

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Lexington County  
Honorable William P. Keesley, Circuit Court Judge

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Appellate Case No. 2013-001849

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RECEIVED  
JAN 19 2016  
SC Court of Appeals

THE STATE,

Respondent,

v.

JAMES C. WILLIAMS,

Appellant

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SUPPLEMENTAL RECORD ON APPEAL

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JAMES C. WILLIAMS, #282929  
Kershaw Correctional Institution  
4848 Goldmine Highway  
Kershaw S.C. 29067

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UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA

|                                     |   |                                 |
|-------------------------------------|---|---------------------------------|
| James Chester Williams, #282929,    | ) | C/A No. 3:07-3714-GRA-JRM       |
|                                     | ) |                                 |
| Petitioner,                         | ) |                                 |
|                                     | ) | <b>RETURN AND MEMORANDUM OF</b> |
| v.                                  | ) | <b>LAW IN SUPPORT OF MOTION</b> |
|                                     | ) | <b>FOR SUMMARY JUDGMENT</b>     |
| Jon Ozmint, Director, S.C. Dept. of | ) |                                 |
| Corrections; and Stan Burt,         | ) |                                 |
|                                     | ) |                                 |
| Respondent.                         | ) |                                 |
|                                     | ) |                                 |

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The Respondent, above-named, by and through the Attorney General of South Carolina, hereby makes Return to the Rule to Show Cause filed by the Honorable Joseph R. McCrorey, United States Magistrate Judge, dated November 26, 2007 to the Petition for Writ of Habeas Corpus filed November 3, 2007. The Respondent would show this Court the following:

**PROCEDURAL HISTORY**

The records before this Court reflect Petitioner is presently confined at the Lieber Correctional Institution in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. He was indicted at the January 2000 term of the Lexington County Grand Jury for murder (00-GS-32-689) and possession of a weapon during the commission of a violent crime (00-GS-32-688). He was represented by William F. Gorski, Esquire. On March 18, 2002, Petitioner proceeded to trial. On March 21, 2002, Petitioner pled guilty to murder after a jury had been impaneled. The Honorable Mark H. Westbrook sentenced Petitioner to confinement for a period of thirty (30) years in keeping with the State's recommendation. The possession of a weapon charge was dismissed as part of the plea agreement.

### *Facts*

Petitioner was convicted of the murder of Kathy Aretha Williams, which occurred on September 15, 1999. Petitioner pled guilty to shooting the victim. Ms. Williams was forty-one (41) years old at the time of her death. She was shot in the neck.

At the time of her death, the victim was separated from Petitioner and had moved into the apartment where she was murdered. Petitioner had come over to the apartment that night apparently to give the victim some money so the victim's smallest child could play football. While there, Petitioner and the victim began arguing about him coming to the victim's apartment so much. Petitioner left the apartment and went to his car and armed himself with a sawed-off shotgun. He took one shotgun shell and loaded the shotgun with it. He went back to the victim's apartment. Petitioner went straight to the victim's room. He motioned for the victim to follow him to the bedroom. She followed him to the bedroom. They continued to argue and then the children heard the victim say: "What are you going to do shoot me? The children then heard a gunshot. Petitioner then ran out of the apartment. The victim was left on the floor alone to die with the gunshot wound to her neck. (App. p. 37-39). The pathologist determined the gun was approximately six inches from her neck when it was fired. (App. p. 39). Her spinal cord was severed.

Petitioner fled to Barnwell County. Petitioner was found there in his brother's home. The car he was driving at the time of the murder was found behind another home in the area. The sawed off shot-gun was found in an old refrigerator behind the trailer and a box of shotgun shells was also found. Out of that box of shells, one shotgun shell was missing. Petitioner's palm print was found on the box of ammunition. (App. p. 39).

If the trial had proceeded to the actual taking of testimony, the State would have called witnesses from Petitioner's workplace who had indicated that for at least weeks before this shooting, Petitioner had threatened to kill the victim, Kathy Williams, as well as himself.

In exchange for the plea of guilty to murder, the State agreed to and did drop the indictment for possession of a weapon during the commission of a violent crime. In exchange for the guilty plea, the State also agreed to and did recommend a sentence of 30 years, the minimum sentence for murder. (App. p. 40).

At his guilty plea, in addition to admitting he was guilty of murder, Petitioner stated as follows: "I just want to apologize to my kids, you know, and what happened to their mother because, you know, I love them both - - their mother just as much as I love them, and I'm basically asking them to forgive me for it. But, you know, whether they do it or not, you know, I don't know, but I wanted to let them know that I still love them." (App. p. 41, ll. 5-10).

At that time of sentencing, Petitioner had a prior criminal record which included a criminal domestic violence (CDV) conviction involving the same victim from 1999. Petitioner also had a grand larceny conviction from 1994. Petitioner could have received a life sentence without the possibility for parole for the murder. Instead, the trial judge sentenced him to the minimum of 30 years. Petitioner made no objection to the voluntariness of his plea to the sentencing judge during his guilty plea or immediately thereafter. Additionally, Petitioner made no motion to withdraw his plea at any time during the colloquy with Judge Westbrook or after the imposition of his sentence.

#### *The Direct Appeal*

Petitioner appealed by way of an Anders brief and was represented on appeal by Robert Dudek, Esquire. After a review pursuant to Anders v. California, 386 U.S. 738 (1967), the South Carolina Court of Appeals dismissed the appeal, State v. Williams, Op. No. 03-UP-329 (decided May 15, 2003). The Remittitur was issued on June 17, 2003.

*The PCR Action*

Petitioner brought an application for post-conviction relief to challenge his 2002 murder guilty plea. The application was filed on May 21, 2003 and the State made its Return on May 20, 2005. An evidentiary hearing was held before the Honorable James Johnson on June 27, 2005 at the Lexington County Courthouse. Petitioner was present and represented by Robert Boorda, Esquire. The State was represented by Sabrina C. Todd of the South Carolina Attorney General's Office.

At the hearing Petitioner testified on his own behalf and called his plea counsel, William Gorski, Esquire as a witness. Additionally, the PCR Court had before it the application, Return, the Lexington County Clerk of Court's records regarding the subject conviction, Petitioner's records from the South Carolina Department of Corrections, and Petitioner's records from his direct criminal appeal, which include the transcript of his guilty plea.

In his application, Petitioner asserted several allegations of ineffective assistance of counsel and alleged his plea was involuntary because of counsel's ineffectiveness; because of the state's failure to rehabilitate him; because he was not informed of the community supervision requirements, and because he was coerced into pleading guilty by counsel's threats he would otherwise be subject to the death penalty. Additionally, Petitioner challenged the trial court's subject matter jurisdiction and alleged he was not notified of the community supervision requirements of his sentence. At the hearing in this case, Petitioner proceeded on several allegations that his counsel was ineffective and

asserted because of medication he was taking at the time of the hearing, he did not understand the proceedings or the plea judge's questions.

The PCR Court had the opportunity to review the record in its entirety and heard the testimony at the post-conviction relief hearing. The Court further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Upon careful consideration, the Court concluded Petitioner had failed to meet his burden of establishing counsel was ineffective. Set forth below are the relevant findings of facts and conclusions of law in accordance with S.C. Code Ann. § 17-27-80 (2003).

