRIT OF CERTIORARI
AND ACCOMPANYING APPENDIX

Counsel for Todd Michael Sowell petitions the Court for a thirty day extension in which to file the petition for writ of certiorari and accompanying appendix in this case. In support of this petition, counsel shows:

1. The petition for writ of certiorari and accompanying appendix are due to be filed with the Court today.
2. Counsel for Mr. Sowell respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required.
3. Counsel filed the initial brief of appellant and designation of matter in State v. Bert Foster on September 7, 2011. On September 12, 2011, counsel filed the petition for writ of certiorari and accompanying appendix in Travis Richardson v. State. Counsel filed the return to petition for writ

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NOV 10 2011

S.C. Supreme Court

(2)


of certiorari in Dorian Cain v. State on September 20, 2011. Counsel filed the petition for writ of certiorari and accompanying appendix in Cody Waters v. State on September 23, 2011. On September 30, 2011, counsel filed the petition for writ of certiorari and accompanying appendix in Terry Smalley v. State. Counsel had three oral arguments scheduled with the South Carolina Supreme Court and South Carolina Court of Appeals during the week of October 3, 2011. Counsel argued In the interest of Justin B., a minor under the age seventeen in the South Carolina Supreme Court on October 4, 2011. On October 5, 2011, counsel argued Kareen Lee v. State and Joseph Walker v. State in the South Carolina Court of Appeals. Counsel filed the initial brief of appellant and designation of matter in State v. Danny Ryant on October 18, 2011. On October 21, 2011, counsel filed the petition for writ of certiorari and accompanying appendix in Troy Zeigler v. State. Counsel filed the petition for writ of certiorari and accompanying appendix in William Wood v. State on October 24, 2011. Counsel file the brief of petitioner in Dana Rikard v. State on October 31, 2011. Counsel also had oral argument in this Court in the case of State v. John Jabar Greene on November 1, 2011.

4. Counsel has not had time to complete the petition for writ of certiorari in this case. As a result, counsel respectfully asks this Court for a thirty day extension in which to file the petition for writ of certiorari and accompanying appendix. Counsel is striving to limit the number of extensions requested. Counsel is attempting to complete the cases with the most number of extensions first.

5. Counsel makes this request in good faith and not for purposes of delay.

Counsel respectfully requests a thirty day extension in which to file the petition for writ of certiorari and accompanying appendix in this case based upon the above circumstances.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

November 10, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Clifton Newman, Circuit Court Judge

TODD MICHAEL SOWELL,

PETITIONER,

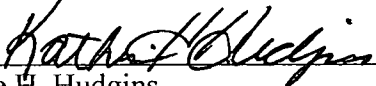
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

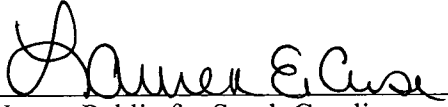
The undersigned attorney hereby certifies that a true copy of the petition for extension of time in which to file the petition for writ of certiorari and accompanying appendix in the above referenced case has been served upon Brian Petrano, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 10th day of November, 2011.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 10th day of November, 2011.



(L.S.)
Notary Public for South Carolina

My Commission Expires: August 23, 2014 .



ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 11, 2011

RECEIVED

OCT 11 2011

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

S.C. Supreme Court

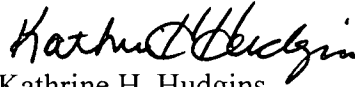
Re: Todd Michael Sowell v. The State

Dear Mr. Shearouse:

The Petition for Writ of Certiorari and accompanying appendix are due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting a thirty day extension in which to serve and file the petition.

By copy of this letter, I am informing Brian Petrano, Esquire, of the Attorney General's Office, of my request.

Sincerely,


Kathrine H. Hudgins
Appellate Defender

KHH/lec

cc: Brian Petrano, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

August 16, 2011
RECEIVED

AUG 17 2011

S.C. Supreme Court

RECEIVED

AUG 18 2011

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

Todd Michael Sowell v. State of South Carolina

8/12/2011

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Sharon A. Graham
Administrative Coordinator



SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

May 17, 2011

RECEIVED

MAY 17 2011

S.C. Supreme Court

Ms. Hilda M. Jordan
Circuit Court Reporter
PO Box 435
Lexington, SC 29071

Dear Ms. Jordan:

Please provide us with the following transcript:

Todd Michael Sowell v. State of South Carolina Case #: 09-CP-40-02686

County: Richland Date of Trial: April 14, 2010

Presiding Judge: Clifton Newman

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

Sharon A. Graham
Administrative Coordinator

cc: S.C. Supreme Court
Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

May 17, 2011

RECEIVED

MAY 17 2011

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

S.C. Supreme Court

Re: Todd Michael Sowell v. State of South Carolina

Dear Mr. Shearouse:

I have had to reorder the transcript in the above-captioned case. The first request was done in a timely manner, but the court reporter has informed us that she did not take the proceedings. I would respectfully request that you start our time schedule for ordering the transcript from today's date.

