LAW OFFICE OF TRICIA A. BLANCHETTE

November 2, 2012
VIA HAND DELIVERY

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

RE: Warren Russell v. State; Docket No.: 2008-CP-40-07960

Dear Sir:

Enclosed for filing is a Notice of Appeal for the above PCR case. Also enclosed are the following:

(1) Proof of service on the Respondent.

(2) A copy of the Order of Dismissal and Order Denying Post-Hearing Motions and Counsel's Motion to be Relieved.

This appeal is being filed with the Supreme Court pursuant to Rule 243 (b), SCACR.

I was appointed to represent Mr. Russell on his PCR Application. Therefore, I am copying the Office of Appellate Defense with the attached documents.

Thank you for your assistance with this matter. Please contact my office with any questions.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Rob Corney, Assistant Attorney General
Office of Appellate Defense
Warren Russell

PO Box 12725 | Columbia SC 29211

p: 803.988.0008 | **f:** 803.988.8070 | **e:** blanchettelaw@gmail.com

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable L. Casey Manning, Circuit Court Judge

Case No.: 2008-CP-40-07960

Warren Russell, Petitioner,

vs.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Warren Russell, Petitioner, through appointed counsel, appeals the Order of Dismissal issued by the Honorable L. Casey Manning on February 1, 2011, which was filed on February 4, 2011. The Petitioner, through appointed counsel, also appeals the Order Denying Post-Hearing Motions and Counsel's Motion to be Relieved issued and filed. The Petitioner, through appointed counsel, received notice of the entry of the Order Denying Post-Hearing Motions via mail on October 17, 2012.

Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008

Other Counsel of Record:

Rob Corney
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
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Case No.: 2008-CP-40-07960

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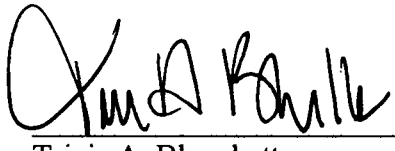
CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, appointed PCR counsel, hereby certify that I hand delivered this 2nd day of November 2012, a copy of a Notice of Appeal to Rob Corney of the Attorney General's Office, at:

Office of the Attorney General
Att: Rob Corney, Ast. AG
1000 Assembly Street, Room 519
Columbia, SC 29201



Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008

November 2, 2012

Form 4

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2008CP4007960

Warren #316802 Russell — *vs.* — State of South Carolina

Plaintiff — Defendant

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☒ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

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

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

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

Dated at Columbia, South Carolina, this _____ day of _____, 2011.

_____
PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2011, and a copy mailed first class this 4 February 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Warren #316802 Russell
Tricia A Blanchette
ATTORNEY(S) FOR THE PLAINTIFF(S)

Brian T Petrano
ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanette W McBride
Clerk of Court

SCRCP APP-24/FORM 4

RICHLAND COUNTY FILED
2011 FEB -4 AM 11:31
JEANETTE W. McBRIDE C.C.P. & G.S.

SCANNED

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
	)	2008CP4007960
	)	
Russell, Warren, 00316802,	)	
	)	
Applicant,	)	
	)	
v.	)	ORDER OF DISMISSAL
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 5, 2008. The Respondent made its Return on or about May 11, 2009. The Applicant was indicted for approximately fourteen (14) charges. He went to trial on February 28, 2008 with the Honorable Deadra L. Jefferson presiding. While the jury was deliberating the applicant pled guilty – in exchange for the plea deal several of the original charges were nol prossed.

The Applicant initially requested that the entire trial transcript be made part of the PCR action. On June 18, 2009, Applicant filed a *Motion for Production of Transcript and Case Documents and/or Motion for Discovery.* The State filed an *Objection to Use of Discovery and Objection to Use of Subpoena in PCR Absent Compliance with S.C. Code Ann. § 17-27-150 (2006)* on or about June 25, 2009. The procedural history as explained in the paperwork and by the parties is that the Honorable James R. Barber III in his capacity as the Chief Administrative Judge for the Court of Common Pleas for the Fifth Judicial Circuit conducted a telephone

conference with counsel for the Applicant (Tricia Blanchette, Esquire represented the Applicant) and the Respondent (Brian T. Petrano on behalf of the Attorney General's Office). An Order dated September 2, 2009 and signed by The Honorable James R. Barber, III concluded that the Applicant was only able to demonstrate that a *portion* of the trial transcript was material to the PCR application, i.e. the jury charge phase leading to the plea itself.[1] Accordingly, the Respondent was ordered to procure that portion only. Additionally, the September 2, 2009 Order rejected the Applicant's request for discovery.[2] Finally, the September 2, 2009 Order noted that the Applicant continued to attempt to file *pro se* documents despite the fact that he was represented by counsel. The Administrative Judge reminded the Applicant (and the parties) that Rule 11, SCRCP prohibits hybrid representation and that the *pro se* filings – unless signed by counsel – are to be "stricken."

