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ATTORNEYS AT LAW

*A PROFESSIONAL ASSOCIATION*

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RECEIVED

MAY 13 2019

May 9, 2019

S.C. SUPREME COURT

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

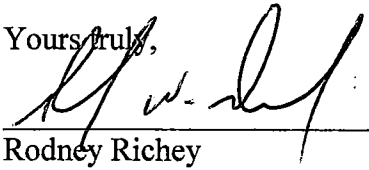
RE: Tamarcus Long vs. The State of South Carolina  
Case No: 2018-CP-42-1279

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,

  
\_\_\_\_\_  
Rodney Richey

RWR/  
Enclosures  
cc: Johnny James, Esquire

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas  
HONORABLE THOMAS A. RUSSO  
2018-CP-42-1279

RECEIVED  
MAY 13 2019  
S.C. SUPREME COURT

TAMARCUS LONG, SCDC# 305486

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

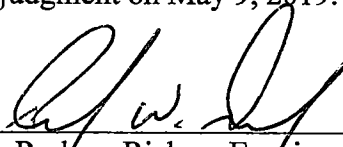
RESPONDENT.

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**NOTICE OF APPEAL**

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Tamarcus Long appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Thomas A. Russo, Circuit Judge on March 4, 2019 an Order issued on April 26, 2019 and filed on May 3, 2019. The Appellant received notice of the judgment on May 9, 2019.



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Other Counsel of Record:  
Johnny James, Esquire  
Office of Attorney General State of SC  
Post Office Box 11549  
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM SPARTANBURG COUNTY

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MAY 13 2019

S.C. SUPREME COURT

Court of Common Pleas  
HONORABLE THOMAS A. RUSSO  
2018-CP-42-1279

TAMARCUS LONG, SCDC# 305486

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

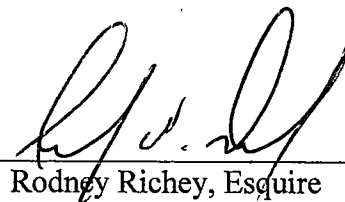
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**AFFIDAVIT OF SERVICE**

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I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on May 9, 2019, addressed to their attorney of record, Johnny James, Esquire Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: May 9, 2019



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STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF SPARTANBURG ) FOR THE SEVENTH JUDICIAL CIRCUIT

**Tamarcus Long,** ) Case No.: 2018-CP-42-1279  
S.C.D.C. No. 305486, )  
Applicant, )  
**ORDER OF DISMISSAL**  
v. )  
State of South Carolina, )  
Respondent. )

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This matter comes before this Court by way of an application for post-conviction relief filed by Tamarcus Long (Applicant) on April 12, 2018. Respondent served its return on August 3, 2018. The Court convened an evidentiary hearing into the matter on March 4, 2019, at the Spartanburg County Courthouse in Spartanburg, South Carolina. Applicant was present at the hearing and represented by Rodney Richey, Esq. Jacob Isenberg, Esq., and Johnny James, Esq., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, John G. Reckenbeil, Esquire (Counsel), also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the plea transcript, and the records of the Spartanburg County Clerk of Court regarding the subject convictions. The Court finds Applicant has not met his burden of establishing any constitutional deprivations or any other grounds entitling him to relief and denies and dismisses this application with prejudice.

**I. PROCEDURAL HISTORY**

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

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SPARTANBURG COUNTY

2016 term of the Spartanburg County Grand Jury for possession with intent to distribute (2016-GS-42-3113) and possession with intent to distribute marijuana within one-half mile of a school or park (2016-GS-42-3114). Applicant was subsequently indicted in December 2016 for distribution of marijuana (2016-GS-42-6473) and distribution of marijuana within one-half mile of a school (2016-GS-42-6474). Counsel represented Applicant on all charges. The case was prosecuted by Assistant Solicitor Grady B. Anthony of the Seventh Circuit Solicitor's Office.

On June 8, 2017, Applicant pled guilty as indicted to all charges before the Honorable R. Keith Kelly. Judge Kelly accepted the negotiated sentence of twelve years to run concurrent. Applicant did not appeal his conviction or sentence.

**II. PRESENT APPLICATION**

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

- 1. "Ineffective Assistance of Counsel"
  - a. Failure to review discovery before plea
  - b. Failure to pursue valid defenses
  - c. Failure to advise 85% sentence

Applicant requested a new trial and resentencing. At the evidentiary hearing, Applicant proceeded forward on the above-mentioned allegations.

**III. 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.

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PARTIAL CLERK'S OFFICE

### A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; 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. Strickland at 686.

“[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 review discovery before plea***

***a. Plea Hearing Statements***

Applicant contends Counsel directed him to lie under oath at the plea hearing about reviewing discovery together. An applicant's statements during the plea hearing are considered "conclusive unless [he] presents valid reasons why he should be allowed to depart from the truth" of them. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007).

