LAW OFFICE OF

TRICIA A. BLANCHETTE

RECEIVED

SEP 24 2018

S.C. SUPREME COURT

September 24, 2018

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: John Edward Washington v. State

Dear Sir:

For filing in the above referenced PCR case, attached please find a Notice of Appeal and Certificate of Service. I am in the process of being retained by Mr. Washington. I had intended to order the transcript of the evidentiary hearing today, but the online form is unavailable since I cannot seem to load the Judicial website. I will order the transcript and provide proof of such as soon as possible.

I appreciate your assistance with this filing. Please contact me if anything further is needed.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Lindsey McCallister, Asst. Attorney General
John Edward Washington

PO Box 2147 • Leesville, SC 29070

803.908.3266 • blanchettelaw@gmail.com

RECEIVED

SEP 24 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Brooks P. Goldsmith, Circuit Court Judge

Case No.: 2015-CP-40-07245

John Edward Washington, 362938,.....Petitioner,

vs.

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

NOTICE OF APPEAL

John Edward Washington, Petitioner, appeals the Order of Dismissal issued by the Honorable Brooks P. Goldsmith on June 25, 2018, which was filed on July 29, 2018. Petitioner also appeals the Order denying Applicant's Motion Pursuant to Rule 59(a) & (e), issued by the Honorable Brooks P. Goldsmith on August 28, 2018, which was filed on August 31, 2018. Petitioner, through counsel, received notice via email of the entry of the Order on August 31, 2018.

Tricia A. Blanchette
Bar #74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

September 24, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Brooks P. Goldsmith, Circuit Court Judge

Case No.: 2015-CP-40-07245

John Edward Washington, 362938,.....Petitioner,

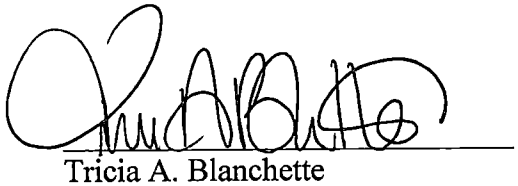
vs.

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

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that I hand delivered this 24th day of September 2018 a Notice of Appeal to Lindsey McCallister, of the Attorney General's Office, at:

Office of the Attorney General
Att: Lindsey McCallister, Assistant Attorney General
1000 Assembly Street, 5th Floor
Columbia, SC 29201



Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

September 24, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
John Edward Washington, S.C.D.C. No. 362938,	)	Case No.: 2015-CP-40-09245
Applicant,	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief filed by John Edward Washington ("Applicant") on December 3, 2015. Respondent made its return on or about April 27, 2016. The Court convened an evidentiary hearing into the matter on March 22, 2018, at the Richland County Courthouse in Columbia, South Carolina. Applicant was present at the hearing and represented by Tricia A. Blanchette, Esq. Jessica E. Kinard, Esq., of the South Carolina Attorney General's Office, represented Respondent.

Two expert witnesses, Tora Brawley, Ph.D., and Donna Maddox, M.D., testified at the evidentiary hearing. Applicant's sister, Jan Washington Caldwell, and Applicant's plea counsel, Johnathan S. Gasser, Esq. ("Counsel") also testified. Applicant did not testify. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Richland County Clerk of Court regarding the subject conviction, the pleadings, and the exhibits introduced at the hearing. 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 Richland County Clerk of Court. Applicant was indicted at the March 2014 term of the Richland County Grand Jury for murder (2014-GS-40-00387). Johnathan S.

Gasser, Esq. represented Applicant, and Kathryn Cavanaugh, Esq., of the Fifth Circuit Solicitor's Office, prosecuted the case. On February 5, 2015, Applicant pled guilty as indicted. The Honorable Edgar W. Dickson sentenced Applicant to imprisonment for a term of 40 years. 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 plea counsel" and "Involuntary guilty plea"
    a. "Failure to fully address the issue of [Defendant's competency] prior to, and during the plea proceedings."
    b. "Failure to fully address Defendant's mental health issues prior to, and during the plea proceedings."
2. "Belated direct appeal"
    a. "Counsel failed to file a direct appeal at Defendant's request."

