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S.C. Supreme Court

VOLUME III OF III

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Kershaw County

Clifton Newman, Circuit Court Judge

WILLIAM LARRY CHILDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213543

APPENDIX

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

MEGAN HARRIGAN
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

1911 Pickens Street
Columbia, S.C. 29201
Tele. # (803) 256-7001
E-mail: [redacted]

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF KERSHAW	)	Case No. 2008-CP-28-1213.
	)	
WILLIAM L. CHILDERS, #278419	)	
Applicant	)	CERTIFICATE OF SERVICE
	)	
VS.	)	
	)	
THE STATE OF SOUTH CAROLINA)		
Respondent	)	

I, the undersigned, as counsel for the Applicant, William Childers, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) specified below via U.S. Mail, with prepaid postage, on August 30, 2011, to the following address:

Pleadings: Motion to Alter or Amend the Judgment

Counsel Served: Brian Petrano, Esq.
Asst. Attorney General
Office of the S.C. Attorney General
P.O. Box 11549
Columbia, S.C. 29211-1549

Jeffrey P. Bloom
Counsel for the Applicant
Dated: August 30, 2011

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF **KERSHAW**	)	
	)	
	)	2008CP281213
	)	
Childers, William L., #278419,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN AND MOTION TO DISMISS
	)	MOTION TO ALTER OR AMEND
State of South Carolina,	)	DENIAL OF PCR PETITION
	)	
Respondent.	)	
	)	

This matter comes before the Court by way of the Applicant's Motion pursuant to Rule 59(e), SCRCP, in which he asks the Court to alter or amend its Order dismissing his Application for post-conviction relief (PCR). The Respondent (the State) would submit the following:

I.

The Order of Dismissal of this Court, dated August 12, 2011, 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) SCRCP. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). Specifically, the Order of Dismissal explains that the Applicant's claims are for the most part illusory because of the plain and simple fact that his testimony was not credible (for example, his claim that he shot in self defense, or that he did not know he could plea guilty and receive less than life, etc.).[1] Additionally, the Applicant's claims were addressed in the Court's Order of Dismissal because the Applicant failed to satisfy his burden of proof and demonstrate any prejudice – the evidence against the Applicant is overwhelming. *See* Order of Dismissal, p. 16 –

[1] The Applicant claims that the Order does not reconcile the "objective testimony of the Applicant's father and sister" who claimed that trial counsel was drinking. The Order of Dismissal adequately explains that no credible evidence was presented that trial counsel was drinking alcohol during the trial.

17. As explained in the Order of Dismissal, Strickland expressly allows a PCR to be dismissed for lack of prejudice without having to address purported claims of deficient performance.

Respondent respectfully requests that he be allowed to brief any issues raised in Applicant's subsequent memorandum that may warrant response.

II.

The State therefore requests that the relief requested by the Applicant be denied and that his Motion be dismissed.

WHEREFORE, having made its Return to the motion, the State requests that the relief requested in the Motion be denied and that said Motion be dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

BY: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

Columbia, South Carolina
December 5, 2011

STATE OF SOUTH CAROLINA	)
	) IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW	
	2008-CP-28-1213
William L. Childers, 278419	)
Applicant,	)
	)
vs	) AFFIDAVIT OF SERVICE BY MAIL
	)
State of South Carolina,	)
	)
Respondent.	)
	)

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Jeffrey P. Bloom Esquire
1911 Pickens Street
Columbia SC, 29201

DATED this 6th day of December, 2011.

Jean R. Indriago, Legal Assistant
For Respondent

ORIGINAL

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF KERSHAW)

William Larry Childers,
PLAINTIFF,
-VS-
State of South Carolina,
DEFENDANT.

MOTION HEARING
2008-CP-28-1213

BEFORE THE HONORABLE CLIFTON NEWMAN, JUDGE

JUNE 1, 2012

CAMDEN, SOUTH CAROLINA

A P P E A R A N C E S:

Jeff Blume, Esq.
For the Applicant

Brian T. Petrano, Esq.
For the State

REMA K. GANTT THOMAS
CIRCUIT COURT REPORTER

I N D E X

PAGE NO.

E X H I B I T S

THERE WERE NO EXHIBITS MARKED TO THIS PROCEEDING.

(The defendant, together with counsel, was personally present in the courtroom.)

THE COURT: Permission to alter or amend the judgment filed by Mr. Blume.

MR. BLUME: Mr. Blume.

THE COURT: Yes, sir, Mr. Blume.

MR. BLUME: If it please the Court, Your Honor, we filed the motion to alter or amend the judgment because we felt that the Court's order which was proposed by the Attorney General's Office didn't address some very specific issues that we raised.

I am also cognizant of the fact that these types of proceedings, if you don't bring what may be some very specific issues to the attention of this Court, the Appeals Court may deem that we've waived those. And we certainly didn't want that to happen in the case.

I won't repeat all the motion to alter or amend the judgment. It is some 20 pages, and we lay out our argument there. But I think specifically I'd like to address two things, one some more recent case law that has come down both from the U.S. Supreme Court as well as the South Carolina Supreme

Court which had not been issued at the time we filed this motion, and we want to call that to Your Honor's attention, and then some very specific motions and issues in the motion to alter or amend.

Your Honor, first the motion to alter or amend itself -- again, I won't repeat everything, and certainly if I leave something out that's contained in the written motion, we're not waiving that -- but just to highlight for the Court, we feel we raised a number of issues of ineffective assistance of counsel which pointed to trial counsel's error.

For example, some of the issues which we list in our motion on pages one and two and again in more detail from pages 10 through 12 of my motion are things such as trial counsel's failure to properly prepare and develop an adequate self-defense theory and request such an instruction; also, failure to move or suppress statements by Mr. Childers made at the time of his arrest which were pre-Miranda.

