

STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Alison Renee Lee, Presiding Judge

2011-CP-40-741

RECEIVED

MAY 17 2013

S.C. Supreme Court

ERIC MANCE, 200410,

Applicant,

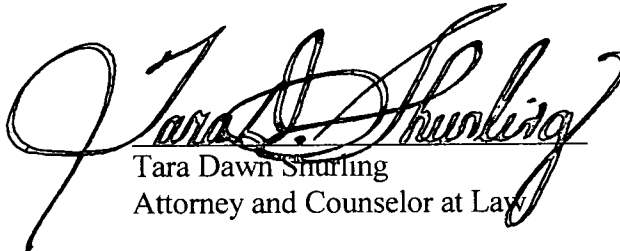
v.

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

**NOW COMES** the Applicant in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned counsel, giving notice of his appeal from the Order of Dismissal denying his Application for Post-Conviction Relief which was filed April 29, 2013.



Tara Dawn Shurling  
Attorney and Counselor at Law

3614 Landmark Drive, Suite A  
Columbia, South Carolina 29204  
(803)738-8622  
(803)738-1600 FAX

ATTORNEY FOR APPLICANT

This 15<sup>th</sup> day of May, 2013.

Other Counsel of Record:  
Megan Harrigan, Assistant Attorney General  
P. O. Box 11549  
Columbia, SC 29211  
Attorney for Respondent  
(803) 734-3737

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v.

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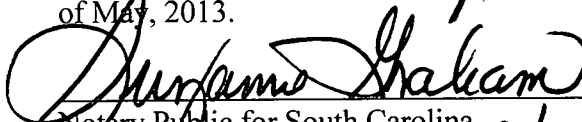
Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that one copy of the Applicant's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Megan Harrigan, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 15<sup>th</sup> day of May, 2013.

  
Tara Dawn Shurling  
Attorney and Counselor at Law

SWORN TO BEFORE me this 15<sup>th</sup> day  
of May, 2013.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: 2/28/2023

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

CASE NUMBER: 2011CP4000741

Eric #200410 Mance

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Dismissal);  Rule 43(k), SCRPC (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):  Affirmed;  Reversed;  Remanded;  Other \_\_\_\_\_

RICHLAND COUNTY  
CLERK OF COURT  
JEANETTE W. MCBRIDE  
2013 APR 29 AM 9:16

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: \_\_\_\_\_

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date \_\_\_\_\_

For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 29 April 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Eric #200410 Mance

Tara Dawn Shurling

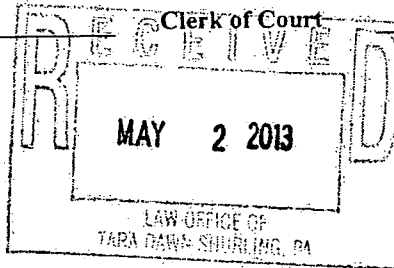
Robert Daniel Corney

Eric #200410 Mance

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_



*Jeanette W McBride*

STATE OF SOUTH CAROLINA )  
 COUNTY OF RICHLAND )  
 )  
 Eric Mance, #200410, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FIFTH JUDICIAL CIRCUIT

DOCKET NO. 2011-CP-40-00741

ORDER OF DISMISSAL

JEANETTE M. McBRIDE  
 CLERK OF COURT & G.S.  
 2013 APR 29 AM 9:16  
 RICHLAND COUNTY

**PROCEDURAL HISTORY**

This matter comes before the Court by way of an application for Post-Conviction Relief (PCR) filed February 4, 2011. An evidentiary hearing into the matter was convened before this Court on Thursday, March 7, 2013, at the Richland County Courthouse. Applicant was present at the hearing with counsel, Tara D. Shurling, Esquire. Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Also testifying were Applicant's former trial counsel, David Tarr, Esquire, and forensic psychiatrist Dr. Donna Schwartz-Watts. This Court also had before it a copy of the transcript of the proceedings against Applicant, the records of the Richland County Clerk of Court, the documents related to Applicant's direct appeal and Applicant's records from the South Carolina Department of Corrections (SCDC).

