SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

February 13, 2012

Ms. Rema Gantt Thomas
Circuit Court Reporter
806 Yacht Club Pointe
Chapin, SC 29036-9998

Dear Ms. Thomas:

Please provide us with the following transcript:

Anthony Franklin v. State of South Carolina Case #: 09-CP-32-04199

County: Lexington Date of Trial: February 2, 2011

Presiding Judge: R. Lawton McIntosh

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

Lorene French

Lorene French
Legal Services Coordinator

cc: S.C. Supreme Court
Attorney General's Office

DAVID E. BELDING
Attorney at Law
South Carolina Bar #00623
Federal ID # 57-1101784
1201 Main Street, Suite 1980
Columbia, South Carolina 29201

Mailing Address:
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January 4, 2012

HAND DELIVERED

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

Re: Anthony Franklin, #314338 vs. State of South Carolina
Civil Action No.: 2009-CP-32-4199

Dear Mr. Shearouse:

Enclosed for filing is a *Notice of Appeal* in the above-referenced case. Also enclosed are the following:

1. Proof of Service of the *Notice of Appeal* on the Respondent.
2. A copy of the *Order of Dismissal* which is challenged on appeal.

Since the Appellant is indigent, and the undersigned appeared as Court-appointed counsel in this matter, I respectfully request that the filing fee be waived pursuant to Rule 203(d), *South Carolina Appellate Court Rules*.

Thank you very much for your assistance.

Sincerely,

David E. Belding
Attorney for Appellant

DEB/ym
cc: Kaelon E. May, Esquire
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
JAN - 4 2012
S.C. Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh, Circuit Court Judge

Case No. 2009-CP-32-4199

Anthony Franklin, #314338.....Appellant,

v.

State of South Carolina.....Respondent.

NOTICE OF APPEAL

Anthony Franklin, #314338, appeals from the *Order of Dismissal* of the Honorable R. Lawton McIntosh, Circuit Court Judge, in this case, dated December 22, 2011, and filed December 28, 2011, dismissing Appellant's post-conviction relief application. Appellant's counsel received notice of entry of this *Order* on January 3, 2012

BY: David E. Belding

David E. Belding (S.C. Bar #00623)
Post Office Box 11964
Columbia, South Carolina 29211
(803) 665-3161
ATTORNEY FOR APPELLANT

Columbia, South Carolina
January 4, 2012

Other Counsel of Record:
Kaelon E. May, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-3737
Attorney for Respondent

RECEIVED

JAN - 4 2012

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh, Circuit Court Judge

Case No. 2009-CP-32-4199

Anthony Franklin, #314338.....Appellant,

v.

State of South Carolina.....Respondent.

PROOF OF SERVICE

I certify that I have served the *Notice of Appeal* on Kaelon E. May, Esquire, counsel for Respondent, by depositing a copy of same in the United States Mail, postage prepaid, on January 4, 2012, addressed to her as counsel of record at Post Office Box 11549, Columbia, South Carolina, 29211-1549.

January 4, 2012

David E. Belding
Post Office Box 11964
Columbia, South Carolina 29211
(803) 665-3161
ATTORNEY FOR APPELLANT.

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2009CP3204199

Anthony Scott Franklin **#314338**	**State of South Carolina**
PLAINTIFF(S)	**DEFENDANT(S)**

Submitted by:	**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ 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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ 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.**

	2155	12/29/2011
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **28th day of December 2011**, and a copy mailed first class or placed in the appropriate attorney's box on **28th day of December 2011**, to attorneys of record or to parties (when appearing pro se) as follows:

David Edward Belding P.O. Box 11964 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

Kaelon May Sc Attorney General P O Box 11549 Columbia, SC 292111549

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/wh

Beth A. Carrigg - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
	2009-CP-32-4199
Anthony Franklin, # 314338, Applicant, v. State of South Carolina, Respondent.	**ORDER OF DISMISSAL**

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed September 15, 2009. The Respondent made its Return on December 16, 2009. An evidentiary hearing into the matter was convened on February 2, 2011, at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by David Belding, Esquire. The Respondent was represented by A. West Lee of the South Carolina Attorney General's Office.

This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Lexington 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 Lexington County Clerk of Court. The Applicant appeared June 22, 2009, before the Honorable William P. Keesley where he waived presentment to one count of Assault and Battery of a High and Aggravated Nature. He was represented by Matthew Buchanan, Esquire, at the plea. Applicant

pled guilty to the charge and was sentenced to ten (10) years imprisonment, provided that upon the service of eight (8) years, the balance would be suspended to five (5) years probation. Applicant did not appeal the plea or sentence.

