STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
J. Ernest Kinard, Jr., Presiding Judge

2011-CP-40-1921

DAYDRIAN J. ROUSE, #342518 Applicant,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

NOW COMES the Applicant in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned counsel, giving notice of his appeal from the Order of Dismissal denying his Post-Conviction Relief filed April 11, 2013, and the Order Denying the Applicant's Motion to Alter or Amend pursuant to Rule 59(e) SCRCP which was filed with the Richland County Clerk of Court on May 21, 2013.

Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803)738-8622
(803)738-1600 FAX

ATTORNEY FOR APPLICANT

This 4th day of June, 2013.

Other Counsel of Record:
Megan Harrigan, Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3319

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THE STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Applicant's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Meagan Harrigan, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 4th day of June, 2013.

Tara Dawn Shurling
Attorney and Counselor at Law

SWORN TO BEFORE me this 4th day of June, 2013.

Notary Public for South Carolina
My Commission Expires: 2/28/2023

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2011CP4001921

Daydrian J #342518 Rouse
PLAINTIFF(S)

State of South Carolina
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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ 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:

RICHLAND COUNTY FILED 2013 MAY 21 PM 4:37 JEANETTE W. McBRIDE C.C.P. & G.S.

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 21 May 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Tara Dawn Shurling | Daydrian J #342518 Rouse | Robert Daniel Corney

Daydrian J #342518 Rouse
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____ **Clerk of Court** Jeanette W. McBride

RECEIVED
MAY 28 2013
LAW OFFICE OF
MAS [illegible] PA

SCRCP Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Daydrian J. Rouse, # 342518, Applicant, v. State of South Carolina, Respondent.	**2011-CP-40-01921** **ORDER**

On March 25, 2013 the Applicant's attorney executed and forwarded a Motion to Alter or Amend the Order of Dismissal filed around 4/11/13. The Order of Dismissal was 22 pages in length and addressed in detail the reasons for denial and, I feel, adequately addressed the allegations raised by the Applicant and addressed by Applicant's proposed Order under Section A as allegations 1, 2, 8, 15, 17, 18, and 19. In any event I have reread the Order I executed and all documents presented and have considered all allegations raised in the 59(e) Motion. While the Applicant would like for me to discuss with greater specificity each of his allegations, I decline to alter or amend the Order of Dismissal I executed. Accordingly, Applicant's Motion to Alter or Amend is **DENIED.**

J. Ernest Kinard, Jr.
Presiding Judge for the Fifth
Judicial Circuit

Beaufort, SC
May 8, 2013

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGM. IN A CIVIL CASE

CASE NUMBER: 2011CP4001921

Daydrian J #342518 Rouse
PLAINTIFF(S)

State of South Carolina
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.

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☐ **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 11 April 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Tara Dawn Shurling — Daydrian J #342518 Rouse — Robert Daniel Corney

Daydrian J #342518 Rouse

ATTORNEY(S) FOR THE PLAINTIFF(S) — **ATTORNEY(S) FOR THE DEFENDANT(S)**

Court Reporter _____ **Clerk of Court** Jeanette W. McBride

APR 15 2013
LAW OFFICE OF TARA DAWN SHURLING, PA

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Daydrian J. Rouse, # 342518, Applicant, v. State of South Carolina, Respondent.	)	**2011-CP-40-01921** **ORDER OF DISMISSAL**

2013 APR 10 PM 2:59

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 22, 2011. The Respondent made its Return on September 19, 2011. An evidentiary hearing into the matter was convened before this Court on Monday, September 10, 2012, at the Richland County Courthouse. The Applicant was present at the hearing represented by attorney Tara D. Shurling, Esquire. The Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying were Applicant's former plea attorneys, George Johnson, Esquire, and Yvonne Murray-Boyles, Esquire, (collectively referred to herein as "counsel"); Applicant's counsel on the motion for reconsideration, Michael Coleman, Esquire; and Applicant's father, Ernest Rouse . This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Richland County Clerk of Court, and the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant was true bill indicted at the July 2009 term of the Richland County Grand Jury for Hit and Run – Great Bodily Injury and two (2) counts of Assault and Battery with Intent to Kill ("ABWIK") (2009-GS-40-03721 through -03723). George Johnson, Esquire, and Yvonne Murray-Boyles, Esquire, represented him on the charges. On August 30, 2010, Applicant proceeded to jury trial before the Honorable G. Thomas Cooper, Jr.

