THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Jul 05 2022
S.C. SUPREME COURT

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Courtney Clyburn Pope, Circuit Court Judge
Honorable William P. Keesley, Circuit Court Judge

Case No.: 2021-CP-06-0019, 2014-CP-06-00369

Dexter B. Brown, II, 330278, Petitioner,

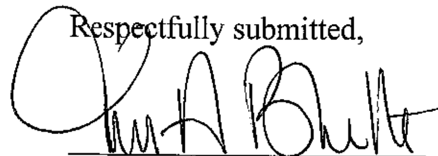
vs.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Dexter B. Brown, II, Petitioner, is filing a Notice of Appeal to perfect a belated appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), of the Order of Dismissal issued on June 1, 2018 by the Honorable William P. Keesley, which was filed on June 4, 2018. This belated appeal is being sought following the issuance of a Consent Order Granting Appeal Pursuant to *Austin v. State* issued by the Honorable Courtney Clyburn Pope on May 13, 2022, which was filed on May 31, 2022. Petitioner, through counsel, received notice of the entry of the Order Granting Appeal Pursuant to *Austin v. State* on June 7, 2022.

Respectfully submitted,



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July 5, 2022

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP0600369

Dexter B. Brown II		South Carolina State of	
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant ☐ 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. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: ____________

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: ____________

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

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 JUDGMENT 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 (List amount(s) below)

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.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/ William P. Keesley	2050	6/12/2018
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **June 1, 2018,** and a copy mailed first class or placed in the appropriate attorney's box on **June 12, 2018,** to attorneys of record or to parties (when appearing pro se) as follows:

Dexter B Brown II
Thurmond Brooker PO Box 1450 Florence, SC 29503-1450

Julie Amanda Coleman PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Constance B. Carter

Constance B. Carter - Deputy Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

Dexter B. Brown, II, #330278,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

2014-CP-06-00369

ORDER OF DISMISSAL

FILED FOR RECORD
2018 JUN -4 PM 4:29
RHONDA D. McELVEEN
CLERK OF COURT

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on October 2, 2014. Respondent submitted its Return and Motion for a More Definite Statement on January 15, 2015. An evidentiary hearing into the matter was convened on January 25, 2018, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Thurmond Brooker, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

WPL #1

At the evidentiary hearing, Applicant testified on his own behalf. The parties also presented testimony from Nicholas R. McCarley, Esquire ("Trial Counsel"), and Public Defender De Grant Gibbons, Esquire. This Court had before it the records of the Barnwell County Clerk of Court regarding the subject convictions, Applicant's records for the Department of Corrections, appellate records, the trial transcript, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Barnwell County Clerk of Court. Applicant was true bill indicted at the January 2011 term of the Barnwell County Grand Jury for two counts of attempted murder (2011-GS-06-00010; -00011) and possession of a

weapon during a violent crime (2011-GS-06-00120). Nicholas R. McCarley, Esquire represented Applicant. Applicant proceeded to a jury trial before the Honorable Edgar W. Dickson. Applicant was found guilty as indicted. On May 12, 2011, Judge Dickson sentenced Applicant to a thirty year term of imprisonment for attempted murder to run consecutively to an additional thirty year term of imprisonment for attempted murder. Additionally, Judge Dickson sentenced Applicant to a five year term of imprisonment for possession of a weapon during a violent crime running consecutively to the first count of attempted murder. Applicant filed a motion to reconsider his sentence. On November 9, 2011, Judge Dickson resentenced Applicant to serve the thirty year terms of imprisonment for attempted murder concurrently, with the weapon sentence to run consecutively, for a total of thirty-five years' imprisonment.

A timely Notice of Appeal was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed the convictions. State v. Brown, Un. Op. 2014-UP-303 (S.C. Ct. App. filed July 30, 2014). The Remittitur was issued on August 15, 2014.