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

1. Ineffective assistance of counsel.
   i. "Misadvised regarding my appeal rights."
   ii. "Public defender didn't spend enough time on my case or defend me enough that day in front of the judge."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the

charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

Ineffective Assistance of Counsel

Applicant first contended counsel's performance as his plea counsel was deficient where counsel failed to properly prepare Applicant's case and sufficiently advise Applicant regarding plea negotiations. Applicant testified he met with counsel twice in the four (4) months from the time he was arrested until he appeared in court for his plea. Applicant contends each meeting was roughly thirty (30) minutes during which time he and counsel discussed the facts giving rise to the charges. Applicant freely admitted he grabbed the victim in this case, but denied he committed criminal domestic violence of a high and aggravated nature. Applicant went on to say he was taken to court on the day of his plea without any knowledge of why he was scheduled to appear there. Upon arriving, Applicant stated, he met with counsel who advised him the solicitor was prepared to go to trial, but that a plea offer had been extended to allow Applicant to plead down from Criminal Domestic Violence of a High and Aggravated Nature (CDVHAN) to Assault and Battery of a High and Aggravated Nature (ABHAN). Applicant testified he was led to believe he would be receiving one (1) year of probation under the plea, despite acknowledging he was aware of the sentences the charges carried and stating counsel had advised him that the sentencing would be left up to the discretion of the judge. Applicant conceded that he fully understood what was going on during the plea hearing, but alleges he was never explained the differences in pleading to CDVHAN and ABHAN by counsel prior to entering his plea.

Counsel testified he met with Applicant three (3) times in preparation for Applicant's case, during which he reviewed the charges with Applicant, Applicant's constitutional rights, the potential sentences he was facing, Applicant's version of the facts giving rise to the charges, and potential defenses to be used at trial. Counsel stated he entered into plea negotiations with the state, initially receiving no offers, but eventually received an offer to allow Applicant to plead down to ABHAN, which he promptly relayed to Applicant. Counsel testified he reviewed all of the discovery materials with Applicant, in addition to mailing the entirety of the discovery file to Applicant for his own review on March 26, 2009. Counsel went on to state that he never promises his clients a particular sentence, and never told Applicant he would receive one year probation for this plea although he did tell Applicant he would request the judge impose such a sentence. Finally, counsel testified that it was ultimately Applicant's voluntary decision to enter the plea, and that had Applicant decided to proceed to trial he would have made every effort to be prepared for such.

Based on the testimony presented at trial and a thorough review of the record, I find counsel's representation was not deficient nor was Applicant prejudiced by any alleged deficiency. Counsel advised Applicant of all relevant issues regarding the charges he was facing, including the facts giving rise to the charges, the potential sentences he was facing, Applicant's constitutional rights, the state's evidence against Applicant, potential defenses that could be used at trial and the consequences of rejecting this plea to proceed to trial. Counsel gave Applicant all the information and advice to make an intelligent and voluntary decision on whether to enter this plea. Counsel diligently entered into plea negotiations on Applicant's behalf where he was able to secure an advantageous plea offer that Applicant ultimately accepted. I further find that Applicant's guilty plea was entered knowingly and voluntarily after being fully and adequately

advised by competent counsel acting within the range of competence demanded of attorneys in criminal cases. Therefore, counsel was not ineffective in this regard and this allegation is without merit.

Failure to Appeal Plea

Applicant also alleges counsel failed to file a direct appeal of the plea and sentence on his behalf. Applicant testified he recalled counsel making a motion to reconsider Applicant's sentence, urging the court to consider sending Applicant to the "Strong Program" rather than the Department of Corrections, but stated he never heard whether the motion was granted. Applicant went on to say that when he returned to the county jail after the plea hearing, he called counsel and asked him to file a direct appeal, but had no knowledge of whether such an appeal was filed.

Counsel similarly testified that he did file a motion for reconsideration after the plea hearing, in which he asked the court to consider re-sentencing Applicant to the "Strong Program" that Applicant had been previously accepted to. Counsel stated that motion was denied and the original sentence remained in place. However, counsel went on to say he did not recall ever discussing a direct appeal with Applicant nor did he remember Applicant asking him to file an appeal, but said that had Applicant asked, he would have certainly filed the appeal.

Based on a review of the testimony presented at the hearing and a thorough review of the record, I find counsel was not ineffective in failing to file a direct appeal. Further, I find counsel's testimony to be credible; conversely, I find Applicant's testimony not to be credible. Counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000). Based on counsel's credible testimony,

Applicant never demonstrated an interest in appealing his plea after the denial of his motion to reconsider, and no extraordinary circumstances existed such that counsel "should have known" Applicant wanted to appeal his plea. Further, counsel plainly testified that had Applicant requested or otherwise shown interest in appealing, he certainly would have done so. Therefore, Applicant has failed to carry his burden in proving counsel was ineffective in this regard or otherwise denied Applicant his right to appeal the plea.

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 22 day of Dec 20 11.

R. Lawton McIntosh
Presiding Judge
Eleventh Judicial Circuit

Aiken, South Carolina.