

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM HAMPTON COUNTY  
Court of Common Pleas  
The Honorable G.D. Morgan, Jr., PCR Action Judge  
2019-CP-25-00311

**RECEIVED**

**Jan 11 2024**

**S.C. SUPREME COURT**

MAURICE MITCHELL, #331615,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**NOTICE OF APPEAL**

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Maurice Mitchell appeals the denial of his post-conviction relief application. The post-conviction relief action was heard and denied by the Honorable G.D. Morgan, Jr., circuit court judge, on November 18, 2022, and was denied by written order issued filed on December 12, 2023. Applicant received notice of the judgement on January 10, 2024.

/s Chelsey F. Marto  
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STATE OF SOUTH CAROLINA	FILED	IN THE COURT OF COMMON PLEAS
COUNTY OF HAMPTON	AM/PM	FOR THE FOURTEENTH JUDICIAL CIRCUIT
Maurice Demon Mitchell, #331615	JAN 2 2024	
Applicant,	MYLINDA D NETTLES	Case No.: 2019-CP-25-311
	CLERK OF COURT	
v.	HAMPTON COUNTY, SC	ORDER OF DISMISSAL
State of South Carolina		
Respondent,		

This matter is before the Court by way of an application for post-conviction (PCR) filed by Maurice Mitchell (Applicant) on August 12, 2019. Respondent filed a return requesting an evidentiary hearing. An evidentiary hearing convened before the Honorable G. D. Morgan Jr. Applicant was present and represented by James K. Faulk, Esquire. Assistant Attorney General Lauren Mims represented Respondent. At the hearing, Applicant testified on his behalf and called as a witness trial counsel Stephen Plexico. Following a thorough review of the records before this Court and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections serving a life sentence. In June 2016, the Hampton County Grand Jury indicted Applicant for murder (2016-GS-25-00229), burglary first degree (2015-GS-25-375), possession of a firearm during the commission of a violent crime (2015-GS-25-373), and possession of cocaine base (2015-GS-25-369). On November 27-29, 2017, Applicant proceeded to a jury trial before the Honorable Roger Young. Public Defender Stephen Plexico represented Applicant, and Solicitor Isaac McDuffie

Stone and Deputy Solicitor Sean Thornton prosecuted the case. The jury convicted Applicant as indicted, and Judge Young sentenced him concurrently to life for murder and first-degree burglary, five years for the weapon charge, and three years for possession of cocaine base.

Applicant filed direct appeal. Appellate Defender Katherine Hudgins perfected the appeal by filing an Anders<sup>1</sup> brief arguing, “The trial judge erred in refusing to suppress identification testimony and evidence when the identification procedure was unnecessarily suggestive rendering the identification unreliable.” The Court of Appeals dismissed pursuant to Anders. State v. Mitchell, No. 2019-UP-228 (filed June 26, 2019). The remittitur was sent July 12, 2019.

#### SUMMARY OF PERTINENT TRIAL TESTIMONY

At trial, Shellevesse Stokes, Applicant’s neighbor, testified she heard Eddie Mole (Victim) say, “Don’t kill me, Don’t shoot me,” (Tr. 148). Mrs. Stokes then testified that she heard a gunshot, opened her front door, saw Applicant standing in the doorway with a bloody gun, and Victim’s feet laying down. (Tr. 149-50). Mrs. Stokes called her husband Rodney Stokes. (Tr. 150). Mrs. Stokes later identified Applicant in a photographic lineup. (Tr. 154).

Rodney Stokes testified he saw Applicant hitting Victim as he was returning to the apartment complex. Stokes exited his vehicle and walked to his apartment, which was directly adjacent to where the murder occurred. (Tr. 163). Stokes testified he heard Victim say, “why are you doing this” and “please don’t kill me.” (Tr. 163). He stated he saw Applicant standing over Victim in the doorway with a pistol in his hand. (Tr. 161). The Stokes called 911, and Mr. Stokes later identified Applicant from a photographic lineup. (Tr. 162-63).

Sergeant Richard Long testified that as soon as the police arrived on the scene, Applicant fled out the front door. (Tr. 173). Sergeant Long pursued Applicant until he cleared the apartment

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<sup>1</sup> Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

complex fence behind the building, then allowed others to continue the pursuit. (Tr. 173). Sergeant Long returned to the scene. (Tr. 173). He testified that he was unable to recognize Victim, whom he had known his entire life, due to the severity of the beating. (Tr. 173). Sergeant Long testified he administered the photographic lineups to Mr. and Mrs. Stokes separately. (Tr. 174).