After jury selection but before the jury was sworn-in by the court, Applicant waived the jury trial and entered guilty pleas to Hit and Run – Great Bodily Injury and the lesser included Assault and Battery of a High and Aggravated Nature ("ABHAN"), as well as entered an Alford[1] plea to the remaining Assault and Battery with Intent to Kill. Judge Cooper sentenced Applicant without recommendations or negotiations to ten (10) years imprisonment each for ABHAN and Hit and Run, and fifteen (15) years imprisonment suspended to service of ten (10) years in jail and five (5) years probation on the ABWIK. The ABWIK was to be converted to a straight ten (10) year sentence with no suspended probationary period upon Applicant's payment of twenty-thousand dollars ($20,000) restitution to victim. All sentences were to run concurrently.

A motion for reconsideration was filed on Applicant's behalf and a hearing was convened on the motion on November 8, 2010, before Judge Cooper. Applicant was represented by Michael Coleman, Esquire, at the hearing. At the close of the hearing, Judge Cooper denied Applicant's request to reconsider the sentence previously imposed.

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

[1] North Carolina v. Alford, 400 U.S. 91 (1970).

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) The Applicant received Ineffective Assistance of Counsel prior and during his plea in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution.

(b) The Applicant's pleas of guilty were not voluntary and intelligently entered. The judgments and sentences against the Applicant were entered in violation of his rights to due process of law and effective assistance of counsel.

(c) ____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Trial Counsel failed to adequately investigate the Applicant's charges, failed to investigate and interview potential witnesses and failed to give his client adequate legal advise prior to the Applicant's guilty plea proceeding. Trial counsel failed to fully advise the Applcant of the consequences of his pleas and further failed to investigate defenses against the charge against the Applicant. Trial Counsel neglected to adequately review discovery materials with the Applicant.

(b) Counsel failed to provide client effective assistance of counsel prior to and during his guilty plea proceeding. The Applicant's pleas of guilt were coerced by counsel's failure to provide adequate representation.

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), SCRCP; 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.

Failure to Advise Applicant of Sentencing Range

Applicant first contends counsel was ineffective for failing to advise him prior to the entry of his plea of the sentencing range associated with the pending charges. Specifically, Applicant testified counsel failed to advise him there was a mandatory minimum sentence associated with the Hit and Run charge which Applicant would be required to serve if he pled guilty to the charge as indicted. Applicant testified at the PCR hearing that had he known there

was a mandatory minimum sentence associated with the charge, he would not have pled guilty to it.

Counsel testified at the PCR hearing that he was retained to represent Applicant by Applicant's parents within one week of the incident, at which time Applicant had not yet been charged. He stated he reviewed all of the evidence against Applicant with him in their pretrial meetings and Applicant was well aware of his right to take the case to trial if he wished to do so. Regarding the sentencing range Applicant was facing on the charges, counsel said he reviewed all of the potential penalties for each charge with Applicant during their meetings, thereafter noting the Hit and Run charge carried a mandatory minimum thirty (30) day sentence. When questioned further on the subject, counsel explicitly testified he was sure based on their discussions that Applicant knew the Hit and Run charge carried a mandatory minimum sentence.

This Court finds this allegation to be without merit. As an underlying matter applicable to the entirety of this Court's ruling on each of the allegations raised, this Court finds Applicant's testimony to be not credible, while conversely finding counsel's testimony to be very credible. Accordingly, the credible evidence presented to this Court indicates counsel *did* in fact undertake a reasonable and appropriate review of the potential sentencing ranges Applicant was facing with Applicant in advanced of the plea hearing, including the thirty (30) day mandatory minimum sentence carried by the Hit and Run charge. [2] Applicant was well aware of the sentencing range he was facing for the Hit and Run charge, including the mandatory minimum. His contention to the contrary is not credible. Therefore, this allegation is denied as Applicant has failed to prove how counsel's performance was deficient in this regard.

Failure to File Motion to Elect/Failure to Challenge Double Jeopardy

[2] Under S.C. Code 56-5-1210(A)(2), a person who fails to stop or otherwise comply with the code section when great bodily injury results is guilty of a felony and must be imprisoned not less than thirty (30) days nor more than ten (10) years.

Applicant next alleges counsel was ineffective for failing to file a pretrial motion to require the state to elect which charges to pursue against Applicant. Specifically, Applicant contends counsel's failure to file a motion to elect between the Hit and Run charge and the Assault and Battery with Intent to Kill charge allowed the state to prosecute Applicant for two charges in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Applicant testified at the PCR hearing he was willing to enter a guilty plea to the Hit and Run charge as indicted, but was unwilling to concede that he had intended to kill the victim.

Counsel testified he did not file a motion to elect between the charges on Applicant's behalf, nor did he recall whether he ever considered filing such a motion. Counsel stated he did review the statutory language of each charge prior to Applicant's plea, and noted there is a difference in the intent required between the two charges. Counsel went on to say while ABWIK allows for general intent or recklessness, Hit and Run requires specific inappropriate conduct by the driver involved. He conceded he did not make a double jeopardy argument to the charges on Applicant's behalf either. Counsel also noted he did not recall discussing with Applicant the possibility of having the Hit and Run charge dropped through directed verdict or otherwise "absorbed" into the ABWIK charge. On cross-examination, counsel stated he believed the two charges did not constitute impermissible double jeopardy as each required different elements to be proven than the other, in particular noting Hit and Run requires proof of "reckless indifference".

