

ROSS AND ENDERLIN, PA  
ATTORNEYS AT LAW

January 28, 2020

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

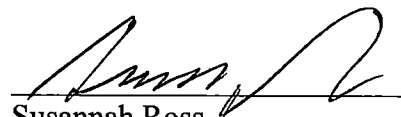
Re: Dennis Ray Alexander v. State  
2018-CP-42-00871

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.

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JAN 30 2020  
S.C. SUPREME COURT

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. Russo, Circuit Court Judge

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2018-CP-42-00871

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Dennis Ray Alexander, ..... Appellant,

v.

The State, ..... Respondent.

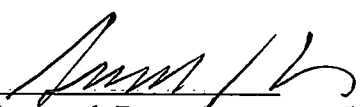
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NOTICE OF APPEAL

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Dennis Ray Alexander appeals the Honorable Thomas A. Russo's Order of Dismissal filed January 13, 2020.

This 28 day of January, 2020.

  
Susannah Ross, Attorney at Law  
330 E. Coffee St.  
Greenville, SC 29601  
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Attorney for Appellant

Other Counsel of Record:  
Jacob A. Isenberg, Assistant Attorney General  
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(803) 734-3970  
Attorney for Respondent

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S.C. SUPREME COURT



STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

) IN THE COURT OF COMMON PLEAS  
) FOR THE SEVENTH JUDICIAL CIRCUIT  
)

Dennis Ray Alexander,  
S.C.D.C. No. 270129,

) Case No.: 2018-CP-42-00871  
)

Applicant,

) **ORDER OF DISMISSAL**  
)

v.

State of South Carolina,

Respondent.

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This matter comes before the Court by way of an application for post-conviction relief filed by Dennis Ray Alexander ("Applicant") on March 12, 2018. Respondent made its return on or about June 6, 2018. The Court convened an evidentiary hearing into the matter on March 4, 2019, at the Spartanburg County Judicial Center in Spartanburg, South Carolina. Applicant was present at the hearing and represented by Susannah C. Ross, 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, Andrew J. Johnston, 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 Applicant's federal sentencing sheets. 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 May

2016 term of the Spartanburg County Grand Jury for attempted murder and possession of a weapon during the commission of a violent crime (2016-GS-42-02396, Cts. I & II). Applicant was further indicted at the October 2016 term for distribution of cocaine base (2016-GS-42-05023). Andrew J. Johnston, Esq. represented Applicant; Jennifer A.J. Jordan and Spenser H. Smith, Esqs., of the Seventh Circuit Solicitor's Office, prosecuted the case. On October 2, 2017, Applicant entered an Alford plea to the above indictments. Upon the State's recommendation of concurrent sentences not to exceed 20 years, The Honorable J. Mark Hayes, II sentenced Applicant to imprisonment for concurrent terms of 20 years for attempted murder, 5 years for the weapon, and "time served" for the drugs. Applicant did not appeal his plea or sentence.

#### Present Application

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

1. Ineffective assistance of plea counsel, in that:
  - a. "No self-defense motion from counsel"
  - b. Counsel failed to investigate "Breaking and Entering in Residence"
  - c. "For handling of my Rule (5)"
  - d. "Shooting was in self-defense and protection of my family"
  - e. "4<sup>th</sup> amendment violation"
  - f. "No arrest warrant"
2. Prosecutorial Misconduct:
  - a. "Coercion and threats to prosecute to fullest extent of the law"

Applicant, by and through PCR counsel, thereafter amended his application to raise the following additional grounds for relief:

1. Ineffective assistance of plea counsel, for:
  - a. "failure to move for immunity or dismissal under SC Code Section 16-11-450;"
  - b. "failure to advise the Applicant that he could for immunity or dismissal under SC Code Section 16-11-450 prior to plea;"

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- c. "failure to advise the Applicant that the State would have to prove to a jury that he had specific intent to kill to get a conviction for attempted murder under State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015);"
- d. "failure to assure that the Applicant received the benefit of his plea bargain which was to have the sentence run concurrent to his Federal sentence."

Applicant requests relief as follows:

- "New Trial or New Plea

At the evidentiary hearing, Applicant proceeded forward only upon the amended allegations.

## 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), 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, 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

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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

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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 Move for Immunity, Advise Regarding S.C. Code Ann. § 16-11-450**

Applicant alleges Counsel was ineffective in failing to move for immunity or otherwise advise him regarding the Protection of Persons and Property Act (hereinafter "the Act"). "When applicable, the Act provides immunity from prosecution." State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013). The Act provides:

A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended to likely cause death or great bodily injury to another person if the person: (1) against whom the deadly force is used is in the process of unlawfully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

S.C. Code Ann. § 16-11-440(A). However, the above presumption does not apply if the person:

(4) against whom the deadly force is used is a law enforcement officer who enters or attempts to enter a dwelling, residence, or occupied vehicle in the performance of his official duties, and he identifies himself in accordance with applicable law or the person using force knows or reasonably should have known that the person entering or attempting to enter is a law enforcement officer.

