

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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AUG 23 2013

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

S.C. Supreme Court

Case No. 2009-CP-40-2523

Jaime E. Marrero,.....Petitioner,

v.

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

NOTICE OF APPEAL

Petitioner Jaime E. Marrero (Petitioner) appeals the Order of the Honorable G. Thomas Cooper, Jr., dated March 8, 2013, denying Petitioner’s application for post-conviction relief. Petitioner received written notice of the entry of this Order on March 14, 2013. Petitioner filed and served a Motion to Alter or Amend the Judgment pursuant to Rule 59(e), SCRCPP, on March 21, 2013. Judge Cooper signed an Order Denying Plaintiff’s Motion to Reconsider on July 18, 2013. Petitioner received written notice of entry of this Order on July 26, 2013.

Respectfully submitted,

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By: 
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August 23, 2013
Columbia, South Carolina

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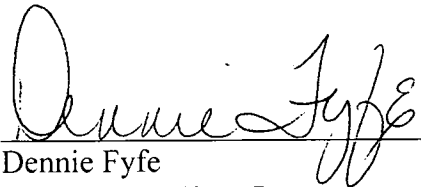
State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Dennie Fyfe, do hereby certify that I have this date served one (1) copy of the Notice of Appeal of Petitioner Jaime E. Marrero upon the following counsel by causing said copy to be deposited with the United States Postal Service, first class postage prepaid and properly affixed thereto and addressed as follows:

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August 23, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
)
 Jaime Eduardo Marrero, #330923,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

2009-CP-40-02523

ORDER OF DISMISSAL

JEANETTE W. MORRIS
 C.C.P. & D.S.
 2013 MAR -8 PM 3:18
 RICHLAND COUNTY
 FILED

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for Post-Conviction Relief (PCR) filed April 7, 2009. An evidentiary hearing into the matter was convened before this Court on Monday, January 14, 2013, at the Richland County Courthouse. Applicant was present at the hearing with counsel, Ethan Ware, Esquire, and Amber Martella, Esquire. Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Also testifying was Applicant's former defense attorney, James H. May, Esquire. This Court also had before it a copy of the transcript of the proceedings against Applicant, the records of the Richland County Clerk of Court and Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the June 2006 term of the Richland County Grand Jury for Murder and Attempted Armed Robbery (2006-GS-40-03620, -03621). He was represented by then Assistant Public Defender James H. May on the charges. On September 25, 2008, Applicant proceeded to jury trial before the Honorable Lee S. Alford. After three (3) days

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of trial, Applicant accepted a state plea offer for a recommended forty (40) year cap sentence under which he pled guilty to the charges as indicted. Judge Alford accepted the guilty plea and sentenced Applicant to thirty-eight (38) years imprisonment for Murder and twenty (20) years imprisonment for Attempted Armed Robbery, with the sentences running concurrently.

In the current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:¹

1. Failure by counsel for Mr. Marrero to disclose or challenge judicial bias and error, which resulted in Mr. Marrero's plea bargain;
2. Lack of evidence to support the plea bargain demanded by trial counsel;
3. Counsel at trial failed to properly cross-examine key witnesses in the case which would have provided exculpatory testimony, including but not limited to Ms. Hannah Fuller, Mr. Chris Ellis, Mr. Thomas Rice, and Mrs. Lamont Ellis;

4. Despite Mr. Marrero proclaiming his innocence, failure by trial counsel to adequately challenge the prosecution's case such that Mr. Marrero had no choice but to enter a plea bargain at insistence of counsel to avoid the death penalty;
5. Counsel for Mr. Marrero did not request or seek a psychological evaluation of Mr. Marrero despite testimony of psychological problems in the record; and
6. There is evidence investigators for Richland County failed to disclose another suspect to the crime alleged was known to be present in the vicinity of the crime scene at the time of the crime.

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

¹ These are the allegations set forth initially by Applicant through his amended post-conviction relief application. However, any allegations not specifically addressed below in this Order were not raised at the evidentiary hearing and, therefore, are deemed to be voluntarily waived.

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. With respect to guilty plea counsel, the Applicant



must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty, but rather would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Failure to Investigate Mental Health History

Applicant first alleges counsel was ineffective for failing to properly investigate Applicant's mental health history and to have him mentally evaluated prior to trial. At the PCR hearing, Applicant testified he had a "pretty rough" childhood growing up as he and his siblings were often left by his parents to take of themselves. He stated his father was in the military and his mother "would go out partying a lot" and that they eventually divorced. Applicant testified he couldn't recall whether he ever went through counseling as a youth for his parents' divorce, but said his brother has told him they did attend counseling as a result of an episode where a neighbor attempted to molest Applicant. Applicant noted he did not remember attending such counseling.

