

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Bamberg County

Honorable Tanya A. Gee, Circuit Court Judge

EDWARD TYLER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000634

APPENDIX

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JULIE COLEMAN
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

RECEIVED

NOV 17 2016

S.C. SUPREME COURT

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2013-CP-05-30

STATE OF SOUTH CAROLINA)
)
 County of Bamberg)
 Edward Tyler #318077)
 Full name and prison number, if any, of applicant.)
)
 v.)
)
State of South Carolina)
 Name of Respondent)
)

In the Court of Common Pleas

FILED
 BAMBURG COUNTY
 2013 FEB 25 AM 10:16
 JAMES B. HIERS
 CLERK OF COURT
 BAMBURG, SC

APPLICATION FOR
 POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention Lee Correctional Institution
990 Wisacky Highway: Bishopville, SC 29010
2. Name and location of Court which imposed sentence _____
Bamberg County Court of General Sessions
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 (a) Murder (Indictment number not known)
 (b) _____
 (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 (a) June 4, 2008 (40 years mandatory)
 (b) _____
 (c) _____

RECEIVED

MAR 04 2013

Referred to Harrigan dm

- 5. Check whether a finding of guilty was made
 - (a) after a plea of guilty Yes
 - (b) after a plea of not guilty _____
 - (c) after a plea of nolo contendere _____

6. Did you appeal from the judgment of conviction or the imposition of sentence? _____
 No _____

- 7. If you answered "yes" to (6), list
 - (a) the name of each Court to which you appealed:
 - i. n/a
 - ii. n/a
 - iii. n/a

- (b) the result in each such Court to which you appealed:
 - i. n/a
 - ii. n/a
 - iii. n/a

- (c) the date of each such result:
 - i. n/a
 - ii. n/a
 - iii. n/a

- (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. n/a
 - ii. n/a
 - iii. n/a

- 8. If you answered "no" to (6), state your reasons for not so appealing:
 - (a) See attached page for answer
 - (b) See attached page for answer
 - (c) _____

- 9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
 - (a) Ineffective assistance of Counsel
 - (b) The guilty plea was not voluntarily, knowingly, or intelligently made
 - (c) _____

Continued from Question 9:

9. If you answered "no", state your reasons for not so appealing:

- (A) Trial attorney misled Applicant into believing a guilty plea could (not) be appealed nor could he use other collateral proceedings such as Post-Conviction to challenge conviction.
- (B) Also Applicant's failure to discover that attorney's erroneous advice about not being allowed to appeal or challenge conviction under PCR proceedings and or to initiate proceedings on his own, and in a timely manner was a result of illiteracy and mental illness, which the South Carolina Supreme Court has recognized as acceptable (cause) for failure to timely file appeals and or PCR Applications.

See: Ferguson v State (SC 2009) 382 SC 615; 677 SE2d 600.

Therefore, Applicant should, at a minimum, be appointed counsel and granted a hearing, giving him an opportunity to prove that his mental condition is what prevented him from timely filing, etc. And upon a finding of such, Applicant with appointed attorney should be allowed to amend PCR application and granted a hearing on the grounds listed and amended under Question (10) on PCR application.

Continued from Question 11:

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(A) Ineffective Assistance of Trial Counsel

- (1) Trial counsel's refusal and failure to investigate victim's past violent history in which would have revealed that the victim was violent and had initiated violent episodes with her own father and attacked him and police had to be called, therefore, there is police record of the incident. Victim had also fought with girlfriend of her daughter's father during and while in another relationship. Victim had also fought violently with her sister and brother on several occasions, and victim was the aggressor in all of the episodes. These are only a few of the documented and instances of victim's aggressive and violent episodes. There is also documentation of the victim being arrested for domestic violence. The attorney could have subpoenaed all these witnesses and documents and interviewed all these witnesses but failed and refused to.
 - (2) Attorney failed to inform me of the existence of what is known as battered spousal abuse defense, in which had I known about with all the other above listed facts, I would not have pled guilty, but exercised my Constitutional right and proceeded to trial by jury. Had my counsel interviewed the victims of my wife's violent past and obtained documents supporting her assaultive behavior, it would have shown my wife (the victim) could very well attacked me first as I told police, which at a minimum, reduce the charges of murder to manslaughter and involuntary manslaughter.
 - (3) Attorney failed to inform me if I chose to go to trial I could possibly be found guilty of lesser included offense if we could have shown victim's violent assaultive behavioral past.
 - (4) Applicant leaves and reserves his right under 71(1)(d) of PCR procedures to amend these issues upon appointment of counsel.
- (B) The guilty plea was not voluntarily, knowingly, nor intelligently made.
- (1) The Applicant was never informed of any defense, and was told there were no defenses to the charge, and I had no choice but to plead guilty, when in fact, there were possible defenses, such as battered spousal abuse syndrome and other defenses that could have reduced the charges to manslaughter, involuntary manslaughter, etc. Keeping in mind (the victim) herself weighed 300 pounds and had a documented assaultive behavioral past.
 - (2) The Applicant leaves this application open for amendment upon appointment of PCR counsel and will amend other grounds.

(ii) State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) See attachment (two) for answer
See attachment (two) for answer

(b) _____

(c) _____

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law ?

No

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

No

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) No

(d) any other petitions, motions or applications in this or any other Court?

No

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. n/a

ii. n/a

iii. n/a

iv. n/a

(b) the name and location of the Court in which each was filed:

i. n/a

ii. n/a

iii. n/a

iv. n/a

(c) the disposition thereof:

i. n/a

ii. n/a

iii. n/a

iv. n/a

(d) the date of each such disposition:

- i. n/a
- ii. n/a
- iii. n/a
- iv. n/a

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. n/a
- ii. n/a
- iii. n/a
- iv. n/a

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. n/a
- ii. n/a
- iii. n/a

(b) the proceedings in which each ground was raised:

- i. n/a
- ii. n/a
- iii. n/a

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) Unable and unaware I could challenge or present it.
- (b) Unable by reason of mental defect and was unaware I could.
- (c) _____

16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? Yes; plea of guilty
- (b) your trial, if any? _____
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____

(e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? No

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

i. Richard Ness; PO Box 909; Barber, SC 29003

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Guilty plea and sentencing

ii. _____

iii. _____

18. State clearly the relief you seek in filing this application.

New Trial

19. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)
)
COUNTY OF _____)

VERIFICATION

I, _____, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

x Edward Tyle

Sworn to and subscribed before me

This 22 day of Feb, 2013

Delma Jones L.S.

Notary Public for South Carolina

My Commission Expires 11-4-2015

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty or perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

x Edward Tyle
Applicant

Sworn to and subscribed before me

This 22 day of Feb, 2013

Delma Jones L.S.

Notary Public for South Carolina

My Commission Expires: 11-4-2015

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 COUNTY OF BAMBERG) FOR THE SECOND JUDICIAL CIRCUIT

Edward Tyler, #318077,) 2013-CP-05-30
)

Applicant,)

v.)

RETURN AND MOTION TO DISMISS

State of South Carolina,)

Respondent.)
 _____)

The Respondent, making its Return to the application for post-conviction relief filed February 25, 2013, would respectfully shoe this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Bamberg County Clerk of Court. The Applicant was true billed indicted at the January 2007 term of the Bamberg County Grand Jury for Criminal Domestic Violence (2007-GS-05-041), Murder (2007-GS-05-042) and Possession Weapon During a Violent Crime (2007-GS-05-043). Kent Kirkland, Esquire represented Applicant. On June 4, 2008, the Applicant pled guilty before the Honorable Doyet A. Early, III, to Murder.¹ Judge Early sentenced Applicant to forty years imprisonment for Murder. The Applicant did not appeal his guilty plea or sentence.

Attached herewith and incorporated herein are the records of the Bamberg County Clerk of Court regarding the subject convictions and the Applicant's records from the South Carolina Department of Corrections. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

¹ Applicant's indictments for Criminal Domestic Violence (2007-GS-05-041) and Possession Weapon During a Violent Crime (2007-GS-05-043) were Nol Prossed pursuant to a plea agreement.

II.

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

1. Ineffective assistance of counsel.
 - a. "Trial counsel's refusal to investigate victims past violent history in which would have revealed that the victim was violent and had initiated violent episodes with her own father and attacked him and police had to be called, therefore, there is police record of the incident..."
 - b. "Attorney failed to inform me of the existence of what is known as battered spousal abuse defense, in which had I known about with all the other above listed facts, I would not have pled guilty..."
2. Involuntary guilty plea.
 - a. "Attorney failed to inform me if I chose to go to trial I could possibly be found guilty of lesser included offense if we could have shown victim's violent assaultive behavioral past."

For the purpose of this Return, the Respondent incorporates the Clarendon County Clerk of Court records and the South Carolina Department of Corrections' records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

The Respondent submits that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996).

The Applicant was convicted of the offense(s) he challenges in this Application on June 4, 2008. The Applicant was therefore required to file his application on or before June 5, 2009. This Application was filed on February 25, 2013, after the expiration of the statutory filing period.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Therefore, the Respondent requests that this Court summarily dismiss the application for post-conviction relief for failure to file within the time mandated by the Post Conviction Procedure Act.

IV.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

[signature block on following page]

V.

WHEREFORE, having made its Return, Respondent moves to summarily dismiss the application because it was filed after the statute of limitations had expired.


Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPECNER
Assistant Deputy Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for the Respondents

Columbia, South Carolina
June 18, 2013.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BAMBERG)
)
 EDWARD TYLER, #318077,)
)
 Applicant,)
))
 vs)
))
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS

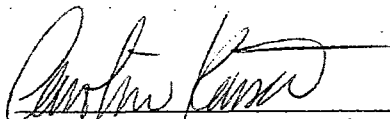
2013-CP-05-0030

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Edward Tyler, #318077
 Lee Correctional Institution
 990 Wisacky Highway
 Bishopville, SC 29010

DATED this 18th day of June, 2013.



 Caroline Kaiser, Legal Assistant
 For Respondent

COUNTY OF BAMBERG

Edward Tyler, #318077
 Plaintiff

v.

State Of South Carolina
 Defendant.

FILED
BAMBERG COUNTY

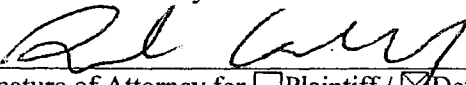
IN THE COURT OF COMMON PLEAS

2013 JUN 28 AM 10:04

CASE NO.
2013-CP-05-0030

JAMES B. NIEERS
CLERK OF COURT
BAMBERG, SC

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Edward Tyler, #318077, Bar No. Address: Lee Correctional Institution Bishopville, SC 29010 phone: fax: e-mail: other:	Defendant's Attorney: Daniel Gourley, Bar No. Address: P.O. Box 11549 Columbia, SC 29211 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input checked="" type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: Estimated Time Needed: Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	June 18, 2013 Date submitted
SECTION III: Motion Fee	
<input type="checkbox"/> PAID - AMOUNT: <input checked="" type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <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, SCRPC) <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	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	JUDGE: _____ CODE: _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ <input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	Date Filed: _____

STATE OF SOUTH CAROLINA)
 COUNTY OF BAMBERG) IN THE COURT OF COMMON PLEAS
 FOR THE SECOND JUDICIAL CIRCUIT

Edward Tyler, #318077,) 2013-CP-05-30
)

Applicant,)

v.)

CONDITIONAL ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

This matter comes before this Court by way of an application for post-conviction relief filed February 25, 2013. In its Return, Respondent requests that the action be summarily dismissed.

PROCEDURAL HISTORY

Before this Court are the records of the Bamberg County Clerk of Court regarding the subject convictions and Applicant's records from the South Carolina Department of Corrections. The records before this Court reflect that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Bamberg County Clerk of Court. The Applicant was true billed indicted at the January 2007 term of the Bamberg County Grand Jury for Criminal Domestic Violence (2007-GS-05-041), Murder (2007-GS-05-042) and Possession Weapon During a Violent Crime (2007-GS-05-043). Kent Kirkland, Esquire represented Applicant. On June 4, 2008, Applicant pled guilty before the Honorable Doyet A. Early, III, to Murder.¹ Judge Early sentenced Applicant to forty years imprisonment for Murder. The Applicant did not appeal his guilty plea or sentence.

¹ Applicant's indictments for Criminal Domestic Violence (2007-GS-05-041) and Possession Weapon During a Violent Crime (2007-GS-05-043) were Nol Prossed pursuant to a plea agreement.

DAEH

In his current application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. "Trial counsel's refusal to investigate victims past violent history in which would have revealed that the victim was violent and had initiated violent episodes with her own father and attacked him and police had to be called, therefore, there is police record of the incident..."
 - b. "Attorney failed to inform me of the existence of what is known as battered spousal abuse defense, in which had I known about with all the other above listed facts, I would not have pled guilty..."
2. Involuntary guilty plea.
 - a. "Attorney failed to inform me if I chose to go to trial I could possibly be found guilty of lesser included offense if we could have shown victim's violent assaultive behavioral past

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that this Application for Post-Conviction Relief should also be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160, S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant pled guilty to the offense he challenges in this Application on June 4, 2008. This application was filed on February 25, 2013, well beyond the one year statutory filing period had expired.

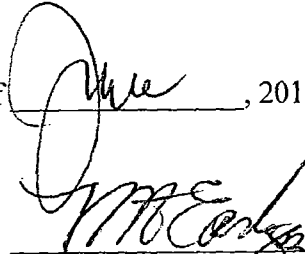
DAEH#2

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent requests that this Court summarily dismiss the application for post-conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have, factual or legal, with the Williamsburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
 Attn: David Spencer, Esquire
 P.O. Box 11549
 Columbia, South Carolina 29211

AND IT IS SO ORDERED this 24th day of June, 2013.


 DOYET A. EARLY, III
 Chief Judge for Administrative Purposes
 Second Judicial Circuit

Bamberg, South Carolina.

STATE OF: SOUTH CAROLINA)	
)	
COUNTY OF: BAMBERG	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
)	
Edward Tyler, #318077	)	Case No.: 2013-CP-05-0030
Applicant,)	
)	
v.	)	'CERTIFICATE OF MAIL SERVICE'
)	
)	
State of South Carolina)	
Respondent.)	
)	
)	

Personally appeared before me, Edward TYler, #318077, Applicant in the above captioned matter, who being first duly sworn, deposes and states the following, that on this ____ day of _____, 2013, I placed a copy of my motion, titled as, "Applicants' Objection and Reply to Proposed and Conditional Order of Dismissal", in the US Postal mail, postage prepaid, mailing it to the Respondents' addressing it:

To: Assistant Attorney General Daniel Gourley
 Office of the South Carolina Attorney General
 Rembert C. Dennis Building
 Post office Box 11549
 Columbia, S.C., 29211-1549

7/11/13 (date)

s/ Edward Tyler
 Edward Tyler, #318077

FILED
 BAMBERG COUNTY
 JAMES B. HERS
 CLERK OF COURT
 BAMBERG, SC
 2013 AUG - 1 PM 4:29

STATE OF SOUTH CAROLINA)

COUNTY OF BAMBERG)

Edward Tyler, #318077)
Applicant,)

v.)

State of South Carolina)
Respondent.)

IN THE COURT OF COMMON PLEAS

FOR THE SECOND JUDICIAL CIRCUIT

Case No.: 2013-CP-05-0030

APPLICANTS' OBJECTION AND REPLY
TO PROPOSED AND CONDITIONAL ORDER
OF DISMISSALFILED
BAMBERG COUNTY
2013 AUG - 1 PM 4:30
JAMES B. HEARS
CLERK OF COURT
BAMBERG, SC

(I)

The Applicant filed a 'Ferguson Petition' pursuant to Ferguson v. State, 382 S.C. 615; 677 S.E. 2d 600, using the standard Post Conviction Relief Application Form, provided to all inmates by Clerks of Court in South Carolina.

The South Carolina Assistant Attorney General, Daniel Gourley, filed a 'Return and Motion to Dismiss' and also submitted a 'Proposed Conditional Order of Dismissal' on June 18, 2013.

This court signed the 'Proposed Conditional Order of Dismissal' on July, 2013, giving the Applicant 20 days to file any response he might, showing why the Ferguson Petition should not be dismissed with prejudice. The Applicant received the signed order on July, 2013, and now thus makes his timely 'Objection and Reply' stating Applicants reasons why the 'Conditional Order of Dismissal' should not become final.

(II)

In 'Ferguson' the South Carolina Supreme Court set mandatory guidelines to be followed when a Post Conviction Relief Applicant alleges, that he/she was prevented by mental impairment and or mental disease from complying with the one year statute of limitation

(page 1)

Case No.: 2013-CP-05-0030

to file.

The S.C. Supreme Court mandated that the applicant should/shall be appointed PCR Court appointed counsel and a hearing shall be held affording the applicant an opportunity to present evidence and or facts to the court to prove that this was in fact, mental disease and or impairments that prevented him/her from complying with the statute of limitations.

The Applicant contends there are mental health records, reports, and mental health care professionals available, that can/ would testify to the Applicants mental health status prior to an during his incarceration and that a court appointed PCR COUNSEL could obtain through subpoena to present in a PCR-Ferguson Hearing. Applicant contends that the above described evidence and testimony is inaccessible to him acting alone due to his being unlearned in matters of law and mental health impairments.