If you have any questions concerning this matter, please do not hesitate to contact me. Thank you for your assistance in this matter.

Sincerely,

Sharon A. Graham
Administrative Coordinator

cc: Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

May 5, 2011

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MAY - 5 2011

S.C. Supreme Court

Ms. Brenda Sigwald
Circuit Court Reporter
P O Box 206
Jackson, SC 29831

Dear Ms. Sigwald:

Please provide us with the following transcript:

Todd Michael Sowell v. State of South Carolina Case #: 09-CP-40-02686

County: Richland Date of Trial: April 14, 2010

Presiding Judge: Clifton Newman

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

Sharon A. Graham
Administrative Coordinator

cc: S.C. Supreme Court
Attorney General's Office

Tommy A. Thomas

ATTORNEY AND COUNSELOR AT LAW

TELEPHONE:
(803) 732-5507
(803) 732-5508

**HARRINGTON BUILDING
7588 WOODROW STREET
IRMO, SOUTH CAROLINA 29063**

PLEASE REPLY TO:
PO Box 88
IRMO, SC 29063

FACSIMILE:
(803) 781-4226

INMATE LINE
(803) 732-6542

April 21, 2011

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

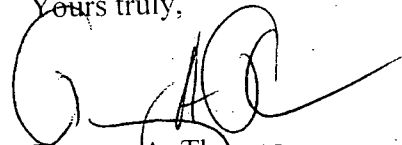
RE: Todd Sowell #238581 v. State of South Carolina
Docket No.: 2009-CP-40-02686

Dear Sir or Madam:

Enclosed please find an Original and a copy of Mr. Sowell's Notice of Appeal, along with a Certificate of Service and attachments.

Kindly return a clocked copy to me in the enclosed envelope. Thank you and should you have any questions, or need any additional information, please do not hesitate to contact me.

Yours truly,


Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: Appellate Defense
Brian Petrano, Esq.
Todd M. Sowell #238581

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APR 25 2011

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief

Clifton Newman, Circuit Court Judge

Case No.: 2009-CP-40-02686

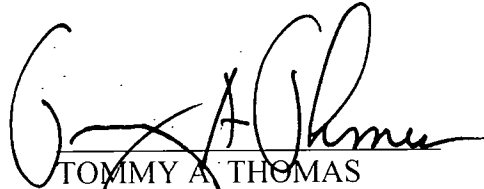
Todd M. Sowell #238581,..... Appellant,

vs.

State of South Carolina,Respondent.

NOTICE OF APPEAL

Todd M. Sowell #238581 appeals the order of the Honorable Clifton Newman dated and filed on April 6, 2011. Appellant received written notice of entry of this order on April 8, 2011.



TOMMY A. THOMAS
Attorney for Appellant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

Other Counsel of Record:

Brian Petrano, Esq.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent

Irmo, South Carolina
April 21, 2011

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APR 25 2011

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief

Clifton Newman, Circuit Court Judge

Case No.: 2009-CP-40-02686

Todd M. Sowell #238581,..... Appellant,

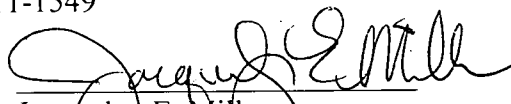
vs.