Sergeant Nick Ginn stated he continued pursuing Applicant and arrested him because he fit the description provided by the Stokes—a “black male with a white shirt and blue jeans or blue jean shorts.” (Tr. 180). Officer David Deloach testified that once he and Sergeant Ginn handcuffed Applicant, he read Applicant his Miranda rights and found a substance that was later determined to be crack cocaine. (Tr. 198). Sergeant Ginn observed blood on Applicant’s shirt. (Tr. 180). Applicant then told Sergeant Ginn at the scene that he had dropped the gun in the wood line from which he just emerged. Sergeant Ginn later interviewed Applicant and took his statement after reading him his Miranda rights. (Tr. 180). Applicant provided the following statement:

Nadine Dunbar Robinson dropped off my two sons a little bit after 3-something to four. We was outside, me and my two sons, and then [Victim] was on his way to his apartment, so I told the boys to go into the house and I went to talk to [Victim]. I asked him did he insert my bottom-back area and he said she didn’t do anything to me. Then, I asked him was he being honest with me? And he said he didn’t do so. I pulled out my weapon P94 Ruger Auto and he started going into the house, so I tried to force my way into the apartment. As I was pushing the door on one another, as my foot [. . .] bend in his doorway, so he couldn’t close it, then I finally did get into the house with him still on his apartment door, he slide and hit my elbow and the gun went off. Not knowing if I strike him or not as he hit the floor. I started hitting him with the armored weapon and then Hampton County rode up to his apartment and I took out and started running behind the apartment buildings, ran in the woods, jumped a fence and ran into some more wooded area. After I fell, I throw the gun into the woods with my right hand and then I ended up on the main highway. Hampton County officers caught me as I was entering out the woods.

(Tr. 193-94).

Tiffany Edwards, an investigator with South Carolina Law Enforcement Division, responded to the scene and documented various items, including Victim's blood, teeth, and soft palate; and Applicant's fingerprints on the grip of the gun. (Tr.205, 219-21). Haley Nelson, an expert in blood stain pattern analysis, reviewed castoff patterns and opined Victim sustained a minimum of four strikes. (Tr. 273-274). Tyler Sturkie, an expert in trace evidence, testified he identified one particle of gunshot residue on Applicant's right hand and one round particle consistent with gunshot residue on his left hand. (Tr. 287-288). Michelle Eichenmiller, an expert in firearms identification, testified concluded a bullet found in the wall at the crime scene was fired from State's Exhibit 9—the weapon retrieved from the wood line where Applicant emerged after fleeing the scene. (Tr. 294). This bullet also matched those found in the cartridge pulled from Applicant's pocket at arrest. (Tr. 294).

#### CURRENT APPLICATION

On August 12, 2019, Applicant timely filed this PCR application alleging:

- I. Ineffective Assistance of Counsel
  - a. Failure to “move on the defense of mistaken identity.”
  - b. Failure to “challenge the state to a meaningful adversarial testing meaning the state did not meet its burden beyond reasonable doubt, they were relieved of their burden with help from counsel.”
  - c. Failure to “petition the rights to a fair trial and equal protection of the law violating petitioner's 14<sup>th</sup> amendment under the United States Constitution and state constitution.”
  - d. Failure to object to hearsay statements attributed to the victim. (R. 148-49, 163).
  - e. Failure to “raise any Constitutional violations.”
  - f. Failure to raise a “request for jury instruction.”
  - g. Failure to “challenge the sufficiency of indictments.”
- II. Appellate Ineffective Assistance of Counsel: failure to raise an abuse of discretion claim.

At the hearing, counsel proceeded only on the following allegations of ineffective assistance of counsel:

1. Failed to object to hearsay statements attributed to the victim. (R. 148-149, 163).
2. Failed to seek a hearing pursuant to State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) to challenge the reliability of SLED agent Eichenmiller's expert testimony in the field of firearm identification. Trial counsel failed to question reliability on whether Eichenmiller could submit an opinion to the jury that Exhibit 36 (bullet recovered from victim's apartment wall) was fired from Exhibit 9 (gun found in the woods following apprehension of Applicant).
3. Failed to preserve an objection to court's decision not to charge the jury on accident, involuntary manslaughter, and voluntary manslaughter.

(PCR 9-10).

#### **TESTIMONY PRESENTED AT EVIDENTIARY HEARING**

At the PCR hearing, Applicant testified he met with counsel three or four times prior to trial. (PCR 6). Applicant testified counsel did not explain strategy regarding the hearsay statements admitted against him, the bullet forensic evidence, or the jury charge. (PCR 6-7). Applicant stated he did not recall if trial counsel ever told him how he planned to defend him at trial, but counsel answered all of his questions at trial. (PCR 11).

Trial counsel testified he had met with Applicant more than three or four times as reflected in his personal records. (PCR 22-23). Regarding hearsay by the Stokes, trial counsel testified he did not object because he believed the statements fell under the dying declaration exception recognized under Rule 804, SCRE. (PCR 20). Trial counsel also testified he did not object as part of his strategy to get the harmful witnesses off the stand as quickly as possible. (PCR 20).