Next, failure for trial counsel to raise certain Fifth and Sixth Amendment issues regarding Mr. Childers' invoking his right to counsel and that testimony in effect being elicited by trial counsel

himself while Mr. Childers was on the witness stand.

We also list in our motion numerous missed evidentiary and testimonial objections by trial counsel. We also listed trial counsel's failure to object to the State's closing argument.

We also listed trial counsel's failure to move to suppress the boots that were placed in evidence. We felt those were important because they prejudiced the defendant in that they seemed to corroborate without any forensic evidence one of the State's witnesses.

In that regard, I would point out in going back and looking at the transcript and my transcript notes of the trial itself, at one point the trial judge did in fact suppress the boots as evidence. So I think that goes to the fact that it's a pretty good Fourth Amendment and illegal search and seizure issue as to those.

Later on, the State in cross-examining Mr. Childers asked him simply to identify if the boots are his, and he honestly answered yes. The State then moved to introduce them again. And at that time, there's still no objection by trial counsel under the Fourth Amendment for illegal search or seizure.

I think that's important, because just because the defendant can identify an object that may belong to him, that does not vitiate the Fourth Amendment violation as to the object.

And, lastly, we listed trial counsel's failure to advise Mr. Childers that he could have pled guilty, and it would have been up to the trial judge whether or not to sentence him to something less than life without parole.

And on that last issue, I would note, Your Honor, that there have been two U.S. Supreme Court cases recently. I'm sure Your Honor is familiar with them, but I have copies to hand up if you'd like. One is Lafler versus Cooper -- and Lafler is spelled L-A-F-L-E-R; its citation is 132 Supreme Court 1376; it's a U.S. Supreme Court decided March 21, 2012 -- and its companion case on the same date is Missouri versus Frye -- F-R-Y-E.

If I may approach, I'll hand them up. I'm sure Your Honor is familiar with these recent cases. Missouri versus Frye and Lafler, Your Honor, of course talk about the Sixth Amendment right to effective assistance of counsel in plea negotiations and in a guilty plea.

Obviously, I know the State's first

response, because I would make it if I were in their shoes, quite frankly, is that there was no plea bargain in this case, there was no plea offer. But that really misses the point of Lafler and Frye.

In this case at PCR, Mr. Rogers, the trial attorney, testified that he advised Mr. Childers -- and in fact this is in the signed order, that he told Mr. Childers that the penalty for murder was a minimum of 30 years up to life and the State was seeking a life sentence.

By his own testimony, trial counsel never gave the next piece of advice, which would be "But the trial judge is not bound by that. The trial judge can sentence you to less than life. He has to sentence you to at least 30 years. But upon pleading guilty, an acceptance of responsibility, the trial judge can sentence you anywhere from 30 years, 31 years, 35, up to life."

Your Honor well knows in cases where defendants plead guilty to murder, other than death penalty cases, trial judges often sentence to something less than life, just based on that acceptance of responsibility and acknowledgment of guilt. It is an extremely rare care.

In fact, I was trying to think of one

today on the way over here. I don't know of one other than the death penalty context where the defendant pleads guilty in exchange for the State not seeking death, gets a life sentence, where upon pleading guilty to murder, our trial judges, circuit judges have sentenced the defendant in that circumstance to the maximum penalty.

The trial courts often give some recognition to the defendant for that acceptance of responsibility. And, of course, under that statute, what was not explained to Mr. Childers is that if he had pled guilty as charged, because that was the most serious charge, the trial judge could take that into consideration and could sentence him to something less than life, maybe 99 years, maybe 50, 25, 30, whatever.

But it certainly was not. Mr. Childers, of course, testified that had he known that, he would have pled guilty. Those facts meet, I submit, the Lafler versus Cooper and Missouri versus Frye test. And we would submit even though there was not a plea bargain, Mr. Childers was never fully advised of his right to waive a jury trial and plead guilty to something potentially less than life, that just because the State was seeking life, that didn't make

it automatic.

I think Mr. Childers' testimony at PCR was clear that in his mind based on the limited advice he got from trial counsel that the evidence he received, what he understood, is if he pled guilty, he'd get life, if he went to trial, he'd get life. So I think the Frye case and the Lafler case clearly apply in this circumstance. And I would ask Your Honor to reconsider on that basis.

Next, the other case that has come down since we met -- and I may have handed it up with those two -- it is the South Carolina Supreme Court case of State versus Justus -- J-U-S-T-U-S. Did I hand that up with the other two, Your Honor? If not, I have an extra copy. If not, I would be glad to hand this up if it's not attached.

THE COURT: It's not up here.

MR. BLUME: I did not?

THE COURT: No, sir.

MR. BLUME: Okay. All right, if I may approach and hand that up. Justus is a capitol case, Your Honor, where the prosecution filed a motion to recuse one of the defense attorneys because she had represented a member of the Solicitor's staff in a Family Court proceeding.

The opinion talks about that creates a conflict of interest and goes to the fairness of the proceedings. And in that case, a little different from here, the defendant was objecting to the recusal of his defense attorney.

Here, Mr. Childers wanted his defense attorney recused because he had a connection to the State's case. Trial counsel actually represented one of the key State's witnesses in a case. And we feel the Justus case is right on that point.

It creates divided loyalties and a conflict of interest. And that issue never did get raised. In the State Supreme Court opinion of this case, they acknowledged that it was not preserved at trial. And, thus, we think it has to now be presented and preserved in PCR.

Lastly, according to our motion to reconsider, Your Honor, we feel that and we respectfully submit that if the Court takes a cumulative review of the errors made by trial counsel throughout this case under the Fret (PH) standard or through other case law, including U.S. Supreme Court law I've cited in our motion, that cumulatively trial counsel made a number of critical errors in here, Fifth and Sixth Amendment errors,

Fourth Amendment errors, errors of advice, errors of failing to object to hearsay, and that cumulatively the only conclusion is that trial counsel rendered ineffective assistance of counsel.