Applicant, by and through PCR counsel Tricia A. Blanchette, Esq., amended his application by filing on March 6, 2018, to allege the following:

1. "Ineffective assistance of counsel that rendered his guilty plea involuntary due to counsel's failure to utilize mental health experts to review records and evaluate Applicant prior to the entry of his guilty plea and to assist in his plea proceeding, specifically, as follows:"
    a. "Failure to utilize mental health experts to assist in plea negotiations."
    b. "Failure to utilize mental health experts to formulate possible defenses and/or in mitigation."
    c. "Failure to utilize mental health experts to ensure that Applicant's plea was knowingly and voluntarily entered."

Applicant proceeded only on the amended allegations at the evidentiary hearing.

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. Because of the inextricably close relation between the allegations pertaining to Applicant's mental health, this Court addresses them together below.

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 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). With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

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 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 it will be treated as such.

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.

1. Failure to Evaluate Applicant's Mental Health, Consult Expert During Negotiations

Applicant alleges Counsel was ineffective in failing to retain an expert to evaluate his mental health status and use the results of such an evaluation as part of negotiating a more favorable set of terms for his guilty plea, or to develop possible defenses.

A criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). At a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. Id., 372 S.C. at 331-32, 642 S.E.2d at

597. Counsel may reasonably rely on his own perceptions in determining what, if any, expert evaluation is necessary and appropriate to the determination and development of defenses. See Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992) (finding Counsel reasonably relied on his own perceptions in deciding to not request a mental examination which may have formed the basis of an insanity defense or a determination of incompetency.).

Due process prohibits the conviction of a person who is mentally incompetent, and that right cannot be waived by a guilty plea. Id., 308 S.C. at 232, 417 S.E.2d at 595 (citing Bishop v. U.S., 350 U.S. 961 (1956); Pate v. Robinson, 383 U.S. 375 (1966)). The test of competency to enter a plea is the same as required to stand trial: the accused must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him. Id., 417 S.E.2d at 596 (citing State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976); Carnes v. State, 275 S.C. 353, 271 S.E.2d 121 (1980)). An applicant alleging incompetence in fact must show by a preponderance of the evidence he was incompetent at the time of his plea. Id.

Under South Carolina law, a defendant may be found guilty-but-mentally-ill if he or she, at the time of the commission of the offense, had the capacity to distinguish right from wrong, but because of mental disease or defect lacked sufficient capacity to conform his conduct to the requirements of the law. S.C. Code Ann. § 17-24-20(A). Where a person pleads or is otherwise found guilty-but-mentally-ill, he or she must be sentenced as provided by law for a defendant found guilty, but when committed to incarceration must first be retained at an appropriate facility for treatment until deemed safe for housing in the general population of the Department of Corrections. S.C. Code Ann. § 17-24-70.

The Plea

The plea court queried Applicant as to his mental health, to which Applicant replied that he was undergoing treatment for depression and taking medication as part of that treatment. (Tr. 6, ll. 7-23). The plea court asked if the medication affected Applicant's ability to understand what he was doing at the proceeding, to which Applicant replied in the negative. (Tr. 6-7). Applicant affirmed he was thinking clearly and understood exactly what he was doing. (Tr. 7, ll. 8-11). Later in the proceeding, Applicant collapsed during the plea court's examination of him; both the Clerk of Court and Counsel reported Applicant had locked his knees. (Tr. 15-16). Applicant recovered and affirmed he understood the allegations in the indictment. (Tr. 16, ll. 18-23). Applicant immediately collapsed a second time and court recessed a few minutes. (Tr. 16-17).

After the recess, the plea court again inquired as to Applicant's lucidity; Applicant wrote off the episode as the result of dehydration. (Tr. 17, ll. 9-17). The plea court then turned to Counsel and asked if Applicant could proceed, to which Counsel responded at length:

> MR. GASSER: Since you're – based on your question, we – I thoroughly looked into the idea of competency during the time, particularly since he was in a significant motor vehicle accident after this incident in which he had a closed-head injury. That during my times and meeting with him, I felt that particularly as the weeks went on after this incident that he, he was thinking with clarity. He was extremely lucid. He's an intelligent man. We spent a significant amount of time, as you can imagine, together over the eighteen times that we have met. I met with him again this morning.
>
> I also talked about these issues of competency with his ex-wife, Sheila Washington, who's in the courtroom, and she will be addressing the court shortly, Your Honor. And she has also on a regular basis, two to three times a week, had telephonic communication with Mr. Washington. She is somebody that has known him for, for thirty years. Has also indicated to me that she knows, she knows John. She's had conversations with John. She's talked about a variety of subject matters. She believes John to be lucid, and he understands what he's doing in his decision-making process.

