

The South Carolina Court of Appeals

Lucius Simuel, #338144, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-001607

RECEIVED

AUG - 5 2016

SC SUPREME COURT

ORDER

This case is transferred to the Supreme Court of South Carolina pursuant to Rule 204(a) of the South Carolina Appellate Court Rules.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:

Scott Wayne Lee, Esquire
James Rutledge Johnson, Esquire
The Honorable Daniel E. Shearouse

FILED

8/4/16

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas, Non-Jury

Honorable Roger L. Couch, Circuit Court Judge

Case Number: 2013-CP-07-0287

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AUG 03 2016

SC Court of Appeals

RECEIVED

AUG - 5 2016

SC SUPREME COURT

Lucius Simuel #338144.....Appellant

v.

State of South Carolina.....Respondent

NOTICE OF APPEAL

The Appellant, Lucius Simuel appeals the judgment of the Circuit Court, the Honorable Roger L. Couch presiding, denying his Application for Post Conviction Relief. The Order of Dismissal was signed on January 28, 2016 and received by counsel for Appellant on February 9, 2016. Appellant submitted a Rule 59 Motion to Alter or Amend Judgment on February 11, 2016. Oral argument on Appellant's Motion to Alter or Amend Judgment was held on May 23, 2016, and the Court denied same via an Order Denying Applicant's Motion to Alter or Amend dated June 29, 2016 and filed on July 12, 2016.

Law Office of Scott W. Lee, PA

Scott W. Lee

Scott W. Lee
Attorney for Appellant
Post Office Box 2124
Beaufort, South Carolina 29901
(843) 986-9030

Opposing Counsel of Record:
J. Rutledge Johnson-SC Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

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AUG - 5 2016

SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
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SC SUPREME COURT

Lucius Simuel #338144.....Appellant

v.

State of South Carolina.....Respondent

PROOF OF SERVICE

Counsel for Appellant Lucius Simuel hereby certifies that he has prepared and served a Notice of Appeal this 1st day of August, 2016 upon the State, as specified by South Carolina Appellate Court Rule 203(b)(1) by depositing a copy of same, postage pre-paid in the United States Mail addressed to opposing counsel of record.

Law Office of Scott W. Lee, PA

Scott W. Lee

Scott W. Lee

Attorney for Appellant

Post Office Box 2124

Beaufort, South Carolina 29901

(843) 986-9030

Opposing Counsel of Record:

J. Rutledge Johnson, Esq.

SC Attorney General's Office

Post Office Box 11549

Columbia, South Carolina 29211

RECEIVED

AUG - 5 2016

SC SUPREME COURT

LAW OFFICE OF SCOTT W. LEE, P.A.

1214 King Street
Beaufort, South Carolina 29902
(843) 986-9030
swlee@swleelaw.com

August 1, 2016

Clerk of Court- South Carolina Court of Appeals
1220 Senate Street
Post Office Box 11629
Columbia, South Carolina 29211

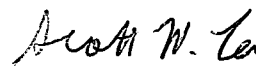
Re: Lucius Simuel #338144 v. State of South Carolina
C/A#: 2013-CP-07-0287
PCR Appeal

Dear Clerk:

Enclosed please find for filing in your Court a Notice of Appeal and Proof of Service in the above-referenced matter. Kindly file the original and return a filed copy to my office in the self-addressed stamped envelope provided. By copy of this letter, I am providing Appellate Defense with a copy of the enclosed documents, along with copies of Judge Couch's Orders, because Mr. Simuel is currently incarcerated and indigent.

Thank you for your kind assistance in this matter, and please feel free to contact me should you have any questions or require additional information.

Very truly yours,



Scott W. Lee

Encl.

Cc: Beaufort County Clerk of Court (w/ encl.)
J. Rutledge Johnson- SC Asst. Attorney General (w/ encl.)
South Carolina Commission on Indigent Defense (w/ encl.)