The records before this Court indicate that Applicant is presently confined at SCDC pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted at the September 2006 term of the Richland County Grand Jury for Assault and Battery with Intent to Kill, Armed Robbery and Possession of a Pistol by a Person Convicted of a Crime of Violence (2006-GS-40-4738; -4739; -4741). Applicant was represented by David Tarr, Esquire, on the charges. On August 25, 2008, Applicant proceeded to a jury trial before the Honorable Clifton Newman. After a three (3) day trial, Applicant was found guilty of all three charges as indicted and sentenced to life imprisonment without parole for Armed Robbery and ABWIK, as well as five (5) years imprisonment for the Pistol charge. The sentences were to run concurrently.

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A notice of appeal was filed on Applicant's behalf and an Anders<sup>1</sup> brief was submitted by Robert Pachak of the South Carolina Office of Appellate Defense. By order filed February 11, 2010, the South Carolina Court of Appeals dismissed the appeal. The remittitur was issued May 28, 2010.

In the current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based upon ineffective assistance of trial counsel and due process violation. At the start of the evidentiary hearing, counsel for Applicant set forth three distinct allegations which Applicant intended to pursue through the current action, all premised on trial counsel's ineffectiveness for failure to: evaluate Applicant for criminal responsibility; advise Applicant of and pursue a guilty but mentally ill (GBMI) verdict; and request recusal of the Fifth Circuit Solicitor's Office from prosecuting the matter or otherwise motion for change of venue.

#### **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 PCR hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (Rev. 2003).

In a PCR action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "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." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984).

The proper measure of performance is whether counsel 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, 286 S.C. at 442, 334 S.E.2d at 814. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

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<sup>1</sup> Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

prong, counsel's performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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.

#### *Evaluation for Criminal Responsibility*

Applicant first contends Counsel was ineffective for failing to properly consider the issue of his criminal responsibility at the time of the crime. Specifically, Applicant contends he does not remember a lot of the incident and, had Counsel requested an evaluation for criminal responsibility, a lack of criminal responsibility or insanity defense could have been developed for trial.

Counsel testified he recalled his court-appointed representation of Applicant on the charges. Counsel filed all the usual pre-trial motions for discovery and was able to obtain copies of Applicant's medical and psychiatric records as part of his investigation and preparation of the case. Based upon his meetings with Applicant, Counsel had some concerns regarding Applicant's competency, so he hired Dr. Donna Schwartz-Watts to perform an evaluation on Applicant for competency to stand trial. Counsel wanted to make sure Applicant understood their conversations and was able to adequately assist in his defense.

Counsel testified Applicant had an extensive mental health history and was low functioning based on his reportedly low IQ. However, a low IQ alone is not determinative of whether a person falls within the classification of "retardation". Counsel noted Dr. Schwartz-Watts issued a competency report based upon her meeting with Applicant and the reports of two other doctors, in which she found Applicant was competent to stand trial and assist in his defense.

Counsel could not specifically recall whether he considered having Applicant evaluated for criminal responsibility in addition to competency; however, Applicant did not appear to lack the ability to understand criminal responsibility based on their discussions. There was evidence in the case such as Applicant's fleeing from the scene of the crime, his immediate hiding of the instruments used in the crime, witness statements that Applicant bragged about committing the crime afterwards, and Applicant's mention of carjacking somebody in the downtown area prior to committing the act. All of this evidence led Counsel to believe that there was not a basis to

question Applicant's criminal responsibility. Based on his review of the case, Counsel did not believe it would be beneficial to continue to investigate that defense.

Counsel was "sure" he talked to Dr. Schwartz-Watts about the criminal responsibility, but could not specifically recall when or what was specifically discussed. At trial, Counsel stipulated to Applicant's criminal responsibility during the Blair<sup>2</sup> hearing because he "did not think there was any chance any doctor would say [Applicant] didn't know right from wrong" based on his perceptions of Applicant and the facts of the case.

