

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

**Sep 08 2023**

S.C. SUPREME COURT

APPEAL FROM CHEROKEE COUNTY  
Court of Common Pleas

The Honorable Daniel D. Hall, Circuit Court Judge

Case No. 2019-CP-11-00570

Mark A. Earls Jr.,

Petitioner,

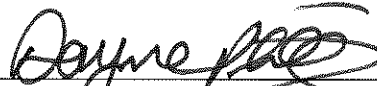
v.

State of South Carolina,

Respondent.

**NOTICE OF APPEAL**

Petitioner Mark A. Earls Jr. appeals the Honorable Daniel D. Hall's Order Denying his Application for Post-Conviction Relief filed on **March 24, 2023**, and the Order Denying Applicant's Motion to Alter or Amend Judgment (Rule 59(e), SCRCP) filed on **September 5, 2023**.

  
Dayne C. Phillips, Esq.  
1614 Taylor Street, Suite D.  
Columbia, SC 29201

**ATTORNEY FOR PETITIONER**

**September 7, 2023**

**Other Counsel of Record:**

Suzanne Shaw, Assistant Attorney General  
South Carolina Attorney General's Office  
P.O. Box 11549  
Columbia, SC 29211

**cc:** Brandy McBee, Cherokee County Clerk of Court

STATE OF SOUTH CAROLINA )  
COUNTY OF CHEROKEE )

IN THE COURT OF COMMON PLEAS  
FOR THE SEVENTH JUDICIAL CIRCUIT

Mark A. Earls, Jr., #379091, )  
Applicant, )

Case No.: 2019-CP-11-00570

v. )

**ORDER OF DISMISSAL**

State of South Carolina, )  
Respondent. )

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2023 MAR 24 A 11:30  
BRANDY W. MCGEE

This matter comes before this Court by way of Applicant's post-conviction relief application filed August 15, 2019. Respondent made its return on October 22, 2019, requesting an evidentiary hearing be convened. An evidentiary hearing was held on August 11, 2022, at the Spartanburg County Courthouse. Dayne Phillips, Esquire, represented Applicant. Assistant Attorney General Chelsey Marto represented Respondent.

Applicant and his mother testified on his own behalf at the evidentiary hearing. Applicant's Mother, Laurie Richardson, and Counsels Richard Welchel and Matthew Craft, Esquires, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

#### **Procedural History**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. Applicant was indicted at the July 2015 term of the Cherokee County Grand Jury for murder (count one) and possession of a firearm during the commission of a violent crime (count two) (2015-GS-11-00624), and two counts of attempted armed robbery (2015-GS-11-00625 and -00626). Richard Welchel and Matthew

Craft, Esquires, represented Applicant. Kimberly Leskanic and Jennifer A. Jordan, Esquires, of the Seventh Circuit Solicitor's Office, prosecuted the case. On February 4, 2019, after selecting a jury, Applicant pled guilty as indicted. The Honorable R. Keith Kelly, circuit court judge, sentenced Applicant to thirty years' imprisonment for murder, five years' imprisonment for the weapons charge, and twenty years' imprisonment for each count of attempted armed robbery, sentences running concurrently. Applicant did not appeal his plea or sentence.

#### **Summary of Relevant Facts**

On May 6, 2015, police were called out to a shooting with injuries. (Tr. 44-45). When they arrived at that location, they found the deceased victim with two gunshot wounds, slumped over in his pickup truck. (Tr. 45). Officers began their investigation. (Tr. 45).

Video footage was retrieved of two individuals, a female and a male walking in that alley. (Tr. 45). The video showed the attempted robbery of the deceased victim and Sandra Tessnear, who was a prostitute that got into the vehicle with the deceased prior to the shooting. (Tr. 45). It showed the two individuals running away after what appeared to be a shooting. (Tr. 45). Officers posted still photographs from the video on the Gaffney website and Facebook page, ultimately receiving tips that Applicant and Lyric Morgan committed the crimes. (Tr. 45).