Applicant went on, saying he served in the U.S. Navy as a jet engine mechanic on the U.S.S. Enterprise during Operation Enduring Freedom, which "initiated attacks against Afghanistan". During his service, Applicant said he saw his shipmate's head "split...wide open" by a helicopter propeller, but did not recall going to counseling as a result. Applicant stated counsel never asked him about this incident, nor did he ever refer Applicant to anyone to have a mental evaluation done. He went on to say he did not recall what happened on the day of the incident except for "when the shot was fired". Applicant testified he lost roughly eighty (80) pounds during his time in jail, which he believed was a result of being depressed. Applicant said he told his prior attorney from the public defender's office, Danielle Payne, about having blacked



out during the incident and then recounted an incident when a friend of his was shot and killed in his presence.

On cross-examination, Applicant agreed he had been using a fair amount of illicit drugs at the time of the incident, and readily conceded he had been using ecstasy and cocaine that night. He reiterated that he blacked out and didn't remember anything about the robbery or shooting until he "came to" when the gunshot was fired. Applicant stated that in reviewing case law and the facts of his case, he saw "mitigating circumstances that would have...pointed to a possible mental illness issue...[that] was never explored on [his] behalf." Applicant said he was not able to say whether he was mentally incompetent to stand trial at the time, but acknowledged he told Judge Alford under oath at the plea hearing he wasn't under the influence of mind-altering drugs, alcohol or any other substance that would interfere with his ability to understand what he was doing, nor was he suffering from any mental, emotional or nervous conditions that would interfere with his judgment or ability to understand the entry of his plea. He finished by plainly agreeing the decision to enter the guilty plea was "his decision alone".

Counsel testified he represented Applicant on the challenged charges in 2008 in his capacity as an Assistant Public Defender for Richland County. He noted he and the Chief Public Defender for the Fifth Judicial Circuit, Doug Strickler, took over representation as the third set of attorneys in the matter after both of Applicant's former attorneys, Betsy Franklin and Danielle Payne, left the public defender's office. Counsel noted prior to Applicant's trial he had tried "at least three" other cases. When asked about Applicant's mental capacity, counsel testified that based on his "interactions with [Applicant]", he believed Applicant "is a highly intelligent, mentally stable person" and "there was never any indication" he saw during their interactions that Applicant was not competent, "nor was there any indication" of such a mental deficiency to



either of Applicant's prior two defense attorneys based upon the contents of their defense files. Counsel went on, saying there "was never any indication that [Applicant] showed any signs beside he was a bright, very capable, very affable, very likeable person" and based upon "the standard in South Carolina to...not be criminally responsible or [to be] mentally [in]competent", there was "absolutely no question in [counsel's] mind that at the time [he] represented [Applicant]", Applicant was both competent and criminally responsible. Counsel stated he and Applicant talked about whether Applicant could use insanity at trial "a lot", but explicitly stated Applicant was not insane at the time of the shooting.

When asked whether he ever referred Applicant to a mental health professional for an evaluation, counsel said "[t]here was never any evidence to support...a claim" that Applicant needed to be evaluated, so he did not. Counsel reiterated that point, saying "there was never any indication whatsoever that [Applicant] had any kind of mental defect to warrant" having him evaluated and "there was never any, never any question about [Applicant's] mental competency or criminal responsibility." Counsel then noted "[t]here is no diminished capacity defense in South Carolina" that could have been developed as a defense for trial, and there "was no indication [Applicant] had any kind of mental defect" to mitigate his criminal responsibility. He also noted he did not have any doubt Applicant was not insane at the time of the crime based upon his sixty-plus (60+) pretrial meetings with Applicant.

Counsel stated he discussed Applicant's competency with prior counsel, Danielle Payne, when he took over Applicant's representation and said she had "looked at all avenues regarding what [Applicant] told...her" and she too did not believe Applicant needed to be evaluated. Counsel noted it is the public defender's office's "practice [that] once a person is quote/unquote tagged as a potential death penalty case, a complete workup is done in preparation[,],....at which



time all kinds of mental health records” on the client are obtained, and in this case counsel was sure they “obtained [Applicant’s] military service records” as part of their preparation.