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AUG 03 2016
SC Court of Appeals

RECEIVED
AUG - 5 2016
SC SUPREME COURT

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2013CP0700287

Lucius Simuel	South Carolina State Of
---------------	-------------------------

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> 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. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order Statement of Judgment by the Court:

Order of Dismissal

ORDER INFORMATION

This order ends does not end the case.
 Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT 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.**

s/ R.L.Couch
Circuit Court Judge

2135
Judge Code

1/28/2016
Date

For Clerk of Court Office Use Only

This judgment was entered on **February 8, 2016**, and a copy mailed first class or placed in the appropriate attorney's box on **February 9, 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

Lucius Simuel #338144 Ashley-A-40 Lieber Corr. Inst. Post
Office Box 205 Ridgeville, SC 29472
Scott Wayne Lee PO Box 2124 Beaufort, SC 29901-2124

James Rutledge Johnson PO Box 11549 Columbia, SC
29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

 Melissa Kilby

Court Reporter

Jerri Ann Roseneau - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Lucius Simuel, #338144,

2013-CP-07-0287

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

2016 FEB - 8 PM 1:44
JENNIFER ROSEBANK
CLERK OF COURT
BEAUFORT COUNTY, S.C.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 4, 2013. The Respondent made its Return on May 29, 2014. An evidentiary hearing into the matter was convened on October 20, 2015, at the Beaufort County Courthouse. Scott W. Lee, Esquire, represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Ian Deysach, Esquire, also testified. This Court had before it a copy of the records of the Beaufort County Clerk of Court, records from the South Carolina Department of Corrections, the trial transcript, the appellate records and memoranda submitted by both the Applicant and Respondent.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. The Applicant was indicted at the September 2008 term of the Beaufort County Grand Jury for accessory before the fact to a felony (2008-GS-07-1858), assault and battery with intent to kill (ABWIK) (2008-GS-07-2009),

burglary- first degree (2008-GS-07-1761), possession of a weapon during the commission of a violent crime (2008-GS-07-1762), and possession of a handgun by a prohibited person (2009-GS-07-1366). The Applicant was represented by Ian Deysach, Esquire.

On November 16-20, 2009, the Applicant proceeded to trial and was found guilty as indicted¹. The Applicant was sentenced by the Honorable Thomas W. Cooper, Jr. to confinement for a period of life without parole for ABWIK and burglary-first degree and five years for possession of a weapon during the commission of a violent crime and possession of a weapon by a prohibited person. The Applicant's convictions are to be served concurrently.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Dayne Phillips, Esquire, of the South Carolina Office of Appellate Defense. The Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Simuel, No. 2012-MO-031 (S.C. July 25, 2012). The Remittitur was issued on August 10, 2012.

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

1. Ineffective assistance of counsel.
2. "Sentencing court without jurisdiction to impose sentence."
3. "Violation of his due process rights 14th, 6th, and 5th"

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

¹ The Applicant's accessory before the fact to a felony charge was *nolle prossed*.

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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 fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he is entitled to post-conviction relief on the basis that he received ineffective assistance of trial counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). To be entitled to post-conviction relief, the applicant must prove both of the following: (1) his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) the applicant suffered prejudice by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). Under this standard, counsel's deficient performance must have prejudiced the Applicant to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

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 v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

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A. Trial counsel's failure to move for a severance of Applicant's case from his co-defendant.

Applicant contends that counsel was ineffective for failing to move for severance in this case.

This argument is without merit.

Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d, 529 (1992).

Further, "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct **from counsel's perspective at the time.**" State v. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985) (emphasis added), citing Strickland v. Washington, 104 S.Ct. 2052, 890 L.E.2d 674(1984). Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. Id.

First, trial counsel is not deficient for not requesting a severance in this case because based on the facts of the case and the evidence at trial, it is highly unlikely the trial judge would grant a severance. "Motions for a severance and separate trial are addressed to the discretion of the trial court." State v. Dennis, 337 S.C. 275, 282, 523 S.E.2d 173, 176 (1999). "The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood

Page 4

he and a codefendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime.” Dennis at 281. Simply because Applicant claimed codefendant was the shooter in this case and he allegedly had no knowledge of codefendant’s decision to shoot the victim, the trial judge still had discretion as to whether to grant severance. Second, it was trial counsel’s testimony at the PCR hearing that at the time of the trial, he did not perceive the defense of Applicant and the defense of codefendant as antagonistic. Further, it was trial counsel’s testimony that he could not find a case in which the trial judge was overturned on appeal because of lack of severance. Lastly, trial counsel testified that his trial strategy was that he did not want a severance because portions of Applicant’s statements to law enforcement would not be admissible under Bruton.

Under Butler and Whitehead, counsel’s representation of Applicant in this regard was not ineffective based on his particular trial strategy. Thus, this allegation is denied.