After a thorough review of the testimony and the record, this Court finds counsel was not ineffective in this regard as Applicant has failed to prove counsel's performance was objectively unreasonable in failing to file such a motion. Further, Applicant failed to prove there is a

reasonable probability such a motion would have been successful if filed, and failed to prove had such a motion been made he would not have pled guilty but rather insisted upon going to trial.

"[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied as 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 v. U.S., 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932). "Accordingly, a defendant may be convicted of two separate crimes arising from the same conduct without being subjected to double jeopardy, where [the] conduct 'consists of two distinct offenses'." State v. Pace, 337 S.C. 407, 523 S.E.2d 466 (Ct. App. 1999), *quoting* State v. Moyd, 321 S.C. 256, 258, 468 S.E.2d 7, 9 (Ct. App. 1996). Further, when a single act combines the requisite ingredients of two or more distinct offenses, the State can indict a defendant for all of the charges arising therefrom without electing between them. State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989).

Of the charges, both the Hit and Run Resulting in Great Bodily Injury and one count of Assault and Battery with Intent to Kill were premised on Applicant's collision with Justin Boyd. Applicant's contention that the two charges cannot be brought simultaneously as such would violate double jeopardy is without merit under the Blockburger "same-elements" test. Under S.C. Code § 56-5-1210(A)(2), the Hit and Run Resulting in Great Bodily Injury statute requires "the driver of a vehicle involved in an accident resulting in injury to...a person" to "immediately stop the vehicle at the scene of the accident or as close to it as possible" and to "return to...and remain at the scene of the accident until he has fulfilled the requirements of Section 56-5-1230". Conversely, Assault and Battery with Intent to Kill requires proof of the accused performing an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied. State v. Kinard, 373 S.C. 500, 646 S.E.2d 168 (Ct. App. 2007). "'Malice

aforethought' is defined as 'the requisite mental state for common-law murder' and it utilizes four possible mental states to encompass both specific and general intent to commit the crime", including "intent to kill, intent to inflict grievous bodily harm, extremely reckless indifference to the value of human life...and intent to commit a felony". Id. at 503 – 504, 646 S.E.2d at 169.

Based on the above, it is clear each charge requires proof of wholly separate and distinct elements from the other, thereby rendering the state's indictment and pursuit of both charges proper. According to counsel's credible testimony, he was aware the two required proof of separate and distinct elements, including different forms of intent. Therefore, counsel was not unreasonable in not filing a motion to elect, nor in failing to pose a double jeopardy argument to the court or otherwise discussing a possible directed verdict on one of the charges based on double jeopardy with Applicant. Further, in reviewing the language of the crimes under the Blockburger test, this Court finds such motions/arguments would have been unsuccessful if raised by counsel and, therefore, Applicant cannot prove prejudice as the motions/arguments would have been fruitless. Finally, Applicant has failed to convince this Court that, had such a pretrial motion to elect been made and been successful in disposing of either one of the charges, he would not have pled but rather insisted upon proceeding to trial. Therefore, he has failed to satisfy his burden of proof. Accordingly, this allegation is denied.

Failure to Investigate Torry Shaw and Review Potential Impeachment

Applicant asserts counsel was ineffective in his representation for failing to fully investigate and discuss with Applicant the potential testimony of Torrence "Torry" Shaw ("Shaw"), who was in the car with Applicant at the time of the incident. At the PCR hearing, Applicant testified he was aware Shaw had given two statements to law enforcement about the crash as he had reviewed them prior to the plea hearing, but said counsel failed to review with

him the possibility of impeaching Shaw's testimony at trial based on inconsistencies in the two statements. Applicant noted he was also aware Shaw had pending charges at the time of the trial.

Counsel testified he was able to review the entire discovery file with Applicant upon his receipt of such, which included the two statements given to law enforcement by Shaw detailing the accident. He noted the two statements did have some minor differences in facts as to the color clothing victim was wearing and whether Applicant slowed down at all before/after hitting victim. Counsel stated while he initially did not think Shaw's second statement was all that damaging to Applicant's case, Shaw's attorney (Jason Peavy, Esquire) advised counsel by letter dated August 27, 2010, that Shaw would be testifying against Applicant at trial. Counsel testified he was never able to interview Shaw as he was represented by Peavy, who refused to allow such an interview. Counsel said he reviewed all of this with Applicant, but could not definitively recall whether he reviewed with Applicant potential impeachment of Shaw at trial based on the inconsistencies and Shaw's pending charges. He did, however, review all of the potential witnesses' testimonies that would be presented at trial with Applicant as well as the ability to cross-examine those witnesses at trial to call their reliability into question. Counsel said Applicant seemed to fully understand all of this based on their discussions. Counsel later reiterated Applicant was aware counsel would have the opportunity to cross-examine all of the state's witnesses to call their credibility and version of facts into question.