(Tr. 17-18). Offered the opportunity to again speak with his client, Counsel again conferred with Applicant and thereafter reported to the plea court that he was "satisfied that he knows what he's doing today, what's going on right this – at this moment." (Tr. 18-19). Nonetheless, the plea court again asked Applicant if he was thinking clearly and understood what he was doing, which Applicant affirmed. (Tr. 19, ll. 11-15). The plea court noted Applicant's age and emphasized that "any sentence you get for this is essentially a life sentence[,]" which Applicant acknowledged. (Tr. 19-20). Applicant pled guilty and the plea court found the plea freely, voluntarily, and intelligently made. (Tr. 20-21).

In mitigation, Counsel confirmed the evidence against Applicant was extremely strong and that Applicant informed him at every meeting that he was guilty and wished to plead guilty. (Tr. 26-27). Counsel expressed some reservations about a client pleading straight-up to murder, but explained he "explored all avenues, all potential differences, all the probabilities of a jury trial," and concluded a plea for mercy was the best way forward. (Tr. 27, ll. 2-18). Counsel cited to Applicant's exemplary record of military service before briefly discussing Applicant's mental health issues discovered during his service:

> Your Honor, the – he was diagnosed. A friend of his, a member of the Guard, Mr. John Edwards, actually noticed some signs, warning signs. Had him go to a physician at Moncrief Army Hospital, and the first documented, preliminary diagnosis of severe depression was on January the 28th. It is in his mental health and medical records that both the state and the defense were able to obtain shortly after this incident.
>
> He was initially put on Wellbutrin, an antidepressant. That was not strong enough. On March the 25th of 2011, they upgraded his medication to Zoloft. So, he had been on Zoloft for a period of eighteen months prior to this, prior to this incident dealing with his severe depressive episodes.

(Tr. 28-29). A number of friends, family, and colleagues of Applicant spoke at length in mitigation. (Tr. 31-43). Immediately prior to sentencing, the plea court expressed the hope "that

what happened will emphasize the need to address domestic violence and mental-health issues in this state, including, including depression." (Tr. 46-47).

The Evidentiary Hearing

At the evidentiary hearing, Applicant called two doctors who evaluated Applicant as part of this PCR action: Dr. Tora Brawley and Dr. Donna Maddox. Dr. Brawley, a clinical neuropsychologist in private practice, evaluated Applicant on May 4, 2017, at the request of Dr. Maddox. Dr. Brawley interviewed Applicant, who reported memory and concentration issues starting in 2011 during a senior leader course in the military, significant depression since 1998, and three head injuries suffered in 1975, 1984, and 2013. Dr. Brawley also conducted a battery of tests on Applicant and found that, at the time of the evaluation, Applicant's IQ was at 74, at the fourth percentile. Dr. Brawley concluded Applicant suffered from a brain deficiency and recommended a full dementia workup. Dr. Brawley reviewed the results of Applicant's previous neuropsychological testing conducted at Fort Gordon, Georgia in 2011, and contested its finding that Applicant suffered no mental deficits; the doctor argued the military wasn't looking for dementia in their testing, but rather only sought to determine whether Applicant met retention standards. Dr. Brawley also criticized the report prepared by the South Carolina Department of Mental Health prior to the plea for relying only on interviews in lieu of any formal testing. Dr. Brawley concluded Applicant's mental deficits at the present were more numerous than at the time of his evaluation in 2011, that Applicant's condition was degenerative, and that he was declining in cognition. On cross-examination, Dr. Brawley conceded she did not attempt to determine culpability or responsibility at the time of the crime.

