ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW



July 2, 2019

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Christopher Ocampo v. State
2018-CP-42-01557

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,

Susannah Ross
Attorney at Law

enclosure

cc: Office of the Attorney General
Office of Appellate Defense
Spartanburg County Clerk of Court

330 E. COFFEE ST.• GREENVILLE/SC • 29601
PHONE: (864) 242-0029
E-MAIL: SUSANNAH@ROSSENDERLIN.COM

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Thomas A. Rosso, Circuit Court Judge

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2018-CP-42-01557

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Christopher Ocampo, ..... Appellant,
v.
The State, ..... Respondent.

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NOTICE OF APPEAL

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Christopher Ocampo appeals the Honorable Thomas A. Rosso's Order of Dismissal filed June 10, 2019.

This 2 day of July, 2019.

Susannah Ross, Attorney at Law
330 E. Coffee St.
Greenville, SC 29601
(864) 242-0029
Attorney for Appellant

Other Counsel of Record:
Johnny E. James, Jr., Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for Respondent

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|---|---|---|
| **STATE OF SOUTH CAROLINA** | ) | |
| | ) | **IN THE SUPREME COURT** |
| **COUNTY OF GREENVILLE** | ) | |
| | ) | |
| CHRISTOPHER OCAMPO, | ) | |
| APPELLANT, | ) | |
| | ) | |
| | ) | |
| VS. | ) | **CERTIFICATE OF SERVICE** |
| | ) | **BY MAIL** |
| | ) | |
| | ) | |
| THE STATE OF SOUTH CAROLINA, | ) | |
| RESPONDANT. | ) | |
| | ) | |

1. I am the attorney for the Applicant in the above-captioned matter.

2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Notice of Appeal** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

**Office of the Attorney General**
**Assistant AG Johnny James, Jr.**
**P.O. Box 11549**
**Columbia, SC 29211**

Attorney for Defendant

**This** 2 **day of** July **, 2019**

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FOR THE SEVENTH JUDICIAL CIRCUIT |
| COUNTY OF SPARTANBURG | ) | |
| | ) | Case No.: 2018-CP-42-01557 |
| Christopher Ocampo,<br>S.C.D.C. No. 373835, | ) | |
| 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 Christopher Ocampo (Applicant) on May 10, 2018, thereafter amended by filing on September 11, 2018. Respondent made its return on or about July 26, 2018. The Court convened an evidentiary hearing into the matter on Thursday, March 7, 2019, at the Spartanburg County Courthouse in Spartanburg, South Carolina. Applicant was present at the hearing and represented by Susannah C. Ross, Esq. Johnny Ellis James Jr., 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, E. Joshua Schultz, 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 Spartanburg County Clerk of Court regarding the subject convictions, the pleadings, and the exhibits introduced at the evidentiary 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 Spartanburg County Clerk of Court. Applicant was indicted at the February 2017 term of the Spartanburg County Grand Jury for attempted armed robbery (2017-GS-42-00621, Ct. I), armed robbery (2017-GS-42-00622, Ct. I), and two counts of possession of a weapon during the commission of a violent crime (2017-GS-42-00621, Ct. II; -00622, Ct. II). E. Joshua Shultz, Esq. represented Applicant, and Spenser H. Smith, Esq., of the Seventh Circuit Solicitor's Office, prosecuted the case. On June 14, 2017, Applicant pled guilty as indicted. The Honorable R. Keith Kelly sentenced Applicant to imprisonment for concurrent terms of 18 years each for armed robbery and attempted armed robbery, and 5 years for each weapon charge. Applicant did not appeal his plea or sentence.



### Present Application

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

1. "Ineffective Assistance of Counsel"
    a. "Trial counsel erroneously advised applicant of the sentence that the trial judge would impose if a plea of guilt was entered."

Applicant, by and through PCR counsel, amended his application by filing on September 11, 2018, to add the following additional allegations:

2. "Ineffective assistance of trial counsel for:"
    a. "advising the Applicant to plea when co-defendant would have refused to testify at trial;"
    b. "turning down plea offer of fifteen years without advising Applicant and misadvising Applicant as to potential sentence;"
    c. "failing to investigate and prepare for trial; and"
    d. "failing to present witnesses in mitigation."

Applicant requests relief as follows:

- "a new trial, a new sentencing hearing"

At the evidentiary hearing, Applicant affirmed that he understood the remedy available in a post-conviction relief action was vacation of the sentence and a remand of the charges for new proceedings.

