THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Case No. 2016-CP-26-05251

Brandon James Littell,
S.C.D.C. No. 363181 Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Brandon Littell appeals the judgement of the Honorable Kristi F. Curtis dated March 25th, 2019. Appellant received written notice of entry of this judgment April 4, 2019.

April 12, 2019

Erin E. Bailey
THE LAW OFFICE OF
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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on April 12, 2019, addressed to its attorney of record, Johnny Ellis James Jr., of the South Carolina Attorney General's Office located at 1000 Assembly Street, Columbia, S.C. 29201.

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LLC

RECEIVED
APR 15 2019
SC Court of Appeals

April 12, 2019

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, S.C. 29211

Re: *Brandon James Littell, S.C.D.C. No. 363181 v. State of South Carolina*
Case Number: 2016-CP-26-05251

Dear Ms. Kitchings:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

(1) Proof of service of the notice of appeal on the respondent.

(2) A copy of the judgment which is to be challenged on appeal.

Please note that while I was not appointed to represent Mr. Littell in the above referenced matter, my representation was *pro bono*. I anticipate that the Office of Indigent Defense will represent him in this appeal. I have mailed Mr. Littell an application for the services of the Office of Indigent Defense. Mr. Littell was represented in the trial courts by the Horry County Public Defender, and was sentenced to life in prison. As such, I have not enclosed a filing fee.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Erin E. Bailey

cc: Johnny James, Esq.
Robert Dudek, Esq.
Brandon Littell

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STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Brandon James Littell, S.C.D.C. No. 363181, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2016-CP-26-05251 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed by Brandon James Littell ("Applicant") on August 8, 2016, amended by and through counsel on November 20, 2018. Respondent made its return on or about July 27, 2017. The Court convened an evidentiary hearing into the matter on Tuesday, November 27, 2018, at the Horry County Government & Justice Center in Conway, South Carolina. Applicant was present at the hearing and represented by Erin E. Bailey, Esq. 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. Eric Fox, Esq. ("Counsel") also testified. 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 Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, the exhibits introduced at the evidentiary hearing, 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 Horry County Clerk of Court. Applicant was indicted at the January 2015

term of the Horry County Grand Jury for murder (2015-GS-26-00428), attempted murder (2015-GS-26-00429), and armed robbery (2015-GS-26-00430). Applicant was further indicted at the July 2013 term for burglary, second degree (2013-GS-26-02843), and larceny, value between $2,000 and $10,000 (2013-GS-26-02844). J. Eric Fox, Esquire represented Applicant, and Nancy Livesay, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On February 26, 2015, Applicant pled guilty to murder; all other charges were dismissed *nolle prosequi*. The Honorable Larry B. Hyman, Jr. sentenced Applicant to imprisonment for a term of life.

Applicant filed a timely notice of appeal. By order filed January 26, 2016, the South Carolina Court of Appeals dismissed the appeal for failure to show an issue that could be reviewed. The Remittitur was issued on February 11, 2016.

Present Application

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

1. "Ineffective Assistance of Counsel" and Involuntary Guilty Plea
    a. "This plea was not taken knowledgable [sic], was not fully aware,"
    b. "My lawyer didn't explain [what] I was truly facing, this plea was made unintelligently, and he did not represent me to the best of his ability."

Applicant requests relief as follows:

- "Case Reversal or Renegotiation of Sentence"

By and through PCR counsel, Applicant amended his application by filing on November 20, 2018, to allege the following additional grounds for relief:

1. "Ineffective Assistance of Counsel as to Eric Fox:"
    a. "Failed to fully review the evidence with the Defendant before recommending that the Defendant give a self-incriminating statement."
    b. "Failed [to] acquire all of the evidence and documentation in the case, specifically the statement of Brandon Littell given to Law Enforcement the day he was arrested."

c. "Failed to effectively communicate and advise the effect of the Proffer agreement."
d. "Failed to object when the Solicitor did not adhere to the prior plea agreement."
e. "Failed to object when the Solicitor violated the Proffer agreement by not communicating the extent of the Defendant's cooperation to the Judge."
f. "Failed to effectively and fully communicate."

