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December 21, 2017

RECEIVED
DEC 27 2017
S.C. SUPREME COURT

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

The Honorable Anita Williams
Marlboro County
P.O. Drawer 996
Bennettsville, SC 29512

RE: George Cousins v. State of South Carolina
2014-CP-34-127

Dear Mr. Shearouse and Ms. Williams:

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

(1) Proof of Service of the Notice of Appeal;
(2) A copy of the Order which is to be challenged on appeal; and
(3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Cousins in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Cousins in this appeal.

Yours very truly,

Lance S. Boozer

cc: Johnny James, AAG
Office of Appellate Defense
George Cousins, #350976

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

DEC 27 2017

S.C. SUPREME COURT

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

The Honorable Roger E. Henderson, Circuit Court Judge

Case No. 2014-CP-34-127

George Cousins, #350976, ...Petitioner,

v.

State of South Carolina,..Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Roger E. Henderson's Order dated November 16, 2017, denying post-conviction relief to the Petitioner and received by undersigned counsel on December 21, 2017. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,

Lance S. Boozer
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THE STATE OF SOUTH CAROLINA
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APPEAL FROM MARLBORO COUNTY
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George Cousins, #350976, ...Petitioner,

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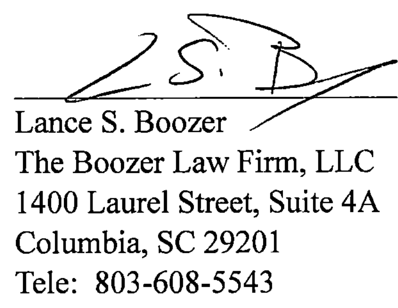
PROOF OF SERVICE

I, Lance S. Boozer, attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Johnny James, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 21st day of December, 2017.



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STATE OF SOUTH CAROLINA

COUNTY OF MARLBORO

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

George A. Cousins,
S.C.D.C. No. 350976,

Applicant,

v.

State of South Carolina,

Respondent.

Case No.: 2014-CP-34-00127

ORDER OF DISMISSAL

FILED
2017 DEC 13 AM 8
ANITA M. WILLIAMS
CLERK OF COURT
MARLBORO COUNTY, S.C.

This matter comes before the Court by way of an application for post-conviction relief filed by George A. Cousins ("Applicant") on May 12, 2014. Respondent made its return on or about December 5, 2016. The Court convened an evidentiary hearing into the matter on July 18, 2017, at the Dillon County Judicial Center in Dillon, South Carolina. Applicant was present at the hearing and represented by Lance S. Boozer, Esquire. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, J. Richard Jones, Esquire ("Jones") and post-sentence motion counsel, Stuart M. Axelrod ("Axelrod") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, a copy of the transcript of the hearing on the motion to reconsider, the records of the Marlboro County Clerk of Court regarding the subject convictions, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Marlboro County Clerk of Court. Applicant was indicted at the January

2011 term of the Marlboro County Grand Jury for murder (2011-GS-34-00050) and possession of a firearm during the commission of a violent crime (2011-GS-34-00051). J. Richard Jones represented Applicant on the charges. Kelly W. Hall and Heather S. Weiss, of the South Carolina Attorney General's Office, prosecuted the case. On May 24, 2012, Applicant pled guilty to the lesser-included charge of voluntary manslaughter, and to the weapon charge as indicted. The Honorable Paul M. Burch sentenced Applicant to imprisonment for concurrent terms of 30 years for voluntary manslaughter and 5 years for the weapon charge.

After the imposition of Applicant's sentence, Jones filed a motion to reconsider on Applicant's behalf. After the filing of the motion, but prior to the hearing thereon, Stuart M. Axelrod substituted for Jones as counsel. Applicant proceeded to a hearing before Judge Burch on April 8, 2013. Axelrod represented Applicant, and Ashley A. McMahan, of the South Carolina Attorney General's Office, represented the State. The Court granted Applicant's motion in part, and reduced his sentence for voluntary manslaughter from 30 to 27 years on May 17, 2013. Reconsideration for the weapons conviction was denied at that time. Applicant did not appeal his plea or sentence.

Present Application

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

1. Ineffective assistance of counsel, in that:
   a. Counsel "assured" Applicant that he would receive a fifteen year sentence;
2. Involuntary Guilty Plea, in that:
   a. Applicant waived his right to a jury trial based on Counsel's "assurance" that he would receive a fifteen year sentence
3. Violation of Due Process

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2017 DEC 13 AM 8 52
ANNIE [illegible] WILLIAMS
CLERK OF COURT
MARLBORO COUNTY, S.C.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel & Involuntary Guilty Plea

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at

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689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

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 at 117, 386 S.E.2d at 625 (citing Strickland at 688). 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 at 117-18, 386 S.E.2d at 625 (citing Strickland at 694). The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

Applicant further claims his plea was not entered knowingly or voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish Applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243 (1969); Dover v . State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as

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COUNTY, S.C.

well as evidence presented at the PCR hearing. See Harris v. Leeke, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he should be allowed to depart from the truth of his statements. See Crawford v. U.S., 519 F.2d 347, 350 (4th Cir. 1975) (overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4th Cir.1985)).