The prejudice is that if the defendant had still elected to going to trial, there could have been a reasonable probability of a different outcome. The Strickland standard under reasonable probability is less than the preponderance of the evidence, and we believe we've met that standard.

On the other hand, Mr. Childers clearly testified that if he had understood his plea options, he would have pled as charged to murder, and accepted responsibility, and then requested the trial judge to sentence him to something less than life understanding the standard mandatory minimum would be 30 years. That's clearly, we think, within, of course, Lafler and Cooper.

Lastly, I would note since we have held hearings on these matters -- and I'm not trying to impugn trial counsel's character in any regard, but it as matter of public record that trial counsel has since been suspended from the practice of law.

It appears from the record and matters related to that that it involves some of the same

behavior that we presented testimony on at trial regarding his unfortunate misuse of alcohol, the continued use of alcohol and inability to function and be professional.

Our sympathies go to trial counsel in that regard. Again, we're not trying to impugn him, but I think those facts as well as if you look at his disciplinary history which we pointed out during the PCR hearing, it now lends additional credibility to the testimony presented on that point.

That would also include the independent testimony from the applicant himself, of two family members, who smelled alcohol on trial counsel's breath. This is the type of case, Your Honor, that while I fully recognize and extend sympathies to the victim's family, and I understand the hurt that they have gone through.

Although I would acknowledge I've never had a family member who was the victim of a violent crime, I have lost a close family member to alcohol and drugs. And it is always a hardship to lose a family member.

But this trial is not the kind and the advice that was not given and the advice that was rendered, it is ineffective, I submit, is not the

type of standard we hold for trial counsel in South Carolina. And I'm not asserting some higher standard than Strickland or what our courts have recognized.

But it's simply not a fair and effective proceeding. Mr. Childers, we respectfully submit, never had his fair day in court in. The entire context of the trial record, the PCR record, demonstrates that trial counsel through whatever human foibles he had -- and I don't impugn him or attack him in that regard, but this was not a good day for justice in South Carolina. Thank you, Your Honor.

THE COURT: All right.

Mr. Petrano.

MR. PETRANO: Thank you, Your Honor. I'll start out with some of the allegations regarding the plea. The applicant is correct. Lafler versus Cooper and Missouri versus Frye did not exist, and they are new cases.

The majority opinion in those cases tries to explain that they're not really earth-shattering, but I believe the dissent explains that basically this is finding a new constitutional requirement here as far as plea bargains being part of the

criminal justice system, which I think is obviously true.

I'm not trying to deflate those opinions or anything like that. I'm just trying to say that they did not exist at the time. But also, if you look at Lafler versus Cooper, which would be the more applicable one -- they are, of course, companion cases -- Missouri versus Frye is one where there's a plea offer, and then ultimately the defendant accepts another plea offer which is much harsher.

And the Court says, "Well, he should get the first plea offer. It's more beneficial to him." Lafler versus Cooper is the case that's more applicable here. It's the case that there was a favorable plea offer, but the attorney somehow said, "You know, you shot the guy below the waist, so there's no way they'll be able to convict you. Let's go to trial."

The defendant in that case got a perfectly fair trial, and the State maintained that that was all that was required under the constitution, the Sixth Amendment. But the Supreme Court said, "No, he was actually entitled to effective representation as to the rejection of that original favorable plea

offer."

My point being with that diatribe, Your Honor, is that there was no plea offer in this case. The applicant's claim that if he had known -- supposedly, he didn't -- if he had known that he could plea and get less than life that he would have done that, that claim in and of itself, Your Honor, was found not credible by Your Honor in the PCR order.

Granted, the State did draft that. I did draft that, but I thought that that was a piece of testimony that was extremely relevant and would deflate that plea claim, if that claim was not credible.

I mean, you kind of have a situation where all of a sudden, now that he's got life, he wants to claim, "Yeah, yeah, I did do it." But I'd like to expand on that as far as the underlying guilt here, whether there be an admission or not.

As the Supreme Court and the Court of Appeals in an awkward, but ultimately as the Supreme Court explained in this case, our Supreme Court, there is really no defense here. There's no legal defense here.

He admits to shooting the victim. He just

says it was an accident, it was self-defense, whatever you want to massage as far as the defense. But that was specifically rejected by the jury. "We believe this is a murder," and that's what the Supreme Court said, by his own testimony.

Your Honor, there's overwhelming here. It wasn't -- he admits he was there. There's no problem with that. That's just not what we have here, Your Honor. The order of dismissal is very thorough. It covers everything.

I will note that, of course, Lafler versus Cooper had not come out at the time, so those are developments. But I don't think they're particularly applicable because, like I said, there was no plea offer.

As far as the Justus case -- and I always like to spell it; it's J-U-S-T-U-S, not justice like justice and order, because I can never find it when I look for it -- anyway, that case and Gregory is the case that Justus relies on. Those talk about an ongoing representation that is the basis of the conflict.

There was no ongoing representation here regarding trial counsel and one of the witnesses in this case. And as the order thoroughly explained,

there's not a hint of impartiality or bias on the part of trial counsel.

Trial counsel frankly grills that witness at the trial, reveals a couple of good gems out there. Considering what this case was, trial counsel did a great job. There's not much that can be done here. There was no indication that the applicant wanted to admit his guilt.

He maintained that he, you know, shot as he was running away because someone shot at him. Now, of course, at a trial level, the test is any evidence as to whether there's a lesser. So those lesser offenses were submitted to the jury, even though they were completely overwhelmed by the other credible.

The jury rejected those claims. Here, at PCR, as explained in the order, the test is not in any evidence that was submitted. The test is a prejudicial analysis test. And I think this is page 17 of the order.

Strickland itself, which is the case we rely on here, Strickland versus Washington, they say -- and I'm quoting here; these aren't my words -- "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,

which we expect will often be so, that course should be followed."