Applicant further preemptively requested to be permitted to amend the application to conform to the evidence presented at the PCR 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.

A. Ineffective Assistance of Counsel - Strickland

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, 286 S.C. 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, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. 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, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. 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, 300 S.C. at 117-18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. 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).

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, 466 U.S. 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. Id. at 696-97.

1. Failure to Acquire, Review Evidence with Applicant

Applicant alleges Counsel was ineffective in failing to review all of the evidence with him before recommending he proffer a self-incriminating statement to the prosecution. The brevity of time spent by an attorney in consultation with his client, without more, does not establish that counsel was ineffective. Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980)). In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Id., 377 S.C. at 75-76, 659 S.E.2d at 145-46 (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

At the evidentiary hearing, Applicant testified he met Counsel "a couple of times" after he was arrested on June 20, 2013. Applicant recalled receiving discovery a few months later. Applicant testified that although he wanted a trial, Counsel believed the case had to be resolved by a plea bargain. Applicant claimed Counsel did not review the discovery with him, but only made a copy of the materials available to him. Applicant asserted that he wanted to hear recordings

in evidence, but that he never got them. Nonetheless, Counsel recommended cooperating with the prosecution and that Applicant explain exactly what happened. Applicant recalled he gave a statement to law enforcement when he was first arrested, and that he had told police he had been smoking marijuana on the beach on the night in question. Applicant denied ever seeing a written plea offer and expressed that he did not know what a proffer was at the time of the evidentiary hearing. Applicant testified Counsel did not discuss potential defenses with him. Applicant testified he did not believe the State had a case against him. Applicant testified there was no discussion of self-defense and no discussion of photographic lineups, but only discussions about pleading. Based upon Counsel's advice, Applicant gave a proffered statement to the prosecution. Applicant noted he asked for a bond hearing and wanted to be present for a preliminary hearing in order to learn the identities of his co-defendants. On cross-examination, Applicant criticized the thoroughness of Counsel's review of the case with him, and asserted all Counsel did was look at the discovery with him.

Counsel testified the public defender's office opened a file for Applicant and filed motions for discovery the same day as his arrest—June 20, 2013. Counsel and Applicant met for the first time on June 25, 2013. Counsel recalled it took about four months for discovery to be provided, at which time he mailed a copy to the jail, and that no discovery was available for Counsel and Applicant's first couple of meetings. In particular, Counsel recalled a period of receiving and reviewing discovery from October 11, 2013, to November 23, 2013.

Counsel testified the case was set on "a plea track" based upon what Applicant told him in their meetings and what he understood the State already knew. Counsel recalled telling Applicant that he needed to be the first in line to cooperate. Counsel admitted he did not yet have the statements of Applicant's codefendants at the time of the recommendation, but had the "skinny"

report of the investigation. Counsel testified he met with Applicant prior to the proffer and that while they did not review all of the materials provided in discovery "page-by-page," they did review specific items of concern. In particular, Counsel noted there was strong evidence to identify Applicant as one of the perpetrators. One of the victims of the shooting survived, and there were two co-defendants, all of whom were known to Applicant. Counsel conceded that he had no notes to indicate sending copies of recordings to Applicant, and explained he received recordings of 911 calls and of the codefendants' statements. Counsel testified he reviewed with Applicant the elements of the offenses charged. Counsel opined he could find nothing to support a self-defense strategy, but rather explained Applicant told him a codefendant forced him to shoot the victims; thus there was some discussion of duress. Counsel was unsure if he specifically analyzed the law of duress with Applicant.

Counsel admitted he made his recommendation of cooperation to Applicant before receiving all of the discovery, but noted that nothing later received in discovery changed his opinion. Counsel explained he had been very concerned about the likelihood that the codefendants would identify his client and cut their own deals with the prosecution, especially as one had retained an attorney[1] whose typical practice is to quickly cut very favorable plea deals in exchange for her clients' cooperation. Counsel testified there was no written offer, and explained that the prosecutors don't give a firm offer prior to receiving any statements because they do not know the value of what the proffered statement would be. Instead, Counsel recalled the solicitor gave a vague assurance that the State would help his client. Counsel denied any discussion of the possibility of a 25 year sentence. Applicant thereafter proffered. On cross-examination, Counsel

[1] Barbara Pratt, Esq.

described the case as a game of musical chairs, such that whichever defendant was left standing when the music stopped would lose.