An evidentiary hearing into the matter was convened on December 8, 2009 at the Richland County Courthouse before this Court. The Applicant was present at the hearing and was again represented by Tricia Blanchette, Esquire. Brian T. Petrano, Esquire, of the South Carolina Attorney General's Office, continued to represent the Respondent.

At the hearing, the Applicant testified on his own behalf. The Applicant's plea counsel, Mark Schnee, Esquire also testified. This Court had before it the records of the Richland County

[1] The Applicant's request for the entire trial transcript was rejected.
[2] S.C. Code § 17-27-150.

Clerk of Court, the transcript of the proceedings against the Applicant,[3] and the Applicant's records from the South Carolina Department of Corrections.[4]

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant was represented by Mark Schnee, Esquire. On February 28, 2008, the Applicant pled guilty and was sentenced by The Honorable Deadra L. Jefferson to the following:

Grand Jury Term	Indictment Number	Charged Offense: CDR - S.C. Code § *Potential Sentence* Offense Description	Sentence Received	Sentenced to Lesser Offense?
6-07	2007GS4003647*	0768 17-25-0030 * 10 * Assault / Assault with intent to kill (AWIK) (victim: Todd Richards)	nol pros	No
6-07	2007GS4003648*	0549 16-23-0490 * 5 * Weapons / Poss. weapon during violent crime, if not also sentenced to life without parol	nol pros	No
6-07	2007GS4003649*	0052 16-23-0440(A) * 10 * Weapons / Discharging firearms into a dwelling	nol pros	No
6-07	2007GS4004163*	0014 16-03-0620 * 20 * Assault / Assault and battery with Intent to Kill (ABWIK) (victim: Anna McLeod)	15	No
6-07	2007GS4004164*	0095 16-03-0910 * 30 * Kidnapping / Kidnapping (victim: Robert Sharpe)	15	No
6-07	2007GS4004165*	030 16-17-0640 *10* Blackmail / Blackmail or Extortion	10	No
6-07	2007GS4004166*	0014 16-03-0620 * 20 * Assault / Assault and battery with Intent to Kill (ABWIK) (victim: Robert Sharpe)	15	No
6-07	2007GS4004167*	0095 16-03-0910 * 30 * Kidnapping / Kidnapping (victim: Anna McLeod)	15	No
6-07	2007GS4004322*	0014 16-03-0620 * 20 * Assault / Assault and battery with Intent to Kill (ABWIK)	nol pros	No
2-08	2008GS4001682	0095 16-03-0910 * 30 * Kidnapping / Kidnapping	nol pros	No
2-08	2008GS4001681*	0095 16-03-0910 * 30 * Kidnapping / Kidnapping (victim: Phyllis Smalls AKA Country)	15	No
2-08	2008GS4001683*	0014 16-03-0620 * 20 * Assault / Assault and battery with Intent to Kill (ABWIK) (victim: Phyllis Smalls AKA Co	15	No
2-08	2008GS4001684	0014 16-03-0620 * 20 * Assault / Assault and battery with Intent to Kill (ABWIK)	nol pros	No
6-07	2007GS403669*	3015 44-53-0375(B)(2) * 5-30 * Drugs / Manufacture, distribution, etc. cocaine base, 2nd offense S	15	No
NOTES	Jury was deadlocked on the charge(s), while they were out on an Allen charge the Applicant pled guilty. *The nol prossing of some charges was in exchange for the plea deal. PWID was indicted as Russell Warren.		TOTAL 15	POSSIBLE 225

The Applicant did not appeal his guilty plea or sentence.

[3] As explained, the plea transcript and the jury charge portion of the [abandoned] trial transcript are both part of the record.

[4] Following the PCR hearing, the Applicant was again transported and appeared before this Court on October 20, 2010. The Applicant again presented one or more *pro se* motions. This Court informed the parties that it was requesting a proposed Order of Dismissal from the Respondent.

In the PCR Application filed on November 5, 2008 the Applicant claimed the following:

8. If you answered "no" to (6), state your reasons for not so appealing:
   (a) Counsel failed to inform defendant of his right to appeal
   (b) Counsel failed to file motion for appeal
   (c) Counsel failure to do above-mentioned was ineffective.
9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
   (a) U.S. Constitution Violations
   (b) S.C. Constitution Violations
   (c) Prosecutorial Misconduct
10. State concisely and in the same order the facts which support each of the grounds set out in (9):
   (a)
   (b) Please See the Attached documents.
   (c)

18. State clearly the relief you seek in filing this application. Conviction Vacated or set aside

Warren Russell # 316802

P.C.R Case Review

Below is a list of fact which support each of the ground set out in (9).