On cross-examination, Counsel noted there was some evidence presented at trial that Applicant stood on the back porch of his house and yelled to the investigating police officers that they would never figure out who committed the crimes because they were too dumb. Counsel reiterated that he did not think there was a basis for a lack of criminal responsibility defense. Counsel previously worked as a public defender and represented many clients during that time with mental health issues; thus, he is familiar with recognizing such problems. The State's case was very strong against Applicant and Counsel wanted to use Applicant's low functioning IQ at trial as part of the defense strategy to challenge whether Applicant possessed the required intent for ABWIK. The defense strategy was to convince the jury Applicant was guilty only of the lesser included offense of Assault and Battery of a High and Aggravated Nature, which would not carry a "most-serious" strike for life without parole enhancement purposes.

Dr. Donna Schwartz-Watts, a forensic psychiatrist, testified at the hearing. Schwartz-Watts testified she is currently a senior psychiatrist at G. Weber Bryan Psychiatric Hospital, and previously worked at the Medical University of South Carolina for a number of years, as well as with inmates through the South Carolina Department of Mental Health. She recalled Counsel requesting she complete a competency evaluation of Applicant, but could not recall whether she was asked to evaluate Applicant for criminal responsibility as well.

Schwartz-Watts noted it is not uncommon for a criminal defense attorney to ask for a client to be mentally evaluated with the specific request that the findings not be reduced to writing. Schwartz-Watts had no recollection of whether that may have occurred in this case. She did have conversations with Counsel by telephone regarding Applicant's mental health during which she could have given an oral opinion as to criminal responsibility. Schwartz-Watts generally would keep a log of evaluations she had done on an individual even if no written report

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<sup>2</sup> State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981)

was issued, but she was unable to obtain her file in Applicant's case to confirm or deny whether she rendered such an opinion.

Schwartz-Watts noted Applicant suffers from a psychotic disorder and has a very low-functioning IQ, which she said are wholly separate and distinct mental limitations. It is not uncommon for someone to be found criminally responsible even with a very low IQ. Even a low IQ with the addition of a psychotic disorder is not determinative of one's criminal responsibility, but would be a factor to consider in the evaluation.

On cross-examination, Schwartz-Watts testified the standard for whether a defendant lacks criminal responsibility in South Carolina is based upon the widely accepted M'Naughten test. Schwartz-Watts testified that under the M'Naughten test, a defendant lacks criminal responsibility if, at the time of the crime, he/she lacks the capacity to distinguish moral or legal right from moral or legal wrong due to a mental disease or defect. However, Schwartz-Watts said, a finding of GBMI may be implicated when, at the time of the crime, the defendant *has* the capacity to distinguish right from wrong, but lacks sufficient capacity to conform his/her conduct to the law. Schwartz-Watts noted the difference in the two standards, stating a GBMI finding requires a lesser level of mental defect than a finding related to insufficient criminal responsibility.

In evaluating for criminal responsibility and competency, Schwartz-Watts reviews a defendant's medical history, pre-existing disorders, the incident reports related to the crime, any witness statements, any statements defendant made to police, and the defendant's jail records. She will discuss the case with the defendant to ascertain the rationale for his conduct, and it is very important to consider the defendant's behavior before and after the incident as well. A defendant attempting to hide the instruments used in the commission of a crime is indicative of someone who recognizes the underlying conduct was morally or legally wrong. Where a defendant not only hides the instruments of a crime after its commission, but also states his intention to carry out such a crime prior to doing so, a finding of sufficient criminal responsibility is even more likely.

Applicant testified briefly on the subject, initially saying he did not recall the incident and only realized what he had done was wrong when he returned home and his wife said he had done something wrong. On cross-examination, Applicant agreed he knows right from wrong and said he knew at the time it was wrong to shoot the victim and to take the victim's car. He hid the gun

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and mask once he returned home because he knew they could link him to the crimes he had committed. He acknowledged he was imprisoned once before for the shooting of his adoptive mother in 1992. That incident made him clearly understand that shooting people is wrongful conduct that can result in jail time.