B. Trial Counsel properly advised Applicant as to life without parole.

Under Lafler v. Cooper, 132 S.Ct. 1376 (2012), trial counsel has an affirmative duty to relay plea offers from the State to the Applicant/Defendant. Where counsel’s advice leads a defendant to reject a plea offer and he receives a harsher sentence, i.e. via trial, a defendant can meet both prongs of the Strickland test. Id.

While Applicant claims that he was not properly advised concerning life without parole based on his prior conviction in Georgia, Counsel clearly testified at the hearing that Applicant was fully aware that he was facing life without parole if convicted. Specifically, Counsel testified the State served Applicant with a life without parole notice on September 1, 2009. This trial did not occur until November 16-20, 2009. Further, it was Counsel’s testimony that Applicant was offered 20 years

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and rejected that offer. Applicant provided no testimony that he relied on Counsel's advice in rejecting the plea offer from the State. This is simply a case of buyer's remorse. As such, Counsel fulfilled his duty under Strickland and Lafler. Thus, this allegation is denied.

C. Trial counsel was not ineffective for failing to properly argue and preserve Applicant's ABWIK charge because the trial judge properly charged the jury with "hand of one, hand of all" based on the evidence presented at trial. Thus, trial counsel had no basis on which to object to the charge.

While Applicant contends that Counsel failed to properly argue and preserve the ABWIK charge related to the injury upon victim with respect to the theory of "hand of one hand of all," Applicant must have been charged with ABWIK for the jury to even consider charging him under accomplice liability.

"Under the "hand of one is the hand of all" theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002). "It is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000).

For Applicant to be convicted under the theory of accomplice liability, South Carolina law is clear that he must have been charged with the principal offense. In this case, Applicant was indicted for ABWIK on Victim. Evidence presented at the trial shows that Applicant was the master mind behind the plan to rob Victim of pills. (Tr. p. 442 lines 9). There was additional evidence presented that Applicant was present at the scene and participated in the crimes with which he was charged.

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(Tr. p. 564 lines 12-17; p. 565 lines 8-19; p. 566 lines 2-11). Further, evidence was presented at the trial that Applicant's codefendant shot victim. (Tr. 568 lines 22-24). Therefore, based on the evidence presented at trial and the indictment charging applicant with the crime of ABWIK as a principal, the trial judge properly charged the jury with an instruction on "hand of one hand of all." As such, Counsel cannot be said to be ineffective when he had no legal ground on which to object. This argument is without merit. Thus, this allegation is denied.

D. Counsel had no reason to object to the jury instruction regarding the elements of burglary first degree, as it was a proper instruction.

Counsel cannot be held ineffective for not objecting to a proper jury charge by the trial judge. When the charge given adequately covers the crime, counsel will not be held ineffective for failing to request an additional or more specific jury charge. Pinckney v. State, 368 S.C. 502, 629 S.E.2d. 367 (2006); see also Cartrette v. State, 323 S.C. 15, 448 S.E.2d 553 (1994).

S.C. Code Ann. 16-11-311 states that Burglary, 1st degree occurs when:

(A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:
(1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:

- (a) is armed with a deadly weapon or explosive; or
- (b) causes physical injury to a person who is not a participant in the crime; or
- (c) uses or threatens the use of a dangerous instrument; or

Plc
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(d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; ...

The trial judge charged exactly what the law is. (Tr. 908-910). Because this is a correct statement of law, this is a proper jury charge. As such, Counsel cannot be held ineffective under Pinckney. Thus, this allegation is denied.

E. Cumulative Error

Applicant contends that there is cumulative effect of Counsel's errors in this case. First, it is unsettled law in South Carolina whether cumulative error is a viable claim. Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002) ("Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina."). Nevertheless, as Applicant has failed to meet his burden of proving any of his claims, Counsel cannot be said to be ineffective in his representation of Applicant. Further, as there is overwhelming evidence of Applicant's guilt in this case, Applicant can prove no resulting prejudice from any of counsel's alleged errors. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994). Thus, this allegation is denied.

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.

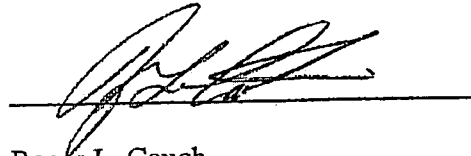
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate

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. Applicant's 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!