Your Honor, that's the course that was followed in this case. It's an overwhelming evidence case, Judge. You don't really have to get into the ins and outs of the ineffectiveness claim if the evidence against the defendant -- the applicant now -- is overwhelming. That's where we are, Judge.

The order does cover the failure to properly prepare claims that were made, the motion to reconsider the self-defense statement, the request for counsel, the closing arguments, the evidence that came in, the boots, the Fourth Amendment issue with the shoes.

I think the shoes and the boots are kind of the same thing. They get intermixed at times. The cumulative error issue, once again, I think we go back to that statement in the order from Strickland. We can just dismiss this if it's an overwhelming evidence case. There's really nothing to diffuse that.

I think that's pretty much it, Judge. I'm basically relying on the order, distinguishing Lafler versus Cooper and Missouri versus Frye, as

well as distinguishing Justus and Gregory as being applicable to the case at hand, once again maintaining that it is an overwhelming evidence case of murder, as the Supreme Court said.

It's, of course, a plurality decision. But all of the justices basically are on that point. They just have their own different ways of finessing the verdict, the opinion and the outcome. But there's no debate this is overwhelming evidence of murder. That's what it was, Judge. Is there anything that you want now? I know I can't ask you questions. Do you want me to follow up on anything in particular?

THE COURT: No, I don't have anything.

MR. PETRANO: Thank you.

MR. BLUME: Very briefly, Your Honor. I respectfully submit Lafler versus Cooper and Missouri versus Frye are not new law for South Carolina. I think the principles they enunciate in there, however, are directly applicable to Mr. Childers' case and are very helpful and instructive in that regard.

The reason I say it's not new is we have a long history, both in PCR hearings and PCR case law from our state appeal courts, that guilty pleas can

involve ineffective assistance of counsel. And that's essentially what Lafler and Frye are about, is applying the Strickland standard to guilty pleas, and plea bargains, and plea offers, and plea negotiations.

We've had that standard in South Carolina a long time. The Thrift Brothers case, which discusses that complex plea bargaining and plea offers should advisably be in writing. We also have cases -- I cite Alexander versus State, Wray versus State -- that both talk about counsel's advice can potentially be ineffective in advising a client about the right to trial versus pleading guilty.

We have a number of cases that talk about ineffective assistance of counsel regarding incorrect advice as to parole eligibility, things of that nature. We have Gibson versus State -- G-I-B-S-O-N -- which talks about ineffective assistance of counsel in advising the defendant to plead guilty when there has been a Brady violation.

And if there's actually exculpatory information, the defendant can vacate that plea and come back and say, "Had I known this, I may not have pled guilty." So we have a long history in our state of applying the Strickland standard, the Sixth

Amendment, to pleas, plea offers, plea negotiations.

I think the importance of Lafler and Frye, however, are the principals in that for the first time our U.S. Supreme Court has acknowledged that if a defendant says, "I would have pled guilty but for the incorrect advice I received," that's a Strickland violation.

Now, they have a number of steps to go through, and I think the defendant has met all those. Trial counsel testified at PCR that -- again, I don't want to repeat myself, but I think it bears refreshing -- and in the order itself, it says trial counsel acknowledged he told the defendant murder carries 30 to life, but the State was seeking life.

There is an absence of any testimony by trial counsel at PCR that he ever said the next thing, "But you can plead guilty as charged. It's your right to have a jury trial or not and ask the judge for less than life." That's what didn't get said, and I think that's the crux of the issue.

THE COURT: Did anyone ask him whether he said it or didn't say it, or whether that discussion took place?

MR. BLUME: Your Honor, I have to be fair.

I had to go back and look at my notes from the PCR proceeding. I don't have a PCR transcript yet since the case has not been appealed, and usually the transcript is generated after that process is initiated.

So I am going by my recollection right now, as well as the order that the Attorney General submitted and respectfully Your Honor signed. In that, it recites that trial counsel said, "I told him murder is 30 to life, and the State was seeking life."

My recollection of the PCR proceeding is Mr. Rogers never acknowledged he gave that additional advice. And, quite frankly, since I don't have the transcript and it's been a couple of years, I can't remember the exact questions asked Mr. Rogers and his exact responses.

But I know that that was a lingering issue. And I think the Frye case and Lafler case go directly to it. If I may just read a sentence from Lafler, it states, "Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more sentence."

And I think that's what happened here, because the defendant clearly testified at PCR, "If I had known I could have asked the judge for something less than life, I would have accepted responsibility and pled guilty."

And that's something, too, both Missouri and Frye state, that the defendant at post-conviction or federal habeas has to be able to say, "Had I received proper legal effective advice, I would have pled and not gone to trial." I think that's how it applies to Mr. Childers' case.

THE COURT: If the lawyer told him that he could get 30 years to life, "But the State is seeking life," you're arguing that he believed that he had no alternative but to go to trial or get life?

MR. BLUME: That he -- yes, sir, that he would get life either way, so why not go to trial? And in fact, that was Mr. Childers' testimony, and I do specifically --

THE COURT: If the lawyer said, "Well, you could get 30 years, or you can get life, or you can get up to life. It's up to the judge what you get."

MR. BLUME: That was not the advice he gave. The advice he gave was murder carries to

life, and the State is seeking life. And so --

THE COURT: Does the State get what the State seeks?

MR. BLUME: Well, Mr. Childers is not an attorney. And from his testimony, his understanding of that advice was "I'm going to get life, no matter whether I plead guilty or go to trial." My recollection of Mr. Rogers' testimony at PCR was he did not dispute that, because it was clear --

THE COURT: How about the plea colloquy with the judge, when the judge explains the range of sentence?

MR. BLUME: But that never occurred, because there was no plea. Mr. Childers didn't know he could plead to something less than life. And that's where I think Lafler and Frye do directly apply to Mr. Childers' case, Lafler most especially, because Lafler is in a similar position. He went to trial in a murder case not understanding there was a plea bargain to a lesser offense in that case. And that was the crux of his issue.