Trial counsel testified that at the time of the trial he believed that the method of testing used by Agent Eichenmiller was reliable. (PCR 26). Furthermore, trial counsel testified he was not

aware of any case law in South Carolina on point at the time of trial and did not have information that would have caused him to question Agent Eichenmiller's method of testing. (PCR 26).

Trial counsel admitted that he failed to preserve the request to charge accident, voluntary manslaughter, and involuntary manslaughter. (PCR 27). He averred the State's evidence against Applicant was so overwhelming that failing to include alternative charges did not prejudice Applicant and would not have changed the outcome of the trial. (PCR 27).

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the records before it, including the Hampton County Clerk of Court records of the underlying convictions, Applicant's records from the South Carolina Department of Correction, the trial transcript, Applicant's appellate records, and the records from this PCR action. The Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh the testimony accordingly. After a careful review based on the Strickland standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

#### ***Ineffective Assistance of Counsel***

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). In a PCR action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When the application alleges ineffective assistance of counsel, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that [it]

cannot be relied upon as having produced a just result.” Strickland, 466 U.S. 668. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, an applicant must prove counsel’s performance was deficient. Strickland, 466 U.S. at 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, courts measure an attorney’s performance under its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, a PCR applicant must prove that counsel’s deficient performance 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.

#### *Failure to Object to Hearsay*

This Court finds Applicant failed to prove counsel was ineffective for not objecting to hearsay statements by the Stokes. The dying declaration hearsay exception applies when a declarant is unavailable to testify at trial for a multitude of reasons, including death. Rule 804(a)(4), SCRE. State v. McHoney, 344 S.C. 85, 92, 544 S.E.2d 30, 33 (2001). A statement will not be excluded by the hearsay rule, specifically in homicide cases, if the declarant makes a statement

while believing their death was imminent about the cause of what they believe to be their impending death. SCRE 804(b)(2). Id.

Here, the declarant was Victim, now deceased. Victim made the following statements: “Don’t kill me, don’t shoot me,” “why are you doing this,” and “please don’t kill me.” (Tr. 148); (Tr. 163). Initially, this Court finds these statements were not hearsay because they were not offered for the truth of the matter asserted. Further, according to the Stokes, Victim made these statements while Applicant was forcing his way into Victim’s home with his gun and threatening Victim. Thus, it is likely that Victim believed he was about to die at the hands of Applicant when he said the words, “don’t kill me don’t shoot me,” as overheard by Mrs. Stokes, and “why are you doing this, please don’t kill me,” as overheard by Mr. Stokes. This Court agrees with counsel’s assessment that the statements fit the dying declaration hearsay exception. See Rule 804(a)(4). Thus, counsel articulated a valid reason for not objecting and Applicant failed to prove deficiency.

Further, this Court finds credible counsel’s testimony that he did not object as part of his strategy to get the harmful witnesses off the stand as quickly as possible. Due to the unlikelihood that the statements would have been excluded by hearsay, this strategy was reasonable within prevailing professional norms, and counsel was not deficient.

Finally, Applicant failed to prove prejudice because it is not reasonably likely the statement would have been excluded based on hearsay. Further, due to the overwhelming evidence of guilt—including two eyewitnesses that identified Applicant, the fact law enforcement arrested Applicant while he was fleeing the scene, and the fact police recovered cartridges on Applicant that were consistent with a cartridge at the scene, and Applicant’s statement admitting he forced his way into Victim’s home with a gun—it is not reasonably likely the outcome would be different had these

statement been successfully excluded. Thus, Applicant did not prove prejudice, and this claim is denied.

*Failed to Seek a State v. Council Hearing*

This Court finds Applicant did not prove counsel was ineffective for failing to request a pre-trial hearing on Eichenmiller's expert testimony. "[T]he proper analysis for determining admissibility of scientific evidence is now under the SCRE." State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). "When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." Id. To determine reliability, the trial judge should apply the Jones factors. Id. "[U]nder the Jones standard, the Court looks at several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." Id. at 1, 515 S.E.2d at 517.

Initially, Applicant did not prove prejudice. Critically, there was no issue at trial as to whether subject gun was the gun used in the shooting. Thus, even if the expert witness should not have been allowed to testify the gun was an exact match, this testimony was not prejudicial. Further, even if counsel had challenged the reliability of this testimony under Jones—the proper standard in South Carolina—Applicant did not set forth sufficient argument or caselaw to show it is reasonably likely this testimony, upon further challenge, would have been excluded as unreliable. Finally, based on the overwhelming evidence against Applicant, it is not reasonably likely the outcome would have been different had counsel successfully excluded this testimony. Specifically, two eyewitnesses identified Applicant, law enforcement arrested Applicant while he

was fleeing the scene, and Applicant admitted he forced his way into Victim's home with a gun. Based on the foregoing, it is not reasonably likely the outcome would have been different had counsel objected to Eichenmiller's expert testimony, and this claim is denied.

Further, this Court finds Applicant did not prove deficiency. The expert testimony here related to identifying firearm markings on cartridge casings is common testimony in South Carolina by experts in this field; thus, counsel's failure to challenge the reliability of this testimony did not fall outside of prevailing professional norms. Likewise, Applicant did not show a reasonable likelihood this testimony would have been excluded under Jones. Although Applicant loosely cited to "Massachusetts Federal cases" that have challenged the admissibility of this type of testimony, he did not set forth with specificity *what* cases he was relying on, and he acknowledged no South Carolina case had questioned the reliability of gun mark evidence.<sup>2</sup> To the extent Applicant contends counsel was deficient for not challenging the existing standard, attorneys are not required to anticipate changes to the law to be constitutionally effective. Cf. Pantovich v. State, 427 S.C. 555, 562–63, 832 S.E.2d 596, 600 (2019) ("Fundamentally, a collateral review proceeding is ill-suited for announcing a new rule of substantive law pertaining to an underlying trial; appellate courts are to do so only in the rarest of circumstances. This is especially true in a retrospective PCR analysis under Strickland, which seeks to determine whether counsel was ineffective at the time of the alleged error. . . . [W]e do not require attorneys to be clairvoyant in anticipating changes to the law . . . ."). Finally, even if federal courts have questioned the reliability of this type of evidence, the standard under Jones and Council does not require universal acceptance. Thus, even if a federal court has questioned this type of evidence, that does not mean a South Carolina Court—applying a different standard than the federal Daubert

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<sup>2</sup> Notably, federal courts apply the Daubert standard, which was rejected by our Supreme Court in Council.

standard—would find this type of evidence unreliable. Because Applicant did not show counsel’s failure to challenge this type of expert testimony was outside of prevailing professional norms, he did not prove deficiency, and this claim is denied.

#### *Improper Jury Charge*

This Court finds Applicant failed to show counsel was ineffective for failing to preserve his request for jury charges on accident, voluntary manslaughter, and involuntary manslaughter. The law requires that the facts support a jury instruction for it to be proper. See State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003). Furthermore, for a defendant to be entitled to a jury instruction for a lesser offense, there must be some evidence in the record to show that the defendant is guilty of the lesser rather than the greater offense. See State v. Funchess 267 S.C. 427, 229 S.E.2d 331 (1976).

Initially, this Court finds counsel properly preserved this issue for appellate review. See State v. Johnson, 432 S.C. 652, 657, 855 S.E.2d 305, 307 (Ct. App. 2021) (stating “[w]hen a party requests a jury charge, and after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at the conclusion of the court’s instructions”). Thus, Applicant did not prove deficiency or prejudice, and this claim is denied.<sup>3</sup>

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<sup>3</sup> This Court further finds no evidence supported a charge for accident, voluntary manslaughter, or involuntary manslaughter. At trial, the Stokes testified they observed Applicant breaking into Victim’s home gun-first, threatening, beating, and shooting Victim. (Tr. 148-50, 163). In his statement, Applicant admitted he was beating Applicant, forcing his way into Victim’s apartment, and threatening Victim with a gun. Thus, the uncontradicted evidence showed Applicant was acting unlawfully and not exercising care in the handling of the gun, and no evidence was introduced that could support an accident, involuntary manslaughter, or voluntary manslaughter charge. See State v. Smith, 391 S.C. 408, 415, 706 S.E.2d 12, 15 (2011) (providing that for a defendant to be entitled to an accident charge, “it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon”); id. at 414 (providing that for a defendant to be entitled to a charge of involuntary manslaughter, there must be evidence of a “reckless disregard for safety of others” while engaged in lawful activity and a lack of intent to kill); id. at 413 (providing that for a defendant to be entitled to a charge of voluntary manslaughter, “there must be evidence of both sufficient legal provocation and heat of passion at the time of the killing”).

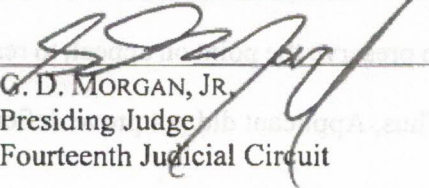
**CONCLUSION**

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. This, this application is denied and dismissed with prejudice. Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgement. See Rule 203, SCAC. Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). If applicant wishes to seek appellate review, PCR counsel must serve and file a notice appeal on applicant's behalf. Rule 71.1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant shall be remanded to and remain in the custody of the State.

**AND IT IS SO ORDERED THIS 12 day of December, 2023**

  
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G. D. MORGAN, JR.  
Presiding Judge  
Fourteenth Judicial Circuit

 \_\_\_\_\_, South Carolina.