Issue # 1 Ineffective Assistance of Counsel

A) failure to file 1st and 2nd post trial Remedies.

B) extremely inflammatory and highly prejudicial Comment in closing Argument to the jury.

C) failure to address defendant requested legal issues in pre-trial, causing prejudicial effects in later proceedings and events that prejudice ensuing trial.

D) failure to request the grand jury minutes, when defendant requested counsel to challenge the indictments.

E) Defendant being charged, Indicted, and sentence under wrong offense to increase punishment. (To be Amend)

Issue # 2 Prosecutorial Misconduct

A) Prosecutor was the sole witness before the grand jury, Prosecutorial abuse before the grand jury by generating indictment with a true bill with no last name of victim

B) Prosecutor deliberately charged, indicted, and sentence defendant under the wrong offense to deliberately and vindictively increase the punishment. (To be Amend)

Enclosed is a report detailing each issue to be addressed.

The PCR application continued with an additional ten (10) pages expanding on the above listed allegations.

On November 19, 2009 the Applicant (through his appointed counsel) filed an amendment to the original application for PCR.

The Applicant, by and through his appointed attorney Tricia A. Blanchette, would respectfully amend and clarify his Application for Post Conviction Relief filed November 5, 2008, by making the following specific allegations:

1. Ineffective Assistance of Counsel and Involuntary Guilty Plea, specifically but not limited to the following grounds:

    a. Failure to meet with the Applicant and properly prepare for trial and/or plea.

    b. Failure to conduct an independent investigation or speak with any of the parties involved, including but not limited to investigating the "tipster."

    c. Failure to attend the preliminary hearing requested by the Applicant and/or waive the hearing without the Applicant's knowledge.

    d. Failure to pursue a meaningful adversarial process on behalf of the Applicant.

        i. Failure to address probable cause issues raised by the Applicant.
        ii. Allowed the State to delay the trial date.
        iii. The Applicant had to file pro-se motions to address the issues that arose in the case.

    e. Failure to address indictment process and irregularities raised by the Applicant.

        i. Failure to look into the dates the grand jury convened as requested by the Applicant.
        ii. Failure to obtain the grand jury minutes as requested by the Applicant.
        iii. Failure to address the amendment and dismissal of Indictment No.: 2008-GS-40-1682.

iv. Failure to object to the lack of notice, the Applicant received five new indictments two days before trial.

f. Failure to notify the Applicant about the trial date and/or request a continuance due to lack of notice.

g. Failure to put the trial court on notice of the motions and hearing to relieve counsel.

h. Failure to properly address the successive Allen charges give to the jury and advocate properly for the Applicant when the jury was deadlocked.

i. Failure to object when the trial court initiated the plea discussion.

i. Failure to raise and/or address the Applicant's concerns regarding double jeopardy in relation to the verdict reached by the jury.

j. Failure to properly advise the Applicant regarding the plea agreement and verdict reached by the jury.

i. It was the Applicant's understanding that the jury's verdict would stand, and he would not be entering a plea to Indictment No.: 2007-GS-40-3669.
ii. Failure to properly advise the Applicant that his non-violent sentence would be superseded by his violent sentence for time computation purposes.

2. Prosecutorial misconduct in conjunction with the procurement and amendment of the indictments.

3. The Applicant requested and counsel did not file a direct appeal. The Applicant is requesting a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

At the evidentiary hearing, Applicant proceeded, for the most part, on the allegations stated in the amended application for post-conviction relief.

Pro Se Filings

This Court notes that the Applicant has continued to present *pro se* filings. The filings are routinely forwarded by his appointed counsel but not signed/adopted by her. Appointed counsel is at best a mere the conduit for the Applicant's *pro se* filings. There is no constitutional right to hybrid representation either at trial or on appeal. *Foster v. State*, 298 S.C. 306, 379 S.E.2d 907 (1989).

> While counsel may choose to submit arguments urged by his client, counsel has an obligation to review those arguments for possible relevance and merit before submitting them. In other words, counsel cannot serve as a mere conduit for *pro se* documents in an effort to avoid the prohibition against hybrid representation and the displeasure of his client.
> Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002).

