

LAW OFFICE OF



PLK

TARA DAWN SHURLING, PA

Attorney and Counselor at Law

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Suite A

Columbia, South Carolina 29204

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E-Mail: tdslaw@shurlinglaw.com

RECEIVED

June 10, 2014

JUN 12 2014

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

S.C. SUPREME COURT

Re: Ila Michelle Carter, #276333 v. State of South Carolina; 2004-CP-04-0529.

Dear Mr. Shearouse:

Enclosed please find for filing a Notice of Appeal on behalf of the above-captioned Post-Conviction Relief client. I would appreciate your returning two (2) clocked copies to me in the envelope provided. Inasmuch as I was court-appointed in this matter, I will now be turning this file over to the South Carolina Commission on Indigent Defense, Office of Appellate Defense for perfection of this appeal. I would note that Judge J. Cordell Maddox issued a written Order of Dismissal on this case which was filed with the Anderson County Clerk of Court's Office on January 5, 2012. Judge Maddox filed a second Order of Dismissal following my filing of a Motion to Alter or Amend pursuant to Rule 59(e). That Order was not filed until May 20 2014. With my thanks for your assistance in this matter, as always, I remain,

Sincerely yours

A large, stylized handwritten signature in black ink that reads "Tara Dawn Shurling".

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg

Enclosures

cc: Walt J. Whitmire, Assistant Attorney General
Kimberly McCall, South Carolina Office of Appellate Defense

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
J. Cordell Maddox, Presiding Judge

2004-CP-04-529

ILA MICHELLE CARTER, 276333

Applicant,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

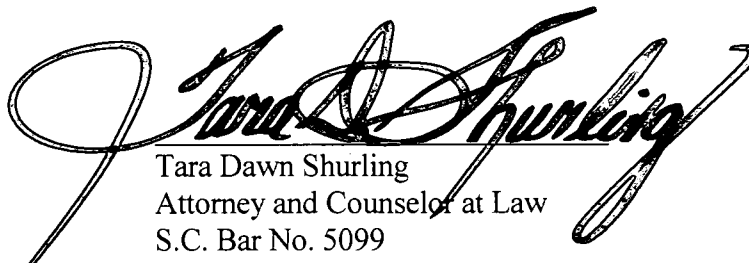
NOTICE OF APPEAL

NOW COMES the Applicant in the above-captioned Post-Conviction Relief matter, acting by and through her undersigned counsel, giving notice of her appeal from the Order of Dismissal denying her Post-Conviction Relief filed January 5, 2012, and the Second Order of Dismissal filed May 20, 2014 issued in response to Applicant's Motion to Alter or Amend pursuant to Rule 59(e), SCRPC.

RECEIVED

JUN 12 2014

S.C. SUPREME COURT



Tara Dawn Shurling
Attorney and Counselor at Law
S.C. Bar No. 5099

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

ATTORNEY FOR APPLICANT

This 10th day of June, 2014.

Other Counsel of Record:
Walt J. Whitmire, Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
J. Cordell Maddox, Presiding Judge

2004-CP-04-529

ILA MICHELLE CARTER, 276333

Applicant,

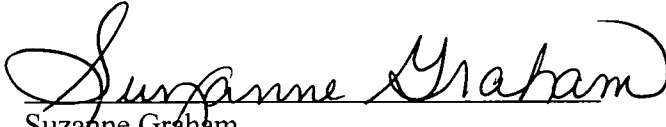
v.

THE STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Applicant's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Walt J. Whitmire, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 11th day of June, 2014.


Suzanne Graham

Paralegal to Tara Dawn Shurling

SWORN TO BEFORE me this 11th day
of June, 2014.

 (L.S.)

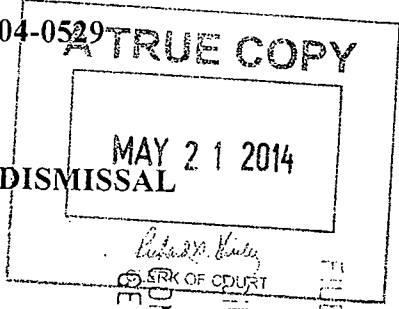
Notary Public for South Carolina

My Commission Expires: Jan. 16, 2017

STATE OF SOUTH CAROLINA)
 COUNTY OF ANDERSON)
 Ila Michelle Carter, # 276333,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE TENTH JUDICIAL CIRCUIT