THE COURT: You're arguing, then, that he would have wanted to plead guilty, and then the judge in the colloquy would have explained the possible range of sentence, because his lawyer

didn't explain it, and that he has been prejudiced because the likelihood is that based on your -- not your research, but based on your never having heard of someone pleading to guilty and getting life.

I mean, I have given people that pled guilty before me -- I haven't kept records of it, but some cases are so bad that even with a guilty plea, the person should be sentenced to life.

MR. BLUME: And I recognize that. But I think even Your Honor would acknowledge that's the rare circumstance than not. And certainly I think the issue here is not what the sentence would have been --

THE COURT: Right.

MR. BLUME: -- because I don't think we can shake our crystal ball of 8-ball and say, "This is what a sentence would have been." But the defendant wasn't provided the proper and legal information of the potential to plead guilty and accept responsibility and get something less than life, that in his mind, the advice he had been given -- and my recollection is Mr. Rogers acknowledged this at PCR -- that Mr. Childers believed he would get life if he pled and life if he went to trial. There was no in-between because the State was

seeking life either way.

THE COURT: That's a big burden on a lawyer if you have a client who is going to have to do this time and suffer the consequences of whatever happens in court, and he's totally dependent on any and everything that the lawyer tells him as to being what's going to happen, and then if the record does not reflect at a PCR that the lawyer engaged in all of that conversation, then the presumption is that the lawyer didn't do it.

MR. BLUME: Yes, sir. In my humble recollection -- again, I don't have the transcript, but in looking back at my notes -- Mr. Rogers acknowledged that he did not specify in his advice to Mr. Childers that just because the State was seeking life that Mr. Childers could ask the judge for something less, obviously with a mandatory minimum floor of 30 years.

And my recollection is Mr. Rogers did not provide that advice. And I think that's why Lafler is critical to this. And I would point out that this -- I would respectfully submit that this is not viewed in isolation.

If you look at the number of cumulative errors made by trial counsel, for whatever reason --

missing objections, missing Fourth Amendment objections, substantial Fifth and Sixth Amendment objections -- it gives a tenor to the whole proceeding, for whatever reason, that trial counsel was not prepared, and he was rendering ineffective assistance of counsel, not just prior to trial but throughout the proceedings.

If you look at the trial transcript -- and, again, I've cited in my motion -- on the day of trial when they're picking the jury and Mr. Childers trying for the first time because he's been in jail and can't just go to court whenever he wants to, trying to get new counsel appointed, Mr. Rogers acknowledges himself that he's not really ready to proceed to trial.

I think the exact quote on page 86 of the trial transcript, lines 23 to 25, is that Mr. Rogers acknowledges that "Up until today, I've been consumed with other matters." So I think that it gives the Court a tenor that trial counsel, unfortunately for whatever reason, was not adequately prepared, made numerous mistakes at trial, may have been engaging during the trial in inappropriate behavior with alcohol, as we presented.

And I don't take joy in presenting that type of testimony. But the entire context and when you look at the Lafler case, I think Mr. Childers in this case received ineffective assistance of counsel. And it's quite on that point, because, again, my recollection is Mr. Rogers acknowledged he did not further advise Mr. Childers that just because the State was seeking life that the trial judge had the option of something less with the mandatory minimum.

THE COURT: All right.

MR. BLUME: As lawyers we know, of course, that sometimes when the State seeks life that that is mandatory, such as the two-strike and three-strike law. Obviously, Mr. Childers doesn't know those subtleties because he's not an attorney. And that was not the case here. We did not have a defendant in a two-strike or three-strike situation.

But for whatever reason, that additional adequate advice never went from Mr. Rogers to Mr. Childers that the trial judge had discretion within that 30 years to life. Mr. Childers, I think, has met the Lafler and Frye burden by his testimony in that he said he would have accepted a plea, he would have pled, rather than exercise his right to a jury

trial had he known the trial judge had that discretion.

THE COURT: All right.

How about that, Mr. Petrano?

MR. PETRANO: Very briefly, Judge, if I could. First of all, the last thing that was said, the testimony by Mr. Childers that he would have accepted -- that he would have pled guilty if he had known he could get less than life, Your Honor, that was found to be not credible.

That's a key portion here that is unlike Lafler versus Cooper. And also, Lafler versus Cooper, if it's not new law, then it must abide by Strickland versus Washington. Strickland versus Washington requires prejudice -- actual prejudice, not argument, not makeup, not make-believe prejudice -- actual prejudice.

The prejudice in Lafler versus Cooper was that there was an actual plea offer that was made. That's a lot like our case of Davey where our Supreme Court said that Mr. Davey is entitled to the plea offer that he didn't get but for counsel's ineffectiveness.

There was an actual plea offer, not just "I could plead straight up and maybe get less time

than I got at trial." That's not what Lafler versus Cooper stands for. That's not really what should be spun about to apply to this case.

Also, as far as the applicant's claim that he did not know judge would sentence him, Your Honor, I would like to point out that this was not his first rodeo. If you look at page 720 of the transcript, the applicant had beat up a prior girlfriend. He got an ABHAN conviction for that.

I assume he was sentenced, and I will assume he understood how it worked. I don't have any details on that conviction because it's not really relevant here because he was found not credible on the underlying premise of the applicability of Lafler versus Cooper.

Second, Your Honor, trial counsel said, "I told him it was 30 to life." Your Honor, that is absolutely correct. It's 30 to life. That's not incorrect advice. That is perfect advice.

If the only thing the applicant could get, the trial counsel would have to say, "Well, the sentence, sir, would be life." Otherwise, the "30 to" words would be superfluous. He could get 30 to life. That's the penalty. That's what he could have gotten.

