

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

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January 12, 2015

RECEIVED

JAN 20 2015

Via US Mail

Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

S.C. SUPREME COURT

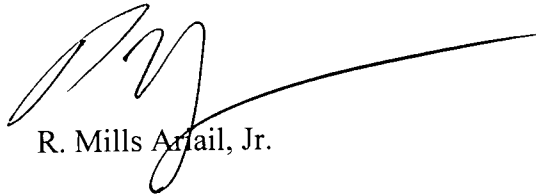
Re: *Notice of Intent to Appeal from Anthony Maurice Lounds vs. State of South Carolina C.A. No.: 2013-CP-23-4178*

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable Letitia W. Verdin's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law



R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

cc: Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

Karen C. Ratigan
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-11549

Anthony Maurice Lounds SCDC# 227456
McCormick Correctional Institution
386 Redemption Way
McCormick, South Carolina 29899

SC Commission of Indigent Defense
Division of Appellate Defense
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JAN 20 2015

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2013-CP-23-04178

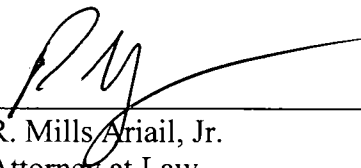
Anthony Maurice Lounds,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable Letitia H. Verdin's Order of Dismissal dismissing Appellant's application for post-conviction relief. On December 8, 2014, the Honorable Letitia W. Verdin signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on December 20, 2014. A copy of the Honorable Letitia W. Verdin's Order of Dismissal is attached.



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Attorney for Anthony Maurice Lounds

Greenville, South Carolina
January 12, 2015

Other Counsel of Record and Interested Parties:

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia W. Verdin, Circuit Court Judge

Case No.2013-CP-23-04178

Anthony Maurice Lounds,..... Appellant,

v.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this January 12, 2015, I served upon the below named individuals copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Karen C. Ratigan, Esq.
Assistant Attorney General
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Columbia, SC 29211
Attorney for the State of South Carolina

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Division of Appellate Defense
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Denise Tanner LaBeck
Denise Tanner LaBeck

January 12, 2015

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2013CP2304178

FILED IN THE COURT OF COMMON PLEAS
GREENVILLE COUNTY, S.C.
PAUL B. WICKENSIMER
2013 FEB 19 PM 4 45

Anthony Maurice Lounds vs. South Carolina State Of

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):**
SCRCP (Vol. Nonsuit): Rule 43(k), SCRCP (Settled); Rule 12(b), SCRCP; Rule 41(a),
 Other: _____
- ACTION STRICKEN (CHECK REASON):**
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other: _____
 Rule 40(j) SCRCP; Bankruptcy;
- 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; Statement of Judgment by the Court:
Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - Letitia H Verdin

This judgment was entered on the . and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

R. Mills Ariail Jr. 11 North Irvine Street, Suite 11
Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Anthony Maurice Lounds,)
)
 S.C.D.C. No. 227456,)
)
 Applicant.)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
)
 _____)


IN THE COURT OF COMMON PLEAS
 C.A. No. 2013-CP-234178
 ORDER OF DISMISSAL
 FILED - CIVIL DIVISION COURT
 GREENVILLE COUNTY S.C.
 PAUL R. WILSON, CLERK
 24 OCT 19 PM 4:55

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 2, 2013. The Respondent made its return on April 8, 2014. A hearing into the matter was held on October 21, 2014 before Judge Letitia H. Verdin at the Greenville County Courthouse. The Applicant was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was Brigham Young, Zeldric Shanaeng Vance, and the Applicant's trial counsel, Scott D. Robinson, Esquire. The Court had before it the transcript of the trial, the Greenville County Clerk of Court records, including the arrest warrant, indictment and sentencing sheet; the Applicant's South Carolina Department of Corrections Records; the PCR Application; and the Return.

PROCEDURAL HISTORY

The Applicant was confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Greenville County Grand Jury indicted the Applicant in the November 2010 term of General Sessions for armed



robbery (2009-GS-23-10155, count 1) and possession of a weapon during the commission of a violent crime (2009-GS-23-10155, count 2). Scott D. Robinson, Esquire, represented the Applicant.

After the State brought the case to trial, the Applicant was found guilty. On July 13, 2011, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to concurrent terms of five years imprisonment without parole for armed robbery and five years for possession of a weapon during the commission of a violent crime.

The Applicant filed a notice of appeal in the South Carolina Court of Appeals. Susan B. Hackett, Esquire, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentenced. State v. Lounds, Op. No. 2013-UP-289 (S.C. Ct. App. June 26, 2013). The Remittitur was sent on July 17, 2013.

ALLEGATIONS

In this Application, the Applicant alleges that he is entitled to PCR for the following reasons:

1. Ineffective assistance of trial counsel;
 - a. Failure to function as the State's adversary and to subject the prosecution's case to adversarial testing;
 - b. Failure to investigate and call witnesses; and
 - c. Failure to offer a defense to the court.