2004-CP-04-0529



ORDER OF DISMISSAL

FILED-CLERK'S OFFICE
 ANDERSON COUNTY
 IN MAY 20 A 8 59
 COMMON PLEAS AND
 GENERAL SESSIONS

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 7, 2004. The Respondent made its Return on October 5, 2004. An evidentiary hearing into the matter was convened on October 7, 2010, at the Anderson County Courthouse. The Applicant was present at the hearing represented by counsel, Tara Shurling, Esquire. The Respondent was represented by A. West Lee of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying was Applicant's trial counsel, Robert Gamble, Esquire ("counsel"). This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Anderson County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. The Applicant was indicted at the March 2001 and May 2001 term of General Sessions for Homicide by Child Abuse and Great Bodily Injury on a Child (2001-GS-04-0756). Applicant was represented by Robert Gamble, Esquire, on the charges. Applicant proceeded to a jury trial before the Honorable John W. Kittredge on June 29, 2001, and was

found guilty of both counts. Judge Kittredge sentenced the Applicant to life imprisonment for Homicide by Child Abuse and a consecutive twenty (20) year term for the Great Bodily Injury charge.

A notice of appeal was filed and an Anders brief was submitted on Applicant's behalf by Joseph Savitz, III, Esquire. The South Carolina Court of Appeals dismissed the appeal by unpublished opinion. State v. Ila Carter, Op. No. 2003-UP-160 (S.C. Ct. App. filed February 25, 2003).

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

1. Ineffective assistance of counsel.
 - a. Attorney did not represent me effectively.
 - b. No witnesses called in my defense.
 - c. Findings of new evidence.

At the PCR hearing, Applicant amended her allegations to set forth the following contentions as her additional grounds for PCR:

1. Ineffective Assistance of Counsel:
 - a. Failure to review discovery file with Applicant.
 - b. Failure to advise Applicant of ability to negotiate plea offers.
 - c. Failure to make several key objections to be preserved for direct appeal.

Pursuant to Applicant's Rule 59(e), SCRCPP, motion to alter or amend this Court's ruling to conform to the testimony presented, this Court includes the following grounds for PCR:

2. Ineffective Assistance of Counsel:
 - a. Failure to review discovery file with Applicant.
 - b. Failure to advise Applicant of ability to negotiate plea offers.
 - c. Failure to make several key objections to be preserved for direct appeal.

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 presented at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms."

Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Failure to Review Discovery Materials

Applicant's first allegation of ineffectiveness on counsel's part is that counsel failed to review the discovery materials and state's evidence with Applicant prior to proceeding to trial on these charges. Specifically, Applicant testified at the hearing that, while she met with counsel two or three times to prepare for trial, she was never shown the discovery materials and in fact did not even know what discovery was until after her trial ended. Applicant went on to state the first time she saw the materials was after her conviction when she wrote counsel requesting a copy of such materials, which she received at Leath Correctional Institution on August 3, 2004.

Counsel testified that during his meetings with Applicant he was able to review the charges she was facing, the elements of the offenses contained in the indictments, the potential punishments she was facing, and the discovery materials. Counsel went on to state that he recalled bringing discovery with him to the jail during a meeting with Applicant. Counsel testified it was his practice to review the State's evidence prior to discussing it with a client.

Based on the testimony presented at the hearing, I find Applicant has failed to establish counsel's deficiency or resulting prejudice in this regard. Further, I find counsel's testimony to be credible and, conversely, I find Applicant's testimony to not be credible. Counsel plainly testified that he did bring the discovery file with him during at least one meeting with Applicant at which time he reviewed the materials with Applicant. Therefore, his representation was not deficient. Further, Applicant failed to prove any resulting prejudice through the introduction of

the discovery materials at the hearing, thereby failing to satisfy either prong of the Strickland v. Washington test in this regard.

Failure to Inform Applicant of Potential Plea Bargaining

Applicant also alleges counsel was ineffective in failing to advise her of the possibility of entering into plea negotiations to attempt to elicit an offer for a lesser prison sentence. Applicant contends counsel never discussed the option of negotiating with the solicitor for a plea offer, but that had an advantageous offer been extended, she would have entered such a plea. She still maintained her innocence and testified counsel never discussed the possibility of an Alford¹ plea. Applicant conceded that she was aware of a defendant's options to either plea or go to trial, but maintains plea negotiations were never something she and counsel discussed during the course of his representation. She testified that her letters that mention '30' had nothing to do with plea bargaining. Instead, she claimed the term '30' was code she used to convey a secret message to counsel's investigator.

