

THE LAW OFFICE OF NATHAN J. SHELDON,
LLC
Working on your behalf

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Rock Hill, SC 29730
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(803)909-9343

April 29, 2017

RECEIVED

MAY 04 2017

S.C. SUPREME COURT

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

Re.: Isaias Gutierrez v. State
2010-CP-46-02611
2015-CP-46-03199

Dear Clerk Shearouse:

Please find enclosed the following documents for the above referenced case. Please note that this case is being appealed pursuant to *Austin v. State*.

- 1- Notice of Appeal
- 2- Proof of Service
- 3- Order denying PCR relief issued by The Honorable Lee S. Alford
- 4- Order granting belated appeal pursuant to *Austin* issued by The Honorable G. Thomas Cooper

Thank you and please contact me with any additional questions or concerns. Please note that I have also sent a copy of this appeal to the South Carolina Commission of Indigent Defense.

Sincerely Yours,

Nathan Sheldon
The Law Office of Nathan J. Sheldon

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAY 04 2017

APPEAL FROM YORK COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Lee S. Alford, Circuit Court Judge

Case No. 2010-CP-46-02611
2015-CP-46-03199

State of South Carolina,

Respondent,

v.

Isaias Gutierrez,

Appellant.

NOTICE OF APPEAL

Isaias Gutierrez appeals the order of the Honorable Lee S. Alford dated August 11, 2011 denying his request for post-conviction relief pursuant to *Austin v. State*. Appellant's *Austin* petition was granted by the Hon. G. Thomas Cooper in Case no. 2015-CP-46-03199. Appellant received written notice of entry of this order on April 19, 2017.

April 29, 2017



Nathan J. Sheldon
SC Bar #: 0074943
331 E. Main St., Suite 200
Rock Hill, South Carolina 29730
(803) 909-9343
Attorney for Appellant

Other Counsel of Record:
Justin Hunter, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549
Attorney for Respondent
(803) 734-3970

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAY 04 2017

S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No. 2010-CP-46-02611
2015-CP-46-03199

State of South Carolina,

Respondent,

v.

Isaias Gutierrez,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Justin Hunter, Esquire with the Attorney General's Office by depositing a copy of it in the United States Mail, postage prepaid, on April 29, 2017 mailed to Post Office Box 11549, Columbia, South Carolina 29211-1549.

April 29, 2017



Nathan Sheldon
331 E. Main St., Suite 200
Rock Hill, SC 29730
803-909-9343
Attorney for Appellant

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R)

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2010CP4602611

Isaias Diaz Gutierrez vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other:
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____

IT IS ORDERED AND ADJUDGED:

- See attached order;
- Statement of Judgment by the Court:

ORDER OF DISMISSAL

Dated at York, South Carolina, this 11th day of August, 2011.

Court Reporter:

Lee S. Alford

PRESIDING JUDGE - Lee S. Alford

This judgment was entered on the 16th day of September, 2011, and a copy mailed first class this 16th day of September, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Isaias Diaz Gutierrez 325762 Lieber Corr Inst
PO Box 205, Ridgeville, SC 29472
David C Cook Cook Law Firm, L.L.C. P O Box
1449 Lancaster, SC 29721

Harrison Brant Office Of The Attorney General
P O Box 11549 Columbia, SC 292111549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

DAVID HAMILTON

SCRPC APP-24/FORM 4

David Hamilton - Clerk of Court

STATE OF SOUTH CAROLINA
COUNTY OF YORK

FILED-RECEIVED
2011 SEP 16 AM 10:27
DAVID HAMILTON
S.C.P. & C.S.
YORK COUNTY, SC

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

2010-CP-46-2611

Isaias D. Gutierrez, #325762,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

This matter comes before the Court by way of Application for Post-Conviction Relief filed June 23, 2010. The Respondent filed its Return on December 27, 2010. An evidentiary hearing into the matter was convened at the Moss Justice Center in York County on June 1, 2011. The Applicant was present at the hearing and was represented by David C. Cook, Esquire. The Respondent was represented by Harrison D. Brant, Esquire, of the South Carolina Attorney General's Office.