Thereafter, counsel's second chair, Yvonne Murray-Boyles ("Murray-Boyles"), testified she became involved in the case in July of 2010, after which she attended several meetings between counsel and Applicant, as well as interviewed several witnesses. Murray-Boyles specifically noted she and counsel reviewed Shaw's statements with Applicant and his potential testimony at trial, as well as reviewed how that testimony could be challenged or refuted at trial.

She finished by saying based on her pre-plea discussions with Applicant, he was well aware he would be fully waiving his right to challenge the state's evidence by entering a guilty plea.

This Court finds counsel was not ineffective in this regard. Counsel's credible testimony reflects he did in fact review with Applicant his ability to cross-examine all witnesses presented at trial by the state to call their reliability and credibility into question regarding their recollection of the night in question. While counsel was unable to definitively testify as to whether he used the language "impeachment" in those discussions, or if he specifically explained the method he would use for impeachment, such testimony is unnecessary for this Court to make the definitive determination that Applicant was fully aware of the ability to challenge the accuracy of Torry's statements law enforcement and testimony presented at trial. Applicant, fully cognizant of that possibility, made the informed and voluntary decision to waive that right in order to accept an advantageous plea offer from the state under which one count of ABWIK was reduced to ABHAN. Applicant has failed to prove counsel's performance was objectively unreasonable in this regard.

Further, this Court finds Applicant's contention that he would have gone to trial but-for counsel's failure to advise him of the ability to impeach Torry's statements to be **not** credible based on the testimony presented and record before this Court. Applicant was facing a plethora of incriminating evidence tending to prove his guilt to the charges regardless of Torry's statements/testimony, including the potential testimony of numerous eye-witnesses at trial and Applicant's own statement to law enforcement admitting he had been driving and did not stop after hitting victim.[3] In fact, counsel's credible testimony was there "wasn't much evidence favorable" to Applicant in the case. Rather, the record reflects it was the opportunity to accept

[3] Based on counsel's credible testimony, a pretrial Jackson v. Denno hearing to suppress Applicant's statement to law enforcement had been finished prior to the start of Applicant's trial, which was unsuccessful.

the advantageous plea offer which swayed Applicant's decision to proceed to trial, as it wasn't until after jury selection that the state extended the offer and Applicant chose to accept it. Therefore, this Court cannot find any reasonable probability that counsel's alleged failure to review potential impeachment of witnesses was the factor upon which Applicant's decision to plead guilty was rooted. Accordingly, Applicant has also failed to prove resulting prejudice.

Failure to Challenge Evidence of Intent at Plea Hearing

Applicant alleges counsel was ineffective in his representation for failing to challenge the state's factual summation of the evidence in the case tending to prove the intent element of the crimes charged. Specifically, Applicant contends counsel was ineffective in failing to contest the state's presentation of Applicant's actions directly after the crash and regarding Applicant "chirping" his tires as they were improper comments tending to prove the intent element of the crimes.

During his PCR testimony, Applicant stated he never had the specific intent to kill the victim as the crash was an accident in which he did not see victim crossing the road prior to hitting him. He went on to say he was willing to plead guilty to the Hit and Run charge because he did leave the scene of the accident improperly, but was unwilling to admit guilt to the ABWIK as he never had the intent to hurt victim. The evidence presented by the state at the guilty plea, Applicant said, should have been challenged by counsel as it tended to insinuate he hit victim on purpose.

Counsel testified that at the time of Applicant's guilty plea, he was prepared to go to trial with Applicant where he would have presented an "accident" defense based on Applicant's rendition of the facts. He noted the ABWIK charge related to the secondary victim was reduced to ABHAN based on that victim having been hit with Applicant's side-view mirror with enough

force to break the mirror off. Counsel said while Applicant believed the facts presented by the solicitor regarding the accident were not entirely correct at the plea hearing, that contention was of little consequence to the decision to plead because Applicant had confessed to driving the car that night and leaving the scene of the accident. Further, Applicant pled guilty to the ABWIK charge relating to the main victim under North Carolina v. Alford, under which Applicant can plead guilty while maintaining his disagreement with the facts presented. Counsel went on to say he did not believe a plea hearing is the appropriate place to argue the case and said Applicant knew he was waiving his right to do so by entering the pleas as he did. Counsel also noted there were some eye witness statements provided in discovery which in fact did reference Applicant having revved his engine and/or "chirped" his tires prior to and after the accident, so the statements were supported by evidence. He also noted the victim and those witnesses were present in the courtroom on the day of the plea and would have testified at trial to the same before the jury had Applicant proceeded.