The Court finds no deficiency on the part of Counsel, nor any prejudice to Applicant from the deficiency alleged. The Court finds that although Counsel did initially recommend to Applicant that he cooperate with the State prior to receiving complete discovery, he did so for valid reasons—namely that any delay in fully cooperating would risk losing favorable treatment to codefendants who could themselves inculpate Applicant, and that there was a surviving victim who could identify Applicant. Having articulated a reasonable basis for his advice to Applicant, this Court cannot find ineffectiveness on the part of Counsel. See Smith, 386 S.C. at 567, 689 S.E.2d at 632. Further, the Court finds Counsel did review evidence in his possession with Applicant as it came in. Counsel credibly testified that nothing later received in discovery would have changed his advice to proffer and cooperate with the prosecution, and Applicant testified he proffered in reliance and trust upon Counsel's advice.

The Court does not find credible Applicant's testimony that Counsel did not review evidence and discovery with him at some point prior to his pleading guilty. Applicant has not presented any evidence which, had it been discussed prior to the proffer, would have changed either Counsel's advice or Applicant's decision to rely upon Counsel's advice and cooperate. Applicant's assertion that he did not know the identity of his co-defendants at the earliest stage of proceedings against him is not credible where he ultimately inculpated them, resulting in their own guilty pleas and sentences. Applicant has offered little more than mere speculation, and thus failed to meet his burden of showing anything to result in a different outcome. For all of these reasons, the Court finds no deficiency in Counsel's advice to cooperate with the prosecution, nor any

prejudice to Applicant resulting therefrom. Accordingly, Applicant's request for relief by way of allegations restated as 1.a and b, above, is **DENIED**.

2. Failure to Advise of Effect of Proffer Agreement, Enforce Agreement

Applicant alleges Counsel was ineffective in failing to adequately advise him of what the effect of what proffering a statement would be, and for thereafter failing to enforce what he believed to be a plea agreement. "Absent an actual plea of guilty, a defendant may enforce an oral plea agreement only upon a showing of detrimental reliance on a prosecutorial promise in plea bargaining." Custodio v. State, 373 S.C. 4, 10, 644 S.E.2d 36, 39 (2007) (citing Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999); State v. Peake, 345 S.C. 72, 545 S.E.2d 840 (Ct. App. 2001)). Where a defendant can enforce a plea agreement under the detrimental reliance exception, and where his counsel fails to do so, that counsel's conduct constitutes deficient performance. Id., 373 S.C. at 12-13, 644 S.E.2d at 40. The appropriate remedy where there is a showing of detrimental reliance on a plea agreement which subsequently goes unenforced is specific performance of the breached agreement. Id., 373 S.C. 13, 644 S.E.2d at 40.

At the very outset of the plea proceeding, the State introduced the case to the plea court and stated the plea was "without any sort of recommendation or negotiation." (Tr. 3). The State did dismiss "several other charges" in light of the guilty plea, as explained in the procedural history set forth in Section I, above. Judge Hyman informed Applicant that the Court could impose a sentence of no less than thirty years and up to life imprisonment, which Applicant acknowledged. (Tr. 3, ll. 22-25). Judge Hyman offered Applicant the opportunity to ask him questions, which Applicant declined. (Tr. 7-8). The State articulated a detailed statement of facts providing that Applicant, alongside codefendants Michael Bellamy and Diaquan Johnson, planned the murder of Jason Quinn, and that Applicant shot him and Kelsie Ann Monin, Quinn's girlfriend who only

happened to be present in the car; Quinn escaped with his life, Monin did not. (Tr. 8-11). The solicitor cited throughout its factual recitation that the facts were as provided by Applicant, and acknowledged his cooperation at the conclusion:

> Mr. Littell did give a statement and cooperated. That statement was used in the waiver hearing against Diaquan Johnson. But just for the Court's knowing, I had talked to Mr. Fox before he ever gave the statement. We all knew he was pleading to murder. This was merely to give him a chance to cooperate as to the final sentencing hearing. But this has always been a murder plea. His cooperation was just to assist us and to assist his own mitigation.

