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January 27, 2020

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

RE: Marcus Lamont Shearin vs. The State of South Carolina  
Case No: 2018-CP-42-2596

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: Jacob A. Isenberg, Esquire

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JAN 31 2020

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas  
HONORABLE G. THOMAS COOPER  
2018-CP-42-2596

MARCUS LAMONT SHEARIN, SCDC# 323389

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

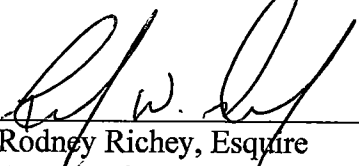
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S.C. SUPREME COURT

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**NOTICE OF APPEAL**

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Marcus Lamont Shearin appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable G. Thomas Cooper, Circuit Judge on October 8, 2019 an Order issued on January 14, 2020 and filed on January 21, 2020. The Appellant received notice of the judgment on January 23, 2020.

  
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Other Counsel of Record:  
Jacob A. Isenberg, 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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HONORABLE G. THOMAS COOPER  
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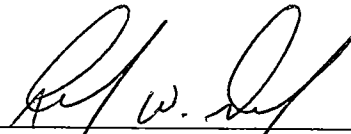
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**AFFIDAVIT OF SERVICE**

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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 January 27, 2020, addressed to their attorney of record, Jacob A. Isenberg, Esquire Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: January 27, 2020



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STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

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

Marcus Lamont Shearin,  
S.C.D.C. No. 323389,

) Case No.: 2018-CP-42-02596  
)

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 Marcus Shearin ("Applicant") on July 24, 2018. Respondent made its return on May 1, 2019. The Court convened an evidentiary hearing into the matter on October 8, 2019, at the Spartanburg County Courthouse in South Carolina. Applicant was present at the hearing and represented by Rodney Richey, Esquire. Jacob A. Isenberg, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Michael Morin, Esquire. ("Counsel") also testified. The assistant solicitor, Jennifer Wells testified as well. 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, and the pleadings. After a thorough review of the evidence and testimony in the record, this Court finds the application should be dismissed with prejudice.

**I. PROCEDURAL HISTORY**

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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 (2016-GS-42-02272), and possession of a weapon during the commission or attempt of a violent crime (2016-GS-42-02273). Michael C. Morin, Esquire, represented Applicant, and Jennifer E. Wells, of the Seventh Circuit Solicitor's Office, prosecuted the case. On September 5, 2017, Applicant pled guilty as indicted above. Accepting terms negotiated between Applicant and the State, the Honorable R. Keith Kelly sentenced Applicant to imprisonment for concurrent terms of 30 years for attempted murder, provided that upon service of 15 years, the balance would be suspended with probation for 5 years, and 5 years for the weapon. Applicant did not appeal his plea or his sentence.

## II. FACTUAL BASIS FOR THE GUILTY PLEA

The underlying facts of the crimes for which Applicant is incarcerated were articulated by the State during the plea proceeding as follows:

Your Honor, this incident occurred on February the 13<sup>th</sup> of 2016. That occurred here in the City of Spartanburg, in the County of Spartanburg.

Mr. Shearin and the victim in this case, Daryl Thompson, had known each other for a period of time. Mr. Thompson had helped Mr. Shearin get employment over the course of the time that they had known each other.

Judge, on this particular evening – during the course of the day leading up to this evening, Mr. Thompson, as well as his long time girlfriend, Ms. Gentry, had had contact with Mr. Shearin, who had reached out about possibly getting a ride from Mr. Thompson later that day. Mr. Thompson had agreed to do that.

Mr. Thompson went to a residence on Massachusetts Boulevard. That's the residence of Wayne Wright. And he met up with Mr. Shearin there. They left that residence together. Mr. Thompson was using a vehicle that he had been loaned to – had been loaned to him by his employer at the time, Dr. Friedman and his wife.

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He drove Mr. Shearin to around the area of Deals Market where Mr. Shearin said he wanted to get out of the vehicle, that that was far enough. Mr. Thompson stopped the vehicle, let him get out. Mr. Shearin exited the vehicle, then came back into the vehicle and fired multiple gunshots at Mr. Thompson, striking him multiple times.