(III)

CONCLUSION

Therefore, The Applicant contends he is entitled to the benefits of the South Carolina Supreme Courts mandates set forth in Ferguson v. State, 382 S.C. 615; 677 S.E. 2d, 600., which has been afforded all others similarly situated, in connection with what the United States and States Equal Protection Clause would require, which under these circumstances, at a minimum, the Applicant be appointed PCR Counsel and a Ferguson Hearing be held, allowing the Applicant an opportunity to present evidence, witnesses/testimony, to prove that his mental health impairment and condition is what prevented him from complying with the 1 year statute of limitations to file for a PCR.

(2)

FILED
BAMBERG COUNTY
2013 AUG - 1 PM 4:31
JAMES B. NERS
CLERK OF COURT
BAMBERG, SC

Case No.: 2013-CP-05-0030

For all the reasons stated herein, the Applicant prays that the "Conditional Order of Dismissal" should not become final and that this Court should order the immediate appointment of a counsel for the Applicant, an order that a Ferguson Hearing be held that is consistent with the mandates set forth in the South Carolina's Supreme Court's decision in Ferguson v. State, 677 S.E. 2d 600 (2009).

Respectfully Submitted,

7/16/13 (date)

s/ Edward Tyler
Edward Tyler, #318077
Applicant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BAMBERG	)	FOR THE SECOND JUDICIAL CIRCUIT
Edward Tyler, #318077,	)	2013-CP-05-30
)	
Applicant,)	
)	
v.	)	AMENDED RETURN
)	
State of South Carolina,)	
)	
Respondent.)	
)	

The Respondent, making its Amended Return to Applicant’s reply to proposed Conditional Order of Dismissal adds the following:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Bamberg County Clerk of Court. The Applicant was true billed indicted at the January 2007 term of the Bamberg County Grand Jury for Criminal Domestic Violence (2007-GS-05-041), Murder (2007-GS-05-042) and Possession Weapon During a Violent Crime (2007-GS-05-043). Kent Kirkland, Esquire represented Applicant. On June 4, 2008, the Applicant pled guilty before the Honorable Doyet A. Early, III, to Murder.¹ Judge Early sentenced Applicant to forty years imprisonment for Murder. The Applicant did not appeal his guilty plea or sentence.

Subsequently, Applicant filed a post-conviction relief action (2013-CP-05-30) alleging that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. “Trial counsel’s refusal to investigate victims past violent history in which would have revealed that the victim was violent and had initiated violent episodes with her own father and attacked him and police had to be called, therefore, there is police record of the

¹ Applicant’s indictments for Criminal Domestic Violence (2007-GS-05-041) and Possession Weapon During a Violent Crime (2007-GS-05-043) were Nol Prossed pursuant to a plea agreement.

- incident...”
- b. “Attorney failed to inform me of the existence of what is known as battered spousal abuse defense, in which had I known about with all the other above listed facts, I would not have pled guilty...”
2. Involuntary guilty plea.
 - a. “Attorney failed to inform me if I chose to go to trial I could possibly be found guilty of lesser included offense if we could have shown victim’s violent assaultive behavioral past.”

The State made its Return and Motion to Dismiss on or about June 18, 2013, requesting the post-conviction relief application be dismissed for failing to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. S.C. Code Ann. §17-27-45(a). In a Conditional Order dated June 24, 2013 and filed June 28, 2013, the Honorable Doyet A. Early, III, found the application should be dismissed based on the statute of limitations; Applicant was given twenty days in which to respond.

Applicant submitted a document captioned “Applicants Objection and Reply to proposed and Conditional Order of Dismissal.” Applicant alleges that he is entitled to a post-conviction relief pursuant to Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009). Applicant “contends there are mental health records, reports, and mental health care professionals available, that can/would testify to the Applicant’s mental health status prior to an[d] during his incarceration” which would show that he was he was prevented from filing for PCR by reason of his mental incompetency.

For the purpose of this Return, the Respondent incorporates the Bamberg County Clerk of Court records, the South Carolina Department of Corrections’ records, Respondent’s Return and Motion to Dismiss, Conditional Order of Dismissal and Applicant’s response to proposed Conditional Order of Dismissal. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009) the South Carolina Supreme Court found Ferguson was entitled to a post-conviction relief hearing to determine whether his mental incapacity prevented him from filing a timely post-conviction relief application. Ferguson, 382 S.C. at 620, 677 S.E.2d at 602. The Court explained that “if the PCR court finds mental incompetence prevented his filing a PCR application, the [PCR] court should determine the duration of the incompetence, and whether the application was filed within one year of Ferguson regaining competency.” Id. The South Carolina Supreme Court remanded the case for an evidentiary hearing in order to determine whether Ferguson mental incompetency prevented him from filing a timely post-conviction relief application and the duration of such incompetency. However, there being nothing in the record to indicate that the Applicant was suffering from any type of mental illness which would prevent him from filing a timely post-conviction relief application, the State submits that the allegation is totally without merit and should be dismissed.

Nevertheless, the allegation probably raises a question of fact, which may not be conclusively refuted by the record and therefore requires that an evidentiary hearing be convened. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

III.

WHEREFORE, having made its Amended Return, the State requests Counsel be appointed and a hearing be held to address only whether Applicant’s mental incapacity prevented him from filing a timely post-conviction relief application.

[signature block on following page]

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

DANIEL GOURLEY
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

September 12, 2013.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BAMBERG)
)
)
)
 EDWARD TYLER, #318077,)
)
 Applicant,)
)
 vs)
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

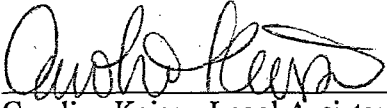
2013-CP-05-0030

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Amended Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Edward Tyler, #318077
 Lee Correctional Institution
 990 Wisacky Highway
 Bishopville, SC 29010

DATED this 12th day of September, 2013.



 Caroline Kaiser, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA

COUNTY OF BAMBERG

Edward Tyler, #318077

Plaintiff

v.

State Of South Carolina

Defendant.

FILED
BAMBERG COUNTY
2013 SEP 17 AM 9:44
JAMES B. HIERS
CLERK OF COURT
BAMBERG, SC

IN THE COURT OF COMMON PLEAS

CASE NO.
2013-CP-05-0030

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Edward Tyler, #318077, Bar No. Address: Lee Correctional Institution Bishopville, SC 29010 phone: fax: e-mail: other:	Defendant's Attorney: Daniel Gourley, Bar No. Address: P.O. Box 11549 Columbia, SC 29211 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:
---	---

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

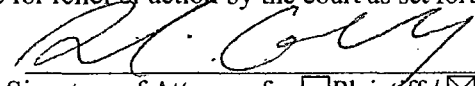
SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

- Written motion attached
- Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


 Signature of Attorney for Plaintiff / Defendant

September 12, 2013
 Date submitted

SECTION III: Motion Fee

- PAID - AMOUNT:
- EXEMPT:
 - Rule to Show Cause in Child or Spousal Support
 - (check reason) Domestic Abuse or Abuse and Neglect
 - Indigent Status State Agency v. Indigent Party
 - Sexually Violent Predator Act Post-Conviction Relief
 - Motion for Stay in Bankruptcy
 - Motion for Publication Motion for Execution (Rule 69, SCRCP)
 - 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:
 Other:

JUDGE'S SECTION

- Motion Fee to be paid upon filing of the attached order.
- Other:

JUDGE _____

CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

- MOTION FEE COLLECTED: _____
- CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

FILED
BAMBERG COUNTY

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

2013 SEP 17 AM 9:44

2013-CP-05-30

Edward Tyler, #318077,

JAMES B. HIGGS
CLERK OF COURT
BAMBERG, SC

v.

State of South Carolina,

Respondent.

**ORDER VACATING CONDITIONAL ORDER
OF DISMISSAL AND SETTING CASE FOR
EVIDENTIARY HEARING**

This matter comes before the Court by way of an Application for post-conviction relief filed February 25, 2013. The State made its Return and Motion to Dismiss dated June 18, 2013, requesting the post-conviction relief application be dismissed for failing to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. S.C. Code Ann. §17-27-45(a). Thereafter, this Court issued a Conditional Order of Dismissal, provisionally denying and dismissing the action, but giving the Applicant twenty days from the date of service in which to provide reasons why the case should not be summarily dismissed without a hearing. Applicant submitted a document captioned "Applicants Objection and Reply to proposed and Conditional Order of Dismissal." Applicant alleges that he is entitled to a post-conviction relief pursuant to Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009). Applicant "contends there are mental health records, reports, and mental health care professionals available, that can/would testify to the Applicant's mental health status prior to an[d] during his incarceration" which would show that he was prevented from filing for PCR by reason of his mental incompetency.

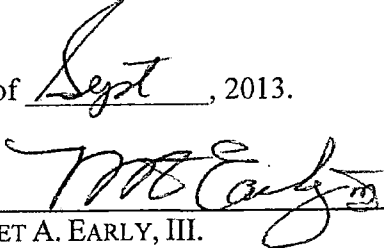
In Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009) the South Carolina Supreme Court found Ferguson was entitled to a post-conviction relief hearing to determine whether his mental incapacity prevented him from filing a timely post-conviction relief application. Ferguson, 382 S.C. at 620, 677 S.E.2d at 602. The Court explained that "if the PCR court finds mental incompetence prevented his filing a PCR application, the [PCR] court should determine the duration


of the incompetence, and whether the application was filed within one year of Ferguson regaining competency.” *Id.* The South Carolina Supreme Court remanded the case for an evidentiary hearing in order to determine whether Ferguson mental incompetency prevented him from filing a timely post-conviction relief application and the duration of such incompetency.

This Court finds that the amended application contains grounds to be sufficient to show why the action for post-conviction relief should not be summarily dismissed without a hearing. Applicant has amended his application to allege a claim of mental incompetency under Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009).

Accordingly, the Conditional Order of Dismissal is hereby **VACATED**, and the matter is to be scheduled for an evidentiary hearing be held solely on the issue of whether Applicant’s mental incapacity prevented him from filing a timely post-conviction relief application.

IT IS SO ORDERED this 13 day of Sept, 2013.


DOYET A. EARLY, III.
Chief Administrative Judge
Second Judicial Circuit

, South Carolina

1	State of South Carolina	)	In the Court
2	County of Bamberg	)	Of Common Pleas
3			
4			Docket No. 2013-CP-05-0030
5			
6	Edward Tyler,)	
7	Applicant,)	
8	vs	)	Transcript of Record
9)	
10	State of South Carolina,)	
	Respondent)	
11			
12			
13			July 30, 2014
14			Aiken, South Carolina
15			
16			<u>B E F O R E:</u>
17			The Honorable R. Knox McMahon, Judge.
18			
19			<u>A P P E A R A N C E S:</u>
20			Johnny Casmersky, Esquire
21			Attorney for the Applicant
22			Daniel Gourley, Assistant Attorney General
23			Attorney for the Respondent
24			Brenda J. Sigwald, Circuit Court Reporter
25			For the Honorable R. Knox McMahon
			P.O. Box 206, Jackson, South Carolina 29831

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I N D E X

Page

Post Conviction Relief Hearing

Edward Tyler

Direct Examination by Mr. Casmersky..... 5

Cross-Examination by Mr. Gourley..... 9

Certificate of Reporter..... 19

Keyword Index, 20

E X H I B I T S

NO.

DESCRIPTION

PAGE

(REPORTER'S NOTE: There were no exhibits
entered during this hearing.)

1 THE COURT: All right. Good morning. This is
2 Tyler versus South Carolina?

3 MR. GOURLEY: Yes, Your Honor.

4 THE COURT: All right. Would you tell me about it
5 please, Mr. Gourley.

6 MR. GOURLEY: Yes, Your Honor, this is Edward Tyler
7 versus State of South Carolina, Docket No. 2013-CP-05-530.

8 Applicant is presently confined in the South
9 Carolina Department of Corrections pursuant to orders of
10 the Bamberg County Clerk of Court. He was true-bill
11 indicted the February 2007 term of the Bamberg County Grand
12 Jury for criminal domestic violence, murder, and possession
13 of a weapon during a violent crime. Kent Kirkland
14 represented him.

15 On June 4, 2008, he pled guilty before the
16 Honorable Doyet A. Early, III to murder. Judge Early
17 sentenced the applicant to 40 years imprisonment. He did
18 not appeal his guilty plea or sentence. He subsequently
19 filed an application on post conviction relief February 25,
20 2013, alleging ineffective assistance of counsel and
21 involuntary guilty plea.

22 The State made its return motion to dismiss on or
23 about June 18, 2013, requesting that the PCR application be
24 dismissed for failing to comply with the statute of
25 limitations. Judge Early signed a conditional order of

1 dismissal on June 24th, 2013. That was filed June 28,
2 2013. The applicant submitted a document captioning;
3 Applicant's objection and replies with a proposed order --
4 excuse me, Applicant's objection and reply to proposed
5 unconditional order of dismissal.

6 In that amendment, Your Honor, he alleged a -- that
7 he was entitled to a post conviction relief pursuant to
8 Ferguson v. State and he contended that there are mental
9 health records, reports, and mental health care
10 professionals available that can cite and would testify to
11 the applicant's mental health status prior to his
12 incarceration, which would show that he was prevented from
13 filing his PCR due to his mental incompetency.

14 Your Honor, the State made an amended return
15 requesting a hearing solely on whether or not the
16 applicants mental incapacity prevented him from filing a
17 timely post conviction relief application on September 12,
18 2013. An order -- or a motion requesting funding was filed
19 on December 4, 2013 requesting funding for a mental health
20 evaluation. A hearing was held and I'm not quite sure
21 where the hearing was held. We had a hearing in front of
22 Judge Early, at which point Judge Early denied the motion
23 for funding on July 12, 2013, and Your Honor we're here
24 today based on the issue of whether his mental incapacity
25 prevented him from filing a timely post conviction relief

Edward Tyler - Direct Examination by Mr. Casmersky

1 application.

2 I will turn it over to Mr. Casmersky.

3 **THE COURT:** All right. Yes, sir.

4 **MR. CASMERSKY:** Good morning, Your Honor. I do
5 agree with the recitation of facts and we're ready to move
6 forward and call Mr. Tyler for testimony.

7 **THE COURT:** All right. If you'd come around and be
8 sworn, please, Mr. Tyler.

9 **EDWARD TYLER,**

10 having been duly sworn, testified as follows:

11 **THE CLERK:** Please have a seat and state your name
12 for the record.

13 **THE WITNESS:** Edward Tyler.

14 **THE COURT:** Thank you. You may be seated, Mr.
15 Tyler.

16 All right. Mr. Casmersky?

17 **DIRECT EXAMINATION**

18 **BY MR. CASMERSKY:**

19 **Q** Good morning, Mr. Tyler.

20 **A** Good morning.

21 **Q** Where are you currently incarcerated?

22 **A** Lee Correction.

23 **Q** And what were you convicted of or what did you
24 plead guilty to?

25 **A** Murder.

Edward Tyler - Direct Examination by Mr. Casmersky

1 Q Did you appeal your conviction for murder?

2 A No.

3 Q Did you file a PCR from the time of -- for a PCR
4 hearing from the time you were convicted to one year past
5 that?

6 A No, sir.

7 Q Have you ever been treated for mental illness?

8 A Yes, sir.

9 Q Please tell the Court -- describe the treatment
10 that you received for mental health.

11 A Well, I was put on medication back in -- I forgot.
12 As far as I was going through counseling and they put me on
13 medication and follow through with treatments of all types.

14 Q Specifically, where were you treated?

15 A In Denmark at the mental health facility.

16 Q And when were you treated?

17 A I can't remember. It was before all this started
18 happening.

19 Q Was it before you were convicted of murder or
20 after?

21 A Before.

22 Q From the time frame after you were convicted did
23 you have any treatment while you were incarcerated?

24 A No, sir.

25 Q Were you taking any medication when you were

Edward Tyler - Direct Examination by Mr. Casmersky

1 incarcerated.

2 A Hypertension medicine, blood pressure medicine and
3 all that. I tried -- when I went to go see psychiatrist, I
4 never -- they ask me do you hear voices? I was like no and
5 yeah and he said there wasn't nothing wrong with me. That
6 was at Perry. That was back in 2006, 2007. Really like --
7 it was really like -- that was before I got convicted. It
8 was like he didn't want to be bothered with me.

9 Q Specifically during the -- from the time after you
10 were convicted to when you were incarcerated, for that one
11 period after your conviction, were you ever treated for
12 mental illness or prescribed any medications for mental
13 illness?

14 A No, sir.

15 Q But you contend that you were mentally incompetent;
16 is that correct? That you didn't know that you were
17 supposed to file a PCR --

18 A I didn't know. Not particularly.

19 Q And why is that? What indications did you have
20 that you were mentally incompetent?

21 A I mean, I just -- I mean I had no -- I just don't
22 know what's going on. All I know, I'm in prison. I don't
23 know enough about the law. You know my mind tell me to do
24 something and don't do it, I'm just out of my mind.