## 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

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. Misadvice to Plead Guilty***

The Court finds Applicant has failed to meet his burden of proof to show that Counsel misadvised him to plead guilty. At the evidentiary hearing, Counsel testified that Applicant was arrested alongside his two co-defendants in a car shortly after a robbery at a nearby Family Dollar store. Goods stolen from the Family Dollar were in the car, including a deposit bag. Counsel testified he expected one of the co-defendants, Jovan Garcia-Sanchez,[1] would testify against Applicant at trial. Counsel explained he based this belief on a conversation with the attorney for Garcia-Sanchez, Michael Morin, Esq., who indicated his client would indeed testify against Applicant at trial. On cross-examination, Counsel indicated he did not expect the third co-defendant, Cesar Mendez-Martinez, to testify against Applicant.



Counsel credibly articulated a reasonable basis for his belief that a co-defendant would testify against Applicant at trial and properly communicated that belief to Applicant. Applicant offers no credible evidence to show that the co-defendant would not have testified, or that Counsel could have or should have been able to ascertain the co-defendant would not have testified. The Court can only conclude that the co-defendant would have indeed testified against Applicant at trial. Accordingly, Applicant has failed to meet his burden of showing any deficiency on the part of Counsel, and his claim for relief by way of this allegation is **DENIED.**

***2. Rejection of Offer Without Consultation, Misadvice as to Expected Sentence***

Applicant has failed to show Counsel rejected a plea offer without consulting him or that Counsel misadvised him as to the sentence he should expect from pleading guilty. A defendant

[1] Counsel could not clearly remember the co-defendant's name but it is reflected in the plea transcript and can be ascertained by process of elimination. (Tr. 41, ll. 19-24).

has the right to effective assistance of counsel during the plea bargaining process. Davie v. State, 381 S.C. 601, 607, 675 S.E.2d 416, 419 (2009) (citing Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996)). "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Missouri v. Frye, 566 U.S. 134, 145 (2012). The failure to timely communicate a plea offer to a defendant constitutes deficient performance. Davie, 381 S.C. at 609, 675 S.E.2d at 420; Frye at 145. To show prejudice from a counsel's failure to communicate a plea offer, an applicant must demonstrate (1) a reasonable probability they would have accepted the earlier plea offer, (2) a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, and (3) that the plea would have provided a more favorable disposition, such as a plea to a lesser charge or sentence than originally resulted. Frye at 147; see also Davie, 381 S.C. at 613, 675 S.E.2d at 422 (applicant must show he or she "would have accepted the State's proposed plea bargain and that he would have benefitted from the offer." An applicant must show actual prejudice, but depending on the facts of the case, an applicant's self-serving statement *may* be sufficient to establish actual prejudice. Davie, 381 S.C. at 613, 675 S.E.2d at 422.



At the evidentiary hearing, Applicant testified that Counsel informed him of an offer to plead guilty in exchange for a 15 year sentence, but that Counsel had already rejected it. Applicant testified that he was told the subsequent plea offer provided a sentencing maximum of 20 years, but that they would try to convince the Court to sentence him to 12 years. Applicant recalled Counsel telling him he did not believe Applicant would be sentenced to 18 years. Applicant testified Counsel insisted he plead guilty and promised he would get better than 18 years. As noted above, Applicant was sentenced to 18 years. On cross-examination, Applicant acknowledged he

did not tell the Court he was promised anything to plead guilty. Applicant further acknowledged he understood he could be sentenced to 18 years, if not more.

Counsel testified he informed Applicant of the 15 year plea offer and that Applicant rejected it and was not interested in a 15 year sentence. Counsel denied promising a sentence of less than 18 years, and denied promising anything. Instead, Counsel testified he advised Applicant he could be sentenced up to 20 years, though they were hoping for less as co-defendant Cesar Mendez-Martinez, the "ringleader," had already been sentenced to 18 years. On cross-examination, Counsel testified he explained to Applicant that if he was convicted he would receive a long sentence, but that they could hope for better than 18 years as part of the plea. Counsel clarified that he received the State's original offer on March 7, 2017, and promptly related it to Applicant, who was not interested.



The Court finds Applicant has failed to meet his burden of proof to show Counsel failed to communicate the State's plea offer to him or that Counsel misadvised him as to what sentence to expect. Counsel credibly testified he communicated the plea offer to Applicant and that Applicant rejected it. This Court does not find credible Applicant's testimony that Counsel claimed he had already rejected it. The Court finds the plea transcript, as well as Counsel's testimony, reflect reasonable grounds to *hope* for better than an 18 year sentence. The Court finds from the testimony that Applicant pled guilty hoping for a more favorable sentence than his co-defendant, but that his hope simply did not pan out. The Court does not find credible Applicant's claim he was promised better than an 18 year sentence. Counsel credibly testified Applicant was not promised anything. Applicant knew he could receive an 18 year sentence, or more or less. Accordingly, Applicant has failed to meet his burden of showing any deficiency on the part of Counsel, and his request for relief by way of these allegations is **DENIED**.

### *3. Failure to Investigate*

Applicant fails to show any ineffectiveness of Counsel for failing to investigate his case and prepare for trial. 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. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (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)).