WPL #2

II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel

Applicant filed an amended application on June 17, 2015, adding the following allegations:

1. Counsel failed to object to improper jury instructions;
2. Counsel failed to move to quash improper indictment.

At the evidentiary hearing, Applicant orally amended his application and informed this Court he was only proceeding on the following allegations:

1. Ineffective assistance of counsel for failure to impeach Roger Benjamin with his statement to Officer Trottie

2. Ineffective assistance of counsel for failure to request the lesser included offense of Assault and Battery of a High and Aggravated Nature and First Degree Assault and Battery
3. Ineffective assistance of counsel for failure to investigate witness Brandon Parker and other potential witnesses at trial.

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

Trial Counsel's testimony

At the evidentiary hearing, Trial Counsel testified he met with Applicant twenty times prior to his trial. He stated he got the case on November 2nd of the previous year and had the case about six months before trial. He testified that at their meetings, he and Applicant reviewed the discovery and discussed multiple potential defenses, but none of them worked or would have been successful enough for them to present. Trial Counsel testified he discussed a possible alibi defense that would involve having Applicant's girlfriend, Adrian Ingram, testify, but the defense never came to fruition. He stated he called Ingram multiple times and left messages, and she never returned his calls. He also went to Taco Bell, where Ingram worked, to try to find her but was unable to do so, but he left his card with the Taco Bell manager. He stated he also asked his investigator to find Ingram, and he was unable to. He testified that Ingram appeared at the trial but did not testify.

WPL #3

Trial Counsel testified Brandon Parker was one of the three victims in this case, but he did not testify at trial for the State because he was incarcerated in North Carolina. Trial Counsel stated he had no recollection and no notes that Applicant told him Brandon Parker would be anything other than an adversarial witness, so he never considered calling Parker as a witness for the defense. He stated he was allowed to sit in on a meeting with Brandon Parker's mother, who testified at trial as a witness for the State, and her testimony was not helpful to Applicant. Trial Counsel stated the Solicitor's Office and Officer Trottie, who investigated the case, both told him

Parker would be a hostile witness toward the defense. Parker was also the victim in the attempted murder case, so Trial Counsel believed it would not be a good idea to call him as his witness. He further stated he believed it was a good strategy to make the State present their case without one of their victims to testify about getting shot at by Applicant.

Trial Counsel testified that he believed Brandon Parker would not be a good witness for him to use because he was in engaged in illegal activity with or against Applicant. He stated Applicant told him Brandon Parker would not have been a good witness for them to use at trial. Trial Counsel stated he had read and was familiar with the deposition of Brandon Parker that was taken for this PCR action. He stated that, based on the transcript of the deposition, Parker's testimony would not have been beneficial to them at trial. He stated he did not find Parker's testimony credible, and he did not believe it would have changed the jury's verdict. Trial Counsel testified that presenting Parker as a witness or presenting his statement as an exhibit would not be worth losing the strategic opportunity to have the last closing argument at trial.

Trial Counsel testified he was familiar with Officer Trottie's report from his interview of Brandon Parker after the shooting which indicated that Parker did not see who was shooting at them during the shooting. He stated that he could have used the statement to show that Parker did not see who was shooting at him from inside the car, but he chose not to because the victims were able to identify Applicant as the shooter after they got out of the car. He testified that Parker's statement also contained hurtful information that the third victim sitting in the backseat of the car yelled out "Dexter! Dexter!" while Applicant was shooting at them. He stated he was also able to impeach Parker through his mother's testimony by asking about his criminal record and the reason why he was currently incarcerated in North Carolina.

Trial Counsel testified that he did not use Roger Benjamin's prior statement to Officer Trottie to impeach him at trial because he did not believe it was a prior inconsistent statement. Although Benjamin's statement said he could not see who was shooting at him while he was inside the car, Trial Counsel stated he learned ~~this~~ during the course of his investigation that once Benjamin got out of the car, ~~ran around the side of the trailer, and~~ he saw Applicant shooting at them. Trial Counsel stated that Benjamin's trial testimony was consistent with this statement, and although he did not use the actual written statement to impeach Benjamin, he did cross-examine him at trial about the content of the statement. Trial Counsel testified that he believed Roger Benjamin had impeached himself enough already at trial, so he did not need to introduce the statement or the testimony of Officer Trottie or Leslie Morrisey, who wrote the statement, to impeach him.