The officers found out where they lived and went to their residence the day after the shooting. (Tr. 46). They brought both to the police station, where Lyric, Applicant's girlfriend, gave a confession. (Tr. 46). She stated that they stole the gun three days prior from Applicant's mother's boyfriend. (Tr. 46). She stated that they had kicked the door in, went in, and stole the gun, which Applicant retrieved from a closet in his house. (Tr. 46). They left the house with intending to commit a robbery. (Tr. 46). They identified the victims as their targets. (Tr. 46).

Applicant approached on the driver's side of the vehicle and Lyric approached on the passenger's side. (Tr. 46). Applicant stated "give me everything that you have got." (Tr. 46-47). He pointed the loaded .22 pistol at Mr. Baltazar. (Tr. 47). Lyric stated she saw the deceased victim reach down, possibly for a gun. (Tr. 47). Applicant pulled the trigger and then he pulled the trigger again. (Tr. 47). The deceased suffered two gunshot wounds, one of which lacerated his lungs and his heart, causing internal bleeding and for him to die at the scene. (Tr. 47).

Applicant's mother identified Applicant based upon the video to the police. (Tr. 47). Applicant, in a police statement, said "I saw a prostitute jump in the truck with a Mexican. I tried to rob the Mexican and the prostitute. The Mexican put his hands up like he was trying to get the gun. I pulled my hand back and the gun went off. His truck was standing there and I thought that he was going to get out. I shot again. I ran. Lyric went with me. She did not have any weapon." (Tr. 48).

After Applicant gave his statement to police, they asked him about the gun. (Tr. 49). He told them that he would take them to the location of the gun. (Tr. 49). He stated that he put it in the woods following the shooting. (Tr. 49). The gun was located. Lyric, who was going to testify for the State, identified that gun, stated that it was the gun that the two of them stolen. (Tr. 49).

### **Current Action Before this Court**

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. Ineffective assistance of counsel, in that:
  - a. "Applicant was plead guilty after counsel failed to adequate review discovery evidence, Applicant was deprived due process as a result of Counsel ineffectiveness."
  - b. "Attorney advised he was gone do a notice of appeal; Prejudice."
  - c. "Attorney failed to Investigate Juvenile statute."
  - d. "Prejudice by attorney advising applicant to 'only plead guilty.'"
  - e. "Attorney failed to file any pre-trial motions."

- f. "Attorney failed to make or exploit any defense in applicant case."
- g. "Attorney verbally told applicant he was 'not' going to fight for him in trial; Resulted in Applicant to plead guilty"
- h. "Attorney neglected the necessary investigations & preparations of applicant case."
- i. "Attorney failed to function as the counsel that the constitutions 6<sup>th</sup> Amendment guarantee's."

Applicant, through PCR Counsel, filed an amendment dated June 6, 2022, alleging:

- 1. Applicant did not knowingly, intelligently, or voluntarily plead guilty.
- 2. Applicant felt coerced into pleading.
  - a. Counsel allowed Applicant's mother to coerce Applicant into pleading.
  - b. Counsel told him he would not fight for him if he proceeded to trial.
- 3. Applicant detrimentally relief on Counsel's erroneous advice without reviewing his constitutional rights, potential defenses, discovery, or correct sentencing consequences.
- 4. Counsel failed to properly advise Applicant he would have to serve his sentence day for day.
- 5. Counsel failed to present all mitigation evidence in preparation of Applicant's defense.
  - a. Failure to use mitigation evidence in negotiations.
- 6. Counsel failed to advise Applicant about potential defenses and legal motions.
- 7. Failure to discuss the option of withdrawing the plea.

At the PCR hearing, Applicant proceeded forward on the following allegations:

- 1. Ineffective assistance of counsel.
  - a. Failure to review discovery.
  - b. Failure to explain and pursue pre-trial motions, especially a motion to suppress.
  - c. Failure to mitigate the sentence and use mitigation evidence in negotiations.
  - d. Failure to discuss the option of withdrawing the plea.
  - e. Failure to discuss Applicant's rights and defenses.
  - f. Failure to prepare defense.
  - g. Failure to pursue waiver hearing.
- 2. Invalid plea.
  - a. Applicant's mother coerced him into pleading.
  - b. Counsel Whelchel told Applicant he would not fight for him at trial.
  - c. Applicant was erroneously told he would only have to serve eighty-five percent of his sentence.
  - d. Trial tax.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