The Applicant filed a *pro se* amendment to his Application for PCR, and made the following additional allegations of ineffective assistance of counsel:

- d. Failure to communicate with the Applicant "to adequately prepare for life without parole trial;"
- e. Failure to challenge the Applicant's arrest;
- f. Failure to "conscientiously discharge his professional responsibilities;" and
- g. Failure to make proper objection and argument concerning the seating of Juror 40.



Of these allegations, the Applicant presented evidence relating to points (b), (e), and (g) at his PCR hearing. The Applicant additionally argued at the hearing that his trial counsel should have moved to quash the indictment in this case, because it was presented to the Grand Jury more thirteen months after the incident occurred.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2014).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 686 (1984); Porter v. State, 368 S.C. 378, 629 S.E.2d 353, 356 (2006). Regarding the first prong, the Applicant must in essence show that counsel's advice was not “within the range of competence demanded of attorneys in criminal cases.” Hill v. Lockhart, 474 U.S. 52, 56 (1985). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel's unprofessional errors, the result of


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the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). A reasonable probability is “a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 686).

Furthermore, the decisions and advice of trial counsel should be assessed for reasonableness under all the circumstances, with heavy deference given to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). A criminal defense attorney has a duty to conduct a reasonable investigation so that he may discover all reasonably available mitigation evidence, as well as any reasonably available evidence tending to rebut evidence produced by the state. McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 361 (2008). There is a strong presumption that adequate assistance of counsel was rendered, and that reasonable care was exercised—particularly in the arena of professional judgments. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007).

a. Failure to function as the State’s adversary and to subject the State’s case to adversarial testing.

During his PCR hearing, the Applicant testified that trial counsel did not adequately cross-examine the State’s witnesses concerning the description of the handgun used in the robbery. There were conflicting statements concerning the gun, which was never recovered. Additionally, different witnesses testified that the gun went off at different times. The Applicant argues that these points were not sufficiently emphasized during his trial.

The Applicant further argues that one of the State’s witnesses originally gave a statement to law enforcement on September 6, 2009, and that this statement conflicted with the State’s theory of events presented at trial. In short, the Applicant claims that trial counsel should have used this witness statement to impeach the State’s witness.



b. Failure to investigate and call witnesses.

As discussed above, a criminal defense attorney has a duty to conduct a reasonable investigation into the facts of a case, and a duty to discover all reasonably available mitigation evidence. McKnight, 378 S.C. at 46, 661 S.E.2d at 361.

During his PCR hearing, the Applicant testified that he disclosed the existence of an alibi witness—Mr. Young—to trial counsel's investigator. However, as the Applicant's trial counsel later testified, this witness would not have provided a true alibi—one which would place the Applicant in a different physical location than the scene of the crime at the relevant time. Rather, Mr. Young merely would have stated that the alleged armed robbery committed by the Applicant was actually a congenial sale of contraband. Mr. Young testified at the Applicant's PCR hearing and confirmed that he would have characterized the Applicant's meeting with the victim in this case as a drug deal, rather than an armed robbery.

The Applicant's trial counsel testified that he received the State's discovery from the Applicant's prior attorney, who stepped down due to a conflict of interest. He further testified that he reviewed the discovery prior to the trial and worked out his trial strategy based on those materials. The Applicant had a "pretty significant" prior record, as well as more than ten outstanding criminal charges at the time. A number of the outstanding charges were dismissed in conjunction with the trial going forward.

When asked whether and how often he conferred with the Applicant directly, trial counsel stated that he did not have a particular recollection of the number of communications in this case, but it is his standard practice to meet with a criminal defendant prior to a trial.

Furthermore, trial counsel testified at the PCR hearing that he subpoenaed several witnesses to testify on the Applicant's behalf at trial, per his instructions. However, most of



these individuals did not show up for the trial, or were otherwise determined to be unhelpful in the defense's case. It appeared to trial counsel that several of the witnesses named by the Applicant used pseudonyms, which made contacting them much more difficult.

c. Failure to offer a defense.

A defendant has no obligation to present any evidence in a criminal case—the burden lies with the state to prove that the events occurred beyond a reasonable doubt.

The Applicant did not present any additional evidence in his PCR application in support of this contention. Therefore, this Court finds that the Applicant has failed to meet his burden of proving that trial counsel failed to offer a proper defense.

d. Failure to communicate with the Applicant “to adequately prepare for life without parole trial.”

This issue was not raised during the Applicant's PCR hearing. Furthermore, the Applicant did not present any evidence in his PCR application in support of this contention. Therefore, this Court finds that the Applicant has failed to meet his burden of proving that trial counsel did not properly prepare the defendant for the possibility of a sentence of life without parole.

e. Failure to challenge the Applicant's arrest.