25 Q At some point, you had a death in your family

Edward Tyler - Direct Examination by Mr. Casmersky

1 that --

2 A My mother --

3 Q Can you tell the Court what kind of impact --

4 A -- and my --

5 Q -- that had on you emotionally.

6 A It just shut me down. Shut me all the way down.

7 That was like six months after I got sentenced. And my son
8 got -- my son was molested. Just all kind of stuff.

9 Q And you found out about all that -- all that
10 information during that first year after you were
11 convicted?

12 A Yes, sir. I just -- just like -- I don't know it
13 just -- my mind just went. It shut down.

14 Q You -- you filed for a PCR hearing in 2013;
15 correct?

16 A Yes, sir.

17 Q And at that point, you had regained some of your --

18 A Yes, sir, what's going on.

19 Q Emotionally, you felt better, mentally, and you
20 realized at that point --

21 A Yes, sir.

22 Q -- that you needed to file a PCR?

23 A I had some -- a couple of people telling me I can
24 file a PCR because when I went to court, my lawyer tell me
25 that I couldn't file -- I mean there wasn't no use to file

Edward Tyler - Direct Examination by Mr. Casmersky

1 an appeal or nothing.

2 Q Do you have anything else to add that I haven't
3 addressed concerning your mental incapacity for the period
4 of one year after -- for why you missed the statute of
5 limitations?

6 A I mean, like I said, just everything that hit me at
7 once. I mean, you sitting all the time. My mother dying,
8 my son being molested, all this -- family just gave up on
9 you and I was in a mental state. I was just...

10 MR. CASMERSKY: I have no further questions, Your
11 Honor.

12 THE COURT: Thank you. Thank you very much.
13 Mr. Gourley?

14 MR. GOURLEY: Yes, Your Honor.

15 **CROSS-EXAMINATION**

16 **BY MR. GOURLEY:**

17 Q Mr. Tyler, after your guilty plea, you said your
18 mother died about six months and then your son was
19 molested?

20 A Yes.

21 Q Okay. And that had an emotional impact on you?

22 A Yes, sir.

23 Q And what was your mind frame during that time?

24 A I mean I was just -- I just shut myself off from
25 everything.

Edward Tyler - Direct Examination by Mr. Casmersky

1 Q Okay.

2 A I mean be honest, I don't remember. I just be
3 honest, I don't remember. I don't know.

4 Q You don't know?

5 A I don't know.

6 Q Were you on any type of medication there in that
7 year?

8 A No, sir.

9 Q You weren't going through any kind of counseling?

10 A Not for that year.

11 Q Okay.

12 A Because -- see never been at SCDC. They can tell
13 you anything, but when you're back there, it's hard to get
14 help.

15 Q Right.

16 A It's hard to get help.

17 Q Okay. And when --

18 A You got to get on your knees and pray to God.
19 That's the only help you got back there.

20 Q Okay. And so how long were you -- how long was
21 your mind shut off?

22 A Really -- I don't know. I be honest. I don't
23 know.

24 Q Okay. So you don't know --

25 A I mean, I don't know. I just -- I just -- I guess

Edward Tyler - Direct Examination by Mr. Casmersky

1 around about 2011 or '12, something like that.

2 Q Is when you started thinking clearly?

3 A Yeah.

4 Q Is there anything that provoked that mind being
5 cleared? Your mind being clear?

6 A Reading my Bible.

7 Q Say what?

8 A Reading my Bible.

9 Q Reading your Bible. Good.

10 And you state that had your lawyer -- after your
11 guilty plea, your lawyer told you not to file an appeal or
12 a PCR or anything like that?

13 A He said it wasn't no used to.

14 Q Why is that --

15 A I wrote him again and asked him if there was any
16 way about I could go back to court. He said there no use
17 to go back to court back at the unit.

18 Q Okay.

19 A So that's why -- that's another reason why I didn't
20 do that.

21 Q So you were aware that you could file an appeal or
22 file a PCR application after your guilty plea?

23 A I didn't know nothing about no PCR.

24 Q Okay. When did you discover the PCR aspect?

25 A Back in 2013.

1 Q Okay. That's when you filed your application?

2 A Yeah. And if I was to file again, I didn't have
3 nothing to file with it. I didn't get my motion discovery
4 until then. No paperwork.

5 Q Okay. All right. Thank you, Mr. Tyler.

6 MR. GOURLEY: Your Honor, I have nothing further.

7 THE COURT: Redirect?

8 MR. CASMERSKY: No further questions, Your Honor.

9 THE COURT: Thank you. Thank you very much
10 Mr. Tyler. You can step down.

11 MR. CASMERSKY: Plaintiff has no further witnesses,
12 Your Honor.

13 MR. GOURLEY: Your Honor, I don't have any
14 witnesses. I do have a copy of the Ferguson v. State if
15 you'd like a copy.

16 THE COURT: Yes, sir.

17 MR. GOURLEY: I'll supply one to Mr. Casmersky as
18 well.

19 THE COURT: Thank you.

20 MR. GOURLEY: Yes, sir.

21 THE COURT: When was the application filed? I
22 didn't write that date down.

23 MR. GOURLEY: It was filed February 25th, 2013.

24 THE COURT: All right. Mr. Casmersky, I'll be
25 happy to hear from you.

1 **MR. CASMERSKY:** Your Honor, although, Mr. Tyler was
2 never on medication or received treatment for his mental
3 illness for his incompetency, the emotional impact that Mr.
4 Tyler spoke to in his testimony of finding out his mother's
5 death, his child being molested combined with receiving a
6 40 year sentence for murder had an impact on him, a severe
7 emotional impact. State v. Ferguson allows the Court to
8 grant an equitable -- a period of equitable tolling for
9 that period that he was mentally incompetent.

10 Mr. Tyler was unable to determine on the stand
11 exactly when that period of incompetency ended, but the
12 latest that he testified to was 2012. If the Court finds
13 that he was mentally incompetent from the time he was
14 convicted until that some period in 2012, Mr. Tyler's
15 application for post conviction relief would have been
16 timely and we would ask that the Court find that during
17 that period of mental incompetency, the statute of
18 limitations be tolled and his PCR application be accepted.

19 **THE COURT:** Thank you, thank you very much.

20 **MR. GOURLEY:** Your Honor, Ferguson v. State allows
21 for the tolling of the statute of limitations if the
22 applicant is determined to be mentally incompetent. It's
23 the applicant's burden of proof. This applicant hasn't
24 proved his mental capacity. I would submit to the Court
25 that he has not met his burden. He was not suffering -- he

1 was receiving counseling, he was not on medication. He
2 pled guilty back in 2008. He was mentally competent to
3 plead guilty. At that point in time within a six month
4 span, as Mr. Casmersky said, his mother passed away and his
5 son was molested. He just stated that his mind shut down.
6 He's not, here today, proven anything or supplied the Court
7 with any kind of document showing that he was suffering
8 from any type of mental incapacity.

9 If you remember, Your Honor, Mr. Tyler stated that
10 his mind began working again in 2011, 2012. This
11 application was filed in 2013, which is questionable at
12 best. At one point in time Mr. Tyler allegedly became
13 incapacitated and filed that PCR application. And Your
14 Honor, he is also aware -- he stated he did not file his
15 PCR application because his lawyer told him that he had no
16 remedy regarding an appeal or a PCR, so I would submit to
17 the Court that the applicant has not met his burden of
18 proving that his lack of capacity prevented him from filing
19 a timely post conviction relief application. Thank you.

20 **THE COURT:** Is there a transcript of Mr. Tyler's
21 guilty plea?

22 **MR. GOURLEY:** I should have one, Your Honor.

23 Your Honor, I don't believe the State ordered it
24 due to its initially being tagged as a statute of
25 limitations case. At that point we filed an amended return

1 requesting the hearing solely on the Ferguson case. I
2 think a transcript was never ordered of the guilty plea
3 proceedings.

4 THE COURT: Did anyone subpoena Mr. Kirkland's
5 file?

6 MR. GOURLEY: No, sir, I did not.

7 MR. CASMERSKY: No, Your Honor.

8 THE COURT: Did anyone subpoena any records from
9 Denmark mental health facility?

10 MR. CASMERSKY: No, Your Honor.

11 THE COURT: Has anyone subpoenaed any records or
12 medical or psychiatric records pertaining to Mr. Tyler from
13 the South Carolina Department of Corrections?

14 MR. CASMERSKY: No, Your Honor.

15 MR. GOURLEY: No, sir.

16 THE COURT: Does anyone object to those records
17 being subpoenaed?

18 MR. CASMERSKY: No, Your Honor.

19 MR. GOURLEY: Your Honor, I don't have an
20 objection. I would just ask that there be a time limit put
21 on it so that it's not out there in limbo for months on
22 end.

23 THE COURT: I don't feel like I have -- this is not
24 by way of criticism whatsoever as to the applicant or the
25 State.

1 MR. GOURLEY: Yes, sir.

2 THE COURT: But like flying a plane when you're
3 flying on instruments and you can't see because of the
4 clouds, my plane doesn't have very good avionics. I don't
5 have the instruments to fly on. And it says equitable
6 tolling.

7 If there are records that exist that shows a
8 pattern of mental health issues within -- I mean, I don't
9 even know the date of your mother's death, whether it was
10 '09, '10, or '11. I don't know. There's a difference
11 between the mental health issues and grief. Everybody goes
12 through grief, different stages, in different way in the
13 death of a loved one, particularly a parent. I'm sure
14 people go through issues upon finding that their child has
15 been harmed in some manner.

16 I don't feel like I have enough information to make
17 a valid decision, a decision at least that I'm comfortable
18 with as to whether or not his mental health issues affects
19 his ability, his competency to file his application within
20 a timely manner or whether they did not. If they did and
21 he didn't regain competency until '12, of course, Ferguson
22 could be read to rule in one direction. If they did not,
23 obviously, the statute of limitations would -- would
24 resolve the issue in another direction. If he was
25 incompetent for that period of time, he deserves his bite

1 at the apple. If he was not, he doesn't deserve his bite
2 at the apple.

3 I don't feel like I've got adequate information to
4 make that decision, based on this record.

5 MR. GOURLEY: And, Your Honor --

6 THE COURT: I do have information to make a
7 decision, but I don't feel like I have sufficient
8 information for a defendant that has been -- that has pled
9 guilty and received a 40 year sentence.

10 Yes, sir, Mr. Gourley?

11 MR. GOURLEY: I do apologize, I was just flipping
12 through our records that was filed -- sent to us from the
13 Bamberg County Clerk of Court. There does appear to be a
14 mental health record from August 2007. I guess he was
15 mentally evaluated prior to his guilty plea. It should be
16 in your packet, Your Honor.

17 THE COURT: I did not see that.

18 MR. GOURLEY: I've got it if you need it. It was
19 behind the sentencing sheet, Your Honor.

20 THE COURT: Behind the sentencing sheet?

21 MR. GOURLEY: Yes, sir. About three quarters of
22 the way --

23 THE COURT: All right. Let me look at that.

24 MR. GOURLEY: I do apologize, Your Honor, I was you
25 not aware that he got that.

1 THE COURT: All right. I'll take it under
2 advisement. If y'all would prepare me an order. Get the
3 records from the Department of Corrections, a record of his
4 mother's death, anything to do with the molestation of his
5 son, and I think the department of corrections, you have to
6 do two orders for his medical and one for psychiatric. But
7 I'll take it under advisement and then let me look at those
8 records also.

9 No objection to that, correct? No objection from
10 the applicant?

11 MR. CASMERSKY: No, Your Honor.

12 THE COURT: No objection from the State?

13 MR. GOURLEY: No, sir.

14 THE COURT: I'll take it under advisement. Once I
15 get those records to do that. If you'll get me an order
16 within 30 days, Mr. Attorney General, I'll look at it and
17 then I'll e-mail y'all. Okay?

18 MR. GOURLEY: Yes, sir.

19 MR. CASMERSKY: Yes, sir.

20 THE COURT: Thank you thank you very much.

21 Good luck, Mr. Tyler.

22 * * * * * END OF TRANSCRIPT * * * * *

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State of South Carolina)

County of Aiken)

Certificate of Reporter

I, THE UNDERSIGNED, Brenda J. Sigwald,
Official Court Reporter for the Fifth Judicial Circuit of
the State of South Carolina, do hereby certify that I
reported the proceedings in the captioned case in the Court
of Common Pleas in and for the State of South Carolina on
the 30th day of July, 2014.

I FURTHER CERTIFY that the foregoing pages,
constitute a true, accurate and complete transcript of said
hearing.

I FURTHER CERTIFY that I am neither kin, counsel,
nor of interest to any party hereto.

IN WITNESS WHEREOF, I have hereunto set my hand and
seal at Aiken County, this 16th day of December 2014.

Brenda J. Sigwald

Brenda J. Sigwald,
Court Reporter and Notary Public
For the State of South Carolina
My commission expires
January 4, 2020

STATE OF SOUTH CAROLINA)
 COUNTY OF BAMBERG)
 Edward Tyler, #318077)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE SECOND JUDICIAL CIRCUIT

Case No. 2013-CP-05-30

**ORDER GRANTING
 EVIDENTIARY HEARING**

FILED
 BAMBERG COUN.
 2014 OCT 13 AM 9:10
 JES B. HIERS
 CLERK OF COURT
 BAMBERG, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 25, 2013. In its Return and Motion to Dismiss, filed on or about June 18, 2013, Respondent requested that the application be summarily dismissed as untimely pursuant to S.C. Code Ann. § 17-27-45. On June 24, 2013, the Honorable Doyet A. Early, III, acting in his capacity as Chief Administrative Judge of the Second Judicial Circuit, signed a Conditional Order of Dismissal, provisionally dismissing the application but allowing Applicant twenty days to show why the dismissal should not become final. Applicant responded on July 11, 2013, alleging that mental health concerns prevented him from timely filing his application. Based on his response and in light of Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009) (requiring the tolling of the statute of limitations if Applicant can establish that mental incompetence prevented the timely filing of his or her application), the Respondent filed an amended return requesting an evidentiary hearing on the matter on September 12, 2013. By order filed September 17, 2013, Judge Early vacated his conditional order of dismissal and set the case for evidentiary hearing.

Applicant's Counsel, Daniel Luginbill, Esquire filed a motion for funding to have Applicant's mental health evaluated on February 25, 2013. A motion's hearing was held on

December 4, 2013, at the Bamberg County Courthouse. Applicant was present and represented by Daniel Luginbill, Esquire and Janek Kazmierski, Esquire. Respondent was present and represented by Daniel Gourley, Esquire of the South Carolina Attorney General's Office. By Order filed December 27, 2013, Judge Early denied Applicant's request for funding to have his mental health evaluated.

A hearing on the State's motion to dismiss was convened on July 30, 2014, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by counsel, Janek Kazmierski, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office. After reviewing all testimony and other evidence presented at the hearing, along with a review of all records provided to the Court, this Court finds that the Applicant is entitled to an evidentiary hearing.

PROCEDURAL HISTORY

This Court has before it a copy of the records of the Bamberg County Clerk of Court, Applicant's medical and mental health records from the South Carolina Department of Corrections, and Applicant's mental health records from the South Carolina Department of Mental Health. The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Bamberg County Clerk of Court. The Applicant was true billed indicted at the January 2007 term of the Bamberg County Grand Jury for Criminal Domestic Violence (2007-GS-05-041), Murder (2007-GS-05-042) and Possession Weapon During a Violent Crime (2007-GS-05-043). Kent Kirkland, Esquire represented Applicant. On June 4, 2008, the Applicant pled guilty before the Honorable



Doyet A. Early, III, to Murder.¹ Judge Early sentenced Applicant to forty years imprisonment for Murder. The Applicant did not appeal his guilty plea or sentence.

In his application for post-conviction relief Applicant alleges that he is being held in custody unlawfully for the following reason:

1. "Applicant contends there are mental health records, reports, and mental health care professionals available, that can/would testify to the Applicant's mental health status prior to an[d] during his incarceration" which would show that he was he was prevented from filing for PCR by reason of his mental incompetency.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the pleadings and all relevant supporting documents. The Court makes the following findings of fact and conclusions of law:

The Applicant pled guilty to the offenses he challenges on June 4, 2008. Therefore, Applicant was required to file his application on or before June 5, 2009. However, due to Applicant's mental incompetency, which was first treated April 2005 and resolved sometime in the middle of 2012, the time to file an application for post-conviction relief should be tolled during this period. Therefore, this Application, which was filed on February 25, 2013, was within the statutory filing period provided by Ferguson.

At the hearing on the State's motion to dismiss, Applicant testified that he is currently incarcerated at Lee County correction institution. Applicant stated that he pled guilty to murder and did not file a direct appeal. Applicant stated that he did not file a post-conviction relief application because he was mentally incapacitated due to the exacerbation of his underlying mental illness by the combination of the stress of being imprisoned, learning of his mother's death in early 2009, and discovering that his son had been abused.

¹ Applicant's indictments for Criminal Domestic Violence (2007-GS-05-041) and Possession Weapon During a Violent Crime (2007-GS-05-043) were Nol Prossed pursuant to a plea agreement.

Applicant was first treated for his mental health condition on April 1, 2005. He was treated at the Denmark Mental Health Center for substance abuse problems and intermittent explosive disorder. After Applicant was arrested for murder in October 2006, he complained of sleep disturbances, depression and anxiety, and was experiencing auditory hallucinations. During his initial psychiatric evaluation he described his previous substance abuse and his concern for his elderly parents. His records also show that he admitted to several suicide attempts and he was described as "mentally unstable." After applicant was sentenced to forty years imprisonment for murder, his mental state crashed. He was not aware of what was going on and had difficulty sleeping. Only six month after being sentenced, Applicant learned that his mother had passed away. And shortly after that, Applicant's son entered emergency protective custody after allegations of physical and sexual abuse. Applicant stated these events caused him to shut down and he quit working on his case. Applicant stated in 2011-2012 his mental condition began to improve after speaking with other inmates and reading the Bible. Applicant stated several inmates told him about post-conviction relief and after he regained his mental competency he filed his application on February 25, 2013.