Trial Counsel testified that he discussed all his strategic decisions with Public Defender De Grant Gibbons, who sat second chair on this trial with him. He stated they discussed the possibility of requesting a lesser-included offense with Applicant and in chambers with the trial judge. Trial Counsel stated he strategically chose not to request the lesser-included offense because he never wanted to admit to the jury that Applicant was at the crime scene; his strategy was to convince the jury Applicant was not at the scene of the crime. He stated he also discussed with Applicant the possible sentencing outcomes and the decision to make it an "all or nothing" choice for the jury. He stated they did not want to give the jury the ability to compromise by finding him guilty of a lesser-included offense rather than finding him not guilty. Trial Counsel testified Applicant made the decision not to request the lesser-included offense, and if Applicant had objected, he would have at least put it on the record.

Trial Counsel testified that he believed the most important evidence against Applicant was the testimony of Alice Thompson, who was a witness for the State. He stated he met with her at the scene of the crime as part of his investigation. Trial Counsel testified that Ms. Thompson's 9-1-1 call was introduced at trial, and he cross-examined her on the flaws in her statements on the recording. He stated that Thompson was a very good witness for the State, and without her testimony the case against Applicant was very weak.

Trial Counsel testified one of his trial strategies was to bifurcate the trial from the other co-defendant to separate Applicant from the event. He stated he could not prove the shooting did not happen, but there was no physical evidence tying Applicant to the crime, so his strategy was to convince the jury that Applicant was not there and did not take part in it. He stated the State's evidence included 14 shell casings on the road that came from two different guns, as well as bullets found in the headrest of the victim's vehicle, which was one of the factors forming the basis of the attempted murder charge.

WPL #6

Applicant's testimony

Applicant testified he met with Trial Counsel twenty times, but they did not discuss anything about the trial until the day before he went to court. He stated the other nineteen meetings were about plea offers and motions. He stated he filed a motion to relieve counsel, but it was denied. He testified that he did not know about the 9-1-1 tape until the night before trial. Applicant testified he told Trial Counsel to investigate his girlfriend, Adrian Ingram, as an alibi witness, and he gave him her cell phone number and told him where she worked. He stated that he learned years after the trial that Ingram had spoken with Trial Counsel but he did not use her as a witness. Applicant testified Ingram came to the trial, but he did not say anything to Trial Counsel about her. Applicant stated Trial Counsel told him Brandon Parker's testimony would

not be beneficial to his case. Applicant testified that Trial Counsel did not discuss requesting the lesser-included offense with him, but if he had, he would have chosen to request it.

De Grant Gibbons' testimony

De Grant Gibbons testified that he has been the Second Circuit Public Defender since 2008, and has been practicing law since 1991. He stated he sat second chair in this case and discussed strategic decisions with Trial Counsel before and during the trial. Gibbons testified that the statement of Roger Benjamin was basically in evidence already through the witnesses' testimony, and it was more important for them to have the last closing argument than to introduce his statement into evidence. He opined that Brandon Parker was not a good witness because he had prior drug run-ins with Applicant. He stated that requesting the lesser-included offense would have changed their defense that Applicant was not at the scene of the crime. He testified that they discussed the lesser-included offense in chambers before the trial, and the trial judge indicated that he would not have allowed it even if they had requested it. Gibbons stated Alice Thompson was a very strong witness for the State and she was very believable because she was a friend, almost family, of Applicant, so she had no motive to make up a name to blame the shooting on.

WFM #7

IV. APPLICABLE LAW

In a post-conviction relief 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, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

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, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 prong, attorney 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. ~~With respect to guilty pleas, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).~~ WPL

WPL #8

V. 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 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 (1985).

As a matter of general impression, this Court finds Applicant's testimony and assertions to be ~~not~~ credible. In contrast, this Court finds Trial Counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant has asserted several allegations of ineffective assistance of counsel. This Court finds these claims to be meritless and they should be denied and dismissed with prejudice. After considering the testimony, judging the credibility of the witnesses, and reviewing the materials presented to the court, this Court finds Applicant has failed to meet his burden of proof. Accordingly, post-conviction relief is denied. Each individual allegation is addressed below.