After a thorough review of the record, the testimony presented, and the arguments of counsel, this Court finds Counsel was not ineffective in failing to have Applicant evaluated for criminal responsibility prior to trial. Applicant gave conflicting testimony of remembering the incident and whether he was aware that his actions were wrongful. Conversely, this Court finds Counsel's testimony as to his perceptions of Applicant based on their pre-trial meetings to be credible and persuasive.

This Court finds Counsel's decision not to have Applicant evaluated for criminal responsibility was objectively reasonable and, therefore, not deficient. Counsel reasonably relied upon his own perceptions of Applicant based upon their extensive interactions, discussions and meetings in deciding such an evaluation was unnecessary and unwarranted. See Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992) (counsel not deficient for failure to mentally evaluate defendant where he reasonably relied on his own perceptions of defendant's mental capacity). Further, the evidence in the record is clear that Applicant was aware of the wrongful nature of his actions, as he attempted to hide the incriminating tools used in carrying out the crime to avoid accountability, voiced his intentions to commit such a crime prior to doing so, and taunted police about their ability to solve the crime as they scoured the area where victim's car was found. These facts, along with the rest of the record and testimony presented, leave this Court firmly convinced Counsel's decision to not have Applicant undergo evaluation for criminal responsibility was not objectively unreasonable when examined under reasonable professional norms. Accordingly, Applicant has failed to prove deficiency.

Applicant has failed to show there is a reasonable probability that had Counsel requested such an evaluation, Dr. Schwartz-Watts would have returned a report finding Applicant lacked criminal responsibility at the time of the incident. In accordance with the language of S.C. Code Ann. § 17-24-10, "[i]t is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act . . . the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong, or to recognize the particular act charged as morally or legally wrong." The record before this Court and testimony

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presented firmly convince this Court Applicant was fully aware of the wrongful nature of his actions at the time of the commission of the crime. Applicant made a recognized and informed decision to carry out the illegal, morally wrong acts knowing the potential consequences he may face as a result. His testimony to the contrary alleging he "blacked out" or otherwise was not cognizant of his actions is wholly not credible and entirely inconsistent with the facts and testimony set forth in the trial record. Applicant has failed to prove he was not criminally responsible at the time of the crimes or that any evaluation conducted before trial would have established he was not criminally responsible. Accordingly, this Court finds Applicant cannot prove resulting prejudice from Counsel's failure to request an evaluation for criminal responsibility.

*Failure to Pursue GBMI Verdict*

Applicant next contends Counsel was ineffective for failing to pursue a GBMI verdict of at trial. Applicant argues such a verdict could have potentially changed Applicant's quality of life at SCDC.

Counsel testified Applicant was facing life without parole ("LWOP") on the ABWIK charge under S.C. Code Ann. § 17-27-45. The State served notice of intent to seek LWOP, which Counsel discussed with Applicant during their pre-trial meetings to ensure Applicant was well aware of the potential risks of going to trial. Counsel explicitly waived requesting a GBMI verdict during the pre-trial Blair hearing because such a verdict would not prevent Applicant from receiving a LWOP sentence. Counsel discussed with Applicant that a GBMI verdict would not prevent him from serving a LWOP sentence. Applicant made clear he wanted to be able to walk out of jail one day; therefore, Counsel's decision not to pursue GBMI was based upon Applicant's wishes. Counsel conceded he did not specifically investigate the conditions of confinement for a GBMI inmate, but assumed the difference entailed housing at a mental health hospital until such time as doctors approve introduction to general population.

On cross-examination, Counsel testified he met with Applicant before trial several times and was able to review with him the entirety of the discovery materials, which Counsel described as very condemning. Counsel noted during their discussions, Applicant voiced his expectations of Counsel's representation, which focused on the idea that Applicant did not want to receive a LWOP sentence and wanted to one day walk out of SCDC as a free man. Because of that specific goal, Counsel believed pursuing a GBMI verdict was imprudent. Further, in his decade

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of experience as a criminal defense attorney, Counsel had seen juries settle or compromise on a verdict of GBMI when faced with several options. With that in mind, Counsel did not want to present the jury with another option which would ultimately result in a LWOP sentence. It was his strategy to essentially argue Applicant's lack of intent mitigated his conduct down to merely Assault and Battery of a High and Aggravated Nature, as such a crime would not invoke a mandatory LWOP sentence under S.C. Code Ann. § 17-27-45.

Schwartz-Watts testified thereafter as to her familiarity with mental health institutions and treatment at SCDC. There is a hospital for mentally ill inmates on the SCDC grounds at Kirkland Institution (Gilliam Psychiatric Hospital). In instances where a defendant is found GBMI at trial, he is sent to Gilliam instead of the routine Reception and Evaluation (R&E) Center at Kirkland. She noted mental health counselors do work at the R&E Center and can send inmates to Gilliam if they perceive mental health issues during the R&E process, but stated GBMI patients housed at Gilliam generally receive quicker mental health treatment. Schwartz-Watts said the ultimate goal is to release the GBMI inmates in Gilliam to general population after treating them. The vast majority of inmates at Gilliam are eventually released to the general prison population. Those inmates convicted as GBMI, she said, are designated as such for the entirety of their time with SCDC, which may or may not help in providing them with further mental health treatment.

Applicant knew the State was seeking a LWOP sentence on the ABWIK charge at trial and he recalled discussing his mental health issues with Counsel. He alleged Counsel never discussed a possible GBMI verdict with him, nor did they discuss the possible benefits of such an outcome. Again, Applicant recognized it was wrongful to shoot the victim in this instance and to carjack him. He acknowledged he hid the items used in the incident under the back stairs of his house because he knew they would be incriminating. Applicant did not recall the shooting or driving away in the victim's car and said he only realized what he had done was wrong upon his wife telling him so.

This Court finds Counsel was not ineffective in failing to investigate, prepare or pursue a GBMI verdict on Applicant's behalf in this instance. Applicant's testimony that Counsel never discussed such an option with him and that Applicant did not understand the wrongful nature of his conduct sufficient to justify a GBMI verdict is entirely not credible. Conversely, Counsel's

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testimony as to his discussions with Applicant about a potential GBMI verdict and his rationale for not pursuing such is credible.

Based on Counsel's credible testimony, Applicant's request was that Counsel's main focus was to ensure Applicant did not receive a LWOP sentence on the ABWIK charge. With this as the primary focus of his representation, Counsel made an objectively reasonable decision to forego any attempt to obtain a GBMI verdict, as it would result in the precise result Applicant sought to avoid (a LWOP sentence). Allowing such a verdict to be considered by the jury would simply allow the jurors to consider other possible verdicts pursuant to which a LWOP sentence could be imposed. By eliminating the GBMI as an option, only a verdict of guilty as charged would result in a LWOP sentence. This Court finds Counsel articulated a valid and reasonable trial strategy in this regard in accordance with Applicant's explicit, unambiguous desire to avoid a LWOP jail sentence. "Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective." Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992). Accordingly, this claim is without merit.

Further, this Court finds Counsel's informed decision not to further investigate or prepare an argument for a GBMI verdict to have been objectively reasonable, as it was based entirely on the information and requests supplied to him by Applicant. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or action" as "[c]ounsel's actions are usually based, quite properly, on informed strategic decisions made by the defendant and on information supplied by defendant." Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. "In particular, what investigation decisions are reasonable depends critically on such information." Id. With Counsel's credible testimony as to Applicant's express desires for the outcome of the case, it is clear Counsel's performance was objectively reasonable. Therefore, this Court finds no deficient performance in this regard.