(Tr. 11, ll. 12-19). Applicant thereafter affirmed he murdered Monin, and his doing so was why he was pleading guilty. (Tr. 11-12). Applicant denied being promised anything to plead guilty, and affirmed he was pleading freely and voluntarily. (Tr. 12, ll. 3-8). Presented a final opportunity to further consider the matter, consult with Counsel, or ask the court any questions, Applicant declined, and affirmed he believed pleading guilty was the best resolution of his case. (Tr. 12, ll. 9-19). The family of the victims spoke at some length and revealed further facts in their understanding of the case, including that the perpetrators "chased [Monin] down when she was able to run from the car and repeatedly kicked her on the ground while she died." (Tr. 13-22) (quotation at Tr. 16, ll. 4-6). Laura Lawrence, a sister of Monin, asked Judge Hyman to keep "these people away from society for as long as possible." (Tr. 18-19). Amy Cappuzello, also a sister, asked Judge Hyman to "punish them all to the fullest extent of the law." (Tr. 21, ll. 22-23). Based on remarks by Monin's father, the solicitor thereafter added that Applicant and codefendants had been trying to start a gang. (Tr. 21-22).

Counsel, in mitigation, noted Applicant's youth and asserted Applicant was standing before the court to take responsibility for his actions. (Tr. 23, ll. 1-8). Counsel revealed Applicant had openly and completely divulged his involvement to Counsel during their first meeting, and "very soon after contacted Ms. Livesay and indicated that he wished to cooperate[.]" (Tr. 23, ll. 9-23).

Counsel noted that at the time Applicant gave statements to the prosecution, they did not yet know the codefendants' postures towards their own charges. (Tr. 23-24). Upon prompting by the plea court, Counsel acknowledged the case could have been elevated to a capital case. (Tr. 24, ll. 2-7). Counsel acknowledged Applicant "committed a monstrous act" but was asking for mercy. (Tr. 25, ll. 10-21). Counsel offered drawings made by Applicant while incarcerated as some evidence of something "more to this young man [than] what he did on June 20th a year and [a] half ago." (Tr. 25-26). Counsel contrasted the cowardice of the killing to the bravery of pleading guilty without negotiation or recommendation, and Applicant's effort "to do everything in the right way both in assisting the State in sorting everything out and telling them everything that he knew and today in pleading guilty without recommendation." (Tr. 26, ll. 13-24). Applicant expressed his remorse, that he was misguided by his codefendants, and that though he wished for forgiveness he understood he did not deserve it. (Tr. 27, ll. 2-17). Counsel followed up and noted that while numerous members of the victim's family spoke on her behalf, no family appeared for Applicant, and implied an upbringing of some difficulty. (Tr. 27-28).

Judge Hyman engaged in a brief colloquy upon the conclusion of Counsel's mitigation:

THE COURT: Mr. Littell, did you intend on that night to kill both of these victims?

MR. LITTELL: We were assuming that Jason was gonna be the only one in the car and Kelsie was driving that day.

THE COURT: Well, she was there when you committed the act, did you intend to kill them both?

MR. LITTELL: Yes, sir.

THE COURT: Answer this question very carefully. Why?

MR. LITTELL: (No response.)

THE COURT: There was a reason. Why?

MR. LITTELL: Kelsie just happened to be there.

THE COURT: She happened to be there? Why was anybody gonna be killed?

MR. LITTELL: Michael Bellamy didn't like Jason.

THE COURT: Didn't like him. You know, Mr. Littell, it's by the grace of the State of South Carolina that you're not facing execution at this time. Do you understand that?

MR. LITTELL: Yes, sir.

(Tr. 28, ll. 3-20). Judge Hyman thereafter sentenced Applicant to life. (Tr. 28-29).

