

**The Grose Law Firm, LLC**  
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November 27, 2017

The Honorable Daniel E. Shearouse  
Clerk of Court, S.C. Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

**RECEIVED**

NOV 30 2017

S.C. SUPREME COURT

Re: *Vinay Tandon v. State of South Carolina*  
Case Number 2014-CP-40-06921

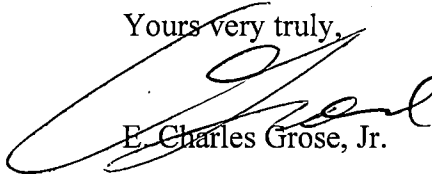
Dear Mr. Shearouse:

Enclosed please find Mr. Tandon's Notice of Appeal. Also enclosed are copies of the written orders of the Honorable Jocelyn Newman dated October 11, 2017 and November 25, 2017.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Mr. Vinay Tandon  
Jessica Kinard, Esquire  
*Clerk of Court, Richland County*

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Jocelyn Newman, Circuit Court Judge

**RECEIVED**

NOV 30 2017

S.C. SUPREME COURT

Case No. 2014-CP-40-06921

Vinay Tandon,.....Petitioner,

v.

State of South Carolina,.....Respondent.

**Notice of Appeal**

Vinay Tandon appeals the order of the Honorable Jocelyn Newman dated October 11, 2017 dismissing his application for post-conviction relief. This appeal is taken from the order of Judge Newman dated October 25, 2017 denying his Rule 59(e), SCRCP motion. Counsel received written notice of this order on October 27, 2017.

Respectfully Submitted,

By 

E. Charles Grose, Jr.  
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*Attorney for the Petitioner*

November 27, 2017

Other Counsel of Record:

Jessica Kinard, Esquire  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**RECEIVED**

NOV 30 2017

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Jocelyn Newman, Circuit Court Judge

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Case No. 2014-CP-40-06921

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Vinay Tandon,.....Petitioner,

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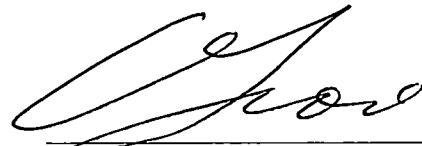
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**Certificate of Service**

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I certify that I have served this pleading on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed to:

Jessica Kinard, Esquire  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211



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November 27, 2017

RICHLAND COUNTY

FILED

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
 ) OF THE FIFTH JUDICIAL CIRCUIT  
COUNTY OF RICHLAND )

Vinay Tandon, ) Case No: 2014-CP-40-6921  
 )

Applicant, )

v. )

**ORDER OF DISMISSAL**

State of South Carolina, )

Respondent. )  
\_\_\_\_\_ )

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 3, 2014, which was amended on January 23, 2017. Respondent made a Return on June 8, 2015. The court convened an evidentiary hearing into the matter on January 30, 2017, at the Richland County Courthouse. Applicant was not present at the hearing, but was represented by Charles Grose, Esquire. Jessica E. Kinard, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant's trial counsel, Jack B. Swerling, Esquire, testified at the hearing. The court had before it a copy of the plea transcript, the records of the Richland County Clerk of Court regarding the subject convictions, the pleadings, and the return. The Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is not presently confined. In June 2012, the Richland County Grand Jury indicted Applicant for criminal sexual conduct, third degree (2012-GS-40-2597). Applicant was subsequently indicted in December 2013 for assault and battery, first degree (2013-GS-40-8755). Jack B. Swerling, Esquire, and Jason P. Peavy, Esquire ("Counsel") represented Applicant. On January 14, 2014, Applicant appeared before the Honorable Judge DeAndrea G. Benjamin and pleaded guilty to assault and battery, second degree with waiver to the grand jury. Pursuant to



negotiations, Judge Benjamin sentenced Applicant to three years' imprisonment, suspended upon service of three days' time served. As part of the plea negotiations, the State dismissed the criminal sexual conduct, third degree charge in exchange for Applicant's agreement to leave the country within forty-eight hours of his plea. Applicant did not appeal his conviction or sentence.

## **II. ALLEGATIONS**

In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. "Mr. Tandon was denied effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 3 and 14 of the South Carolina Constitution during his guilty plea."