The applicant knew fully well. He had already pled guilty before. Before going to the trial, I had dealt with the applicant prior to that. He was found not credible when he said that he would have pled guilty if he had known he could less than life.

Your Honor, he was maintaining that this, you know, was not a murder all along. That was simply -- "absurd" is probably too strong of a word, Your Honor, and I apologize if it denotes any disrespect. But it's absurd to suggest now that he would plead guilty to murder. Thank you, Judge.

MR. BLUME: I'll be very brief, sir. The Attorney General knows that Mr. Childers' testimony was found not to be credible. We all know how this process works. The Attorney General in the proposed order of course put that specific finding in there.

And obviously I can't tell the Attorney General how to write his order or take things out. I would ask Your Honor to reconsider even that, because on that point, there is corroboration between Mr. Childers and trial counsel, because trial counsel, again, according to my humble recollection, acknowledged that after he told Mr. Childers the State was seeking life, trial counsel

didn't go the extra step and say, "But the trial court has discretion."

So I think in that respect, Mr. Childers and Mr. Rogers are consistent, and Mr. Childers' testimony would have been credible. The prejudice is, again, respectfully, while Your Honor knows that some defendants who have pled guilty to murder are still sentenced for life given circumstances that warrant it, that is more greater.

And so I think the prejudice here is the defendant lost the opportunity, the potential, to make a case before the sentencing judge in mitigation either in terms of the facts of the case, or his background, or for whatever reasons to sentence him something to life.

And Your Honor well knows on most guilty pleas, whether it's murder, armed robbery, or any other number of offenses that are recognized to be violent, it is a rare occasion when the trial judge pleas sentences to the maximum, that usually a defendant is given some acknowledgement for acceptance of responsibility.

Obviously, that's within each trial judge's discretion. But Mr. Childers was denied that opportunity. Lastly, for the Attorney General

to cite a prior conviction and the defendant knew how this works, one can't compare apples and oranges. And that prior offense in no way impacts his understanding of the penalties for the ineffective assistance of counsel that was rendered to him regarding the murder charge. Thank you.

THE COURT: Mr. Petrano, regarding the order that Mr. Blume attacked for being inadequate and the court failed to address many issues that are raised during the PCR, of course, I know that the Attorney General did a proposed order in this case.

And whether I adopted and signed the exact order that you prepared or modified it in some points, I can't recall since it was at this point in time some months ago when it was signed. But he specifically addresses seven different things that the Court's order is deficient in addressing. Can you take those one by one and tell me what your response is?

MR. PETRANO: Sure, Your Honor. And if I may, just an overall response at first. My response is -- gets into specifics. But, first, the overarching, the main claim, Your Honor, the preface to the applicant's motion to reconsider was that if he does not point out the supposed lack of

addressing particular issues in his order, he may be barred from pursuing those on appeal as they may be deemed waived.

The Marler versus Pruitt, I believe, is the case that that doctrine applied. I would just point out that by doing so today, by claiming that things were not addressed in the order, he is preserving those issues in with Marler versus Pruitt.

So that particular preface has been deflated by the mere mechanism of today's hearing. But that being said, Your Honor, the self-defense issue I believe is covered in the order. If you want me to just turn to the page and go through?

THE COURT: Yes, sir.

MR. PETRANO: Certainly, Your Honor, if you'll just give me a moment.

THE COURT: All right.

MR. PETRANO: This is covered in part on page 14, Your Honor, as to where the applicant was found not credible. These aren't things that are just put into the order just to be mean. These are actually relevant things.

When someone testifies, there is ultimately a credibility finding. That's Your

Honor's function. Obviously, the State was asked to draft the order, so I drafted the order finding those credibility findings in a manner that would support our argument, which I believe is the point of us drafting the order.

But, anyway, counsel explained that -- and I'm paraphrasing, of course, and this is kind of, again, around page 14, and it is accompanying with some of the other recitations. But counsel explained that the applicant during the representation didn't really tell him anything.

It was only just a, you know, "I didn't do it" kind of thing until the State started presenting their case, and not just through discovery. Remember, the applicant said he never even saw the discovery, which trial counsel said, "No, we did go over discovery. That's an error."

But as the trial is progressing, as the State's witnesses are testifying, it's only then that the applicant is giving trial counsel his version of events. That's kind of makes it difficult to "develop" a defendant's, a client's, whatever you want to call him, self-defense theory if you're kind of not working with him till in the middle of the trial.

I think that is ultimately -- that lack of cooperation is somewhat with the overall application to a lot of the issues. I'm going to jump to the end, Your Honor. I'm also going to point that the order does address the issues in the sense that it addresses them in compliance with Strickland versus Washington, whereas if it is easier to dispose of an ineffectiveness claim because of lack of prejudice, i.e. overwhelming evidence, then that course should be followed.

So in compliance with Strickland versus Washington, the order does address those things. But going back to the line items, counsel explained about the shoes and the boots. And it's been a while, and I don't have a transcript of the PCR.

But I think the order reflects that counsel had a strategic reason where it was something about the -- counsel knew that the boots or the shoes were not properly taken into evidence, and he was going to be able to exploit that.

And I believe that that's specifically pointed out -- if I may, Your Honor. I believe we've got that on page 11 and 12. Counsel explained -- I'm talking the top of page 11. Counsel explained that the boots/shoes were not a match in

the sense it was a SLED report.

It was just a naked eye match. And counsel explained that he strategically did not object when the boots/shoes were first shown. And, remember, they were kind of flashed. This is a parenthetical here in the order. They were not introduced but flashed to the jury because he -- trial counsel -- knew the officer was incorrect, and he would be able to expose that later.

And counsel ultimately testified during cross that, sure, in hindsight maybe he should have handled it a little differently, but there was a strategic reason here. But, anyway, that's addressed in the order, Your Honor.

Counsel explained -- and, you know, this is getting to the closing argument as far as counsel should have objected during the closing argument. Counsel explained that he's always very hesitant to object during closing.