This Court finds that Applicant has established that mental incapacity prevented him from timely filing his application within the statutory period and that the statute of limitations should be tolled as required by Ferguson.

CONCLUSION

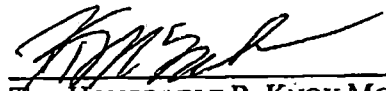
Based on all the foregoing, this Court finds and concludes that Applicant was mentally incompetent from April 2005 until sometime in the middle of 2012. During this period of time, the statutory period to file a PCR application should be tolled. Therefore, this Application, which was filed on February 25, 2013, is timely and this matter should be set for an evidentiary hearing.



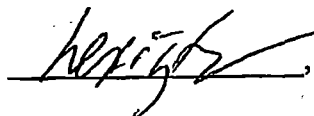
IT IS THEREFORE ORDERED:

1. That this application for post-conviction relief shall be set for an evidentiary hearing.

AND IT IS SO ORDERED this 3 day of Oct, 2014.



THE HONORABLE R. KNOX MCMAHON
Presiding Judge
Second Judicial Circuit


_____, South Carolina.

1 STATE OF SOUTH CAROLINA

CIRCUIT COURT
2013-CP-05-00030

2 COUNTY OF BAMBERG

3

4 EDWARD TYLER,
Applicant,

5

-vs-

TRANSCRIPT OF RECORD

6

7 STATE OF SOUTH CAROLINA,
Respondent.

8

9

Post Conviction Relief Hearing

10

Heard on Thursday, May 21, 2015

11

Aiken, South Carolina

12

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BEFORE:

14

THE HONORABLE TANYA A. GEE

15

16

17 APPEARANCES:

Counsel on Behalf of the Applicant:
Janek Kazmierski, Esq.

18

19

Counsel on Behalf of the Respondent, State of SC:
Daniel F. Gourley, II, Esq.

20

21

22

Cheri L. Young, RPR
Circuit Court Reporter
P O Box 5232
Aiken, SC 29803-5232

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1 ON THURSDAY, MAY 21, 2015 AT 2:03 P.M.:

2 THE COURT: Mr. Gourley, call your next
3 case, please.

4 MR. GOURLEY: Yes, Your Honor.

5 This is Edward Tyler versus the State of
6 South Carolina, Docket Number 2013-CP-05-30.

7 He was true -- he's presently confined in
8 the South Carolina Department of Corrections
9 pursuant to orders of commitment of the Bamberg
10 County Clerk of Court. He was true bill indicted
11 at the January 2007 term of the Bamberg County
12 Grand Jury for criminal domestic violence,
13 murder, and possession of a weapon during a
14 violent crime. Mr. Ness represented him.

15 On June 4, 2008, he pled guilty before the
16 Honorable Doyet A. Early the Third to murder, two
17 remaining charges were nol prossed pursuant to
18 the plea agreement. Judge Early sentenced the
19 Applicant to a negotiated 40-year term of
20 imprisonment. He did not appeal his plea or
21 sentence.

22 Mr. Tyler filed a -- again, filed his
23 motion for PCR on February 25th, 2013. The State
24 initially filed a return and motion to dismiss on
25 June 18th, 2013, based off of statute of

1 limitations.

2 On June 24th, 2013, Judge Early acting in
3 his capacity as Administrative Judge for the
4 Second Judicial Circuit signed a conditional
5 order of dismissal basically dismissing
6 application but allowing Applicant 20 days to
7 respond.

8 Applicant responded on July 11, 2013,
9 alleging that there was mental health concerns
10 that prevented him from timely filing his
11 application. Based on his response in the light
12 of Ferguson v. State, a hearing was held in front
13 of Judge McMahon regarding whether or not mental
14 illness prevented him from timely filing his
15 application. Judge McMahon issued an order filed
16 October 13th, 2014, granting Mr. Tyler a full
17 evidentiary PCR hearing. And that is what we're
18 here today for.

19 THE COURT: All right. Thank you so much.
20 for that review.

21 Sir, I'll hear from you.

22 MR. KAZMIERSKI: May it please the Court.
23 Good afternoon, Your Honor. Janek Kazmierski
24 from the firm of Wilson and Lugenbill. I
25 represent Mr. Tyler in his PCR application.

1 THE COURT: It's Kazmierski?

2 MR. KAZMIERSKI: Kazmierski. Yes.

3 THE COURT: Okay. Got it. Go ahead.

4 MR. KAZMIERSKI: I'm ready to call

5 Mr. Tyler.

6 THE COURT: All right. Mr. Tyler, if
7 you'll come up here to be sworn in.

8 MR. GOURLEY: And, Your Honor, if we may
9 just before -- I'm sorry, I should have put this
10 on the record.

11 The guilty plea transcript is obviously
12 destroyed. I've got a letter from Ms. Davenport
13 regarding the transcript, if you'd like to make
14 it a Court Exhibit or State's Exhibit.

15 THE COURT: Let's make it a Court Exhibit.

16 MR. GOURLEY: And, Your Honor, obviously
17 the record is going to need to be reconstructed.
18 However you'd like to do that, whether you --
19 typically it's been my understanding that PCR
20 hearings are done first and then afterwards we do
21 the reconstruction but of course however Your
22 Honor would prefer it.

23 THE COURT: We'll go ahead and have
24 Mr. Tyler be sworn in. We'll do the PCR hearing,
25 and then we'll reconstruct the record if that

EDWARD TYLER - DIRECT BY KAZMIERSKI

1 suits everybody.

2 MR. KAZMIERSKI: Yes, Your Honor.

3 MR. GOURLEY: Yes, Your Honor.

4 THE COURT: Okay. Thank you.

5 (Court's Exhibit No. 1, court reporter's
6 letter, was received into evidence.)

7 EDWARD TYLER, having been duly sworn, was
8 examined and testified as follows:

9 THE CLERK: Please have a seat in witness
10 box and state your full name for the Court.

11 THE APPLICANT: Edward Tyler.

12 DIRECT EXAMINATION

13 BY MS. KAZMIERSKI:

14 Q. Mr. Tyler, you're currently serving a 40-year
15 prison term for murder; is that correct?

16 A. Yes, sir.

17 Q. And you pleaded guilty to murder on June 4th, 2008,
18 correct?

19 A. Yes, sir.

20 Q. And Mr. Ness who's sitting back here in the
21 gallery, he was your lawyer at the time?

22 A. Yes, sir.

23 Q. And at the time of your plea, right?

24 A. Yes, sir.

25 Q. Okay. Did you have a chance to discuss your case

EDWARD TYLER - DIRECT BY KAZMIERSKI

1 and the facts of your case with Mr. Ness?

2 A. No, sir.

3 Q. Did you ever meet with Mr. Ness?

4 A. I met with him once.

5 Q. Now Mr. Ness was ultimately the lawyer that
6 negotiated the plea agreement; is that correct?

7 A. Yes, sir.

8 Q. But you had a lawyer with Mr. Ness's firm before
9 Mr. Ness took over your case?

10 A. Yes, sir.

11 Q. And who was that?

12 A. Patrick Wright.

13 Q. Okay. And is it your understanding that before
14 Mr. Wright was appointed your lawyer there was a third
15 lawyer that was also involved in your case, Mr. Kent
16 Kirkland?

17 A. No, sir.

18 Q. You're not aware of that?

19 A. Not on this case.

20 Q. Okay. Did you ever have a chance to talk with
21 Mr. Wright?

22 A. Yes, sir. At the evaluation, before the last
23 evaluation he told me he was leaving and Mr. Ness would
24 be my lawyer. So.

25 Q. Okay. Explain what you mean by "before the

EDWARD TYLER - DIRECT BY KAZMIERSKI

1 evaluation". Did you have a mental health evaluation?

2 A. Yes, sir.

3 Q. Before going to trial?

4 A. Uh-huh.

5 Q. Did you and Mr. Wright talk about the facts of your
6 case and the evidence that the State had?

7 A. No. He just telling me that the most time I could
8 get was, like, 35 years.

9 Q. So Mr. Wright advised you that the maximum sentence
10 was 35 years?

11 A. 35 years, voluntary manslaughter, something like
12 that. He was trying to get me voluntary manslaughter,
13 something like that.

14 Q. Okay. And after Mr. Wright left Ness and Jett Law
15 Firm, Mr. Ness took over your case; is that your
16 understanding?

17 A. Yes, sir.

18 Q. Did you have conversations with Mr. Ness about your
19 case?

20 A. Once when he came to visit me at the county jail.
21 That was it.

22 Q. With either Mr. Ness or Mr. Wright, did you ever
23 mention that your wife had a violent history?

24 A. No.

25 Q. You didn't mention that to either one of them?

EDWARD TYLER - DIRECT BY KAZMIERSKI

- 1 A. No. They never asked.
- 2 Q. Was your wife ever violent towards you?
- 3 A. Yes, sir.
- 4 Q. The day of the murder, it was October 6th, 2006; is
5 that correct?
- 6 A. Yes, sir.
- 7 Q. Was your wife violent to you that day?
- 8 A. Yes, sir. She had a knife.
- 9 Q. She was wielding a knife --
- 10 A. Yeah.
- 11 Q. -- at the time of the incident?
- 12 A. Yes, sir.
- 13 Q. Did you talk about that with Mr. Ness or
14 Mr. Wright?
- 15 A. I think I told Mr. Wright about that. I think now.
- 16 Q. And why was it important for you, for you to talk
17 with Mr. Wright about that?
- 18 A. Because, I mean, I was really defending myself.
- 19 Q. And that could have been a defense --
- 20 A. Yeah.
- 21 Q. -- that you may have asserted if you had gone to
22 trial, correct?
- 23 A. Yes, sir.
- 24 Q. Okay. Did Mr. Ness talk to you about the charges
25 you were facing?

EDWARD TYLER - DIRECT BY KAZMIERSKI

1 A. He told me once that I can get up to a life
2 sentence. That was the time we met in the county jail.
3 He told me about the plea. He was trying to get me a
4 lesser plea, 30 years. So I guess I went through with
5 the 40 years.

6 Q. Okay. Did Mr. Ness express that he had talked with
7 Mr. Wright about your case and that he was aware of the
8 conversation that you had?

9 A. No.

10 Q. Was it your understanding -- did Mr. Ness ever talk
11 with you about any possible defenses that you may have?

12 A. No.

13 Q. Would you have pleaded guilty to murder if you
14 could have asserted a defense of self-defense at trial?

15 A. Would I have pleaded guilty? No.

16 Q. Did Mr. Ness ever talk with you about using a
17 battered-spouse defense?

18 A. No. Like I told you, me and Mr. Ness talked one
19 time. Then the next time we talked was at, when I went
20 to court.

21 Q. Did Mr. Ness ever talk to you about going to trial
22 and the possibility that you could be convicted of a
23 lesser-included offense?

24 A. No. Everything --

25 Q. But Mr. Wright may have talked to you about that?

EDWARD TYLER - CROSS BY GOURLEY

1 A. Yeah.

2 Q. Did Mr. Ness go over the State's evidence with you
3 before your plea deal?

4 A. Nobody went over the State evidence with me.

5 Q. Did you understand the charges you were facing when
6 you pleaded guilty?

7 A. All I know I'm charged with murder and that's it.
8 I don't know too much about the law, you know. And 40
9 years sounded better than a life sentence, so I went with
10 the number.

11 Q. If you had had additional conversations with
12 Mr. Ness concerning the possibility of going to trial and
13 the possibility of asserting defenses or being convicted
14 of a lesser-included offense, would you have still
15 pleaded guilty?

16 A. No.

17 Q. Is there anything else from your post-conviction
18 relief application that you feel is important for the
19 Court to hear?

20 A. I don't know

21 MR. KAZMIERSKI: I don't have any further
22 questions, Your Honor.

23 THE COURT: All right. Thank you.
24 Mr. Gourley?

25 MR. GOURLEY: Thank you, Your Honor.

EDWARD TYLER - CROSS BY GOURLEY

CROSS-EXAMINATION

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BY MR. GOURLEY:

Q. Mr. Tyler, what did you and Mr. Ness talk about during your one meeting in the county jail?

A. He told me that -- he told me that if I go to trial --

Q. Uh-huh.

A. -- that the solicitor said that they couldn't miss and I would get a life sentence.

Q. And you'd be what?

A. Get a life sentence.

Q. Life sentence?

A. Or he would try -- he would try to get me a lesser -- I mean, 40 years was up there. Basically saying, take the 40 years because if you go to trial you get a life sentence.

Q. And your attorney advised you when you pled guilty you were going to get 40 years?

A. Yeah.

Q. If the judge accepted the negotiations?

A. Uh-huh.

Q. And you plead guilty because you didn't want to get life?

A. Pretty much.

Q. Okay. 40 years sounded better than life?

EDWARD TYLER - CROSS BY GOURLEY

1 A. It still a life. I got a chance.

2 Q. Yes, sir. Now, you're saying that Mr. Ness never
3 asked you about your wife allegedly having a knife?

4 A. No.

5 Q. Okay. Let's just talk about what kind of happened
6 that night or what the State was alleging happened.
7 Basically you shot your wife while she was walking down
8 the stairs, right?

9 A. No.

10 Q. What did the State allege that you did, in your
11 words?

12 A. I don't know what the State allege.

13 Q. Okay.

14 A. I mean, whatever they -- what did they say?

15 Q. I'm asking you.

16 A. I mean, if you look at the warrant. I mean, if --
17 they didn't investigate it. They said that time of death
18 three o'clock. Ain't no way I was there at three
19 o'clock.

20 Q. Okay. Had you gone to trial, what would your
21 defense have been?

22 A. If I had gone to trial knowing it would have been
23 an investigation of battered spouse syndrome, whatever.
24 I mean, I would have took it to trial.

25 Q. So you're saying you shot your wife because she

EDWARD TYLER - CROSS BY GOURLEY

1 abused you?

2 A. I mean, it was, like, she was trying to hurt me.

3 Q. Okay.

4 A. Like, self-defense.

5 Q. Self-defense --

6 A. Yeah.

7 Q. -- is what you would have proceeded to trial on?

8 A. Yes.

9 Q. Okay. How big was your wife?

10 A. She was 310.

11 Q. 310?

12 A. Yeah, she was bigger than me. Now. I was 260 at
13 the time.

14 Q. Okay. How tall was she?

15 A. Five-10 something like that.

16 Q. I mean, Mr. Tyler, you're a big guy.

17 A. Now, I am.

18 Q. Okay. And your wife was -- how was she physically
19 abusing you?

20 A. I mean, she -- don't get me wrong, she was a good
21 woman but she did love the fight.

22 Q. Okay. And what do you mean by fight? Like, fist
23 fight?

24 A. She loved to fight. Put it like that.

25 Q. How many altercations did you all get in in the

EDWARD TYLER - CROSS BY GOURLEY

1 past?

2 A. There were a few.

3 Q. A few?

4 A. (Nods head.)

5 Q. And you didn't tell your attorney about any of
6 those altercations?

7 A. He never asked.

8 Q. Okay. And you didn't tell your attorney about her
9 having a knife?

10 A. No. I told Mr. Wright about the knife.

11 Q. Okay. You told Mr. Wright about the knife?

12 A. Yeah.

13 Q. You didn't tell Mr. Ness?

14 A. He never asked. When he came and talked to me, it
15 was basically what was on the table is a life sentence or
16 a 40-year plea.

17 Q. Okay.

18 A. Don't get me wrong, Mr. Ness was a good lawyer and
19 all of that.

20 Q. Yes, sir.

21 A. But he never asked those questions.

22 Q. Okay. And had he asked those questions and looked
23 into the battered spouse and the self-defense claim,
24 those are your issues that you have with Mr. Ness?

25 A. Yes, sir.

EDWARD TYLER - REDIRECT BY KAZMIERSKI

1 Q. And had he done those things you would have gone to
2 trial?

3 A. Yes, sir.

4 MR. GOURLEY: Okay. Beg the Court's
5 indulgence, Your Honor.

6 THE COURT: Sure.

7 (Pause.)

8 MR. GOURLEY: Your Honor, I don't have any
9 other questions. Thank you, Mr. Tyler.

10 THE COURT: Okay. Thank you. Any
11 redirect?

12 MR. KAZMIERSKI: A few questions, Your
13 Honor.

14 THE COURT: Okay. Sure.

15 REDIRECT EXAMINATION

16 BY MS. KAZMIERSKI:

17 Q. Mr. Tyler, you said that you chose to plead guilty
18 because you were contemplating a 40-year sentence versus
19 a life sentence?

20 A. Yes, sir.

21 Q. And 40 years just sounded better?

22 A. Yes, sir.

23 Q. Would you have done that if you had known that you
24 could have asserted certain defenses?

25 A. I wouldn't have took the 40 if I had known that.

EDWARD TYLER - RECROSS BY GOURLEY

1 Q. Would you have accepted a 40-year sentence if you
2 had the opportunity to discuss with your lawyer the
3 circumstances that surrounded the incident such as your
4 wife may have had a knife at the time, and you could
5 have -- may have asserted a defense of self-defense or
6 you may have gone to trial and you could have been
7 convicted of a lesser offense?