Dr. Maddox, qualified as an expert in forensic psychiatry, reviewed the evaluation by the Department of Mental Health, Applicant's medical records from Palmetto Richland from the collision and injury after the killing, Applicant's 2011 records form Moncrief Army Hospital,

records of the investigation and plea, Dr. Brawley's report, and the results of an MRI. From her interview with Applicant, Dr. Maddox reported he still suffered from significant depression, was still remorseful, and had been prescribed Remeron, an antidepressant. Dr. Maddox noted Applicant had difficulty remembering his history of head injuries and that his present deficits were very apparent. Dr. Maddox found Applicant could not draw a cube, confabulated words during a Montreal Cognitive Assessment, and exhibited nystagmus consistent with prior head injury. Dr. Maddox opined that both the military and DMH evaluations identified the cognitive deficits, but attributed them to Applicant's depression. Dr. Maddox asserted Applicant suffered frontal lobe dysfunction and that she would have been able to testify that Applicant could not conform his conduct to the requirements of the law due to his dementia. However, Dr. Maddox also conceded there was no question of Applicant's criminal responsibility—Applicant, overwhelmed with remorse, attempted to kill himself immediately after killing the victim. Dr. Maddox affirmed she would have been willing and able to assist Counsel had she been asked to do so.

On cross-examination, Dr. Maddox explained Applicant's condition would have led him to "ruminate" or fixate on a belief and would be unable to properly comprehend changes, such as a change in relationship status. The doctor testified Applicant's dementia made him aggressive and impulsive inconsistent with his prior personality, but again conceded Applicant knew right from wrong. Dr. Maddox asserted no difficulty in judging Applicant's capacity at the time of the killing thanks largely to Applicant's prior evaluation in 2011 as a point of comparison for his mental faculties. Dr. Maddox concluded the present matter was a case of "guilty, but mentally ill."

Applicant's sister, Jan Washington Caldwell, testified to hearing the 911 tape of Applicant in Counsel's office, at which time she told Counsel that the voice was not her brother,

in the sense that Applicant's voice was bizarre. Caldwell recalled the same response when looking at Applicant's picture. Caldwell testified Counsel never discussed Applicant's mental health or mental capacity with her. Caldwell then recalled an instance of Applicant getting fixated and irrationally upset while installing a rug in their mother's house in or about 2011 to 2012. Caldwell characterized Applicant as very, very private, and expressed surprise upon finding numerous prescription bottles while cleaning out his home after his incarceration. Caldwell recalled Applicant was slurring his words during the plea proceeding. On cross-examination, Caldwell admitted that though she had concerns about Applicant's mental fitness during the plea proceeding, she did not share those concerns with either Counsel or anybody else in her family. Caldwell additionally testified that she was completely unaware of Applicant's mental conditions previously.

Counsel testified to 31 years of experience practicing law, overwhelmingly in criminal practice. Though Applicant wished to plead all along, Counsel indicated his own initiative to investigate discovery in the case and other records he could obtain. In particular, Counsel had Applicant sign a waiver to permit him access to his medical records from Moncrief Army Hospital. Counsel considered consulting with a mental health expert, but found the records to be clear as to Applicant's diagnosis and treatment received. Counsel additionally spent considerable time consulting with Applicant's ex-wife, Sheila Washington, to explore Applicant's background and health, but learned nothing to lead him to believe expert consultation was necessary. Counsel discussed matters both related to and unrelated to the killing in order to confirm Applicant's understanding of things in light of the treatment indicated in the Moncrief records. Counsel affirmed he thoroughly reviewed the medical records and marked up a copy as part of his mitigation notebook. Based on his review of the records, his

consultation with Ms. Washington, and his interactions with Applicant, Counsel never had reason to believe Applicant had any mental health problems beyond his diagnosis for depression.

Counsel demurred as to whether Applicant's present-day diagnosis of dementia would have played a factor in his plea negotiations given the diagnosis was based on testing occurring several years after the plea, let alone the killing and subsequent suicide attempt. Counsel noted the M'Naghten standard was a high bar and, based on his investigation and observations, he felt that a plea of guilty-but-mentally-ill was never a realistic option. Instead, Counsel focused on mitigation, including his mental health records, but focused primarily on his exemplary military record, as he felt that would be most persuasive to Judge Dickson.