State of South Carolina,Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Applicant, hereby certify that I placed in the United States Mail, a copy of an Notice of Appeal, with postage prepaid and the return address clearly shown on said envelope to the Attorney General's Office, at:

Brian Petrano, Esq.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549



Jacquelyn E. Miller
Secretary to Tommy A. Thomas
Attorney for Applicant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

Irmo, SC
April 21, 2011

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Todd Michael Sowell, 238581,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina;)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 FIFTH JUDICIAL CIRCUIT

2009-CP-400-2686

ORDER OF DISMISSAL

RICHLAND COUNTY
 FILED
 2011 APR -6 PM 4: 04
 JEANETTE W. McBRIDE
 C.C.P. & G.S.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 14, 2009. The Respondent made its Return on or about July 2, 2009. An evidentiary hearing into the matter was convened on April 14, 2011 at the Richland County Courthouse before the Honorable Clifton Newman. The Applicant was present at the hearing and was represented by Tommy A. Thomas, Esquire. Brian T. Petrano, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

The Applicant testified on his own behalf at the hearing. This Court also had before it a copy of the transcript of the Applicant's trial, the records of the Richland County Clerk of Court, and the Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Applicant was represented by Maxwell G. Schardt, Esquire and E. Deon O'Neil, Esquire. On March 16, 2007, after a jury trial with the Honorable L. Casey Manning, the Applicant was convicted and sentenced to the following:

Grand Jury Term	Indictment Number	Charged Offense:		Sentence Received	Sentenced to Lesser Offense?
6-05	2005GS4000393	CDR - S.C. Code §	*Potential Sentence* Offense Description	20	No
0079 16-11-0311 * 15-L * Burglary / Burglary (After June 20, 1985) - First degree					
NOTES				TOTAL	POSSIBLE
				20	LIFE

A timely Notice of Appeal was filed on Applicant's behalf, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence pursuant to an Anders brief. State v. Todd Sowell, Op. No. 09-UP-040 (S.C. Ct. App. filed January 15, 2009 Remittitur date April 8, 2009).¹

ALLEGATIONS

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

<p>9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:</p> <p>(a) <u>Double jeopardy</u></p> <p>(b) <u>Ineffective assistance of trial counsel; appellate counsel</u></p> <p>(c) <u>Prosecutorial misconduct</u></p>
<p>10. State concisely and in the same order the facts which support each of the grounds set out in (9)</p> <p>(a) <u>Applicant was previously tried for the same act in Magistrate Court, S.C. Code Ann. § 17-23-20 completely bars this prosecution, as well as S.C. Const. Art. I, § 12; USCA Const. Amend 5.</u></p> <p>(b) <u>Ineffective utilization of discovery procedures, failure to 1. subpoena witness; 2. preserve Speedy Trial violation; 3. advice of habeas corpus procedure; 4. assert consent defense; failure to raise preserved issues.</u></p> <p>(c) <u>Unfair or improper remarks about defendant and counsel, reference to previous convictions, presentation of false evidence, material misstatements of law, and fact.</u></p>
<p>18. State clearly the relief you seek in filing this application.</p> <p><u>1. Vacate the judgement of the trial court; 2. Grant the Applicant a relief on specific issues;</u></p> <p><u>3. Revoke and/or Resentence the Applicant's conviction; 4. And further relief as this Court may deem to be just and proper.</u></p>
<p>19. Are you now under sentence from any other court that you have not challenged?</p>

¹ Anders v. California, 386 US 738 (1967).

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, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 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.

The Applicant alleged that Trial Counsel was ineffective for failing to argue consent in his case. However, the evidence in the case would not support an argument of consent. Applicant's statement to law enforcement was admitted at trial. This statement directly contradicted any argument of consent that could have been made. Accordingly, this Court finds that Counsel's failure to argue consent was reasonable under prevailing professional norms when the weight of the evidence would not have borne such a claim. This Court further finds that Applicant failed to demonstrate any prejudice or deficient performance from Counsel's failure to argue consent when that theory was in fact contrary to the weight of the evidence in the case. An obvious twist to this argument was presented at the PCR hearing suggesting that but for ineffective assistance of counsel the statement would not have been admitted. This argument fails because for the Applicant to attempt to argue consent he would have to testify to the same, doing so would be contradicted by the statement and the statement (or its premise if making the statement was denied) would have been admissible as a prior inconsistent statement. *See generally* Rule 613(b), SCRE.

The Applicant further alleged that Trial Counsel was ineffective for failing to develop any theory of defense. Applicant then testified that Counsel had a theory of defense, it just was not effective. The Applicant testified that Trial Counsel told Applicant he was going to try to convince the jury that at the point Applicant entered the victim's home, he lacked the intent to commit a crime, an essential element of burglary. Applicant testified that Counsel failed to get medical records to prove that Victim was hospitalized for an unrelated condition, however,

hospitalization is not an element of Criminal Domestic Violence; the crime upon which the elements of the burglary somewhat overlapped, only harm or "offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril," is necessary to constitute Criminal Domestic Violence. S.C. Code Ann. § 16-25-20 (2003). Accordingly, proceeding on the theory that Applicant lacked the intent to commit a crime, without raising the fact that Victim was in the hospital is not indicative of a failure to develop a theory of defense. This Court finds that this allegation is without merit and is hereby denied and dismissed.