S.C. Code Ann. § 16-11-440(B)(4). "A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard[.]" Id. (citing State v. Dunham, 392 S.C. 404, 709 S.E.2d 662 (2011)).

Applicant testified he explained his version of events to Counsel—namely that he never heard law enforcement announce and identify themselves before they stormed the house—but acknowledged that the case would boil down to his word against theirs. On cross-examination, Applicant testified he met with Counsel on two or three occasions. Applicant testified that

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though he saw some of his discovery, he did not review all of it with Counsel. Applicant stated he provided Counsel a lead to a witness who could explain why Applicant shot at the police storming his house. Nonetheless, Applicant recalled Counsel told him that accepting the plea offer would be a good deal. Applicant testified he did *not* plead guilty because he thought the State could convict him.

Counsel testified he filed motions pursuant to Rule 5, SCRCrimP, and Brady v. Maryland, and received materials he understood and believed to be complete. Counsel testified he reviewed all of the discovery with Applicant. Counsel opined that the State's plea offer was favorable to Applicant. Counsel declined to say there was *no* evidence to show that law enforcement failed to announce and identify itself, but explained the challenges that faced Applicant and why they did not move for immunity under the Act. First, Applicant was asleep when law enforcement first arrived and was said to have announced themselves. Second, the witness Applicant provided, his landlord, was sympathetic but not actually of any help. Third, Applicant's co-defendant, Michael Goggins, gave conflicting statements as to whether he heard the police announce and identify themselves before or after storming in. Counsel noted that he had a copy of the Act with the law enforcement exception highlighted. Counsel explained that Applicant could have tried his luck with an immunity hearing, and then pled guilty thereafter if it did not resolve in his favor, but that he would have lost the favorable plea offer from the State in the process. Counsel testified he would have attempted to invoke the Castle doctrine if the case had gone to trial, but opined that Applicant's chances of prevailing were "iffy."

Prosecutor Jennifer Jordan testified she turned over all discovery in the case. Jordan testified there were no police bodycam recordings of law enforcement's arrival announcement.

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The Court finds no deficiency on the part of Counsel, nor any prejudice from the deficiency alleged. Counsel conducted a reasonable investigation and reviewed the discovery provided in this case with Applicant. All discovery was provided to Counsel by the State. Counsel fully explained the strengths and weaknesses of Applicant's case, both in the context of the State's burden at trial and Applicant's burden in proceeding to an immunity hearing. Counsel and Applicant weighed the value of proceeding to an immunity hearing against the fact that they would lose the plea offer by doing so, and determined they did not wish to risk the favorable plea offer on a slim chance of prevailing. The Court finds that given the facts before it, Applicant has failed to show that had he proceeded to an immunity hearing, he would have prevailed. To the contrary, based on the record before this Court, the Court finds there is no credible evidence to refute law enforcement's anticipated testimony that they knocked on the door, announced their presence, and identified themselves as police before storming the house. For all of these reasons, the Court finds Applicant has failed to meet his burden of showing any deficiency on the part of Counsel, or any prejudice from the deficiency alleged, and his request for relief by way of this allegation is DENIED.

**2. Failure to Advise Regarding "Specific Intent"**

Applicant alleges Counsel was ineffective in failing to advise Applicant that the State would need to establish "specific intent" beyond a reasonable doubt in order to secure his conviction. Attempted murder is a specific intent crime. State v. King, 422 S.C. 18 (2017).

As explored in the previous subsection, Applicant and Counsel discussed the different versions of what happened on the night of the raid, as would be relevant to considering the State's ability to prove specific intent. At the evidentiary hearing, Applicant did not specifically

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mention whether he was or was not advised of the element of specific intent. Counsel testified he explained King to Applicant and appraised him that the State would have to prove specific intent beyond a reasonable doubt.

The Court finds Counsel informed Applicant that the State would have to prove specific intent beyond a reasonable doubt in order to convict him for attempted murder. Counsel and Applicant fully discussed the facts in the case relevant to the issue of specific intent. Counsel credibly testified to this point at the evidentiary hearing, and notes that Applicant offered no testimony to dispute Counsel's recollection. Applicant has failed to meet his burden of showing Counsel was deficient in advising him of the elements of the charges against him; accordingly, his request for relief by way of this allegation is **DENIED**.

### *3. Failure to Ensure Concurrent Federal Sentencing*

The Court rejects Applicant's contention that Counsel was ineffective for failing to ensure his state and federal sentences would run concurrently because they are, in fact, running concurrent to one another. "The sentence of a person convicted of a federal offense commences to run from the date on which such person is received at the penitentiary." Clark v. State, 321 S.C. 377, 379, 468 S.E.2d 653, 655 (1996) (citing Thomas v. Whalen, 962 F.2d 358 (4th Cir. 1992)); see also 18 U.S.C. § 3585(a) (stating the same). "Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." 18 U.S.C. § 3584(a); see also Setser v. United States, 566 U.S. 231 (2012) (holding a federal district court has discretion to run a federal sentence consecutively to an anticipated state sentence). However, where a state term of imprisonment is anticipated to result from another offense that is "relevant"

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conduct" to the offense for which a defendant is sentenced in federal court, the federal sentence "shall be imposed to run concurrently to the anticipated term of imprisonment." Federal Sentencing Guidelines Manual § 5G1.3(c); see also United States v. Olmeda, 894 F.3d 89 (2d Cir. 2018) (remanding for resentencing where a federal district court failed to take into account § 5G1.3(c)).