Roger L. Couch
Presiding Circuit Court Judge
Fourteenth Judicial Circuit

1/28, 2016

Spartanburg, South Carolina

2013-CP-07-0287

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

Lucius Simuel, #338144,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

2013-CP-07-0287

**ORDER DENYING APPLICANT'S
MOTION TO ALTER OR AMEND**

2016 JUL 12 PM 1:26
JERRI ANN ROSENEAU
CLERK OF COURT
BEAUFORT COUNTY, S.C.

This post-conviction relief matter came before the Court for an evidentiary hearing at the Beaufort County Courthouse on October 20, 2015. The Applicant was present and represented by Scott W. Lee, Esquire. The State was represented by J. Rutledge Johnson, Assistant Deputy Attorney General. After taking the matter under advisement, this Court issued a Final Order of Dismissal dated January 28, 2016. The Applicant was served with the Final Order on February 9, 2016, and he submitted, through counsel, a timely Motion for Rehearing and/or Motion to Alter or Amend the Judgment on February 11, 2016.

The Applicant raises the following issues in his Rule 59 Motion:

1. "The Court incorrectly found that plea counsel's failure to move for severance was not ineffective assistance of counsel;"
2. "The Court incorrectly found that plea counsel had properly advised Applicant as to the mandatory applicability of life without parole;"
3. "The Court incorrectly found that plea counsel had no basis on which to object to, argue, and preserve the trial judge's jury instructions on "hand of one is the hand of all"";

Lee
P1

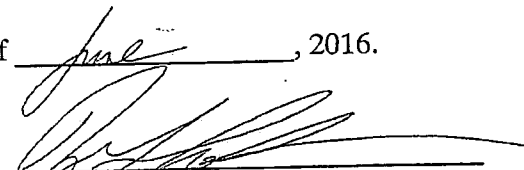
4. "The Court incorrectly found that plea counsel had no reason to object to the trial judge's jury instruction on Burglary, 1st degree charge; and"
5. "The Court incorrectly found that cumulative error doctrine need not be considered in evaluating applicant's petition because it found there was "overwhelming evidence of applicant's guilt" and that as such there was no resulting prejudice."

Having carefully reviewed the entire record in this matter including a motion's hearing on May 23, 2016 at the Beaufort County Courthouse, this Court finds that no basis for altering or amending is prior ruling. This Court also finds the Applicant is merely asking the Court to reverse its decision and grant post-conviction relief. Such a request is more properly addressed through the appellate process. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting the proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court).

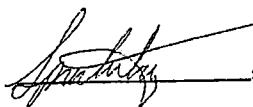
Therefore, this Court hereby denies the Applicant's Rule 59 Motion in its entirety, and affirms the previous Order of Dismissal.

This Court advises that if the Applicant desires to secure appellate review of this Order and the Order of Dismissal, a notice of appeal must be filed and served **within thirty (30) days** of the service of this Rule 59 Order. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

AND IT IS SO ORDERED this 29th day of June, 2016.



Roger L. Couch
Presiding Judge
Fourteenth Judicial Circuit


_____, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF Beaufort)

IN THE COURT OF COMMON PLEAS
14 JUDICIAL CIRCUIT

CASE NO.: 2013-CP-07-287-

Lucius Simuel # 338144
Plaintiff,)

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

vs.
State of So. Carolina
Defendant.)

Plaintiff's Attorney: <u>Scott W. Lee</u> , Bar No. <u>66471</u>		Defendant's Attorney: <u>J Rutledge Johnson</u> , Bar No. _____	
Address: <u>P.O. Box 2124 Beaufort SC 29901</u>		Address: <u>P.O. Box 11549 Columbia SC 29211</u>	
Phone: <u>843-986-0130</u> Fax <u>843-525-9442</u>		Phone: _____ Fax _____	
E-mail: <u>swlee@swlee-law.com</u> Other: _____		E-mail: _____ Other: _____	
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)			
<input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)			
<input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: <u>to alter and amend judgment</u>			
Estimated Time Needed: <u>N/A</u>		Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO	
SECTION II: Motion/Order Type			
<input checked="" type="checkbox"/> Written motion attached			
<input type="checkbox"/> Form Motion/Order			
I hereby move for relief or action by the court as set forth in the attached proposed order.			
<u>Scott W. Lee</u> Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant		<u>Feb. 11</u> , 20 <u>16</u> Date submitted	
SECTION III: Motion Fee			
<input type="checkbox"/> PAID - AMOUNT: \$ _____			
<input checked="" type="checkbox"/> EXEMPT: (check reason)			
<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support			
<input type="checkbox"/> Domestic Abuse or Abuse and Neglect			
<input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party			
<input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief			
<input type="checkbox"/> Motion for Stay in Bankruptcy			
<input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP)			
<input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions			
Name of Court Reporter: _____			
<input type="checkbox"/> Other: _____			
JUDGE'S SECTION		CLERK'S VERIFICATION	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order.		JUDGE CODE _____	
<input type="checkbox"/> Other: _____		Date: _____, 20____	
Collected by: _____		Date Filed: _____, 20____	
<input type="checkbox"/> MOTION FEE COLLECTED: \$ _____			
<input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____			