## Summary of the Testimony

### *Applicant Testimony*

Applicant stated that Counsels began representing him after his first attorney, Don Thompson, retired in 2018. He stated that there was a mitigation specialist and they met four or five times. He stated he met with Counsel Whelchel three to four times. He stated they discussed the statements. He stated that he was not told challenging the police statement was an option. He stated that during his first meeting with Counsel Whelchel he told Applicant that he new represented him. He stated they did not discuss his rights or defenses. He stated that at the second meeting he was given his Rule Five and this was explained to him. In the Rule Five were police statements and the police report. He stated that it was sixty-three pages long. He stated that the meeting lasted thirty to forty minutes long. He stated they reviewed the body camera videos and took notes. He stated that they never discussed the paper discovery together. He stated that he met the mitigation specialist while represented by Thompson but never discussed the mitigation specialist materials. He stated that during his fourth meeting with Counsel they picked a jury and reviewed video, which Counsel said were helpful. He stated that Counsels did not mention pretrial motions or evidence. He stated that Counsel Whelchel stated that he did not have a defense. He stated that Counsels answered his questions concerning trial. He stated his mother was on the phone that day, crying and telling him to plead. He stated that Counsel Whelchel said he did not stand a chance at trial and should plead. He stated he talked to Counsel Craft at trial, who said he only had to serve eighty-five percent of his sentence. He stated he thought he only had to serve twenty-one years' when he pled. He stated he wanted to talk to Counsels about the officers regarding the statement. He stated he was not happy with the plea and never talked to Counsels about withdrawing it. He stated he was upset Counsel did not

prepare a defense. He stated that he thought his only options were to plead or spend life in prison.

#### *Richardson Testimony*

Richardson testified that Applicant is her second son. She stated the plea was a last-minute decision. She stated that Counsel Whelchel was very hit or miss with communication. She stated Applicant wanted to go to trial but decided to plead to thirty years because Counsels told him he would not have to serve the entire thirty years. She stated Counsel told Applicant to plead.

#### *Counsel Whelchel Testimony*

Counsel Whelchel testified that Applicant decided to plead. He stated Applicant discussed the discovery with him. He stated there was never a plea offer made to a lesser-included offense. He stated that they discussed motions they would have pursued if Applicant went to trial. He stated he told Applicant he would have to serve the sentence day for day. He stated Applicant pled to the mandatory minimum. He stated that the strategy at trial would have been to poke holes in the State's case. He stated that Applicant's mother talked to him about pleading. He stated he met with Applicant more than four times. He stated that the evidence against Applicant included his co-defendants testimony and his own confession. He stated they discussed a motion to suppress the statement, which they would have pursued at trial. He stated that Applicant's decision to testify was up in the air. He stated they discussed the ballistics report, which was inconclusive. He stated that no one could make Applicant testify. He stated that he does not do written motions but brings them up in person before the trial judge. He stated he discussed his general practice regarding motions with Applicant. He stated he did not do a waiver hearing because he thought it was already done. He stated that someone else was hired to

do the waiver hearing. He stated that Applicant was young and impressionable. He stated that the State was unwilling to let Applicant plead to voluntary manslaughter. He stated he told Applicant about what would happen at the motion to suppress hearing. He stated he told Applicant there was a good chance of the statement being admitted. He stated he had a phone conversation with Applicant's mother, where he said the jury was picked. He stated Applicant asked to talk to his mother. He stated he never asked Applicant's mother to convince Applicant to plead. He stated it was Applicant's decision to plead.

#### ***Counsel Craft Testimony***

Counsel Craft testified that he told Applicant he would have to serve his sentence for murder day for day, minus the time he spent in the county jail before being transported to SCDC. He stated that Applicant received a negotiated sentence.

#### **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. Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the plea transcript, and this PCR action's records. 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 conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

#### ***Ineffective Assistance of Counsel***

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's

conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRPC (“The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.”). Reasonableness is determined by the “variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant,” and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. “A reasonable probability is

a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

The court makes this determination based upon the totality of the evidence. *Id.* at 695.

Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

#### ***Invalid Plea***

In the context of a guilty plea, the applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Applicant’s right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness included in the guilty plea process. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (“Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.”). Absent valid reasons why the applicant is entitled to depart from previous judicial admissions made at the plea hearing, statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v.*

*United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

For a plea to be valid, the applicant must have been aware of the nature and crucial elements of the offense the maximum and minimum penalties, and the rights he is waiving by accepting the plea. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 29 (2000). A plea is not knowing or voluntary if a defendant “lacks knowledge of material evidence in the prosecution’s possession.” *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999).

A defendant’s knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and “may be accomplished by colloquy between the court and defendant, between the court and defendant’s counsel, or both.” *Roddy v. State*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.” *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, “guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea.” *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

This Court finds the plea was entered freely, voluntarily, knowingly, and intelligently. He stated he was pleading to a negotiated thirty years’ imprisonment with several other sentences running concurrently. (Tr. 36). He stated he understood the charges, elements, indictments, and sentencing ranges he was pleading to. (Tr. 37-38). He stated he understood violent and most serious distinctions, when applicable. (Tr. 37-38). He stated that he knew he was waiving his rights to remain silent, to proceed to a jury trial, and to call and confront witnesses. (Tr. 39-40).

He stated that he was pleading guilty to all freely and without pressure and coercion. (Tr. 41). He stated that he talked to his mother about pleading, but she did not force him to plead. (Tr. 42). He stated it was his decision to plead and no promises were made. (Tr. 42). He stated he had no complaints about Counsels. (Tr. 44). He stated he talked about the case with Counsels. (Tr. 44). He stated he was not forced into pleading. (Tr. 44). He stated that Counsels went over discovery and wanted to proceed forward with the plea. (Tr. 44). He agreed with the facts as stated by the prosecutor. (Tr. 44-50). Accordingly, the plea was freely, knowingly, intelligently, and voluntarily and cannot be withdrawn now.

#### ***Rights***

Applicant claims he did not know about the rights waived by entering the plea. This was refuted by the plea transcript and relief is denied accordingly.

#### ***Defenses***

Applicant claims his plea is not valid because he did not discuss potential defenses with Counsels. Applicant has failed to highlight any specific defense that would have caused him to proceed to trial. Further, the right to present a defense was waived through entry of a valid plea. Accordingly, relief is denied.

#### ***Failure to Review Discovery***

Applicant claims Counsel was ineffective for failure to share and review discovery. Counsel credibly testified that he reviewed the discovery with Applicant. Applicant has failed to show anything existed in the discovery not shown to him that would have caused him to proceed to trial instead. Accordingly, relief is denied.

#### ***Trial Tax***

Applicant claims he was coerced into pleading because he was afraid of facing more time

at trial. Being informed that if he went to trial, he would face more time in prison does not rise to the level of coercion and is not enough to render the plea invalid. Accordingly, relief is denied on this ground.

#### ***Applicant's Mother***

Applicant claims the plea was coerced because Counsels had Applicant's mother talk to him about pleading. In fact, the plea transcript reflects that he spoke with his mother beforehand but she did not coerce him to plead. (Tr. 42). This Court finds that this conversation did not rise to the level of coercion. Accordingly, relief is denied.

#### ***Counsel would not Fight***

Applicant claims Counsel was ineffective for telling him he would not fight for him at trial. This Court finds this claim not credible or supported by Counsel's testimony about actions taken leading up to the plea. Even so, Applicant has failed to establish prejudice. Relief is denied on this ground.

#### ***Pre-Trial Motions***

Applicant claims Counsel was ineffective for failure to inform him about his right to pursue pre-trial motions. Counsel credibly testified that he informed Applicant about this, with particular focus on the motion to suppress and how they would likely lose that motion. The right to pursue this motion was waived with entry of an otherwise valid plea. Accordingly, relief is denied.