9-1-1 was called. They had a hard time locating Mr. Thompson originally because he was still mobile. He was -- the vehicle was still moving. They finally found him in front of a residence in the City of Spartanburg. Just inside of his vehicle, Judge, testimony at trial would have shown that there were gun -- that bullets, as well as shell casings, 380, were recovered from in and around the vehicle.

Mr. Thompson was transported to Spartanburg Regional where he was treated for massive internal injuries. He stayed in the hospital for weeks. He has a half-million dollars in medical bills and more surgeries to come as a result.

...

Mr. Shearin was later apprehended. Mr. Thompson identified Mr. Shearin, both from have [sic] a photo lineup and also from knowing each other. He knew him as his street name, which was Polo. Additionally, Keith Wright, who was at Wayne Wright's residence that evening, said that Mr. Shearin and Mr. Thompson had left together just shortly before the shooting happened that night of February the 13<sup>th</sup>, 2016.

(Tr. 8-11). Upon inquiry by the Court, Applicant confirmed the above articulated facts. (Tr. 11, 11. 13-17)

### III. CURRENT APPLICATION

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

1. Ineffective assistance of counsel, in that:

- a. "[H]e failed to notify his client that State offered a plea bargain for 'restitution' had counsel relayed this offer to his client he would have accepted the plea offer of restitution, and but for counsel's ineffective assistance he would have resolved charges through restitution and not have state withdraw the offer after given period of time and end up pleading to 15 years."

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- b. "Trial counsel failed to do any pretrial investigation or do anything at all to represent his client and pur[suant] to [United States v. Cronin, 466 U.S. 648 (1984)] the total lack of any representation the prejudice is per se requiring reversal. This is evidenced in fact he did not even relay state offer to pay restitution to resolve the complaint."

Applicant requests relief as follows:

- "To be able to accept original plea offer"
- "Plea be vacated."

At the evidentiary hearing, Applicant withdrew all allegations against Counsel except: 1) failure to review relevant cellphone records; and 2) failure to communicate a plea offer for restitution.

#### IV. SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

##### Applicant

Applicant testified on his own behalf at the evidentiary hearing. Applicant testified he did not believe Counsel was ineffective. However, Applicant testified Counsel did not provide cellphone records from the night of the incident. Applicant testified the Assistant Solicitor offered restitution only. However, this offer was rejected without his consent. Applicant then testified another attorney represented him when this offer was made. Applicant testified he could not remember telling Counsel about this offer.

Applicant reiterated he had no issue with Counsel. Thereafter, Applicant withdrew all allegations against Counsel and that this withdrawal was free and voluntary.

##### Counsel

Counsel testified on behalf of Respondent at the evidentiary hearing. Counsel testified Applicant did tell him about the previous offer for restitution only. However, Counsel stated the Solicitor's Office claimed this offer was never made.

Counsel testified they received the cellphone records in discovery and he shared these cellphone records with Applicant.



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Counsel testified he reviewed potential defenses with Applicant. He further testified he made a trial notebook in preparation for a trial or plea. Counsel testified Applicant wanted to use cellphone tracking of his location but Counsel advised Applicant that this was not going to provide him with an alibi. Counsel investigated cellphone records as directed by Applicant, but testified he concluded these cellphone records did not exist.

Counsel testified Applicant pled guilty based upon it being in his best interest.

Assistant Solicitor Wells

Assistant Solicitor Wells testified on behalf of Respondent at the evidentiary hearing. She testified she never offered Applicant restitution only. However, Wells testified Counsel did propose a five year sentence along with restitution. She said this deal was not offered at the victim's request. Assistant Solicitor Wells said she customarily talks to victims before making plea offers and said this victim would have never agreed to restitution only based upon the circumstances.

Assistant Solicitor Wells testified they eventually offered to allow Applicant to plead straight up to ABHAN, along with restitution. She testified Applicant would have been subject to twenty years at the time.

**V. 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**

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Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Eullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees

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reasonable competence, not perfect advocacy judged with the benefit of hindsight.” Yarborough at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel’s deficient performance must have prejudiced 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. “The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury.” United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel’s alleged errors, he/she would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant’s right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) (“Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.”). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he or she should be allowed to depart from the truth of his statements. Dalton v. State, 376 S.C. 130, 137-38, 652 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975)).

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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 Cellphone Records***

Applicant contends Counsel failed to review relevant cellphone records with him. Specifically, Applicant testified Counsel never showed him the records reflecting his location at the time of this incident. 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). Additionally, 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).

On the other hand, Counsel testified they reviewed the cellphone records that were provided in discovery but Applicant wanted separate cellphone records that would provide an alibi. Counsel testified no such cellphone records existed. Counsel testified the alibi defense was not viable based upon the circumstances.

Accordingly, this Court finds Counsel provided credible testimony on the cellphone records. At the plea hearing, Applicant agreed with the following facts: (1) the victim knew Applicant before the shooting. (Tr. 8-11); (2) the victim successfully identified him in a photo lineup as the shooter. (Tr. 10-1); and (3) an additional witness saw them together just before the

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shooting occurred. (Tr. 10-1). Accordingly, this Court finds Counsel strategically decided not to pursue an alibi defense. As a result, this Court finds Counsel reasonably decided not to further investigate cellphone records for such a defense. As a result, this Court finds Applicant has failed to overcome the burden to prove Counsel was deficient in this regard.

Applicant contends exculpatory cellphone records would provide a sufficient alibi for him. However, speculation is insufficient to establish prejudice. Dalton v. State, 376 S.C. 130 at 143, 654 S.E.2d 870 at 877. Applicant did not provide physical evidence to support this claim. Therefore, this Court finds he insufficiently speculated about exculpatory cellphone records. As a result, this Court finds Applicant has failed to overcome the burden to prove prejudice.

## ***2. Failure to Communicate Plea Offer for Restitution***

Applicant contends Counsel failed to finalize an offer for a plea that would merely provide restitution to the victim. "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution and to accept a plea on terms and conditions that may be favorable to the accused." Missouri v. Frva, 566 U.S. 134, 145 (2012); see also Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009) (adopting "rule that counsel's failure to convey a plea offer constitutes deficient performance"). When alleging plea counsel was deficient in his or her handling of a plea offer, an applicant "must demonstrate a reasonable probability that: (1) he 'would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;' (2) 'the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;' and (3) 'the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.'" Collins v. State, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (citing Missouri v. Frye, 566 U.S. 134, 147 (2012)); see Lafler v. Cooper, 566 U.S. 156, 164 (2012) (stating "a

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defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed"). If an applicant is able to meet the requirements set forth above, the appropriate relief is to require the State to re-extend the previous plea offer to Applicant. Lafler, 566 U.S. at 174. ("The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement.").

Here, Applicant testified he was offered a plea deal which only required him to pay restitution. However, Applicant testified this happened before Counsel began representing him. Applicant testified he did not remember talking about this offer with Counsel.

On the other hand, Counsel testified they discussed the alleged offer. However, Counsel testified he contacted the Solicitor's office to see if such an offer was made. The Solicitor's office said no such offer was made.

Additionally, the Assistant Solicitor Wells testified she never made an offer for restitution only. She said she customarily consults with the victim before making a formal plea offer. In this case, Assistant Solicitor Wells testified the victim did not approve an offer as low as five years. Therefore, she concluded she would not have made an offer that failed to include incarceration.

Accordingly, this Court finds the Assistant Solicitor Wells provided credible testimony about this issue. She never made an offer that merely required Applicant to pay restitution. Th

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As a result, Applicant has failed to overcome the burden to prove he is now entitled to accept this offer based upon legal representation deficiencies.

**VI. 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 remain in the custody of the South Carolina Department of Corrections.

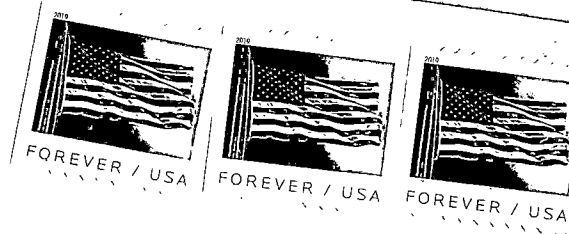
AND IT IS SO ORDERED this 14 day of January, 2020.

  
 G. THOMAS COOPER  
 Presiding Judge  
 Seventh Judicial Circuit

CAWTON, South Carolina

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 SEVENTH JUDICIAL CIRCUIT  
 COLUMBIA, SC

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The Honorable Daniel E. Shearouse  
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