On cross-examination, counsel testified he met with Applicant “approximately between 50 and 60 times” to discuss the charges and to prepare the case for trial, during which he “never” had any concerns about Applicant’s ability to understand and/or participate in their discussions. He explicitly noted he saw “zero” reason for having Applicant evaluated based on their extensive interactions. Counsel stated he “can’t imagine there would ever be...testimony” available from a psychiatrist or psychologist finding Applicant incompetent to stand trial or insane at the time of the shooting. Counsel agreed there was a lot of testimony at trial presented showing Applicant’s on-going drug use including the fact that he had been high on cocaine and ecstasy at the time of the shooting. In that regard, counsel noted, voluntary intoxication is not a viable defense in South Carolina, so arguing Applicant “blacked out” at the time of the shooting wouldn’t have helped build a defense if the jury believed Applicant’s drug use was the cause of that black out. When asked directly whether there was any indication of whether an insanity defense could be developed for use at trial, counsel testified there was “none”. Counsel finished by saying even in hindsight, he is confident with his decision not to have Applicant evaluated.

Based on a thorough review of the record and testimony presented, this Court finds Applicant has failed to carry his burden in proving counsel was ineffective in this regard. First, this Court finds counsel’s performance was not deficient or objectively unreasonable in any way relating to this claim. This Court finds counsel’s testimony to be entirely **credible** as to his interactions and meetings with Applicant, as well as his perceptions of Applicant’s mental capacity and capabilities. Counsel’s credible testimony makes abundantly clear that based on his sixty-plus (60+) meetings with Applicant, he had no concerns whatsoever with Applicant’s

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competency to stand trial or to enter a guilty plea. Further, counsel made clear there was entirely **no** factual or evidentiary basis to support an insanity defense at trial and Applicant's alleged "black out" was almost certainly due to his voluntary illicit drug use on the night in question, which provides no basis for a defense at trial. Aside from the inconsequential information contained in the medical records provided at the PCR hearing, this Court finds Applicant's testimony as to his alleged mental health problems and his inability to recall the incident to be wholly **not credible**. In sum, this Court finds counsel reasonably relied on his own perceptions of Applicant as uncovered during their countless interactions and made an objectively reasonable decision to not have Applicant mentally evaluated prior to trial. Accordingly, counsel was not deficient in this regard.

Further, this Court finds Applicant has failed to prove resulting prejudice from counsel's failure to have him evaluated. Applicant failed to present any credible evidence, medical diagnosis or expert testimony to this Court to substantiate a claim that he was mentally incompetent at the time of his trial or otherwise insane at the time of the shooting. "Under the second prong of Strickland, the petitioner need only demonstrate a 'reasonable probability' that he was either insane at the time of the shooting or incompetent at the time of the [trial]." Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992). Applicant has failed to produce any such probability aside from his own incredible testimony and medical records showing he has a history of depression. The record of Applicant's trial and guilty plea, coupled with counsel's credible PCR testimony, affirmatively refute any claim that Applicant was either incompetent at the time of trial or insane at the time of the crime. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496



S.E.2d 415, 417 (1998). Applicant has failed to produce anything other than his own incredible testimony and pure speculation as to what the result of such an evaluation would be. Therefore, Applicant has failed to prove resulting prejudice. Accordingly, this allegation must be denied as Applicant has failed to meet either of the two necessary prongs for ineffectiveness under Strickland v. Washington.

Involuntary Guilty Plea

Applicant next contends his guilty plea was entered involuntarily as a result of counsel's ineffective representation prior to and during the course of his jury trial.

Applicant testified on the third day of his trial, his two attorneys told him they had not realized how strong the testimony against him was going to be and they believed Applicant had "a 99.9 percent chance of walking out of [the courtroom] with a life sentence and...a .1 percent chance of getting a hung jury". He went on to say prior to trial counsel had been "real gung-ho" about going to trial, but "at the end he totally changed". Applicant stated counsel told him "if you want to see your son again", pleading guilty "is going to be your only chance to get back to [him]".

When it came time to discuss entering the plea, Applicant said, he wasn't given much time to consider his options and was only able to speak with his family very briefly about the decision before the judge asked to proceed with the trial. He added he "felt pressured" to plead guilty "when the comment came up about [his] son" and he was "hearing [his] only chance of getting back out there and spending time with [his] son" was to plead guilty.

Applicant said on "the fourth day when [he] came in before [he] took the plea agreement [he] was told, look, the judge made the solicitor come back with a plea" because the judge "said it's clear of this young man's guilt". Applicant noted that had he not been told he had no chance



of winning at trial, he would not have pled guilty. Regarding the state's intention to seek the death penalty, Applicant stated counsel told him throughout the process "it [was] still in the air" whether they intended to seek the death penalty because "[t]hey [hadn't] served the paperwork" yet. In sum, Applicant said he "didn't feel that [he] had any other choice" but to enter the plea.