8 A. I would have went to trial.

9 MR. KAZMIERSKI: That's all, Your Honor.

10 THE COURT: Okay. Thank you.

11 MR. GOURLEY: Your Honor, if I may can ask
12 one question.

13 THE COURT: Sure.

14 RECROSS-EXAMINATION

15 BY MR. GOURLEY:

16 Q. You knew about your spousal abuse and you knew
17 about your wife having a knife before you pled guilty.
18 You were aware of all those factual circumstances prior
19 to pleading guilty?

20 A. Repeat again.

21 Q. You knew about your wife having a knife and you
22 knew about your wife abusing you prior to you entering
23 your guilty plea, right?

24 A. Yeah.

25 MR. GOURLEY: Okay. Thank you. No further

RICHARD NESS - DIRECT BY GOURLEY

1 questions, Your Honor.

2 THE COURT: You may step down. Thank you
3 so much.

4 Mr. Kazmierski, any additional witnesses?

5 MR. KAZMIERSKI: No other witnesses, Your
6 Honor.

7 THE COURT: All right. Mr. Gourley?

8 MR. GOURLEY: Yes, Your Honor. We call
9 Mr. Ness to the stand, please.

10 RICHARD NESS, having been duly sworn, was
11 examined and testified as follows:

12 THE CLERK: Please have a seat in the
13 witness box, state your full name for the Court.

14 THE WITNESS: Richard Ness.

15 DIRECT EXAMINATION

16 BY MR. GOURLEY:

17 Q. Mr. Ness, how long have you been practicing law?

18 A. This is my 32nd year.

19 Q. And were you appointed or retained in this case; do
20 you recall?

21 A. I was not appointed to represent Mr. Tyler. I was
22 retained by his family.

23 Q. Did you have the opportunity -- or, did you file
24 Rule Five motions, Brady motions in this case?

25 A. I did. The standard motions for discovery and

RICHARD NESS - DIRECT BY GOURLEY

1 exculpatory information. I have copies somewhere in the
2 file. I looked at them earlier today.

3 Q. Okay. Did you have the opportunity to review that
4 material with Mr. Tyler before his plea?

5 A. Oh, sure. He was in jail for probably better than
6 a year before the plea came up.

7 Q. How many meetings would you say you had with
8 Mr. Tyler roughly?

9 A. Well, I had Patrick Wright who was an associate in
10 my office.

11 Q. Okay.

12 A. Between he and I, we went back and forth over it.
13 He probably saw Mr. Tyler more than I did simply because
14 he's a younger lawyer, he had less things to do.

15 Q. Yes, sir.

16 A. But the notes in my file from meetings with
17 Mr. Tyler that Mr. Wright wrote, there are notes in my
18 file that I wrote in discussions with Mr. Tyler. I also
19 met with Mr. Tyler's brother, Mark Tyler, and I met with
20 his dad and several other relatives a couple of times,
21 got background information from them regarding whatever
22 they could tell me about his history and, the history
23 with -- between he and his wife. Those sorts of things.

24 Q. And you mentioned his history with his wife. Can
25 you kind of expound on that just a bit?

RICHARD NESS - DIRECT BY GOURLEY

1 A. Well, I think it had been kind of a rocky
2 relationship would probably be the best way to say it.
3 I'm not sure -- I don't remember whether they were living
4 together at the time that the incident happened or not.
5 But I know that the -- we got, through the solicitor's
6 office we got the histories of both of the, both
7 Mr. Tyler and his wife, criminal histories. There was
8 some criminal domestic violence issues between them. I
9 think there had been maybe one guilty plea for her for
10 CDV.

11 Q. Okay. It's a fair characterization to say that you
12 were well aware of Mr. Tyler and his wife's past history
13 regarding any kind of domestic disputes?

14 A. Yes, sir. We knew it was a rocky relationship
15 between them.

16 Q. Did you ever contemplate any kind of spousal-abuse
17 syndrome or anything like that in Mr. Tyler's case?

18 A. No, sir. We looked at the general issues you have
19 to look at when you're trying to decide about spousal
20 abuse or self-defense, those sorts of things. And
21 Mr. Tyler according to my notes and the medical records
22 we've got from various places, he was six-three, about
23 280 pounds back then.

24 Q. Yes, sir.

25 A. She was five-six and about, I think she weighed

RICHARD NESS - DIRECT BY GOURLEY

1 about 315 pounds, according to medical records.

2 Q. Yes, sir.

3 A. So I didn't, I didn't look at it from the situation
4 that she would be an abuser to him. I think they got
5 into some fights but thinking that he would be afraid of
6 her, that's not something that came up in any of our
7 discussions with her -- or with him about her.

8 Q. Okay. In your opinion with 32 years of experience,
9 did this case fit a profile of a spousal abuse situation
10 or defense?

11 A. It did not. Plus the facts of that particular day
12 were directly against that. I mean, they were arguing
13 over a TV, a TV set the day that the incident happened.
14 Mr. Tyler came in to wherever Mrs. Tyler was with a
15 single-barrel shotgun. He shot her one time with the
16 single-barrel shotgun, hit her in the back, lower back
17 and buttocks area. And then she went outside or either
18 fell down outside. And there were four eyewitnesses to
19 this. He walked up to her within a matter of a couple
20 feet from her and pointed the gun at her chest and pulled
21 the trigger with her on the ground.

22 Well, the facts didn't really warrant a whole lot
23 of those kinds of issues, I didn't think.

24 Q. Yes, sir.

25 A. We had four eyewitnesses that all said basically

RICHARD NESS - DIRECT BY GOURLEY

1 the same thing.

2 Q. In addition to the four eyewitnesses, was Mr. Tyler
3 pulled over with the weapon as well later on after that?

4 A. Yeah. He left the scene that afternoon in midday,
5 I think it was, when this thing happened and
6 disappeared. They put out a BOLO kind of thing for him.
7 They didn't find him for five or six hours and then in
8 the early evening he came back to the area where his home
9 was.

10 Q. Okay.

11 A. And the police were still around and they arrested
12 him and they found a shotgun in the car, a single-barrel
13 shotgun.

14 Q. Did Mr. Tyler ever -- well, being that Mr. Wright
15 was an associate of yours, you were aware of any kind of
16 conversations Mr. Wright would have had with Mr. Tyler or
17 read his notes?

18 A. Oh, yeah. Mr. Wright and I talked a lot about this
19 case trying to figure out a way to defend it.

20 Q. Okay.

21 A. Patrick had worked in some criminal defense work up
22 in Columbia before he came back to Bamberg.

23 Q. Yes, sir.

24 A. And so Patrick knew his way around a criminal court
25 but he was an associate in my office and we both worked

RICHARD NESS - DIRECT BY GOURLEY

1 on the case.

2 Q. Okay. If -- did Mr. Tyler ever express to you or
3 if your notes reflect Mr. Tyler ever express to
4 Mr. Wright any kind of discussion about his wife
5 potentially having a knife or any kind of self-defense
6 claim?

7 A. There was discussions of a knife. We knew that
8 allegation was out there, but no knife was ever found.

9 Q. Okay.

10 A. None of the four eyewitnesses saw a knife. I've
11 got that in my notes that we had checked on that all the
12 way around. And there was no, no evidence other than
13 what Mr. Tyler said about a knife.

14 And I, and I knew that's what he was going to say
15 if he testified in the case, but given the facts of the
16 case, I just didn't think that was going to get out of
17 the batter's box, clearly not to first base.

18 Q. Okay. And did you explain all of this to Mr. Tyler
19 before his entering of the plea?

20 A. You know, it's been seven years. I can't tell you
21 that I explained all of that to him.

22 Q. Yes, sir.

23 A. But I know Mr. Wright and I both talked to him at
24 different times about the difficulty we were having
25 trying to find a way to defend his case and do anything

RICHARD NESS - DIRECT BY GOURLEY

1 beyond a murder charge. We looked at manslaughter, a
2 possibility of that was a idea but the solicitor's office
3 would not discuss a manslaughter plea with us at all.
4 And the facts didn't really warrant it as we thought or
5 we were hoping to get a lesser plea for manslaughter.

6 Q. Okay.

7 A. It just didn't work out. It never did happen. He
8 tried that.

9 Q. Okay. And then ultimately Mr. Tyler pled. And did
10 you kind of discuss -- was this a negotiated sentence,
11 recommended sentence, kind of things like that?

12 A. It was a negotiated sentence to, we tried to get a
13 30-year sentence once we realized we had to deal with the
14 murder conviction itself or the guilty plea on murder.

15 We tried to get a 30-year agreed-upon sentence with the
16 solicitor's office and they would not even talk to us
17 about it.

18 I've got two or three different letters where
19 they'd maybe write us a letter and offer a plea in the
20 amount of 40 years.

21 Q. Did Mr. Tyler ever express any interest to you in
22 wanting to plead guilty?

23 A. Yeah. I mean, in a couple of the letters, I
24 believe Mr. Tyler wrote me a letter and said, "please get
25 me a 30-year sentence, I don't want to do life or 40

RICHARD NESS - DIRECT BY GOURLEY

1 years". So that was the discussion -- I mean, one of the
2 difficulties we had with Mr. Tyler is that they put him
3 in, I believe, Lee Correctional Institution outside of
4 Bamberg for a fair amount of time. And so we didn't have
5 a lot of close access to him but he wrote us some
6 letters.

7 And those letters indicated that he wanted to work
8 out some kind of plea which is why we were going for
9 either manslaughter or trying to get a 30 year
10 agreed-upon sentence, and neither one of them worked out.

11 Q. Do you have a copy of that letter by chance?

12 A. If you give me a second I can find it. May I?

13 THE COURT: Yeah, please.

14 (Pause.)

15 BY MR. GOURLEY:

16 Q. Mr. Ness, if it's not immediately available it's
17 fine.

18 A. Well, I saw it today in this file.

19 Q. Yes, sir.

20 A. I just can't put my hand on it just right this
21 second.

22 THE COURT: It doesn't bother me to take a
23 few minutes to look for it.

24 MR. GOURLEY: If you don't mind, Mr. Ness

25 THE COURT: Yes, sir.

RICHARD NESS - DIRECT BY GOURLEY

1 THE WITNESS: Go ahead and look for it?

2 MR. GOURLEY: Yes, sir. Please. I
3 apologize.

4 THE WITNESS: (Complying.) Here it is.

5 BY MR. GOURLEY:

6 Q. All right. Mr. Ness, this is a true and accurate
7 representation of a letter you received from Mr. Tyler?

8 A. Yes, it would have been signed by Mr. Tyler and I
9 don't know if I've got the envelope or not --

10 Q. Okay.

11 A. -- that he mailed it, but he would have mailed it
12 to me.

13 Q. And having been his counsel, do you recognize his
14 signature?

15 A. Yes. It comports with all the other letters. He
16 sent me a letter at times. That's one that he talks
17 about 30 years. He says to me: "I know that you're
18 doing your best but I need for you to try a little harder
19 for that 30 years. I'm still praying. Is there any way
20 you can get me back at Bamberg Detention Center."

21 And he goes on about trying to get back. They had
22 him either in Allendale or Lee, I believe. He was out of
23 town. Just because the Bamberg jail wasn't always set up
24 to hold prisoners that long.

25 MR. GOURLEY: Your Honor, if I may enter

RICHARD NESS - DIRECT BY GOURLEY

1 this as State's One.

2 THE COURT: Okay. Any objection? Have you
3 seen it?

4 MR. GOURLEY: He has not. (Document shown
5 to counsel.) I'll make copies.

6 (Pause.)

7 MR. KAZMIERSKI: (Conferring with
8 Applicant.)

9 Your Honor, Mr. -- I object to introducing
10 this as Mr. Tyler believes that this is not his
11 handwriting.

12 THE COURT: Okay.

13 MR. KAZMIERSKI: and is not a letter that
14 he sent to Mr. Ness.

15 THE COURT: Based on the testimony of
16 defense counsel identifying that as a letter he
17 received from the defendant, your objection is
18 overruled and it will be admitted into evidence.
19 Thank you.

20 You can address that in cross-
21 examination -- in your examination.

22 (State's Exhibit No. 1, letter, received
23 into evidence.)

24 MR. GOURLEY: Your Honor, that's all the
25 questions I have for Mr. Ness.

RICHARD NESS - CROSS BY KAZMIERSKI

1 THE COURT: All right.

2 MR. GOURLEY: Thank you, Mr. Ness.

3 CROSS-EXAMINATION

4 BY MR. KAZMIERSKI:

5 Q. Good afternoon, Mr. Ness.

6 A. Hi.

7 Q. You mentioned that you and Mr. Wright were both
8 involved in Mr. Tyler's case, correct?

9 A. Yeah. I was retained as the lawyer by his family
10 to defend him. Mr. Wright was a young lawyer working in
11 my office.

12 Q. And Mr. Wright ultimately left your firm; is that
13 correct?

14 A. Yes, sir. He left. He got a job with the State
15 and left and went back to Columbia. I think he had a
16 girlfriend in either Orangeburg or Columbia and he moved.

17 Q. Did you and Mr. Wright talk at length about
18 Mr. Tyler's case?

19 A. Yes, sir.

20 Q. And you mentioned that you had some discussions
21 with him about possible defenses or how you were going to
22 defend the case. What were some of the ideas that you
23 came up with?

24 A. Well, we had hoped to possibly manslaughter
25 because -- the heat of passion kind of thing because

RICHARD NESS - CROSS BY KAZMIERSKI

1 Mr. Tyler had come in -- not a lot of a reason we could
2 figure out. He had come in and shot his wife, according
3 to the evidence, over a television set. He wanted the TV
4 and she had the TV and they were fighting over, you know,
5 arguing over the TV possession. So we looked at it from
6 a heat of passion standpoint.

7 You know, you always look at a case to see did your
8 client commit the crime. But in this case we had four
9 eyewitnesses. The shotgun was found. Dad identified the
10 shotgun as being his father's shotgun. I know it wasn't
11 Mr. Tyler's and it was missing from his father's house.

12 So once we got past the fact that our client had
13 some serious legal problems here, then we tried to figure
14 out starting with manslaughter and then we looked at, you
15 know, the murder statute trying to figure out a way to
16 work around that where he wouldn't get a life sentence.
17 And that's why we were looking at the 30 years.

18 And Mr. Tyler according to the notes that I, I
19 think the notes that we have, my recollection, seven
20 years ago, and the letter he wrote that I had, we worked
21 -- and I think there's a letter from me to Mr. Tyler
22 saying we can't work out the 30 years. And that just
23 didn't happen.

24 You know, the battered-spouse syndrome. I know
25 about that. We've had cases involving that. We won a

RICHARD NESS - CROSS BY KAZMIERSKI

1 case several years ago involving that. But it just
2 didn't fit the facts of this case and I didn't see the
3 abuse issue. If Mr. Tyler had been five foot six and his
4 wife six foot three, maybe that would have been something
5 we could have looked at and come up with a little bit
6 more information on. But Mr. Tyler is a large man and I
7 just didn't see that that was going to be something that
8 a jury would buy even if he went in and got on the stand
9 and testified to it.

10 Q. Okay. You mentioned eyewitnesses. Now, this case
11 started, the incident started inside the house; isn't
12 that right?

13 A. It was in a building of some sort. I don't
14 remember if it was a house or a kitchen or exactly what
15 it was. It started in a dwelling of some sort.

16 Q. And were those witnesses inside of the house at the
17 time; is that your recollection?

18 A. No, I think they were outside. It might have been
19 one that was inside, but all of them saw at least a
20 second shot that happened when he walked over to her on
21 the ground and shot her more or less at point-blank range
22 laying on the ground.

23 Q. So to the best of your knowledge, was anyone going
24 to be able to testify as a witness to what happened
25 inside the house to what led up to the disagreement and

RICHARD NESS - CROSS BY KAZMIERSKI

1 the conflict?

2 A. If I can look back at my notes I can tell you.
3 This is seven years ago.

4 Q. Sure.

5 A. Or eight years ago, really. (Looking through
6 documents.)

7 There was a witness, Tyrone Moncrief, who said that
8 he heard a shot in the house and then when Rosalyn Tyler
9 came outside, was on the ground, that Mr. Tyler came up
10 and shot her.

11 There was a witness, Willie Rogers. And Willie
12 Rogers was the brother of Rosalyn Tyler and was talking
13 to Rosalyn Tyler on the telephone. And they were
14 actually talking about Mr. Tyler, I think, on the
15 telephone when he walked in. And she told her brother,
16 according to this statement I'm looking at, that he had a
17 gun and told her to leave. She said, "Paul, I'm
18 leaving -- and she said, "Paul, I'm leaving now". And
19 then Paul says he heard over the telephone a shot.

20 So from that standpoint there was no evidence of
21 any fighting going on in the house at that point in time,
22 it would be a self-defense call or anything like that.

23 Another witness, Minnie Carter, says that Rosalyn
24 was talking to her brother on the telephone, that she
25 heard Rosalyn Tyler say, "Don't point that gun at me."

RICHARD NESS - CROSS BY KAZMIERSKI

1 And said that she walked down the stairs, outside. He
2 shot her. She fell on the ground and begged for someone
3 to help her.