An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial instead. See Roscoe v. State, 345 S.C.16, 20, 546 S.E.2d 417, 419 (2001); see also Richardson v. State, 310 S.C. 360, 362 426 S.E.2d 795, 797 (1993). Given Applicant's burden of proof and the analysis to be applied to this claim, Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and the Court treats it as such.

IAC Allegation #1 – Misadvice as to Certainty of 15 Year Sentence

Applicant alleges that he only pled guilty due to Jones' assurance that he would receive a sentence of only 15 years for voluntary manslaughter. Even where counsel offers misinformation as to the duration of sentence a defendant faces upon pleading guilty, the deficiency can be cured where the trial court properly informs the defendant about the sentencing range. Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011) (citations omitted); see

also Moorehead v. State, 329 S.C. 329, 333, 496 S.E.2d 415, 416-17 (1998) ("Even if trial counsel erroneously informed [Applicant] his sentence would be probationary, any misconception was cured at the plea hearing."). Furthermore, where a defendant signs a properly prepared, and accurate sentencing sheet, he or she thereby manifests his or her desire to plead guilty and acknowledges the character of his or her plea. Id., 393 S.C. at 575, 713 S.E.2d at 616-17.

At the evidentiary hearing, Applicant testified that Jones met with him in April 2012 and communicated a "one time deal" in which Applicant could plead guilty in exchange for a sentence of 15 years. Applicant testified he communicated his acceptance of that plea to Jones and that he appeared in court in May 2012 with the belief that he would be entering a plea for 15 years based on what Jones told him. Applicant was "shocked" when Judge Burch imposed a sentence of 30 years. Applicant testified he told Axelrod about six months before the hearing on his motion for reconsideration that Jones had communicated to him an offer of 15 years. Applicant described his relationship with Jones as "kind of rocky" after Applicant was attacked by members of the victim's family at his bond hearing. Applicant testified he would have proceeded to trial had he known he would not receive a sentence of 15 years. On cross-examination, Applicant admitted the court told him the maximum possible sentence for voluntary manslaughter was 30 years. Applicant never saw anything in writing to reflect the purported plea deal.

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ANITA WILLIAMS
CLERK OF COURT
MARLBORO COUNTY S.C.

Jones testified he asked Applicant if he wanted to explore the possibility of a plea, to which Applicant replied that he did. Jones denied ever telling Applicant that he would receive a sentence of 15 years. Jones called the attorney general working on the case and asked about the possibility of voluntary manslaughter; to Jones' surprise, the attorney general agreed. Jones

explained to Applicant that he would ask for the minimum sentence while the State would ask for the maximum. Jones further explained to Applicant Judge Burch's process for sentencing during guilty pleas: Judge Burch would take the maximum sentence, cut it in half, and then go up or down based on either mitigation or aggravation. Jones explained Judge Burch's process to Applicant on multiple occasions. Jones, like Applicant, testified he was shocked by the 30 year sentence. Jones filed a motion for reconsideration and prepared until about a week before the hearing, at which time Applicant's mother called and informed Jones that Applicant had retained Axelrod to represent him on the motion. Jones met with Axelrod to discuss the case the day of the hearing on the motion for reconsideration. Jones denied telling Axelrod that he'd guaranteed Applicant a 15 year sentence; rather, the conversation revolved around Axelrod's concerns about the extent of Jones' trial preparation.

Axelrod testified he was retained to represent Applicant on his motion for reconsideration, which had already been filed. Axelrod testified Applicant communicated to him that Jones promised a sentence of 15 years. Axelrod expressed initial skepticism of Applicant's claim. Axelrod testified he told Jones' about Applicant's report that Jones promised 15 years, which Jones then confirmed. Axelrod testified he communicated the problem to Judge Burch and the attorney general in chambers and specifically requested a sentence of 15 years during the hearing. Axelrod affirmed that he did not wish to be at the evidentiary hearing.

Jones was again called as a witness by Respondent and reaffirmed his recollection of his conversation with Axelrod. Jones noted the only specific recollection he had was Axelrod asking why Jones did not pursue a plea for involuntary manslaughter, to which Jones replied that the facts of the case did not fit involuntary manslaughter. Jones denied ever promising Applicant

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COUNTY S.C.

a sentence of 15 years. Jones denied ever telling anybody else that he promised Applicant a sentence of 15 years.