On cross-examination, Applicant testified he told Judge Alford under oath at the plea hearing he was, in fact, guilty of killing the victim in this case. He agreed the trial judge said at the conclusion of the plea he believed the evidence proving Applicant's guilt was "pretty substantial" and, had Applicant continued with trial and been found guilty, he most likely would have imposed a life without parole sentence. Applicant conceded there were three different witnesses who had known him for many years who testified at trial, identifying Applicant as the shooter on the surveillance videotape based upon his voice, language, demeanor and appearance. Applicant also noted he told Judge Alford during the plea he was satisfied with counsel's representation. Finally, Applicant testified it was his decision alone to enter the guilty plea.

Counsel testified Applicant's case was "originally tagged as a death penalty case" because "it was an execution on videotape", but noted the state "never actually served death penalty notice". He went on to say based on discussions with the solicitor's office, it was "a case that they [thought] [met] the standard, there's the aggravating factors, and this [was] a case they [were] intending to look at to go capital", but "there was never any kind of notice given that they actually were seeking the death penalty." Counsel stated by the time the trial was called, he was well aware it was not a death penalty case as the "procedure [for a capital trial] was never instituted because death notice was never given."

Counsel went on, saying he met with the prosecuting solicitor and Judge Alford in chambers on the Thursday during trial, at which time the judge told the state to "make this boy [a

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plea] offer” because of the way the trial was going at that point. Counsel said after discussing it with the victim’s family, the state extended a plea offer for a forty (40) year cap sentence which he discussed with Applicant at counsel table. Counsel testified he told Applicant “if [he] did this [crime], [he] need[s] to plea”, but if he didn’t do it then he should reject the offer and “try to walk...out the front door” with a not guilty verdict from the jury. He expounded on that conversation, saying he told Applicant that while they were “going to try to win” the trial, he recommended “if [Applicant] did [the crimes]”, he should plead guilty so he can see his child one day as a free man. After discussing the matter with his sister-in-law, counsel said, Applicant told counsel “[he] did it” and “[he] need[ed] to plead”.

Regarding Applicant’s rendition of their in-court plea discussions, counsel disagreed with Applicant’s testimony saying “nobody would ever give a percentage chance” of winning a trial to their client “because you don’t know what a jury is going to do”. He then explicitly stated he has “never given a percentage chance” to a client “saying [they] [are] going to win” or lose their trial.

On cross-examination, counsel testified he met with Applicant between fifty (50) and sixty (60) times in preparing the case for trial and watched the surveillance videotape depicting the murder “probably four or five hundred times”. Counsel stated there isn’t “any other way to describe” the videotape of the murder but to say it was an execution of the victim, and he described the tape as “awful” and “hard to overcome”. He went on to say he had “no doubt in [his] mind” that he provided all the advice and information necessary to Applicant for Applicant to make a voluntary, intelligent decision whether to plead guilty or to continue on with his trial. Counsel also noted he believed Applicant had a sufficient understanding of his rights and the waiver of those rights by pleading to make an informed decision whether to plead guilty.

Counsel further noted Applicant "always knew that life without parole was a realistic possibility" as an outcome at his trial as they "discussed it ad nauseum in preparing" for trial. He finished by saying, "I remember it like it was yesterday sitting down with [Applicant] saying if you did this you need to plead so that way you can see your son[, but] [i]f you didn't [do it], we need to go tell them...pardon my language...to fuck themselves and we walk out the front door", at which time Applicant "started crying" and "said he did it".

This Court finds Applicant has failed to establish his guilty plea was entered involuntarily or that counsel was ineffective in any way which would render his plea involuntary. As a preliminary matter, this Court finds Applicant's testimony as to his plea discussions with counsel to be entirely **not credible**, while conversely finding counsel's testimony in that regard to be **credible**.

"A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial." Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The credible testimony and record firmly convince this Court that Applicant's plea was entered freely, intelligently and voluntarily with full knowledge and understanding of all relevant issues, concerns, potential defenses and realistic potential penalties related thereto, in accordance with the requirements of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969).

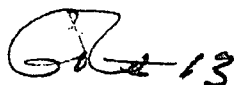
Applicant readily admitted at the plea hearing he was aware of the potential sentences he was facing, the waiver of rights associated with pleading guilty, and the plea negotiations extended by the state. He further noted his satisfaction with counsel's representation and agreed



he was entering the pleas of his own free will without threats, coercion, promises or use of force to induce the plea. Further, Applicant readily acknowledged he would be waiving his ability to challenge the state's evidence/witnesses and to present a defense on his behalf by pleading, and admitted his guilt under oath to the charges.