Counsel went on to say he didn't want to specifically harp on Applicant's actions after the accident as they were not flattering to Applicant's case, but noted he did provide the court with Applicant's reason for going to McDonald's directly after the fight to mitigate the state's presentation of that fact, which involved his passenger's need to take pain medication as a result of the fight. Counsel testified there was "a lot" of evidence in the discovery file that gave him concerns about Applicant's chances at trial, all of which he reviewed with Applicant and Applicant's family. Counsel said there was evidence which seemed to indicate Applicant attempted to hide his car after the accident to avoid detection, but he did challenge those facts in mitigation by saying Applicant didn't want to drive a car with a broken side view mirror.

Finally, Murray-Boyles gave limited testimony on the subject, saying Applicant was well aware that by pleading guilty he would be waiving his right to challenge the entirety of the state's evidence at trial, and was waiving his right to present evidence in his defense to prove his lack of intent.

This Court finds this allegation to be without merit. Counsel's performance was reasonable in attempting to challenge the facts provided by the state which tended to indicate intent where practical, while keeping in mind Applicant was entering a guilty plea for the charges and waiving his right to challenge the evidence at trial. The arguments presented by counsel in that regard were well within the wide range of competence required of defense attorneys during mitigation at a guilty plea hearing and Applicant has failed to prove otherwise. Counsel was clear in indicating his intention to avoid placing blame on victim or "putting victim on trial" through arguments at the plea hearing as counsel believed those arguments "would not go over well" with the plea judge. With the testimony presented and a review of the record, this Court finds counsel was not deficient in this regard.

Further, this Court finds no reasonable probability that had counsel presented some further argument in mitigation challenging the state's presentation, the plea judge would have imposed a lesser sentence. In fact, accepting responsibility for his wrongful conduct where applicable and saving the severely injured victim from a lengthy trial likely proved beneficial to the sentence imposed. Accordingly, this allegation is denied as Applicant has failed to prove counsel was ineffective in this regard.

Failure to Object to Restitution Portion of Sentence

Applicant alleges counsel was ineffective in failing to object to the plea judge's imposition of a monetary reimbursement for victim's medical bills as part of the criminal

sentence imposed pursuant to the pleas. Applicant testified at the PCR hearing he did not recall ever being advised by counsel or the plea judge there was a potential that restitution could be imposed as part of the sentence and said he was entirely unaware he was entitled to a restitution hearing prior to such an imposition. Applicant stated there was no restitution hearing held, but he was given roughly thirty (30) minutes alone with his family at the courthouse to decide whether to accept the state's plea offer after the jury was selected in his case.

Counsel testified there were no plea negotiations entered into with the state prior to trial despite his attempts throughout the process, as the prosecuting solicitor made it clear the only offer would be for Applicant to plead guilty "straight up". After the start of trial and jury selection, counsel said, he and the solicitor met in chambers with Judge Cooper where the state made a plea offer for Applicant to plead guilty to the lesser included ABHAN for the secondary victim (Pringle) as opposed to ABWIK, and Applicant would be allowed to plead under North Carolina v. Alford to the ABWIK relating to the main victim. Counsel testified he was provided with the medical records of the main victim's injuries, but noted they were not needed as that victim's injuries "were obvious". Counsel stated he did not recall discussing potential restitution as part of the sentence with Applicant or Applicant's family prior to the plea and agreed generally a separate hearing must accompany the imposition of restitution. However, counsel stated he did not object to the court's imposition of the twenty-thousand dollar reimbursement as part of the sentence as he "thought that the $20,000 was in [Applicant's] benefit". Counsel noted he did not believe the fine imposed was presented as "restitution", but rather as a way to assist victim because of the lack of insurance on the car involved in the crash. Counsel plainly stated "it was [his] understanding at the time of the plea that the funds were available" to pay the fine imposed and lessen Applicant's sentence by five years in doing so.

On cross-examination, counsel testified pictures of the victim showing the extent of his injuries were included in the discovery file, and he noted victim has to have part of his skull removed as a result of this incident. Counsel stated the plea judge at one point went off the record in chambers to call the Department of Corrections to ask about fashioning a sentence for Applicant which would entail the imposition of a monetary reimbursement for victim. Counsel said he discussed the potential imposition of a monetary obligation with Judge Cooper in chambers thereafter, and said he was able to discuss such with Applicant's father as well to determine whether they would be able to make such a payment if imposed. Counsel said based on those discussions, he was under the impression Applicant and Applicant's family would be able to make that payment if imposed; he also noted they were "on board" with the monetary sentence being imposed if it gave Applicant the opportunity to reduce his jail sentence. Counsel plainly testified he was "sure" the discussions about imposition of a monetary obligation as part of the criminal sentence were had in Applicant's presence with Applicant's family.