At the evidentiary hearing, Applicant testified he believed he was pleading in exchange for a sentence of thirty years. Applicant also testified he was told of an offer in or about October 2013 that he could plead guilty and serve no more than twenty-five years in prison. However, when he was prepared about a week before pleading guilty, Applicant testified he was told the State would offer, ask for, or expect a thirty year sentence. Applicant explained that when he heard "thirty to life" during the plea proceeding, he believed that was the description of the potential sentence murder carried, not what actually constituted the potential range applicable to him. Applicant asserted Counsel made no motion to enforce the plea agreement, and criticized Counsel for not doing anything in mitigation but offering that he cooperated. Applicant testified he never saw a written plea offer, and was not familiar with the concept of a proffer. Applicant testified he disagreed with some of the factual assertions made by the prosecution during the recitation of facts, and on cross-examination explained he disagreed with the description of the killing as drug-motivated or premeditated. Applicant again asserted he thought he was pleading in exchange for a thirty year sentence.

Counsel articulated the underlying facts succinctly: Applicant and Bellamy were small-time partners in the drug business who thought Quinn was a snitch, so they prepared, Bellamy slipped a gun to Applicant, and Applicant shot both victims point blank in the backs of their heads. Counsel described a good attorney-client relationship, that Applicant trusted him, followed his

advice, and did not withhold any information from him. Counsel explained there was no written offer, but that the prosecution only gave the vague assurance that they would help Applicant in exchange for his cooperation. In particular, the State was interested to know who chased Monin from the vehicle after she was shot. Counsel did not recall any discussion of a plea in exchange for a sentence of twenty-five years.

Counsel recalled meeting with Judge Hyman, solicitor Livesay, and counsels for the co-defendants in January 2015. The purpose of the meeting was to explain the nature of the case to Judge Hyman before the pleas were actually entered. Judge Hyman specifically asked Counsel to articulate the facts of the case, and Counsel complied. Counsel explained the extent of Applicant's cooperation, but also admitted bad facts. The solicitor added nothing to Counsel's recitation. No firm agreement resulted from the meeting in chambers, but Counsel testified there was an understanding that a thirty year sentence was acceptable to the parties, and recalled Judge Hyman jokingly pointing at each of the lawyers in succession, stating "thirty, twenty, ten," as though to indicate Applicant would receive a thirty year sentence and his codefendants would receive twenty and ten. Counsel clarified he never interpreted Judge Hyman's remark to constitute any guarantee of a particular sentence. Counsel again met with Applicant in February 2015, and communicated the results of the meeting in chambers. Counsel recalled telling Applicant that he perceived no red flags from Judge Hyman, and nothing alarming. Counsel could not remember if he told Applicant about Judge Hyman's "thirty-twenty-ten" jest, but did recall warning him that the Judge could sentence anywhere from thirty to life.

Counsel expressed his opinion of the State's presentation at the plea proceeding as "vicious" in tone. Counsel did not believe the State helped in any way, but rather did the "exact opposite of that." Counsel argued that Applicant's cooperation was very helpful to the State's

investigation and prosecution of all three defendants, but that the prosecution did not do much to communicate the value of Applicant's assistance. Nonetheless, Counsel believed the prosecution's tone was "victim theater" and that, given the prior conference in chambers, Applicant would still get a favorable sentence. Counsel did not file any motion to enforce because he did not believe there was an enforceable agreement where any understanding was little more than a generalized "you help us, we'll help you."

On cross-examination, Counsel testified he met with Applicant eight or nine times in the course of his representation. Counsel testified he did not recall ever discussing the possibility of pleading to voluntary manslaughter with Applicant. Counsel asserted he never firmly told Applicant he would get or could expect a sentence of thirty years. On redirect, Counsel recalled explaining to Applicant after the chambers conference that they did not have a deal, and that the outcome was still in Judge Hyman's hands. Nonetheless, asked on the stand if he believed he had a deal, Counsel replied "yes" and criticized his own arrogance. Counsel testified that given the same facts, he would still advise a course of cooperation, but would seek some kind of recommendation, and would not "do that, that way, with that judge." Counsel recalled scrambling alongside the State afterward to speak with Judge Hyman regarding his sentence, but perceived no likelihood he would reconsider it.