The PCR Court noted that in a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. *Citing Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel 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." *Citing Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see also Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The Court also noted the proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases, and courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 690. The Court also noted the applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The PCR Court also pointed out the reviewing court applies 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, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). 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." Id. at 117-18, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 689). With respect to guilty plea counsel, the PCR Court noted that the applicant must show 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, 59 (1985). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

The PCR court also pointed out that when an applicant alleges his guilty plea entered with the advice of counsel he may only challenge his plea as unknowing or involuntary by establishing ineffective assistance of counsel. Citing Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

The PCR Court summarized the testimony as follows. Petitioner testified his plea counsel was ineffective for failing to help decide whether to plead guilty. He alleged counsel only met with him one time and coerced him into pleading guilty by threatening that if he went to trial he would be found guilty and sentenced to death but that if he pled guilty he would receive a twenty-five year sentence. As to allegations of his medication, he alleged he was taking Desyrel, an anti-depressant medication that made him feel drunk and that as a result he did not understand the proceedings or

the judge's questions. When questioned on cross-examination about the inconsistencies between his plea testimony and his testimony to the PCR Court, Petitioner testified he lied to the judge at his guilty plea and that counsel had instructed him to do so. When asked whether he was taking any medication that would affect his ability to understand the proceedings before the PCR Court, Petitioner reported he was not, the same answer he gave to the judge who accepted his guilty plea. (Citing Tr. p. 36)

Mr. Gorski testified he had talked with Petitioner several times before the guilty plea, and was prepared to go to trial. He stated the case was never a death penalty case and he never threatened Petitioner with the death penalty or promised Petitioner a particular sentence. On the contrary, Petitioner initially wanted to go to trial understanding the mandatory minimum sentence of thirty years for murder was essentially a life sentence for someone his age. However, counsel testified that after talking with relatives following jury selection, Petitioner was adamant about pleading guilty. Counsel further testified he talked with Petitioner about his psychological condition but Petitioner denied using alcohol or medications at the time of the plea. Counsel emphatically denied telling Petitioner to lie at his guilty plea.

The PCR Court made the following findings of fact and conclusions of law based on the evidence presented to him and the record before the Court. Petitioner had failed to carry his burden that counsel was deficient in his performance. There was no evidence counsel's actions were less than reasonable under prevailing professional norms. Petitioner had failed to convince the PCR Court by a preponderance of the evidence that he pled guilty because of any threats or promises made by his attorney. Instead, the Court found counsel was prepared to go to trial and Petitioner decided at the last minute to plead guilty. In reaching this conclusion, the Court noted Petitioner's admission

during his testimony that he had lied to the trial judge at his guilty plea did not inspire confidence in his testimony to the PCR Court. By contrast, the Court found Mr. Gorski to be a credible witness. Additionally, the Court found Petitioner had failed to establish his claim the medication he was taking at the time of his plea rendered his plea involuntary or unknowing.

As to any and all other allegations raised in the PCR application or at the hearing which were not specifically addressed in this order, the PCR Court found they were waived because Petitioner failed to present sufficient evidence to meet his burden of proof regarding them. Therefore, they were denied and dismissed. It was therefore ordered that the application for post-conviction relief was dismissed with prejudice and Petitioner was remanded to the custody of the Respondent for completion of his sentence.

*The Appeal from the Denial of PCR*

Petitioner timely appealed from the denial of his application for post-conviction relief. Petitioner appealed by way of a Johnson brief to the South Carolina Supreme Court. Petitioner filed a *pro se* Petition for Certiorari and then an Amended *pro se* Petition for Certiorari. The case was transferred to the South Carolina Court of Appeals by the South Carolina Supreme Court. After thorough review of the record pursuant to Johnson, the South Carolina Court of Appeals denied the Petition for Certiorari and granted appellate counsels Petition to be Relieved. (See Attached Order of the Court of Appeals). The Remittitur was subsequently filed. (See Attached Remittitur from denial of Johnson Petition for Certiorari).

**ATTACHMENTS**

Appendix, James W. Johnson, Circuit Court Judge

Final Anders Brief of Appellant

May 15, 2003 Opinion of S.C. Court of Appeals

Remittitur from direct appeal

Notice of Appeal from denial of PCR

Johnson Petition for Writ of Certiorari from denial of PCR

*Pro Se* Response to Johnson Petition/Petition for Writ of Certiorari

Amended *Pro Se* Response to Johnson Petition/Petition for Writ of Certiorari

Letter from Attorney General in Response to Johnson Petition

Order Denying Petition for Certiorari from Denial of PCR Relief

Remittitur from Denial of Petition for Certiorari from Denial of PCR Relief

#### **FEDERAL HABEAS ACTION**

**Ground One:** (Rule 11) Whether petitioner's guilty plea complied with the mandates set forth in Boykin v. Alabama.

a. Petitioner argued that his plea should be set aside because it had been accepted in violation of (Rule 11) of the federal Rules of Criminal Procedure. Petitioner contended that the state court had accepted his plea without first addressing (him) personally and determining that the plea was made voluntary with understanding of the nature of the charge.

**Ground Two:** Rule (11)

a. That the court had entered judgment without determining that there was a factual basis for the plea.

**Ground Three:** (Rule 11)

a. Due process of law requires that before a guilty plea can be entered voluntarily and intelligently a defendant must be advised of his privilege against compulsory self incrimination the right to trial by a jury and the right to confront one's accusers. A waiver of these rights cannot be presumed from a silent record.

**Ground Four:** (Rule 11)

a. Rule 11 is designed to assist the judges in making the constitutionally required determination that a defendant's guilty plea is truly voluntary. Second, the Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination.<sup>1</sup>

### **APPLICABILITY OF THE AEDPA**

The present habeas petition was filed on November 3, 2007. Accordingly, the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") apply to this case. Lindh v. Murphy, 521 U.S. 320 (1997). Under the AEDPA, claims adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was "contrary to, or involved an unreasonable application of 'clearly established federal law as decided by the United States Supreme Court, or the decision 'was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.'" 28 U.S.C. § 2254(d). State court factual findings are presumed to be correct and the Petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

### **EXHAUSTION**

Petitioner was convicted after a guilty plea. Petitioner filed a direct appeal and his direct appeal was denied by the South Carolina Court of Appeals. Petitioner did not appeal to the South Carolina Supreme Court. Petitioner filed a PCR application and that application was denied. Petitioner appealed from the denial of his PCR application and that appeal was denied by the South Carolina Court of Appeals. Petitioner has exhausted his state remedies. However, Petitioner failed to properly exhaust his state remedies as to the grounds in his petition, therefore, those grounds are

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<sup>1</sup>Petitioner raises four grounds all of which are direct appeal grounds against the trial judge for failing to comply with the requirements of Rule 11 of the Federal Rules of Criminal Procedure. None of these grounds were raised in state court. Petitioner raises no ineffective assistance claim in grounds one through four.

procedurally barred.

### PROCEDURAL BAR AND DEFAULT

Ground One of this habeas petition was procedurally defaulted in state court and is therefore procedurally barred from consideration on habeas review. Petitioner alleges the state court that accepted his guilty plea violated the mandates of Boykin v. Alabama because his plea was accepted in violation of Rule (11) of the Federal Rules.<sup>2</sup> This issue was never raised to the trial court that accepted his plea. It was never raised to the trial court after his plea and sentencing. In ground one, Petitioner now attempts to assert a direct appeal claim alleging trial court error under Boykin, not a claim that this plea was involuntary because of ineffective assistance of counsel. This claim was procedurally defaulted in state court. State v. Lopez, 352 S.C. 373, 574 S.E.2d 210 (2002)(defendant challenging free and voluntary nature of plea was procedurally barred on appeal where the issue was not raised to the court that accepted the plea); State v. McKinney, 278 S.C. 107, 292 S.E.2d 598 (1982)(absent timely objection at plea proceeding, unknowing and involuntary nature of guilty plea can be attacked only through post-conviction relief); State v. Bradley, 263 S.C. 223, 209 S.E.2d 435 (1974)(263 S.C. 223, 209 S.E.2d 435 (1974)(finding defendant who failed to assert at trial that his guilty plea was involuntarily entered was precluded from consideration of such claim on appeal).<sup>3</sup>

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<sup>2</sup>Petitioner raised a Boykin claim at his PCR, however it was not this specific issue raised in ground one. Petitioner alleged his plea was not knowing, voluntary and intelligent because he was under the influence of a certain antidepressant. Additionally, at PCR Petitioner alleged ineffective assistance of counsel. Therefore, the issue in ground one, as well as the remaining grounds, which are new issues never raised before, were procedurally defaulted in state court.

