

# FALK LAW FIRM, LLC.

James K. Falk

(843) 606-6007

(843) 972-9005 Fax Admitted to practice: KY(1984) S.C. (2010) jfalklaw@gmail.com

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August 10, 2016

Clerk of Court  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

**RECEIVED**

AUG 15 2016

**SC SUPREME COURT**

Re: Eric Darien, 2013-CP-27-00111

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Jasper County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc: Rutledge Johnson, Esq.; Eric Darien 275549.

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

AUG 16 2016

APPEAL FROM JASPER COUNTY

**[SC SUPREME COURT]**

Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Judge

Case No.: 2013-CP-27-0111

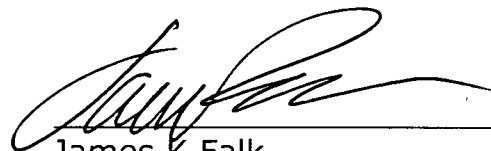
Eric Darien 275549.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Eric Darien appeals the Honorable L Lawton McIntosh's May 17 2016, Order of Dismissal. Undersigned counsel received notice of entry of the order on July 22, 2016. A copy of the order on appeal is attached hereto.



James K Falk  
Falk Law Firm  
PO Box 1058  
Charleston, SC 29402

August 10, 2016

Rutledge Johnson, Esq.  
Office of S.C. Attorney General  
PO Box 11549  
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

AUG 15 2016

SC SUPREME COURT

APPEAL FROM JASPER COUNTY  
Court of Common Pleas  
Honorable L. Lawton McIntosh, Circuit Judge

Case No.: 2013-CP-27-00111

Eric Darien 275549.....PETITIONER

V.

State of South Carolina.....RESPONDENT

PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Rutledge Johnson, Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this August 10, 2016.



James K Falk  
Falk Law Firm  
PO Box 1058  
Charleston, SC 29402

STATE OF SOUTH CAROLINA  
COUNTY OF JASPER

IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT

Eric Darien, #275549,

2013-CP-27-0111

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina, *AG*

Respondent.

FILED  
JUL 11 2016  
CLERK OF COURT  
JASPER COUNTY  
SOUTH CAROLINA

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 21, 2013. The Respondent made its Return on July 2, 2014. An evidentiary hearing into the matter was convened on March 3, 2016, at the Beaufort County Courthouse in Beaufort, SC. James K. Falk, Esquire, represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Charles Macloskie, Esquire, also testified. This Court had before it a copy of the records of the Jasper County Clerk of Court, records from the South Carolina Department of Corrections, the trial transcript, the appellate and records.

**PROCEDURAL HISTORY**

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Jasper County Clerk of Court's orders of commitment. The Applicant was indicted by the December 2008 term of the Jasper County Grand Jury for Murder (2008-GS-27-0728). Charles Macloskie, Esquire, represented him. On February 8-9, 2010, the Applicant proceeded to a jury trial

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JUL 11 2016

Referred to J. Johnson / dm  
Answered \_\_\_\_\_

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BY DX DATE MAY 20 2016

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pursuant to which he was found guilty of Voluntary Manslaughter as a lesser included offense of murder. The Honorable Carmen T. Mullen sentenced the Applicant to confinement for eighteen (18) years for Voluntary Manslaughter. On June 8, 2010, Judge Mullen amended Applicant's sentence to fifteen (15) years.

A notice of appeal was filed and an appeal perfected pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Darien, Op. No. 2012-UP-307 (filed May 16, 2012). The Remittitur was issued on June 6, 2012.