Apart from any overlapping issues that were otherwise presented at the hearing, this Court cannot consider any allegations made solely in Applicant's *pro se* filings/claims. Rule 11, SCRCP, requires every pleading, motion, or other paper of a party represented by counsel to be signed by at least one attorney of record who is an active member of the South Carolina Bar. If a pleading, motion, or other paper is not signed, "it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." Rule 11, SCRCP. South Carolina does not recognize any right to hybrid representation at trial or on appeal. See, e.g.,

Jones v. State, 348 S.C. 13, 558 S.E.2d 517 (2002); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989).[5]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

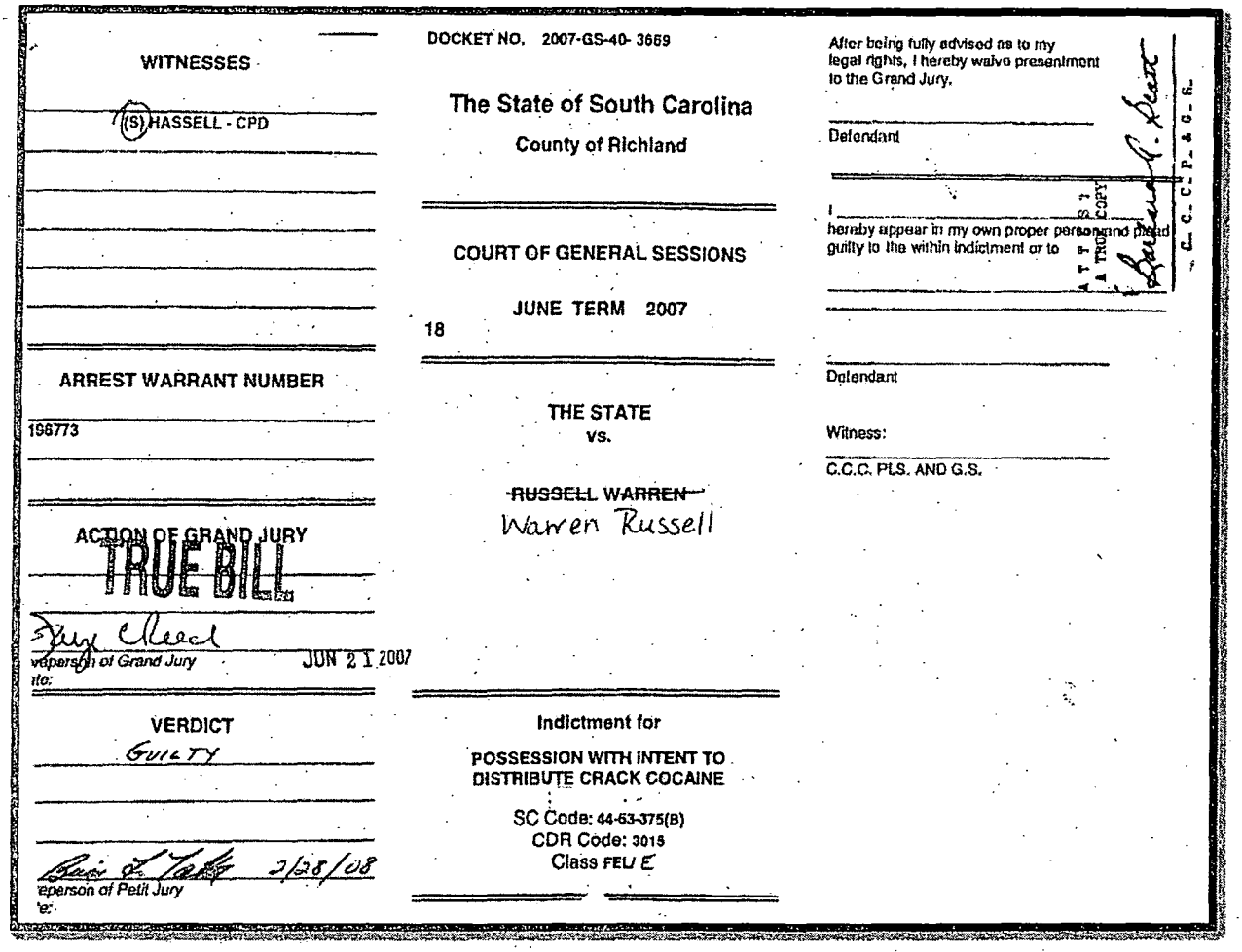
This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly.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

The Applicant introduced several exhibits (sixteen (16) of them), consisting of letters/pleadings from him and court documents. At the PCR hearing the Applicant explained that his "trial" attorney was ineffective that is why he felt forced to plea guilty. The Applicant testified that he understood the risks in going forward with the PCR, i.e. potential loss of any plea deal. The Applicant testified that he had no claims against co-counsel (Kristy Grafton). The Applicant explained that he met with counsel at the county detention center and that they had at least three (3) face to face meetings. The Applicant explained that he and counsel did review the discovery materials. The Applicant noted that although they reviewed the discovery materials they never formally discussed a defense. The Applicant testified and submitted documents to support his claim that counsel failed to adequately communicate with him. The Applicant