Based upon the record and PCR testimony, this Court finds counsel adequately advised Applicant of all relevant issues and matters pertinent to the case to allow Applicant to make an intelligent, informed and voluntary decision on whether to enter a guilty plea or proceed to trial. Applicant, with full knowledge of the nuances and particulars of his case, made the voluntary and informed decision to forfeit his right to jury trial to accept an advantageous plea offer from the state. Applicant has failed to carry his burden in proving counsel was deficient in any way in his representation on the charges; in fact, the credible testimony before this Court indicates counsel's representation was extremely thorough and entirely in line with the high legal standards demanded of criminal defense attorneys in such serious cases. Accordingly, this Court finds counsel was not objectively unreasonable and Applicant's plea was entered freely, intelligently and voluntarily.

Further, this Court finds Applicant has failed to prove resulting prejudice from counsel's alleged deficient representation. Applicant has failed to convince this Court there is *any* "reasonable likelihood" that but-for counsel's alleged deficient performance, Applicant would not have pled guilty but rather continued with his trial. The evidence presented during the three days of trial set a very high hurdle for Applicant to overcome, and it is clear Judge Alford intended to impose a life without parole sentence upon Applicant had the jury returned a verdict of guilty. With these things in mind, along with the entirety of the record, it is clear Applicant

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has failed to prove that “but for counsel’s alleged deficiency”, he would not have pled but rather insisted upon proceeding to trial.

Failure to Object to Leading Questions

Applicant also alleges counsel was ineffective in failing to pose an objection to the solicitor’s questions to Hannah Fuller on the basis that he was improperly leading her. In particular, Applicant points to Fuller’s testimony during direct examination where she stated Applicant mentioned to her that he had killed somebody. (Trial Tr. p. 225, ll. 11 – 22).

Counsel testified he “objected a lot in the beginning” of the trial to the solicitor’s leading questions, but eventually came to realize the trial judge “was going to let [the solicitor] lead” the witnesses with his questions. Counsel went on to say “[t]here’s time when you object and there’s times when you don’t”, and that’s part of “being a criminal defense attorney.” Counsel noted his objections wouldn’t have stopped the testimony from being admitted in the end anyway as “an objection (sic) of leading doesn’t preclude the testimony, it just precludes the form of the question” posed by the attorney. Counsel thereafter noted that objecting to the testimony would have only highlighted Fuller’s damning testimony to the jury and ultimately would not have stopped the testimony from being admitted after the solicitor simply rephrased the question.

On cross-examination, counsel testified the solicitor prosecuting Applicant’s case was “notorious” for not being able to “ask a question that was not leading”, but said “oftentimes circuit court judges will just allow it because that’s what [that particular solicitor] does” when questioning witnesses. He also agreed there was nothing stopping the solicitor from simply rephrasing his questions to avoid leading and still eliciting the same answers as the substance of the testimony itself was not objectionable. Counsel stated he did not feel any of the instances of

alleged leading questions by the solicitor resulted in testimony that was the lynchpin of the case or otherwise changed the ultimate result.

This Court finds counsel was not objectively unreasonable for deciding not to decide to the solicitor's leading question(s) to Hannah Fuller about Applicant's admission of having killed someone. As accurately set forth by counsel at the PCR hearing, the substance of Fuller's testimony was not objectionable and, therefore, any objection based upon leading would only have caused the solicitor to rephrase the question, thereafter eliciting the same testimony a second time. Counsel stated he recognized the testimony could not be suppressed and, therefore, did not want to highlight that portion of the testimony by having the question asked multiple times. This Court finds counsel's testimony to be a reasonable articulation of valid trial strategy. See Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) ("Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective"). Accordingly, this Court finds counsel was not deficient in his performance in this regard.

Further, this Court finds Applicant has failed to carry his burden in proving this alleged deficiency resulted in prejudice. As set forth above, the testimony elicited by the solicitor was admissible as non-hearsay under Rule 801(d)(2), SCRE, as the statements provided by Fuller were Applicant's own. Therefore, any objection to the leading question would have only precluded the form of the question and not the eventual substance of the testimony provided. Accordingly, the testimony was going to be admitted regardless and this Court can find no reasonable probability that the outcome of Applicant's case would have been any different had counsel posed an objection to the solicitor's leading question(s) to Fuller.