Counsel testified in contradiction to Applicant, stating that he did believe he discussed the possibility of a plea with Applicant, ultimately referring to a letter from his file in which he indicated might have evidenced an orally conveyed plea offer for a thirty (30) year prison sentence. Counsel went on to say his general practice is to relay all plea information to his client and then allow the client time to decide whether to proceed to trial or take the plea offer. Counsel stated that he didn't specifically recall the details of any plea offers made because Applicant had always maintained her innocence of the charges, but that there would be no written record of such plea offers as they were extended orally at the time. Counsel confidently testified that the Solicitor would have made an Alford plea based upon the facts of the case. Counsel also testified

¹ North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970)

that he “would have gone into the possibility of negotiating a plea” in his discussions with Applicant when preparing the case. Counsel finished by stating that based on the state’s evidence against Applicant, in his opinion Applicant needed to “plead and get out of there because it was a conviction all the way” as there was overwhelming evidence of Applicant’s guilt in this matter.

Based on a review of the trial transcript and the testimony presented at the hearing, I find Applicant has failed to carry her burden in proving counsel was ineffective regarding the possibility of entering into plea negotiations with the state. Further, I find counsel’s testimony to be credible, while finding Applicant’s testimony to not be credible. Counsel, in accordance with his standard practice as a public defender for roughly twenty-six (26) years, reviewed with Applicant the possibility of negotiating a plea and relayed all relevant plea information to Applicant. Applicant was given the opportunity to make an independent decision as to whether to proceed to trial or enter a plea without coercion or pressure from counsel. With this information in mind, Applicant made the voluntary decision to proceed to trial in an attempt to prove her innocence after being fully advised by competent counsel of her options. Neither was counsel deficient for failing to advise Applicant on parole eligibility in discussing a possible guilty plea. See Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997). Therefore, Applicant has failed to prove counsel’s performance was deficient. Further, Applicant has not proven resulting prejudice based on this alleged deficiency. Applicant has failed to produce any evidence to show the state would have extended an advantageous plea offer if negotiations were entered into where Applicant now alleges they were not, or that she would have taken such a plea if one was offered, especially in light of her continued assertion of innocence. Therefore, I find this allegation to be without merit.

Failure to investigate and prepare Applicant’s case for trial

Applicant alleged counsel was ineffective for failing to investigate the cause of the victim's death. She postulated that Lupus could have been proximate cause and not child abuse. Counsel testified he discussed this matter with Applicant. As a result, counsel investigated the victim's medical records, researched Lupus, and discussed the possibility with Dr. Carter, a Pediatrician. As a result of counsel's efforts, he formed the opinion that the Lupus theory of causation was unlikely. He did not pursue genetic testing on the matter.

Applicant alleged counsel was ineffective for failing to investigate the victim's sons' potential bias towards her because of her divorce from his father. She asserted counsel should have investigated this matter and used the material to impeach her son's credibility at trial. Counsel testified that he reviewed and evaluated the son's statement and did not find it appropriate to delve into a Family Court matter here. Counsel recalled executing a successful cross-examination of the witness in question. He stated he was able to elicit testimony that the son had been prepped by the State in anticipation of trial.

Based on a review of the trial transcript and the testimony presented at the hearing, I find Applicant has failed to carry his burden in proving counsel's ineffectiveness in this regard. Counsel demonstrated sound performance in his investigation of the victim's medical history that possibility that the victim even had Lupus. Again, counsel demonstrated sound performance in his cross-examination of Applicant's son. Regardless, Applicant's cannot show prejudice where no credible scientific testimony or evidence was presented concerning the 'Lupus' theory on causation. Similarly, no specific testimony or evidence was presented to establish the son's bias. Thus, this allegation rests entirely on speculation.

Failure to Make Objections to Testimony/Argument Given At Trial

Applicant's final allegation is counsel was ineffective in failing to object to statements made at trial, and that such failures rendered his representation ineffective. Specifically, there are two distinct statements which Applicant contends counsel improperly failed to object to.