Counsel recalled going over the head of the assistant solicitor assigned to the case to negotiate with the elected circuit solicitor in order to try and attain the best deal possible. Counsel presented Applicant's history of depression and treatments to Solicitor Johnson, but noted the concern of the Fifth Circuit Solicitor's Office about setting a precedent that any indication of depression would result in relatively lenient treatment for extremely violent crime. Counsel reported the Solicitor considered the mitigation package provided, but the State was unwilling to offer a plea to voluntary manslaughter. Counsel described the facts of the case as extremely aggravating and that his realistic best hope was for a sentence in the low-to-mid 30's. Counsel recalled getting an assurance from the State that they would not ask for a specific sentence.

Counsel testified all of his meetings with Applicant were face-to-face, one-on-one, with no phone interviews or meetings separated by barriers, and that all of them were of substantial duration. Counsel recalled 18 meetings with Applicant. Counsel again observed and communicated with Applicant after his fainting episodes during the plea proceeding and was satisfied he was lucid. Counsel observed the plea court paid very close attention during the

entirety of his extended mitigation efforts. Counsel described the question of the present-day diagnosis as "Monday morning quarterbacking" and questioned whether it was realistic to conclude the same conclusions would have been reached had Applicant been tested between 2013 and 2015.

On cross-examination, Counsel denied ever observing anything in Applicant or in Applicant's medical history to suggest a cognitive defect or deficiency and that, had he so detected a deficiency, he would have followed up on it. None of the individuals who wrote letters or spoke on Applicant's behalf in mitigation reported anything to Counsel to indicate any concerns about his mental health. Counsel recalled the underlying facts of the case: Applicant drove by the victim's house only to be blown off by the victim, after which Applicant returned to his own home, retrieved and loaded his gun, drove back to the victim's house, chased her inside her home, kicked her front door down, chased her back into her garage, and shot her dead, with the killing shot captured on the recording of a neighbor's 911 call. Counsel again affirmed Applicant wanted to plea all along and, after investigating the case, Counsel agreed that there was no defense that he could present at trial. Counsel attributed Applicant's fainting at the plea proceeding to locking his knees while standing. As to the question of pursuing a guilty-but-mentally-ill defense, Counsel affirmed his focus was on mitigation, not the form of plea that would impact the character of his incarceration. Counsel described Applicant's post-killing head injury as mild beyond the immediate risk of death.

In closing, Applicant very briefly argued Counsel was ineffective in relying on his own judgment in lieu of retaining the expertise of a mental health or medical expert. Applicant asserted Counsel's failure to discuss the possibility of a guilty-but-mentally-ill plea prejudiced Applicant. In support of his position, Applicant provided seven cases: Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001) ("diminished capacity doctrine" not recognized in South Carolina);

State v. Lewis, 328 S.C. 273, 494 S.E.2d 115 (1997) (where no evidence a defendant was unable to distinguish right or wrong, an insanity charge is not appropriate); Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015) (finding counsel deficient for failing to call an expert witness at trial to challenge the medical evidence presented by the State); Winkler v. State, 418 S.C. 643, 795 S.E.2d 686 (2016) (finding the PCR court abused its discretion in denying a continuance for Applicant to investigate potential brain damage and mental health issues); Ramirez v. State, 419 S.C. 14, 795 S.E.2d 841 (2017) (finding counsel deficient for failing obtain another competency evaluation after a second evaluation revealed severe mental retardation, but rendered no opinion as to legal competency); and Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009) (finding counsel deficient for failing to present evidence of defendant's alleged mental illness in capital mitigation, where counsel mistakenly believed the finding of competency foreclosed such a presentation). Respondent argued in reply that Applicant always wanted to plea, faced overwhelming evidence, and that a guilty-but-mentally-ill plea would not have been a meaningfully different outcome. Respondent further asserted no evidence was presented to show that the plea entered was anything less than knowingly, freely, and voluntarily entered. Respondent emphasized Counsel's numerous meetings with Applicant provided him a superior position to make a competent evaluation of Applicant's then-existing mental state. Respondent asserted Applicant failed to meet either prong of Strickland.

Ruling

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. First, there is no evidence in the record to raise a question of Applicant's legal competence. The testimony of both doctors and Counsel unequivocally show that Applicant knew and knows the difference between right and wrong, and immediately in the wake of the crime was struck with overwhelming remorse at the gravity of the wrong he then committed in killing the victim.