Counsel for Applicant on the motion to reconsider sentence, Michael Coleman, Esquire (hereafter "Coleman") testified at the PCR hearing as well. Coleman said at the time of his representation, he and Applicant's family were both aware of the twenty-thousand dollars ($20,000) in restitution imposed by the plea judge as part of the criminal sentence, but said they "weren't really concerned about the money at the time", so that portion of the sentence wasn't challenged through the motion.

Thereafter, Applicant's father, Ernest Rouse, Jr. (hereafter "Rouse"), testified, saying during a break in the plea hearing when Judge Cooper left the courtroom, counsel "reached over and briefly talked about something about restitution" with him. Rouse said counsel "mention[ed] something about $20,000 at that particular time", but said it was unclear whether he indicated

any willingness to pay that amount if such was imposed. Rouse noted that restitution amount was, in fact, never paid on Applicant's behalf.

After a thorough review of the record and testimony presented, this ground for relief is denied. To reiterate, this Court finds counsel's testimony to be credible, while conversely finding the testimonies of Applicant and Applicant's father (Rouse) to be not credible. According to the record before this Court, Judge Cooper sentenced Applicant to fifteen (15) years imprisonment suspended to service of ten (10) years and five (5) years of probation, as well as restitution in the amount of twenty-thousand dollars ($20,000) for the ABWIK on the primary victim. The judge went on to say if the restitution was paid on or before January 1, 2011, the sentence would be reduced to a "straight" ten (10) year sentence with no probationary period.

Based upon the credible evidence presented at the PCR hearing, counsel acted reasonably in failing to pose an objection to the imposition of restitution as part of the criminal sentence as both Applicant and Applicant's family were "on board" with the restitution imposed as a means to reduce Applicant's sentence. In fact, counsel credibly testified Applicant's family made it clear to him they would be able to make the payment prior to the deadline imposed, thereby reducing Applicant's criminal sentence. While S.C. Code § 17-25-322 does require a hearing be held to determine the amount of restitution to be given to the victim of a crime, counsel articulated a valid, strategic reason for not requesting such a hearing based on Applicant's family's representations to him about their ability to pay the obligation and his belief that the imposition of the monetary obligation as a means to reduce Applicant's criminal sentence was beneficial to Applicant. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992) ("Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance."). Counsel's credible testimony reflects Applicant's family

and Applicant himself likewise believed the sentence imposed was advantageous as it allowed the sentence to be reduced upon payment. Therefore, counsel's strategy in allowing the sentence to be imposed without a full restitution hearing was objectively reasonable.

Further, counsel's evaluation of the restitution imposed as being "beneficial" to Applicant is justifiable and supported by the record before this Court, as the testimony reflects victim incurred medical costs more than fifty (50) times greater than the $20,000 fine imposed as a result of Applicant's unlawful actions. Applicant could have been ordered to pay the entirety of the medical bills had such a restitution hearing been held and detailed medical bills been presented to the plea judge. Counsel testified he had the medical records of victim at the time of the plea hearing and noted the injuries victim suffered as a result of the incident were "obvious". Accordingly, this Court finds counsel's informed decision not to object to the imposition of the monetary portion of the sentence to be objectively reasonable in light of the facts of this case. Accordingly, this Court finds counsel's performance was not deficient.

This Court also finds Applicant has failed to prove but-for counsel's failure to pose such an objection to the restitution imposed, he would not have pled but rather insisted on going to trial where he faced much more jail time and restitution costs far in excess of those actually imposed. Additionally, Applicant has failed to prove had counsel posed such an objection and a hearing been held, there is a reasonable likelihood the amount of restitution would have been less than the amount imposed by Judge Cooper.[4] Furthermore, it is highly likely that the amount of restitution imposed would have been much higher had such a hearing taken place. Accordingly, Applicant has failed to prove resulting prejudice as well and this allegation must be denied.

[4] Applicant at one point noted he had received documents in the on-going civil case relating to the incident which were never supplied by the state in the criminal matter through Rule 5 or Brady; this Court would note Applicant failed to produce any such documents at the PCR hearing to substantiate that claim or to otherwise prove what effect those documents could have had on the case had they been uncovered. Therefore, Applicant failed to carry his burden in this regard as well and failed to prove the restitution costs would have been less had a hearing been held.

