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November 18, 2016

Daniel E. Shearouse, Clerk  
The Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

Re.: Foster v. State  
2015-CP-29-1199

Dear Clerk of Court:

Please find enclosed the original and one copy of the Notice of Appeal and Proof of Service on the above referenced case along with a copy of the Order that is being appealed. Please file the originals and mail a stamped copy back to me in the also enclosed self-addressed stamped envelope. Please note that I have mailed a copy of this file to Appellate Defense asking them to handle this appeal. Thank you and please contact me with any additional questions or concerns.

Sincerely Yours,

Nathan Sheldon  
The Law Office of Nathan J. Sheldon

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NOV 22 2016

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM LANCASTER COUNTY  
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

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Case No. 2015-CP-29-1199

State of South Carolina, Respondent,

v.

Dyeshawn Foster, Appellant.

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NOTICE OF APPEAL

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Dyeshawn Foster appeals the order of the Honorable Brian M. Gibbons dated February 17, 2016 denying his request for post-conviction relief. Appellant received written notice of entry of this order on November 16, 2016.

November 18, 2016



Nathan J. Sheldon  
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Attorney for Appellant

Other Counsel of Record:  
Patrick Schmeckpeper, Esquire  
Assistant Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211-1549  
Attorney for Respondent  
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**RECEIVED**

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Case No. 2015-CP-29-1199

State of South Carolina,

Respondent,

**RECEIVED**

v.

**NOV 22 2016**

Dyeshawn Foster,

Appellant.

**S.C. SUPREME COURT**

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PROOF OF SERVICE

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I certify that I have served the Notice of Appeal on Patrick Schmeckpeper with the Attorney General's Office by depositing a copy of it in the United States Mail, postage prepaid, on November 18, 2016 mailed to Post Office Box 11549, Columbia, South Carolina 29211-1549.

November 18, 2016



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Attorney for Appellant

STATE OF SOUTH CAROLINA )  
COUNTY OF LANCASTER )  
) )  
Dyeshawn Foster, #358161, )  
) )  
Applicant, )  
) )  
v. )  
) )  
State of South Carolina, )  
) )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
SIXTH JUDICIAL CIRCUIT

Case No. 2015-CP-29-1199

**ORDER OF DISMISSAL**

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CLERK OF COURT  
LANCASTER, SC

This matter comes before this Court by way of a post-conviction relief (PCR) application filed on August 26, 2015. Respondent made its return on December 7, 2015. An evidentiary hearing into the matter was convened on January 12, 2015, at the Lancaster County Courthouse. Applicant was present at the hearing and was represented by Nathan Sheldon, Esquire. Respondent was represented by Assistant Attorney General J. Croom Hunter of the South Carolina Attorney General's Office.

**PROCEDURAL HISTORY**

The Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Lancaster County Clerk of Court's orders of commitment. The Applicant was indicted at the January 2013 term of the Lancaster County Grand Jury for attempted murder (2013-GS-29-0048), unlawful carry of a pistol (2013-GS-29-0051) and possession of a firearm or knife during the commission of a violent crime (2013-GS-29-0052). Mark Grier, Esquire, represented him. On December 9, 2013, the Applicant entered an Alford plea to the lesser included of assault and battery of a high and aggravated nature (ABHAN) and as indicted to the remaining charges. The Honorable J. Ernest Kinard, Jr. sentenced the Applicant

to concurrent terms of eighteen years imprisonment for ABHAN and five years imprisonment for the possession of a firearm. Applicant received time served for the unlawful carry.

A notice of appeal was filed on Applicant's behalf and an appeal was perfected by Benjamin J. Tripp, Esquire. The South Carolina Court of Appeals dismissed the Applicant's appeal pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Foster, 2015-UP-143 (filed March 18, 2015). The Remittitur was issued on April 3, 2015.

### ALLEGATIONS

At the post-conviction relief hearing, Applicant argued his confinement is unlawful based upon the following grounds:

1. Ineffective assistance of counsel.
  - a. Plea counsel failed to adequately prepare Applicant's case for trial.
  - b. Plea counsel failed to retain an investigator.
  - c. Plea counsel failed to request a Stand Your Ground hearing.
2. Involuntary guilty plea.

### SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. This Court also heard testimony from plea counsel, Mark Grier, Esquire (Counsel), as well as Applicant's grandmother, Gloria Craig. This Court also had before it a copy of the plea transcript, the Lancaster County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

### INEFFECTIVE ASSISTANCE OF COUNSEL

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the



application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

This Court finds Applicant failed to demonstrate that Counsel's performance was deficient in any way. This Court further finds that Applicant presented no evidence to show any prejudice resulting from Counsel's representation. Additionally, this Court finds Counsel's testimony credible and Applicant's testimony not credible. This Court finds Ms. Craig's

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testimony irrelevant to the issues presented in this PCR action.

### **1. Failure to Prepare**

Applicant alleges Counsel did not thoroughly prepare his case for trial, nor did Counsel review the evidence with Applicant. The Court finds this allegation is without merit. At the PCR hearing, Counsel testified he has been practicing law since 1990, with the great majority of his work devoted to criminal defense. Counsel testified he filed the appropriate Rule 5 and Brady motions, received discovery materials from the State, and went over the evidence with Applicant. Counsel testified he reviewed the 911 tape prior to Applicant's plea. Although Counsel could not recall with specificity how many times he met with Applicant, he testified he met with Applicant regularly. Counsel testified he met with Ms. Craig, and he did not believe her testimony would help Applicant because she did not witness the shooting. Counsel testified he went to the scene of the shooting and spoke to neighbors during his preparation of the case. Additionally, Counsel testified he was prepared to try Applicant's case, and that a jury had already been picked when Applicant decided to plead guilty.