There is no evidence in the record to show Applicant was incapable of assisting counsel in the preparation of his defense, or in the determination of the appropriateness of pleading guilty. To the contrary, despite 18 extended face-to-face meetings with his client, Counsel testified he had no concerns about Applicant's mental fitness outside of his continuing battle with severe depression. As such, the plea was knowingly, intelligently, and voluntarily entered.

The Court finds Counsel properly and reasonably relied on his own judgment in determining the scope of necessary investigation. Counsel repeatedly met with Applicant, met with those who knew Applicant, and acquired Applicant's medical records from Moncrief. The Moncrief records, submitted to this Court as Applicant's Exhibit #2, clearly, unequivocally, and repeatedly concludes that, at the time of his 2011 evaluation, Applicant demonstrated "[n]o global decline in cognition" and that there was "NO evidence that the patient is experiencing significant cognitive defects." (emphasis original).

The Court finds Counsel reasonably applied his professional judgment in determining the most effective approach to mitigation—a focus on Applicant's record of service in the armed forces. Counsel thoroughly explored that record, presented mitigation witnesses consistent with that approach, and weighed his experience with the particular plea judge in determining the best mitigation strategy. Counsel offered applicant's history of depression to the plea court and cannot be said to be deficient for not belaboring the subject. Counsel effectively presented mitigation both during the plea proceeding, and as indicated in his testimony at the evidentiary hearing, during the course of his plea negotiations with the Fifth Circuit Solicitor's Office.

The Court finds Applicant has not shown any prejudice from Counsel's decisions for three reasons. First, Counsel agreed with Applicant's desire to plead guilty based on his professional judgment of the evidence against Applicant as overwhelming, a judgment that was not contested at the hearing and the basis of which will not be restated here in light of the review

above. Second, the possible alternative outcome of a guilty-but-mentally-ill plea is not substantially different from the plea here entered. The difference between a guilty plea and a GBMI plea is only the character of a defendant's incarceration during rehabilitation, not the duration of his sentence or certainty of his guilt. Third, the evidence presented shows Applicant was never interested in a trial, but that from the moment of the killing through to the present day he was intensely remorseful about his actions and wished only to plead his guilt to the Court.

For all of these reasons, this Court finds Applicant has not met his burden of proving either deficiency on the part of Counsel, nor prejudice therefrom. The Court finds Counsel did not err in declining to call upon the assistance of a mental health expert in plea negotiations, the formulation of defenses, the formulation of mitigation evidence, or in determining Applicant's competency. Accordingly, the application for post-conviction relief is **DENIED**.

2. Belated Appeal Claim

In the original application, Applicant alleged Counsel was deficient in failing to file an appeal at Applicant's request. No mention of this allegation was made by Applicant's PCR counsel during the opening statements at the evidentiary hearing, and no testimony or other evidence was offered in support of the allegation. As previously indicated, Applicant proceeded only on the interconnected allegations pertaining to the investigation of Applicant's mental health. Furthermore, Applicant has at no point indicated a desire for a belated appeal, but in response to Question 19 on the form application for post-conviction relief, indicated only a desire for "[a] new trial." This Court finds Applicant has not only failed to meet his burden as to this allegation, but has abandoned this claim for relief entirely. Accordingly, the application for post-conviction relief is **DENIED**.

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 25 **day of** June **, 2018.**

BROOKS P. GOLDSMITH
Presiding Judge
Fifth Judicial Circuit

_____, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	2015-CP-40-09245
John Edward Washington,	)	
Applicant	)	
v.	)	ORDER
State of South Carolina,	)	
Respondent	)	
_____	)	

This matter comes before the court upon Applicant's Motion Pursuant To Rule 59(a) & (e) dated July 3, 2018, wherein Applicant requests that the court alter, amend and/or reconsider its order dated June 25, 2018.

Respondent filed a response to the Motion. After considering the issues raised in the Motion I find no reason to alter, amend, and/or reconsider the order dated June 25, 2018.

It is therefore Ordered, Adjudged and Decreed that the Motion dated July 23, 2018 is Hereby Denied.

August 28, 2018

Brooks P. Goldsmith

Circuit Judge