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Here, Applicant's statement at the plea hearing that Counsel reviewed all discovery with him is considered conclusive. (Tr. 7, L. 8-9). During the hearing, Applicant, despite multiple opportunities, never altered that statement. (Tr. 7, L. 3-18). Moreover, there is nothing in the record to support Applicant's contention that Counsel directed his answers. However, there is evidence to support Counsel's credible testimony that they reviewed discovery extensively before the plea hearing. (Tr. 12, L. 5-12). Furthermore, Counsel credibly testified to never directing Applicant to lie at the hearing. Thus, Applicant's reasoning is not valid and his deficiency claim fails on this allegation.

***b. Deficiency based upon failure to review video***

Additionally, Applicant contends Counsel failed to review a material video with him. The disclosure of a material video to counsel instead of the applicant is sufficient for discovery requirements during negotiations when it contains "footage of a confidential informant whose identity would have been compromised" if watched by the applicant. Hyman v. State, 397 S.C. 35, 48, 723 S.E.2d 375, 382 (2012), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Here, Counsel credibly testified he did not get the video through discovery. Moreover, Counsel gave credible testimony that he never watched the video because the Seventh Circuit Solicitor's Office's policy is to terminate any plea offer, and cease any further plea negotiations, if Counsel or the Defendant elects to view the video involving the confidential informant. This policy is followed by the federal government and a majority of Solicitor offices in South Carolina to ensure the anonymity and the protection of confidential informants. Furthermore, Counsel credibly testified Applicant agreed to forgo video access to accept a negotiated sentence.

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ASSOCIATION

Therefore, this Court finds Applicant has not proved Counsel was deficient for failing to review the video involving a confidential informant.

*c. Prejudice based upon failure to review*

Applicant contends he wanted to go to trial to gain access to this video. An applicant is not prejudiced by deficiencies involving video disclosure when he “was aware throughout negotiations and guilty plea proceedings that videotape was not exculpatory.” Hyman, 397 S.C. at 48, 723 S.E.2d at 382. Counsel credibly testified he advised Applicant a jury could “likely” identify him selling illegal drugs in the video. Furthermore, Counsel credibly testified Applicant agreed a jury could identify him based upon seeing photographs from the video. Accordingly, this Court finds Applicant was aware the video was not exculpatory through negotiations, which means any alleged failure to review was not prejudicial.

**2. Failure to Pursue a Defense**

Applicant contends Counsel was ineffective for failing to pursue a valid defense of third-party guilt. In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation “was itself reasonable.” Taylor v. State, 404 S.C. 350, 364, 745 S.E.2d 97, 104 (2013). However, Counsel is not deficient in conducting a reasonable investigation as long as they interview potential witnesses “when it is reasonable to do so.” Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). Additionally, an applicant’s statements during the plea hearing are considered “conclusive unless [he] presents valid reasons why he should be allowed to depart from the truth” of them. Dalton, 376 S.C. at 137, 654 S.E.2d at 874.

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**a) Male witness**

Applicant contends Counsel failed to pursue a defense of third-party guilt through a male witness he offered. At the plea hearing, Applicant confirmed he was satisfied with Counsel's services, answered all questions, and "did everything he possibly" could for Applicant. (Tr. 7, L. 6-13). Furthermore, Counsel credibly testified about interviewing this male witness in his office. Counsel also credibly testified about credibility concerns with the male's story. Thereafter, Counsel credibly testified he discussed his concerns about the credibility of the male witness with the Applicant and the problems this would present at trial. This Court finds Counsel's credibility assessment of the witness after conducting an independent interview to be sufficient for a reasonable investigation. Therefore, this Court finds Applicant has failed to prove Counsel is deficient for failing to pursue a defense based on the male witness.

**b) Female witness**

Applicant contends Counsel was deficient for not using a female witness to present a third-party guilt defense. Specifically, Applicant testified Counsel never interviewed a female witness who wanted to take ownership of drugs used to prosecute him. Furthermore, Applicant testified the police report reflected she was responsible for all drugs recovered. Counsel testified of his awareness with female's story because of the police report. However, Counsel credibly testified the report indicated she could not identify specific details at the scene, which presented credibility concerns. Counsel further credibly testified he met with Applicant and the female witness before entering into the negotiated sentence. Counsel credibly testified the three of them went over all discovery, options, and opinions. Counsel credibly testified, at some point, he advised the Applicant that blaming his girlfriend would probably not sit well with the jury. Thereafter, the Applicant went before the plea judge where he confirmed, under oath, that he wished to waive his

right to call and confront witnesses despite having had knowledge of alleged third-party guilt. (Tr. 6, L. 5). Accordingly, this Court finds Applicant has not proved Counsel was deficient in failing to pursue a defense based upon the female witness.