Failure to impeach Roger Benjamin with prior statement

Applicant alleges Trial Counsel was ineffective for failing to impeach victim Roger Benjamin with his prior written statement given to Officer Trottie on the day of the shooting. This allegation is meritless. Applicant has failed to prove Trial Counsel failed to explore inconsistencies between the written statement given to law enforcement and his trial testimony, and he has further failed to prove ineffective assistance in regard to any of the cross-examination or trial presentation. Trial Counsel thoroughly cross-examined Benjamin at trial on the inconsistencies of his statements and the fact that he did not tell the officer that he saw Applicant shooting at him:

> Trial Counsel: Did you give a statement to the police, to the police on the day of the incident?
> Benjamin: Yeah.
> Q: You did. Do you remember what you wrote down in that statement?
> A: Yeah.
> Q: You do?
> A: (Nods head.)

...

Q:	But here in your statement you made no mention whatsoever of seeing Dexter Brown.
A:	I ain't wrote those statements.
Q:	I do see here where Mrs. Morrisey wrote it for you. But what happens is it has to be attested to by a police officer sitting right there.
A:	I ain't wrote one so.
Q:	Okay. Well, it was signed by you and it's, you know, you give this signature, you're telling the truth and what's in this statement.

Tr. 90, line 25 – 92, line 9.

The transcript clearly shows Trial Counsel impeached Benjamin with the content of the statement in the exact manner Applicant now alleges he should have. This Court finds Trial Counsel's impeachment of the witnesses was proper and reasonable under the circumstances, and therefore not deficient. This Court further finds Trial Counsel offered a valid strategical reason for choosing not to introduce the prior statement or any testimony regarding the statement so that he would not lose the chance to argue the last closing argument, so he cannot be deficient for failing to do so. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Applicant has failed to prove Trial Counsel was deficient in this manner, or that any deficiency changed the outcome of the trial. Accordingly, this allegation is denied and dismissed with prejudice.

WJL #10

Failure to request lesser included offense

Applicant's allegation that Trial Counsel was ineffective for failing to request the lesser-included offenses is meritless. Trial Counsel credibly testified that he discussed this decision with Applicant and Applicant made the choice not to request lesser-included offenses. He credibly testified their decision was strategically based on the presentation of their defense at

trial, that Applicant was not present at the scene of the crime. Public Defender Gibbons credibly testified he believed it was not a good strategy to argue to the jury that "I wasn't there and even if I was, it wasn't attempted murder." Gibbons and Trial Counsel further testified that they wanted "all or nothing," and they did not wish to give the jury an opportunity to compromise by finding Applicant guilty of a lesser-included offense rather than finding him not guilty.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland, at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

This Court finds Trial Counsel articulated a valid trial strategy in choosing not to request the lesser-included offense, and the decision was discussed with and agreed upon by Applicant. Accordingly, because Trial Counsel offered a valid strategic reason for his choice, and Applicant did not prove the outcome of the trial would have been different, Applicant has failed to prove either prong of the Strickland test, and this allegation is denied and dismissed with prejudice.

Failure to investigate Brandon Parker and other potential witnesses

Applicant's assertion that Trial Counsel was ineffective for failing to investigate Brandon Parker and other potential witnesses is meritless, and this Court must deny and dismiss the allegation.

Brandon Parker

Brandon Parker was one of the three victims in this shooting incident. Parker was driving the vehicle that Applicant rode behind and at which he was shooting, and bullets were found in the headrest behind Parker's head. He did not testify for the State at trial because he was incarcerated in North Carolina. Trial Counsel indicated that Parker knew Applicant because they had been involved in illegal drug activity together. Applicant now alleges Trial Counsel should have called Brandon Parker as a witness for the defense at trial to testify that he did not see who was shooting at him from inside his car, and he does not think any of the other victims would be able to see who was shooting because the windows of the car they were in were so darkly tinted they were impossible to see out of.