The Applicant then alleged that Trial Counsel improperly referred to Applicant's statement as a "confession." Trial Counsel called the statement given to police by Applicant after the crime a confession throughout the trial and in his closing argument. Counsel, in his closing argument noted that he and the solicitor had been calling this statement a confession, and used the term to stress the honesty of Applicant. Trial Counsel, in using the term confession spoke of how Applicant had "confessed" to several elements, and several unsavory details, but stated that the confession was really "a statement of [Applicant]'s innocence" because it lacked any intent to commit a crime when he entered his old residence. The use of the term "confession" was in fact obviously an attempted strategy by trial counsel to bolster the credibility of Applicant in pursuing the theory that Applicant lacked the intent to commit a crime and therefore could not be guilty of burglary. (Trial Transcript, p. 288, 293, 296). Accordingly, Counsel's failure to object to the term does not constitute deficient representation when Counsel's use of the term was in an effort to assist the Applicant. Therefore, this Court finds that this allegation is hereby denied and dismissed.

The Applicant further alleged that Trial Counsel was ineffective for failing to challenge the admission of his CDV conviction pursuant to Rule 403, and 404, SCRE. The CDV conviction, however was not used as character evidence or give the impression that Applicant was predisposed to some sort of mischief, but to establish some of the elements of burglary, i.e., that the Applicant had the intent to commit a crime in the dwelling he entered. Rule 404 SCRE. Rule 403, SCRE permits exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403 SCRE. However, while the evidence of a conviction may be prejudicial to a defendant, in a burglary case, where intent to commit a crime inside the dwelling is an essential element of the crime, the probative value of evidence of the crime being committed clearly outweighs the prejudicial effect. Once, again, it is also obvious rebuttal evidence concerning the Applicant's claim that he did not intend to commit a crime when he entered his former residence. The Applicant pled guilty to a CDV for hitting the victim, which is relevant to what his intentions were when he entered the house.² It cannot be said that had Counsel made the motion at issue he would likely have prevailed. Accordingly, this Court finds that this allegation is without merit and is hereby denied and dismissed.

The Applicant next alleged that Trial Counsel and Appellate Counsel both provided ineffective assistance by failing to argue that being subjected to prosecution for the Burglary charge, after pleading guilty to the Criminal Domestic Violence charge arising from the same incident amounted to Double Jeopardy.

"The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense."

² This Court notes that the CDV and Burglary charges do somewhat overlap considering they are from the same incident involving the Applicant and his former girlfriend that evening.

State v. Elders, 386 S.C. 474, 481, 688 S.E.2d 857, 861 (Ct. App. 2010) quoting Stevenson v. State, 335 S.C. 193, 198, 516 S.E.2d 434, 436 (1999). See U.S. Const. amend. V (“No person shall be ... subject for the same offence to be twice put in jeopardy of life or limb ...”) “In both multiple punishment and successive prosecution cases, double jeopardy claims are evaluated under the “same elements” test set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).” Elders, at 481, 688 S.E.2d at 861 (Ct. App. 2010). “[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” Blockburger, 284 U.S. at 304, 52 S.Ct. 180; “Under the Blockburger test, a defendant may be convicted of two separate crimes arising from the same conduct without being placed in double jeopardy where his conduct ‘consists of two “distinct” offenses.’ ” Elders, at 482, 688 S.E.2d at 861 (2010), citing State v. Pace, 337 S.C. 407, 417, 523 S.E.2d 466, 471 (Ct.App.1999) (quoting State v. Moyd, 321 S.C. 256, 258, 468 S.E.2d 7, 9 (Ct.App.1996)); accord State v. Hall, 280 S.C. 74, 77, 310 S.E.2d 429, 431 (1983); State v. Steadman, 216 S.C. 579, 589, 59 S.E.2d 168, 173 (1950); State v. Lewis, 321 S.C. 146, 148, 467 S.E.2d 265, 266 (Ct.App.1996).