4 Then there was another witness, Henry Odom, who I
5 think was actually a friend of Mr. Tyler. And they heard
6 the commotion outside, heard yelling and they went
7 outside. He wasn't an eyewitness to the first shot but
8 he was to the second one.

9 We looked at it from all those angles and that's
10 the evidence we had to deal with.

11 Q. I'm going to go back to my original question. But
12 there was -- there would not have been any eyewitness
13 that could describe the events that led up to the
14 incident where Ms. Rosalyn Tyler was shot, the first shot
15 inside the house though; is that correct?

16 A. No, it sounds like the lady actually may have seen
17 it and then certainly the brother Paul was talking to her
18 on the phone. So there wasn't any fight going on
19 according to Paul, or anything else other than Edward
20 Tyler came in the house and --

21 Q. Other than her telling him that she was getting
22 ready to leave?

23 A. Yeah. We looked at it from admissibility of those
24 issues, could that come in, talking to her on the
25 telephone. We looked at it from -- one of them says,

RICHARD NESS - CROSS BY KAZMIERSKI

1 "Help me," I think. And I looked at the dying
2 declaration standpoint. We looked at every angle we
3 could think of trying to figure out how to defend the
4 case. It was just a tough case.

5 Q. Did you interview any of those witnesses? Did you
6 talk to any of them?

7 A. Yes. I got some notes in there. I talked to a
8 couple of them on the phone. I knew Henry Odom. I think
9 I talked to him. I didn't know Paul but I think I talked
10 to him as well.

11 Q. And there were -- and when you talked to them you
12 noticed some inconsistencies with the physical evidence
13 and what they wrote in their statements; is that correct?

14 A. Well, there are always some inconsistencies in what
15 somebody sees but if you add them all together they all
16 basically saw the same thing.

17 Q. And you also mentioned that you were aware that
18 Mr. Tyler and Ms. Tyler had a rocky relationship, right?

19 A. Yeah. Yes, sir.

20 Q. Did -- in your discussions with the solicitor, did
21 you bring up their relationship past in your discussions
22 and your negotiations in order to try to get a
23 manslaughter plea?

24 A. Well, the solicitor would have known that because
25 the criminal record issue is -- about CDV that I saw,

RICHARD NESS - CROSS BY KAZMIERSKI

1 that was given to me by the solicitor's office.

2 We also subpoenaed records. Mr. Tyler had some
3 sort of an alcohol or a drug problem. We subpoenaed
4 records from the Michael Watson Treatment Facility which
5 is an alcohol and drug abuse type center.

6 We got the autopsy report from MUSC. I don't know
7 if I subpoenaed that or if the solicitor's office gave
8 that to me.

9 We also filed a motion for a competency evaluation
10 of Mr. Tyler. That was granted so there was an order for
11 competency to stand trial evaluation pursuant to State
12 versus Blair. And there was an order for criminal
13 responsibility and capacity to conform evaluation,
14 McNaughton test kind of thing, right from wrong. Two
15 different orders which I have copies of in my file which
16 we were given as a result of our motions. And then of
17 course we had the report from, I guess it's the SCDC
18 psychiatrist that did the evaluations pursuant to the
19 Court's order.

20 We had another set of records here that, which I
21 think were all of the records from the evaluation and the
22 interviews and stuff that they had at SCDC. We had the
23 records and we would have produced them to the
24 solicitor's office anything we got by subpoena because,
25 you know, the discovery sharing of documents.

RICHARD NESS - CROSS BY KAZMIERSKI

1 Q. So did those discussions come up, based on the
2 rocky relationship, the possibility of a manslaughter
3 plea, or instead of a 40-year sentence what Mr. Tyler was
4 looking for you to do was to get a 30-year sentence, did
5 those topics come up with the solicitor?

6 A. You asked me did I request a 30-year sentence with
7 the solicitor's office?

8 Q. Yes.

9 A. Yes, sir. And they just ignored that and they sent
10 me two or three different letters because several terms
11 of court passed by before this case actually came up.
12 And they thought it might come up and so they sent me the
13 letter that the solicitor's office normally sends you
14 saying your case is coming up we'll make this offer to
15 you. Each time they said 40 years on a murder plea is
16 the best we're going to do, basically.

17 Q. And you informed Mr. Tyler of that negotiated plea
18 offer; is that right?

19 A. Oh sure. I mean, he knew that but that's why he
20 was asking me to try to get it to 30. And we did our
21 best we could but they just, you know, they dealt from
22 strength in this case. They had four eyewitness and it
23 wasn't any way of getting them to move.

24 Q. Now you provided this letter. It's written by
25 Mr. Tyler that you purport that you received from

RICHARD NESS - CROSS BY KAZMIERSKI

1 Mr. Tyler?

2 A. It would have come in the mail to me in an envelope
3 addressed from one of correctional institutions, Edward
4 Tyler.

5 Q. And it seems like this would have been in response
6 to the letter that you sent him regarding a 40-year
7 negotiated plea; is that right? Here he's asking you to
8 --

9 A. I don't remember which came first. I mean, I know
10 there's a letter in my file that I wrote him and told him
11 that the solicitor's office wasn't really being agreeable
12 to try to work out any kind of plea other than 40 years.

13 Q. Now you knew Mr. Tyler. You questioned his
14 competency. You had a competency evaluation done. You
15 knew he had some drug and alcohol history. And then --
16 letters like this, there are a number of other letters in
17 your file that are similar to this.

18 Do you think he understood based on this letter the
19 terms of the plea agreement and what was happening in his
20 case?

21 A. Yes, sir. I wouldn't have let him plead guilty if
22 I thought he had any problem with understanding it. By
23 that time -- by the time he pled we already had the
24 orders from these competency evaluations and they said
25 that he had known right from wrong at the time the crime

RICHARD NESS - CROSS BY KAZMIERSKI

1 was committed.

2 And in my discussions and/or Patrick Wright's
3 discussions with Mr. Tyler along and along, you know,
4 during the pendency of his case, if we thought he had
5 gotten incompetent or was incompetent the day he pled
6 guilty, I wouldn't have let him plead guilty.

7 Q. At that critical point when you had the
8 conversations with Mr. Tyler about pleading guilty and
9 accepting the 40-year negotiated plea, leading up to
10 that, you mentioned he was housed at -- either in
11 Allendale or maybe Lee and that you corresponded with
12 him, letters from you and letters from him, back and
13 forth. Don't you think it was important that you sit
14 down and talk to him face to face to lay out the terms of
15 the deal, the State's evidence, and go over all of that
16 with him rather than just corresponding?

17 A. Mr. Wright did meet with him face to face and then
18 I met with him, we brought him in the week before the
19 trial, I think, and I met with him again that day and I
20 met with his brother who was also -- Mark Tyler, who was
21 actually a guy that I had worked with. I represented the
22 Department of Social Services in some cases and Mark
23 worked for DSS. And he and I talked a number of times
24 about how to deal with his brother's case, you know.
25 It's a family discussion kind of thing.

1 And we had one meeting where we had Mark Tyler,
2 Mr. Tyler, Sr., the dad, and a couple of either friends
3 or uncles about what we could do to try to work this case
4 out. And, you know, our discussions were probably,
5 wasn't anything confidential about it but the discussions
6 were probably along the lines of we were trying to work
7 out a plea agreement. And nobody within the family that
8 I talked to ever expressed any problems with his, or
9 concern with his competency.

10 MR. KAZMIERSKI: Okay. Thank you,
11 Mr. Ness. I don't have any other questions, Your
12 Honor.

13 THE COURT: All right. Mr. Gourley, any
14 follow up?

15 MR. GOURLEY: I don't have any follow-up
16 questions, Your Honor.

17 THE COURT: All right. Mr. Ness, you may
18 step down. Thank you very much.

19 THE WITNESS: Thank you.

20 MR. GOURLEY: Your Honor.

21 THE COURT: Are we going to need him to
22 recreate the record? Should we keep him here?
23 Is he the first one that we're going to hear
24 from?

25 MR. GOURLEY: I was going to call the

BENJAMIN ROBERT MOORE - DIRECT BY GOURLEY

1 solicitor first, Your Honor.

2 THE COURT: Have a seat and we'll bring you
3 back up. Thank you, sir.

4 MR. GOURLEY: Just to have a break for the
5 record for appeal purposes so it's kind of
6 distinct.

7 THE COURT: Sure.

8 MR. GOURLEY: And, Your Honor, that would
9 conclude the witnesses for the PCR hearing aspect
10 from the State.

11 THE COURT: Let's move on to recreating the
12 record.

13 MR. GOURLEY: All right. Your Honor, we
14 call Mr. Moore to the stand, please.

15 BENJAMIN ROBERT MOORE, having been duly
16 sworn, was examined and testified as follows:

17 THE CLERK: Please have a seat in the
18 witness box and state your full name for the
19 Court.

20 THE WITNESS: Benjamin Robert Moore.

21 DIRECT EXAMINATION

22 BY MR. GOURLEY:

23 Q. Mr. Moore, how were you involved in this case?

24 A. I was the assistant solicitor assigned to the case
25 and basically my case down there in Bamberg.

BENJAMIN ROBERT MOORE - DIRECT BY GOURLEY

1 Q. Do you recall when this plea hearing took place?

2 A. I do. It's not a strong memory, but I do recall
3 the plea in general.

4 Q. And does June 4, 2008, sound like the date that it
5 was taken?

6 A. Yes, yes. We only had four terms of court --

7 Q. Okay.

8 A. -- a year in Bamberg. And we -- I know we noticed
9 it for January and then the next term of court I believe
10 was that June one.

11 Q. Okay.

12 A. And at that point we did the plea.

13 Q. Is it fair to say that you pled numerous defendants
14 in front of Judge Early?

15 A. It's fair to say I pled hundreds, maybe a
16 thousand --

17 Q. Okay.

18 A. -- defendants in front of Judge Early.

19 Q. Having pled a thousand defendants, were you
20 familiar with Judge Early's typical plea colloquy?

21 A. Yes.

22 Q. And in your experience, does Judge Early typically
23 ask the same questions during a plea colloquy?

24 A. Yes. I'd just add to that. If you had a situation
25 like this one where the person's been evaluated or

BENJAMIN ROBERT MOORE - DIRECT BY GOURLEY

1 something like that, he would go beyond the additional
2 colloquy.

3 Q. And you got my next question. Outside of the
4 evaluation, was there anything that kind of jumped out at
5 you during this plea that kind of stuck out in your mind?

6 A. No. You know, you sent me the notice a couple
7 months ago and then for today, and I have thought about
8 it. And the main thing I remember is that nothing stood
9 out as unusual. As the solicitor, you have those pleas
10 where, wow, that guy just barely made it through, and
11 usually not on the competency. Sometimes they talk
12 themselves out of guilty pleas.

13 Q. Right.

14 A. Basically their mitigation becomes I didn't do it
15 almost or things like that, or occasionally somebody
16 just, boy, he seemed weak or something like that. And,
17 on a murder case like this, especially down in Bamberg, a
18 small county, it would have stood out to me if there was
19 something about the plea that -- I don't know, that was
20 strange or would have worried me because it was such a
21 serious case.

22 Q. And nothing stood out to you or gave you any cause
23 for any concern?

24 A. Not at all.

25 Q. And is it typical for Judge Early to advise the

BENJAMIN ROBERT MOORE - DIRECT BY GOURLEY

1 defendant of the potential charges he was facing?

2 A. Absolutely.

3 Q. What about the sentences, sentencing range?

4 A. Every time, every time.

5 Q. Okay. In this case do you recall if it was a
6 negotiated sentence, recommended sentence?

7 A. It was a negotiated sentence.

8 Q. And would it have been typical for Judge Early to
9 go over what a negotiated sentence meant, with Mr. Tyler
10 in this case?

11 A. Yes, he would have.

12 Q. Does Judge Early typically ask defendants how they
13 want to plead?

14 A. Yes.

15 Q. And do you recall if Judge Early did so in this
16 case?

17 A. I don't have a specific memory of that.

18 Q. Does Judge Early typically ask the defendants
19 whether anyone was promising them or coercing them to get
20 them to plead guilty?

21 A. He always asks that.

22 Q. Do you have any specific recollection in this case
23 if that question was asked?

24 A. I don't. Like I say, I can say that that's a
25 question that I recall him asking every time.

BENJAMIN ROBERT MOORE - DIRECT BY GOURLEY

1 Q. Okay. And just for the record purposes, this was
2 seven years ago so I understand if you don't have a
3 specific recollection regarding these questions.

4 Do you recall if Judge Early typically asks the
5 defendant if he was freely and voluntarily pleading
6 guilty?

7 A. Really the same answer. That was a question he
8 always did ask. I don't have a specific memory at this
9 point to that.

10 Q. Yes, sir. What about whether or not the defendant
11 is under the influence of any kind of prescription drugs,
12 anything like that, or suffers from any kind of mental
13 incompetency?

14 A. Yeah. He always asks that. And like I said
15 before, if someone's been evaluated he would read over
16 the actual report from the psychiatrist.

17 Q. Right.

18 A. And, you know, this one mentions some alcohol, also
19 mentions some particular type of malingering about
20 wanting some kind of pills or something. But when things
21 like that come up, he would follow up in particular about
22 something like that, especially in a case this serious.

23 Q. Do you recall if he did so in this case?

24 A. I can't say that, but I will say that if there was
25 something he would read that report and if they mentioned

BENJAMIN ROBERT MOORE - DIRECT BY GOURLEY

1 something about drugs or alcohol, it just made him kind
2 of double down on that issue.

3 Q. Yes, sir. What about, does Judge Early typically
4 advise the defendants of their constitutional rights?

5 A. Absolutely. Yes.

6 Q. Do you recall that being done in this case?

7 A. No, but I sure would recall it if he didn't. In
8 fact, that's a charge that I would have actually asked to
9 approach the bench about that if he had not because I
10 didn't want my murder case coming back.

11 Q. Yes, sir. What about, do you recall if Judge Early
12 would typically ask the defendant if he was satisfied
13 with his attorney's services?

14 A. Yes, sir. He always asked that.

15 Q. And do you have any specific recollection in this
16 case?

17 A. No, sir. Not in this case, but that was a question
18 he always asked.

19 Q. And would Judge Early typically put on the record
20 his finding that the plea was entered knowingly and
21 voluntarily and intelligently?

22 A. Yes, sir.

23 Q. Do you recall if that was done in this case?

24 A. Not specifically, no.

25 Q. Does Judge Early typically advise the defendant of

BENJAMIN ROBERT MOORE - DIRECT BY GOURLEY

1 the right to appeal within 10 days after guilty pleas
2 were done?

3 A. Yes. That was one of his standard questions.

4 Q. Yes, sir. Do you recall anything about that in
5 this case?

6 A. Not specifically in this case.

7 Q. As the solicitor, do you typically have the
8 opportunity to put some of the factual context on the
9 record?

10 A. Yes. Always.

11 Q. Did you do that in this case?

12 A. Yes.

13 Q. Okay.

14 A. In a case like this, like I say, it's a big deal.
15 And we take our time and try to give more facts than we
16 normally do, just for the victim's sake in a case like
17 this, and for the Court's sake. It's a heavy burden for
18 the Court to sentence somebody in something like this.

19 Q. Yes, sir.

20 A. I wanted him to have all the facts.

21 Q. Yes, sir.

22 A. So I would have been a little more long winded than
23 normal.

24 Q. Do you recall any kind of context or what you told
25 the judge? If you don't, that's perfectly fine.

BENJAMIN ROBERT MOORE - DIRECT BY GOURLEY

1 A. No. The basic facts that you were hearing from
2 Mr. Ness about the eyewitnesses, certainly, certainly
3 went over that. That's something that stands out to me
4 because I don't think I ever had a case this strong --

5 Q. Yes, sir.

6 A. -- where I actually had eyewitnesses orally in a
7 sense or hearing.

8 Q. Yes, sir..

9 A. Through the cell phone and visually.

10 Q. Yes, sir.

11 A. So that's something that stands out to me and
12 certainly something I went over because it's just very
13 unusual.

14 Q. Does Judge Early typically ask the defendant if he
15 would agree with the recitation of the facts as stated by
16 you or agree with what's found or typed in the
17 indictment?

18 A. Yes. I don't think he asks on my recitation.

19 Q. Okay.

20 A. But the way I recall is reading the indictments,
21 did you do that.

22 Q. Yes, sir.

23 A. And specifically that type of approach --

24 Q. Okay.

25 A. -- is what I remember him doing.

BENJAMIN ROBERT MOORE - DIRECT BY GOURLEY

1 Q. Do you typically with Judge Early -- does Judge
2 Early typically ask about the defendant's prior record?

3 A. Yes, sir.

4 Q. Do you have any specific recollection about that
5 here today?

6 A. I know -- not a specific, but I always gave the
7 judge the defendant's prior criminal history.

8 Q. Okay. Do you recall if any victims spoke at this
9 plea?

10 A. I do not.

11 Q. Okay. Do you recall if Mr. Ness gave any kind of
12 mitigation statement during the plea?

13 A. Not specifically. I know that he did because he
14 always did.

15 Q. Okay.

16 A. Every defense attorney did, but --

17 Q. Yes, sir.

18 A. -- specifically what it was, no. That he did one,
19 yeah.

20 Q. Do you recall if anybody spoke on the defendant's
21 behalf outside of Mr. Ness?

22 A. It seems like he had a lot of family there, and
23 someone did. But I'm on the stand, I can't swear to it.

24 Q. Yes, sir.

25 A. But it does seem like he had family there and that

BENJAMIN ROBERT MOORE - DIRECT BY GOURLEY

1 someone spoke, but --

2 Q. Okay.

3 A. -- that's kind of a general memory. But can I
4 absolutely swear to that? No. That's what I think I
5 recall.

6 Q. And just to kind of an overall analysis. Had the
7 defendant not answered the questions appropriately, would
8 Judge Early have accepted the plea?