<sup>3</sup> *cf* State v. Cash, 304 S.C. 223, 403 S.E.2d (1991); State v. Coto, 296 S.C. 480, 374 S.E.2d 181 (1989)(wherein the Court found no valid *waiver of right to counsel* in *pro se* defendants pleas, however it is not clear from the decisions whether the state raised lack of preservation on appeal).

The issue was procedurally defaulted in state court because even under Anders review the South Carolina appellate courts could not consider an issue that was not preserved for review. See In the Interest of Arisha K.S., 331 S.C. 288, 501 S.E.2d 128 (Ct. App. 1998)(issue of voluntariness of guilty plea held not preserved below because there was no objection and Anders brief raised issue on appeal). This issue is procedurally barred on federal habeas review. Wainwright v. Sykes, 433 U.S. 72 (1997)(failure to comply with state contemporaneous objection rule provides independent state procedural ground for denying federal habeas relief absent a showing of cause and prejudice.

Additionally, since Petitioner did not properly preserve this issue below it could not be raised in his direct appeal to the South Carolina appellate court. In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. In the Interest of Michale H., 360 S.C. 540, 602 S.E.2d 729 (2004)(trial court must be given an adequate opportunity to resolve the issue); State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Knight v. Waggoner, 359 S.C. 492, 597 S.E.2d 894 (Ct. App. 2004)(arguments raised for the first time on appeal are not preserved for review). Since the issue could not be considered on appeal, it cannot now be considered on habeas review. Coleman v. Thompson, 501 U.S. 722 (1991); Murray v. Carrier, 471 U.S. 478 (1986).

Ground two of this habeas petition was also procedurally defaulted in state court and is therefore procedurally barred from consideration on habeas review. Mathews v. Evatt, 105 F.3d 907, 911 (4<sup>th</sup> Cir. 1997). In ground two, Petitioner alleges a violation of Federal Rule (11) in that the trial court entered judgment without determining there was a factual basis for the plea. This issue was not raised at the trial court level. Therefore it was not preserved for appellate review and could not be considered on direct appeal. State v. Lopez, *supra* (defendant challenging free and voluntary

nature of plea was procedurally barred on appeal where the issue was not raised to the court that accepted the plea). Therefore, it is procedurally barred on habeas review. Coleman v. Thompson, *supra*; Murray, *supra*; Mathews, *supra*. Nor was this specific issue even raised to the PCR Court as an ineffective assistance of counsel claim. (See App. p. 70-105). Nor was it addressed in the PCR Court's Order denying relief. (See App. p. 107-111). It could not be addressed by the South Carolina Appellate Courts on appeal from the denial of post-conviction relief. Humbert v. State, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001)(issue not raised or ruled on in the PCR Court's order denying relief is not preserved for appellate review); Marlar v. State, Shearhouse Advance Sheets, Opinion No. 26391 (filed November 1, 2007)(matters not addressed in the order denying relief must be raised by a Rule 59(e) Motion or they are not preserved for review). No Rule 59(e) Motion was filed in this case asking the PCR Court to consider this issue not addressed in its Order. This issue could not be considered on appeal. Therefore, this issue was procedurally defaulted in state court and cannot be considered on habeas review. Wainwright, *supra*; Coleman, *supra*; Murray, *supra*.

Ground three of this habeas petition is procedurally barred for the same reasons. Petitioner raises a Rule 11 violation against the trial court for allegedly not questioning him on the record regarding his constitutional rights. Petitioner did not raise the specific issue raised in ground three before the trial court. It was therefore not preserved for state appellate review. State v. Lopez, *supra*. It cannot be considered now on federal habeas review. Wainwright, *supra*; Coleman, *supra*; Murray, *supra*; Mathews, *supra*.

Nor was this issue even raised as an ineffective assistance claim before the PCR court and it was not even addressed in the PCR Court's Order denying relief. No Rule 59(e) Motion was filed in this case asking the PCR Court to consider this issue not addressed in its Order. Therefore, the

issue was not preserved and could not be considered by the South Carolina appellate courts. Humbert, supra; Marlar, supra. It was procedurally defaulted in state court and cannot be considered on habeas review. Coleman, supra; Murray, supra; Mathews, supra.

Ground four of this habeas petition is also procedurally barred for the same reasons stated above. Petitioner did not raise this specific issue to the trial court or to the PCR Court. Petitioner raised no voluntariness challenge to his guilty plea before the trial court. Therefore any such challenge could not be considered by the South Carolina appellate courts. Lopez, supra. The issue was therefore procedurally defaulted and cannot be considered on habeas review. Wainwright, supra; Coleman, supra; Murray, supra; Mathews, supra.

Nor was this specific issue even addressed in the PCR Court's Order denying relief as an ineffective assistance of counsel claim. Petitioner filed no Rule 59 Motion to alter or amend the PCR Court's Order to address this specific issue. Because of these failures, this issue could not be raised to the South Carolina appellate courts, and even if raised would not have been considered because it was not preserved for appellate review. Humbert, supra; Marlar, supra. Therefore, this issue was procedurally defaulted in state court and cannot now be considered on habeas review. Coleman, supra; Murray, supra; Mathews, supra.

#### **Cause and Prejudice**

Petitioner's grounds are procedurally barred absent a showing of cause and actual prejudice, or actual innocence. Wainwright v. Sykes, 433 U.S. 72, 87 (1977); Mathews v. Evatt, 105 F.3d 907 (4<sup>th</sup> Cir. 1997). The existence of cause must ordinarily turn on whether the prisoner can show some objective factor external to the defense impeded counsel's or his efforts to comply with the State's procedural rule. Murray v. Carrier, 477 U.S. 478, 488 (1986). Petitioner expresses no particular

cause for procedurally defaulting on his grounds. *Failure of his PCR counsel to preserve grounds for appeal cannot constitute cause.* Ellis v. Armenakis, 222 F.3d 627, 633 (9<sup>th</sup> Cir. 2000); Sidebottom v. Delo, 46 F.3d 744, 751 (8<sup>th</sup> Cir. 1995); Lowe-Bey v. Groose, 28 F.3d 816, 820 (8<sup>th</sup> Cir. 1994); Caswell v. Ryan, 953 F.2d 853, 862 (3<sup>rd</sup> Cir. 1992) *emphasis added*. Petitioner had a trial which he waived, a guilty plea, a direct appeal, a PCR hearing, and an appeal from the PCR in which to raise these issues and he failed to raise them, raise them properly, or preserve these issues for habeas review. As noted above, Petitioner cannot establish cause and prejudice, because he consistently abandoned opportunities to preserve these specific issues.

In the alternative Petitioner must show a miscarriage of justice. In order to demonstrate a miscarriage of justice Petitioner must show he is actually innocent. Actual innocence is defined as factual innocence not legal innocence. Bousley v. United States, 523 U.S. 614, 622, 118 S.Ct. 1604 (1998).

Petitioner cannot establish that the constitutional error he complains of probably resulted in the conviction of an innocent person. Schlup v. Delo, 513 U.S. 298, 327 (1995). In order to pass through the actual innocence gateway, a petitioner's case must be "truly extraordinary." Id. A defendant convicted by a jury comes before the federal court with a "strong—and in the vast majority of cases conclusive—presumption of guilt." Id. at 326 n.42. How much more so a defendant who pled guilty. The record would make an assertion of actual innocence, incredible. Petitioner pled guilty to the crime of murder. Petitioner admitted to the crime of murder before the Court. After having an argument with the victim, Petitioner returned to his car, armed himself with a shotgun, loaded it and then shot the victim at close range in the neck. Petitioner had told co-workers he was going to kill his wife and then himself. At this plea, Petitioner apologized the victim's children for

what he had done. Petitioner also had a previous conviction for committing criminal domestic violence on the same victim. Petitioner simply cannot show actual innocence. The procedural bar should be applied without exception. Murray, *supra*. Furthermore, actual innocence is not a claim but merely lifts the procedural bar, if established, and allows consideration of the habeas petition on the merits. Bousley v. United States, *supra*. Petitioner cannot establish actual innocence. The procedural bar should not be lifted.