WPL #12

Applicant introduced the transcript of the deposition of Brandon Parker, taken on October 19, 2017 at the Duplin County Detention Center in Kenansville, North Carolina. This Court has reviewed the transcript of this deposition and finds many of the statements made by Parker to be not credible. In Parker's written statement to law enforcement immediately after the shooting, he told Officer Trottie about how he was driving the vehicle and an unknown man named "T" was riding in the backseat. As Applicant began shooting at their car, Brandon told Officer Trottie, "The guy 'T' that caught a ride kept yelling 'Dexter, Dexter." However, when asked about this at the deposition, Parker recanted this statement and said his mother, who wrote it for him, wrote it down incorrectly:

Q: Sure. Now, when your mom wrote your statement, did she write it exactly as you told her to?

A: Like I say, the only part that – I don't – I said that the guy that caught a ride kept yelling – he didn't kept [sic] yelling "Dexter". He said that looked like Dexter. He didn't directly say that was Dexter, but that's what she put right there, which wasn't right.

Depo. Tr. 19, line 19 – 20, line 1. This Court finds this section of Parker's deposition testimony to be not credible, as he is recanting his prior statement to law enforcement. "Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial." State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) (quoting State v. Mayfield, 235 S.C. 11, 34–35, 109 S.E.2d 716, 729 (1959)). This Court further finds Parker's testimony that it was impossible to see who was in the car behind them because of the tint of his vehicle's windows to be not credible. See Depo Tr. 22-23.

WM #13

This Court finds that failing to call Brandon Parker as a witness for the defense was not deficient because it was reasonable under the circumstances. This Court further finds that the decision not to call him as a witness cannot be deficient because Trial Counsel articulated a reasonable, valid trial strategy in choosing not to call him. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Trial Counsel credibly testified that Applicant, the Solicitor's Office, and Officer Trottie all told him that Brandon Parker would be a hostile witness against the defense and would not help his case. He testified that he sat in on a meeting with Parker's mother, who testified at trial, and gathered from that meeting that Parker's testimony would not be helpful.

Trial Counsel and Public Defender Gibbons further explained that making the State present their case without one of their victims present to testify was a good strategy, rather than

calling the victim himself to tell the jury that he was being shot at. Finally, Parker was actively incarcerated in North Carolina and had a criminal record. Trial Counsel credibly testified that, based on Parker's previous drug run-ins with Applicant, Parker would not be a good witness. In Edwards v. State, this Court held that "[a] witness's credibility and demeanor is crucial to an attorney's trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility questions." Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011). This Court finds these strategies articulated by Trial Counsel to be valid, and his decision was not deficient.

Secondly, this Court finds there is no prejudice from Trial Counsel's failure to call Brandon Parker as a witness because the State's strongest witness, Alice Thompson, observed the shooting from the front porch of her trailer and independently identified Applicant as the shooter. This Court agrees with Trial Counsel and Gibbons' opinion that Thompson's testimony was very credible because she was very closely connected to Applicant and had no motive to make up his identity. Thompson testified at trial that she had known Applicant for years and had helped raise him. The jury heard the 9-1-1 recording of Thompson identifying "Little Dexter" as the shooter to law enforcement immediately after the shooting occurred. She later picked Applicant out of a photo lineup and made an in-court identification of Applicant as the shooter. Accordingly, because Alice Thompson was such a strong witness that identified Applicant as the shooter independently of Parker or Benjamin's testimony, this Court finds Trial Counsel's choice not to call Brandon Parker as a witness would have no effect on the outcome of the trial.

WPK #14

Adrian Ingram

Finally, this Court finds Applicant's allegation that Trial Counsel was ineffective for failing to investigate and call Adrian Ingram as an alibi witness is meritless. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

WPR #15

Trial Counsel testified that he investigated Ingram and was unable to find her. He stated he called her cell phone and left multiple messages, he went to her place of work and left his card with the manager, and he asked his investigator to find her. After he was unsuccessful, he and Applicant abandoned their potential alibi defense. This Court finds Trial Counsel was not deficient in failing to find Ingram because he employed reasonable efforts to find her.

Most importantly, Applicant can show no prejudice from his failure to call Ingram as a witness because he did not present her testimony at the evidentiary hearing. To qualify as an alibi, a witness's testimony must account for the defendant's whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime. Walker v. State, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012). In order to support a

claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Id.