9 A. No.

10 Q. If there was any hesitation on the defendant's
11 part, would Judge Early have accepted the plea or would
12 he have stopped the proceedings to allow more time for
13 the defendant to discuss with his attorney?

14 A. He would have given him more time and he would have
15 been glad to tell me to get ready to try the case.

16 Q. Yes, sir.

17 A. If, if -- there definitely wasn't any, we're going
18 to force somebody to plead guilty or anything like that.
19 But he was very, solicitor, are you ready to go kind of
20 thing. When people did that kind of thing he emphasized
21 that, you know, we can try this case.

22 Q. Yes, sir.

23 A. And that's something I remember a lot, kind of look
24 at me and I'd say, yes, sir.

25 Q. So Judge Early has in the past stopped pleas if the

BENJAMIN ROBERT MOORE - DIRECT BY GOURLEY

1 defendant did not answer appropriately?

2 A. Yes. He stopped pleas. And he stops and lets them
3 know and, like I say, a lot of times the talk got into,
4 well, we can have a jury trial. This is what a jury
5 trial is. Mr. Moore, can we try this tomorrow or
6 whatever, sometimes.

7 Q. Right.

8 A. I remember that because I was, like, sometimes, oh
9 boy, I might be trying something tomorrow but, yeah.

10 Q. Yes, sir.

11 A. He would go through and that emphasize that.

12 Q. And finally, Mr. Moore, there again, just for the
13 record, there was nothing about this plea that stuck out
14 in your mind that made it somehow outside of the ordinary
15 other than the charges themselves?

16 A. Right. And I really think that because the
17 charges, you don't -- you know, solicitors office,
18 assistant solicitors, you get a lot of cases --

19 Q. Yes, sir.

20 A. -- but you don't get a lot of murder cases and you
21 remember them in particular. And it would have really
22 stood out in a case this serious if there was some kind
23 of issue.

24 MR. GOURLEY: All right. Thank you,

25 Mr. Moore.

BENJAMIN ROBERT MOORE - CROSS BY KAZMIERSKI

1 I have no further questions, Judge.

2 THE COURT: Any cross?

3 CROSS-EXAMINATION

4 BY MR. KAZMIERSKI:

5 Q. Good afternoon, Mr. Moore.

6 A. Good afternoon.

7 Q. This case, this plea deal was almost seven years
8 ago, right?

9 A. Yes, sir.

10 Q. Is it fair to say that your recollections today and
11 the answers that you provided to Mr. Gourley were based
12 on your overall experiences with Judge Early's plea
13 deals?

14 A. I would say yes. I mean, you could go back and
15 look at particular questions but most of them, it was
16 more based on course of conduct, how he normally did it.
17 But I was the assistant solicitor down in Barnwell and
18 Bamberg during that time and we mainly had Judge Early,
19 so I did a lot of work with Judge Early. So I was very
20 familiar with what he normally did.

21 MR. KAZMIERSKI: That's all the questions,
22 Your Honor.

23 THE COURT: Okay. Thank you so much. You
24 may step down.

25 THE WITNESS: You're welcome.

RICHARD NESS - DIRECT BY GOURLEY

1 MR. GOURLEY: Your Honor, I would just ask
2 that Mr. Moore be excused.

3 THE COURT: Thank you. You may be excused
4 as well. Thank you.

5 THE WITNESS: Okay.

6 MR. GOURLEY: Your Honor, we call Mr. Ness
7 to the stand, please.

8 THE COURT: All right. And you are still
9 under oath. You can take the witness stand
10 without re-swearing.

11 THE WITNESS: Still under oath.

12 THE COURT: Still under oath.

13 THE WITNESS: Yes, ma'am.

14 RICHARD NESS, having been duly sworn, was
15 examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. GOURLEY:

18 Q. Mr. Ness, this is going to be very repetitive. How
19 did you come about being present in this case?

20 A. We were retained to represent Mr. Tyler by his
21 family.

22 Q. And Mr. Tyler pled guilty on June 3rd -- 4, 2008,
23 correct?

24 A. Well, I can't tell you the date because I don't
25 have the date written down in my notes but I have my

RICHARD NESS - DIRECT BY GOURLEY

1 notes that I prepared the guilty plea from so I can tell
2 you a little bit.

3 Q. Absolutely. If you don't mind just generally what
4 you have written down, that would be fantastic.

5 A. Well, this would be my notes that I prepared prior
6 to the guilty plea. In general we told the Court or we
7 conceded that Mr. Tyler had a CDV and some cocaine issues
8 in his history, that he had one child, that he had had a
9 drug problem and had had some treatment. That was why we
10 had ordered the Dawn Center records back then.

11 Q. Yes, sir.

12 A. But that he had a lot of family support. We
13 introduced Mary Tyler, Nicole Isaac, Mark Tyler, and I
14 wrote down brother-in-law, but I don't remember if I knew
15 the brother-in-law's name but I don't have it on this
16 sheet of paper. We told the Court about the evaluation
17 that he had pursuant to the Court order. And we told the
18 Court, you know, within that evaluation it showed a mood
19 disorder and an anti-social personality trait that the
20 doctors had picked up on but that he was competent to
21 stand trial or plead guilty.

22 And that's what we would have presented generally
23 to Judge Early. I believe a couple of the family members
24 that we introduced actually said something in the
25 courtroom that day but I can't tell you that for sure.

RICHARD NESS - DIRECT BY GOURLEY

1 Q. Okay. And, Mr. Ness, how many times did you plead
2 somebody in front of Judge Early?

3 A. In front of Judge Early?

4 Q. Yes, sir.

5 A. I'd say 15 or 20.

6 Q. Okay.

7 A. Because by the time Judge Early went on the bench I
8 had been on the State's Character and Fitness Committee
9 for a number of years and they changed the rule and said
10 that if you serve on that committee you didn't have to
11 get appointed in criminal cases. So my appointments went
12 from 100s over the years down to very few in the last
13 eight or 10 years. But this was a retained case, like I
14 said.

15 Q. Were you familiar with Judge Early's plea colloquy
16 in any way?

17 A. Yeah. Sure. I've seen it happen a lot of times.

18 Q. Does Judge Early typically ask or advise the
19 potential charges with the defendant?

20 A. Yes, he would have.

21 Q. Okay.

22 A. In a murder case -- and I'm sure Judge Early was
23 thorough. If I remember it was a right detailed guilty
24 plea because of the fact it was a murder case.

25 Q. Yes, sir. Does Judge Early typically advise the

RICHARD NESS - DIRECT BY GOURLEY

1 potential sentence he was facing by pleading guilty to
2 murder?

3 A. Yes, he would have done that.

4 Q. And, Mr. Ness, is it your understanding this was a
5 negotiated plea?

6 A. Yes, it was.

7 Q. Does Judge Early typically tell the defendant what
8 a negotiated sentence meant?

9 A. Yes, sir. And he also will tell the defendant that
10 he's not bound by a negotiated sentence if he thinks
11 something else should be done.

12 Q. Do you recall if Judge Early did so in this case?

13 A. I feel sure he did. I can't tell you that I
14 specifically recall it, but I feel sure he did.

15 Q. Does Judge Early typically ask how a defendant
16 wants to plead?

17 A. Yes.

18 Q. Do you have any specific recollection if he did so
19 in this case?

20 A. Again, I'm sure he did.

21 Q. Okay.

22 A. You know, I was standing up in front of the Court
23 with my client at that point in time so I didn't write
24 down any notes on that part of the plea, but I'm sure he
25 did because every i was dotted, you know, in a murder

RICHARD NESS - DIRECT BY GOURLEY

1 guilty plea like this.

2 Q. Yes, sir. Does Judge Early typically advise the
3 defendants or ask the defendants if anybody is promising
4 or forcing them to get them to plead guilty?

5 A. Yes.

6 Q. Do you recall if he did so in this case?

7 A. I'm sure he did. I don't recall it specifically.
8 There's nothing out of the ordinary about this guilty
9 plea from the standpoint of the way that guilty pleas are
10 normally done.

11 Q. Yes, sir. Regarding -- I know Mr. Tyler had some
12 mental competency issues in the past or y'all certainly
13 looked into that prior to him pleading guilty. Do you
14 recall any kind of out-of-the-ordinary discussions with
15 Mr. Tyler on the record during his plea regarding his
16 mental competency?

17 A. No, other than I remember presenting to the judge
18 that he had been evaluated with a mood disorder and an
19 anti-social personality trait issue, hoping that
20 information would help the judge in keeping the sentence
21 down. That was my intention of telling him that.

22 Q. Okay. And do you recall if Judge Early went over
23 his constitutional rights during the plea?

24 A. I'm sure he did.

25 Q. Did Mr. Tyler -- do you recall if Judge Early asked

RICHARD NESS - DIRECT BY GOURLEY

1 Mr. Tyler if he was satisfied with your services?

2 A. I'm sure he did that too because that's something
3 he always asks. And I'm sure Mr. Tyler would have told
4 him he was satisfied with my services, at that point in
5 time at least.

6 Q. Do you recall if Judge Early advised him of his
7 right to appeal?

8 A. That's his practice.

9 Q. Yes, sir.

10 A. I can't tell you I remember that either but I'm
11 satisfied that he did.

12 Q. Had Mr. Tyler had any hesitation in pleading guilty
13 or shown any hesitation to Judge Early, do you feel that
14 Judge Early would have stopped the plea at that point?

15 A. He would have stopped it or delayed it and sent us
16 into one the rooms to discuss it to see if we wanted to
17 go forward or if we wanted withdraw what he had done back
18 up. So we would have been given that opportunity. Yes,
19 sir.

20 Q. Is there anything that stood out to you about this
21 plea outside of ordinary guilty plea colloquy except for
22 the fact that it was a murder charge?

23 A. Absolutely nothing other than his family members
24 were there and I knew a couple of them. I had worked --
25 and they had hired me, so I remember feeling really sorry

RICHARD NESS - CROSS BY KAZMIERSKI

1 for them that their brother or son in the case as it was
2 was going to go to jail.

3 Q. Yes, sir. All right. Thank you, Mr. Ness.

4 Your Honor, I don't have any other questions.

5 THE COURT: All right. Anything further
6 for Mr. Ness?

7 MR. KAZMIERSKI: Just one question, Your
8 Honor.

9 CROSS-EXAMINATION

10 BY MR. KAZMIERSKI:

11 Q. Your recollections today are based on your
12 experiences with Judge Early in guilty pleas. Is that an
13 accurate statement?

14 A. Yes, sir. That plus the other years of experience
15 before Judge Early went on the bench, too.

16 Q. And other than the notes that you had regarding
17 your impressions and your notes in order to make the
18 plea, you don't have any specific recollection about the
19 guilty plea with Mr. Tyler, do you?

20 A. The only specific recollection I've got about the
21 guilty plea was that I talked to Mark Tyler, his brother,
22 and I felt really concerned for him because I knew Mark
23 and I liked him because I had done some work with him.
24 And I remember that part. The rest of it is just pretty
25 routine. Just -- I'm satisfied it happened. I just

EDWARD TYLER - DIRECT BY KAZMIERSKI

1 don't recall it.

2 MR. KAZMIERSKI: That's it, Your Honor.

3 Thank you.

4 THE COURT: Okay. Thank you. You may step
5 down. Do you have additional questions?

6 MR. GOURLEY: No, Your Honor.

7 THE COURT: You may step down.

8 MR. GOURLEY: Your Honor, I would ask
9 Mr. Ness be excused from the subpoena.

10 THE COURT: Sure, he may be.

11 THE WITNESS: Thank you, Your Honor.

12 THE COURT: Thank you. Any additional
13 witnesses for recreating the record?

14 MR. KAZMIERSKI: Your Honor, I'd like to
15 call Mr. Tyler.

16 THE COURT: Sure. Mr. Tyler, please take
17 the stand again. You remain under oath, okay?
18 You were sworn in earlier and you are still
19 required to tell the truth.

20 EDWARD TYLER, having been duly sworn, was
21 examined and testified as follows:

22 DIRECT EXAMINATION

23 BY MR. KAZMIERSKI:

24 Q. Mr. Tyler, you heard the testimony of Mr. Moore and
25 Mr. Ness regarding the guilty plea that occurred on June

EDWARD TYLER - DIRECT BY KAZMIERSKI

1 4th, 2008, correct?

2 A. Yes, sir.

3 Q. Is there anything about their testimony that you
4 disagree with?

5 A. Yes, sir.

6 Q. And tell us what that is.

7 A. I mean, they -- since we don't have no records they
8 could come up here and say anything. I mean ---

9 Q. Specifically.

10 A. Specifically saying that they don't know. I don't
11 know. Nobody knows because we don't have no records.

12 Q. Do you remember pleading guilty?

13 A. Yeah. And I also remember them going back in the
14 room before I pleaded guilty. It was two pleas, it was a
15 30-year plea and a 40-year plea. They went in the room,
16 they come out with a 30-year plea. So they went back in
17 the room, came back out and Judge Early told the victim
18 family that they don't have to take the plea, send me to
19 trial. He promised them that he'd give me a life
20 sentence. So they went back in the room, Mr. Ness and
21 the solicitor come back with a 40-year plea.

22 Q. Anything else that you disagree with what Mr. Moore
23 and Mr. Ness testified to?

24 A. They got -- I mean, to be honest with you, ain't
25 nobody going to believe me because I'm an inmate. They

EDWARD TYLER - DIRECT BY KAZMIERSKI

1 going to believe the lawyers and the solicitors. I mean,
2 that's just the way it is. I'm just up here, I'm telling
3 the truth. Just like ain't nobody -- really, it's been a
4 long time ago. Nobody really know what was said,
5 really. Everybody just -- they just saying to just get
6 on through.

7 Q. Well, today's your chance to tell the Court what
8 you know and what you remember about it. So I'm going to
9 ask you some specific questions.

10 When you pleaded guilty, were you aware of the
11 charges that were against you?

12 A. I was aware of the murder case. And, like I said,
13 40 years sound better than a life sentence. That's why I
14 took it.

15 Q. Did you understand the consequences of pleading
16 guilty to murder?

17 A. No, sir.

18 Q. Do you remember either Mr. Ness or Judge Early
19 advising you of the consequences of, or the potential
20 consequences of pleading guilty to murder?

21 A. No, sir.

22 Q. Is there anything else based on the guilty plea, on
23 Mr. Moore's or Mr. Ness's testimony, that you think is
24 important that the Court hear?

25 A. No. I mean, just -- they couldn't give an answer.

EDWARD TYLER - DIRECT BY KAZMIERSKI

1 I mean, when they testified up here they say they wasn't
2 sure. So that show you that they don't know what was
3 going on. They can't remember. I mean, if you can't
4 remember what happened how can you sit up here and say
5 something happened if you can't remember?

6 Q. Were there aspects of what they said that you
7 specifically remember didn't happen?

8 A. I don't remember him ever explaining the plea to
9 me. I don't. I mean --

10 Q. Do you remember Judge Early asking you how you
11 plead?

12 A. No.

13 Q. Do you remember Judge Early advising you of your
14 constitutional rights?

15 A. No.

16 Q. Do you remember Judge Early asking you whether --
17 or advising you that he didn't have to accept the plea,
18 that you could have a jury trial, that was a
19 constitutional right?

20 A. No. I mean, when you're facing -- when you stand
21 in front of a judge, you know, you got a -- you getting
22 ready to get time or you don't know what's going to
23 happen, your main focus is I hope you don't say life
24 sentence. You don't really listen to no questions.

25 MR. KAZMIERSKI: Okay. I don't have any

EDWARD TYLER - CROSS BY GOURLEY

1 additional questions, Your Honor.

2 THE COURT: Okay. Mr. Gourley?

3 MR. GOURLEY: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. GOURLEY:

6 Q. Mr. Tyler, the one thing we can be sure of that
7 happened June 4, 2008, is that you pled guilty and got 40
8 years?

9 A. Yeah.

10 Q. Right?

11 A. Yeah.

12 Q. Okay. And Mr. Kazmierski just asked you a couple
13 of things. Did the judge ever explain to you what a
14 negotiated sentence was?

15 A. No, sir.

16 Q. Okay. Did he ever ask you if anyone was promising
17 you or threatening you to plead guilty?

18 A. No, sir.

19 Q. Okay. Did he ever ask you if you were pleading
20 guilty freely and voluntarily?

21 A. No, I don't think so.

22 Q. Okay. Did he ask you about your mental
23 incompetency issues?

24 A. No.

25 Q. Or any -- did he ask you if you had been drinking

EDWARD TYLER - CROSS BY GOURLEY

1 or on any kind of medication?