#### ALTERNATIVE DEFENSES

Petitioner *waived* and *abandoned* all four grounds asserted in his petition by not raising these issues at his guilty plea. The guilty plea acts as a waiver of all non-jurisdictional defects and defenses. Tollet v. Henderson, 411 U.S. 258, 93 S.Ct. 1602 (1973); State v. Easler, 584 S.E.2d 117 (S.C. 2003); State v. Passaro, 567 S.E.2d 862, 866 (2002)(free and voluntary guilty plea acts as a waiver of all non-jurisdictional defects); State v. Oleary, 393 S.E.2d 186, 187 (1990)(impermissible for a defendant to preserve constitutional issues while entertaining a guilty plea); Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975). When Petitioner pled guilty without raising any objection at his plea or immediately after his sentencing, he waived any issue regarding the voluntariness of his guilty plea.

Additionally, Petitioner should be estopped from raising these claims at this time based on the defenses of *equitable estoppel* and *laches*. Petitioner did not assert these claims in a timely fashion in state court, therefore there is no state court decision on these grounds for this Court to review for unreasonableness under the AEDPA. Therefore, Respondent has been prejudiced. These claims should be dismissed with prejudice.

### STANDARD OF REVIEW

The standard of review to be applied in habeas is “quite deferential to the rulings of state courts.” Burch v. Corcoran, 273 F.3d 577 (4th Cir. 2001). Petitioner cannot prevail before this Court on the merits of this action.

To prevail on an ineffective assistance of counsel claim, Petitioner must show (1) that his trial counsel’s performance fell below an objective standard or reasonableness, and (2) that a reasonable probability exists that but for counsel’s error, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1985). Petitioner bears the burden of proving an error and prejudice in his ineffective assistance of counsel claim. Id.

He also bears the burden of showing he is entitled to habeas corpus relief. Smith v. North Carolina, 528 F.2d 807, 809 (4th Cir. 1975). To obtain habeas relief, Petitioner must show the PCR judge or the South Carolina Supreme Court unreasonably applied federal law, as determined by the United States Supreme Court, or made “an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.” 28 U.S.C. Section 2254(d); Carey v. Musladin, 127 S.Ct. 649, 653-54 (2007). Here, Petitioner has shown neither. The PCR judge did not unreasonably apply clearly established federal law, as decided by the United States Supreme Court, nor was the factual determination unreasonable in light of the facts. Nor did the South Carolina Supreme Court unreasonably apply clearly established federal law, as decided by the United States Supreme Court, nor was its factual determination unreasonable in light of the facts before it.

To establish an unreasonable application of federal law, Petitioner must show more than “..an incorrect or erroneous application of federal law.” Williams v. Taylor, 529 U.S. 362,413 (2000). Thus, “a federal court may not issue the writ simply because that court concludes in its independent

judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be 'unreasonable' for habeas relief to be granted. This is a substantially higher threshold." Id. at 410. Petitioner has failed to overcome this threshold.

### THE MERITS

**Ground One:** (Rule 11) Whether petitioner's guilty plea complied with the mandates set forth in Boykin v. Alabama.

a. Petitioner argued that his plea should be set aside because it had been accepted in violation of (Rule 11) of the federal Rules of Criminal Procedure. Petitioner contended that the state court had accepted his plea without first addressing (him) personally and determining that the plea was made voluntary with understanding of the nature of the charge.

There is no merit to ground one of this petition. The record in this case clearly reflects an affirmative showing that Petitioner's guilty plea was knowingly, intelligently and voluntarily entered into. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976)(test established by Boykin is whether the record establishes that a guilty plea was voluntarily and understandingly made). To knowingly and voluntarily enter a plea of guilty, all that is required is that a defendant has a full understanding of the consequences of his plea and the charges against him. Simpson v. State, 317 S.C. 506, 508, 455 S.E.2d 175, 176 (1995). The record in this case clearly shows that Petitioner was aware of the consequences of his plea and the charges against him. The trial court went over with Petitioner the fact that if he pled guilty he would be waiving his right to a jury trial and his right to remain silent. (App. p. 31-37). Petitioner stated that he understood that he would be giving up his right to confront the witnesses against him and to put up any defense in the case. (App. p. 31-37). The record is clear that the court instructed Petitioner that if he pled guilty to murder the court could sentence him up to life in prison without parole and at a minimum would have to sentence him to at least 30 years. (App. p. 32). Petitioner stated on the

record that he understood the possible sentences he was facing. (App. p. 32). Petitioner was asked and also acknowledged that he understood the nature of the charges against him. (App. p. 32). Petitioner was already aware of the nature of the charge because the court read verbatim from the indictment when the case was initially called for trial. (App. p. 4-5). The indictment listed the elements of the crime of murder which Petitioner was charged. (App. p. 4-5). Petitioner was asked if he wanted to plead guilty to murder and he stated yes. (App. p. 31). Petitioner acknowledged that he understood what he was charged with. (App. p. 32). Petitioner admitted he was guilty of the charge of murder. (App. p. 31). There is no question Petitioner understood what he was charged with since the case had been called for trial two days before, a jury had been selected, and Petitioner had been in pretrial detention since September 16<sup>th</sup>, 1999. (App. p. 5 & 41). Furthermore, counsel testified that he discussed the elements of the crime with Petitioner, what the state would be required to prove. (App. p. 100, l. 22-p. 101, l. 8). See Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360(1984)(To determine whether a guilty plea was taken in accordance with constitutional standards, the Court will consider the entire record including facts presented at the PCR hearing.); Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972).

In accepting a guilty plea, "the trial judge is free to use any appropriate procedure for determining the accuracy of the guilty plea. The judge must be certain that a defendant understands the charge and the consequences of his plea and that the record indicates a factual basis for the plea. State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975). See also LoPiano v. State, 270 S.C. 563, 569, 243 S.E.2d 448, 451 (1978) (the record must establish a factual basis for the plea). The record in this case is also clear there was a factual basis for the plea.

At the time of her death, the victim was separated from Petitioner and had moved into the

apartment where she was murdered. Petitioner had come over to the apartment that night. While there, Petitioner and the victim began arguing about him coming to the victim's apartment so much. Petitioner left the apartment and went to his car and armed himself with a sawed-off shotgun. He took one shotgun shell and loaded the shotgun with it. He went back to the victim's apartment. Petitioner went straight to the victim's room. He motioned for the victim to follow him to the bedroom. She followed him to the bedroom. They continued to argue and then the children heard the victim say: "What are you going to do shoot me?" The children then heard a gunshot. Petitioner then ran out of the apartment. The victim was left on the floor alone to die with the gunshot wound to her neck. (App. p. 37-39). The pathologist determined the gun was approximately six inches from her neck when it was fired. (App. p. 39). Gunpowder residue tests determined her hands were in a defensive posture when the shotgun blast was fired. Her spinal cord was severed. The victim died as a proximate result of the shotgun blast. (App. p. 37-39).

Petitioner fled to Barnwell County. Petitioner was found in the brother's home. The car he was driving at the time of the murder was found behind another home in the area. The sawed off shot-gun was found in an old refrigerator behind the trailer and a box of shotgun shells was also found. Out of that box of shells, one shotgun shell was missing. Petitioner's palm print was found on the box of ammunition. (App. p. 39).

If the case had proceeded to trial, the state would have called witnesses from Petitioner's workplace who had indicated that for at least weeks before this shooting, Petitioner had threatened to kill his wife, Kathy Williams, as well as himself, evidencing malice and a premeditated plan to murder his wife and then take his own life. "All that is required before a plea can be accepted is that the defendant understands the nature and crucial elements of the charges, the consequences of the

plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea.” Rollison v. State, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001). As previously discussed, all of these are present in the record in this case.<sup>4</sup>

The fact that the judge failed to state expressly his finding as to the voluntariness of the plea does not defeat the fact that the record itself reveals a voluntary waiver and the court implicitly found his plea as free and voluntary when it accepted it and sentenced him within the statutory framework. Gaines v. State, 335 S.C. 376, 517 S.E.2d 439 (1999)(trial judge satisfied all the necessary requirements when he accepted pleas from appellant, and clear implication was he found the pleas voluntary, fact that he failed to state so expressly does not defeat the fact that the record itself reveals a voluntary waiver). “If the record reflects, as it does here, that the trial court has assured itself that the plea was voluntary and intelligently entered into with full knowledge of the nature of the offense, the lack of precise language in the record expressing these considerations in not of itself a valid reason for reversal.” State v. Lambert, 225 S.E.2d at 342. This ground should be dismissed with prejudice.

To the extent Petitioner is raising in this ground the same Boykin, issue that he raised below in the PCR Court, which he is not, there is no merit to this claim. At PCR, Petitioner alleged his plea was not knowing and voluntary because of anti-depressant medication he was taking. The PCR

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<sup>4</sup>Furthermore, in absence of a factual basis for the plea, the plea was still voluntary where the plea reflected a calculated decision made on advice of counsel and based on consideration of weight and nature of evidence against defendant. Anderson, supra. Accord Renzi v. Warden U.S. Penitentiary, Terre haute, Ind., 792 F.2d 311 (2<sup>nd</sup> Cir. 1986). Petitioner was facing a life sentence without the possibility of parole with overwhelming evidence of his guilt about to be introduced by the State in his trial. Respondent submits Petitioner pled guilty to avoid a life sentence and to receive the recommendation of the state to a sentence of thirty (30) years and the dismissal of the accompanying possession of a weapon charge.

Court viewed the witnesses, heard their testimony, and was able to judge their credibility. The PCR Court found Petitioner's testimony was not credible and trial counsel's testimony was credible. This determination is entitled to deference. Burch, *supra*. This determination was not unreasonable given the record before the State PCR Court. During his guilty plea, Petitioner was asked by the judge whether he was under the influence of any drugs or alcohol. (App. p. 36 ). Petitioner stated that he was not and he understood what he was doing by pleading guilty and he understood the judge's questions. (App. p. 36, 31-41). At his PCR hearing, Petitioner testified in essence that he lied to the judge who accepted his plea when he was asked these questions. (App. p. 78-79, 83-87). Petitioner testified he had been taking anti-depressants for two and one-half years. (App. p. 81). Trial counsel testified Petitioner did not appear to be under the influence of anything. (App. p. 99 & 102). The PCR court found Petitioner's contradictions under oath in two different proceedings critical to Petitioner's lack of credibility. This determination was certainly reasonable. The record of the guilty plea clearly reflects that Petitioner was not struggling under any disability caused by any medication at the time of his plea. (App. p. 31-42). Furthermore, given the fact that Petitioner had been taking the medication for two and one-half years, it strains credulity to believe that on this particular day, the anti-depressant caused Petitioner to be intoxicated. This ground is completely without merit and should be dismissed with prejudice. Petitioner has failed to show by clear and convincing evidence that the PCR Court unreasonably applied United States Supreme Court precedent in determining Petitioner's plea was knowingly, voluntarily, and intelligently made.

To the extent Petitioner is alleging his plea was not knowing and voluntary due to ineffective assistance of counsel, which he is not alleging above, there is no merit to this claim. The PCR Court's order finding counsel's performance did not fall below the required standard is supported

by the record nor did Petitioner establish prejudice. Strickland, *supra*. The PCR Court's decision is entitled to deference. Burch, *supra*. The PCR Court observed the witnesses, heard their testimony, and determined Petitioner not to be credible and counsel to be credible on the issues before the PCR Court. This decision is also entitled to deference. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Wilson v. Ozmint, 352 F.3d 847, 858-859(4th Cir. 2003).

Petitioner has failed to offer clear and convincing evidence to overcome the presumption of correctness or to show that the PCR Court unreasonably applied United States Supreme Court precedent or made an unreasonable factual determination given the evidence before it. Carey, *supra*. In fact, given Petitioner's complete lack of credibility discussed above, the PCR Court's conclusion regarding his ineffective assistance of counsel claims was entirely reasonable. Petitioner's allegation that counsel coerced him into pleading guilty by threatening him with the death penalty is incredible. The record shows this case was never a death penalty case, and a jury had already been selected in Petitioner's case. (App. p. 99). The State was not seeking the death penalty, and the jury was not death qualified. (App. p. 1-31). Furthermore, the trial court specifically informed Petitioner at the start of his plea that the maximum sentence he could receive was life in prison, not the death penalty. (App. p. 32). Trial counsel testified he never threatened Petitioner with the death penalty. (App. p. 99). Petitioner's claim that he was coerced into pleading guilty lacked any credibility whatsoever. Instead, the record and the inferences therefrom show that Petitioner pled guilty because of the overwhelming evidence against him, the plea offer that was made by the State, and because of his conversations with his family after his jury was impaneled. (App. p. 31-41 & 93-95). Petitioner did not want to put his family through a trial. (App. p. 94). Because of this, the PCR Court's finding that Petitioner failed to show prejudice, i.e. that but for counsel's error there is a reasonable likelihood

that he would not have pled guilty, was not unreasonable. Hill, *supra*. Petitioner's other ineffective claim was likewise not credible. Petitioner claimed counsel was ineffective for failing to help him decide whether or not to plead guilty. Petitioner claimed counsel only met with him one time before trial. To the contrary, Petitioner's counsel testified he talked with Petitioner several times. (App. p. 88-89). He and Petitioner discussed the facts of the case. (App. p. 88 & 91). He discussed Petitioner's psychological condition with him. (App. p. 28). Counsel discussed plea negotiations with Petitioner. (App. p. 94). Counsel testified he discussed Petitioner's rights with him. (App. p. 31). Counsel testified that he discussed the elements of murder with Petitioner. (App. p. 101). Counsel testified he explained the possible sentences to Petitioner. (App. p. 101). Counsel testified he didn't advise Petitioner to plead guilty but believes he discussed with him the pros and cons of pleading guilty. (App. p. 95). Counsel testified he just wanted to make sure pleading guilty was what Petitioner wanted to do. (App. p. 96). Petitioner told counsel he wanted to waive his rights and plead guilty. (App. p. 100). Counsel testified it was Petitioner's decision to plead guilty. (App. p. 93-95, 98). There is no merit to this claim. Petitioner failed to overcome the substantial burden imposed upon him, and the record fully supports the PCR court's findings in this regard. Carey, *supra*; Williams, *supra*. Petitioner has failed to show by clear and convincing evidence that the PCR Court unreasonably applied United States Supreme Court precedent, or made an unreasonable factual determination given the evidence before it when it determined Petitioner failed to establish either element of Strickland, *supra*. Furthermore, the PCR Court's decision that Petitioner had failed to show prejudice under Hill, *supra*, was not unreasonable given the fact that the record shows Petitioner pled guilty of his own free will and accord, and not as a result of the advice of counsel. This ground, if raised, should be dismissed with prejudice.

**Ground Two: Rule (11)**

a. That the court had entered judgment without determining that there was a factual basis for the plea.

There is no merit to this ground. The sentencing court did not enter judgment without determining that there was a factual basis for the plea.<sup>5</sup> The court clearly requested of the Solicitor that he give the factual basis for the plea. (App. pp. 37, ln. 19-40, ln. 19). The Solicitor recited the evidence the State would have produced had the trial continued. (App. pp. 37, ln. 23-40, ln. 15). The evidence recited clearly established a factual basis for the plea to murder. (App. pp. 37, ln. 23-40, ln. 19). The court implicitly found that there was a factual basis for the plea, because almost immediately after the recitation of the facts by the Solicitor the court accepted the plea and proceeded with the guilty plea of Petitioner and sentenced him. (App. pp. 40, ln. 23). Neither Petitioner nor his counsel objected to or contradicted the facts as stated by the Solicitor. (App. pp. 40-41). It was not necessary that the court make an express finding that there was a factual basis for the plea. Gaines v. State, *supra*; State v. Lambert, *supra* (holding judge does not have to expressly say he found plea free and voluntary where record shows plea was voluntary). The question is whether the plea was knowingly and voluntarily made and the record reveals that it was under the requirements of Boykin.<sup>6</sup> There simply is no merit to this ground. It should be dismissed with

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<sup>5</sup>The purpose of requiring a factual basis for a guilty plea is to assure the court that the conduct which defendant admits by his plea of guilty constitutes the offense charged in the indictment or lesser offense included therein. Anderson v. State, 342 S.C.54, 535 S.E.2d 649 (2000) *citing* United States v. Thompson, 680 F.2d 1145 (7<sup>th</sup> Cir. 1982), cert. denied 459 U.S. 1089, 103 S.Ct. 573 (1982).

<sup>6</sup>Additionally, since the record establishes the plea was entered into freely and voluntarily, Petitioner does not have the right to attack the plea upon the ground that the facts were insufficient to establish the offense to which he pled. LoPiano, *supra*; *citing* S.C. Code Ann.

prejudice.

**Ground Three:** (Rule 11)

a. Due process of law requires that before a guilty plea can be entered voluntarily and intelligently a defendant must be advised of his privilege against compulsory self incrimination the right to trial by a jury and the right to confront one's accusers. A waiver of these rights cannot be presumed from a silent record.

There is no merit to this ground. The record reflects Petitioner was advised of his privilege against self incrimination. (App. pp. 34). The record reflects Petitioner was advised of his right to a trial by jury. (App. pp. 32-33). The record reflects Petitioner was advised of his right to confront his accusers. (App. pp. 33). Furthermore, the record reflects Petitioner knew all of these rights because he had exercised them prior to pleading guilty when he elected to proceed with a jury trial on March 18, 2002. Furthermore, Petitioner's trial counsel testified at PCR that he advised Petitioner of all these rights prior to his guilty plea. (App. pp. 27, 100, 101-103). Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984); Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972)(to determine whether a guilty plea was taken in accordance with constitutional standards, the Court will consider the entire record including facts presented at a PCR hearing). There is no merit to this ground and it should be dismissed with prejudice.

**Ground Four:** (Rule 11)

a. Rule 11 is designed to assist the judges in making the constitutionally required determination that a defendant's guilty plea is truly voluntary. Second, the Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination.

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Section 17-27-20(a)(6) (1976); Ramey v. State, 257 S.Ct. 127, 184 S.E.2d 544 (1971). "By entering a plea of guilty, LoPiano waived his right to attack his conviction on this ground." LoPiano, supra.

This claim is vague and ambiguous and should be dismissed. It fails to state what the basis for Petitioner's claimed habeas relief is. Petitioner simply recites his understanding of what Federal Rule of Criminal Procedure (11) is designed to accomplish. This allegation is too vague to warrant relief. Aubut v. Maine, 431 F.2d 688, 689 (1<sup>st</sup> Cir. 1970) ("The petition should set out substantive facts that will enable the court to see a real possibility of constitutional error."). "Unsupported conclusory allegations do not entitle a habeas petitioner to an evidentiary hearing. Nickerson v. Lee, 971 F.2d 1125, 1136 (4<sup>th</sup> Cir. 1992), overruled on other grounds Gray v. Netherland, 518 U.S. 152, 165-66 (1996). Petitioner has failed to make the requisite allegations. This ground should be dismissed with prejudice.

To the extent Petitioner is alleging *the record does not support a finding that his plea was knowingly and voluntarily entered into*, Respondent incorporates and reaffirms its response to ground one above as if fully stated herein. Petitioner's conviction is not unconstitutional as he alleges. There simply is no merit to the grounds set forth in Petitioner's habeas petition. Respondent submits that the record reflects that Petitioner's plea to murder was knowingly and voluntarily entered according to the mandates of Boykin v. Alabama, 395 U.S. 238 (1969) and later cases developing that doctrine. *See for example* Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972). There is no doubt that Petitioner was aware of the consequences of his plea because the record of his trial and later guilty plea reflect his knowing, voluntary, and intelligent choice.

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents reasons why

he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 317 (4<sup>th</sup> Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4<sup>th</sup> Cir. 1976). Petitioner has failed to present any reasons why he should be allowed to depart from the truth of his statements. Indeed, “the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas.” United States v. Timmreck, 441 U.S. 780, 784, 99 S.Ct. 2085, 2087 (1979).

### CONCLUSION

All of Petitioner’s grounds are procedurally barred in this setting, because they were procedurally defaulted in state court. Additionally, there is no merit to any of Petitioner’s grounds, because the entire record supports the fact that Petitioner’s guilty plea was knowingly and intelligently, and voluntarily made under the requirements of Boykin v. Alabama, *supra*.

Respectfully submitted,

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Attorney General

JOHN MCINTOSH  
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A handwritten signature in black ink, appearing to read "Anthony Mabry", written in a cursive style.

By: s/J. Anthony Mabry

**ATTORNEY FOR RESPONDENTS**

February 19, 2008

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA

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|-------------------------------------|---|---------------------------|
| James Chester Williams, #282929,    | ) | C/A No. 3:07-3714-GRA-JRM |
|                                     | ) |                           |
| Petitioner,                         | ) |                           |
|                                     | ) |                           |
| v.                                  | ) |                           |
|                                     | ) |                           |
| Jon Ozmint, Director, S.C. Dept. of | ) |                           |
| Corrections; and Stan Burt,         | ) |                           |
|                                     | ) |                           |
| Respondent.                         | ) |                           |

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**CERTIFICATE OF SERVICE**

I, **Anthony Mabry**, do hereby certify that I have this date served the Respondent's  
*Return and Memorandum in Support of Motion for Summary Judgment* in the foregoing action  
on the Petitioner by depositing one copy of the same in the United States mail, first-class postage  
prepaid, and addressed as follows:

James Chester Williams, #282929  
Lieber Correctional Institution  
P.O. Box 205  
Ridgeville, SC 29472

This 19<sup>th</sup> day of February, 2008.



s/Anthony Mabry

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF SOUTH CAROLINA

|                                           |   |                                         |
|-------------------------------------------|---|-----------------------------------------|
| James Chester Williams, #282929,          | ) |                                         |
|                                           | ) | Civil Action No. 3:07-3714-GRA-JRM      |
| Petitioner,                               | ) |                                         |
|                                           | ) |                                         |
| vs.                                       | ) |                                         |
|                                           | ) |                                         |
|                                           | ) |                                         |
| Jon Ozmint, Director, S. C. Dept. of      | ) | <b><u>REPORT AND RECOMMENDATION</u></b> |
| Correction; and Stan Burt,                | ) |                                         |
|                                           | ) |                                         |
| Respondents.                              | ) |                                         |
| <hr style="width: 30%; margin-left: 0;"/> | ) |                                         |

Petitioner, James Chester Williams ("Williams"), is an inmate at the South Carolina Department of Corrections serving a sentence of thirty years imprisonment for murder. He filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 alleging that he is in custody in violation of the Constitution of the United States. The case was automatically referred to the undersigned pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Rule 73.02 (B)(2)(c), DSC. Respondents filed a motion for summary judgment, supported by copies of portions of the state court record, on February 19, 2008. Because petitioner is proceeding pro se, an order pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), was issued on February 22, 2008, advising petitioner of his responsibility to properly respond to the motion for summary judgment. Petitioner filed his response on February 26, 2008.