Judicial Bias

Applicant alleges counsel was ineffective in failing to object to and/or move for recusal of the trial judge due to the alleged bias of the trial judge. Applicant contends the trial judge improperly ordered the state extend a plea offer to Applicant for less than LWOP as the judge believed the facts clearly indicated Applicant was guilty of the charges.

Applicant testified he was unaware of any pre-trial discussions between counsel, the state and the trial judge, but he did become aware of an in-chambers discussion with the judge during the course of the trial regarding a plea offer. Specifically, Applicant stated on the fourth day of trial, counsel told him the judge "made the solicitor come back with a plea" offer for Applicant because the judge "said it's clear of this young man's guilt and [he] want[ed] a plea." Applicant said counsel told him that was what the judge had said to them in-chambers. Applicant noted he felt pressured by the trial court to make a decision whether to accept the plea offer extended.

On cross-examination, Applicant stated he told the trial judge during the plea hearing under oath that he was guilty of the murder as charged and agreed there were at least three witnesses very familiar with Applicant who identified his voice, mannerisms and language off the surveillance videotape showing victim being shot in the face. Applicant noted he "was answering [the trial judge's] question as he asked" Applicant during the plea hearing because he was "trying not to hinder...being able to get [the] minimum] sentence" under the plea. Applicant finished by saying it was ultimately his decision alone to enter the plea as he did.

Counsel testified he met with the solicitor and trial judge on the Monday before trial at which time the trial judge asked the solicitor what the case was about. After the state set forth that it was a murder on video, the trial judge asked "why are we trying this case if [Applicant's] on video". Counsel said he replied to the judge that it was not Applicant on the videotape and

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then he explained that the men on the videotape are wearing masks the entire time. Counsel said the trial judge never suggested nor said anything about a plea being appropriate at that time, so he did not request the trial judge be recused.

The Thursday of trial, counsel said, he and the solicitor again met in chambers with the trial judge, at which time the judge "said with the way the trial [was] going and with Ms. Fuller's testimony about [Applicant's] remorse, please make, this boy needs to get an offer." Counsel said he told the judge he did not believe Applicant would accept any plea offers because Applicant didn't commit the crime, but co-counsel said to let the state find out what plea offer they could extend. After discussing the matter with the victim's family, the state returned with a plea offer for a forty year cap sentence. Counsel testified the state did have a choice about whether they wanted to extend any plea offer to Applicant and noted the state could have said no to the judge's request to extend an offer. Counsel also said it was the solicitor who "came up with the number 40 years" for the offer, and the trial judge at no point indicated what kind of offer the state should extend. Further, counsel said, the trial judge noted he couldn't tell the state what plea offer to extend to Applicant, but thought the forty year plea offer "sound[ed] like a fair offer".

Based upon a review of the transcript, this Court finds Applicant has failed to prove counsel was ineffective for failing to move for recusal of the trial judge simply based upon the trial judge's in-chambers remarks about the state extending a plea offer to Applicant. "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including instances where he has a personal bias or prejudice against a party." Koon v. Fares, 379 S.C. 150, 156, 666 S.E.2d 230, 234 (2008). "It is not sufficient for a party seeking disqualification to simply allege bias; rather, the party must show some evidence of bias or

prejudice.” Id. The only instance Applicant can point to an off-record discussion which he was not a party to where the trial judge, after sitting through three-plus days’ worth of incriminating evidence, suggested the state extend a plea offer to Applicant. Applicant has failed to prove the specific circumstances under which the comment was made and had failed to convince this Court such a suggestion reveals a judicial bias sufficient to warrant counsel requesting recusal. Therefore, Applicant has failed to carry his burden in proving counsel was objectively unreasonable in failing to move for such.

Further, Applicant has failed to prove resulting prejudice as he has failed to show such an alleged judicial bias reasonably affected the outcome of the case. Both sides were allowed to present their arguments during the four day trial and all of the trial court’s determinations set forth in the record were rationally and reasonably based upon the evidence and arguments presented at trial in accordance with the relevant law. See e.g. Danley Williams v. Moore, 400 S.C. 90, 733 S.E.2d 224 (Ct. App. 2012). Applicant has failed to establish any point in the record where the judge exhibited bias. Additionally, Applicant’s testimony is clear that he understood it was solely his decision to accept the state’s plea offer and that he ultimately did so in an effort to avoid a LWOP sentence at trial. Applicant has failed entirely to prove such an alleged bias reasonably affected his decision to forego his right to jury trial in favor of accepting an advantageous plea offer from the state. Accordingly, this allegation is denied.