[5] This Court is fully aware of our Court's recent ruling that "Rule 11 of the South Carolina Rules of Civil Procedure does not apply to PCR proceedings." Hiott v. State, 381 S.C. 622, 674 S.E.2d 491 (2009). However, this Court interprets the Hiott decision to be narrowly tailored to the issue(s) presented in Hiott [sanctions] and not to negate any and all applicability of Rule 11(a) for PCR proceedings. This Court, respectfully, does not interpret Hiott to implicitly abrogate Jones v. State, 348 S.C. 13, 558 S.E.2d 517, (2002), or Foster v. State, 298 S.C. 306, 379 S.E.2d 907, (1989).

complained that counsel's performance was deficient regarding his pretrial issues such as: preliminary hearing, addressing the tipster issue, moving to suppress because of a lack of probable cause, etc. The Applicant explained that he though it was in his best interest to defend himself but that he could not get a ruling on his habeas attempts and that he was told no judge would rule on his speedy trial claim. The Applicant also explained that he was concerned about with the dates that the grand jury supposedly convened. The Applicant explained that just before trial he received several new/additional indictments. The Applicant explained that he did not have sufficient notice of the new charges prior to trial, that he wanted counsel to renew the Brady motion because there were insufficient statements to support the new charges. Additionally, the Applicant testified that he tried to have counsel relieved and was potentially prepared to argue that he could/should go *pro se*.

The Applicant explained that the jury was able to reach a verdict on indictment 2007GS403669 (See image below):



WITNESSES

(S) HASSELL - CPD

ARREST WARRANT NUMBER

196773

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

JUN 21 2007

Date:

VERDICT

GUILTY

Foreperson of Petit Jury

2/28/08

Date:

DOCKET NO. 2007-GS-40- 3669

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

JUNE TERM 2007

18

THE STATE

vs.

~~RUSSELL WARREN~~

Warren Russell

Indictment for

POSSESSION WITH INTENT TO DISTRIBUTE CRACK COCAINE

SC Code: 44-53-375(B)

CDR Code: 3015

Class FELONY E

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

A TRUE COPY

C. C. C. P. & G. S.

The Applicant explained that the court improperly gave two (2) Allen charges and that counsel did not properly object and preserve the issue for appeal.[6] The Applicant claims that it was his understanding that he was pleading guilty only to the deadlocked charges but that the jury verdict was the source of the conviction for the other charge(s).[7] The Applicant claimed that the foreman signed the jury verdict form finding him guilty of 2007GS403669. The Applicant claimed that no one interviewed the alleged victim so therefore the grand jury proceeding was improper, i.e.

[6] Allen v. United States, 164 U.S. 492 (1896) (defining charge used to encourage a deadlocked jury to reach a verdict).

[7] This is the basis for the Applicant's double jeopardy claim.

prosecutorial misconduct. The Applicant claims that he did request a direct appeal and that he did not file any *pro se* documents regarding an appeal.

Counsel testified that he met with Applicant several times, where he discussed the discovery in the case and the possible defenses for Applicant. Counsel explained that he and the Applicant went through the discovery in depth through various meetings. Counsel testified that he reviewed the possible defenses relating to the "tipster" and determined that no real issue existed with respect to the tipster, and therefore he chose not to pursue any defense involving him. Counsel explained that the defense strategy they developed would be to attack the credibility of the alleged victims/witnesses. Counsel explained that the Applicant was indicted of his offense(s) prior to the scheduled preliminary hearing, which is why the preliminary hearing was cancelled. Counsel explained that they discussed the probable cause supporting the stop, counsel explained that there was a rational basis considering the facts to support the stop. Counsel testified that the Applicant sent a motion for a speedy trial but that he (counsel) did not agree and did not join the motion. Counsel explained that the "track" this trial was set on had not ended so there was no undue delay. Counsel explained that he did receive the Applicant's request for the county grand jury documents; counsel explained that he told the Applicant that there were no records like the ones sometimes available for State Grand Jury. Counsel explained that they discussed the amendment of the indictment, that the Solicitor explained that the reversed name was from one of the other victims. Counsel testified that he told the Applicant that the investigation/information suggested that one or more of the victims would not be located/produced for the trial. Counsel testified that he had plenty of notice for the trial. Counsel explained that the Applicant was transported several days prior to the trial to be served with