First, Applicant contends counsel should have objected to opinion testimony presented by forensic pathologist and examining coroner, Dr. Brett Woodard, where Dr. Woodard commented on the psychological development of the young victim in this matter. Applicant contends these comments were improper and objectionable as they were opinions which Dr. Woodard offered outside of his area of expertise. Counsel testified he is very familiar with Dr. Woodard as he has served as the coroner in nearly every murder case counsel has ever been involved with. Counsel went on to state that, while he agreed the statement was likely objectionable and in retrospect he probably should have objected, he did not believe that failure had any effect on the ultimate outcome of the trial as there was additional overwhelming evidence of Applicant's guilt introduced throughout the trial.

Applicant alleges counsel was ineffective for failing to persuade to the solicitor enter an agreement to stipulate to various diagnoses and injuries found on the victim. Applicant asserts effective performance here could have resulted in the introduction of fewer gruesome pictures of the victim's injuries at trial.

Applicant alleges counsel was ineffective in failing to object to the closing argument of Solicitor White where she commented on Applicant's request for an attorney during her interrogation by police. Applicant alleges counsel's failure to pose a timely objection to the comment resulted in a violation of her Fifth Amendment right to silence and Sixth Amendment right to counsel, as set forth in Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976).

Counsel testified that that he did not considering attempting to solicit such a stipulation agreement with the State. He opined that the judge would have had ultimate discretion on whether to allow for the stipulation agreement.

Counsel testified that he did recall the solicitor's comments in closing arguments, but stated that he did not object to the comments as he generally will not object during closing arguments unless the comment is "really heinous", as it is his strategy to avoid drawing any further jury attention to an improper comment. Counsel went on to say that had something been said during closing arguments that wasn't based on some scintilla of evidence or was otherwise was clearly inadmissible, he would have contemporaneously objected to it. Further, counsel testified that, while he believed it was a close call, any alleged Doyle violation in this matter would have been cured by the ruling set forth in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981).

Based on a review of the trial transcript and the testimony presented at the hearing, I find Applicant has failed to carry his burden in proving counsel's ineffectiveness in this regard. First, regarding the solicitor's closing arguments, the South Carolina Supreme Court has said that our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Counsel articulated a valid and commonly practiced strategic reason for choosing not to object to the comments made by the solicitor in her closing argument where he opted to not bring the comment to the jury's attention again, especially in

light of its likely inevitable admissibility based on the relevant case law. Therefore, I find no deficiency in this regard.

Further, Applicant has failed to prove resulting prejudice from counsel's failure to object to both the expert witness and solicitor's comments. While counsel readily admits in hindsight he could have objected to the opinion testimony rendered by Dr. Woodard, he also testified the admission of the testimony made no difference on the ultimate outcome of the trial. *See Strickland v. Washington* at 689, 2065 (*a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight...to evaluate the conduct from counsel's perspective at the time*). Additionally, where there is overwhelming evidence of guilt, as in this case, any alleged deficient performance by trial counsel will not be prejudicial to a defendant's case. *See Ford v. State* 314 S.C. 245, 442 S.E.2d 604 (1994); *See also Humbert v. State*, 345 S.C. 332, 548 S.E.2d 862 (2001); *and also Geter v. State*, 305 S.C. 365, 409 S.E.2d 344 (S.C. 1991). Therefore, in both instances, Applicant has failed to carry his burden in proving counsel's ineffectiveness.

Applicant's allegation that counsel was ineffective for failing to solicit a stipulation regarding the State's discretion in presenting admissible evidence to make its case is wholly without merit. *See State v. James*, 355 S.C. 25, 34, 583 S.E.2d 745, 749 (2003).

Based on the facts above, I find that Applicant did not prove by a preponderance of the evidence that counsel was ineffective in his representation. As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed in its entirety.

CONCLUSION

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

Except as discussed above, this Court finds that the Applicant failed to raise any other allegations cognizable in PCR at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue 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 advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 19 day of May, 2014.



J. Cordell Maddox
Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina.

FILED-CLERK'S OFFICE
ANDERSON SC
2014 MAY 20 A 8:59
COMMON PLEAS AND
GENERAL SESSIONS

FORM 4

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

JUDGMENT IN A CIVIL CASE

A TRUE COPY

CASE NO. 2004- CP-04-529

JAN - 6 2012

Lia Michelle Carter #276333

State of South Carolina

Richard K. ...
 CLERK OF COURT

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Salley W. Elliott

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. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- 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 (List amount(s) below)
		\$
		\$
		\$

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.