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

1. "Applicant was denied the effective assistance of counsel, in violation of South Carolina law, and the Sixth and Fourteenth Amendments to the United States Constitution, as a result of trial counsel's failure to sequester witnesses and jurors during an in camera hearing."
  - a. "The State intended to rely upon Applicant's statement. Trial counsel failed to move to sequester relevant trial witnesses and selected jurors during an in camera proceeding to a Jackson v Denno hearing to determine the admissibility of the statement."
2. "Applicant was denied the effective assistance of counsel, in violation of South Carolina law, and the Sixth and Fourteenth Amendments to the United States Constitution, as a result of trial counsel's failure to challenge Applicant's statement in a Jackson v Denno hearing."
  - a. "Trial counsel failed to utilize the mandatory Jackson v Denno procedure to challenge Applicant's statement that Applicant was under the influence of alcohol and suffered heard trauma on the night of the incident, hours prior to making the statement."
3. "Applicant was denied the effective assistance of counsel, in violation of South Carolina law, and the Sixth and Fourteenth Amendments to the United States Constitution, as a result of trial counsel's failure to review the contents of Applicant's

statement which contained evidence of prior bad acts.”

- a. “Trial counsel failed to object to, or review the contents of Applicant’s statement in the Jackson v Denno proceeding. The State introduced and published the statement, which contained a highly prejudicial review of Applicant’s criminal history, which was not admissible unless the Applicant testified, which he did not.”
4. “Applicant was denied the effective assistance of counsel, in violation of South Carolina law, and the Sixth and Fourteenth Amendments to the United States Constitution, as a result of trial counsel’s failure to move for a mistrial.”
  - a. “Trial counsel failed to challenge the contents of Applicant’s statement in the Jackson v Denno hearing. Upon publication of the nontestifying Applicant’s statement to the jury, Applicant’s criminal history was also published to the jury. Although counsel moved for a redaction, the judge issued a curative instruction to disregard that part of the taped statement. No instruction was issued concerning the statement in the jury charges. Given the prejudicial impact on the jury of the prior bad acts, the fair trial guarantee was tainted and counsel should have moved for a mistrial.”
5. “Applicant was denied the effective assistance of counsel, in violation of South Carolina law, and the Sixth and Fourteenth Amendments to the United States Constitution, as a result of trial counsel’s failure to object to the Solicitor pitting State and Defense witnesses.”
  - a. “Trial counsel failed to object to the Solicitor pitting family witnesses [children] against Detective Hipp during direct examination of the children.”
6. “Applicant was denied the effective assistance of counsel, in violation of South Carolina law, and the Sixth and Fourteenth Amendments to the United States Constitution, as a result of trial counsel abandoning Applicant’s defense in an improper cross-examination of a State witness.”
  - a. “Trial counsel abandoned the Applicant’s defense at a critical stage of trial where counsel cross-examined Detective Hipp and elicited testimony that Applicant was completely lucid and cooperative, conceding Applicant’s mens rea guilt.”
7. “Applicant was denied the effective assistance of counsel, in violation of South Carolina law, and the Sixth and Fourteenth Amendments to the United States Constitution, as a result of trial counsel abandoning Applicant’s defense by proffering the testimony of a State witness.”
  - a. “Trial counsel abandoned the Applicant’s defense at a critical stage (Jackson v. Denno hearing), by proffering the testimony of Detective Jeff Crosby, regarding Applicant’s statement, without subjecting the witness to the

adversarial process.”

8. “Applicant was denied the effective assistance of counsel, in violation of South Carolina law, and the Sixth and Fourteenth Amendments to the United States Constitution, as a result of trial counsel failing to object to the trial court’s failure to include a jury charge supported by the record.”

a. “The trial court declined to give a jury charge on confessions, where Applicant’s statement contained prejudicial prior bad acts, based upon trial counsel’s earlier stipulation that “I have no grounds to challenge that statement,” and counsel failed to request a charge on confessions or object to the omission thereof.”

### **SUMMARY OF TESTIMONY**

Counsel, Charles Macloskie, testified he was retained by the family on October 7, 2008 and met with Applicant on October 20, 2008. Counsel stated that he received discovery from the State, which included Applicant’s statement to police. Counsel testified he reviewed the statement numerous times, but could not recall if he played a recording of the statement to Applicant. Counsel then stated the State could prove its case without Applicant’s statement. Counsel testified is never helpful for an accused to make a statement to police.

Counsel testified, according to his theory of the case, that initially he thought there was a chance for a self-defense claim; however, the forensics showed otherwise. Counsel testified he went to trial on a self-defense theory. Counsel stated he could not recall discussions with Applicant concerning physical/mental health.