new/amended indictment(s), review discovery, and for the motion to relieve counsel. Counsel explained that he did file the motion for new counsel/motion to go *pro se* because that is what the Applicant was suggesting. However, counsel explained there were no conflicts it was just that the Applicant was a difficult client because he was intelligent yet did not understand the system. Counsel explained that at the end of the trial the jury came back and indicated they had some questions, that they had reached a verdict on one charge but not on the others. Counsel explained that the jury was out for about nine (9) hours. Counsel explained that he did not like what he perceived to be a 2nd Allen charge. Counsel explained that he made an objection to preserve the 2nd Allen charge issue for appeal. Counsel explained that after the 2nd Allen charge the Judge called the parties up to the bench and asked the Solicitor to make an offer. Counsel explained that they never knew which one of the charges the jury had reached a verdict on because the jury never made it clear. Additionally, counsel explained that although shown indictment 2007GS403669 (see p. 11 infra), there had to be a jury verdict form because there was a lesser-included offense.[8] Nevertheless, counsel testified that the Applicant was fully aware that he was pleading guilty to ALL of the offenses, there was not a situation where there was a jury verdict for one offense and he pled to the remaining ones. Counsel testified that this was not a conditional plea, that there was no prosecitorial misconduct, that the Applicant did not ask him to appeal the plea, and that prior to the trial he (counsel) renewed their Rule 5/Brady request.

Beyond his review of the undisputed procedural history, this Court finds Applicant's testimony is not credible. Plea counsel's testimony is credible. Accordingly, this Court finds

[8] The jury never formally issued a verdict on any of the charges. (Guilty plea transcript, p. 3 L. 2 – 4).

Applicant has failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

The fact is the Applicant pled guilty. If the trial contained errors, the appropriate method of review was a direct appeal or perhaps a PCR following conviction – that is assuming the Applicant would have been convicted of all the charges at trial. Nevertheless, counsel testified credibly regarding the supposed claims of ineffective assistance of counsel (during the trial). For example, counsel explained that the preliminary hearing was cancelled because the Applicant had been indicted. Every criminal defendant is entitled to notice of his right to a preliminary hearing "to determine whether sufficient evidence exists to warrant [his] detention and trial." Rule 2(a), SCRCrimP. If a defendant makes a timely request for a hearing, one should be held within ten days. Rule 2(a)-(b), SCRCrimP. However, the hearing "shall not be held ... if the defendant is indicted by a grand jury ... before the preliminary hearing is held." Rule 2(b), SCRCrimP; see also State v. Hawkins, 310 S.C. 50, 54-55, 425 S.E.2d 50, 53 (Ct.App.1992) (holding trial court did not err in refusing to quash defendant's indictments because he did not receive a requested preliminary hearing because he was indicted before a preliminary hearing was held). Furthermore, a defendant has no constitutional right to a preliminary hearing. State v. Keenan, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982). Therefore, although the Applicant may have timely requested a preliminary hearing, his right to have the hearing ended with the grand jury's indictment.

In regards to the allegation that counsel failed to pursue meaningful adversarial process on behalf of Applicant, counsel testified that he reviewed the probable cause issue raised by Applicant and discussed his review with the Applicant. Counsel further testified that he explained the rational basis standard to the Applicant. Counsel explained that he did not join in the *pro se* motions submitted by Applicant because there was no undue delay and no basis for the motions submitted. Accordingly, this Court finds that the allegation that counsel was ineffective for failing to pursue meaningful adversarial conduct on behalf of Applicant is without merit and is hereby denied.

In regards to Applicant's claim that counsel failed to address the irregularities of the indictment process raised by Applicant, counsel testified that he explained to Applicant that county Grand Juries do not keep a transcript and record proceedings in the way the State Grand Jury does. Counsel further testified that he discussed the amended indictments with the Solicitor's Office, that the amendments were merely to correct the victim's name, and that the indictments did not serve to surprise counsel, which would require that he request a continuance. See S.C. Code Ann. § 17-19-100 (2009). Accordingly, this Court finds that the allegation that counsel was ineffective for failing to address the irregularities of the indictment process raised by Applicant is without merit and is hereby denied.

In regards to Applicant's claim that counsel failed to inform defendant of his trial date or request a continuance due to lack of notice, counsel testified that he and the Applicant were both given plenty of notice before trial. Counsel and Applicant both testified that Applicant was transported to the Courthouse several times in the weeks preceding Applicant's trial. Counsel testified that Applicant was transported to the Courthouse so that he could be served with his

new indictments, review his discovery once again with counsel, and hold a hearing on Applicant's motion to relieve counsel. Accordingly, this Court finds that the allegation that counsel was ineffective for failing to inform Applicant of his trial date or request a continuance for lack of notice is without merit and is hereby denied.