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BEAUFORT)	
)	
LUCIUS SIMUEL #338144,)	Case No.: 2013-CP-07-0287
Applicant)	
-versus-)	APPLICANT'S MOTION TO ALTER AND
)	AMEND JUDGMENT
STATE OF SOUTH CAROLINA,)	
Respondent)	

RECEIVED
 01/11/16 11:58

Applicant Lucius Simuel, by and through his undersigned counsel and pursuant to SCRCRCP Rule 59, hereby moves for reconsideration of the Court's Order of Dismissal signed January 28, 2016 in the above-captioned Post-Conviction Relief case, a copy of which is attached hereto. The purpose of this motion is to request that the Court reconsider its findings and rulings so that issues raised and facts presented by Applicant are adequately addressed for preservation and appellate review should the Court not find an alteration of the judgment appropriate. In support of this motion, Applicant respectfully asserts as follows:

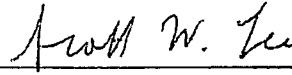
1. Applicant's PCR Petition was heard on October 20, 2015 by the Honorable Roger L. Couch in the Beaufort County Court of Common Pleas.
2. At the conclusion of the hearing, Judge Couch informed the parties that he would be taking the matter under advisement.
3. On November 3, 2015 the parties were advised by Judge Couch's law clerk via e-mail that Judge Couch was requesting memoranda of the issues raised at the October 20, 2015 hearing.
4. On January 7, 2016, Applicant's attorney received via e-mail the State's Memorandum in Opposition to Applicant's Application for Post-Conviction Relief.
5. On January 8, 2016 the parties were advised by Judge Couch's law clerk via e-mail that Judge Couch was denying Applicant's petition, and that he would like Assistant Attorney General Rutledge Johnson to prepare a proposed Order of Dismissal and to forward same to Applicant's attorney for review.

6. On January 28, 2016, Applicant's attorney received via e-mail the State's proposed Order of Dismissal.
7. Later in the day on January 28, 2016, and before he could forward any objections or exceptions to the State's proposed Order, Applicant's attorney received an e-mail from Judge Couch's law clerk advising the parties that Judge Couch had already signed the State's proposed Order of Dismissal.
8. On February 9, 2016, Applicant's attorney received a signed, but unfiled Order of Dismissal.
9. Applicant respectfully requests that the Court reconsider its Order of Dismissal, signed on January 28, holding that plea counsel was not ineffective, on the following grounds:
 - a. The Court incorrectly found that plea counsel's failure to move for a severance was not ineffective assistance of counsel;
 - b. The Court incorrectly found that plea counsel had properly advised Applicant as to the mandatory applicability of life without parole;
 - c. The Court incorrectly found that plea counsel had no basis on which to object to, argue, and preserve the trial judge's jury instructions on "the hand of one is the hand of all";
 - d. The Court incorrectly found that plea counsel had no reason to object to the trial judge's jury instruction on the Burglary 1st Degree charge; and
 - e. The Court incorrectly found that the cumulative error doctrine need not be considered in evaluating Applicant's petition because it found there was "overwhelming evidence of Applicant's guilt", and that as such there was no resulting prejudice.
10. Applicant hereby incorporates by reference, and realleges the arguments made at the October 20, 2015 hearing, in support of the above grounds.

For the reasons set forth above, Applicant respectfully requests that the Court reconsider its Order of Dismissal signed January 28, 2016, and amend same to grant the relief sought by Applicant in his PCR Application.

Signature page follows

Respectfully submitted,



Scott W. Lee
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(843) 986-9030

Beaufort, South Carolina

February 11, 2016

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Lucius Simuel, #338144,

2013-CP-07-0287

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 4, 2013. The Respondent made its Return on May 29, 2014. An evidentiary hearing into the matter was convened on October 20, 2015, at the Beaufort County Courthouse. Scott W. Lee, Esquire, represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Ian Deysach, Esquire, also testified. This Court had before it a copy of the records of the Beaufort County Clerk of Court, records from the South Carolina Department of Corrections, the trial transcript, the appellate records and memoranda submitted by both the Applicant and Respondent.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. The Applicant was indicted at the September 2008 term of the Beaufort County Grand Jury for accessory before the fact to a felony (2008-GS-07-1858), assault and battery with intent to kill (ABWIK) (2008-GS-07-2009),

Handwritten signature and initials, possibly "R. Lee" and "P. 1".

burglary- first degree (2008-GS-07-1761), possession of a weapon during the commission of a violent crime (2008-GS-07-1762), and possession of a handgun by a prohibited person (2009-GS-07-1366). The Applicant was represented by Ian Deysach, Esquire.

On November 16-20, 2009, the Applicant proceeded to trial and was found guilty as indicted¹. The Applicant was sentenced by the Honorable Thomas W. Cooper, Jr. to confinement for a period of life without parole for ABWIK and burglary-first degree and five years for possession of a weapon during the commission of a violent crime and possession of a weapon by a prohibited person. The Applicant's convictions are to be served concurrently.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Dayne Phillips, Esquire, of the South Carolina Office of Appellate Defense. The Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Simuel, No. 2012-MO-031 (S.C. July 25, 2012). The Remittitur was issued on August 10, 2012.

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

1. Ineffective assistance of counsel.
2. "Sentencing court without jurisdiction to impose sentence."
3. "Violation of his due process rights 14th, 6th, and 5th."

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

¹ The Applicant's accessory before the fact to a felony charge was *nolle prossed*.



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 fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he is entitled to post-conviction relief on the basis that he received ineffective assistance of trial counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). To be entitled to post-conviction relief, the applicant must prove both of the following: (1) his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) the applicant suffered prejudice by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). Under this standard, counsel's deficient performance must have prejudiced the Applicant to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

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 v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

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A. Trial counsel's failure to move for a severance of Applicant's case from his co-defendant.

Applicant contends that counsel was ineffective for failing to move for severance in this case. This argument is without merit.

Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d, 529 (1992).

Further, "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." State v. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985) (emphasis added), citing Strickland v. Washington, 104 S.Ct. 2052, 890 L.E.2d 674(1984). Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. Id.

First, trial counsel is not deficient for not requesting a severance in this case because based on the facts of the case and the evidence at trial, it is highly unlikely the trial judge would grant a severance. "Motions for a severance and separate trial are addressed to the discretion of the trial court." State v. Dennis, 337 S.C. 275, 282, 523 S.E.2d 173, 176 (1999). "The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood

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he and a codefendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime." Dennis at 281. Simply because Applicant claimed codefendant was the shooter in this case and he allegedly had no knowledge of codefendant's decision to shoot the victim, the trial judge still had discretion as to whether to grant severance. Second, it was trial counsel's testimony at the PCR hearing that at the time of the trial, he did not perceive the defense of Applicant and the defense of codefendant as antagonistic. Further, it was trial counsel's testimony that he could not find a case in which the trial judge was overturned on appeal because of lack of severance. Lastly, trial counsel testified that his trial strategy was that he did not want a severance because portions of Applicant's statements to law enforcement would not be admissible under Bruton.

Under Butler and Whitehead, counsel's representation of Applicant in this regard was not ineffective based on his particular trial strategy. Thus, this allegation is denied.

B. Trial Counsel properly advised Applicant as to life without parole.

Under Lafler v. Cooper, 132 S.Ct. 1376 (2012), trial counsel has an affirmative duty to relay plea offers from the State to the Applicant/Defendant. Where counsel's advice leads a defendant to reject a plea offer and he receives a harsher sentence, i.e. via trial, a defendant can meet both prongs of the Strickland test. Id.

While Applicant claims that he was not properly advised concerning life without parole based on his prior conviction in Georgia, Counsel clearly testified at the hearing that Applicant was fully aware that he was facing life without parole if convicted. Specifically, Counsel testified the State served Applicant with a life without parole notice on September 1, 2009. This trial did not occur until November 16-20, 2009. Further, it was Counsel's testimony that Applicant was offered 20 years

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and rejected that offer. Applicant provided no testimony that he relied on Counsel's advice in rejecting the plea offer from the State. This is simply a case of buyer's remorse. As such, Counsel fulfilled his duty under Strickland and Lafler. Thus, this allegation is denied.

C. Trial counsel was not ineffective for failing to properly argue and preserve Applicant's ABWIK charge because the trial judge properly charged the jury with "hand of one, hand of all" based on the evidence presented at trial. Thus, trial counsel had no basis on which to object to the charge.

While Applicant contends that Counsel failed to properly argue and preserve the ABWIK charge related to the injury upon victim with respect to the theory of "hand of one hand of all," Applicant must have been charged with ABWIK for the jury to even consider charging him under accomplice liability.

"Under the "hand of one is the hand of all" theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002). "It is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense," State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000).

For Applicant to be convicted under the theory of accomplice liability, South Carolina law is clear that he must have been charged with the principal offense. In this case, Applicant was indicted for ABWIK on Victim. Evidence presented at the trial shows that Applicant was the master mind behind the plan to rob Victim of pills. (Tr. p. 442 lines 9). There was additional evidence presented that Applicant was present at the scene and participated in the crimes with which he was charged.

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(Tr. p. 564 lines 12-17; p. 565 lines 8-19; p. 566 lines 2-11). Further, evidence was presented at the trial that Applicant's codefendant shot victim. (Tr. 568 lines 22-24). Therefore, based on the evidence presented at trial and the indictment charging applicant with the crime of ABWIK as a principal, the trial judge properly charged the jury with an instruction on "hand of one hand of all." As such, Counsel cannot be said to be ineffective when he had no legal ground on which to object. This argument is without merit. Thus, this allegation is denied.

D. Counsel had no reason to object to the jury instruction regarding the elements of burglary first degree, as it was a proper instruction.

Counsel cannot be held ineffective for not objecting to a proper jury charge by the trial judge. When the charge given adequately covers the crime, counsel will not be held ineffective for failing to request an additional or more specific jury charge. Pinckney v. State, 368 S.C. 502, 629 S.E.2d 367 (2006); see also Cartrette v. State, 323 S.C. 15, 448 S.E.2d 553 (1994).

S.C. Code Ann. 16-11-311 states that Burglary, 1st degree occurs when:

(A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:
(1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:

- (a) is armed with a deadly weapon or explosive; or
- (b) causes physical injury to a person who is not a participant in the crime; or
- (c) uses or threatens the use of a dangerous instrument; or

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(d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; ...

The trial judge charged exactly what the law is. (Tr. 908-910). Because this is a correct statement of law, this is a proper jury charge. As such, Counsel cannot be held ineffective under Pinckney. Thus, this allegation is denied.

E. Cumulative Error

Applicant contends that there is cumulative effect of Counsel's errors in this case. First, it is unsettled law in South Carolina whether cumulative error is a viable claim. Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002) ("Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina."). Nevertheless, as Applicant has failed to meet his burden of proving any of his claims, Counsel cannot be said to be ineffective in his representation of Applicant. Further, as there is overwhelming evidence of Applicant's guilt in this case, Applicant can prove no resulting prejudice from any of counsel's alleged errors. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994). Thus, this allegation is denied.

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.

This Court notifies the 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

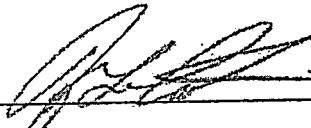
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appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

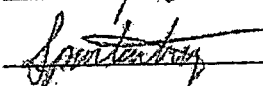
IT IS THEREFORE ORDERED:

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!



Roger L. Couch
Presiding Circuit Court Judge
Fourteenth Judicial Circuit

1/28, 2016
, South Carolina

2013-CP-07-0287

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February 11, 2016

Honorable Roger L. Couch
Circuit Court Judge
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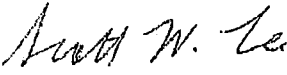
Re: Lucius Simuel #338144 v. State of South Carolina
Case No.: 2013-CP-07-0287

Dear Judge Couch:

Enclosed please find Applicant's Motion to Alter or Amend your Order in the above-referenced case. I received a signed but not yet filed copy of the order in the mail February 9 from the Attorney General's Office. As you know, it is my obligation as PCR counsel to file such a motion, and a procedural prerequisite for the filing of any appeal, pursuant to Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004) and Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992).

Thank you for your kind consideration in this matter. Please feel free to contact me should you have any questions regarding this letter.

Very truly yours,


Scott W. Lee

Encl.

Cc: J. Rutledge Johnson, Esq. (w/ encl.)