"Although a state trial judge may properly order the sentences which he or she imposes to run concurrently, or consecutively, to each other, a state court is without authority to modify or place conditions on a sentence from a foreign jurisdiction." Clark, 321 S.C. at 379, 468 S.E.2d at 655. Accordingly, where a defendant is subject to a federal sentence and a state court subsequently imposes a separate sentence intended to run concurrent to the federal sentence, there is only one way to effectuate the state trial court's order: have the defendant delivered to federal custody to serve his federal sentence. Id. Federal custody can be established either by physically delivering the inmate into the custody of the Federal Bureau of Prisons, or by designation of the state prison in which the inmate is incarcerated by the Federal Bureau of Prisons as the inmate's place of federal detention. See 18 U.S.C. 3621(b)

At the evidentiary hearing, Applicant testified he thought he would be sentenced to less than twenty years, and that he thought his State sentence would run together with his federal sentence. However, Applicant testified he later learned from a "case worker" that his federal sentence could not run concurrent with his State sentence. Pressed by the State on cross examination, Applicant affirmed he would go forward with his PCR even if his State and federal sentences were run concurrent.

Counsel testified that he was concerned Applicant was not receiving the benefit of his plea bargain, and that the ten year federal sentence was not running concurrent to the State

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sentence; Counsel thus sent Applicant a letter explaining his concern. (Applicant's Exhibit #1). Counsel also brought Clark v. State to Applicant's attention. Counsel testified the plea agreement was favorable to Applicant. On cross-examination, Counsel clarified that he did not represent Applicant on his federal charges, but that he delayed his plea in state court in order to ensure the plea and sentence was entered subsequent to the federal sentence. Counsel also clarified that he did not promise Applicant he would receive a concurrent sentence, only that the State would recommend it. Counsel recalled that he advised Applicant that the Judge could sentence him without regard to the State's recommendation. Counsel learned of the sentencing issue after being notified that Applicant had filed for post-conviction relief, and testified that he assumed the Federal Bureau of Prisons would have picked Applicant up to take him into custody. Counsel also testified that he did not know for certain that the federal and State sentences were not running concurrent. Counsel confirmed that the concurrent character of the sentences was a critical aspect of the plea deal.

Subsequent to the evidentiary hearing, Respondent contacted this Court by e-mail on July 5, 2019, and provided copies of Applicant's indictment in federal district court, as well as his sentencing sheets (i.e. "Judgement in a Criminal Case") on the federal charge. Respondent formalized its communication and request to supplement the record by "Motion to Supplement Record, Amend Request for Proposed Order" filed August 14, 2019 (hereinafter Respondent's Motion"). The second page of the federal judgment indicates a sentence of 120 months to begin on August 22, 2017, and further indicates that "[t]he state facility is designated as the incarceration location for the federal sentence until such time the defendant is remanded to federal custody." (Respondent's Motion Exhibit #1). Respondent further provided an e-mail communication from the Federal Bureau of Prisons to indicate that the federal sentence was

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indeed active and running concurrent to the state sentence, and that Applicant's projected "release" date on the federal sentence is November 28, 2014, and would otherwise "maxout" on March 13, 2026. (Respondent's Motion Exhibit #2).

Applicant has filed no objections since the filing and service of the motion. The Court grants Respondent's motion to supplement the record, and its request to submit a proposed order reflecting the additional information contained therein.

In light of the information to conclusively establish that Applicant's federal sentence is running concurrent to his state sentence, and vice-versa, the Court finds that Applicant's claim that Counsel failed to ensure his sentences were running concurrent is without factual basis.

Accordingly, Applicant cannot show any deficiency on the part of Counsel by way of this allegation, or any prejudice from the deficiency alleged, and his request for relief is **DENIED**.

*[Conclusion and signature on following page]*

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**III. CONCLUSION**

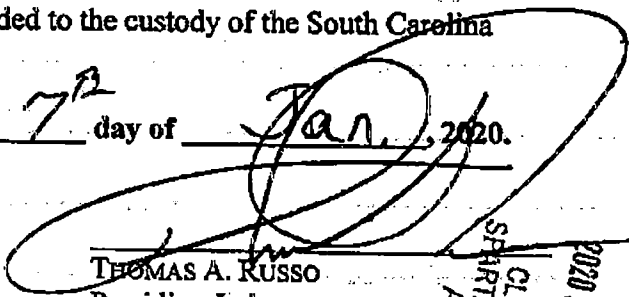
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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 7<sup>th</sup> day of Jan., 2020.

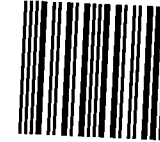
  
THOMAS A. RUSSO  
Presiding Judge  
Seventh Judicial Circuit

Florence, South Carolina

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