The record also reflects that counsel objected to the second Allen Charge given by Judge Jefferson. (Partial trial transcript, p. 42). Counsel further testified at the hearing that he had objected to the second Allen Charge. Accordingly, Applicant's allegation that counsel was ineffective for failing to object to the second Allen Charge is without merit and is hereby denied.

Applicant also alleges that counsel was ineffective for failure to address Applicant's double jeopardy claim. "Generally, jeopardy attaches when the jury is sworn and impaneled, unless the defendant consents to the jury's discharge before it reaches a verdict." State v. Mathis, 359 S.C. 450, 458, 579 S.E.2d 872, 876 (Ct. App. 2004). In Applicant's case, jeopardy never attached because Applicant consented to the jury's discharge before reaching a verdict by entering a plea of guilty. Accordingly, this Court finds that the allegation that counsel was ineffective for failing to address Applicant's double jeopardy claim is without merit and is hereby denied.

In regards to Applicant's claim that counsel was ineffective for failing to adequately explain Applicant's plea, counsel testified that he told the Applicant he would have to serve 85% of whatever sentence he was given because of the violent nature of the crimes. Counsel further testified, and the record reflects, that the Applicant understood he was entering a plea of guilty to all charges currently at trial in order to have all pending charges *nol prossed.* Counsel also testified that the possibility that the plea was conditional was never discussed, and that he and

Applicant did not know which indictment the jury had agreed on, so no special conditions were discussed or placed on the plea to indictment 2007-GS-40-3669.

The Applicant alleged prosecutorial misconduct in the procurement and amendment of the new indictments. Counsel testified that he conferred with the Solicitor regarding the new and amended indictments. Counsel further testified that all the new and amended indictments stemmed from the same charges and that no new facts were involved. Applicant claims that no one spoke to the victim so the grand jury could not properly indict him. "Absent evidence to the contrary, however, the regularity and legality of proceedings before a grand jury is presumed." State v. James, 321 S.C. 75, 79, 472 S.E.2d 38, 40 (Ct. App. 1996), citing Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995). This Court finds that Applicant's mere assertion that irregularities existed rendering the Grand Jury proceedings in his case constitutionally impermissible is insufficient to support this allegation. Accordingly, this Court finds this allegation is without merit and is hereby denied.

This Court recognizes that this Order seems to address some of the Applicant's claims of ineffective assistance of trial counsel. By doing so, this Court is not finding that a claim of ineffective assistance of trial counsel is proper when the Applicant abandons said trial and decides to plead guilty. The findings of this Court related to claims of ineffective assistance of trial counsel are in this Order only in the event that a reviewing Court determines that claims of ineffective assistance of trial counsel are not abandoned when an Applicant instead pleads guilty.

For the defendant who considers his trial court - or his trial counsel - deficient during trial, tendering a plea of guilty would seem a most improbable alternative. The sensible course would be to continue to contest his guilt, in the event he is convicted he can attempt to prevail on

his claims on appeal, or, if necessary, in a collateral proceeding, and win acquittal, however guilty he might be. This Applicant does not stand convicted due to supposed errors by the trial court or supposed errors by trial counsel during trial; rather, he stands convicted on his counseled admission in open court that he committed the crimes charged against him.

But for the claim for a belated appeal and the claim that he did not understand he was also pleading guilty to 2007GS403669 there are virtually no PCR allegations related to the plea itself. The record of Applicant's plea reflects that he indicated that he was fully satisfied with the services of his attorneys. (Guilty plea transcript, p. 15 L. 11 – p. 16 L. 3).[9] The record is clear, the Applicant pled guilty to 2007GS403669 (plea transcript, p. 8):

[9] The Applicant also apologized. (Guilty plea transcript, p. 23 L. 24 – p. 24 L. 8). *See* State v. Sroka, 267 S.C. 664, 665, 230 S.E.2d 816, 817 (1976) (holding appellant's guilt was conclusively shown by the record and any doubt about correctness of guilt was eliminated by the admission of appellant in open court, after conviction and during the pre-sentence inquiry by the trial judge, that the appellant had participated in the robbery)

THE COURT: Sir, are you pleading guilty to each of these offenses because you are guilty?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And I got a little ahead of myself, and I apologize.

On Indictment 2007-GS-40-3669, which is possession with the intent to distribute crack cocaine second, sir, how do you plead, guilty or not guilty?

THE DEFENDANT: Guilty, Your Honor.

THE COURT: Do you understand that that carries a minimum penalty of five years, a maximum of 30 years, and/or a maximum fine of $50,000?