And, Your Honor, something that I stumble across once in a while when I'm reading the rules, there's actually a specific rule that says an attorney shall not interrupt another attorney's argument. And I believe that's in the evidence rules, one of the later ones.

But my point being that it's something that is cautioned against. However, I'm not trying to dismiss that and say an attorney does not have a duty as far as Sixth Amendment in a criminal representation to object when there's something incorrect coming in. I'm just saying that that caution is supported.

Counsel explained that he -- this is on the bottom of 11 and top of page 12. Counsel did move for a mistrial. Counsel was cautious and made a strategic decision -- and this was in agreement with the trial court. I think if you'll look on transcript page 383 -- regarding a curative instruction for some of these other items, some of the evidence items that were not supposed to come in but did come in.

Counsel also explained and Your Honor found counsel credible -- although I drafted the order, I'll admit that. But the order finds counsel credible, and that's where the explanation is regarding the request for counsel, that there was a Doyle problem, that the defendant, when he was being examined by his own attorney, kind of just went off into -- and that's when I asked the lawyer something.

And I'm paraphrasing, "And it was during counsel's questioning that that happened. But counsel explained, "Look, I perhaps should have coached him better, but that did come out and that's where we are."

And, you know, Your Honor, all these little things aren't really issues in and of themselves. And that's I guess where the applicant's current cumulative error argument goes. And I believe that's Greene -- G-R-E-E-N-E -- versus State.

Our Court has explained that cumulative error is not really a ground for PCR. I don't think they come out and say it's not really, but it's something that they say we haven't said it is, leaving the door open. Perhaps one day they will say there's a cumulative error doctrine for ineffective assistance of counsel.

I'm going all over the place here, Judge, and I'm not trying to be evasive or anything like that. But the order does address these issues. It does do so regarding the explanations by trial counsel and finding trial counsel credible.

Also, it does so by the applicability of Strickland and simply dismissing the arguments as

Strickland instructs our PCR courts to do when the case is overwhelming. Our Supreme Court has already said that the case was overwhelming as far as the murder of the victim in this case. I think I've answered all your questions, Judge.

THE COURT: Okay.

MR. PETRANO: Again, I'm relying on the testimony of trial counsel, which is in 11, and 12, and 10, and there's conclusory statements on 14. But the vast majority, if not all, of these issues are covered I believe effectively, thoroughly, and as they should be in compliance with Strickland in the order. But I'd be more than happy to address something specific if I have not done so, which is kind of a non-reply, Your Honor.

THE COURT: Mr. Blume, any response?

MR. BLUME: Your Honor, briefly, just some of the points Mr. Petrano made in regards to the finding in the order that trial counsel stated that some of Mr. Childers' defenses weren't told to trial counsel until they're in court and in trial, I think that's contradicted by trial counsel's own admissions in the transcript where he's telling the judge he's not really been up to speed on this case.

He's had a number of other cases he was

tending to. He hadn't seen Mr. Childers in jail all that much. With Mr. Childers in jail, what is he supposed to tell him if his trial attorney isn't coming to see him in jail not often enough, where trial counsel admitted he only got the case, a murder case, a month before trial, and that they had a disagreement from the beginning over Mr. Childers' perception of trial counsel having conflicts in the case.

So I would say trial counsel contradicts himself in that regard, and that's not a proper finding. The response by Mr. Petrano that trial counsel knew that -- something with the boots or shoes. The officer was incorrect, and trial counsel could expose and exploit later, but the transcript reflects he never did.

And so just because trial counsel offers a purported strategic reason at PCR for not objecting to anything, all one has to do is go back and look at the trial transcript to see that strategic reason is more a matter of hindsight than something he was thinking at the time, because he didn't expose the police officer in illegal or improper behavior.

And the boots were ultimately admitted without objection when the trial court had

previously ruled it inadmissible under the Fourth Amendment. The finding and argument that trial counsel says he's hesitant to object to closing, Mr. Petrano responds to a rule where we're not supposed to interrupt.

I don't have that rule in front of me. But my recollection is that applies that we're not supposed to interrupt each other during argument to the Court or proceedings at trial. We don't just stand up and interrupt opposing counsel with our own position.

There's nothing in the rule that a trial attorney should not object when one side is making proper or closing argument. We have case law where objections have been made to closing argument, and our appeal courts say, "Yes, the objection should have been sustained."

I think the remaining from my points, Mr. Petrano has acknowledged that we have preserved our other issues by the hearing today and our written motion. Nonetheless, Your Honor has some specific questions about any particular issue. And that would be my response, thank you.

THE COURT: All right.

MR. PETRANO: And if I may, just very,

very quickly.

THE COURT: Yes, sir.

MR. PETRANO: I'm in full agreement with Mr. Blume. I was not trying to suggest that the rule suggests that an attorney should not object. I was just saying there's some support to trial counsel's testimony that he's cautious to interrupt an argument.

I agree that counsel, of course, has a duty to make objections on the record, absolutely. And I apologize if that was misunderstood. It's not.

MR. BLUME: Thank you.

THE COURT: All right. We'll be in recess for just a few minutes.

MR. BLUME: Thank you, Your Honor.

(Court in recess.)

THE COURT: All right, any other comments that need to be made?

MR. BLUME: Nothing further on behalf of the applicant.

MR. PETRANO: No, Your Honor, unless you have anything specific.

THE COURT: Well, I have no additional questions. Is there anything that either of you

would like to submit following this hearing for my reconsideration?

MR. BLUME: No, sir. I think the three cases I've cited are sufficient. I don't need to submit them in a formal written memorandum. I think my oral arguments in that regard are sufficient, so thank you.

THE COURT: All right. In this case, the date of the offense in this matter was when?

MR. PETRANO: One moment, Your Honor.

MR. BLUME: October 15, 2000.