**Background and Procedural History**

On September 15, 1999, Williams fatally shot his estranged girlfriend, Kathy Aretha Williams, with a sawed off shotgun in Lexington County. He fled to his brother's residence in Barnwell County where he was arrested. Williams was indicted for murder and possession of a

firearm during a crime of violence. (App. 112-15).<sup>1</sup> After a jury was selected, Williams entered a negotiated plea for thirty years, and the firearms charge was dismissed.

Williams filed a direct appeal by way of the South Carolina Office of Appellate Defense which filed an Anders<sup>2</sup> brief. The following issue was raised:

Whether the court erred by informing appellate he could appeal the results of his guilty plea in the same manner as a guilty verdict from a jury, since this erroneously informed appellant an appellate court could vacate the plea in the absence of an objection, undermined the finality of the plea, and make it an impermissible conditional plea?

(App. 46). The appeal was dismissed by the South Carolina Court of Appeals. See State v. Williams, No. 2003-U.P 329 (S. C. Ct. App. May 15, 2003) (unpublished). Williams did not seek further review by the South Carolina Supreme Court. The Remittitur was returned on June 17, 2003. (Res. Mem., Ex. 4).

Williams filed an application for post-conviction relief ("PCR") on May 21, 2003 (App. 54). An evidentiary hearing was held on June 27, 2005. (App. 70). Williams appeared and testified. He was represented by Robert N. Boorda, Esquire. Trial counsel was called as a witness by the State. The PCR court filed a written order of dismissal on August 18, 2005. (App. 107).

A Johnson<sup>3</sup> petition was filed on Williams' behalf by the South Carolina Office of Appellate Defense raising the following issue:

Whether petitioner's guilty plea complied with the mandates set forth in Boykin v. Alabama?

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<sup>1</sup>Exhibit 1 to respondents' memorandum is the appendix prepared in connection with Williams' petition for writ of certiorari following denial of his application for post-conviction relief. It is referred to herein as "App. \_\_\_\_."

<sup>2</sup>Anders v. California, 386 U.S. 738 (1967).

<sup>3</sup>Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

(Res. Mem., Ex. 6). Williams filed a pro se brief and an amended pro se brief. (Res. Mem., Ex. & and 8). The South Carolina Court of Appeals denied the petition for writ of certiorari by order of September 21, 2007. (Res. Mem., Ex. 10). The Remittitur was returned on October 10, 2007. (Res. Mem., Ex. 11).

#### **Grounds for Relief**

In his present petition, Williams asserts that he is entitled to a writ of habeas corpus on the following grounds:

**Ground One:** (Rule 11) Whether petitioner's guilty plea complied with the mandates set forth in Boykin v. Alabama?

a. Petitioner argued that his plea should be set aside because it had been accepted in violation of (Rule 11) of the federal Rules of Criminal Procedure. Petitioner contended that the state court had accepted his plea without first addressing (him) personally and determining that the plea was made voluntary with understanding of the nature of the charge.

**Ground Two:** Rule (11)

a. That the court had entered judgment without determining that there was a factual basis for the plea.

**Ground Three:** (Rule 11)

a. Due process of law requires that before a guilty plea can be entered voluntarily and intelligently a defendant must be advised of his privilege against compulsory self incrimination the right to trial by a jury and the right to confront one's accusers. A waiver of these rights cannot be presumed from a silent record.

**Ground Four:** (Rule 11)

a. Rule 11 is designed to assist the judges in making the constitutionally required determination that a defendant's guilty plea is truly voluntary. Second, the Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination.

Williams is a pro se litigant, and thus his pleadings are accorded liberal construction. Hughes v. Rowe, 449 U.S. 5, 9 (1980) (per curiam); Estelle v. Gamble, 429 U.S. 97 (1976); Haines v.

Kerner, 404 U.S. 519 (1972); Loe v. Armistead, 582 F.2d 1291 (4th Cir.1978); Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir.), cert. denied, Leeke v. Gordon, 439 U.S. 970 (1978). Under established local procedure in this judicial district, a careful review has been made of the pro se Petition herein pursuant to the procedural provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, Title I, § 104, 110 Stat. 1214, codified at 28 U.S.C. § 2254. This review has been conducted in light of the following precedents: Denton v. Hernandez, 504 U.S. 25 (1992); Neitzke v. Williams, 490 U.S. 319, 324-25 (1989); Haines v. Kerner, 404 U.S. 519 (1972); Nasim v. Warden, Maryland House of Correction, 64 F.3d 951 (4th Cir.1995) ( en banc ), cert. denied, 516 U.S. 1177 (1996); Todd v. Baskerville, 712 F.2d 70 (4th Cir.1983).

Pro se pleadings are held to a less stringent standard than those drafted by attorneys. Hughes, 449 U.S. 5 (1980). Even under this less stringent standard, however, the pro se complaint nonetheless may be subject to summary dismissal. The mandated liberal construction afforded to pro se pleadings means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so, but a district court may not rewrite a petition to include claims that were never presented. Barnett v. Hargett, 174 F.3d 1128 (10th Cir.1999). Likewise, a court may not construct the plaintiff's legal arguments for him ( Small v. Endicott, 998 F.2d 411 (7th Cir.1993)) or "conjure up questions never squarely presented" to the court. Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4th Cir.1985), cert. denied, 475 U.S. 1088 (1986).

### **Standard for Summary Judgment**

Summary judgment is appropriate only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). Rule 56(c) mandates entry of summary judgment “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In deciding whether there is a genuine issue of material fact, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in his favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” Id. at 248.

Moreover, “[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). With respect to this burden, “it is the responsibility of the [nonmovant], not the court, to identify with particularity the evidentiary facts existing in the record which can oppose the [movant's] summary judgment motion.” Malina v. Baltimore Gas & Elec. Co., 18 F. Supp. 2d 596, 604 (D.Md.1998).

### **Standard for Review**

Since Williams filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), review of his claims is governed by 28 U.S.C. § 2254(d), as amended. Lindh v. Murphy, 521 U.S. 320 (1997); Breard v. Pruett, 134 F.3d 615 (4th Cir.), cert.

denied, 521 U.S. 371 (1998) and Green v. French, 143 F.3d 865 (4th Cir. 1998), cert. denied, 525

U.S. 1090 (1999). That statute now reads:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The United States Supreme Court has addressed procedure under § 2254(d). See Williams v. Taylor, 529 U.S. 362 (2000). In considering a state court's interpretation of federal law, this court must separately analyze the "contrary to" and "unreasonable application" phrases of § 2254(d)(1).

A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases .... A state- court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the Court's] precedent.

\* \* \*

[A] state-court decision involves an unreasonable application of [the Supreme] Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of [the] Court's precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Id. at 1519-20. Ultimately, a federal habeas court must determine whether "the state court's application of clearly established federal law was objectively unreasonable." Id. at 1521.

### Discussion

Relief under Section 2254 may be had only after a habeas petitioner has exhausted his state court remedies: "It is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas. Claims not so raised are considered defaulted." Breard v. Green, 523 U.S. 371, 375 (1998), citing Wainwright v. Sykes, 433 U.S. 72 (1977); see also 28 U.S.C. § 2254(b). Thus, if claims were never reviewed by the highest court in South Carolina, those claims will be barred and cannot be considered by the Court.