Because Applicant failed to present the testimony of Ingram that he alleges Trial Counsel should have used at trial, this Court cannot speculate as to what the testimony would have been or the effect it would have had on the outcome of the trial. Accordingly, because Applicant failed to prove deficiency or prejudice, this allegation is denied and dismissed with prejudice.

VI. 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 notes that Applicant must file and serve a notice of appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant 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 is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 1st day of June, 2018.

William P. Keesley
WILLIAM P. KEESLEY
Presiding Judge
Second Judicial Circuit

~~_______________, South Carolina~~

#17

STATE OF SOUTH CAROLINA

COUNTY OF BARNWELL

Dexter B. Brown, II, 330278,
☒ Plaintiff

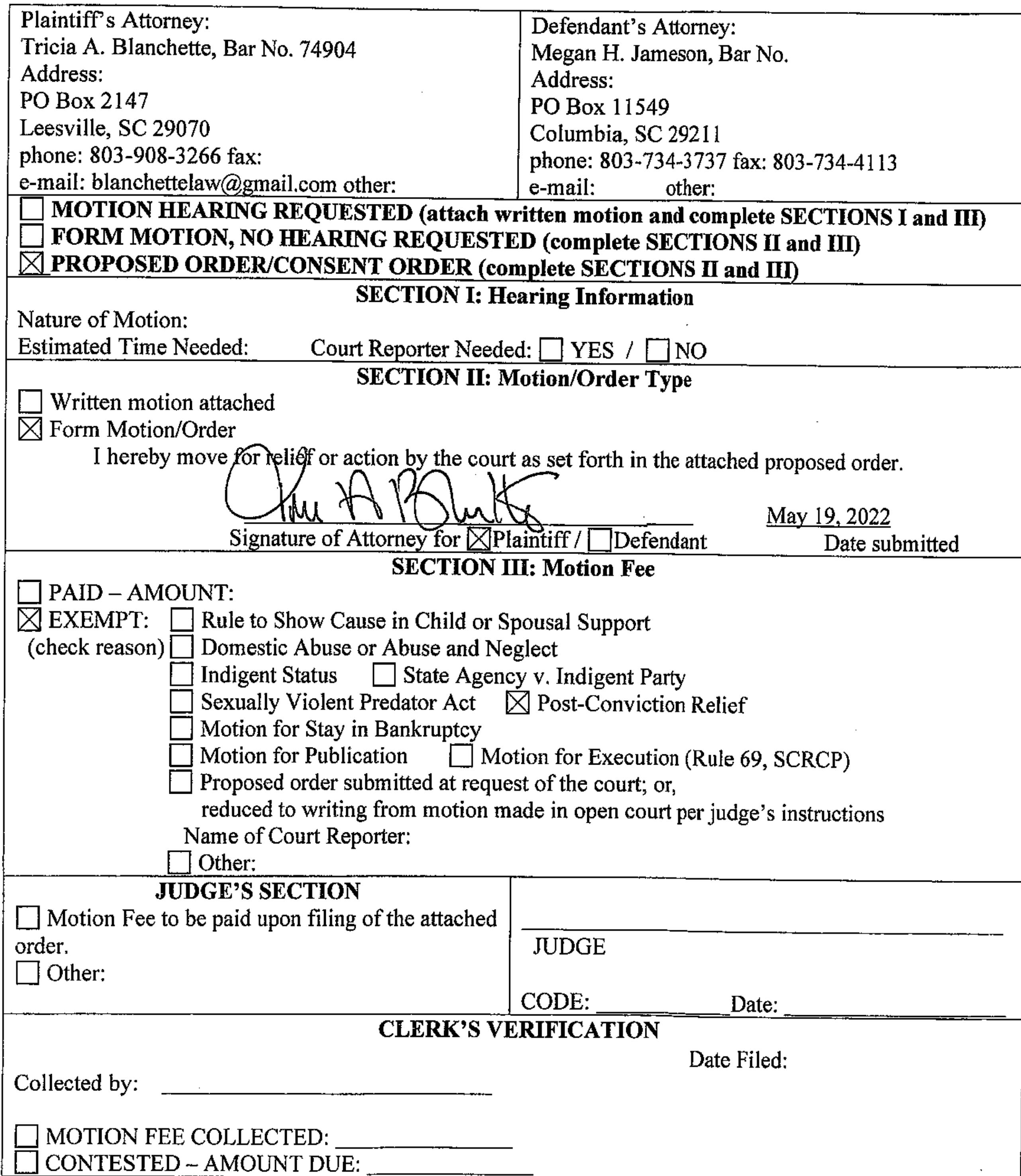
v.

State Of South Carolina
☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2021-CP-06-0019

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET



Plaintiff's Attorney:	Defendant's Attorney:
Tricia A. Blanchette, Bar No. 74904	Megan H. Jameson, Bar No.
Address:	Address:
PO Box 2147	PO Box 11549
Leesville, SC 29070	Columbia, SC 29211
phone: 803-908-3266 fax:	phone: 803-734-3737 fax: 803-734-4113
e-mail: blanchettelaw@gmail.com other:	e-mail: other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

_________________________ May 19, 2022
Signature of Attorney for ☒Plaintiff / ☐Defendant Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	_________________________ JUDGE
☐ Other:	CODE: ________ Date: ____________

CLERK'S VERIFICATION

Collected by: _________________________ Date Filed:

☐ MOTION FEE COLLECTED: _____________
☐ CONTESTED – AMOUNT DUE: _____________

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA)
COUNTY OF BARNWELL)

Dexter B. Brown, II, 330278, Applicant,

v.

State of South Carolina, Respondent.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

2021-CP-06-0019

CONSENT ORDER GRANTING APPEAL PURSUANT TO *AUSTIN V. STATE*

2022 MAY 31 PM 1:58

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on January 28, 2021. Respondent submitted a Return on May 3, 2021. Applicant, through counsel, submitted a Motion for Discovery on July 20, 2021. An Order Authorizing Discovery was issued on August 18, 2021 and filed on September 2, 2021.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to order of commitment from the Barnwell County Clerk of Court. During the January 2011 term of the Barnwell County Grand Jury, Applicant was indicted for two counts of attempted armed murder (2011-GS-06-00010 to 00011) and possession of a weapon during a violent crime (2011-GS-06-00120). Nicholas R. McCarley, Assistant Public Defender, represented Applicant, and Lauren Maurice, Assistant Solicitor, prosecuted the case.

On May 11, 2011, Applicant proceeded to trial in Barnwell County in front of the Honorable Edgar W. Dickson and a jury. After the jury found Applicant guilty as indicted, Judge Dickson sentenced Applicant to thirty years on each count of attempted murder and five years consecutive for the weapons charge. Following the pronouncement of the sentences, Judge Dickson modified the sentences to all be run consecutively due to

circumstances that unfolded in the courtroom. Following a motion for reconsideration, Judge Dickson reinstated the original sentence via order filed November 15, 2011.

Thereafter, a timely direct appeal was filed, and it was perfected by Tommy A. Thomas, Esquire. On July 30, 2011, the South Carolina Court of Appeals issued an unpublished opinion affirming Applicant's convictions and sentences. *State v. Dexter B. Brown, II*, Unpub. Op. No. 2014-UP-303 (S.C. Ct. App. filed July 30, 2011). The remittitur was issued on August 15, 2014.

On October 2, 2014, Applicant filed a Post Conviction Relief Application (2014-CP-06-0369). Respondent submitted a Return and Motion for More Definite Statement on January 15, 2015. Applicant filed an amended application on June 17, 2015, alleging: 1) Counsel failed to object to improper jury instructions; and 2) Counsel failed to move to quash improper indictment.

On January 25, 2018, an evidentiary hearing was convened at the in front of the Honorable William P. Keesley. Applicant was present and was represented by Thurmond Brooker, Esquire. Respondent was represented by Julie Coleman, Assistant Attorney General. At the start of the hearing, Applicant, through counsel, orally amended his Application and informed the Court he was only proceeding on the following allegations:

1. Ineffective assistance of counsel for failure to impeach Roger Benjamin with his statement to Officer Trottie.

2. Ineffective assistance of counsel for failure to request the lesser included offense of assault and battery of a high and aggravated nature and first degree assault and battery.

3. Ineffective assistance of counsel for failure to investigate witness Brandon Parker and other potential witnesses at trial.

Following the hearing, Judge Keesley denied relief and issued an Order on June 1, 2018, which was filed on June 4, 2018. An appeal was not filed.

On June 5, 2019, Applicant filed a petition for habeas corpus in the United States District Court on June 5, 2019. Respondent moved for summary judgment on July 31, 2019. On January 31, 2020, United States District Judge Richard M. Gergel dismissed the petition without prejudice.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

By way of his current Application, Applicant has provided the following ground: Pursuant to *Austin v. State*, 305 S.C. 453 (1991), Applicant is requesting a belated appeal of the Order of Dismissal issued on Case No. 2014-CP-06-00369. In support of this ground, the following factual support was provided: Applicant's counsel failed to file an appeal following the issuance of the Order of Dismissal, which was filed on June 4, 2018.

In *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), the South Carolina Supreme Court provided for a belated appellate review of an initial post-conviction relief action where prior post-conviction relief counsel fails to timely appeal the denial of the application. *Id.* at 454, 409 S.E.2d at 396; *see also* S.C. Code Ann. § 17-27-100 (right to appeal final judgment by post-conviction relief court). Pursuant to *Austin*, an evidentiary hearing may be conducted in regard to a successive post-conviction relief application "on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review." *Id.* at 454, 409 S.E.2d at 396. "If the circuit court finds that the petitioner never in fact south discretionary review, the petitioner may appeal the finding." *Id.* at 455, 409 S.E.2d at 396. *Austin*, therefore, allows an applicant to petition the South Carolina Supreme Court for discretionary review of the dismissal of his initial post conviction-relief application, and may do so outside the ordinary time limits for bringing such an appeal.

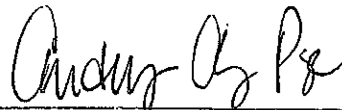
Here, both Applicant and Respondent agree that Applicant requested and was denied an opportunity to seek appellate review of his initial post-conviction relief application. Based upon the consent of counsel for both parties, this Court finds that Applicant is entitled to a belated appellate review of his initial post-conviction relief application pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

This Court notes that Applicant, through counsel, must serve a notice of appeal within thirty days from receipt by counsel of written notice of entry of the judgment to secure the appropriate appellate review, and file such notice in the South Carolina Supreme Court within ten days of service. Rule 203 & 243, SCACR. Furthermore, Applicant and counsel are directed to Rule 203, 207, and 243, SCACR regarding to ensure the proper filing and perfecting of an appeal.

IT IS THEREFORE ORDERED:

1. That Applicant is granted a belated appeal of his initial post-conviction relief application pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

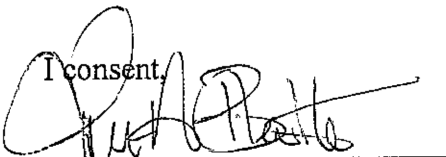
AND, IT IS SO ORDERED.



Honorable Courtney Clyburn Pope
Chief Administrative Judge
Second Judicial Circuit

May 13, 2022

I consent,



Tricia A. Blanchette
Attorney for Applicant

I consent,

Megan Harrigan Jameson
Attorney for Respondent

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
Dexter B. Brown, II, 330278, Applicant, v. State of South Carolina, Respondent.	)	2021-CP-06-0019 CERTIFICATE OF SERVICE

2022 MAY 31 PM 1:58

Pursuant to the Supreme Court's Order "RE: Service by E-Mail in the Trial Courts," issued on May 6, 2022, the undersigned hereby certifies a true copy of a Consent Order Granting Appeal Pursuant to *Austin v. State* has been served on opposing counsel this 19th day of May 2022 by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Megan Harrigan Jameson, Senior Assistant Deputy Attorney General
mjameson@scag.gov

Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

May 19, 2022