The Applicant presented no evidence on this point during his PCR hearing. The PCR materials submitted by the Applicant also do not discuss this issue. An examination of the trial transcript reveals that the Applicant's trial counsel adequately cross examined both of the officers who were involved in the investigation and the subsequent arrest. (Trial Tr. 140–41, 148–52, 157–61.) Therefore, the Applicant has not met his burden of proving that trial counsel was ineffective for failing to challenge his arrest. The first prong of Strickland has not been satisfied.



f. Failure of trial counsel to “conscientiously discharge his professional responsibilities.”

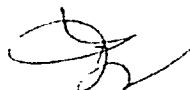
The Applicant presented no evidence on this point during his PCR hearing. Further, in his PCR materials the Applicant has not pointed to any specific instances in which trial counsel acted unprofessionally. This Court finds that the Applicant has failed to meet his burden of proving that trial counsel rendered ineffective assistance by acting unprofessionally.

g. Failure to make proper objection and argument concerning the seating of Juror 40.

Criminal defendants have a constitutional right to a fair and impartial jury. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see also Smith v. State, 375 S.C. 507, 518, 654 S.E.2d 523, 529 (2007). The trial judge has a duty to ensure that a jury of fair, impartial, and unbiased jurors is impaneled. State v. Powers, 331 S.C. 37, 43, 501 S.E.2d 116, 119 (1998). The trial judge’s determination of the ability of a prospective juror to be neutral will not be disturbed on appeal in the absence of manifest error. DeLee v Knight, 266 S.C. 103, 111–12, 221 S.E.2e 822, 847 (1975).

A trial judge acts with discretion when he or she evaluates a prospective juror’s qualifications. State v. Simpson, 325 S.C. 37, 41, 479 S.E.2d 57, 59 (1996). Where a prospective juror’s conflict of interest in a case is exposed, the prospective juror must only be excused if the court determines that her opinions would prevent or substantially impair the performance of a juror’s duty. State v. George, 323 S.C. 496, 503, 476 S.E.2d 903, 907 (1996). In short, a trial judge may choose to accept a potential juror’s statement that, in spite of a conflict, he or she is able to be fair and impartial.

In this case, Juror #40 clearly stated that she could be fair and impartial despite her experience as a victim of a violent crime twenty-six years prior. (R. at 14, 24, 26.)



Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test—that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed wither errors or omissions in his representation of the Applicant. This Court also finds that the Applicant has failed to prove the second prong of Strickland—that he was prejudiced by trial counsel’s performance. This Court concludes that the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier, 351 S.C. at 389, 570 S.E.2d at 174.

Delayed Presentation of the Indictment

Pre-indictment delay will only violate the Due Process Clause when (1) such a delay caused substantial actual prejudice to a defendant’s right to a fair trial and (2) the prosecution can present no justification for the delay that outweighs the prejudice experienced by the defendant. State v. Brazell, 325 S.C. 65, 68–69, 480 S.E.2d 64, 72 (1997) (citing United States v. Lovasco, 431 U.S. 783 (1977)). Substantial prejudice requires a showing that a defendant was meaningfully impaired in his ability to defend against the state’s charges. to the extent that the outcome of the proceeding was likely affected. Brazell, 325 S.C. at 73, 480 S.E.2d at 69. Applying Brazell, the South Carolina Supreme Court previously found that a delay of twelve years before seeking an indictment violated the Due Process Clause because it presented a significant obstacle to the defendant in preparing an adequate defense and receiving a fair trial. State v. Lee, 375 S.C. 394, 399, 653 S.E.2d 259, 261 (2007).

This issue was not raised in the Applicant’s PCR application or its *pro se* amendment. The Applicant argued at his PCR hearing that his indictment should have been quashed, because it was presented to the Greenville County Grand Jury thirteen months after the incident occurred.



The Applicant also asserts that this is an additional ground which supports his argument for ineffective assistance of counsel.

In the case at bar, this Court finds that the delay of thirteen months before the indictment was presented to the Grand Jury did not cause substantial prejudice for the Applicant.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

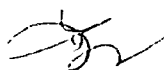
CONCLUSION

Based on all the foregoing, this Court finds that the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by Counsel's representation. Furthermore, this Court finds no evidence of prosecutorial misconduct. Therefore, this PCR application must be denied and dismissed with prejudice.

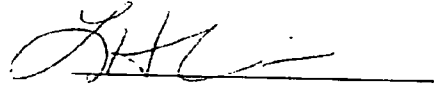
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.



AND IT IS SO ORDERED this 8 ^{Dec.} day of November, 2014.



Letitia H. Verdin
Circuit Court Judge
Thirteenth Judicial Circuit



ARIAL, JR.

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E, SC 29601

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Clerk of Court
South Carolina Supreme Court
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