Concerning the Jackson v Denno<sup>1</sup> hearing, Counsel testified he only put up one witness on Applicant’s behalf and did not challenge the statement. Counsel stated that both detectives were in

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<sup>1</sup> 378 U.S. 368, 84 S.Ct. 1774 (1964).

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the courtroom during the Denno hearing. Counsel stated he could think of no strategic reason as to why both detectives were in the courtroom. Counsel stated that the outcome of the hearing would not have changed if the detectives had testified differently; he could have raised this at trial if the testimony was different. Counsel was sure that he had a chance to interview the detective before trial; Counsel having noted his file that he met with the detective to discuss the statement prior to trial. Counsel did not recall asking defendant if he had slept that night before, whether he had eaten, or whether he was injured. Counsel testified that when he initially spoke with Applicant, Applicant said he was in good health, with no impairments, no mental disorders, no history of treatment, learning disabilities, and no ADHD. Counsel stated that Applicant said he was hit by the victim and was in some sort of a daze.

Concerning the audiotape, Counsel testified it was admitted into evidence without objection. This tape was not played at the Denno hearing, and that he did not have any grounds for objection. Counsel then testified it was the jury's decision to determine whether the statement was voluntarily given. Counsel then stated he did not know if it was his trial strategy to have admitted or whether he could not find a way to keep it from being admitted into evidence.

Counsel testified that it is his general practice to review all of the evidence prior to trial and that this case was no exception. Counsel testified he knew the audiotape contained information of Applicant's prior criminal history and objected to this after the tape was published to the jury. Counsel admitted he did not consider redacting the police statements before the trial, but should have. In the tape, a police officer talked about Applicant's prior jail time. Counsel asked for curative instruction and received one because he did not want the jury to consider the tape because it would

not be helpful to Applicant's case. Counsel also testified that in the audiotape there was a police officer saying that he had nothing to prove and talking about the shooting of victim.

In addition, Counsel testified the biggest issue concerning Applicant's statements to the police was the police's statements to Applicant. Specifically, one police officer stated to Applicant, "you do not have the right to take someone else's life" and "I have nothing to prove... The court has to decide those things." Counsel admitted he did not ask for curative instructions or move for mistrial. Counsel lastly stated he did not have a trial strategy as to the statements.

On cross-examination, Counsel admitted that he found Applicant statement to be voluntary and has been practicing law for 49 years. Counsel testified he is handled hundreds of cases, including murder cases. Counsel also admitted that he has challenge many defendant statements, and has been successful previously; but challenges statements on a case-by-case basis. Counsel stated that in hindsight, he should have objected to the police officer statements concerning Applicant's prior jail time, but he asked for and received a curative instruction. Counsel testified he presented evidence for a self-defense claim, but witnesses testified that Applicant was the one who picked up the gun. Counsel then testified the forensic evidence revealed that three shots were fired and numerous witnesses testified as such. Counsel also testified that he was granted sequestration during the trial, but does not know if it is typical for him to ask for sequestration during a Denno hearing. Counsel admitted that he did not have any legal grounds to challenge Applicant's statement at the time; he based his decision on information supplied by the Applicant.

Applicant testified that he was at the hospital prior to giving his statement to law enforcement because he had just been beaten up. Applicant admitted he gave his statement around 3:00 PM the

following day, while the incident had occurred at 7:00 PM the night before he gave his statement. Applicant claims that he did not sleep and was suffering from head injury. Applicant stated he had not eaten in more than 10 hours. Applicant further claimed that he did not hear his statements prior to trial and had no discussions about his statements with counsel.

Counsel was recalled by the State and testified that he would have certainly discussed Applicant statement with him prior to trial.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witness presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

First, this Court finds Applicant's testimony concerning Counsel's alleged ineffectiveness not credible while finding Counsel's testimony credible.