Counsel met with Applicant an adequate number of times prior to the guilty plea. Counsel also obtained discovery from the solicitor and went over it with Applicant. Counsel interviewed witnesses and reviewed the evidence against Applicant. Finally, Counsel testified he was prepared to go to trial. Accordingly, this Court finds Counsel thoroughly investigated and prepared Applicant's case.

### **2. Failure to Retain an Investigator**

Applicant argues Counsel was ineffective for failing to retain a private investigator. This allegation is without merit. Counsel explained at the PCR hearing that based upon the evidence against Applicant, he did not believe it was necessary to hire an investigator. Council's belief



was confirmed at the PCR hearing, where the expert testimony presented by Applicant added little either factually or theoretically. As such, Applicant has not shown a reasonable probability that the outcome would be different had Counsel retained an investigator. "Counsel has a duty . . . to make a reasonable decision that makes particular investigations unnecessary" Strickland, 466 U.S. at 691. Finally, the record is clear that Applicant was well aware that by pleading guilty, he waived any right to challenge the evidence against him. Accordingly, this Court finds no deficiency in Counsel's decision not to retain an investigator.

### **3. Failure to Request a Stand Your Ground Hearing**

Applicant argues that Counsel was ineffective for failing to request a Stand Your Ground hearing. This argument is without merit. Counsel testified that although some facts would possibly corroborate a self-defense claim, Applicant maintained to Counsel throughout his representation that Applicant did not shoot the victim. Furthermore, Counsel testified the evidence indicated the victim was fleeing when he was shot. Counsel testified his strategy based on Applicant's representations of the facts to him was to argue that Applicant was not the shooter. Counsel testified he did not think about holding a Stand Your Ground hearing where his client insisted he did not shoot the victim. This Court finds Counsel's decision not to request a Stand Your Ground hearing perfectly reasonable under the circumstances. Counsel could not reasonably be expected to request a Stand Your Ground hearing when his client insisted he did not shoot the victim.

Accordingly, this Court finds Applicant did not demonstrate any deficiencies in Counsel's representation. This Court finds that because Counsel's representation was well within the range of competence required in criminal cases, Applicant has failed to make any showing that, but for Counsel's alleged deficiencies, the result of Applicant's case would have been any

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different.

### INVOLUNTARY GUILTY PLEA

The voluntariness of a guilty plea is determined in light of the entire record before the court. Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012) (citing Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000)). “To knowingly and voluntarily enter a plea of guilty, all that is required is that a defendant have a full understanding of the consequences of his plea and of the charges against him.” Simpson v. State, 317 S.C. 506, 508, 455 S.E.2d 175, 176 (1995) (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991)). Furthermore, a defendant must only be informed of the privilege against self-incrimination, the right to a jury trial, and the right to confront one’s accusers. Roddy, 339 S.C. at 33, 528 S.E.2d at 421 (citing Boykin v. Alabama, 395 U.S. 238 (1969)). “When attempting to determine the voluntary and intelligent nature of a plea, the plea colloquy ordinarily serves as confirmation that a criminal defendant is waiving the right to raise certain constitutional claims by pleading guilty.” Hyman, 397 S.C. at 44, 723 S.E.2d at 379 (citing Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97, 98 (1975)). However, the plea judge need not provide an “enumeration of specific rights waived ... where the record otherwise reveals affirmative awareness of the consequences of a guilty plea.” State v. Lambert, 266 S.C. 574, 579, 225 S.E.2d 340, 342 (1976) (citing Stinson v. Turner, 473 F.2d 913 (10th Cir. 1973)). Furthermore, “[a] guilty plea is a solemn, judicial admission of the truth of the charges” against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions “made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements.” Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th



Cir. 1976)). Pleading guilty to avoid a possibly greater sentence, without more, does not render a guilty plea involuntary. Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed. 2d 747 (1970); Wicker v. State, 310 S.C. 8, 12, 425 S.E.2d 25, 27 (1992).

The record before this Court clearly shows that Applicant was fully informed of the consequences of entering his guilty plea. The record shows Applicant's plea was not coerced, and it was Applicant's decision to plead guilty. Additionally, this Court finds Applicant's testimony not credible. Applicant was advised that by pleading guilty he gave up his right to challenge the evidence the State had against him, as well as his right to put up any affirmative defenses. Applicant has failed to present any valid reasons why he should be allowed to depart from his valid plea of guilty. Accordingly, this Court finds Applicant's plea was knowingly, intelligently, and voluntarily entered.

#### **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 Applicant failed to present sufficient evidence regarding such allegations. Accordingly, this Court finds Applicant has abandoned any such allegations.

#### **CONCLUSION**

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Plea counsel rendered effective assistance in regard to the claims raised by Applicant. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate

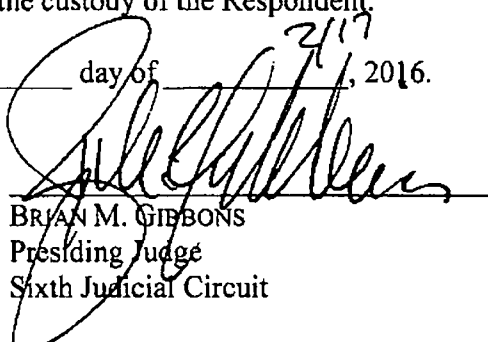
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appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR 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.

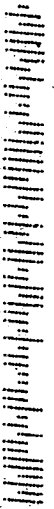
**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 21<sup>st</sup> day of July, 2016.

  
BRIAN M. GIBBONS  
Presiding Judge  
Sixth Judicial Circuit

, South Carolina



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