- a. "Plea counsel did not adequately advise Mr. Tandon about the immigration consequences of the guilty plea, including the fact that the resulting conviction and sentence makes Mr. Tandon inadmissible for visa/immigration to the United States, Canada, Australia, United Kingdom, Europe, and most developed countries. *See Padilla v. Kentucky*, 559 U.S. 356 (2010). Mr. Tandon would not have plead [sic] guilty but for plea counsel's ineffectiveness."
- b. "Plea counsel was ineffective for advising Mr. Tandon to accept a guilty plea offer that required him to "leave the country within 48 hours." This sentencing condition amounts to banishment, which is an illegal sentence under South Carolina law. *See Henry v. State*, 276 S.C. 515, 280 S.E.2d 536 (1981). Mr. Tandon would not have plead [sic] guilty but for plea counsel's ineffectiveness."

## **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

### **A. Summary of PCR Testimony**

At the call of the case, PCR counsel began by providing a timeline of the events in the case. Further, he presented an affidavit from Applicant in lieu of testimony, and stated to the



court that he had witnessed Applicant sign the affidavit over Skype, thus leading him to attach a verification. The State objected on the ground that this was not a notarized affidavit, and not properly authenticated. The court ruled that it would accept the affidavit for what it was worth. PCR counsel further stated that Applicant decided to withdraw the amended application and proceed on the original application. Applicant did not call any witnesses, and rested on his application and affidavit.

The State called Jack B. Swerling, Esquire. He began by testifying that he and Mr. Peavy, whom he shared office space with, had prepared this case for trial and pretrial motions began before Applicant decided to plead. In preparation, they investigated every possible witness, and there were no witnesses to the actual assault. However, there was a DNA match between Applicant and a DNA sample taken from saliva left on the victim's breast. Mr. Swerling further testified that there were further issues with the case, such as that Applicant had given a statement to law enforcement that had been deemed admissible in pre-trial motions. Additionally, Applicant had two allegations of a sexual nature from the University of South Carolina that had caused him to be removed from the university and barred from campus. This also meant that his visa status (student or otherwise) was frequently changing.

Mr. Swerling testified that, before lunch, Applicant's sister asked if it were possible that Applicant simply leave the country. When counsel approached the solicitor about this possibility, they agreed to the negotiated sentence that was ultimately ordered. Counsel testified that Applicant decided he would like to leave the country if it meant that he did not have to go to jail. Mr. Swerling also testified that he had referred Applicant to two different immigration attorneys during the course of representation so that Applicant could be certain of his rights. He further



testified that he and Applicant were both aware that the plea judge could not order Applicant to leave, and could not banish him from the country.

On cross examination, PCR counsel submitted filings from a federal court case that Mr. Swerling handled regarding similar issues with an immigrant, which included documents where all parties stipulated to judicial removal. Mr. Swerling said there were no such documents in this case, but the idea was similar. When asked how it was permissible for the court order to state that Applicant had to leave the country when the circuit court did not have that power, Mr. Swerling testified that it was part of a negotiated sentence, and the entire negotiation had to be put on the record. Mr. Swerling reiterated that he referred Applicant to two immigration attorneys, and believes that Applicant had ample time to contact either or both of them both before trial and prior to actually entering his plea. He emphasized that he would have helped Applicant in all ways possible, including attempting to delay entry of his plea, to contact an immigration attorney if he had questions. The court was directed to pages three and four of the plea transcript where Mr. Swerling represented that he did not know how long Applicant would have to be out of the country or if it would preclude him from returning. He testified that he believed with certainty Applicant knew what he was doing, including that neither Mr. Swerling nor the court could advise him of immigration consequences, and the court could not banish him. Ultimately, he testified, the decision to plead was made by Applicant with adequate information.

**B. Ineffective Assistance of Trial Counsel**

In a PCR action, 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, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as



having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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.

***Plea Counsel’s Advice Regarding Immigration Consequences of Guilty Plea***

Applicant argued that counsel was ineffective for failing to advise him of the immigration consequence of his guilty plea, and that he would not have pled guilty had he known the consequences. He further argues that Padilla v. Kentucky, 559 U.S. 356 (2010) requires advice of possible deportation, and that was not provided here. The State argued that the record is clear that counsel did not advise Applicant of his immigration consequences, but that was because he did not feel qualified or informed to do so. Instead, he encouraged Applicant to visit or retain an



immigration attorney, including providing him with two names. He further testified that he would have worked for more time to consult an immigration attorney if needed. This does not violate the holding of Padilla because Applicant chose to leave the country and chose to either not obtain or not follow advice of an immigration attorney.