Failure to Present Sufficient Argument in Mitigation

Applicant contends counsel was ineffective in his presentation of mitigating evidence on Applicant's behalf as counsel failed to present a sufficient argument to lessen Applicant's respective culpability for the accident. Applicant testified while counsel introduced evidence of his good character and being a good student in mitigation, he failed to present other positive traits of his in mitigation and failed to set forth discrepancies in the evidence to mitigate his culpability.

Counsel testified the defense theory he planned to present at trial was one of "accident", but said when it comes to mitigation following a guilty plea there is a different strategy in presenting the facts of the case as a lot of judges are interested in hearing the defendant accept responsibility for his actions. In this particular case, counsel said, he did not want to present mitigating evidence that would "put the victim on trial or blame the victim" as he didn't think "that would go over well" with the plea judge when it came to sentencing. He noted his belief that mitigation is not the right time to argue the merits of the case as he would at trial. Counsel conceded there were some discrepancies in the evidence as to whether Applicant was "revving his engine" or "chirping" the tires before/after the collision. He also stated he did not want to harp too much on the alleged inconsistencies in the statements of the witnesses as there were some witness statements indicating after the incident Applicant had gone to McDonald's, then driven back by the scene revving his engine while victim still laid severely injured in the street.

After a thorough review of the mitigation presented at the plea hearing, in conjunction with the PCR testimony and the remaining portions of the record, this Court finds counsel was not ineffective in this regard. At the close of the plea hearing, counsel requested sentencing be

deferred until the following day to allow for Applicant's presentation of mitigation from family members on his behalf.

The following day, the matter was reconvened for sentencing at which five individuals spoke on Applicant's behalf in mitigation in addition to the introduction of several letters written on Applicant behalf and Applicant's own plea for mercy from the court. At the close of the state's summary of facts, counsel specifically noted he wished to address some of the alleged facts set forth by the state, which he was able to do as part of his mitigation thereafter. During such, counsel called several of the state's factual representations into question including the identity of the person saying they were "going to get the Omegas", the reason for Applicant going to McDonald's after the incident, his rationale for not stopping at the scene, and his willingness to cooperate with law enforcement the day following the accident. Further, counsel accepted personal responsibility for Applicant's lack of apology to victim/victim's family saying he advised Applicant not to have any contact with them until the conclusion of the case; spoke about Applicant's sincere remorse for his actions and continuous concern for victim's injuries during the time prior to trial; and noted Applicant's lack of prior record and minimal probability of recidivism. With these things in mind, this Court finds counsel's presentation of mitigating evidence to be objectively reasonable.

Further, this Court finds Applicant failed to present any evidence he alleges counsel should have presented in mitigation, and has failed to convince this Court that had counsel presented some further evidence there is a reasonable probability the plea judge would have imposed a lighter sentence. In fact, the plea judge's commentary prior to sentencing make it clear the sentence he imposed was well-thought out and specifically tailored to the specific facts of the case, only further convincing this Court counsel's presentation of some further mitigating

evidence would not have changed the sentence imposed. Likewise, the credible testimony of Michael Coleman, Esquire, (resentencing counsel) at the PCR hearing was clear in establishing the plea judge could not be convinced to impose some lesser sentence than that given. Therefore, this Court finds no resulting prejudice has been proven either.

Failure with Regard to Applicant's Assertions during the Plea Proceeding

Applicant contends counsel was ineffective for advising Applicant that it was too late to halt his plea once the plea proceeding had begun, failing to request a recess during the plea proceeding to obtain Applicant's objections to the State's factual recitations, and for allowing Applicant to plead guilty to ABHAN where his comments to the Court allegedly did not admit the criminal intent necessary to commit ABHAN.

This Court finds no prejudice in these allegations as Applicant makes no legal argument as to the prejudicial effect of counsel's failure to halt the proceedings or request a recess in order to ascertain Applicant's objections to the State's factual allegations. Furthermore, the argument that counsel was ineffective for allowing Applicant to plead guilty to ABHAN where he allegedly did not admit criminal intent is without merit as evidence of intent is irrelevant for purposes of a plea proceeding.

Failure to Adequately Advise Applicant Concerning Communications with his Brother

Applicant further contends that counsel was ineffective for neglecting to advise him that certain communications taking place with his brother may have been excluded based upon Fifth and Fourteenth Amendment grounds or otherwise be characterized as prior consistent statements supporting his defense.

The Court finds no prejudice in failing to advise regarding the admissibility of the conversations with his brother as Applicant makes no allegation that the admissibility of such evidence had any bearing upon his decision to plead guilty.

Failure to Explore the Possibility of Alford Pleas on all Counts

Applicant finally contends that counsel was ineffective on the grounds that he did not explore the possibility of entering a plea pursuant to Alford during the plea negotiations once the Applicant raised an objection to the State's claim that he deliberately committed an assault and battery on both victims.