#### **Ineffective Assistance of Counsel**

The Applicant alleges he is entitled to post-conviction relief on the basis that he received ineffective assistance of trial counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). To be entitled to post conviction relief, the Applicant must prove both of the following: (1) his counsel failed to render reasonably effective assistance under prevailing

professional norms, and (2) the Applicant suffered prejudice by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). Under this standard, counsel's deficient performance must have prejudiced the Applicant to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or 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. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland at 689-90, 104 S. Ct. at 2065-66.

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Id. at 691, 104 S. Ct. at 2066.

*Failure to challenge Applicant's statement*

Applicant alleges that Counsel was ineffective for failing to challenge his statement to law enforcement. However, Counsel testified that he had no legal basis by which to challenge the statement. Counsel further testified that when he initially met with Applicant, Applicant stated he was in good health, with no impairments, no mental disorders, no history of mental health treatment, no learning disabilities, and no ADHD. Counsel also stated that he spoke with the detective prior to trial during his investigation. Based on this information, Counsel decided not to challenge the statement because he had no legal grounds to do so. Also, Counsel testified that he should have objected to the statements prior to them being published to the jury; however, he asked for a curative instruction and received one.

This Court finds Counsel effectively represented Applicant concerning his statements to law enforcement. Under Strickland, Counsel based his decision to not challenge Applicant's statement on

Applicant's own information. Therefore, Counsel's actions cannot now be challenged as unreasonable. Concerning the statement itself, Counsel asked for and received a curative instruction concerning the statements made by the police officer during their interrogation. See State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) ("Generally, a curative instruction is deemed to have cured any alleged error. A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission.") (internal citations omitted). Therefore, this Court finds Applicant has failed to meet his burden of proving this allegation. Thus, it is denied.

*Applicant's Mental Condition*

Applicant also alleges that Counsel failed to investigate his mental condition at the time of the incident and at the time that he gave his statement to law enforcement. As stated above, Counsel testified that when he initially interviewed Applicant, Applicant stated he was in good health, had no impairments, had no mental disorders, had no history of treatment, had no learning disabilities, and had no ADHD. This Court also notes Applicant failed to produce any mental health expert at the PCR hearing to show that an investigation by Counsel would have been fruitful. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). (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 in order to establish prejudice from the witness' failure to testify at trial.). Based on the information given to Counsel by Applicant and based on the fact that no expert testified at the PCR

hearing, this Court finds Applicant has failed to meet his burden of proving this allegation. Thus, it is denied.

### CONCLUSION

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

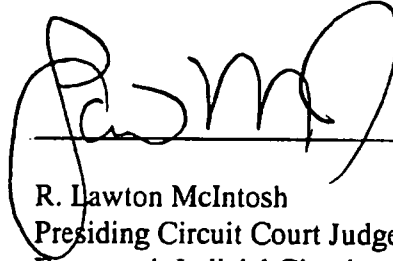
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, 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 Respondent.

**AND IT IS SO ORDERED!**



A handwritten signature in black ink, appearing to read 'R. Lawton McIntosh', written over a horizontal line.

R. Lawton McIntosh  
Presiding Circuit Court Judge  
Fourteenth Judicial Circuit

5-17, 2016

Andersen, South Carolina

2013-CP-27-0111

STATE OF SOUTH CAROLINA  
COUNTY OF JASPER  
IN THE COURT OF COMMON PLEAS

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ERIC DARIEN, #275549

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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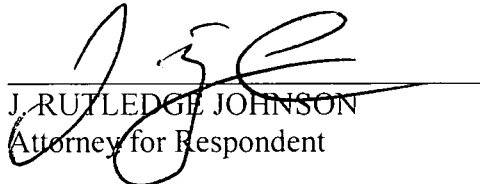
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Order of Dismissal (2013-CP-27-0111)** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

**James K. Falk, Esquire  
Post Office Box 1058  
Charleston, South Carolina 29402**

This 20<sup>th</sup> day of July, 2016.

  
J. RUTLEDGE JOHNSON  
Attorney for Respondent

SWORN to before me this 20<sup>th</sup> day of July, 2016.

  
Notary Public for South Carolina.  
My Commission Expires: 12/16/2024

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**FALK LAW FIRM**

PO Box 1058

Charleston, SC 29402

Clerk of Court

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