The Applicant testified on his own behalf at the hearing.¹ The Applicant's trial counsel, Derek S. Chiarenza, Esquire, also testified at the hearing. This Court had before it the records of the York County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the Applicant's appellate records including the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. The Applicant was

¹ The Applicant answered questions and testified through the use of a Spanish interpreter, Idolinda Mummert.

indicted at the April 2007 term of the Court of General Sessions for York County for three counts of Forgery (2007-GS-46-1261, -1264, -1265), Armed Robbery (2007-GS-46-1262), Murder (2007-GS-46-1263), and Burglary, first degree (2007-GS-46-1266). Derek S. Chiarenza, Esquire, represented him.

From December 10-13, 2007, the Applicant proceeded to a jury trial and was found guilty as indicted of all charges. The Honorable J. Derham Cole sentenced him to confinement for a period of five (5) years for each forgery conviction, thirty (30) years for armed robbery, and to life imprisonment for the murder and burglary convictions, sentences running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Gutierrez, Op. No. 2009-UP-495 (S.C. Ct. App. filed October 21, 2009). The Remittitur was issued on November 6, 2009.

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

1. Ineffective assistance of counsel
 - a) Failure to request competency hearing to determine whether A understood situation or nature of charges
2. Ineffective assistance of appellate counsel
 - a) Failure to appeal sentence

At the commencement of the evidentiary hearing, counsel for the Applicant notified the Court the Applicant was withdrawing all prior claims, and proceeding only on the following allegations:

1. Ineffective assistance of counsel
 - a) Failure to tender offer by the State
 - b) Failure to challenge admissibility of statement during Jackson v. Denno hearing

Further, through his testimony at the evidentiary hearing the Applicant effectively alleged that counsel's preparation for trial was deficient because counsel failed to adequately address issues involving the Applicant's language barrier.

SUMMARY OF TESTIMONY

The Applicant testified the State made him a plea offer for thirty (30) years. He stated trial counsel did advise him of the plea offer; however, counsel stated he had already turned it down. He testified counsel said he would take his case to trial because it was not that complicated, he had won harder cases in the past, and he could get him less than thirty years. He stated he wanted counsel to negotiate for less than thirty years, and would have taken less if such an offer was made; however, he stated he would have taken the thirty for sure. On cross-examination, the Applicant's answers were different. He stated he might have taken an offer for less than thirty if such an offer was made. He then admitted he would not have taken the thirty year offer.

The Applicant testified trial counsel failed to appear at his preliminary hearing. He stated he asked counsel to show him the paperwork on all of his charges, but counsel never gave them to him. He testified counsel also never showed him the State's discovery. He stated he asked counsel about the possibility of getting another attorney, but counsel said this was unnecessary because the case was not that complicated. On cross-examination, he testified he did not have any money to hire another lawyer, but his family might have been able to get the money for one. He stated he never asked the court for a new attorney.

The Applicant testified he had trouble communicating with trial counsel due to language barriers. He stated his first meeting with counsel lasted about ten minutes, and he did not understand any of the conversation. He stated he asked for an interpreter and counsel said he

would bring one, but counsel never did. . On cross-examination, he testified he was able to understand a little bit of his conversations with counsel. He then stated he knew the charges he was facing because counsel advised him of this.

The Applicant stated he wanted to testify in his own defense at trial because witnesses were lying about him. He testified he did not, however, because counsel told him he would get nervous on cross-examination and would not be able to respond to questions. He testified counsel also told him not to testify because they would lose the last argument at trial. He stated he did not know any better and followed his attorney's advice.

The Applicant testified trial counsel failed to challenge the admissibility of his statement at the Jackson v. Denno hearing. He stated an individual who interpreted for him at the jail testified he gave a statement indicating he was in a fight with the victim at the time of the crime. He denied saying this, and asserted the interpreter testified he said other things that he did not say. On cross-examination, he testified he was prejudiced by the interpreter's testimony because he never made these statements.