This court finds that counsel's performance was not ineffective, as he was not deficient, nor did he cause prejudice to Applicant. Counsel realized his professional limitations and advised his client of the same, thus encouraging and assisting him in finding an immigration attorney. Providing him with this information and aid certainly did not cause prejudice to Applicant, and any harm he may have suffered from not having immigration advice is at his own hands. For this reason, the two prongs of the Strickland test are satisfied.

Furthermore, this court finds that Applicant was not affirmatively misadvised by counsel. Though this usually arises in the context of a defendant's understanding of collateral consequences, this Court finds it apt in this circumstance. See, generally Frasier v. State, 351 S.C. 385, 389-90, 570 S.E.2d 172, 174-75 (2002). Counsel did not fail to advise or actively misadvise Applicant of any consequences of his plea or part of his negotiation; rather, he stated on the record that he did not know the duration of this consequence and could not advise.

***Plea Counsel's Advice Regarding the Sentence and whether it was Banishment***

Applicant argues that counsel was ineffective when he advised Applicant to accept a guilty plea offer that required him to leave the country, as it amounted to banishment, which is an illegal sentence under South Carolina law. He cited Henry v. State, 276 S.C. 515, 280 S.E.2d 536 (1981) for this proposition. The State argued that this could not be viewed as a sentence or as banishment because it was Applicant's voluntary removal of himself from the country.



Though it was "signed off on" by the plea judge, it was as part of a negotiation, not a court-ordered sentence.

This court agrees with the State's argument. As there was no court order banishing Applicant from the state or country, that term and argument are ineffective. Rather, this court views this as a creative solution that both the State and Applicant agreed to at the time. It satisfied the interests of all parties, and was approved by the court. It is also clear in the record that when or whether Applicant could return would be a matter for a different tribunal. Plea Tr. p. 12. It is abundantly clear in the transcript that Applicant understood to what he was agreeing and the terms of that agreement. For this reason, this court finds no reason to believe that counsel was ineffective. His performance was not deficient, as he continuously advised Applicant of the terms and consequences of the negotiation as he knew them, and again encouraged Applicant to seek other counsel, if desired. Because of this, none of his actions can be viewed as having caused prejudice to Applicant. Therefore, there is no ineffectiveness pursuant to the Strickland standard.

#### **IV. CONCLUSION**

Based on the foregoing, the Court finds and concludes 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.

The 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 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

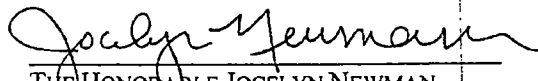


of post-conviction relief. Rule 71.1(g), SCRPC, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED THAT:**

1. The application for post-conviction relief is denied and dismissed with prejudice.

**AND IT IS SO ORDERED** this 11th day of October, 2017.



THE HONORABLE JOCELYN NEWMAN  
Presiding Judge  
Fifth Judicial Circuit

Columbia, South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2014 CP-40-6921

VINAY TANDON

STATE OF SOUTH CAROLINA

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: NEWMAN, J.	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

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

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court: Applicant's Motion for Reconsideration pursuant to Rule 59(e), SCRPC, dated October 19, 2017 (filing date unknown) is DENIED.

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

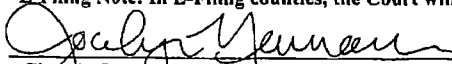
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below:

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

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

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

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

  
 Circuit Court Judge

2757

Judge Code

October 25, 2017

Date

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 27 day of Oct, 2017 to attorneys of record or to parties (when appearing pro se) as follows:

E. Charles Grose Jr.

Jessica Elizabeth Kinard

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

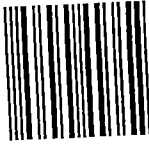
Clerk of Court \_\_\_\_\_

*Jeanette W. McBride*

he Grose Law Firm, LLC  
404 Main Street  
Greenwood, SC 29646



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