[Signature]
 Circuit Court Judge

2131
 Judge Code

01/04/12
 Date

For Clerk of Court Office Use Only

This judgment was entered on the 5th day of Jan, 2012 and a copy mailed first class or placed in the appropriate attorney's box on this 6th day of Jan, 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Tara Shurling, Esquire

ATTORNEY(S) FOR THE PLAINTIFF(S)

A. West Lee

Attorney General's Office

PO Box 1649 Columbia SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Richard A. Shuling
CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)
)
Ila Michelle Carter, # 276333,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

2004-CP-04-0529

TRUE COPY
JAN - 6 2012
CLERK OF COURT

ORDER OF DISMISSAL

PROCEDURAL HISTORY

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

1. Ineffective assistance of counsel.
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At the PCR hearing, Applicant amended her allegations to set forth the following contentions as her additional grounds for PCR:

1. Ineffective Assistance of Counsel:
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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 presented at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

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Applicant's first allegation of ineffectiveness on counsel's part is that counsel failed to review the discovery materials and state's evidence with Applicant prior to proceeding to trial on these charges. Specifically, Applicant testified at the hearing that, while she met with counsel two or three times to prepare for trial, she was never shown the discovery materials and in fact did not even know what discovery was until after her trial ended. Applicant went on to state the first time she saw the materials was after her conviction when she wrote counsel requesting a copy of such materials, which she received at Leath Correctional Institution on August 3, 2004.

Counsel testified that during his meetings with Applicant he was able to review the charges she was facing, the elements of the offenses contained in the indictments, the potential punishments she was facing, and the discovery materials. Counsel went on to state that he recalled bringing the discovery file to the jail with him during a meeting with Applicant, and further stated that he would have reviewed all of the discovery materials and evidence with Applicant after taking time to review it himself.

Based on the testimony presented at the hearing, I find Applicant has failed to establish counsel's deficiency or resulting prejudice in this regard. Further, I find counsel's testimony to be credible and, conversely, I find Applicant's testimony to not be credible. Counsel plainly testified that he did bring the discovery file with him during at least one meeting with Applicant at which time he reviewed the materials with Applicant. Therefore, his representation was not deficient. Further, Applicant failed to prove any resulting prejudice through the introduction of the discovery materials at the hearing, thereby failing to satisfy either prong of the Strickland v. Washington test in this regard.

Failure to Inform Applicant of Potential Plea Bargaining

Applicant also alleges counsel was ineffective in failing to advise her of the possibility of entering into plea negotiations to attempt to elicit an offer for a lesser prison sentence. Applicant contends counsel never discussed the option of negotiating with the solicitor for a plea offer, but that had an advantageous offer been extended, she would have entered such a plea. Applicant conceded that she was aware of a defendant's options to either plea or go to trial, but maintains plea negotiations were never something she and counsel discussed during the course of his representation.

Counsel testified in contradiction to Applicant, stating that he did believe he discussed the possibility of a plea with Applicant, ultimately referring to a letter from his file in which he indicated that he had brought a plea offer to Applicant. Counsel went on to say his general practice is to relay all plea information to his client and then allow the client time to decide whether to proceed to trial or take the plea offer. Counsel stated that he didn't specifically recall the details of any plea offers made because Applicant had always maintained her innocence of the charges, but that there would be no written record of such plea offers as they were extended orally at the time. Counsel also testified that he "would have gone into the possibility of negotiating a plea" in his discussions with Applicant when preparing the case. Counsel finished by stating that based on the state's evidence against Applicant, in his opinion Applicant needed to "plead and get out of there because it was a conviction all the way" as there was overwhelming evidence of Applicant's guilt in this matter.

I find Applicant has failed to carry her burden in proving counsel was ineffective regarding the possibility of entering into plea negotiations with the state. Further, I find counsel's testimony to be credible, while finding Applicant's testimony to not be credible. Counsel, in

accordance with his standard practice as a public defender for roughly twenty-six (26) years, reviewed with Applicant the possibility of negotiating a plea and relayed all relevant plea information to Applicant. Applicant was given the opportunity to make an independent decision as to whether to proceed to trial or enter a plea without coercion or pressure from counsel. With this information in mind, Applicant made the voluntary decision to proceed to trial in an attempt to prove her innocence after being fully advised by competent counsel of her options. Therefore, Applicant has failed to prove counsel's performance was deficient. Further, Applicant has not proven resulting prejudice based on this alleged deficiency. Applicant has failed to produce any evidence to show the state would have extended an advantageous plea offer if negotiations were entered into where Applicant now alleges they were not, or that she would have taken such a plea if one was offered, especially in light of her continued assertion of innocence. Therefore, I find this allegation to be without merit.

Failure to Make Objections to Testimony/Argument Given At Trial

Applicant's final allegation is counsel was ineffective in failing to object to statements made at trial, and that such failures rendered his representation ineffective. Specifically, there are two distinct statements which Applicant contends counsel improperly failed to object to.

First, Applicant contends counsel should have objected to opinion testimony presented by forensic pathologist and examining coroner, Dr. Brett Woodard, where Dr. Woodard commented on the psychological development of the young victim in this matter. Applicant contends these comments were improper and objectionable as they were opinions which Dr. Woodard offered outside of his area of expertise. Counsel testified he is very familiar with Dr. Woodard as he has served as the coroner in nearly every murder case counsel has ever been involved with. Counsel went on to state that, while he agreed the statement was likely objectionable and in retrospect he

probably should have objected, he did not believe that failure had any effect on the ultimate outcome of the trial as there was additional overwhelming evidence of Applicant's guilt introduced throughout the trial.

Second, Applicant alleges counsel was ineffective in failing to object to the closing argument of Solicitor White where she commented on Applicant's request for an attorney during her interrogation by police. Applicant alleges counsel's failure to pose a timely objection to the comment resulted in a violation of her Fifth Amendment right to silence and Sixth Amendment right to counsel, as set forth in Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976).

Counsel testified that he did recall the solicitor's comments in closing arguments, but stated that he did not object to the comments as he generally will not object during closing arguments unless the comment is "really heinous", as it is his strategy to avoid drawing any further jury attention to an improper comment. Counsel went on to say that had something been said during closing arguments that wasn't based on some scintilla of evidence or was otherwise was clearly inadmissible, he would have contemporaneously objected to it. Further, counsel testified that, while he believed it was a close call, any alleged Doyle violation in this matter would have been cured by the ruling set forth in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981).

Based on a review of the trial transcript and the testimony presented at the hearing, I find Applicant has failed to carry his burden in proving counsel's ineffectiveness in this regard. First, regarding the solicitor's closing arguments, the South Carolina Supreme Court has said that our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530

(1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Counsel articulated a valid and commonly practiced strategic reason for choosing not to object to the comments made by the solicitor in her closing argument where he opted to not bring the comment to the jury's attention again, especially in light of its likely inevitable admissibility based on the relevant case law. Therefore, I find no deficiency in this regard.

Further, Applicant has failed to prove resulting prejudice from counsel's failure to object to both the expert witness and solicitor's comments. While counsel readily admits in hindsight he could have objected to the opinion testimony rendered by Dr. Woodard, he also testified the admission of the testimony made no difference on the ultimate outcome of the trial. See Strickland v. Washington at 689, 2065 (*a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight...to evaluate the conduct from counsel's perspective at the time*). Additionally, where there is overwhelming evidence of guilt, as in this case, any alleged deficient performance by trial counsel will not be prejudicial to a defendant's case. See Ford v. State 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); and also Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (S.C. 1991). Therefore, in both instances, Applicant has failed to carry his burden in proving counsel's ineffectiveness.

Based on the facts above, I find that Applicant did not prove by a preponderance of the evidence that counsel was ineffective in his representation. As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed in its entirety.

CONCLUSION

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

Except as discussed above, this Court finds that the Applicant failed to raise any other allegations cognizable in PCR at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue 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 advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 04 day of January, 2012.



J. Cordell Maddox
Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina.

2012 JAN 04 10:08 AM
J. C. MADDOX
CLERK OF COURT

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June 10, 2014

Walt J. Whitmire, Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-

RE: Ila Michelle Carter, #276333 v. State of South Carolina; 2004-CP-04-0529.

Dear Mr. Whitmire :

Enclosed please find for your records a copy of the Notice of Appeal that was filed in the above-captioned matter. I was court-appointed in this matter and will now forward this file to the Appellate Division of the South Carolina Commission on Indigent Defense in the next few days. Therefore, please direct any further questions to that office after this date. It was a pleasure working with you on this case. Thank you. I remain

Sincerely yours,

A handwritten signature in cursive script that reads "Tara Dawn Shurling".

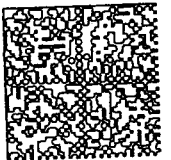
Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg

Enclosure

cc: The Honorable Daniel E. Shearouse, Clerk, Supreme Court of South Carolina.

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