Counsel testified that Applicant's primary concern was about how to present the facts of the case in the light most favorable to him. Counsel noted that an alibi defense would have been difficult given Applicant was arrested in the vehicle with the co-defendants and the stolen goods. Counsel explained he expected co-defendant Garcia-Sanchez to testify against Applicant based on a conversation with Garcia-Sanchez's attorney. Applicant claimed to Counsel that he was under the influence of narcotics at the time of the crime, and so Counsel had Applicant tested promptly after his arrest. The ten panel screen of Applicant's hair came back negative for everything but marijuana. (State's Exhibit #1). Counsel asserted that any narcotics would have appeared on the hair test weeks after the crime. On cross-examination, Counsel conceded that a hair test would not test for alcohol. Counsel testified Applicant may have been armed with some airsoft guns, but

on re-direct acknowledged the State's assertion that Applicant was armed with a shotgun. (See Tr. 42, line 8).

Applicant has failed to meet his burden of proof to show Counsel failed to adequately investigate his case and prepare for trial. Applicant presents nothing to this Court which would have resulted in a different outcome. To the contrary, Counsel's credible testimony reflects he promptly and thoroughly followed up on leads provided to him by Applicant, investigated the likelihood of hostile witnesses, and considered possible alternate means of defense. Counsel thoroughly investigated Applicant's case and was prepared to proceed to trial. Nothing in the record supports relief, and so Applicant's request for relief by way of this allegation is **DENIED.**

***4. Failure to Present Mitigation Witnesses***

Applicant fails to meet his burden of showing any ineffectiveness for Counsel's alleged failure to present additional witnesses in mitigation. The standards set forth in Strickland v. Washington do "not require counsel investigate every conceivable line of mitigating evidence or require the submission of such evidence in every case, [but] strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment support the limitations on investigation[.]" Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004) (quoting Wiggins v. Smith, 539 U.S. 510 (2003). In order for an applicant to meet his or her burden of proof in alleging ineffectiveness for failing to call a witness, the 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 in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (citing Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)) (emphasis omitted).

At the plea proceeding, Counsel spoke in some length in mitigation. Counsel spoke to the Court about Applicant's Christian faith, that Applicant was roped into the crimes by Cesar Mendez-Martinez, that he was a United States citizen, that he was a good father, that Applicant was potentially under the influence of something, Applicant's minimal prior record, and Applicant's cooperation with the State despite pressure from Mendez-Martinez. (Tr. 44-48). Counsel also presented Applicant's wife, Autumn Ocampo, who praised him as a hardworking husband and father. (Tr. 49, ll. 3-25). Applicant himself spoke in his own mitigation, expressing his remorse, his relief in speaking with the prosecutor, his gratitude for his job, the prosecution, and his attorney, and his hope that he would not get an 18 year sentence. (Tr. 50-51). Applicant implied he was under the influence at the time of the crime and acknowledged he could have killed somebody in the course of the crimes. (Tr. 51-53). The plea court noted just how deadly a 12-guage shotgun could be. (Tr. 53, ll. 10-24).

At the evidentiary hearing, Applicant testified that he was working while out on bond and that his boss from his landscaping job was willing to speak in mitigation on his behalf, but that Counsel did not want him. Applicant additionally testified that his wife could have spoken for him, but that she no longer spoke with him at the time of the hearing. On cross-examination, Applicant acknowledged that his wife did in fact speak for him in mitigation.



Counsel testified that he had some witnesses present to speak on Applicant's behalf for a bond hearing, but that the only person who came back for the plea was Applicant's wife. Counsel could not recall telling Applicant that his landscaping boss was not necessary, but did note that Applicant was proceeding to trial before the plea and that his boss was not necessary for trial. On cross-examination, Counsel retrospectively wished he had called Applicant's employer and pastor in mitigation.

Applicant presented no witnesses at the evidentiary hearing other than his own testimony and, as such, he has failed to meet his burden of proof to show he was prejudiced at all by Counsel's failure to call additional witnesses in mitigation. There is nothing in the record to demonstrate to this Court that any different outcome would have resulted from the presentation of additional mitigation, and the Court is left with mere speculation as to what additional mitigation witnesses would have said. Counsel, by his own remarks in mitigation, already spoke to Applicant's industriousness and faith. For these reasons, Applicant has failed to show either a deficiency on the part of Counsel, or any prejudice that could have resulted from the deficiency alleged, and his request for relief by way of this allegation is **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** 31ST **day of** May **, 2019.**

THOMAS A. RUSSO
Presiding Judge
Seventh Judicial Circuit

Florence, South Carolina

SUSANNAH ROSS ESQ.
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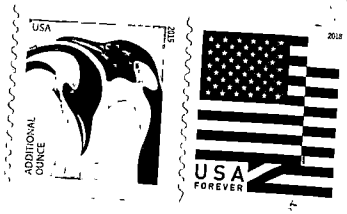


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