Trial counsel testified he was appointed to the Applicant's case. He testified he worked in the solicitor's office from 1993 until 1998, and since then he has been in private practice consisting of about eighty percent criminal law. He stated he met with the Applicant a couple of times, and his investigator did as well. He testified he did not have an interpreter present at meetings because the Applicant did not have trouble communicating and understood their conversations. He stated the Applicant never requested a translator, but he did have one present for final trial preparation, during which he had a long conversation with the Applicant. An interpreter was also present during trial. He testified he speaks some Spanish, and so does his investigator. He testified the Applicant asked and answered questions, and communicated well

with them. He stated the Applicant provided him with names of alibi witnesses and his version of the facts. He further stated the Applicant told him that his girlfriend gave him the checks to cash, and he also denied any involvement in the crimes. He testified he discussed all of the State's discovery with the Applicant, including all statements.

Trial counsel testified his defense strategy was to point to evidence indicating the involvement of the Applicant's girlfriend, and poke holes in the State's case by pointing to the lack of forensic evidence connecting the Applicant to the crime. He testified they did not have much choice of any other strategy to go with. He stated the Applicant gave input to help build this defense, and concurred with this strategy. He stated the Applicant specifically explained to him how his girlfriend took charge during their first attempt to purchase a car, and he was able to use this at trial to try and show that the girlfriend was the ringleader.

Trial counsel testified the State did make an offer of thirty years, and the offer was open for the entire length of trial; however, the Applicant told him he would not take thirty years. He further stated that if the Applicant wanted the deal, they would have accepted it. He testified he never told the Applicant not to take the plea because he has won harder cases in the past, and never turned down the offer without consulting him. He stated he is sure he tried to negotiate for less than thirty years. However, he stated he has worked with and against the solicitor's office for more than thirteen years, and based on the nature of the case and the fact the State had a testifying co-defendant, the minimum thirty year sentence for murder was the best offer the Applicant was going to get.

Trial counsel testified the Applicant never asked for another attorney, and he would have gladly stepped aside if he had. He stated he never discouraged the Applicant from seeking another attorney, and never told him to save his money and spend it in Mexico once they won.

He stated he was not aware of any preliminary hearing that he missed, but there may have been one before he was appointed. He testified that, regardless, probable cause would have been found, and if not then a direct indictment would have been sought.

Trial counsel testified that the record is clear the Applicant was advised of his right to testify at trial. He stated he advised the Applicant of the advantages of disadvantages of him testifying. He stated he advised the Applicant that he would be questioned by a skilled prosecutor who would try to make him look bad, and if he denied things the jury knew as true then it would hurt his case. He stated he advised the Applicant that he would be questioned about why he left the jurisdiction after the crime and disappeared, and this would not have been beneficial to his case. He testified he likely advised the Applicant of the perceived advantage of having the last argument to the jury. He stated he might have advised the Applicant not to testify, but the decision was ultimately the Applicant's.

Trial counsel testified nothing prejudicial to the Applicant resulted from the Jackson v. Denno hearing. He testified the Applicant's statement as used at trial only included an admission to forgery; however, he was able to keep out the most prejudicial portion regarding a fight with the victim. He stated he felt the statement was going to come in because the Applicant was read his rights, and the statement as a whole was not otherwise inadmissible. He testified the State also had video evidence of the Applicant in a bank presenting the forged checks. He stated the Applicant never denied making the statement as he now claims.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their

testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (2003).

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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.

Failure to Tender Offer by the State

The Applicant alleges trial counsel failed to communicate to him the State's thirty year plea offer before rejecting it. To prevail on a claim of ineffective assistance of counsel for an uncommunicated plea offer, an applicant must establish counsel failed to communicate a plea offer, and the offer was one the applicant would have accepted and benefited from. Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009).

This Court finds the Applicant's claim counsel failed to communicate the thirty year plea offer is entirely without merit. This Court finds the testimony of counsel more credible on the issue than that of the Applicant. Counsel testified he not only communicated the offer, but the offer was open throughout the course of trial. Furthermore, the Applicant testified he wanted something less than what was offered, and would not have taken thirty years. This Court finds the Applicant made the decision to reject the thirty year plea offer. Therefore, this claim is denied and dismissed.

*Failure to Challenge Admissibility of Statement
During Jackson v. Denno Hearing*

The Applicant alleges counsel should have objected to the admissibility of a statement he made to law enforcement which was addressed during a Jackson v. Denno hearing at trial. The record establishes the Applicant was interviewed at a detention center by detectives after he was apprehended. The detectives read him his rights from a standard form in English, the Applicant indicated he understood his rights, and the Applicant then initialed and signed the form. (Tr. 461-463). The Applicant stated he could read English, but could only write in Spanish. (Tr. 463-464). The detectives proceeded to ask him about his girlfriend and the murder victim, and the detectives only had to reword something periodically; the Applicant otherwise had no problems communicating in English. (Tr. 464-465).

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The Applicant answered questions, and detectives then typed up the Applicant's statement based on those answers. (Tr. 468-469). Detectives then had Robert Guzman, a jailer who speaks Spanish, read the typed statement back to the Applicant in Spanish.² (Tr. 468-469). The Applicant agreed with what was typed and signed the statement. The pertinent portions of the Applicant's statement are as follows:

I was asked about the death of Clarence Cubley by two detectives from the York County Sheriff's Office. I told them I didn't know anything about Mr. Cubley's death until I was in custody in Missouri and a white boy showed me a newspaper article. I never went to Mr. Cubley's trailer to rob him or assault him. I did know Mr. Cubley because we lived in the trailer park in Fort Mill for about two years. I was told Dana made a statement saying I was the one who killed Mr. Cubley. I think Dana made these statements because she was mad at me. I left Rock Hill about this time because police were coming by my trailer looking for me. I knew they had warrants on me because I didn't show up for court on a criminal domestic violence charge. I did not hit Dana, but she told the police that I did. I left town to get away from Dana and so I wouldn't go to jail.

Before I left town Dana gave me some checks that she said her grandfather gave her. She wanted me to cash the checks so she could buy a car. I did cash these checks. . . . and that was my signature on the back of the checks.

(Tr. 469-470).

Guzman then testified that when he asked the Applicant why he assaulted the victim, the Applicant responded that "he did not assault Mr. Cubley; that they had an argument and he left in a taxi." (Tr. 492-493). He testified he did not relay this portion of the Applicant's response to detectives because the conversation was fast and he was translating very quickly. (Tr. 493-494). The State agreed not to go into this oral statement regarding the argument with the victim because it was only discovered the week before, and it was not turned over to the defense. (Tr. 495-496).

Trial counsel moved to suppress the entire written statement based on the lack of an intelligent waiver of rights by the Applicant due to the language barrier and the fact he was not

² Guzman was initially brought in to help because the Applicant asked for someone who spoke Spanish to help him explain a small portion of the statement better. (Tr. 470-471).

read his rights in Spanish, and also based on the fact the Applicant requested that the Mexican consulate be notified of his arrest, but this was only complied with after the interview. (Tr. 498-499). The trial court denied the motion, and found the statement was voluntarily given after the Applicant knowingly and intelligently waived his rights. In the presence of the jury, the entire written statement was read into the record. (Tr. 525-526). As agreed by the State, the oral statement regarding the argument with the victim was never presented before the jury.

This Court finds the Applicant's claim to be without merit. The record clearly establishes trial counsel moved to suppress the statement at the conclusion of the hearing on two separate grounds, but his motion was denied. Trial counsel's determination the statement would have been admissible over any further objection is a reasonable conclusion. As the trial court found, the Applicant was advised of his Miranda rights, waived those rights, and voluntarily gave a statement. Accordingly, this claim is denied and dismissed.

Inadequate Trial Preparation Due to Language Barriers

The Applicant testified at the hearing that counsel was deficient in his preparation and handling of trial due to a language barrier, and testified counsel failed to bring an interpreter to meetings despite his requests for one. The Applicant initially testified he did not understand anything that was said in his first meeting with counsel. However, he also testified to having numerous detailed discussions with counsel concerning, among other things, the thirty year plea offer, the possibility of obtaining another attorney, and the charges he was facing. Assuming all of these discussions took place, the Applicant was clearly able to understand the discussions without the help of an interpreter.³

³ The Court observed the Applicant throughout the hearing and noted that when his attorney or the Assistant Attorney General asked him questions, some of which were not short or simple, he started answering before any translation by the interpreter. He clearly understood their questions in English even though he chose to answer in Spanish.

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Further, trial counsel testified he and/or his investigator met with the Applicant several times, and they both speak a little Spanish. He testified that communication with the Applicant was never a problem.⁴ He testified the Applicant never requested a translator, but one was used in final preparation for trial. He testified the Applicant was able to provide him with names of alibi witnesses and his version of the facts. He further testified the Applicant agreed with his trial strategy, and provided input to help build the defense.

This Court finds no merit to this issue. Based on the above testimony, this Court finds counsel's testimony on the issue more credible than that of the Applicant. This Court finds the Applicant was able to sufficiently communicate with counsel. This Court also finds the Applicant did not request an interpreter, but one was involved in final preparation for trial. Furthermore, this Court finds the Applicant failed to present any evidence to show how the alleged language barrier affected the outcome of his case or his decisions. Therefore, this Court finds no prejudice to the Applicant with regards to the preparation and trial of his case due to language limitations. This claim is denied and dismissed.

Miscellaneous Issues Raised at the Hearing

The Applicant testified to several other issues that were not specifically alleged as claims for relief. With regards to each of these issues, the Court finds the testimony of trial counsel more credible than that of the Applicant. Specifically, the Applicant indicated in his testimony that he expressed to counsel some desire to have him substituted with retained counsel. Counsel's testimony refuted this claim entirely, and stated he would have gladly stepped aside if that's what the Applicant wanted. Moreover, the Applicant testified he did not have any money for a lawyer, but his family *might* have been able to get money for one. This Court finds the

⁴ The trial record further establishes the Applicant could sufficiently communicate in English with little problem. At least three witnesses testified to this. See Tr. 214-215, 462-465, 477-488.

Applicant made no effort to hire an attorney to replace trial counsel, nor does it appear the Applicant even had the means to. Further, this Court finds trial counsel is a very experienced criminal defense lawyer whose practice area is primarily criminal defense. To the extent the Applicant raised this issue in his testimony, the allegation is denied and dismissed as being without merit.

The Applicant also testified that he wanted to testify at trial, but he remained silent based on counsel's advice. He testified counsel told him he would get too nervous to respond to questions, and also told him not to testify because they would lose the right to argue last to the jury. To the contrary, this Court finds counsel merely rendered sound advice for the Applicant to consider in making his decision of whether to testify. Counsel testified he advised the Applicant that he would be questioned by a skilled prosecutor who would try to make him look bad in front of the jury, and who would question him on why he fled the jurisdiction for so long. He testified he also advised the Applicant that if he decided to testify, they would in fact lose the right to argue last to the jury. Further, he testified the Applicant ultimately made the decision not to testify. This Court agrees the decision not to testify was made by the Applicant. Therefore, to the extent the Applicant's testimony raised allegations as to this issue, it is denied and dismissed.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence trial counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance. This Court concludes Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, the

allegation of ineffective assistance of counsel is denied.

CONCLUSION

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

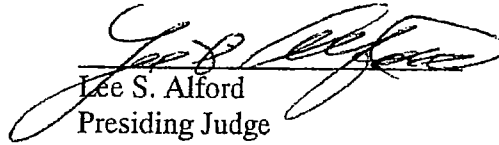
This Court advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (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), SCRCR, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf.

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IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 11th day of August, 2011.


Lee S. Alford
Presiding Judge
Sixteenth Judicial Circuit

York, South Carolina.

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FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP4603199**

Isaias Diaz Gutierrez		South Carolina State Of	
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PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**

<input type="checkbox"/> Rule 12(b), SCRPC;	<input type="checkbox"/> Rule 41(a), SCRPC (Vol. Nonsuit);
<input type="checkbox"/> Rule 43(k), SCRPC (Settled);	<input type="checkbox"/> Other: _____
- ACTION STRICKEN (CHECK REASON):**

<input type="checkbox"/> Rule 40(j) SCRPC;	<input type="checkbox"/> Bankruptcy;
<input type="checkbox"/> Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;	<input type="checkbox"/> Other: _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

<input type="checkbox"/> Affirmed;	<input type="checkbox"/> Reversed;	<input type="checkbox"/> Remanded;	<input type="checkbox"/> Other:
------------------------------------	------------------------------------	------------------------------------	---------------------------------

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

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: **ORDER GRANTING A BELATED REVIEW PUSUANT TO AUSTIN V. STATE**

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

<i>s/ G. Thomas Cooper, Jr.</i>	2126	4/19/2017
G. Thomas Cooper, Jr. Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on April 19, 2017, and a copy mailed first class or placed in the appropriate attorney's box on April 19, 2017, to attorneys of record or to parties (when appearing pro se) as follows:

Nathan James Sheldon PO Box 36682 Rock Hill, SC 29732

Justin James Hunter PO Box 11549 Columbia, SC
29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter: Wanda Nelson

David Hamilton - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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

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

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 Isaias Gutierrez,)
 S.C.D.C. No. 325762,)
)
 Applicant,)
)
 v.)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 OF THE SIXTEENTH JUDICIAL CIRCUIT

2015-CP-46-3199

**ORDER GRANTING A
 BELATED REVIEW PURSUANT
 TO AUSTIN V. STATE¹**

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 DAVID HAMILTON
 S.C.C.P. & J.S.
 YORK COUNTY, S.C.

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed October 2, 2015. Respondent made its Return on March 28, 2017, requesting an evidentiary hearing be convened solely on the issue of whether Applicant was entitled to an appellate review of his first post-conviction relief action pursuant to Austin. An evidentiary hearing was held on April 17, 2017, at the Moss Justice Center in York County. Applicant was present and represented by Nathan Sheldon, Esquire. Justin J. Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the April 2007 term of the Court of General Sessions for York County for three counts of Forgery (2007-GS-46-1261, -1264, -1265), Armed Robbery (2007-GS-46-1262), Murder (2007-GS-46-1263), and Burglary, first degree (2007-GS-46-1266). Derek S. Chiarenza, Esquire, represented him. From December 10-13, 2007, Applicant proceeded to a jury trial and was found guilty as indicted of all charges. The Honorable J. Derham Cole sentenced him to confinement for a

¹ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

period of five years for each forgery conviction, thirty years for armed robbery, and to life imprisonment for the murder and burglary convictions, all sentences running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Gutierrez, Op. No. 2009-UP-495 (S.C. Ct. App. filed October 21, 2009). The Remittitur was issued on November 6, 2009.

2010-CP-46-2611

On June 23, 2010, Applicant filed his first application for post-conviction relief, alleging that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
 - a. Failure to request competency hearing to determine whether Applicant understood situation or nature of charges
2. Ineffective assistance of appellate counsel
 - a. Failure to appeal sentence

Respondent filed its Return on December 27, 2010. An evidentiary hearing into the matter was convened at the Moss Justice Center in York County on June 1, 2011. Applicant was present at the hearing and was represented by David C. Cook, Esquire. Respondent was represented by Harrison D. Brant, Esquire, of the South Carolina Attorney General's Office. Applicant testified on his own behalf at the hearing, through the use of a Spanish interpreter, Idolinda Mummert. Applicant's trial counsel, Derek S. Chiarenza, Esquire, also testified at the hearing.

At the commencement of the evidentiary hearing, counsel for Applicant notified the Court that Applicant was withdrawing all prior claims, and proceeding only on the following allegations: Ineffective assistance of counsel, for failure to tender offer by the State, failure to



challenge admissibility of statement during Jackson v. Denno hearing, and failure to adequately address issues involving Applicant's language barrier.

By an order signed August 11, 2011, and filed September 16, 2011, the Honorable Lee S. Alford denied and dismissed Applicant's application with prejudice. The order indicates that a copy was mailed to Applicant and Mr. Cook on September 16, 2011.

Current Application 2015-CP-46-3199

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

1. "PCR Counsel failed to file appeal from adverse dismissal"

Before this Court are the records of the York County Clerk of Court regarding Applicant's convictions, the records from the South Carolina Department of Corrections, Applicant's prior PCR application and the corresponding Order of Dismissal, the current application and attachments, and the Return and Partial Motion to Dismiss.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his prior application. Prior to the start of the evidentiary hearing, the State indicated to this Court that they would be consenting to the grant of an Austin appeal. The State informed this Court that they were consenting based off of the letters presented from Applicant in his application. The letters indicate that Applicant asked his counsel to file a notice of appeal from the denial of his first PCR application, and his counsel indicated that he would not file the appeal.

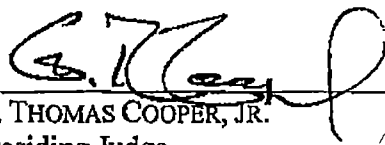


Respondent consents to allow Applicant a belated review of the denial of his PCR application (2010-CP-46-2611). After review of the facts and circumstances surrounding the waiver of Applicant's right to appeal the denial of his post-conviction relief application, this Court finds that Applicant did not knowingly and voluntarily waive his right to appeal his first PCR application. Accordingly, this Court grants Applicant a belated review of the denial of post-conviction relief action (2010-CP-46-2611) pursuant to Austin v. State, in which he may raise on appeal any issues that were raised and ruled upon in his prior application. In order to secure this review, however, Applicant must appeal from this Order.

IT IS THEREFORE ORDERED:

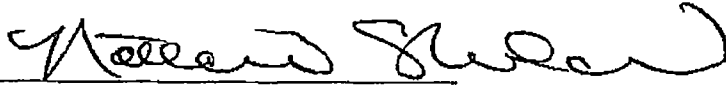
1. That the Applicant be granted an appeal of case 2010-CP-46-2611 pursuant to Austin v. State; this second application for post-conviction relief is hereby denied and dismissed with prejudice;
2. Within thirty (30) days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate appellate review of the Applicant's first post-conviction relief action. Counsel and the Applicant are direct to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 243, SCACR for the appropriate procedure for a belated appeal; and
3. That the Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 19 day of APRIL, 2017.


G. THOMAS COOPER, JR.
Presiding Judge

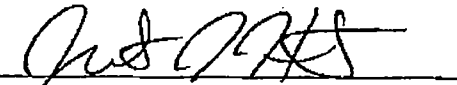
JOEK, South Carolina

I consent:

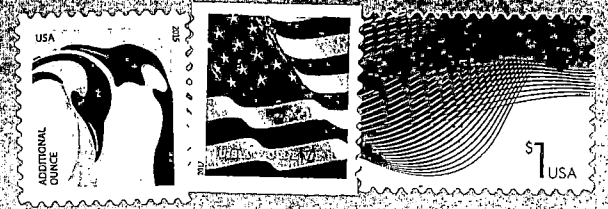
A handwritten signature in black ink, appearing to read "Nathan Sheldon", written over a horizontal line.

Nathan Sheldon, Esquire
Counsel for Applicant

I consent:

A handwritten signature in black ink, appearing to read "Justin Hunter", written over a horizontal line.

Justin Hunter, Esquire
Counsel for Respondent



Nathan J. Sheldon
., Suite 200
9730

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