THE DEFENDANT: Yes, Your Honor.

The Applicant's testimony at the PCR hearing to the contrary was not credible and expressly rebuked by the record.

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967). Id. However, the standard for a guilty plea differs. Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a

guilty plea. Roe v. Flores-Ortega, 528 U.S. 470 (2000); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995). This Court finds that Applicant's claim that he requested that counsel file a Notice of Appeal is not credible. This Court specifically finds that counsel's testimony that Applicant never requested that he file for an appeal was credible. This Court further finds that in this case no extraordinary circumstances existed that would cause a defendant to wish to appeal his guilty plea. Accordingly, this Court finds that Applicant failed to satisfy his burden to prove he is entitled to a belated direct appeal and the allegations is hereby denied.

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there

is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).

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

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. Counsel was not deficient in any manner, nor was Applicant prejudiced by counsel's representation. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. As to any and all allegations that were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court cautions 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 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 intent to appeal has been timely filed.

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.

3. No *pro se* post-hearing motions will be entertained by this Court unless fully adopted by appointed counsel.

AND IT IS SO ORDERED this 1 day of Feb., 2010.

The Honorable L. Casey Manning
Presiding Judge
Fifth Judicial Circuit

_____, South Carolina.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Warren Russell, #316802, Applicant, v. State of South Carolina, Respondent.	)	**2008-CP-40-07960** **ORDER DENYING POST-HEARING MOTIONS AND COUNSEL'S MOTION TO BE RELIEVED**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 5, 2008. An evidentiary hearing into the matter was convened on December 8, 2009, at the Richland County Courthouse before this Court. The Applicant was present at the hearing with appointed counsel, Tricia A. Blanchette, Esquire. The Respondent was represented by Brian T. Petrano of the South Carolina Attorney General's Office. By way of order filed February 4, 2011, this Court denied and dismissed the application with prejudice.

Applicant filed a Motion for Rehearing and Motion to Alter/Amend the Order of Dismissal under Rules 59(a) and 59(e), SCRCP, for which a hearing was convened on July 26, 2011. The matter was taken under advisement at that time. Applicant has since submitted several documents/pleadings which have been reviewed by this Court in their entirety prior to the issuance of this order. Additionally, on September 11, 2012, counsel for Applicant filed a motion requesting to be relieved from her representation of Applicant.

Based on this Court's careful reconsideration of the entirety of the record in the matter, along with full consideration of Applicant's motions and numerous other documents/pleadings filed, this Court is not persuaded to reconsider, alter or amend the judgment previously entered.

Further, the previous order fully comports with the requirements of Rule 52(a), SCRCP, and S.C. Code § 17-27-80. Therefore, Applicant's Rule 59(a) and (e), SCRCP, motions are hereby denied.

This Court would note Applicant additionally filed several other items/documents/pleadings with the Richland County Clerk which were heard at the July 26, 2011, hearing, or otherwise reviewed and considered in their entirety by this Court in conjunction with the current motions, and finds each to be wholly without merit and entirely unsuccessful in persuading this Court to alter the ruling set forth in the February 4, 2011, order of dismissal.[1]

Finally, this Court hereby denies counsel's request to be relieved from her representation as "it is appointed counsel's duty in PCR matters to serve and file the notice of appeal", should Applicant wish to do so. See Dennison v. State, 371 S.C. 221, 223, 639 S.E.2d 35, 35 (2006). Therefore, counsel's duties will be satisfied and her representation complete upon filing of the notice of appeal, should Applicant desire to do so.

[1] The pleadings which were considered include, but are not limited to, the following items received by this Court and/or filed by the Richland County Clerk of Court: "Motion for Summary Judgment" filed August 3, 2010; "Motion for Default" filed August 27, 2010; "Judicial Notice of Adjudicative Facts" filed November 5, 2010; "Affidavit/Default" filed November 5, 2010; "Letter of Evidence" dated April 21, 20111 "Judicial Notice of Adjudicative Facts" filed November 18, 2011; "Motion to Compel a Judgment" dated May 2, 2012; "Affidavit of Statement of Facts" filed May 2, 2012; "Affidavit and Statement of Facts" dated June 25, 2012.

IT IS THEREFORE ORDERED:

1. That Applicant's post-hearing motions, including the Rule 59(a), SCRCP, Motion for Rehearing and Rule 59(e), SCRCP, Motion to Alter/Amend Judgment, are hereby **DENIED**; and

2. PCR counsel's Motion to be Relieved is **DENIED**.

AND IT IS SO ORDERED this 10 day of Oct., 2012.

L. Casey Manning
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina.