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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The 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

App. Case No.: 2022-000920

Dexter B. Brown, II, 330278, Petitioner,

vs.

State of South Carolina, Respondent.

APPENDIX
VOLUME II OF II

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Dexter Brown, #330278 Petitioner, v. Brian Stirling, Respondent.	)	C/A No. 2:19-cv-01613-RMG-MGB **RETURN AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Respondent, by and through the undersigned attorneys, hereby makes a Return to the Rule to Show Cause issued by the Honorable Mary Gordon Baker, United States Magistrate Judge, issued in response to the petition for federal habeas corpus relief filed by Petitioner on June 6, 2019. Respondent would show this Honorable Court there is no genuine issue of material fact and Respondent is entitled to judgment as a matter of law pursuant to Rule 56, F.R.C.P. In support of its motion for summary judgment, Respondent would show the Court as follows:

PROCEDURAL HISTORY

Petitioner is presently confined in the Lieber Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Barnwell County Clerk of Court. Petitioner was indicted at the January 2011 term of the Barnwell County Grand Jury for two (2) counts of Attempted Murder (Ind. #s 2011-GS-06-00010; -00011) and Possession of a Weapon During a Violent Crime (Ind. # 2011-GS-06-00120). Nicholas R. McCarley, Esquire represented Petitioner. Petitioner proceeded to a jury trial before the Honorable Edgar W. Dickson, Circuit Court Judge. Petitioner was found guilty as indicted. On

May 12, 2011, Judge Dickson sentenced Petitioner to a thirty (30) year term of imprisonment for attempted murder to run consecutively to an additional thirty (30) year term of imprisonment for attempted murder. Additionally, Judge Dickson sentenced Petitioner to a five (5) year term of imprisonment for possession of a weapon during a violent crime running consecutively to the first count of attempted murder. Petitioner filed a motion to reconsider his sentence. On November 9, 2011, Judge Dickson resentenced Petitioner to serve the thirty (30) year terms of imprisonment for attempted murder concurrently, with the weapon sentence to run consecutively, for a total of thirty-five (35) years' imprisonment.[1]

Respondent's Statement of Facts

On October 15, 2010, Petitioner and his cohort, Kendrick Jacobs, began following victims Brandon Parker and Roger Benjamin after they stopped at a store called Harry's in Barnwell County. (See R. 85-86). Petitioner was driving a blue Mercury Grand Marquis that belonged to his girlfriend's father, and the victims were in a burgundy Blazer that belonged to Parker's mother. (R. 87; 104; 116; 130). The victims noticed the blue Mercury behind them and tried to take an alternate route home to avoid it. (R. 86, ll. 3-8). However, Petitioner and Jacobs were able to follow the victims, and a "high-speed chase" ensued. (R. 86; 99, ll. 21-22). Petitioner and Jacobs began shooting at the victims as soon as the Blazer turned off into Benjamin's grandmother's driveway.[2] (R. 86, ll. 9-10). Benjamin and the other occupants jumped out of the Blazer, and Benjamin ran and hid behind the house and then turned around to

1 Petitioner had a prior criminal record for Burglary in the 2nd Degree from 2004 and Possession of Crack Cocaine in 2008. During sentencing, Petitioner also cursed the trial judge and threatened a witness.

2 Parker turned into the driveway so fast that he struck something and damaged the front end of the vehicle. (R. 105, ll. 17-22).

see who was shooting at them.[3] (R. 86, ll. 12-13). At that point Benjamin saw that the shooters were Petitioner and Kendrick Jacobs, who were both shooting automatic weapons that witnesses described as "machine guns." (R. 59, ll. 59-64; 86, ll. 15-17; 99-100; 135-37). Benjamin had known Petitioner since he was eleven (11) or twelve (12) years old, and Kendrick Jacobs was Benjamin's cousin. (R. 90). Benjamin observed that Jacobs was sitting in the passenger-side window, shooting across the roof of the car, while Petitioner was shooting out of the driver's side window. (R. 88). Petitioner and Jacobs went up the road past Benjamin's grandmother's house but then turned around, came back, and stopped in the driveway. (R. 88-89; 135-38; 143-44). At that point, although the occupants of the Blazer had already fled, Petitioner and Jacobs continued to shoot at the Blazer. (R. 135-37; 150).

Meanwhile, Alice Thompson, Benjamin's grandmother, observed part of the incident from her front porch. (See R. 134-47). She heard what sounded like firecrackers and came out onto the porch as Petitioner and Jacobs were coming by her house and heading up to the store to turn around and come back. (R. 147, ll. 21-23). She saw Petitioner driving a light blue car and Jacobs sitting in a window shooting in the direction of her yard. She saw them turn around and come back to her house with Petitioner shooting out the driver's window. She testified both men had what appeared to be machine guns they were shooting. The pulled into the end of her driveway. She immediately recognized Petitioner and Jacobs as the shooters and she cried out, asking what they were doing. Petitioner and Jacobs continued shooting at the Blazer and then left when Ms. Thompson told them she was calling the police. (R. 134-35; 144, ll. 13-15; 149, ll. 12-15). Ms. Thompson subsequently called 911 and told the dispatcher what has happening and

[3] Roger Benjamin testified that a man he knew only as "T" was a backseat passenger. (R. 91, ll. 8-15). "T" had asked Brandon Parker to give him ride to a "little club" down the road from the victims. (R. 97, ll. 4-12).

specifically mentioned Petitioner as one (1) of the shooters. (R. 138-43). Ms. Thompson had known Petitioner since he was a child and cared for Petitioner as a child when Petitioner's father was in prison. Ms. Thompson was relieved that none of the neighborhood children, including her granddaughter, had been playing outside the day of the shooting, because if they had been, "there'd a been a lot of dead peoples out there." (R. 138, ll. 20-25).

Officer Trottie arrived on the scene within a few minutes, and he encountered Brandon Parker, who kept repeating that "somebody tried to kill me." (R. 47-48). Investigator Chavis arrived shortly thereafter and collected the numerous shell casings, fourteen (14) located in the road and on the property. (R. 57-66). Investigator Chavis determined where several bullets hit the victim's Blazer and noted that one (1) bullet hit the driver's side headrest. (R. 62-66). Investigator Chavis also determined that automatic weapons were used by the shooters. (See R. 59-64). Investigator Chavis found no indication that a gun had been fired out of the victims' Blazer.[4] (R. 74).

Petitioner was not located on the day of the incident, but was apprehended later following further investigation and after the police received anonymous tips. (R. 119-20). After receiving one particular tip about Petitioner's location, police arrived at that location and were permitted entry to search for Petitioner. (R. 119-23). Police found Kendrick Jacobs in one of the rooms and found Petitioner hiding in the closet of another room. (R. 122-23). At some point police also located the blue Mercury Petitioner had been driving on the day of the incident, but the car had obviously been cleaned and vacuumed out so no forensic evidence was recoverable. (R. 126-27).

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[4] In fact, a gunshot residue test was performed on Brandon Parker and the results were negative. (R. 69; 77-81). Investigator Chavis explained that he was not able to perform a gunshot residue test on Roger Benjamin because the only test he had left was unusable because the necessary fluid had evaporated. (R. 72-73). However, Benjamin testified that he did not have a gun on the day of the incident. (R. 97, ll. 20-24).

Police were never able to locate the weapons used by Petitioner and Jacobs in the shooting. However, police were able to recover fired bullets and fired shell casings at the crime scene. There were both 9mm and .380 caliber shell casings recovered indicating two (2) guns were used in the crime consistent with Ms. Thompson's testimony. (R. 128, ll. 6-7). [5]

The Direct Appeal

Petitioner directly appealed his convictions and sentences to the South Carolina Court of Appeals. The Court of Appeals affirmed the convictions. State v. Dexter Brown, Unpublished Opinion No. 2014-UP-303 (Ct. App. filed July 30, 2014). The Court's Opinion read as follows:

> **PER CURIAM:** Dexter Benard Brown, II, appeals his convictions for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime, arguing the trial court erred in (1) denying his motion for a directed verdict and (2) charging the jury on "inferred malice" from the use of a deadly weapon. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:
>
> 1. As to whether the trial court erred in denying counsel's motion for a directed verdict: S.C. Code Ann. Section 16-1-60 (Supp. 2013)(showing attempted murder is listed as a "violent crime" per statute): S.C. Code Ann. Section 16-23-490(A)(2003("If a person is in possession of a firearm . . . during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in [s]ection 16-1-60, he must be imprisoned five years . . . "); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006)("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."); id. At 292 - 93, 625 S.E.2d at 648 ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, [an appellate court] must find the case was properly submitted to the jury."); State v. Dennis, 402 S.C. 627, 638, 742 S.E.2d 21, 27 (Ct. App. 2013)(noting the jury may infer an intent to kill from the use of a dangerous or deadly weapon in a manner reasonably calculated to cause death or great bodily harm.
>
> 2. As to whether the trial court erred in charging that malice may be inferred from the use of a deadly weapon: State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94

5 After Petitioner's conviction and sentencing, Petitioner's co-defendant pled guilty and received a sentence of fifteen (15) years.

(2003)("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court.] Issues not raised and ruled upon in the trial court will not be considered on appeal.").

AFFIRMED.[6]

HUFF, THOMAS, and MCDONALD, JJ., concur.

The Remittitur was issued on August 15, 2014.

The PCR Action

Petitioner then filed a post-conviction relief (PCR) action on October 2, 2014 (2014-CP-06-369). 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 before the Honorable William P. Keesley, Circuit Court Judge ("the PCR Court"). Petitioner 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. On June 1, 2018, the PCR Court issued its Order of Dismissal, filed June 4, 2018, denying and dismissing all of Petitioner's PCR claims with prejudice.

The Order of Dismissal[7]

[Beginning of pertinent portion of the Order of Dismissal]

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

6 We decide this case without oral argument pursuant to Rule 215, SCACR. [Court's footnote].
7 Respondent believes it has set forth the Order of Dismissal verbatim for the convenience of the Court; however, the actual signed Order of Dismissal is contained within the attached Appendix.

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.

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.

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.

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 during the course of his investigation that once Benjamin got out of the car, 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.

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.

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.

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 not to be 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.

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.

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.

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.

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).

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.

[End of pertinent portion of the Order of Dismissal]

Petitioner did not file a Rule 59, S.C.R.C.P. Motion to Alter or Amend to have the PCR Court address any other issues in its Order of Dismissal.

The Lack of Appeal from the Denial of PCR

Petitioner **did not** appeal from the denial of his post-conviction relief (PCR) application. This federal habeas petition was filed on June 6, 2019.

ATTACHMENTS[8]

Record on Appeal, the Honorable Edgar Dickson

State v. Dexter Brown, *supra* (Direct Appeal)

Remittitur (Direct Appeal)

Order of Dismissal (PCR Action)

FEDERAL HABEAS GROUNDS

Ground one: Trial counsel was ineffective for failing to impeach and confront victim at trial with inconsistent statement made to law enforcement immediately following shooting.
Supporting facts: At trial the victim testified that he saw the person shooting at him and it was petitioner. Trial counsel failed to impeach the victim's testimony on cross-examination with a statement he gave to Officer John Trottie, whom was one of the first officers on the scene, which he stated to Office Trottie, which was preserved in Officer Trottie's incident report, that he did not see the shooters and could not identify the shooters.

Ground two: Trial counsel was constitutionally ineffective for failing to object to the courts charge to the jury on the element of malice.
Supporting facts: The trial court charged the jury that the malice element for purpose of proving attempted murder could be inferred from the use of a deadly weapon.

Ground three: Trial counsel was ineffective for failing to impeach the testimony of the victim, Roger Benjamin, with the testimony of Leslie Morrisey.
Supporting facts: The victim testify that his the statement he signed the day of the shooting, which failed to mention petitioner as the shooter, was in accurate because Leslie Morrisey, whom he had wrote the statement for him, failed to recorded his statement accurate. Ms. Morrisey was called as a witness however trial counsel failed to question her as to whether she recorded Benjamin Roger's statements accurately before he read and sign it.

APPLICABILITY OF THE AEDPA

This action was filed on June 6, 2019. As a result, the provisions of the AEDPA apply. Lindh v. Murphy, 521 U.S. 320 (1997). Under the AEDPA, claims adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was

8 Because Petitioner did not appeal from the denial of his PCR Application, there is no Appendix [or PCR transcript] to attach or provide to this Court.

"contrary to, or involved an unreasonable application of "clearly established federal law as decided by the United States Supreme Court, or the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. Section 2254(d). State court factual findings are presumed to be correct and the Petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. Section 2254(e)(1).

EXHAUSTION

Petitioner has exhausted his state remedies. Petitioner was tried by a jury and convicted. Petitioner filed a direct appeal, which was denied. Petitioner filed a PCR action which was denied. Petitioner did not appeal the denial of his PCR action. The time for filing an appeal from the denial of his PCR application has expired. As a result, Petitioner has exhausted his state remedies; however, he did not properly exhaust his state remedies and as a result all of his federal habeas grounds are procedurally barred on federal habeas review. (See Procedural Bar Section below).

STATUTE OF LIMITATIONS

Petitioner's convictions and sentences were final on **July 30, 2014** when the Court of Appeals affirmed his convictions and sentences. The AEDPA one (1) year statute of limitations began to run fifteen (15) days later [giving Petitioner fifteen (15) days to file a petition for rehearing, which he did not do] on **August 15, 2014**. Petitioner filed his PCR action on **October 2, 2014**. As a result, **forty-eight (48) days expired** on the AEDPA one (1) year time clock before the PCR action was filed. Petitioner had **three hundred and seventeen (317) days remaining** within which to timely file his federal habeas petition. The PCR action tolled the AEDPA statute of limitations. The PCR Court issued its Order of Dismissal on June 1, 2018

and it was filed on June 4, 2018. The AEDPA one (1) year statute of limitations began to run again thirty (30) days from the date of the filing of the Order of Dismissal, on **July 5, 2018** since Petitioner did not appeal the Order of Dismissal. **The AEDPA one (1) year statute of limitations expired three hundred and seventeen (317) days later.** This federal habeas petition was not filed until *June 6, 2019*, approximately **three hundred and thirty-six (336) days from July 5, 2018.** As a result, **Petitioner is violation of the AEDPA one (1) year statute of limitations.**[9] Respondent pleads the AEDPA one (1) year statute of limitations as a complete bar and defense to this petition and all grounds asserted therein.

PROCEDURAL BAR AND DEFAULT

Petitioner raises three (3) grounds of ineffective assistance of counsel (IAC). All three (3) grounds are procedurally barred on federal habeas review because they were not appealed from the denial of PCR to the South Carolina appellate courts. Coleman v. Thompson, 501 U.S. 722 (1991)(issue not properly raised to the state's highest court, and procedurally impossible to raise there now, is procedurally barred from review in federal habeas); Murray v. Carrier, 477 U.S. 478, 488 (1986)(failure to appeal issue to state's highest court results in procedural bar on federal habeas review); Smith v. Murray, 477 U.S. 527 (1986)(failure to assign error on appeal resulted in procedural bar); Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997) (issue procedurally defaulted in state court is barred on habeas review). As a result, these grounds must be denied and dismissed.

Ground two is also procedurally barred because it was not addressed in the PCR Court's Order of Dismissal and Petitioner did not file a Rule, 59 Motion to Alter or Amend to have the

9 According to Respondent's calculations, **three hundred and eight-four (384) days expired** on the AEDPA one-year time clock **before Petitioner filed his federal habeas petition**. Petitioner is **in violation** of the AEDPA statute of limitations **by nineteen (19) days**.

PCR Court address this ground in its Order of Dismissal. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007)(failure to file Rule 59 Motion to have unaddressed issue addressed in the Order of Dismissal, results in issue not being preserved for review on appeal from PCR); Bostick v. Stevenson, 589 F.3d 160 (4th Cir. 2009)(same); Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (failure to preserve issue under state law results in procedural bar on federal habeas review); Mathews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997) (issue procedurally defaulted in state court is barred on habeas review). As a result, this ground must be denied and dismissed with prejudice.

Ground three is also procedurally barred for the same reason. This specific issue of IAC was not addressed in the PCR Court's Order of Dismissal, and Petitioner did not file a Rule 59, S.C.R.C.P. Motion to Alter or Amend to have this issue addressed by the PCR Court. As a result, this ground is procedurally barred on federal habeas for this reason as well. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (failure to file Rule 59 Motion to have unaddressed issue addressed in the Order of Dismissal, results in issue not being preserved for review on appeal from PCR); Bostick v. Stevenson, 589 F.3d 160 ; Wainwright v. Sykes, 433 U.S. at 87 (failure to preserve issue under state law results in procedural bar on federal habeas review); Mathews v. Evatt, 105 F.3d at 911 (issue procedurally defaulted in state court is barred on habeas review). This ground must be denied and dismissed with prejudice.

Cause and Prejudice

Petitioner cannot overcome the procedural bar of Ground one pursuant to Martinez v. Ryan, because this issue was raised by PCR counsel at the PCR hearing and decided by the PCR Court in its Order of Dismissal. (See Order of Dismissal, Appendix). This ground was simply not raised **on appeal** from PCR. Martinez does not apply in such a situation. *See* Arnold v. Dormire, 675 F.3d 1082, 2086-87 (8th Circuit 2012)(failure of collateral appellate counsel to

preserve claims on appeal from post-conviction relief does not constitute "cause" to excuse a procedural default), *quoting* Martinez, 132 S.Ct. at 1320); Johnson v. Warden of Broad River Corr., 2013 WL 856731 at *1 (4th Cir. Mar. 8, 2013)(PCR appellate counsel error cannot constitute cause under Martinez exception); Cross v. Stevenson, 2013 WL 1207067 at *3 (D.S.C. March 25, 2013)("Martinez, however, does not hold that the ineffective assistance of counsel in a PCR appeal establishes cause for a procedural default. In fact, the Supreme Court expressly noted that its holding 'does not concern attorney error in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts.'" *Quoting* Martinez, 132 S.Ct. at 1320); Green v. Cartledge, C/A No: 4:15-cv-0774-JMC-TER, 2016 WL 1055585, Report and Recommendation (D.S.C. 2016)(same).

Petitioner cannot overcome the procedural bar of Grounds two or three because they are not substantially meritorious. (See discussion of Grounds two and three in the merits section of this Return as if fully incorporated herein). Martinez. As a result, all of the above grounds remain procedurally barred.

Miscarriage of Justice/Actual Innocence

In the alternative, Petitioner must show a miscarriage of justice. In order to demonstrate a miscarriage of justice Petitioner must show he is actually innocent. Actual innocence is defined as factual innocence not legal innocence. Bousley v. United States, 523 U.S. 614, 622, (1998). Petitioner cannot establish that the constitutional error he complains of probably resulted in the conviction of an innocent person. Schlup v. Delo, 513 U.S. 298, 327 (1995). In order to pass through the actual innocence gateway, a petitioner's case must be "truly extraordinary." Id. A defendant convicted by a jury comes before the federal court with a "strong–and in the vast

majority of cases conclusive- - presumption of guilt." Id. at 326 n.42. The record would make an assertion of actual innocence not credible. (See Procedural History, Respondent's Statement of Facts, & Trial Transcript). Petitioner was identified by eyewitnesses as the person who shot at the victims and shot up one (1) victim's car. Fourteen (14) fired shell casings were found at the crime scene. Several fired projectiles were recovered including one (1) in the driver's headrest of the victim's car. The car used by Petitioner and his co-defendant used to commit the attempted murders belonged to Petitioner's girlfriend's father. Petitioner was arrested hiding from police in a closet at a friend's residence. Petitioner offered no evidence at trial. Petitioner cannot establish actual innocence. Grounds one through three remain procedurally barred and must be denied and dismissed with prejudice. Bousley v. United States, 523 U.S. 614, 622; Schlup v. Delo, 513 U.S. 298, 327.

THE MERITS

Standard of Review

The standard of review to be applied in habeas is "quite deferential to the rulings of state courts" and as described by the United States Supreme Court in Harrington v. Richter, 131 S.Ct. 770 (2011) "is difficult to meet[.]" Burch v. Corcoran, 273 F.3d 577, 583 (4th Cir. 2001); Richter, 131 S.Ct. at 786.

To prevail on an ineffective assistance of counsel ("IAC") claim, Petitioner must show (1) that his counsel's performance fell below an objective standard or reasonableness, and (2) that a reasonable probability exists that but for counsel's error, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1985). Petitioner bears the burden of proving an error and prejudice in his ineffective assistance of counsel claim. Id.

Petitioner also bears the burden of showing he is entitled to habeas corpus relief. Smith

v. North Carolina, 528 F.2d 807, 809 (4th Cir. 1975). To obtain relief, Petitioner must show the state court unreasonably applied federal law, as determined by the U.S. Supreme Court, or show by clear and convincing evidence the relevant state court made "an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." 28 U.S.C. Section 2254(d); Carey v. Musladin, 127 S.Ct. 649, 653-54 (2007). As explained in Richter, a state court's determination is reasonable under Section 2245(d) so long as "fair minded jurists could disagree on the correctness of the state court's decision." Richter, 131 S.Ct. at 786 (internal quotations omitted). In other words, a state court determination that a claim lacks merit is unreasonable only where fair-minded jurists would agree the state court decision was incorrect. Id. Here, Petitioner has shown neither. The state court did not unreasonably apply clearly established federal law, as decided by the U.S. Supreme Court, nor has Petitioner shown by clear and convincing evidence that the state court's factual determinations were unreasonable in light of the facts and evidence before it.

Pursuant to Section 2254(d)(1), a state court ruling is "contrary to clearly established federal law, as determined by the Supreme Court of the United States" where the ruling "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law[.]" Williams v. Taylor, 529 U.S. 362, 413 (2000). Likewise, a state court ruling is "contrary to clearly established federal law, as determined by the Supreme Court of the United States" where "the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Id. "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the U.S. Supreme Court]." Knowles, v. Mirzayance, 556 U.S. 111, 122 (2009)(quotation marks omitted). This is because the phrase "clearly established Federal law"

refers "to the holdings, as opposed to dicta, of [the U.S. Supreme Court's] decisions as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000). Similarly, when the Supreme Court has not yet "confront[ed] 'the specific question presented by [a particular] case,' the state court's decision [cannot] be 'contrary to' any holding" of the Supreme Court. Lopez v. Smith, 135 S.Ct. 1, 4 (2014)(*per curiam*); Morva v. Zook, 821 F.3d 517, 524 (4th Cir. 2016).

This Court may not "consult [its] own precedents, rather than those of [the U.S. Supreme Court] in assessing a habeas claim governed by Section 2254." White v. Woodall, 572 U.S. ___, 134 S.Ct. 1697, 1702, n. 2 (2014)(quotation marks and alteration omitted). Therefore, circuit court precedent may not be used "to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme Court] has not announced." Marshall v. Rodgers, 133 S.Ct. 1446, 1450, *reh'g denied* 133 S.Ct. 2408 (2013). Also a circuit court "may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to [the Supreme Court], be accepted as correct." Id. at 1451.

To establish an unreasonable application of federal law, Petitioner must show more than "..an incorrect or erroneous application of federal law." Williams v. Taylor, 529 U.S. at 413. Thus, "a federal court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be 'unreasonable' for habeas relief to be granted." Id. at 410. "This is a substantially higher threshold." Id. at 410.

Further detailing the limited scope of federal habeas review, the Richter court explained that Section 2254(d) "reflects the view that habeas corpus is 'a guard against extreme

malfunctions in the state criminal justice system,' not a substitute for ordinary error correction through appeal." Id. (*quoting* Jackson v. Virginia, 443 U.S. 307, 332, n. 5 (1979)(Stevens J. concurring)). Thus, for relief under Section 2254(d)(1), Richter concludes " a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." Id. Accordingly, pursuant to Section 2254(d)(1), state court rulings "must be granted deference and latitude that are not in operation" on direct review of the same claim and "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Id., 131 S.Ct. at 785-86.

Like its counterpart, Section 2254(d)(2)'s requirement that a petitioner prove the state court made "an unreasonable determination of the facts in light of the evidence presented in state court proceedings" is difficult to meet. *See* Richter, 131 S.Ct. at 786 ("If [Section] 2254(d)'s standard is difficult to meet, that is because it was meant to be."). This is evidenced in Section 2254(e)(1)'s "presumption of correctness" given to state court factual determinations as well as its requirement that the petitioner can only rebut such a presumption by, "clear and convincing evidence." *See* 28 U.S.C. Section 2254(e)(1)(stating determination of factual issue made by a state court is presumed to be correct and the petitioner must rebut the presumption by clear and convincing evidence). Accordingly, a habeas petitioner is entitled to relief under Section 2254(d)(2) only if he can prove, by clear and convincing evidence, that the state court unreasonably determined the facts in light of the evidence presented in state court.

When evaluating whether a state court's application of a legal rule of the U.S. Supreme Court was unreasonable, and thus warrants federal habeas relief, a court must consider the rule's specificity; the more general the rule, the more leeway state courts have in reaching outcomes in

case by case determinations. Richter, 131 S.Ct. at 788. As explained in Richter, the Strickland standard for ineffective assistance of counsel, "is a general one, so the range of reasonable applications is substantial. Id., 131 S.Ct. at 788. Thus, when reviewing ineffective assistance of counsel claims under Section 2254(d), review is "doubly" deferential. *See* Id. ("The standards created by Strickland and Section 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so.")(emphasis in original)(internal citations omitted)(internal quotations omitted). Moreover, "federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under Section 2254(d)." Id. Accordingly, where Section 2254(d) applies, "the question is not whether counsel's actions were reasonable[,]" but rather, "whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id. As to this issue, Respondent submits the state court correctly denied Petitioner relief and did not unreasonably apply U.S. Supreme Court precedent.

When "assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel had acted differently." Richter, 131 S.Ct. at 791-92 (*citing* Wong v. Belmontes, 130 S.Ct. 383, 390 (2009)(*per curiam*)(slip op., at 13); Strickland, 466 U.S. at 693. Rather Strickland asks whether it is "reasonably likely the result would have been different." Id. (*quoting* Strickland, 466 U.S. at 696 (internal quotations omitted). Indeed Strickland dictates do "not require a showing that counsel's actions more likely than not altered the outcome," but instead asks whether "the likelihood of a different result" is substantial, as opposed to conceivable. Id. (*quoting* Strickland, 466 at 693, 697 (internal quotations omitted)).

Under 28 U.S.C. Section 2254, '"federal habeas courts [have] no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by

them.'" Cagle v. Branker, 520 F.3d 320, 324 (4th Cir. 2008) *quoting* Marshall v. Lonberger, 459 U.S. 422, 434 (1983)(alteration in original). "Credibility determinations such as those the state . . . court made regarding [a witness], are factual determinations. As such, they 'are presumed to be correct absent clear and convincing evidence to the contrary, and a decision adjudicated on the merits and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding.'" Wilson v. Ozmint, 352 F.3d 847, 858 (4th Cir. 2003) *quoting* Miller-El, 537 U.S. at 340). "For a federal habeas court to overturn a state court's credibility judgments, the state court's error must be stark and clear." Cagle, 520 F.3d at 3243.

The standard of Section 2254(d) is "difficult to meet ... because it was meant to be." Burt v. Titlow, 134 S.Ct. 10, 16 (2013)(quotation marks omitted). "State courts are adequate forums for the vindication of federal rights ..., AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." Id., at 15-16. This "highly deferential standard" demands that "[t]he petitioner carries the burden of proof," Cullen v. Piinholster, 131 S.Ct. 1388, 1398 (2011)(quotation marks omitted), and "that state-court decisions be given the benefit of the doubt," Woodford v. Visciotti, 537 U.S. 19, 24 (2002). Under these standards of review, there is no merit to any of Petitioner's grounds.

The Lack of Merit of Petitioner's Grounds

Ground one: Trial counsel was ineffective for failing to impeach and confront victim at trial with inconsistent statement made to law enforcement immediately following shooting.
Supporting facts: At trial the victim testified that he saw the person shooting at him and it was petitioner. Trial counsel failed to impeach the victim's testimony on cross-examination with a statement he gave to Officer John Trottie, whom was one of the first officers on the scene, which he stated to Office Trottie, which was preserved in Officer Trottie's incident report, that he did not see the shooters and could not identify the shooters.

This ground was waived and abandoned when Petitioner did not appeal the denial of PCR by the PCR Court. As a result, this ground must be dismissed pursuant to the defenses of waiver and abandonment.

Further, there is no factual or legal merit to this claim. The PCR Court addressed this claim of ineffective assistance of counsel (IAC) and found it to be without merit. That determination is entitled to double deference by this Court. Harrington v. Richter. That determination is fully supported by the record. The PCR Court also found trial counsel's testimony was credible and Petitioner's testimony and claims and assertions were not credible. That determination is also entitled to deference by this Court. Cagle v. Branker. That determination is fully supported by the record.

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, 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 saw Petitioner shooting at them. 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. 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.

Counsel testified that he discussed all his strategic decisions with Public Defender De Grant Gibbons, who sat second chair on this trial with him. Counsel testified that he believed the most important evidence against Petitioner 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. 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 Petitioner was very weak.

Counsel testified one (1) of his trial strategies was to bifurcate the trial from the other co-defendant to separate Petitioner from the event. He stated he could not prove the shooting did not happen, but there was no physical evidence tying Petitioner to the crime, so his strategy was to convince the jury that Petitioner was not there and did not take part in it. He stated the State's evidence included fourteen (14) shell casings on the road that came from two (2) different guns, as well as bullets found in the headrest of the victim's vehicle, which was one (1) of the factors forming the basis of the attempted murder charge.

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 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. 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 Petitioner, so she had no motive to make up a name to blame the shooting on.

In its Order of Dismissal, the PCR Court correctly noted that in a PCR action, the applicant has the burden of proving the allegations in the application. *Citing* Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). And, 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." *Quoting* Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The PCR Court correctly noted the proper measure of performance was whether the attorney provided representation within the range of competence required in criminal cases. And, courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Citing* Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). And, the applicant must overcome this presumption to receive relief. *Citing* Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The PCR Court correctly pointed out that courts use a two-pronged test in evaluating allegations of IAC. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Quoting* 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." *Again quoting* Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The PCR Court noted it had the opportunity to review the record in its entirety and had heard the testimony at the PCR hearing. The Court had 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, the Court found Petitioner's testimony and assertions to be not credible. In contrast, the Court found counsel's testimony to be credible and persuasive. These credibility findings were applied to the Court's findings and conclusions set forth below.

The Court noted that Petitioner asserted several allegations of IAC. It found 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, the Court found Petitioner failed to meet his burden of proof. Accordingly, post-conviction relief was denied. Each individual allegation was addressed including the one asserted here.

Failure to impeach Roger Benjamin with prior statement

The PCR Court noted Petitioner alleged IAC for failing to impeach victim Roger Benjamin with his prior written statement given to Officer Trottie on the day of the shooting. The PCR Court reasonably and correctly found this allegation was meritless. The Court found Petitioner had failed to prove counsel failed to explore inconsistencies between the written statement given to law enforcement and the witness' trial testimony. The Court reasonably and correctly found counsel thoroughly cross-examined Benjamin at trial on the inconsistencies of his trial testimony and his prior statement and the fact that he did not tell the officer that he saw Petitioner shooting at him. This is fully supported by the trial record. (R. 90-98).

The PCR Court reasonably and correctly found the transcript clearly showed counsel impeached Benjamin with the content of the statement in the exact manner Petitioner now alleges he should have. (R. 90-98). Counsel impeached and cross-examined the witness about inconsistencies in the prior statement for approximately eight (8) pages of trial transcript, including the fact the witness did not identify Petitioner in that written statement. (R. 90-98). The Court reasonably and correctly found counsel's impeachment of the witnesses was proper

and reasonable under the circumstances, and therefore not deficient. The Court further found counsel offered a valid strategic 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 counsel could not be deficient for failing to do so. Strickland v. Washington, 466 U.S. at 689 (reasonable trial strategy is not a basis for ineffective assistance of counsel); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998)(tactical decision cannot be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991)(tactical decision sustainable unless it is both incompetent and prejudicial.); Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995)(standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).[10] The PCR Court pointed out that where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Citing* 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). The record shows counsel did make the last closing argument to the jury and pointed out deficiencies in the State's case. As second chair counsel De Grant Gibbons credibly testified at the PCR hearing, what Petitioner had stated in his original written statement the day of the crime was thoroughly covered before the jury on the record by first chair trial counsel during cross-examination and counsel made an objectively reasonable strategic decision under the circumstances not to introduce the written statement and lose last closing argument where nothing additional would be gained. (See R. 90-98). As a result,

10 At the time of Petitioner's trial, under South Carolina precedent, if the defendant introduced any evidence at all during the trial, he lost the right to last closing argument.

Petitioner had failed to prove counsel was deficient in this manner, or that any deficiency changed the outcome of the trial. Strickland v. Washington. Accordingly, this allegation was appropriately denied and dismissed with prejudice. Id.

Further, the record shows witness Benjamin can be heard in the background on the 911 call shortly after the crime stating it was Dexter Brown who was shooting at him trying to kill him. Another Detective also testified Petitioner informed him it was Dexter Brown who was shooting at him. As a result, the impeachment value of the written statement, if it had been introduced, is lessened. Strickland (defendant must prove prejudice by a preponderance of the evidence, i.e. the result of the trial would have been different if counsel had acted the way defendant alleges he should have).