THE COURT: 2000 -- October 15th, 11 and a half years ago.

MR. BLUME: Yes, sir.

THE COURT: And the trial, the appeal, the Appellate Court's reversal, and the Supreme Court's reversal of the Appellate Court --

MR. BLUME: Yes, sir.

THE COURT: -- and all that?

MR. BLUME: That's what actually, for whatever reason, took a significant amount of time in the case, because the trial was in September 2001. Then the Court of Appeals' opinion and then the South Carolina Supreme Court's review of that was final I believe in 2007. So that took some time

for the Appellate Court to review.

THE COURT: All right. And is this a life life or a 20-year life?

MR. PETRANO: This is a natural life, life without parole.

THE COURT: Natural life?

MR. PETRANO: Yes, sir.

THE COURT: Well, I'd like to take the opportunity to look at the cases and study them out of an abundance of caution to ensure that current law is being applied.

And also I wanted to hear your argument, Mr. Blume, regarding the manner that you contend the order issued was deficient or is deficient. So I will take that under advisement. It will not be as long as it was the last time, and I'll submit a written order.

MR. BLUME: Did you want both sides to submit an additional supplemental order or not?

THE COURT: Well, Mr. Petrano's position is that his order that he submitted --

MR. BLUME: Yes, sir.

THE COURT: -- is fine. You would only want to submit one if you were on the winning side, I would think. Is that right --

MR. BLUME: Yes, sir.

THE COURT: -- or you want to modify his order?

MR. BLUME: It would vacate his order if I submitted something. So I'll do that if Your Honor becomes so inclined, if you've been persuaded.

THE COURT: All right.

MR. BLUME: Otherwise, I'll just wait to hear from you.

THE COURT: Right. I'll issue a written order, unless I find some need to request something from counsel.

MR. BLUME: All right, sir.

THE COURT: Perhaps the objections is the reason why the judge used to write all the orders. But it's just physically impossible in most instances. Of course, I know a number of judges in PCR cases -- is it Judge Keesley who writes everything from scratch?

MR. PETRANO: Well, Judge Keesley submits a memorandum order which is to be developed into an actual order. But, yes, he does, but that's not --

THE COURT: That's not writing the entire order.

MR. PETRANO: Yes, I'm not trying dilute

what you're saying about Judge Keesley, but it's not --

THE COURT: I thought he was the gold standard on this. Is there anyone else who writes them?

MR. PETRANO: Judge Alford writes his own orders, Your Honor, it's my understanding, in the Upstate. I believe there is another judge. I think the death penalty -- Mr. Blume can probably correct me. But I believe that the judges write the orders.

MR. BLUME: Judge, not to be too abrupt about it, but my experience in similar circumstances is the Appellate Court is satisfied if there's imply a one-page order that says the motion -- applicant's motion to alter or amend the judgment is denied or is granted.

THE COURT: Of course, yes.

MR. BLUME: Right. If it's granted, of course, then, of course, the Court would then write an additional proposed order.

THE COURT: I wasn't referring to the order that I am to write.

MR. BLUME: Oh.

THE COURT: The reason I said I'm going to write it, if your motion is denied, then there won't

be a -- well, wait -- if it's granted, then I will have you draft it, and it may be 20-something pages --

MR. BLUME: Yes, sir.

THE COURT: -- or more. The question was, generally with judges around the state, do you know of any who draft orders such as like these 19 pages that Mr. Petrano --

MR. BLUME: I have not had that experience. And Judge Keesley, as you mentioned, will often revise either side's proposed order. Occasionally, he will also prepare a memorandum order which then he'll submit to the party who's getting relief.

THE COURT: And I typically tweak and change and delete some things, add some things as I see fit. But a basic order, I'm not sure what occurred with this and whether I --

MR. BLUME: But my experience is most times Your Honor has a much bigger caseload, both civil and criminal, than the Appellate Courts obviously, no disrespect to those folks. And so it is my experience that orders are submitted from either side, and Your Honor simply elects which side to grant relief based on your overall decision.

MR. PETRANO: And just to follow up with your question, not all of them, but Judge Lee does write orders from scratch from time to time.

THE COURT: All right. Okay, very good. Thank you all.

MR. BLUME: Thank you, Your Honor.

THE COURT: Mr. Childers, are you doing okay?

MR. CHILDERS: Yes, sir.

THE COURT: All right, good luck to you.

MR. BLUME: Thank you for your consideration, Your Honor.

THE COURT: All right.

MR. PETRANO: Thank you, Your Honor.

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

COURT REPORTER'S CERTIFICATION

I, REMA K. GANTT THOMAS, OFFICIAL COURT REPORTER, AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE ABOVE-CAPTIONED CASE ON JUNE 1, 2012, IN CAMDEN, SOUTH CAROLINA.

I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL NOR KIN TO ANY OF THE PARTIES TO THIS CAUSE OF ACTION, NOR AM I INTERESTED IN ANY MANNER IN ITS OUTCOME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL AT CHAPIN, SOUTH CAROLINA, THIS THE EIGHTEENTH DAY OF FEBRUARY, 2013.

Rema K. G. Thomas

REMA K. GANTT THOMAS
OFFICIAL COURT REPORTER
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 11/21/2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW	)	
William L. Childers, #278419	)	Civil Action No.: 2008-CP-28-01213
Applicant,	)	
v.	)	**ORDER DENYING MOTION TO ALTER OR AMEND**
State of South Carolina,	)	
Respondent.	)	

The Court issued an Order of Dismissal on August 12, 2011. The Applicant subsequently filed a Motion to Alter or Amend that Order pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. A hearing was conducted on June 1, 2012, on the motion. After considering the motion, applicable law and arguments of counsel, the Motion to Alter or Amend is hereby DENIED.

AND IT IS SO ORDERED.

Clifton Newman
Presiding Judge

November 29, 2012
Columbia, South Carolina