2 A. I was in jail.

3 Q. Okay. Fair enough. Did he ask you if you were
4 satisfied with Mr. Ness's service?

5 A. I can't recall.

6 Q. Okay. Do you recall Mr. Moore putting up the
7 factual context on the record?

8 A. I don't know. I don't remember him speaking at
9 all.

10 Q. Okay. Did anybody speak on your behalf; do you
11 recall that? Any family members, anybody like that?

12 A. Yeah.

13 Q. Who spoke?

14 A. My sister and Mark.

15 Q. And who is Mark?

16 A. My cousin. He's not my brother. He's my cousin.

17 Q. Did you say anything at your plea?

18 A. No -- yeah. Yeah, I might. I don't know.

19 Q. If you don't remember, that's fine. I understand
20 it was a very long time ago. So you don't recall talking
21 at your plea?

22 A. (No response.)

23 Q. And I think as you stated previously the only thing
24 that you were concerned about when you were pleading
25 guilty was the time that you were going to receive?

1 A. Yeah.

2 MR. GOURLEY: Thank you, Mr. Tyler. I
3 appreciate it. No further questions, Judge.

4 MR. KAZMIERSKI: I don't have any additional
5 questions, Judge.

6 THE COURT: Okay. Mr. Tyler, thank you.
7 You can step down.

8 Anything further? Would either of you like
9 to close?

10 MR. KAZMIERSKI: Briefly, Your Honor.

11 I think Mr. Tyler has established that
12 conversations were very limited with Mr. Ness,
13 that Mr. Ness's representation was below the
14 objective standard, and he would not have pled
15 guilty had he had proper representation.

16 And we'd ask the Court to grant Mr. Tyler a
17 new trial, actually vacate the guilty plea and
18 allow him to have a trial.

19 THE COURT: Okay. Thank you so much.

20 Mr. Tyler, I understand your frustration
21 that there's no transcript from your guilty plea
22 in this case.

23 I also listened to you and understand your
24 concern that a judge would hear this and would
25 automatically side with the attorneys and not

1 believe an inmate. But I think that from what I
2 heard we can recreate the guilty plea transcript
3 under these circumstances.

4 And I do believe that you're very credible
5 when you say you don't really remember the guilty
6 plea, that you were concerned you were facing a
7 40-year sentence. And I do understand that you
8 don't feel as though you understood the
9 consequences.

10 However, because you were fearful and knew
11 you were facing a 40-year sentence, that to me
12 shows that you were aware of the consequences
13 against you.

14 I also find that Mr. Moore and Mr. Ness
15 were credible when they testified that although
16 they might not be able to specifically remember
17 this plea, they do specifically remember that
18 there was nothing atypical about this plea.

19 Trial judges do guilty pleas over and over
20 and over again. Defense attorneys and solicitors
21 hear guilty pleas over and over and over again.
22 And trial judges actually have a colloquy that is
23 typed out that judges follow.

24 So, when lawyers say that the typical
25 guilty plea colloquy was followed, I think that

1 that is enough, and they say under oath that they
2 remember that, that we can be satisfied that
3 Judge Early would have gone over the substantial
4 factual basis for this plea.

5 He would have gone over Mr. Tyler's
6 constitutional rights, would have made sure that
7 Mr. Tyler was waiving those rights and choosing
8 to plead guilty, that the guilty plea was freely
9 and voluntarily entered, that there was no
10 coercion or threat in order to have Mr. Tyler
11 plead guilty, and that during the guilty plea
12 Mr. Tyler did admit to those facts.

13 His attorney, Mr. Ness, provided mitigation
14 for him. At least two family members spoke on
15 his behalf, his cousin and, I believe he said his
16 mother spoke as well, that other family members
17 were in the audience. And so I believe we can
18 recreate the guilty plea transcript.

19 With regard to the specific PCR
20 allegations, I find that the testimony from the
21 defendant and defense counsel shows that the plea
22 was entered into knowingly and voluntarily.
23 Mr. Tyler testified that he was aware that he was
24 pleading guilty to murder and that he knew that
25 it was a 40-year sentence that he would receive.

1 With regard to the allegation of failure
2 to investigate the victim's past violent
3 behavior, I find as a fact that Mr. Ness did
4 investigate that, that he was aware of the prior
5 criminal domestic violence charge, and that he
6 knew that the defendant and the victim had a
7 rocky relationship. And so there was no
8 deficiency with his failure to investigate that
9 aspect of the case.

10 With regard to the failure to pursue the
11 battered-spouse defense. Again, I find as a
12 fact that Mr. Ness was not deficient. Based on
13 his experience and the circumstances of this
14 case, he determined that the battered-spouse
15 defense was not a viable defense.

16 Are there any issues that I have not
17 addressed that were raised in the PCR
18 application?

19 MR. GOURLEY: None that I'm aware of,
20 Your Honor.

21 THE COURT: So, Mr. Gourley, I would ask
22 you to issue an order, a proposed order for me
23 to sign denying the PCR application. And I ask
24 that you prepare that order within the next 30
25 days.

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MR. GOURLEY: Thank you, Your Honor
MR. KAZMIERSKI: Thank you, Your Honor.
THE COURT: Thank you.

END OF CASE: 3:22 P.M.

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CERTIFICATE OF REPORTER

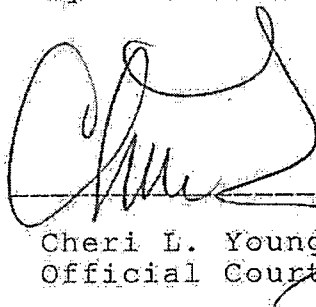
STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

I, Cheri L. Young, Registered Professional Reporter and Official Court Reporter for the State of South Carolina, Second Circuit-At Large, do hereby certify that the foregoing proceedings were written stenographically by me using computer-aided translation further, that the foregoing is a true, accurate and complete record, to the best of my skill and ability, of all the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Aiken County, on the 21st day of May, 2015.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

I have hereunder set my hand this 8th day of June, 2016.



Cheri L. Young, RPR
Official Court Reporter



South Carolina Court Administration
South Carolina Supreme Court
Columbia, South Carolina

ROSALYN FRIERSON
DIRECTOR

1015 SUMTER STREET,
SUITE 200
COLUMBIA, SOUTH
CAROLINA 29201
PHONE: (803) 734-1800
FAX: (803) 734-0269

October 15, 2014

Caroline Kaiser
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

In re: Edward Tyler v. State of S. Carolina

Dear Ms. Kaiser:

I am responding to your letter to Lisa Davenport dated October 14, 2014, requesting a transcript from proceedings before Judge Early on June 4, 2008.

Ms. Davenport is no longer employed by this agency and was required to turn her records over to this office. Pursuant to Rule 607, court reporter records are retained for a period of five years. If a transcript is not ordered within that five-year period, the records are destroyed. Unfortunately, the records to produce a transcript from proceedings heard before **October 2009** are no longer available. I am sorry that I am unable to assist you further.

Sincerely,



Desiree R. Allen
Court Reporter Manager

A TRUE COPY

Attest... *J. B. Hiers*
CLERK OF COURT
BAMBERG COUNTY, SC

STATE OF SOUTH CAROLINA)
COUNTY OF BAMBERG)
Edward Tyler, #318077)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Case No. 2013-CP-05

ORDER OF DISMISSAL

JAMES B. HIERS
CLERK OF COURT
BAMBERG, SC

2016 MAR 14 AM 9:56

FILED
BAMBERG COUNTY

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on February 25, 2013. An evidentiary hearing was convened on May 21, 2015, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Janek Kazmierksi, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Bamberg County Clerk of Court. The Applicant was true billed indicted at the January 2007 term of the Bamberg County Grand Jury for Criminal Domestic Violence (2007-GS-05-041), Murder (2007-GS-05-042), and Possession Weapon During a Violent Crime (2007-GS-05-043). Richard Ness, Esquire represented Applicant. On June 4, 2008, Applicant pled guilty before the Honorable Doyet A. Early, III, to Murder.¹ Judge Early sentenced Applicant to forty years imprisonment for Murder. Applicant did not appeal his guilty plea or sentence.

¹ Applicant's indictments for Criminal Domestic Violence (2007-GS-05-041) and Possession of a Weapon During a Violent Crime (2007-GS-05-043) were *nolle prossed* pursuant to a plea agreement.

In its Return and Motion to Dismiss, filed on June 18, 2013, Respondent requested that the application be summarily dismissed as untimely pursuant to S.C. Code Ann. § 17-27-45. On June 24, 2013, the Honorable Doyet A. Early, III, acting in his capacity as Chief Administrative Judge of the Second Judicial Circuit, signed a Conditional Order of Dismissal, provisionally dismissing the application, but allowing Applicant twenty days to show why the dismissal should not become final. Applicant responded on July 11, 2013, alleging that mental health concerns prevented him from timely filing his application. Based on his response and in light of Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009) (requiring the tolling of the statute of limitations if Applicant can establish that mental incompetence prevented the timely filing of his or her application), the Respondent filed an amended return requesting an evidentiary hearing on the matter. By order filed September 17, 2013, Judge Early vacated his conditional order of dismissal and set the case for a hearing to determine whether Applicant's lack of capacity prevented him from timely filing his post-conviction relief application.

Applicant's Counsel, Daniel Luginbill, Esquire filed a motion for funding to have Applicant's mental health evaluated on February 25, 2013. A hearing was held on December 4, 2013, at the Bamberg County Courthouse. Applicant was present and represented by Daniel Luginbill, Esquire and Janek Kazmierski, Esquire. Respondent was present and represented by Daniel Gourley, Esquire of the South Carolina Attorney General's Office. By Order filed December 27, 2013, Judge Early denied Applicant's request for funding to have his mental health evaluated.

A hearing on the State's motion to dismiss was convened on July 30, 2014, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by counsel, Janek Kazmierski, Esquire. Respondent was represented by Assistant Attorney General Daniel

Gourley of the South Carolina Attorney General's Office. By order dated October 3, 2014, and filed on October 13, 2014, the Honorable R. Knox McMahon found Applicant's mental incompetency prevented him from timely filing his application. Judge McMahon granted Applicant a full evidentiary hearing.

ALLEGATIONS

In his current Application, Applicant alleges that he is being held in custody unlawfully due to his attorney's failure to pursue battered spouse syndrome as a defense at trial.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from Richard Ness (hereinafter "Plea Counsel"), a copy of the Aiken County Clerk of Court records, Applicant's South Carolina Department of Correction records, the PCR application, and return.²

During the evidentiary hearing, Applicant testified that he pled guilty to murder and received a forty-year sentence. Applicant stated that Patrick Wright represented him prior to Plea Counsel taking over his case and that Kent Kirkland represented him on an unrelated case. Applicant further stated that he met with Plea Counsel one time prior to his guilty plea and that he never discussed the case with Plea Counsel during that meeting. Applicant also recalled that the plea was a negotiated sentence for forty years and that Plea Counsel advised him that he

² This Court notes the Respondent produced a letter from the Court Reporter at the guilty plea hearing (Court Exhibit 1), which stated the plea transcript was unavailable because Rule 607 requires the Court Reporter to retain the record for a period of five years. Applicant's guilty plea hearing was taken on June 4, 2008, and the transcript was not ordered until October 14, 2014. As a result, the guilty plea hearing transcript was destroyed. At the conclusion of the PCR hearing, the parties reconstructed the record with testimony from assistant solicitor Benjamin Moore, Plea Counsel, and the Applicant. This Court finds the record was adequately reconstructed.

could potentially get life without parole if he was found guilty of murder, but that plea counsel told him if he pled guilty he would get thirty years.

At the hearing, Applicant recalled that he was mentally evaluated prior to trial. Applicant testified that he and his attorney did not discuss the facts of the case before the plea, that he was hoping for a voluntary manslaughter plea, and that he expected to receive a thirty-five year sentence. Applicant also stated Plea Counsel never asked about his violent history with Rosalyn Tyler (hereinafter "Victim"). Specifically, Applicant stated Victim was violent towards him and that on October 6, 2006, Victim had a knife. Applicant stated that he told Patrick Wright about Victim possessing a knife and was defending himself when he shot Victim. Plea Counsel advised Applicant that he had no defenses despite Applicant's belief that he could argue self-defense.

Applicant recalled that he discussed the battered spouse defense with Plea Counsel one time while at court and that Plea Counsel reviewed the questions that the plea court was likely to ask. Specifically, Applicant stated that he reviewed the charges he was facing and that Plea Counsel told him if he proceeded to trial he could get life without parole if convicted. Applicant stated that he chose to plead guilty because forty years was better than a life sentence.

Following Applicant's testimony, Plea Counsel was called to testify. Plea Counsel stated that he has been practicing law for thirty-two years and that he was retained to represent Applicant in this matter. Plea Counsel further stated that he was aware of Applicant's rocky relationship with Victim and that both Applicant and Victim suffered from alcohol/drug problems. Plea Counsel recalled that he filed a motion to get Applicant evaluated and that the evaluation revealed that Applicant was criminally responsible.

During his testimony, Plea Counsel stated that a spousal abuse defense was not viable in this case. He noted that Applicant is 6'3" and 280 lbs., while Victim was 5'6" and 315 lbs., and therefore it would have been difficult to argue that Victim abused Applicant. Plea Counsel further stated that the evidence did not support a spousal abuse defense. Applicant had said he and Victim were arguing over a T.V. set. Plea Counsel explained that the evidence showed that Applicant got a single-barrel shotgun, shot Victim once in the lower back/butt, Victim went outside and fell into the front yard, and that Applicant followed Victim outside of their house, went up to Victim, and shot her in the chest. Evidence also showed that Applicant fled the scene and was not found for another five or six hours. Applicant had the shotgun in his possession when he was arrested.

Plea Counsel stated that there were multiple witnesses outside who viewed the shooting. Specifically, Plea Counsel stated Willie Rogers was on the phone with Victim prior to her being shot and then subsequently heard a gunshot. Rogers would have testified that Victim and Applicant were not fighting. Plea Counsel also stated a witness named Henry Odom heard a commotion and went outside. Plea Counsel admitted there were some inconsistencies in their statements.

Plea Counsel recalled that he and Applicant discussed the issue of whether Victim possessed a knife, but that a knife was never recovered from the scene and no witnesses saw a knife. Plea Counsel stated that he and Applicant discussed the possibility of arguing that Applicant was acting under the heat of passion, but that Plea Counsel did not think a jury would believe that Applicant killed Victim in a heat of passion.

Plea Counsel stated the Solicitor's office refused to offer a voluntary manslaughter plea and offered a forty-year negotiated plea. Plea Counsel testified that Applicant understood the terms of the agreement.

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. Specifically, this Court finds Counsel's testimony credible, while Applicant's testimony is not credible. 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).

INEFFECTIVE ASSISTANCE OF COUNSEL

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; 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, (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). Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

Plea Counsel was not ineffective for failing to pursue a battered spouse defense.

Applicant's allegation that he received ineffective assistance of counsel due to Plea Counsel's failure to pursue a battered spouse defense is denied. Plea Counsel testified that he was aware of Applicant and Victim's violent history, but that the evidence did not support a theory of battered spouse syndrome. This Court agrees. Moreover, Applicant has not shown what additional evidence Plea Counsel could have presented to support this defense. See Glover v. State, 318 S.C. 496, 458 S.E.2d 53 (1995). Accordingly, Applicant failed to establish that Plea Counsel was deficient or that any deficient performance prejudiced his defense.

ALL OTHER ALLEGATIONS

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

CONCLUSION

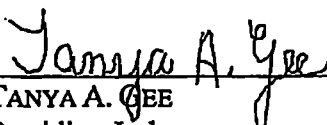
Based on all the foregoing, Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

Applicant must file and serve a notice of appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRCPC, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on Applicant's behalf. Applicant 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 is denied and dismissed with prejudice; and
2. The Applicant is remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 8th day of March, 2016.



 TANYA A. GEE
 Presiding Judge
 Second Judicial Circuit

Columbia, South Carolina

FILED
 BAMBERG COUNTY
 2016 MAR 14 AM 9:57
 JAMES B. HIERS
 CLERK OF COURT
 BAMBERG, SC

WITNESSES

T. Williams-B.C.S.O.

DOCKET NO. 2007-GS-05-042

The State of South Carolina
County of Bamberg

COURT OF GENERAL SESSIONS

JANUARY 8, TERM 2007

ARREST WARRANT NUMBER

J400273

THE STATE
vs.

EDWARD C. TYLER

ACTION OF GRAND JURY

True Bill

[Signature]
Foreperson of Grand Jury
Date: *1-4-2007*

VERDICT

Foreperson of Petit Jury
Date:

Indictment for
MURDER

SC Code 16-03-0010
CDR Code 116
Class FEL-EXM

FILED
BAMBERG COUNTY
JAMES R. HIERS
CLERK OF COURT
BAMBERG, SC
900A JUN -4 PM 2:58

STATE OF SOUTH CAROLINA)
)
COUNTY OF BAMBERG)

INDICTMENT

At a Court of General Sessions, convened on January 8, 2007 the Grand Jurors of Bamberg County present upon their oath:

MURDER

That EDWARD C. TYLER did in Bamberg County on or about October 6, 2006, with malice aforethought, kill one Roslyn Tyler by means of shooting the victim with a shotgun and said victim died as a result thereof, all in violation of Section 16-3-10, *South Carolina Code of Laws*, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


BARBARA R. MORGAN SOLICITOR
For