#### ***Mitigation***

Applicant claims Counsel was ineffective for failing to present mitigation evidence in negotiations. Counsel may be found deficient for failing to sufficiently investigate and present mitigating evidence. *See Council v. State*, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008)

(finding it unreasonable for counsel not to further investigate the defendant's background and present even minimal mitigating evidence obtained); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (finding it unreasonable when Counsel failed to investigate mitigating evidence beyond a couple retained records, including the presentence investigation report and social service records); *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (finding that Counsel was unreasonable for failing to evaluate the totality of available mitigation evidence). An applicant is prejudiced by this deficiency if there is a reasonable probability that a different sentence would have been imposed but for Counsel's failure to investigate and present mitigating evidence. *Council v. State*, 380 S.C. 159, 171, 670 S.E.2d 356, 362 (2008).

Applicant has failed to show that Counsel's approach was unreasonable or that Counsel failed to present any mitigation evidence that would have resulted in a different sentence. Accordingly, relief is denied.

#### ***Withdrawing Plea***

Applicant claims Counsel was ineffective for failure to withdraw the plea. Applicant admitted he did not ask Counsel for this option. Additionally, Applicant seemingly presented no signs to Counsels that caused them to discuss this option with Applicant. Accordingly, relief is denied.

#### ***Eighty-Five Percent Sentence***

Applicant claims Counsel was ineffective for telling him he only had to serve eighty-five percent of his sentence to be parole eligible. "It is well settled that parole eligibility is a collateral consequence of sentencing, and that trial counsel need not advise a client of his parole eligibility or ineligibility in order to render effective assistance." *Jackson v. State*, 349 S.C. 62, 64, 562 S.E.2d 475, 476-77 (2002) (citations omitted). "When considering an allegation on PCR that a

guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether information conveyed by the plea judge cured any possible error made by counsel." *Burnett v. State*, 352 S.C. 589, 592, 576 S.E.2d 144, 145 (2003) (citing *Moorehead v. State*, 329 S.C. 329, 496 S.E.2d 415 (1998)).

Counsel Craft credibly testified he would have to serve his sentence day for day with credit for time served. Accordingly, relief is denied.

#### ***Waiver Hearing***

Applicant claims Counsel was ineffective for failure to hold a waiver hearing. Counsel testified that he thought this hearing was conducted with another attorney. Regardless, Applicant has failed to establish prejudice and relief is denied accordingly.

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Conclusion

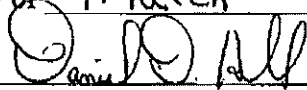
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to 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 Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

**IT IS THEREFORE ORDERED:**

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 21<sup>st</sup> day of March, 2023.

  
\_\_\_\_\_  
DANIEL D. HALL  
Presiding Judge  
Seventh Judicial Circuit

Yock, South Carolina.

**FORM 4**

**STATE OF SOUTH CAROLINA  
COUNTY OF CHEROKEE  
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2019CP1100570**

Mark A Earls, #379091 Jr.	State Of South Carolina	
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<b>PLAINTIFF(S)</b>	<b>DEFENDANT(S)</b>
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> 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.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC;  Nonsuit;  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other: \_\_\_\_\_

FILED IN OFFICE OF CLERK OF COURT, CHEROKEE COUNTY, S.C. MAR 24 2023 11:55 AM

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 JUDGMENT 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 (List amount(s) below)
NA		

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.**

**E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.**

S/ Daniel D Hall	2753	3/24/2023
<b>Circuit Court Judge</b>	<b>Judge Code</b>	<b>Date</b>

**For Clerk of Court Office Use Only**

This judgment was entered on 03/24/2023 , and a copy mailed first class or placed in the appropriate attorney's box on 03/24/2023 , to attorneys of record or to parties (when appearing pro se) as follows:

Dayne C. Phillips 1614 Taylor Street Suite D Columbia, SC 29201

Alan McCrory Wilson S.C. Attorney General's Office PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

*Brandy W. McBee*

Brandy W. McBee Clerk of Court

Court Reporter

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRPC.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2023 MAR 24 P 1:55  
BRANDY W. MCBEE

STATE OF SOUTH CAROLINA )  
COUNTY OF CHEROKEE )

IN THE COURT OF COMMON PLEAS )  
FOR THE SEVENTH JUDICIAL CIRCUIT )

Mark A. Earls, SCDC # 379091, )  
Applicant, )

Case No. 2019-CP-11-00570 )

v. )

ORDER DENYING APPLICANT'S )  
MOTION TO ALTER OR AMEND )  
PURSUANT TO RULE 59(a) SCRPC )

State of South Carolina, )  
Respondent. )

FILED IN OFFICE OF )  
CLERK OF COURT )  
CHEROKEE COUNTY, )  
S.C. )  
2023 SEP - 5 A 11:35 )  
BRANDY W. MCBE )

This matter comes before this Court by way of Applicant's Motion to Alter or Amend pursuant to Rule 59(a), SCRPC, asking this Court to alter or amend its Order of Dismissal denying Applicant post-conviction relief filed March 24, 2023.