The Court finds no deficiency on the part of Counsel, nor any prejudice to Applicant therefrom. The Court finds Counsel's testimony credible, and finds that Counsel explained to Applicant the nature of proceedings and negotiations, explained that there was no firm plea agreement, and explained that sentencing was wholly in Judge Hyman's discretion. The Court is strained to identify any agreement which could be enforceable, and ultimately must conclude there was none. To the extent the generalized understanding (or misunderstanding) between the State

and Counsel could be interpreted to represent an enforceable agreement, the State abided by it and "helped" Applicant by not making an adverse sentencing request, by dismissing all other pending charges against Applicant excepting the murder charge, and by acknowledging Applicant's cooperation with the investigation, limited though that acknowledgement may have been.

The Court does not find credible Applicant's testimony that there was any discussion of a twenty-five year plea offer, or that he was ever instructed or expected a sentence of thirty years. The Court finds Applicant was afforded multiple opportunities throughout the plea proceeding to ask questions or raise concerns about his sentencing exposure if, in fact, he believed he was to be sentenced to a specific term of incarceration. The Court finds Counsel adequately and thoroughly explained to Applicant the evidence that was available to him, the nature of negotiations with the State, Counsel's perceptions from the chambers conference, Applicant's sentencing exposure, and the elements of the offenses charged. Applicant has failed to show any deficiency on the part of Counsel by way of this allegation, or any prejudice therefrom. Accordingly, Applicant's request for relief by way of amended allegations restated above as 1.c, d, e, and f, is **DENIED**.

B. Ineffective Assistance of Counsel - Cronic

Applicant, in closing at the evidentiary hearing, argued that he should be entitled to relief by virtue of the breakdown of the adversarial process, such that prejudice should be presumed. "[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." United States v. Cronic, 466 U.S. 648, 658 (1984). Generally speaking, attorneys are presumed competent to provide "the guiding hand that the defendant needs," such that "the burden rests on the accused to demonstrate" a violation of the Sixth Amendment. Id. However, there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Id.

Prejudice may be presumed *per se* in three circumstances: (1) when a defendant is completely denied counsel at a critical stage of his trial; (2) when there has been a constructive denial of counsel from an attorney's complete failure to subject the prosecution's case to meaningful adversarial testing; and (3) when circumstances of trial are such that the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that the presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. Nance v. Ozmint, 367 S.C. 547, 551-52, 626 S.E.2d 878, 880 (2006); Cronic, 466 U.S. at 659-60. "A finding of *per se* prejudice under any of these three prongs is 'an extremely high showing for a criminal defendant to make.'" Nance, 367 S.C. at 552, 626 S.E.2d at 880 (quoting Brown v. French, 147 F.3d 307, 313 (4th Cir. 1998)). Presumption of prejudice as a standard is only used for those cases where counsel fails to "function in any meaningful sense as the Government's adversary." Id., 367 S.C. at 552, 626 S.E.2d at 881 (quoting Florida v. Nixon, 543 U.S. 175, 190 (2004)).

The relevant facts are already set forth in Section II.A., above. The Court finds that none of the three circumstances providing for the presumption of prejudice are applicable to Applicant's case. Applicant was certainly not completely denied counsel at a critical stage of trial; to the contrary, Applicant's representation was assumed by the public defender's office with considerable haste and continued until the resolution of his charges. Second, the circumstances of the case were not such that no attorney, however competent, could have provided competent assistance—Counsel and Applicant had adequate time to meet, to discuss evidence, and to discuss how to best resolve the charges against Applicant. Third, Counsel did not fail to conduct "meaningful adversarial testing" in advising Applicant to cooperate and plead guilty—Counsel gave his advice based on the facts available to him from Applicant and the early stages of the investigation, confirmed the validity of his advice upon review of additional evidence as it became

available, conferred with Judge Hyman to probe the likelihood of a favorable sentence, secured dismissal of all but the one murder charge, and contested (however conservatively) the State's less flattering framing of Applicant's cooperation with the prosecution's investigation. For these reasons, the Court finds a presumption of prejudice inappropriate, and for the reasons and analysis set forth in Section II.A., above, finds the application for post-conviction relief must be **DENIED**.