Concurrent Time on Federal and State Sentences

Applicant contends counsel was ineffective for failing to ensure his federal and state sentences were set to run concurrently with each other as he believed they would upon entry of his Richland County guilty plea.



Applicant testified he does understand the difference between “concurrent” and “consecutive” sentences and he was adamant that his plea be conditioned upon his federal and state sentences running concurrently. Applicant stated counsel explained to him that “it was [a] formality to have to say that if this could happen or whatever”, but counsel then told Applicant “do not worry” because he would “get [Applicant] into federal custody and...[run] that time concurrent...with the feds”. Applicant stated had he known his five (5) year federal sentence was going to run consecutive with his state sentence, thereby turning the thirty-eight (38) year sentence into forty-three (43) years, he would not have pled guilty.

Counsel testified that, in addition to the thirty-eight (38) year sentence for Murder, Applicant was sentenced under the plea to twenty (20) years imprisonment to run concurrently for Attempted Armed Robbery and a Lynching — Second was dismissed by the state. He also noted there may have been a second petty crime the state dismissed with the Lynching. Counsel went on to say Applicant “was under sentence from the federal court for a cocaine trafficking” conviction at the time as well, on which “he got five [5] years” from Judge Currie. Counsel said he and Applicant discussed the federal sentence in trial preparation “not briefly”, but rather “extensively”, and because Applicant had never first been in federal custody he would “do state custody beforehand”.

Counsel continued, saying he “knew [they] worked actively to try to get [Applicant] into federal custody both immediately after his trial and then actually at one point...with the attorney general...because the [trial] judge definitely wanted [Applicant] to...not get the five [5] additional years at the end of the [thirty-eight] 38 year” sentence. Counsel said he communicated to Applicant that “when you’re in state custody, you do your state custody and then you go do federal custody” as the “Bureau of Prisons does not calculate state time in their calculations”.

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Counsel noted that at the plea hearing, the trial judge said he didn't "know if [he] can order this but if at all possible try to get concurrent time". Counsel said the state and federal sentence "was an issue that [he and Applicant] discussed at length" and Applicant "understood that he was going to be transferred from Bureau of Prisons one way or the other at the conclusion of his state term of incarceration". Counsel testified he did not believe it was ever Applicant's understanding that he was going to be transferred immediately to the federal prison upon entry of the plea based on their pre-plea discussions.

On cross-examination, counsel testified he never guaranteed Applicant at any point during plea negotiations that his federal and state sentences would run concurrently, which counsel believed Applicant understood. Finally, counsel stated the order in which the two sentences were set to run was "out of [their] hands" since the federal plea had already been entered without Applicant having ever been in federal custody.

After a thorough review of the testimony presented and the record, this Court finds Applicant has failed to meet his burden in proving counsel was ineffective in this regard. First, this Court finds Applicant's testimony as to counsel advising him the sentences would run concurrently to be **not** credible. Rather, this Court finds counsel's testimony about the discussions to be **credible**, specifically in that Applicant was fully advised and aware that he would be pleading guilty with no guarantee that his federal and state charges would run concurrently. The commentary in the record before this Court only further supports this finding as Applicant readily acknowledged his understanding of counsel's statement to the court that "neither [counsel nor the solicitor] can guarantee" the federal sentence would be run concurrent to the sentence to be imposed on the plea. (Trial Tr. pp. 289, l. 16 - p. 290, l. 25). Accordingly,

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the credible evidence and record reflect Applicant entered his plea with full knowledge that his federal and state sentences were not guaranteed to run concurrently.

Further, the record before this Court indicates Applicant entered his guilty plea in an effort to avoid a life without parole sentence that would stop him from seeing his son ever again as a free man. With that in mind, and the statements on the record by the trial judge regarding his intention to sentence Applicant to LWOP if convicted by the jury, this Court finds no reasonable probability that had Applicant known he would be serving a forty-three (43) year sentence instead of a forty (40) year sentence, he would not have pled guilty but rather continued with the trial to face a near certain LWOP sentence. Applicant's testimony to the contrary is **not** credible. Accordingly, Applicant has failed to prove resulting prejudice.

Failure to Advise of Right to Appeal

Applicant finally contends counsel was ineffective for failing to adequately advise him of the right to appeal the entry of his guilty plea. Applicant said he "was confused" when the trial judge advised him during the plea hearing that he had ten days to file for appeal as counsel had previously said Applicant would not be entitled to appeal if he pled and that he did not see any trial court error which could be appealed. Other than that, Applicant said, he and counsel never discussed the right to direct appeal.