### PROCEDURAL HISTORY

The records before this court show that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Cherokee County Clerk of Court. Applicant was indicted during the July 2015 term of the Cherokee County Grand Jury for murder (count one), and possession of a firearm during the commission of a violent crime (count 2) (2015-GS-11-00624). Richard Welchel and Matthew Craft, Esquires, represented Applicant. Kimberly Leskanic and Jennifer A. Jordan, Esquires, of the Seventh Circuit Solicitor's Office, prosecuted the case. On February 4, 2019, after selecting a jury, Applicant pled guilty to all charges as indicted. The Honorable R. Keith Kelly, circuit court judge, sentenced Applicant to thirty years' imprisonment for murder, five years' imprisonment for the weapons charge, and twenty years' imprisonment for each count of attempted armed robbery, with the sentences running concurrently. Applicant did not appeal his plea or sentence.

### Summary of Relevant Facts

On May 6, 2015, police were called out to a shooting with injuries. (Tr. 44-45). When they arrived at that location, they found the deceased victim with two gunshot wounds, slumped over in his pickup truck. (Tr. 45). Officers began their investigation. (Tr. 45).

Video footage was retrieved of two individuals, a female and a male walking in that alley. (Tr. 45). The video showed the attempted robbery of the deceased victim and Sandra Tessnear, who was a prostitute that got into the vehicle with the deceased prior to the shooting. (Tr. 45). It showed the two individuals running away after what appeared to be a shooting. (Tr. 45). Officers posted still photographs from the video on the Gaffney website and Facebook page, ultimately receiving tips that Applicant and Lyric Morgan committed the crimes. (Tr. 45).

The officers found out where they lived and went to their residence the day after the shooting. (Tr. 46). They brought both to the police station, where Lyric, Applicant's girlfriend, gave a confession. (Tr. 46). She stated that they stole the gun three days prior from Applicant's mother's boyfriend. (Tr. 46). She stated that they had kicked the door in, went in, and stole the gun, which Applicant retrieved from a closet in his house. (Tr. 46). They left the house with intending to commit a robbery. (Tr. 46). They identified the victims as their targets. (Tr. 46).

Applicant approached on the driver's side of the vehicle and Lyric approached on the passenger's side. (Tr. 46). Applicant stated "give me everything that you have got." (Tr. 46-47). He pointed the loaded .22 pistol at Mr. Baltazar. (Tr. 47). Lyric stated she saw the deceased victim reach down, possibly for a gun. (Tr. 47). Applicant pulled the trigger and then he pulled the trigger again. (Tr. 47). The deceased suffered two gunshot wounds, one of which lacerated his lungs and his heart, causing internal bleeding and for him to die at the scene. (Tr. 47).

Applicant's mother identified Applicant based upon the video to the police. (Tr. 47). Applicant, in a police statement, said "I saw a prostitute jump in the truck with a Mexican. I tried

to rob the Mexican and the prostitute. The Mexican put his hands up like he was trying to get the gun. I pulled my hand back and the gun went off. His truck was standing there and I thought that he was going to get out. I shot again. I ran. Lyric went with me. She did not have any weapon.” (Tr. 48).

After Applicant gave his statement to police, they asked him about the gun. (Tr. 49). He told them that he would take them to the location of the gun. (Tr. 49). He stated that he put it in the woods following the shooting. (Tr. 49). The gun was located. Lyric, who was going to testify for the State, identified that gun, stated that it was the gun that the two of them stolen. (Tr. 49).