[*Conclusion and signature on following page*]

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, 409 S.E.2d 395 (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

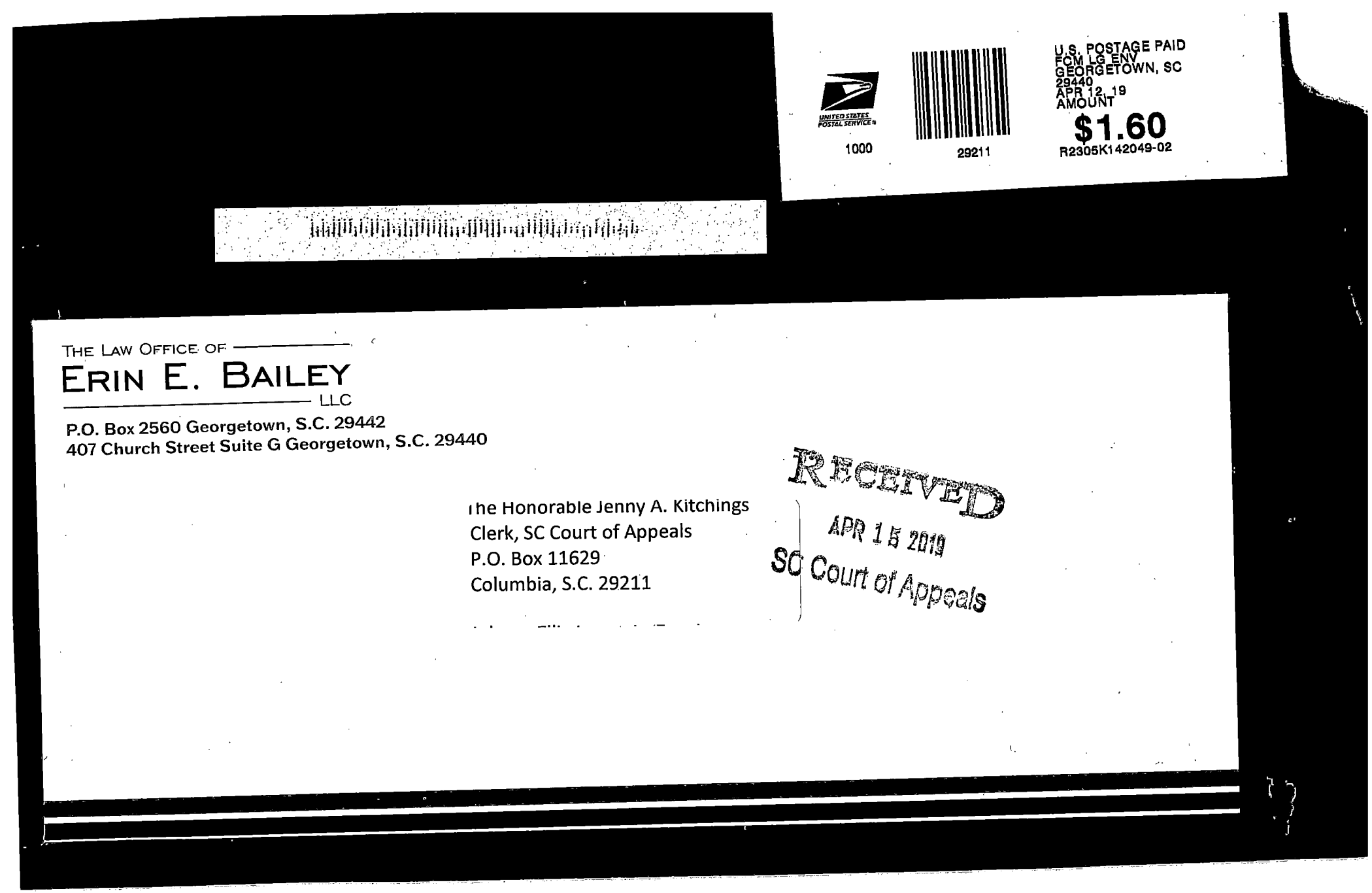
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 25th **day of** March **, 2019.**

Kristi F. Curtis

KRISTI F. CURTIS
Presiding Judge
Fifteenth Judicial Circuit

Sumter, South Carolina



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