Counsel testified Applicant waived his right to direct appeal of the issues preserved during the course of the trial itself by entering the guilty plea as he did, but that he did have a right to appeal the plea. Counsel said he didn't know whether he and Applicant ever discussed the right to appeal the plea, but noted there was nothing objected to during the plea colloquy. Counsel stated he "spent the better part of the following day" after the plea "at the jail with [Applicant]...for...between one-and-a-half to two hours", but could not say whether they ever



discussed the right to appeal the plea. Counsel said he believed Applicant had sufficient understanding of the rights he was waiving by pleading guilty at the time he entered the plea. Counsel finished by saying it's generally his "practice that whenever [he] met with somebody" he would advise of the right to appeal, but also tell them that if an objection isn't raised during the plea "there's really nothing to appeal".

This Court finds counsel's testimony regarding his general practice to advise of the right to appeal to be **credible** and likely the course followed in this matter. Further, the record reflects the trial judge specifically advised Applicant of the right during the course of the plea. There is no evidence in the record to indicate Applicant ever requested an appeal be filed, nor to show counsel should have "reasonably believed" Applicant wanted to appeal. Applicant was fully aware of his right to appeal prior to final entry of the plea and at no time thereafter gave any indication that he wished to pursue such an avenue. Therefore, this allegation is without merit.

Further, even assuming *arguendo* counsel **did** fail to review the right to appeal with Applicant as Applicant now alleges, he has failed to set forth any credible evidence that would entitle him to a belated appeal. Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to direct appeal from a guilty plea. Roe v. Flores-Ortega, 528 U.S. 470 (2000). The South Carolina Supreme Court has applied this standard to guilty pleas as well, saying:

...absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to appeal from a guilty plea... The bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief. Instead, there must be proof that extraordinary circumstances exist such that the defendant should have been advised of the right to appeal.

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Weathers v. State, 319 S.C. 59, 459 S.E.2 838 (S.C. 1995). Therefore, even if taken as true, an allegation that counsel did not inform Applicant of the right to direct appeal is not *per se* reason to warrant a belated direct appeal.

Regardless, the credible evidence before this Court indicates Applicant was fully informed of the right to appeal, but did not request one be filed. No extraordinary circumstances existed such that counsel reasonably *should have* known Applicant wanted an appeal. In fact, Applicant entered his plea freely and voluntarily under the terms of a negotiated cap sentence. Therefore, counsel had no reason to believe Applicant would want to appeal. Applicant also failed to establish any non-frivolous grounds existed for appeal. Accordingly, this Court finds Applicant is not entitled to relief and the current application must be denied and dismissed with prejudice.

Having found the allegations raised by Applicant at the PCR hearing to be wholly without merit, this Court finds the current application for post-conviction relief must be denied and dismissed **with prejudice**. Further, the current order is a complete and all-inclusive set of findings based upon the allegations raised by Applicant at the PCR hearing and Applicant has not presented any additional allegations for this Court to consider outside those specifically addressed above.

CONCLUSION

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

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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. BML, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

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

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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 8 day of MARCH, 2013.



G. THOMAS COOPER, JR.
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina.

RECEIVED

MAR 1 2013

McNAIR LAW FIRM

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2009CP4002523

Jaime Eduardo #330923 Marrero

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. No. Suit);
 Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award. Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

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

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

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

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

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

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

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

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 23 July 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Jaime Edward #330923 Marrero Ethan Robert Ware
Amber B. Carter

Robert Daniel Corney

Jaime Edward #330923 Marrero

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

RECEIVED

Jeanette W. McBride

JUL 23 2013

August 23, 2013

Amber B. Carter

acarter@mcnair.net
T 803.799.9800
F 803.753.3278

RECEIVED

AUG 23 2013

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Jaime E. Marrero v. State of South Carolina, Case No. 2009-CP-40-2523
Notice of Appeal to the South Carolina Supreme Court

Dear Mr. Shearouse:

Enclosed for filing, please find the Notice of Appeal in the above-referenced case, which is being filed contemporaneously with the Clerk of Court for the Richland County Circuit Court and has been served upon opposing counsel as required by the South Carolina Rules of Appellate Procedure. Accompanying the Notice of Appeal are the proof of service, the \$100.00 filing fee, and the copies of the circuit court orders, as required by Rule 203(d), SCACR.

The transcript of the post-conviction relief hearing has been ordered and received.

Please do not hesitate to contact me if you have any questions.

Sincerely,

McNAIR LAW FIRM, P.A.



Amber B. Carter

ABC:dmf

Enclosures: as stated

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Columbia, SC 29201

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