This Court finds no prejudice in these allegations as Applicant puts forth no argument regarding any prejudicial effect stemming from the inability to enter a plea pursuant to Alford.

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 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 any other 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 10 day of April, 2013.

J. Ernest Kinard, Jr.
Presiding Judge
Fifth Judicial Circuit

Camden, South Carolina.

PCR

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June 4, 2013

The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk
Post Office Box 11330
Columbia, South Carolina 29211-1330

Re: Daydrian J. Rouse, #342518 v. State of South Carolina; 2011-CP-40-1921.

Dear Mr. Shearouse:

Enclosed please find for filing a Notice of Appeal on behalf of the above-captioned Post-Conviction Relief client. I would appreciate your returning two (2) clocked copies to me in the stamped self-addressed envelope provided. I have been *retained* by the family to handle this appeal. I have already received the transcript of the PCR hearing held in this matter and request that the time limits be set from the date this Notice of Appeal is filed. I have courtesy copied the Appellate Division of the South Carolina Commission on Indigent Defense on this correspondence so they will make note that I am retained in this case, and won't need to send me an inquiry concerning this appeal. With my thanks for your assistance in this matter, as always, I remain,

Sincerely yours,

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg
Enclosures
cc: Megan Harrigan, Assistant Attorney General
Sharon Graham, South Carolina Commission on Indigent Defense, Office of Appellate Defense

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June 4, 2013

Megan Harrigan, Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-

Re: Daydrian J. Rouse, #342518 v. State of South Carolina; 2011-CP-40-1921.

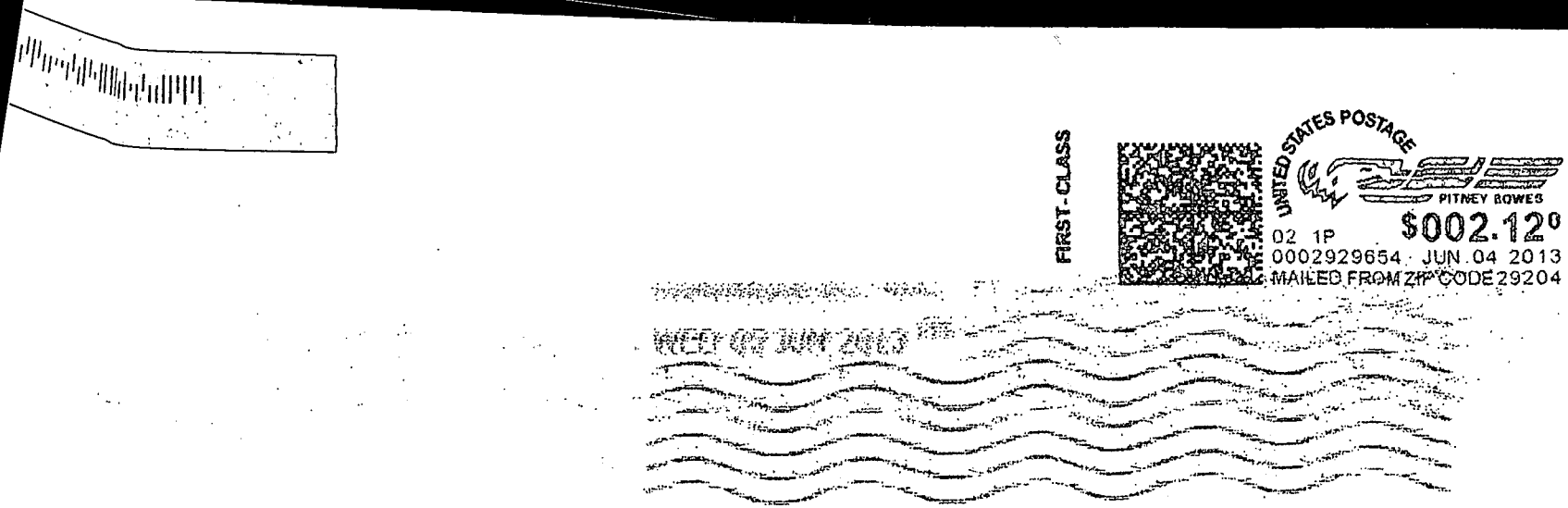
Dear Ms. Harrigan:

Enclosed please find for your records a copy of the Notice of Appeal that was filed in the above-captioned matter. I was retained in this Post-Conviction Relief case and have also been retained for the PCR appeal. If you have any questions please do not hesitate to call. Since I already have the PCR hearing transcript, I have asked that my filing deadline for the Petition for Writ of Certiorari be set from the date of this Notice of Appeal. I remain,

Sincerely yours,

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg
Enclosure
cc: The Honorable Daniel E. Shearouse, Clerk, Supreme Court of South Carolina



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TO:

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