***c) Prejudice based upon failure to pursue third-party guilt***

Applicant alleges the failure to pursue a defense for third-party guilt prejudiced his decision to avoid trial. The prejudice prong is dependent upon whether counsel's deficiencies "affected the outcome of the plea process." Frierson v. State, 417 S.C. 287, 789 S.E.2d 762 (Ct. App. 2016), *aff'd as modified*, 423 S.C. 257, 815 S.E.2d 433 (2018). To establish prejudice through witness corroboration, an applicant "must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted. SCRE 801. Mere "speculation" about the details of what a witness would testify about is insufficient to establish prejudice. Dalton v. State, 376 S.C. 130 at 143, 654 S.E.2d 870 at 877.

Here, Applicant testified both of the alleged witnesses were willing to accept ownership of drugs on his behalf. However, neither alleged witness testified or submitted affidavits for his PCR hearing. Without testifying, the female's conversation with police officers at the scene is inadmissible hearsay because it goes towards the truth of the matter asserted. Also, the police report itself is actually a statement from officers at the scene. Accordingly, Applicant's testimony about the male and female's version of events is mere speculation. Accordingly, this Court finds Applicant has presented evidence insufficient to prove prejudice based upon alleged deficiencies in failing to pursue a defense.

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SOUTH CAROLINA COURT

**3. Failure to Advise about delayed eligibility for release under community supervision**

**a) Deficiency based upon the failure to advise**

Applicant contends Counsel was deficient for failing to advise him that he must serve 85% of the sentence before he would be eligible for early release under community supervision. However, Counsel credibly testified he customarily provides clients with a sentencing explanation sheet, which includes the mandatory 85% minimum incarceration for third offense sentences.<sup>1</sup> Furthermore, Counsel credibly testified he provided this sentencing explanation sheet to Applicant before the plea hearing. Thereafter, Counsel credibly testified he verbally explained the sentence details to Applicant, including the 85% minimum incarceration requirement before eligibility for release. As a result, this Court finds Applicant has not proven Counsel was deficient based upon a failure to advise about delayed eligibility for release under community supervision.

**b) Prejudice based upon alleged failure to advise**

Applicant contends he would have gone to trial if he had known about his delayed eligibility for release under community supervision. The South Carolina Supreme Court has found deficient counsel does not prejudice an applicant where the basis for their decision to avoid trial was a favorable plea. Goins v. State, 397 S.C. 568, 575, 726 S.E.2d 1, 4 (2012). (Finding no prejudice where evidence showed Applicant accepted the plea after State offered to dismiss certain charges). Applicant credibly admitted he accepted the negotiated sentence based upon the fear of being exposed to LWOP at trial. Thereafter, Counsel credibly testified Applicant was aware of LWOP risks on multiple charges during plea negotiations. Counsel credibly testified he advised the Applicant the State likely had enough evidence to convict him through the confidential

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<sup>1</sup>Counsel credibly testified former Seventh Circuit Solicitor Trey Gowdy recommended this sentencing sheet, and he has been using it for many years without issue.

informant's testimony and the video. Counsel further credibly testified the State was ready to serve LWOP notice on a second distribution charge if it had lost this trial. Thereafter, Counsel credibly testified Applicant agreed the twelve-year negotiated sentence for all charges was a good deal. During the plea hearing, Counsel actually discussed Applicant's awareness of the "benefit" of not having been subject to LWOP on two occasions. (Tr. 11, L. 25) (Tr. 12, L. 15). Accordingly, Applicant thought this plea deal was more favorable than risking LWOP. Therefore, this Court finds Applicant failed to prove he would have gone to trial if he had received the proper advice regarding delayed eligibility for release under community supervision.

### III. CONCLUSION

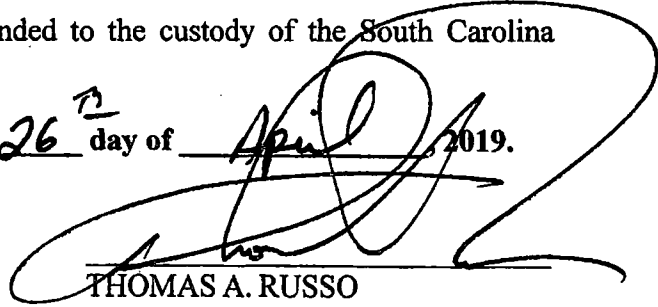
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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 26<sup>th</sup> day of April, 2019.

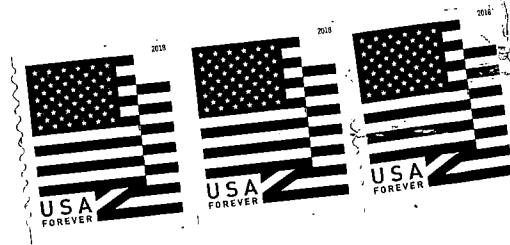


THOMAS A. RUSSO  
Presiding Judge  
Seventh Judicial Circuit

Florence, South Carolina

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SOUTH CAROLINA COUNTY

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