Further, while this Court need not turn to the prejudice prong of the analysis having found Counsel's performance to have been objectively reasonable, this Court would further note Applicant has failed to prove resulting prejudice under the guiding standard set forth under Strickland. Applicant contends had he been found "guilty but mentally ill" at trial, his quality of life at SCDC would have been different. This claim misinterprets the prejudice standard used in evaluating claims of ineffective assistance of Counsel and is entirely without merit.

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“When a defendant challenges a conviction, the question” to be considered by the court in measuring prejudice “is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt.” Strickland, 466 U.S. at 695, 104 S.Ct. at 2068- 2069. The South Carolina Supreme Court has interpreted this standard for proving resulting prejudice as set forth in Strickland, stating “[t]he second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant 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, 300 S.C. at 118, 386 S.E.2d at 625. “To return a verdict of ‘guilty but mentally ill’ the burden of proof is upon the State to prove beyond a reasonable doubt to the trier of fact that the defendant committed the crime, and the burden of proof is upon the defendant to prove by a preponderance of the evidence that when he committed the crime he was mentally ill”, meaning “he had the capacity to distinguish right from wrong or to recognize his act as being wrong . . . but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.” S.C. Code Ann. § 17-24-10 (A) & (B). Applicant has failed to convince this Court there is a reasonable probability that had Counsel prepared and presented an argument for a verdict of GBMI, the jury would have returned such a verdict. Therefore, this Court finds no reasonable probability of a different result in the proceeding and, thus, no prejudice. That is the proper analysis to be conducted by this Court.

Applicant’s claim as to prejudice resulting from the difference in his quality of life at SCDC had he been found GBMI is both erroneous and a misapplication of the test for resulting prejudice under Strickland. Applicant’s conditions of confinement are not within the purview of the sentencing judge and are entirely corollary to the result of the proceeding, which is the measure for prejudice. Therefore, Applicant’s contention regarding the conditions of confinement is wholly without merit and of no relevance to this Court’s prejudice analysis.

*Failure to Request Recusal of Solicitor’s Office or Change of Venue*

Applicant finally contends Counsel was ineffective for failing to move for recusal of the Fifth Circuit Solicitor’s Office from prosecuting the case, or alternatively requesting a change of venue because the victim was a practicing attorney in the Columbia area and the incident occurred within close proximity of the Richland County Courthouse.

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Counsel testified the victim, Darryl Hawkins, was an attorney whose office was nearby at the time the incident occurred. Neither Counsel nor the prosecuting solicitors were familiar with Mr. Hawkins in either a professional or personal capacity prior to the trial. The shooting occurred next to the Richland County Courthouse on Main Street. The Solicitor's Office is located in the Courthouse. Counsel did not consider filing a motion for change of venue or recusal of the Fifth Circuit Solicitor's Office because the victim did not practice criminal law and none of the parties involved in the case were familiar with the victim. Counsel testified "a lot of crime" occurs on Main Street which ends up being prosecuted at the Richland County Courthouse. He did not believe the proximity to the courthouse was sufficient reason to ask for change of venue. Counsel did not believe having the case heard in any other county would have helped change the outcome of the case, but if the solicitors had been familiar with the victim he may have considered those motions more seriously.

Based on Counsel's credible testimony and a review of the record, this Court finds this claim to be without merit. First, Counsel was not objectively unreasonable in his evaluation of the motions for change of venue and in opting not to file such a motion under the circumstances. Applicant has failed to produce anything to this Court to show victim's occupation as a practicing attorney in Richland County in any way affected the jury's ability to be fair and impartial. Further, Applicant has failed to convince this Court that such a motion would have been granted by the trial court and the outcome of the case would have been different in a new venue. Finally, Applicant has failed to establish any juror prejudice.

A motion for change of venue is addressed to the sound discretion of the trial judge and subject to an abuse of discretion standard on appeal. See e.g. State v. Parker, 381 S.C. 68, 671 S.E.2d 619 (Ct. App. 2008). "When a trial judge grants or denies a motion for change of venue after adequate *voir dire* of prospective jurors, the decision will not be overturned absent extraordinary circumstances." State v. Woods, 382 S.C. 153, 157, 676 S.E.2d 128, 131 (2009). On a motion for change of venue, the moving party has the burden of demonstrating actual juror prejudice. State v. Caldwell, 300 S.C. 494, 388 S.E. 2d 816 (1990). The record reflects the trial judge undertook thorough and adequate *voir dire* of the jury panel prior to the trial, during which no jurors indicated a familiarity with the victim. Accordingly, this Court finds this claim is entirely without merit and Counsel was not ineffective in this regard.

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Further, this Court likewise finds Counsel's decision not to move for recusal of the Solicitor's Office from prosecuting the matter to have been objectively reasonable as well. Counsel's credible testimony reflects none of the parties involved in the matter, including the prosecuting solicitors, were familiar with the victim in either a professional or personal capacity. Therefore, Applicant has failed to establish any evidence to provide a basis for such a motion. Further, Applicant has failed to prove any actual conflict existed which would have resulted in the motion being successful, or that the Fifth Circuit Solicitor's Office's involvement resulted in any prejudice to his case. "[A]n Appellant who seeks disqualification of a Solicitor's Office must show actual prejudice." State v. Bell, 374 S.C. 136, 142, 646 S.E.2d 888, 891 (Ct. App. 2007), citing State v. Chisolm, 312 S.C. 235, 439 S.E.2d 850 (1994).

Therefore, this Court finds Applicant has failed entirely to prove Counsel was objectively unreasonable for not filing motions for change of venue and recusal of the 5<sup>th</sup> Circuit Solicitor's Office. Applicant has also failed to prove those decisions resulted in prejudice to his case. Accordingly, these claims are 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 with prejudice.

This Court notes Applicant 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), 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 Respondent.

**AND IT IS SO ORDERED.**

  
ALISON RENEE LEE  
Presiding Judge  
Fifth Judicial Circuit

April 25, 2013  
Columbia, South Carolina.

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LAW OFFICE OF



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May 15, 2013

**RECEIVED**

MAY 17 2013

The Honorable Daniel E. Shearouse  
South Carolina Supreme Court Clerk  
Post Office Box 11330  
Columbia, South Carolina 29211-1330

**S.C. Supreme Court**

RE: Eric Mance, #200410 v. State of South Carolina; 2011-CP-40-741.

Dear Mr. Shearouse:

Enclosed please find for filing a Notice of Appeal on behalf of the above-captioned Post-Conviction Relief client. I would appreciate your returning two (2) clocked copies to me in the envelope provided. Inasmuch as I was court-appointed in this matter, I will now be turning this file over to the South Carolina Commission on Indigent Defense, Office of Appellate Defense, for perfection of this appeal. I would note that Judge Lee issued a written Order of Dismissal on this case which was filed with the Richland County Clerk of Court's Office on April 29, 2013. I *did not* file a Rule 59(e) in this case. With my thanks for your assistance in this matter, as always, I remain,

Sincerely yours,

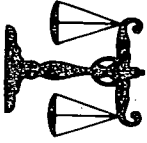
A large, stylized handwritten signature in black ink that reads "Tara Dawn Shurling". The signature is written in a cursive, flowing style with a large initial 'T' and 'S'.

Tara Dawn Shurling  
Attorney and Counselor at Law

TDS/sg

Enclosures

cc: Megan Harrigan, Assistant Attorney General  
Sharon Graham, South Carolina Office of Appellate Defense

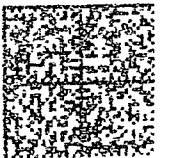


Law Office of  
**Tara Dawn Shurling, P.A.**  
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Columbia, South Carolina 29204

The Honorable Daniel E. Shearouse  
South Carolina Supreme Court Clerk  
Post Office Box 11330  
Columbia, South Carolina 29211-1330

RE: Eric Mance

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