Finally, as both counsel credibly testified at the PCR hearing, it was Ms. Thompson's testimony that was the most damaging to Petitioner. She actually witnessed Petitioner and Jacobs shooting at the victim's car as they drove by her house, when they turned around, and when they pulled in her driveway. Ms. Thompson had known Petitioner since he was approximately twelve (12) years old and helped care for Petitioner when his father was incarcerated. The car used in the shooting, as described by witnesses, belonged to Petitioner's girlfriend's father. Petitioner was arrested hiding from police in a closet. As a result, given all of the evidence in this case that Petitioner was one (1) of the shooters, Petitioner cannot establish prejudice under this ground. Strickland v. Washington. Therefore, this ground has no merit and must be denied and dismissed with prejudice.

Petitioner has failed to show the PCR Court unreasonably applied United States Supreme Court precedent in deciding this issue. Petitioner has failed to show by clear and convincing evidence that the PCR Court reached an unreasonable determination of the facts given the

evidence and record before the PCR Court. As a result, Petitioner has failed to overcome the double deference accorded the state PCR Court's determination of this issue of ineffective assistance of counsel. Richter, *supra*. Therefore, this ground has no merit and must be denied and dismissed with prejudice.

Ground two: Trial counsel was constitutionally ineffective for failing to object to the court's charge to the jury on the element of malice.
Supporting facts: The trial court charged the jury that the malice element for purpose of proving attempted murder could be inferred from the use of a deadly weapon.

This ground was waived and abandoned in state court. Petitioner did not file a Rule 59 Motion to have this issue addressed by the PCR Court in its Order of Dismissal. Petitioner did not file an appeal from the denial of PCR. As a result, this ground should be dismissed pursuant to the defenses of waiver and abandonment.

Further, there is no factual or legal merit to this claim. The trial judge's implied malice charge was proper under Belcher because there were no circumstances that would have reduced, mitigated, excused, or justified Petitioner's actions, and even assuming error with respect to the jury charge, it was harmless where the evidence of malice was overwhelming.

Petitioner argues the trial judge erred in charging the jury that malice could be inferred from the use of a deadly weapon and counsel should have objected to this charge. (See R. 195, ll. 15-16). At trial, Petitioner raised no objection to this charge. (See R. 151-64; 185-200; specifically 200, ll. 7-8). *See* State v. Stone, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985) (in order to preserve an objection to a jury charge, a defendant must object to the charge as given or request an additional charge when afforded the opportunity to do so); State v. Williams, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976) ("The rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded,

constitutes a waiver of any right to complain on appeal of an alleged error in the charge."); State v. Todd, 264 S.C. 136, 139, 213 S.E.2d 99, 100 (1975) ("In cases too numerous to cite, . . . it has been held that the failure of a defendant to object to the charge as made or to request additional instructions, when the opportunity to do so is afforded, constitutes a waiver of any right to complain of errors in the charge.")(citations omitted); *see also* Rule 20(b), SCRCrimP ("Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires. Any objection shall state distinctly the matter objected to and the grounds for objection. Failure to object in accordance with this rule shall constitute a waiver of objection."). Because Petitioner failed to object, the issue was not preserved for appellate review.

However, even if the issue had been preserved, the judge's implied malice charge was proper and counsel was neither deficient nor was Petitioner prejudiced because of the failure to object. Strickland v. Washinton. In State v. Belcher, the South Carolina Supreme Court held as follows:

> Today we return to the rationale underlying Hopkins, Levelle and Jackson and hold that where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon. The permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder (or assault and battery with intent to kill).

State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009). The State agrees with Petitioner's contention that the rationale of Belcher should apply in attempted murder cases, especially since the Belcher court specifically made reference to assault and battery with intent to kill, the predecessor of attempted murder. *See* S.C. Code § 16-3-29 (creating the offense of

attempted murder effective June 2, 2010).

However, initially, it appears that Petitioner's Belcher argument - which is premised upon his assertion that there was a dearth of evidence that he "pointed a gun and fired it at any person" - is misplaced because this argument focuses on the *actus reus* element of the offense rather than the *mens rea* element. In other words, Petitioner asserts he did not commit the act required by the attempted murder statute, but his argument does not actually dispute the *mens rea* element. In that vein, it is incorrect to say that a failure of the State to prove the *actus reus* would "excuse" a charge of attempted murder; instead, this would render Petitioner not guilty of the offense. *See* Belcher, 385 S.C. 597, 685 S.E.2d 802 (evidence of justification and/or reduction of the offense because it appeared the defendant may have been acting in self-defense or in the heat of passion); State v. Miller, 397 S.C. 630, 725 S.E.2d 724 (Ct. App. 2012)(evidence of mitigation existed because it appeared the gun may have discharged accidentally or that the shooting may have constituted involuntary manslaughter); State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013)(there was evidence that the offense might be excused under the insanity defense); cf. State v. Price, 400 S.C. 110, 114-15, 732 S.E.2d 652, 654 (Ct. App. 2012)(testimony indicating that the victim and his brother were drug-dealing gang members and that victim's shooting may have been part of a drug deal gone wrong was not evidence that would "reduce, mitigate, excuse, or justify the crime"). The common theme of Belcher and its progeny is that, if there is evidence that would negate the "malice" element despite the fact that a deadly weapon is used, the charge regarding inferring malice from use of a deadly weapon is inappropriate. Since Petitioner does not point to any evidence that would negate the malice element - other than his assertion that he *did not commit the crime at all* - his Belcher argument is misplaced. Petitioner's argument is not what Belcher held.

In any event, the State disagrees with Petitioner's contention that the judge's implied malice charge impermissibly shifted the burden of proof on the element of malice and therefore violated his rights under the Due Process Clause,[11] and also disagrees with Petitioner's contention that there was evidence indicating he did not aim a gun at any person. (See BOA, p. 12). To the contrary, as discussed above, the evidence reflected that Petitioner and Jacobs began repeatedly shooting at the victims while they were inside the vehicle, well before the victims fled from the vehicle on foot. (See R. 48, ll. 19-20; 59, ll. 21-22; 86; 95; 99-100; 137, ll. 19-20). There was no evidence that would "reduce, mitigate, excuse, or justify" Petitioner's conduct. Significantly, no lesser-included offense charges were requested by Petitioner or charged to the jury. (See R. 151-222). Furthermore, Petitioner did not argue self-defense, accident, insanity, or that the offense constituted a lesser offense; instead he argued there was no physical or forensic evidence linking him to the crime. (See R. 178-85; see also 220, ln 25 – 221, ln. 6). Accordingly, Petitioner's argument that the implied malice charge was improper under Belcher is without merit. *See* Belcher at 612, 685 S.E.2d at 810 ("The permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder (or assault and battery with intent to kill)."); *see also* State v. Price, 400 S.C. at 115, 732 S.E.2d at 654 ("Belcher does not prohibit the trial court from instructing the jury that it may infer malice from the use of a deadly weapon where the only jury question created by the evidence is whether the defendant is the person who committed [the crime]").

Furthermore, notwithstanding any alleged error in the jury instructions, the evidence of

[11] The trial judge did not charge a "mandatory presumption" (see Brief of Appellant, p. 12); instead, the judge told the jury that "inferred malice may also arise when the deed is done with a deadly weapon." (R. 195, ll. 15-16).

malice was so overwhelming that any error with respect to the implied malice charge was harmless. Again, the evidence reflected that Petitioner and Jacobs followed the victims home and, after a high-speed chase, *repeatedly* fired automatic weapons described as a "machine guns" into the victims' vehicle while they were inside of it. (See R. 48, ll. 19-20; 59, ll. 21-22; 86; 95; 99-100; 137, ll. 19-20). Then, even *after* the victims fled from the vehicle, Petitioner and Jacobs turned back around and continued to shoot the victim's vehicle until Ms. Thompson told them she was calling the police. (R. 134-35; 144, ll. 13-15; 149, ll. 12-15). The only conclusion to be drawn from these facts was that Petitioner acted with malice. *See* State v. Kinard, 373 S.C. 500, 503-504, 646 S.E.2d 168, 169 (Ct. App. 2007) ("'Malice aforethought' is defined as 'the requisite mental state for common-law murder' and it utilizes four possible mental states to encompass both specific and general intent to commit the crime. These four possibilities are intent to kill, intent to inflict grievous bodily harm, extremely reckless indifference to the value of human life (abandoned and malignant heart), and intent to commit a felony (felony murder rule).")(citations omitted); State v. Stanko, 402 S.C. 252, 264-65, 741 S.E.2d 708, 714 (2013) (error in giving the implied malice charge was harmless where evidence of malice was overwhelming and the evidence of malice was not limited to Appellant's use of a deadly weapon). Therefore, even if the trial judge erred by instructing the jury that an inference of malice may arise from use of a deadly weapon, this error was harmless beyond a reasonable doubt. *See* State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991) (appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result); State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008) (error is harmless beyond a reasonable doubt if it does not contribute to the verdict).

Ground three: Trial counsel was ineffective for failing to impeach the testimony of the victim, Roger Benjamin, with the testimony of Leslie Morrisey.
Supporting facts: The victim testify that his the statement he signed the day of the shooting, which failed to mention petitioner as the shooter, was in accurate because Leslie Morrisey, whom he had wrote the statement for him, failed to recorded his statement accurate. Ms. Morrisey was called as a witness however trial counsel failed to question her as to whether she recorded Benjamin Roger's statements accurately before he read and sign it.

This ground has no merit. This ground was waived and abandoned by Petitioner when he did not file a Rule 59 Motion to have this issue addressed by the PCR Court and Petitioner did not raise this issue on appeal from the denial of PCR. As a result, this ground must be dismissed pursuant to the defenses of waiver and abandonment.

Regardless, there is no factual or legal merit to this ground. Petitioner alleges counsel should have impeached Roger Benjamin's testimony with the testimony of Leslie Morrisey; however, Petitioner failed to call Leslie Morrisey at the PCR hearing and elicit what her testimony would have been had she been cross-examined as Petitioner alleges counsel should have cross-examined her. It is entirely speculative what Ms. Morrisey would have testified to. As a result, Petitioner has failed to prove deficient performance *or* resulting prejudice. Moss v. Hofbauer, 286 F.3d 851, 864-65 (6th Cir. 2002)(speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3rd Cir. 1991(applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented); *See* Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990)(petitioner's allegation attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony); Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001)(similar);

Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995)(In order to support an IAC claim for failing to interview or call potential 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. Applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy applicant's burden of showing prejudice); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997)(holding record did not support PCR judge's conclusion that counsel's deficient performance was prejudicial to the defendant, where the defendant did not show how additional preparation would have resulted in a different outcome); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (finding defendant was not entitled to post-conviction relief where there was no evidence presented at the PCR hearing to show how additional preparation would have had any possible effect on the result of the trial); Porter v. State, 368 S.C. 378, 629 S.E.2d 353 (2006)(counsel was not ineffective for failing to interview a witness, where defendant presented no evidence showing that an interview of the witness would have yielded a result different from that which counsel believed at the time of the plea); Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998)(state's failure to object to hearsay testimony as to what another witness's testimony might have been does not relieve applicant of burden of producing admissible testimony in accordance with the rules of evidence); Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)(same or similar); Foye v. State, 335 S.C. 586, 518 S.E.2d 265(1999)(same); Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008)(same); Putnam v. State, 417 S.C. 252, 789 S.E.2d 594 (Ct.App. 2016)(where PCR attorney did not call witnesses or expert witness during PCR hearing, any testimony that witnesses may have testified to at the defendant's trial was mere speculation; a PCR applicant cannot show that he was prejudiced by counsel's failure

to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence; mere speculation what the witness' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice; trial attorney was ineffective for failing to secure the attendance of witnesses at trial, given he had an opportunity to subpoena witnesses while they were in-State, and then failed to use provisions of Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings when witnesses moved out of State; although counsel's performance was deficient, defendant failed to demonstrate how counsel's performance prejudiced her trial, where no witnesses testified at PCR hearing, such that any testimony that witnesses may have testified to at the defendant's trial was mere speculation).

Additionally, a reviewing court must consider the potential risk that cross-examination would have led to damaging testimony being repeated. Moss v. Hofbauer, 286 F.2d 851, 865 (6th Cir. 2002). The record shows the witness Benjamin can be heard in the background of the 911 call just moments after the crimes stating that it was Petitioner who was shooting at him. If counsel had cross-examined the witness as Petitioner argues he should have, counsel may have received a devastating response damaging to Petitioner's defense. Id.

Further, the record shows witness Benjamin can be heard in the background on the 911 call shortly after the crime stating it was Dexter Brown who was shooting at him trying to kill him. Another Detective also testified Petitioner informed him it was Dexter Brown who was shooting at him. As a result, the impeachment value of Morrisey's testimony, if it had been proffered, is lessened.

Finally, as both counsel credibly testified at the PCR hearing, it was Ms. Thompson's testimony that was the most damaging to Petitioner. She actually witnessed Petitioner and

Jacobs shooting at the victim's car as they drove by her house, when they turned around, and when they pulled in her driveway. Ms. Thompson had known Petitioner since he was approximately twelve (12) years old and helped care for Petitioner when his father was incarcerated. The car used in the shooting was owned by Petitioner's girlfriend's father. Petitioner was arrested hiding from police in a closet in a friend's apartment. As a result, Petitioner cannot establish prejudice under this ground. Strickland v. Washington. Therefore, this ground has no merit and must be denied and dismissed with prejudice.

CONCLUSION

Petitioner is in violation of the AEDPA one (1) year statute of limitations and has not shown he is entitled to equitable tolling. Petitioner's grounds are all procedurally barred and Petitioner cannot show cause and prejudice or actual innocence to overcome the procedural bar. Finally, there is no merit to any of Petitioner's grounds in this setting. Harrington v. Richter, *supra*. As a result, Respondent's Motion for Summary Judgment must be granted and this petition dismissed with prejudice.

Respectfully submitted,

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By: s/J. Anthony Mabry
ATTORNEYS FOR RESPONDENTS

July 31, 2019.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Dexter Brown, Petitioner, vs. Randall Williams, *Warden at Lieber Correctional Institution,* Respondent.	)	C/A No.: 2:19-cv-01613-RMG-MGB *Roseboro* Order to Petitioner

Respondent has filed a motion to dismiss (pursuant to Fed. R. Civ. P. 12) or a motion for summary judgment (pursuant to Fed. R. Civ. P. 56) asking the court to dismiss your case. Because you are not represented by counsel, this "*Roseboro* Order"[1] is issued to advise you of the dismissal/summary judgment procedures and the possible consequences if you fail to respond adequately to respondent's motion. Please carefully review this information, including the attached excerpts of the Federal Rules of Civil Procedure regarding motions to dismiss and motions for summary judgment.

You have 31 days from the date of this order to file any material in opposition to the motion that respondent filed. If you fail to respond adequately, the court may grant the respondent's motion, which may end your case.

Explanation of Motions to Dismiss

Motions to dismiss can be filed pursuant to Fed. R. Civ. P. 12. Many motions to dismiss are filed under Fed. R. Civ. P. 12(b)(6), in which the respondent usually argues that the law does not provide a right to relief for claims that a petitioner makes in his case. Because motions to dismiss usually concern questions of law and not questions of fact, the court presumes as true the plausible facts of the petition for the purpose of a motion to dismiss.

The court decides a motion to dismiss on the basis of the applicable law and pleadings, meaning the petition, respondent's answer (if any), the exhibits attached to the petition, documents that the petition incorporates by reference (provided they are both undisputed and pertinent to the pleaded claims), and materials of which the court may take judicial notice. In some cases, the parties present materials outside of the pleadings, such as affidavits or declarations in support of or in opposition to the motion to dismiss. If the court, in its discretion,

[1]The court enters this order in accordance with *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975) and *Webb v. Garrison*, No. 77-1855 (4th Cir. July 6, 1977) (requiring courts to provide explanation of dismissal/summary judgment procedures in federal habeas corpus cases).

considers materials outside of the pleadings, the motion to dismiss is converted to a motion for summary judgment under Fed. R. Civ. P. 56. *See* Fed. R. Civ. P. 12(d).

Explanation of Motions for Summary Judgment

Motions for summary judgment filed by respondents pursuant to Fed. R. Civ. P. 56, and returns in support of such motions, argue that the petitioner's claims are not supported by the specific facts of the case. Because motions for summary judgment concern both questions of law and questions of fact, if the court finds that there is not any genuine dispute as to any material fact on a claim, the court will determine which party is entitled to judgment under the law. The court decides a motion for summary judgment on the basis of the applicable law, the pleadings, affidavits, declarations, and any other properly-submitted evidence.

Your Response to the Respondent's Motion/Return

Your filing in opposition to the respondent's motion and/or return should be captioned either as "Response to Motion to Dismiss" or "Response to Summary Judgment and Return," as applicable, and should include the following: (1) an explanation of your version of the facts, if different from respondent's version of the facts; and (2) your legal argument regarding why the court should not grant the motion and end your case. Rule 56(c) requires that you support your version of all disputed facts with material such as depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials. Your failure to support facts in dispute with such material may result in the court granting the motion. Any affidavits or declarations you file in opposition to summary judgment must be based on personal knowledge, contain facts admissible in evidence, and be signed by a person who would be competent to testify on matters contained in the affidavit or declaration if called to testify about them at trial. The court will not consider affidavits, declarations, or exhibits that are unrelated to this case or affidavits or declarations that contain only conclusory statements or argument of facts or law. If you fail to dispute the respondent's version of the facts with proper support of your own version, the court may consider the respondent's facts as undisputed.

All affidavits, declarations, or other evidence you submit to the court must be made in good faith and the facts sworn to in the affidavit or affirmed in the declaration must be true. All affidavits and declarations submitted in this case are submitted under penalties of perjury or subornation of perjury. 18 U.S.C. §§ 1621 and 1622. If the court finds that a party has presented affidavits, declarations, or other evidence in bad faith or only to delay the action, the court may order sanctions, payment of fees, or hold that party in contempt of court.

IT IS SO ORDERED.

August 1, 2019
Charleston, South Carolina

MARY GORDON BAKER
UNITED STATES MAGISTRATE JUDGE

EXCERPTS OF FEDERAL RULES OF CIVIL PROCEDURE
Rule 12 and Rule 56 (effective December 1, 2010)

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions, Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading. [OMITTED]

...

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or
(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) **Joining Motions.**

(1) **Right to Join.** A motion under this rule may be joined with any other motion allowed by this rule.

(2) **Limitation on Further Motions.** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) **Waiving and Preserving Certain Defenses.**

(1) **When Some Are Waived.** A party waives any defense listed in Rule 12(b)(2)-(5) by:
(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or
(B) failing to either:
(i) make it by motion under this rule; or
(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) **When to Raise Others.** Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:
(A) in any pleading allowed or ordered under Rule 7(a);
(B) by a motion under Rule 12(c); or
(C) at trial.

(3) **Lack of Subject-Matter Jurisdiction.** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) **Hearing Before Trial.** If a party so moves, any defense listed in Rule 12(b)(1)-(7)--whether made in a pleading or by motion--and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Rule 56. Summary Judgment

(a) **Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) **Time to File a Motion.** Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) **Procedures.**

(1) **Supporting Factual Positions.** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) **Objection That a Fact Is Not Supported by Admissible Evidence.** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) **Materials Not Cited.** The court need consider only the cited materials, but it may consider other materials in the record.

(4) **Affidavits or Declarations.** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;
(2) allow time to obtain affidavits or declarations or to take discovery; or
(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;
(2) consider the fact undisputed for purposes of the motion;
(3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it; or
(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;
(2) grant the motion on grounds not raised by a party; or
(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact--including an item of damages or other relief--that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court--after notice and a reasonable time to respond--may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Dexter Brown, Petitioner, vs. Randall Williams, *Warden at Lieber Correctional Institution*, Respondent.	)	C/A No.: 2:19-cv-01613-RMG-MGB *Amended Roseboro* Order to Petitioner

Respondent has filed a motion to dismiss (pursuant to Fed. R. Civ. P. 12) or a motion for summary judgment (pursuant to Fed. R. Civ. P. 56) asking the court to dismiss your case. Because you are not represented by counsel, this "Amended *Roseboro* Order"[1] is issued to advise you of the dismissal/summary judgment procedures and the possible consequences if you fail to respond adequately to respondent's motion. Please carefully review this information, including the attached excerpts of the Federal Rules of Civil Procedure regarding motions to dismiss and motions for summary judgment.

As way of background, the Court previously entered a Roseboro Order for the pending dispositive motion on August 1, 2019, and mailed the Order to Petitioner's noticed address at Lieber Correctional Institution. Petitioner's response was due by September 3, 2019, and Petitioner has failed to respond. The Court has located Petitioner on the SCDC Inmate Locator website. According to the SCDC Locator, Petitioner has been incarcerated at Lee Correctional Institution since July 22, 2019. However, Petitioner has not filed a change of address notice. Respondent filed his Motion for Summary Judgment on July 31, 2019. (Dkt. Nos. 11; 12.) He included a certificate of service, certifying that he served Petitioner the Motion and accompanying memo and exhibits at Lee Correctional Institution. (Dkt. No. 12-1.) Accordingly, it appears Petitioner has received the pending motion. However, because Petitioner did not update his address, the Court mailed the Roseboro Order to his noticed address at Lieber Correctional Institution. **The Court therefore issues this amended Roseboro Order for the pending Motion for Summary Judgment.**

Petitioner has until September 30, 2019 to file any material in opposition to the motion that Respondent has filed. If Petitioner fails to respond adequately, the Court may grant the Respondent's motion, which may end your case. In addition, the Court reminds Petitioner that he is ordered to always keep the Clerk of Court advised in writing of his address changes, so as to ensure that orders or other matters that specify deadlines for Petitioner to meet will be received by him.

[1]The court enters this order in accordance with *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975) and *Webb v. Garrison*, No. 77-1855 (4th Cir. July 6, 1977) (requiring courts to provide explanation of dismissal/summary judgment procedures in federal habeas corpus cases).

Explanation of Motions to Dismiss

Motions to dismiss can be filed pursuant to Fed. R. Civ. P. 12. Many motions to dismiss are filed under Fed. R. Civ. P. 12(b)(6), in which the respondent usually argues that the law does not provide a right to relief for claims that a petitioner makes in his case. Because motions to dismiss usually concern questions of law and not questions of fact, the court presumes as true the plausible facts of the petition for the purpose of a motion to dismiss.

The court decides a motion to dismiss on the basis of the applicable law and pleadings, meaning the petition, respondent's answer (if any), the exhibits attached to the petition, documents that the petition incorporates by reference (provided they are both undisputed and pertinent to the pleaded claims), and materials of which the court may take judicial notice. In some cases, the parties present materials outside of the pleadings, such as affidavits or declarations in support of or in opposition to the motion to dismiss. If the court, in its discretion, considers materials outside of the pleadings, the motion to dismiss is converted to a motion for summary judgment under Fed. R. Civ. P. 56. *See* Fed. R. Civ. P. 12(d).

Explanation of Motions for Summary Judgment

Motions for summary judgment filed by respondents pursuant to Fed. R. Civ. P. 56, and returns in support of such motions, argue that the petitioner's claims are not supported by the specific facts of the case. Because motions for summary judgment concern both questions of law and questions of fact, if the court finds that there is not any genuine dispute as to any material fact on a claim, the court will determine which party is entitled to judgment under the law. The court decides a motion for summary judgment on the basis of the applicable law, the pleadings, affidavits, declarations, and any other properly-submitted evidence.

Your Response to the Respondent's Motion/Return

Your filing in opposition to the respondent's motion and/or return should be captioned either as "Response to Motion to Dismiss" or "Response to Summary Judgment and Return," as applicable, and should include the following: (1) an explanation of your version of the facts, if different from respondent's version of the facts; and (2) your legal argument regarding why the court should not grant the motion and end your case. Rule 56(c) requires that you support your version of all disputed facts with material such as depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials. Your failure to support facts in dispute with such material may result in the court granting the motion. Any affidavits or declarations you file in opposition to summary judgment must be based on personal knowledge, contain facts admissible in evidence, and be signed by a person who would be competent to testify on matters contained in the affidavit or declaration if called to testify about them at trial. The court will not consider affidavits, declarations, or exhibits that are unrelated

to this case or affidavits or declarations that contain only conclusory statements or argument of facts or law. If you fail to dispute the respondent's version of the facts with proper support of your own version, the court may consider the respondent's facts as undisputed.

All affidavits, declarations, or other evidence you submit to the court must be made in good faith and the facts sworn to in the affidavit or affirmed in the declaration must be true. All affidavits and declarations submitted in this case are submitted under penalties of perjury or subornation of perjury. 18 U.S.C. §§ 1621 and 1622. If the court finds that a party has presented affidavits, declarations, or other evidence in bad faith or only to delay the action, the court may order sanctions, payment of fees, or hold that party in contempt of court.

IT IS SO ORDERED.

September 11, 2019
Charleston, South Carolina

MARY GORDON BAKER
UNITED STATES MAGISTRATE JUDGE

EXCERPTS OF FEDERAL RULES OF CIVIL PROCEDURE
Rule 12 and Rule 56 (effective December 1, 2010)

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions, Waiving Defenses; Pretrial Hearing

(a) **Time to Serve a Responsive Pleading.** [OMITTED]

...

(b) **How to Present Defenses.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
(1) lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) **Motion for Judgment on the Pleadings.** After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.

(d) **Result of Presenting Matters Outside the Pleadings.** If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) **Motion for a More Definite Statement.** A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) **Motion to Strike.** The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:
(1) on its own; or
(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) **Joining Motions.**

(1) **Right to Join.** A motion under this rule may be joined with any other motion allowed by this rule.

(2) **Limitation on Further Motions.** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) **Waiving and Preserving Certain Defenses.**

(1) **When Some Are Waived.** A party waives any defense listed in Rule 12(b)(2)-(5) by:
(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or
(B) failing to either:
(i) make it by motion under this rule; or
(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) **When to Raise Others.** Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:
(A) in any pleading allowed or ordered under Rule 7(a);
(B) by a motion under Rule 12(c); or
(C) at trial.

(3) **Lack of Subject-Matter Jurisdiction.** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) **Hearing Before Trial.** If a party so moves, any defense listed in Rule 12(b)(1)-(7)--whether made in a pleading or by motion--and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Rule 56. Summary Judgment

(a) **Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) **Time to File a Motion.** Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) **Procedures.**

(1) **Supporting Factual Positions.** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
(B) showing that the materials cited do not establish the absence or presence of a

genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) **Objection That a Fact Is Not Supported by Admissible Evidence.** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) **Materials Not Cited.** The court need consider only the cited materials, but it may consider other materials in the record.

(4) **Affidavits or Declarations.** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) **When Facts Are Unavailable to the Nonmovant.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;
(2) allow time to obtain affidavits or declarations or to take discovery; or
(3) issue any other appropriate order.

(e) **Failing to Properly Support or Address a Fact.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;
(2) consider the fact undisputed for purposes of the motion;
(3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it; or
(4) issue any other appropriate order.

(f) **Judgment Independent of the Motion.** After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;
(2) grant the motion on grounds not raised by a party; or
(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) **Failing to Grant All the Requested Relief.** If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact--including an item of damages or other relief--that is not genuinely in dispute and treating the fact as established in the case.

(h) **Affidavit or Declaration Submitted in Bad Faith.** If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court--after notice and a reasonable time to respond--may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Dexter Brown, PETITIONER, vs. Randall Williams, Warden at Leiber Correctional Institution, RESPONDENT.	)	C/A No. 2:19-CV-01613-RMG-MGB **REPORT AND RECOMMENDATION**

Petitioner Dexter Brown, appearing *pro se*, has filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254. On July 31, 2019, Respondent filed a Motion for Summary Judgment. (Dkt. Nos. 11; 12.) On August 1, 2019, this Court issued an Order pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), advising Petitioner of the dismissal procedure and the possible consequences if he failed to adequately respond to the motion. (Dkt. No. 13.) Petitioner's response was due on September 3, 2019, and Petitioner failed to respond.

The Court then located Petitioner on the SCDC Inmate Locator website and learned he has been incarcerated at Lee Correctional Institution since July 22, 2019. However, Petitioner failed to file a change of address notice. On May 29, 2019, the Court sent an Amended Roseboro Order to Petitioner's current address. (Dkt. No. 15.) The Court advised Petitioner to always keep the Clerk of Court advised in writing of his address changes, so as to assure that orders or other matters that specify deadlines for Plaintiff to meet will be received by him. (*Id.*) The Court noted that Respondent's Motion for Summary Judgment included a certificate of service, certifying that he served Petitioner the Motion and accompanying memo and exhibits at Lee Correctional Institution. (Dkt. No. 12-1.) Per the Amended Roseboro Order, Petitioner's response to the pending dispositive

motion was due by September 30, 2019. Petitioner failed to file a response or provide any change of address form.

On October 7, 2019, the Court issued an Order extending the deadline for Petitioner to file a response to the Motion for Summary Judgment to October 21, 2019. (Dkt. No. 17.) Petitioner was specifically advised that if he failed to respond, this action could be dismissed pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. (*Id.*) Petitioner has still failed to respond to Respondent's Motion.

Based on the foregoing, it appears Petitioner no longer wishes to pursue this action. Accordingly, it is recommended that this action be dismissed with prejudice for lack of prosecution and for failure to comply with this Court's orders, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure and the factors outlined in *Chandler Leasing Corp. v. Lopez*, 669 F.2d 919, 920 (4th Cir. 1982). *See Ballard v. Carlson*, 882 F.2d 93 (4th Cir. 1989).

IT IS SO RECOMMENDED.

October 29, 2019

Charleston, South Carolina

MARY GORDON BAKER
UNITED STATES MAGISTRATE JUDGE

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. **Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections.** "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
Post Office Box 835
Charleston, South Carolina 29402

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Dexter Brown, # 330278, Petitioner, v. Kenneth Nelsen, Respondent.	)	Case No. 2:19-cv-1613-RMG-MGB **REPORT AND RECOMMENDATION**

Dexter Brown, a *pro se* state prisoner, seeks habeas corpus under 28 U.S.C. § 2254. (Dkt. No. 1.) On July 31, 2019, the Warden moved for summary judgment. (Dkt. Nos. 11 & 12.) On August 1, 2019, this Court issued a *Roseboro*[1] order advising Brown of the dismissal procedure and the possible consequences if he failed to adequately respond to the motion. (Dkt. No. 13.) Brown's response was due on September 3, 2019. He did not file any response.

When Brown filed this case, he was imprisoned at Lieber Correctional Institution. (Dkt. No. 1 at 1.) He was transferred to Lee Correctional Institution in July 2019 but never informed the Court that his address had changed. After Brown's response deadline ended, the undersigned learned of Brown's transfer. The undersigned reviewed the certificate of service for the Warden's motion and saw it stated the Warden sent the motion to Brown at Lee. However, due to Brown's failure to notify the Court of his address change, the Court sent the August 1 *Roseboro* order to Lieber. Because it was unclear whether Brown ever got that order, the undersigned issued another *Roseboro* order on September 11, 2019; *that* order was sent to Lee. (Dkt. No. 15.) That order

[1] *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975).

reset Brown's deadline for responding to the Warden's motion to September 30, 2019. (*Id.* at 1.) Brown did not file anything.

On October 7, the undersigned extended Brown's deadline to October 21. (Dkt. No. 17.) The undersigned warned him that if he failed to respond this time, his case may be dismissed with prejudice under Rule 41 of the Federal Rules of Civil Procedure. (*Id.* at 2.) Brown still did not respond. Thus, on October 29, the undersigned issued a report and recommendation cataloging Brown's failures to respond and suggesting the Court dismiss the case under Rule 41 for failure to prosecute and failure to comply with several Court orders. (Dkt. No. 19.)

However, the undersigned then learned that both the October 7 and the October 29 report were inadvertently mailed to Lieber, rather than to Lee. (*See* Dkt. Nos. 18 & 20.) Because it was questionable whether Brown ever received those two documents, the undersigned withdrew her report and recommendation on November 20. (Dkt. No. 21.) On that same date, the Clerk's office updated Brown's address in the docket to reflect his current incarceration at Lee. (Dkt. No. 22.) The next day, the undersigned issued an order extending Brown's response deadline again, this time to December 13. (Dkt No. 24.) The undersigned warned Brown that failure respond may result in his case being dismissed with prejudice under Rule 41. Brown did not respond.

The Warden's motion has been pending since last July. Brown has received, at minimum, a copy of that motion and of the Court's September 11 and November 21 orders. To date, Brown has not filed anything in this case other than his § 2254 petition. He has failed to prosecute this case and has failed to respond to at least two of this Court's orders. The undersigned therefore recommends that this case be dismissed with prejudice for lack of prosecution and for failure to comply, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. In making this recommendation, the undersigned has considered the factors from *Chandler Leasing Corp. v.*

Lopez, 669 F.2d 919, 920 (4th Cir. 1982) (per curiam), and finds dismissal with prejudice to be appropriate. *See also Ballard v. Carlson*, 882 F.2d 93, 96 (4th Cir. 1983) (affirming dismissal with prejudice where magistrate warned non-responding plaintiff that further failure to respond would result in dismissal of case).

IT IS SO RECOMMENDED.

January 6, 2020
Charleston, South Carolina

MARY GORDON BAKER
UNITED STATES MAGISTRATE JUDGE

The parties' attention is directed to the important notice on the next page.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. **Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections.** "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
Post Office Box 835
Charleston, South Carolina 29402

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Dexter Brown, #330278 Petitioner, v. Warden Kenneth Nelsen, Respondent.	)	Case No. 2:19-cv-1613-RMG **ORDER AND OPINION**

This matter is before the Court on the Report and Recommendation ("R. & R.") of the Magistrate Judge (Dkt. No. 28) recommending that this Court dismiss Petitioner's case with prejudice. For the reasons set forth below, the Court declines to adopt the R. & R. as the order of the Court and dismisses the petition without prejudice.

I. Background and Relevant Facts

Petitioner Dexter Brown, a state prisoner, is proceeding *pro se.* Petitioner filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254 on June 5, 2019. (Dkt. No. 1). At that time, Petitioner was confined at Lieber Correctional Institution ("Lieber"). On June 6, 2019, an Order was entered and was mailed to Petitioner, directing Petitioner to "always keep the Clerk of the Court advised in writing . . . if your address changes for any reason." (Dkt. No. 3). Respondent moved for Summary Judgment on July 31, 2019. (Dkt. Nos. 11 &12). Petitioner was sent a *Roseboro* order on August 1, 2019, indicating that Petitioner had until September 3, 2019 to respond to Respondent's Summary Judgement Motion. (Dkt. No. 13).

September 3, 2019 came and went without any response from Petitioner. Subsequently, the Magistrate Judge learned Petitioner had been transferred to Lee Correctional Institution

("Lee") in July 2019. Petitioner never alerted the Court of his change of address. The Magistrate Judge sent another *Roseboro* order to Petitioner at Lee on September 11, 2019, setting September 30, 2019 as Petitioner's deadline to respond to the Warden's Motion for Summary Judgment. (Dkt. No. 15). The Magistrate Judge also learned that, in July 2019, Respondent had sent Petitioner a copy of the Motion for Summary Judgement (Dkt. Nos. 11 & 12) at Lee.[1] (Dkt. No. 12).

After receiving the second mailed *Roseboro* Order at Lee, Petitioner sent the Court nothing. On October 7, 2019, the Magistrate Judge extended Petitioner's time to respond to October 21, 2019 and warned Petitioner that, if Petitioner did not respond to the Respondent's Motion, his case may be dismissed with prejudice. (Dkt. No. 17). When Petitioner did not respond by October 21, 2019, the Magistrate Judge issued a R. & R. recommending dismissal for Petitioner's case for failure to prosecute. (Dkt. No. 19).

However, the Magistrate Judge learned that both the October 7, 2019 Order and the October 29, 2019 R. & R. were sent to Lieber, not Lee. Subsequently, on November 20, 2019, the October 29, 2019 R. &. R. was withdrawn, and Petitioner was sent an order extending his response deadline to December 13, 2019. (Dkt. Nos. 21 & 24). The Magistrate Judge warned Petitioner that failure to respond may result in his case being dismissed with prejudice per Fed. R. Civ. P. 41.

On January 6, 2020, the Magistrate Judge issued an R. & R. recommending dismissal of Petitioner's petition with prejudice and giving Petitioner until January 21, 2020 to file objections. The R. & R. was sent to Petitioner's address at Lee. To date, Petitioner has not responded nor has Petitioner filed anything with this Court since his initial petition.

[1] In sum, Petitioner received the Respondent's Motion for Summary Judgment, but not the Magistrate Judge's initial *Roseboro* Order. Petitioner was mailed the second *Roseboro* Order at his updated address.

II. Legal Standards

a. *Pro Se* Pleadings

This Court liberally construes complaints filed by *pro se* litigants to allow the development of a potentially meritorious case. *See Cruz v. Beto*, 405 U.S. 319 (1972); *Haines v. Kerner*, 404 U.S. 519 (1972). The requirement of liberal construction does not mean that the Court can ignore a clear failure in the pleadings to allege facts which set forth a viable federal claim, nor can the Court assume the existence of a genuine issue of material fact where none exists. *See Weller v. Dep't of Social Services*, 901 F.2d 387 (4th Cir. 1990).

b. Magistrate's Report and Recommendation

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility for making a final determination remains with this Court. *See Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). This Court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objection is made. Additionally, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where the petitioner fails to file any specific objections, "a district court need not conduct a *de novo* review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (internal quotation omitted).

III. Discussion

The Magistrate Judge explained in the January 6, 2020 R. & R. that Petitioner's Complaint is subject to dismissal with prejudice because Petitioner met all the criteria for dismissal under *Chandler Leasing Corp. v. Lopez*, 669 F.2d 919 (4th Cir. 1982). To merit dismissal for failure to

prosecute, the Court considers: "(1) the degree of personal responsibility of the petitioner, (2) the amount of prejudice caused the defendant, (3) the existence of a drawn out history of deliberately proceeding in a dilatory fashion, and (4) the existence of a sanction less drastic than dismissal." *Id.* at 920; Fed. R. Civ. P. 41(b) ("If the petitioner fails to prosecute . . . a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) . . . operates as an adjudication on the merits.") Because dismissal with prejudice is a "harsh sanction which should not be invoked lightly," "a district court retains the authority to dismissal without prejudice under Rule 41(b)." *Rosales v. Catawba Cty. Schools*, No. 5:15-CV-149, 2017 WL 210242, at *2 (W.D.N.C. 2017). The Fourth Circuit has noted that "the four factors discussed in *Chandler* are not a rigid four-prong test. Rather, the propriety of a dismissal of the type involved here depends on the particular circumstances of the case." *Ballard v. Carlson*, 882 F.2d 93, 95 (4th Cir. 1989).

Here, despite receiving a *Roseboro* Order, (Dkt. No. 15) (amended *Roseboro* Order sent to updated address on September 11, 2019), Petitioner has failed to respond to Respondent's Motion for Summary Judgement or contact the Court in any manner. Petitioner is proceeding *pro se* and thus personally responsible. *Rosales*, 2017 WL 210242, at *2. There does not appear to be a sanction less sever than dismissal, as "[a]ny other course would . . . place the credibility of the court in doubt and invite[] abuse." *Ballard*, 882 F.2d at 97. However, even assuming some amount of prejudice to Respondent, the Petitioner's behavior does not evidence a "drawn out history of deliberately proceeding in a dilatory fashion." *Chandler*, 669 F.2d at 920; *Ballard*, 882 F.2d at 94-96 (finding dismissal with prejudice warranted where plaintiff, a *year* after filing his suit, still had not made "particularized allegations at the individual defendants sufficient to allow them to mount a defense"). Because the Court lacks information that Plaintiff is deliberately proceeding in a

dilatory fashion, Petitioner's case will be dismissed without prejudice. *Rosales*, 2017 WL 210242, at *3 (dismissal without prejudice is the appropriate remedy where the court lacks evidence of a history of non-participation). If Petitioner were to refile and proceed in a similar manner, however, the third factor from *Chandler* might weight differently and in favor of a dismissal with prejudice.

IV. Conclusion

For the reasons set forth above, this Court declines to adopt the R. & R. (Dkt. No. 28) as the order of the Court. Petitioner's petition is **DISMISSED** without prejudice.

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Court Judge

January 31, 2020
Charleston, South Carolina

UNITED STATES DISTRICT COURT

for the

District of South Carolina

Dexter Brown *Petitioner* v. Warden Kenneth Nelsen, *Respondent*	)	Civil Action No. 2:19-cv-01613-RMG

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one):*

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($__), which includes prejudgment interest at the rate of ____ %, plus postjudgment interest at the rate of ____ %, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____.

■ other: Petitioner, Dexter Brown, shall take nothing of Respondent, Warden, Kenneth Nelsen, as to the petition filed pursuant to 28 U.S.C. § 2254 and the petition is dismissed without prejudice.

This action was *(check one)*:

☐ tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict.

☐ tried by the Honorable _____ presiding, without a jury and the above decision was reached.

■ decided by the Honorable Richard M. Gergel, United States District Judge, presiding.

Date: January 31, 2020

ROBIN L. BLUME, CLERK OF COURT

s/H.Adaway

Signature of Clerk or Deputy Clerk

MC Blanchette

FILED FOR RECORD

2021 JAN 28 PM 1:21

RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF BARNWELL)	
Dexter B. Brown, II, 330278,)	2021-CP-06-00019
Full name and prison number (if any) of Applicant.)	
v.)	**APPLICATION FOR**
State of South Carolina)	**POST-CONVICTION RELIEF**

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010

2. Name and location of Court which imposed sentence Barnwell County Court of General Sessions, 141 Main Street, Barnwell, SC 29812

3. Name(s) of co-defendant(s) (if any) _____

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

   (a) 2011-GS-06-00010; attempted murder

   (b) 2011-GS-06-00011: attempted murder

   (c) 2011-GS-06-00120: possession of a weapon during a violent crime

5. The date upon which sentence was imposed and the terms of the sentence:

(a) May 12, 2011: 30 years

(b) May 12, 2011: 30 years, consecutive

(c) May 12, 2011: 5 years consecutive

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty X

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Convictions and sentences affirmed

ii. _____

iii. _____

(c) the date of each such result:

i. July 30, 2014

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. 2014-UP-303

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in

custody unlawfully:

(a) 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.

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Applicant's counsel failed to file an appeal following the issuance of the Order of Dismissal, which was filed on June 4, 2018.

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? Yes.

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes.

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____

(d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. PCR Application (2014-CP-06-00369)

ii. Petition for Writ of Certiorari

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. Barnwell County

ii. Federal District Court

iii. _____

iv. _____

(c) the disposition thereof:

i. Dismissed

ii. Dismissed

iii. _____

iv. _____

(d) the date of each such disposition:

i. June 4, 2018

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Applicant was advised that he could not pursue an appeal of his PCR application.

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Nicholas R. McCarley, PO Drawer 2247, Aiken, SC 29802

ii. Tommy A. Thomas, 7588 Woodrow Street, Irmo, SC 29063

iii. Thurmond Booker, 238 Warley Street, Florence, SC 29501

(b) the proceedings at which each such attorney represented you:

i. trial

ii. direct appeal

iii. post conviction relief and habeaus corpus

19. State clearly the relief you seek in filing this application:

A belated appeal of prior PCR Application.

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)
)
County of Lee)

VERIFICATION

I, Dexter B. Brown, II, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Dexter B. Brown II

SWORN to and subscribed before me this 20th day of January, 2021.

Aundrea Richburg (L.S.)
Notary Public

My Commission Expires: June 27, 2029

AUNDREA RICHBURG
NOTARY PUBLIC, STATE OF SOUTH CAROLINA
My Commission Expires 06/27/2029

Revised 3/2003

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	)	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT
Dexter B. Brown, II, SCDC# 330278, Applicant,	)	Case No.: 2021-CP-06-0019
v.	)	**RETURN TO THE APPLICATION FOR POST-CONVICTION RELIEF** (Counsel Already Appointed)
State of South Carolina, Respondent.	)	

In response to the post-conviction relief application filed by Applicant Dexter B. Brown, II on January 28, 2021, and received by Respondent the State of South Carolina on February 2, 2021, Respondent would show this Court:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections.

During its January 2011 term, the Barnwell County Grand Jury indicted Applicant for two counts of Attempted Murder (Ind. #s 2011-GS-06-00010; -00011) and Possession of a Weapon During a Violent Crime (Ind. # 2011-GS-06-00120). Assistant Public Defender Nicholas R. McCarley of the Aiken County Public Defender's Office represented Applicant. Assistant Solicitor Lauren Maurice of the Second Circuit Solicitor's Office prosecuted the matter.

On May 11, 2011, Applicant proceeded to a jury trial before the Honorable Edgar W. Dickson, circuit court judge. The jury convicted Applicant as indicted. Judge Dickson originally sentenced Applicant to thirty year terms of imprisonment for each attempted murder to be served concurrently and a five year term of imprisonment for the weapons charge to be served run consecutively. However, following the pronouncement of sentence, Applicant had an outburst in the courtroom wherein he used a curse word and issued a threat to one of the victims, and he subsequently made comments to the sheriff that were interpreted as a threat. (R. p. 216-221). Judge

Dickson then modified the sentence by making all of the sentences consecutive. (R. p. 221-22). However, after defense counsel filed a motion for reconsideration, Judge Dickson reinstated the original sentence by order filed November 1 5, 2011. (R. p. 238).

Applicant's Direct Appeal

Applicant pursued a direct appeal and was represented on appeal by Tommy A. Thomas, Esquire. On appeal, Applicant raised the following instances of trial court error:

> I. "The circuit court improperly denied counsel's motion for a directed verdict because there was insufficient evidence to support the elements of attempted murder and possession of a firearm during the attempt to commit a violent crime"; and
>
> II. "The circuit court's jury charge that malice can be implied from the use of a deadly weapon violates the South Carolina and United States Constitution and contravenes State v. Belcher which found it improper for the court to make such an implied malice charge to the jury under circumstances which would reduce, mitigate, excuse, or justify homicide caused by a deadly weapon."

Following briefing, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion. State v. Dexter B. Brown, II, Unpub. Op. No. 2014-UP-303 (S.C. Ct. App. filed July 30, 2011). The remittitur was sent on August 15, 2014.

Applicant's Initial Post-Conviction Relief Action (2014-CP-06-0369)

Applicant then filed a post-conviction relief action on October 2, 2014, alleging ineffective assistance of counsel. In response, Respondent made its Return and Motion for a More Definite Statement on January 15, 2015. 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.

An evidentiary hearing into the matter was convened on January 25, 2018, before the Honorable William P. Keesley, circuit court judge. 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. 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.

Following the hearing, Judge Keesley denied relief. A written order memorializing his findings of fact and conclusions of law was issued June 1, 2018, and filed June 4, 2018. Applicant did not file an appeal challenging the denial of relief.

Applicant's Federal Habeas Corpus Action (Case No. 2:19-cv-1613-RMG)

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

II. Statement of Facts Giving Rise to the Conviction

On October 15, 2010, Applicant and his cohort, Kendrick Jacobs, began following victims Brandon Parker and Roger Benjamin after they stopped at a store called Harry's in Barnwell County. (R. 85-86). Applicant was driving a blue Mercury Grand Marquis that belonged to his girlfriend's father, and the victims were in a burgundy Blazer that belonged to Parker's mother. (R. 87; 104; 116; 130). The victims noticed the blue Mercury behind them and tried to take an alternate route home to avoid it. (R. 86, ll. 3-8). However, Applicant and Jacobs were able to

follow the victims, and a "high-speed chase" ensued. (R. 86; 99, ll. 21-22). Applicant and Jacobs began shooting at the victims as soon as the Blazer turned off into Benjamin's grandmother's driveway.[1] (R. 86, ll. 9-10). Benjamin and the other occupants jumped out of the Blazer, and Benjamin ran and hid behind the house and then turned around to see who was shooting at them.[2] (R. 86, ll. 12-13). At that point Benjamin saw that the shooters were Applicant and Kendrick Jacobs, who were both shooting automatic weapons that witnesses described as "machine guns." (R. 59, ll. 59-64; 86, ll. 15-17; 99-100; 135-37). Benjamin had known Applicant since he was eleven or twelve years old, and Kendrick Jacobs was Benjamin's cousin. (R. 90). Benjamin observed that Jacobs was sitting in the passenger-side window, shooting across the roof of the car, while Applicant was shooting out of the driver's side window. (R. 88). Applicant and Jacobs went up the road past Benjamin's grandmother's house but then turned around, came back, and stopped in the driveway. (R. 88-89; 135-38; 143-44). At that point, although the occupants of the Blazer had already fled, Applicant and Jacobs continued to shoot at the Blazer. (R. 135-37; 150).

Meanwhile, Alice Thompson, Benjamin's grandmother, observed part of the incident from her front porch. (See R. 134-47). She heard what sounded like firecrackers and came out onto the porch as Applicant and Jacobs were coming by her house and heading up to the store to turn around and come back. (R. 147, ll. 21-23). She saw Applicant driving a light blue car and Jacobs sitting in a window shooting in the direction of her yard. She saw them turn around and come back to her house with Applicant shooting out the driver's window. She testified both men had what appeared to be machine guns they were shooting. The pulled into the end of her driveway. She

---

[1] Parker turned into the driveway so fast that he struck something and damaged the front end of the vehicle. (R. 105, ll. 17-22).

[2] Roger Benjamin testified that a man he knew only as "T" was a backseat passenger. (R. 91, ll. 8-15). "T" had asked Brandon Parker to give him ride to a "little club" down the road from the victims. (R. 97, ll. 4-12).

immediately recognized Applicant and Jacobs as the shooters and she cried out, asking what they were doing. Applicant and Jacobs continued shooting at the Blazer and then left when Ms. Thompson told them she was calling the police. (R. 134-35; 144, ll. 13-15; 149, ll. 12-15). Ms. Thompson subsequently called 911 and told the dispatcher what has happening and specifically mentioned Applicant as one of the shooters. (R. 138-43). Ms. Thompson had known Applicant since he was a child and cared for Applicant as a child when Applicant's father was in prison. Ms. Thompson was relieved that none of the neighborhood children, including her granddaughter, had been playing outside the day of the shooting, because if they had been, "there'd a been a lot of dead peoples out there." (R. 138, ll. 20-25).

Officer Trottie arrived on the scene within a few minutes, and he encountered Brandon Parker, who kept repeating that "somebody tried to kill me." (R. 47-48). Investigator Chavis arrived shortly thereafter and collected the numerous shell casings, fourteen located in the road and on the property. (R. 57-66). Investigator Chavis determined where several bullets hit the victim's Blazer and noted that one bullet hit the driver's side headrest. (R. 62-66). Investigator Chavis also determined that automatic weapons were used by the shooters. (See R. 59-64). Investigator Chavis found no indication that a gun had been fired out of the victims' Blazer.[3] (R. 74).

Applicant was not located on the day of the incident, but was apprehended later following further investigation and after the police received anonymous tips. (R. 119-20). After receiving one particular tip about Applicant's location, police arrived at that location and were permitted

[3] In fact, a gunshot residue test was performed on Brandon Parker and the results were negative. (R. 69; 77-81). Investigator Chavis explained that he was not able to perform a gunshot residue test on Roger Benjamin because the only test he had left was unusable because the necessary fluid had evaporated. (R. 72-73). However, Benjamin testified that he did not have a gun on the day of the incident. (R. 97, ll. 20-24).

entry to search for Applicant. (R. 119-23). Police found Kendrick Jacobs in one of the rooms and found Applicant hiding in the closet of another room. (R. 122-23). At some point police also located the blue Mercury Applicant had been driving on the day of the incident, but the car had obviously been cleaned and vacuumed out so no forensic evidence was recoverable. (R. 126-27). Police were never able to locate the weapons used by Applicant and Jacobs in the shooting. However, police were able to recover fired bullets and fired shell casings at the crime scene. There were both 9mm and .380 caliber shell casings recovered indicating two guns were used in the crime consistent with Ms. Thompson's testimony. (R. 128, ll. 6-7). [4]

III. Current Application

In his second and current application for post-conviction relief, Applicant alleges he is entitled to belated appellate review of his initial post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Attached to this Return and incorporated by reference are the records of the Barnwell County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the transcript from Applicant's trial, Applicant's appellate records, the records from Applicant's first post-conviction relief matter, the records from Applicant's federal habeas corpus action, and this current application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

IV. Response to Allegations Raised

Successive applications such as the one before this court are disfavored. S.C. Code Ann. § 17-27-90. However, here Applicant alleges that he was denied the right to appeal the dismissal

[4] After Petitioner's conviction and sentencing, Petitioner's co-defendant pled guilty and received a sentence of fifteen years.

of his previous post-conviction relief application. Inherent in this allegation is a claim that former post-conviction relief counsel was ineffective. The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under [S.C. Code Ann.]§ 17-27-90." Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State. Austin provides 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 S.C. Code Ann. § 17-27-100 (right to appeal final judgment by post-conviction relief court). But Austin "is limited to its particular factual situation." Aice, 305 S.C. at 452, 409 S.E.2d at 394.[5] Pursuant to Austin, an evidentiary hearing may be conducted in regards 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." Austin, 305 S.C. at 454, 409 S.E.2d at 396. "If the circuit court finds that the petitioner never in fact sought discretionary review, the petitioner may appeal that finding." Id. at 455, 409 S.E.2d at 396. Austin, therefore, allows an applicant to petition the Supreme Court for discretionary review of the dismissal of his initial post-conviction relief application, and may do so outside of the ordinary time limits for bringing such an appeal.

In the present case, Applicant asserts prior post-conviction relief counsel failed to file an

[5] Aice was issued in conjunction with *Austin*, limiting the reach of Austin and holding "that once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of prior PCR counsel." 305 S.C. at 454 n.1, 409 S.E.2d at 396 n.1.

appeal on his behalf. At the present time, Respondent lacks sufficient information to determine whether Applicant made a knowing, voluntary, and intelligent waiver of his right to seek appellate review from the denial of his first post-conviction relief action. Accordingly, Respondent requests an evidentiary hearing to determine if he is entitled to Austin review of his initial post-conviction relief action.

V. Any Future Amendments and Invocation of Discovery Process

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRCP. *Pro se* filings will not be considered at the PCR hearing. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State pursuant to Love v. State, 428 S.C. 231. 834 S.E.2d 196 (2019), or, alternatively, the State will request a continuance in the matter. See *Love* (Kittredge, J., dissent) ("If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.").

If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, the State reserves the right to move to dismiss this allegation or claim. S.C. Code Ann. §§ 17-27-10 to -160; Rule 71.1, SCRCP. See also Rules 15(a)-(b), SCRCP. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State. See Rule 15(a), SCRCP.

Pursuant to S.C. Code Ann. § 17-27-150, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from

the Court upon a showing of good cause. Furthermore, the State requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to the State well in advance of the evidentiary hearing. The State reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to the State.

VI. General Denial

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

VII. Conclusion

WHEREFORE, Respondent respectfully requests this Court convene an evidentiary hearing to determine whether Applicant is entitled to Austin review and any other relief proper.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

By: Megan H. Jameson
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

May 3rd, 2021

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BARNWELL	)	
	)	
	)	2021-CP-06-0019
	)	
DEXTER B. BROWN, II, #330278,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return to Application for Post-Conviction Relief** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC.
Post Office Box 2147
Leesville, South Carolina 29070

DATED this the 3rd day of May, 2021.

Kaitlyn S. Slice, Legal Assistant
For Respondent

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

Dexter B. Brown, II, 330278,) CASE NO.
☒ Plaintiff) 2021-CP-06-0019

v.) MOTION AND ORDER INFORMATION
) FORM AND COVER SHEET

State Of South Carolina)
☐ Defendant.)

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

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

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ 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. ☐ Other:	_____ JUDGE CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:
Collected by: _____

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

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
Dexter B. Brown, II, 330278, Applicant, v.	)	2021-CP-06-0019
State of South Carolina, Respondent.	)	CONSENT ORDER GRANTING APPEAL PURSUANT TO *AUSTIN V. STATE*

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

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):

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May 19, 2022