The theory of exhaustion is based on 28 U.S.C. § 2254, which gives the federal court jurisdiction of habeas petitions. Section 2254 allows relief when a person "is in custody in violation of the Constitution or laws or treaties of the United States." The statute states in part:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court, shall not be granted unless it appears that

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is either an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

This statute clearly requires that an applicant pursue any and all opportunities in the state courts before seeking relief in the federal court. Reading subsections (b) and (c) in conjunction, it

is clear that Section 2254 requires a petitioner to present any claim he has to the state courts before he can proceed on the claim in this court. See O'Sullivan v. Boerckel, 526 U.S. 838 (1999).

The court's exhaustion requirements under Section 2254 are explained in Matthews v. Evatt, 105 F.3d 907, 910-911 (4th Cir.), cert. denied, 522 U.S. 833 (1997):

In the interest of giving state courts the first opportunity to consider alleged constitutional errors occurring in a defendant's state trial and sentencing, a § 2254 petitioner is required to "exhaust" all state court remedies before a federal district court can entertain his claims. Thus, a federal habeas court may consider only those issues which have been "fairly presented" to the state courts[.]

To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim to the state's highest court. The burden of proving that a claim has been exhausted lies with the petitioner.

The exhaustion requirement, though not jurisdictional, is strictly enforced [.] (Citations omitted)

Indeed, a claim is unexhausted unless the substance of a petitioner's claims are "fairly presented" to the state courts. The Matthews court explained, "[t]he ground relied upon must be presented face-up and squarely; the federal question must be plainly defined. Oblique references which hint that a theory may be lurking in the woodwork will not suffice. In other words, fair presentation contemplates that both operative facts and the controlling legal principles must be presented to the state court." Matthews v. Evatt, 105 F.3d at 911.

In South Carolina, a person in custody has two primary means of attacking the validity of his conviction. The first method involves a direct appeal and, pursuant to state law, a petitioner is required to state all his grounds in that appeal. See SCAR 207 and Blakeley v. Rabon, 221 S.E.2d 767 (S.C. 1976). The second method involves the filing of an application for relief under the South Carolina Post Conviction Procedure Act, S.C. Code Ann. §§ 17-27-10-160. The applicant may allege constitutional violations in a post-conviction relief ("PCR") proceeding, but only if the issue

could not have been raised by direct appeal. Gibson v. State, 495 S.E.2d 426, 428 (S.C. 1998), citing S.C. Code Ann. §§ 17-27-20(a)(1), (b). In South Carolina, a PCR applicant is also required to state all of his grounds for relief in his application. See S.C. Code Ann. § 17-27-90. Thus, a petitioner's failure to pursue a claim at the PCR hearing constitutes an abandonment of that claim, resulting in that claim being thereafter procedurally barred. See Plyler v. State, 424 S.E.2d 477 (S.C. 1992) (finding an issue that was neither raised at the PCR hearing nor ruled upon by the PCR court procedurally barred); see also S.C. Code Ann. § 17-27-80. Furthermore, strict time deadlines govern the direct appeal and the filing of a PCR in the South Carolina Courts. A petition for PCR must be filed within one year of judgment, or if there is an appeal, within one year of the appellate court decision. S.C. Code Ann. § 17-27-45. Significantly, when the petition for habeas relief is filed in the federal court, a petitioner may present only those issues which were presented to the South Carolina Supreme Court through direct appeal or through an appeal from the denial of the PCR application, whether or not the Supreme Court actually reached the merits of the claim, unless the petitioner has procedurally bypassed (that is, procedurally defaulted) his state remedies, at which point he would be procedurally barred from raising them in federal court.

If any avenue of state relief remains available, the petitioner must proceed through the state courts before requesting a writ of habeas corpus in the federal courts. See, e.g., Patterson v. Leeke, 556 F.2d 1168 (4th Cir.1977) and Richardson v. Turner, 716 F.2d 1059 (4th Cir.1983). If a petitioner has failed to raise the issue before the state courts, but still has any means to do so, he will be required to return to the state courts to exhaust the claims. See Rose v. Lundy, 455 U.S. 509, 515 (1982).

Respondents assert that Williams “failed to properly exhaust his state remedies as to the grounds in his petition, therefore, those grounds are procedurally barred.” (Res. Mem., pp. 10-11).

In his Anders' brief, Williams argued that the trial court's advising him that he could appeal had "the tendency to lead [him] to believe that an appellate court could vacate his guilty plea if it found it unfair in some way—that undermined the finality of the guilty plea—and made it an impermissible conditional guilty plea." (App. 48). Williams cited only state precedent. In the Johnson petition, Williams argued that his "guilty plea failed to comply with the mandates set forth in Boykin v. Alabama," 395 U.S. 238 (1969). (Res. Mem., Ex. 6, p. 4). In this brief, Williams stated that "the 'essence' of Boykin was to make the requirements of Rule 11 of the Federal Rules of Civil Procedure applicable to the states." (Id.). Williams couches his present claims as violations of Rule 11.

The dismissal of Williams direct appeal by the South Carolina Court of Appeals constitutes an adjudication on the merits to the extent that a potential issue was properly preserved for review in the trial court. State v. McKennedy, 559 S.E.2d 850 (S.C. 2002) and State v. Sullivan, 282 S.E.2d 838 (S.C. 1981) (objection must be raised to trial court to preserve issue for appellate review). Respondents assert that Williams present claims were not reached under the Anders procedure because they were not preserved for review at the guilty plea. Respondents further argue that since Williams' claims are issues that should have been presented on direct appeal, but were not, he waived these issues and could not properly raise them in the PCR process.<sup>4</sup>

In any event, Williams claims fail if considered on the merits. Williams asserts: (1) that the trial court failed to personally address him to determine whether his plea was knowing and voluntary; (2) that no factual basis for the plea was presented; and (3) the trial court failed to advise

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<sup>4</sup>The PCR court found only that trial counsel was not ineffective in advising Williams in connection with his guilty plea and that Williams had not shown that his guilty plea was involuntary because he was taking medication at the time. (App. 110).

him of his right against self-incrimination and his right of confrontation. The record refutes these assertions.

Williams was placed under oath for the change of plea proceeding. (App. 31). The trial judge personally addressed Williams in an extensive plea colloquy. Williams indicated that he was pleading guilty of his own free will, that he had not been threatened or coerced, there had been no promises except for the plea agreement, that he was not under the influence of alcohol or medication, and that he was, in fact, guilty. (App. 35-36). The Solicitor provided the court with an extensive recitation of the facts involved in the case. (App. 37-40). Further, the trial court fully explained the procedure which would be followed if the trial went forward. The court specifically advised Williams on the State's burden of proof and that he would not be required to testify. Last, the court specifically explained to Williams that his attorney would have the right to cross-examine witnesses presented by the State. (App. 33-37).

To be constitutionally sufficient, a guilty plea must be made "knowingly" and "intelligently" by the defendant. Boykin v. Alabama 395 U.S. at 242. These two terms are often used interchangeably. Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005). A defendant must receive "real notice of the true nature of the charge against him" in order for him to enter a knowing and intelligent plea. Bausley v. United States, 523 U.S. 614, 618 (1998). Here, the trial court specifically advised Williams of the nature of the offense by quoting the allegations from the indictment. (App. 32).

Further, a guilty plea must be "a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31 (1970). As discussed above, the trial court explained to Williams his options of proceeding to trial or pleading guilty. Williams specifically indicated that his plea was voluntary.

**Conclusion**

Based on a review of the record, it is recommended that respondents' motion for summary judgment be granted, and the petition dismissed without an evidentiary hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. McCrorey', with a stylized flourish at the end.

Joseph R. McCrorey  
United States Magistrate Judge

July 25, 2008

Columbia, South Carolina

**The parties' attention is directed to the important information on the attached notice.**