### **Current Action Before this Court**

In his PCR application, Applicant alleged he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. Ineffective assistance of counsel, in that:
  - a. “Applicant was plead guilty after counsel failed to adequate review discovery evidence, Applicant was deprived due process as a result of Counsel ineffectiveness.”
  - b. “Attorney advised he was gone do a notice of appeal; Prejudice.”
  - c. “Attorney failed to Investigate Juvenile statute.”
  - d. “Prejudice by attorney advising applicant to ‘only plead guilty.’”
  - e. “Attorney failed to file any pre-trial motions.”
  - f. “Attorney failed to make or exploit any defense in applicant case.”
  - g. “Attorney verbally told applicant he was ‘not’ going to fight for him in trial; Resulted in Applicant to plead guilty”
  - h. “Attorney neglected the necessary investigations & preparations of applicant case.”
  - i. “Attorney failed to function as the counsel that the constitutions 6<sup>th</sup> Amendment guarantee’s.”

Applicant, through PCR Counsel, filed an amendment dated June 6, 2022, alleging:

1. Applicant did not knowingly, intelligently, or voluntarily plead guilty.
2. Applicant felt coerced into pleading.
  - a. Counsel allowed Applicant’s mother to coerce Applicant into pleading.
  - b. Counsel told him he would not fight for him if he proceeded to trial.
3. Applicant detrimentally relief on Counsel’s erroneous advice without reviewing his constitutional rights, potential defenses, discovery, or correct sentencing consequences.

4. Counsel failed to properly advise Applicant he would have to serve his sentence day for day.
5. Counsel failed to present all mitigation evidence in preparation of Applicant's defense.
  - a. Failure to use mitigation evidence in negotiations.
6. Counsel failed to advise Applicant about potential defenses and legal motions.
7. Failure to discuss the option of withdrawing the plea.

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective assistance of counsel.
  - a. Failure to review discovery.
  - b. Failure to explain and pursue pre-trial motions, especially a motion to suppress.
  - c. Failure to mitigate the sentence and use mitigation evidence in negotiations.
  - d. Failure to discuss the option of withdrawing the plea.
  - e. Failure to discuss Applicant's rights and defenses.
  - f. Failure to prepare defense.
  - g. Failure to pursue waiver hearing.
2. Invalid plea.
  - a. Applicant's mother coerced him into pleading.
  - b. Counsel Whelchel told Applicant he would not fight for him at trial.
  - c. Applicant was erroneously told he would only have to serve eighty-five percent of his sentence.
  - d. Trial tax.

Following its review of the testimony and evidence presented at the hearing, this Court found that there were no constitutional deprivations or other errors entitling Applicant to relief and denied and dismissed the application with prejudice. This Court issued a formal order to this effect, signed on March 21, 2023 and filed on March 24, 2023.

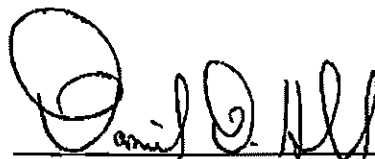
On or about April 3, 2023, Applicant served a copy of his Motion to Alter or Amend Pursuant to Rule 59(e) SCRCF, on this Court. Respondent filed a return to the motion on or about August 1, 2023.

After reviewing Applicant's Motion and the State's Return, this Court finds that its fifteen page Order of Dismissal contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976) and Rule 52(a) SCRCF. See also McCray v.

State, 305 S.C. 329, 408 S.E.2d 241 (1991). Having carefully reviewed the entire record in this matter, this Court finds that there is no basis for altering or amending its prior ruling.<sup>1</sup> Therefore, this Court hereby denies the Applicant's Motion in its entirety and affirms the previous Order of Dismissal.

This Court notes that if the Applicant desires to secure appellate review of this Order and the Order of Dismissal, a notice of appeal must be filed and served within thirty days of the service of this Order. Petitioner is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after a Notice of Appeal has been timely filed.

AND, IT IS SO ORDERED this 24<sup>th</sup> day of August, 2023



DANIEL D. HALL  
Presiding Judge  
Seventh Judicial Circuit

York, South Carolina

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<sup>1</sup> The Court, in its discretion, has considered this matter based upon the motions submitted by the parties and the post-conviction relief file, since oral argument will not aid the Court in reaching its decision. See Rule 59(f), SCRPC.