“A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or the entering or remaining occurs in the nighttime.” S.C. Code Ann. § 16-11-311 (1995). Conversely, to establish that a person is guilty of Criminal Domestic Violence, the State must prove that the defendant “cause[d] physical harm or injury to a person's own household member” S.C. Code Ann. §16-25-20 (2003). A household member for purposes of the

criminal domestic violence statute is defined by the legislature as “a male and female who are cohabiting or formerly have cohabited” S.C. Code Ann. 16-25-10 (2005) (emphasis supplied).

Upon application of the Blockburger test, the transaction at issue here clearly violated two separate and distinct statutory provisions, and therefore did not subject the Applicant to “double jeopardy”. Burglary requires the element that the perpetrator have two or more previous convictions, or that the crime is committed at night. Criminal Domestic Violence requires that the perpetrator harm a household member. Accordingly, prosecution for these separate and distinct statutory provisions was proper. Because the prosecutions did not violate the constitutional prohibition on “double jeopardy”, it cannot be said that submission of this argument against them would likely have resulted in a different outcome. Further, Applicant testified that his pro se brief to the Court of Appeals during the course of his direct appeal contained a challenge on this very ground, meaning this very issue has been previously presented to the court. Therefore, it is the finding of this Court that the allegations that Trial and Appellate Counsel were ineffective for failure to argue that the prosecution constituted impermissible “double jeopardy” is without merit and is hereby dismissed. Finally, regarding the first degree burglary charge, the *intent to commit a crime* element of burglary can be satisfied from trespass, or it can be inferred from the breaking and entering if done so at night. McMillian v. State, 383 S.C. 480, 680 S.E.2d 905 (2009). Accordingly, the evidence against him is overwhelming considering that his own statements (and testimony at the PCR hearing) establish all of the elements except for his disagreement of *intent to commit a crime*; when, as explained throughout,

intent to commit a crime is clearly established in this case by more than one means. Therefore, the Applicant has failed to demonstrate any prejudice.³

³ While it appears on the surface that the Applicant received a twenty (20) year sentence for a CDV crime, it is not this Court's function to second guess the Solicitor's discretion to also seek a first degree burglary charge even though some of the elements in this case overlap between CDV and first degree burglary.

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. Counsel was not deficient in any manner, nor was Applicant prejudiced by counsel's representation. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. As to any and all allegations that were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice. 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.

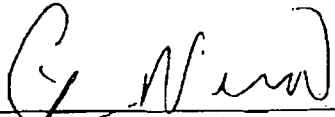
This Court cautions the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453

(1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), 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. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

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.

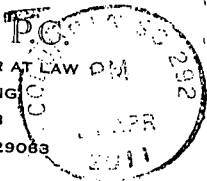
AND IT IS SO ORDERED this 6th day of April, 2011.



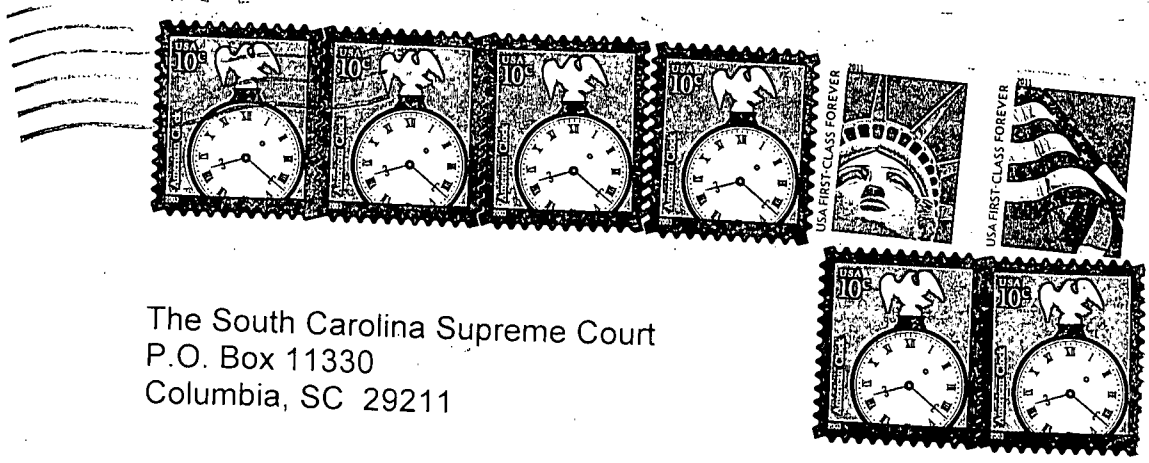
Clifton Newman
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