This Court finds that Applicant's testimony was not credible and entirely self-serving. The plea transcript shows that Judge Burch properly and clearly communicated to Applicant the full breadth of his sentencing exposure, and when asked if he had any questions about that exposure, Applicant replied "No, sir." Tr. 6. The State was unequivocal that "[t]here is no agreed recommendation," and zealous in its demand for the maximum sentence within the range available for voluntary manslaughter and the weapon charge. Tr. 4, 18-30. Applicant's testimony at the evidentiary hearing that Jones' said nothing during the plea proceeding is plainly inconsistent with Jones' efforts to mitigate the killing. Tr. 12-15, 30-32. Applicant was there and present for the entire proceeding and signed the sentencing sheets—there was no room for confusion in that plea.

This Court finds Jones' testimony was clear, thorough, consistent, and credible. Jones accurately explained Judge Burch's sentencing process to Applicant. Axelrod misunderstood a statement by Jones during their conversation immediately prior to the hearing on the motion for reconsideration, then requested a modification of Applicant's sentence to 15 years based upon that misunderstanding. Jones committed no deficiency in his representation and Applicant suffered no prejudice. Accordingly, Applicant cannot meet his burden as to either prong of <u>Strickland</u> and his request for relief is **DENIED**.

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ANITA M. WILLIAMS
CLERK OF COURT
MARLBORO COUNTY, S.C.

III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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.

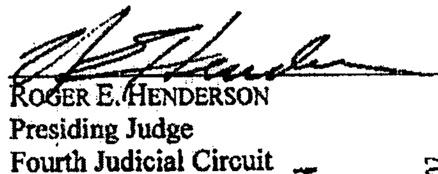
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention 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 South Carolina Department of Corrections.

AND IT IS SO ORDERED this 16th day of November, 2017.



ROGER E. HENDERSON
Presiding Judge
Fourth Judicial Circuit

Chesterfield, South Carolina

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2017 DEC 13 AM 8 52
ANITA M. WILLIAMS
CLERK OF COURT
MARLBORO COUNTY, S.C.

STATE OF SOUTH CAROLINA
COUNTY OF MARLBORO

IN THE COURT OF (Select one.)
☐ GENERAL SESSIONS ☐ FAMILY COURT
FOURTH JUDICIAL CIRCUIT
CASE NO.: 2014-CP-34-127

State of South Carolina,
Plaintiff,
-vs-
George Cousins,
☑ Defendant ☐ Juvenile.

APPOINTMENT OF COUNSEL
(Select one.)
☑ ORDER
☐ AMENDED ORDER

Offense(s): PCR

It appears that the above named person is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

☐ the public defender now represents another person involved herein and that a conflict would arise if that office represents the above-named individual.

☐ the public defender has indicated a possible conflict of interest or other good cause warranting the appointment of counsel based on: __________

☐ the public defender or court-appointed counsel has indicated that the named individual has now retained private counsel and is no longer entitled to appointed counsel.

☐ court-appointed counsel has claimed an exemption or has demonstrated good cause pursuant to Rule 608 warranting the appointment of new counsel based on:

☐ court-appointed counsel has obtained substitute counsel named below pursuant to Rule 608(h)(2); only the member who originally received the appointment and who sought substitute counsel shall receive credit for the appointment.

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2015 JUN -8 PM 3:00
WILLIAM B. FUNDERBURK
CLERK OF COURT
MARLBORO COUNTY, S.C.

Therefore, it is ordered that Lance Boozer, Esquire hereby is appointed as
(Select only one.) ☑ counsel ☐ lead counsel (if capital PCR case)

for the above-named person. Counsel previously appointed is/are hereby relieved as counsel.

☐ (If Death Penalty PCR Case) It is further ordered that __________, Esquire, is hereby appointed as second counsel in this capital case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED THIS 8 DAY OF June, 2015.

William B. Funderburk
☐ Circuit Judge ☑ Clerk of Court

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.scoid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

THE BOOZER LAW FIRM, LLC
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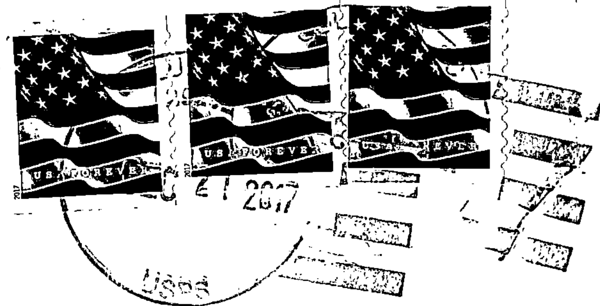

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
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Columbia, SC 29211