

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

**Jun 06 2024**

S.C. SUPREME COURT

\_\_\_\_\_  
Certiorari to Florence County

Honorable Debra R. McCaslin, Circuit Court Judge

\_\_\_\_\_  
CORY NETTLES ALLEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001925

\_\_\_\_\_  
APPENDIX  
\_\_\_\_\_

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**VOLUME II**

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1           As I have already told you, the burden is always upon  
2 the State to prove the Defendant's commission of the crime  
3 alleged against him beyond a reasonable doubt, and this  
4 would therefore necessarily require that the State prove  
5 beyond a reasonable doubt the absence of self-defense.

6           Now, in order for you to consider a defense of self-  
7 defense, you obviously must know what the elements are,  
8 and there are four basic elements that are required before  
9 self-defense may be established.

10          First, it must be shown that the Defendant was with-  
11 out fault in the bringing on the immediate difficulty  
12 which gave rise to the necessity of using deadly force  
13 which resulted in the taking of human life.

14          A person cannot provoke, initiate or otherwise through  
15 his own fault bring about the difficulty and then claim  
16 the right of self-defense in the use of deadly force as  
17 against an attack which was caused by that provocation.

18          Second, it must be shown that at the time the fatal  
19 act was committed that the Defendant actually believed  
20 he was in imminent danger of losing his life or of sustain-  
21 ing serious bodily injury, or some other person was, or  
22 that the Defendant actually was in such imminent danger,  
23 and the term imminent danger means an immediate or present  
24 danger, and not a past or future danger.

25          Thirdly, if the self-defense is based upon a belief

1 of imminent danger then it must be shown that the belief  
2 was reasonable; that is, a reasonably prudent person of  
3 ordinary firmness and courage would have entertained the  
4 same belief.

5 If the Defendant actually was in imminent danger then  
6 it must be shown that the circumstances were such that  
7 it would warn a person of ordinary prudence and courage  
8 to inflict the fatal injury or injuries in order to save  
9 himself or some other person from death or serious bodily  
10 injury.

11 In other words, it must be shown that a reasonably  
12 prudent person of ordinary firmness and courage, if acting  
13 under the same or similar circumstances, would have reached  
14 the same conclusion and entertained the same belief.

15 Deadly force is only appropriate when necessary and  
16 may only be exercised where the Defendant entertained the  
17 reasonable belief that he or some other was about to sus-  
18 tain loss of life or suffer serious bodily harm.

19 The law of self-defense encompasses preventative ac-  
20 tions taken to protect one's own life or another when such  
21 action is taken in anticipation of imminent danger of  
22 losing one's life or sustaining serious bodily injury.

23 A Defendant has a right to act upon appearances. He  
24 may be mistaken. The law does not hold someone to a fine  
25 assessment of the danger as might be accomplished having

1 an adequate time to reflect, but rather, however, that  
2 the Defendant has acted as a person of ordinary reason,  
3 firmness and courage would have acted or should have acted  
4 in meeting the appearance of danger.

5 In other words, one does not have to wait until his  
6 assailant used his advantage. One always has the right  
7 under the law of self-preservation to prevent another  
8 from getting the advantage.

9 Again, there is, however, a requirement of objectiv-  
10 ity. Any such belief must be reasonable; that is, a rea-  
11 sonable and prudent person, if acting under the same or a  
12 similar circumstance, would have so believed or would  
13 have also been warranted in acting as the Defendant did.  
14 Objective, a reasonable and prudent person of ordinary  
15 firmness and courage.

16 Fourth, it must be shown that the Defendant had no  
17 other means of avoiding the danger of losing his life or  
18 sustaining serious bodily injury than to act as he did un-  
19 der the particular circumstances as existed because, as  
20 I have stated, self-defense is founded upon necessity.

21 If the Defendant is justified in defending himself  
22 or others and in firing the first shot, then a Defendant  
23 is also justified in continuing to shoot until it is  
24 apparent that the danger of death or serious bodily in-  
25 jury has completely ended.

1           Threats made by the victim may be considered in deter-  
2           mining whether the Defendant actually was or believed he  
3           was in imminent danger.

4           Ladies and gentlemen, if you have a reasonable doubt  
5           as to the Defendant's guilt, as it relates to a proof of  
6           an unlawful homicide after considering all of the evidence  
7           received during the trial, including any evidence relating  
8           to the issue of self-defense, then it would be your duty  
9           to resolve that reasonable doubt in favor of the Defendant  
10          and find him not guilty.

11          If, on the other hand, you have no reasonable doubt  
12          as to the Defendant's guilt, as it relates to the proof  
13          of an unlawful homicide after considering all of the evi-  
14          dence presented in the case, including the evidence relat-  
15          ing to the issue of self-defense, then it would be your  
16          duty to resolve that, and it would be your duty to resolve  
17          that and find the Defendant guilty.

18          Ladies and gentlemen, as to the elements of self-  
19          defense, the four elements, the State has the burden of  
20          disproving self-defense beyond a reasonable doubt.

21          If any one of those four elements is disproved by  
22          the State, then self-defense fails. There are four ele-  
23          ments. The State would not have to prove the four ele-  
24          ments but any one of those elements of self-defense. They  
25          can prove them all but they only have to prove one because

1 the defense would fail if it does not meet the standards  
2 of the law.

3 Finally, ladies and gentlemen, as to the form of the  
4 verdict, you will have this form in there along with the  
5 exhibits.

6 Mr. Foreman, this is very self-explanatory. It has  
7 the caption, it's got the Indictment Number and charge.  
8 There are two possible verdicts which you may find in this  
9 case, guilty or not guilty.

10 There is actually no significance whatsoever in the  
11 order in which I have listed the possible verdicts. It  
12 is simply that one must be given first.

13 Ladies and gentlemen, your verdict must be a unani-  
14 mous verdict; all twelve of you must agree.

15 Mr. Foreman, when the jury agrees on the verdict, you  
16 will please check -- if you find the State has met its  
17 burden of proof beyond a reasonable doubt then you find  
18 the Defendant guilty, and I would ask you to please check  
19 to the left of the word guilty with a check mark, circle  
20 the word guilty, and sign the verdict as Foreperson.

21 If you determine that the State has failed to meet  
22 its burden of proof in this case beyond a reasonable doubt,  
23 then your verdict is not guilty, and I would ask you to  
24 please check to the left of the two words, not guilty, and  
25 circle the check mark or the two words not guilty. Then

1 sign and date it.

2 If you have any questions during the course of your de-  
3 liberations, would you please write out a note for me, Mr.  
4 Foreperson, knock on the jury room door, hand it to the  
5 bailiff. She will present it to me and I will respond in  
6 a timely manner.

7 Once you reach a unanimous verdict, execute the ver-  
8 dict form and sign it, I would ask you to knock on the jury  
9 room door and inform the bailiff that you have reached a  
10 verdict.

11 At that time, we will receive you back into the Court-  
12 room.

13 I ask you now to return to your jury room, but do not  
14 begin your deliberations until you have been directed to  
15 do so by the Clerk. I have to meet with the attorneys one  
16 final time out of your presence before the case is submitted  
17 to you.

18 I may have mis-stated something and I may have to  
19 bring you out here to further instruct you. If I do not,  
20 what will happen is -- everybody looks great today and so  
21 we will bring our two alternates out. The evidence will  
22 be presented to you, along with the verdict form, and you  
23 then be instructed to begin your deliberations.

24 With that being said, thank you very much for your  
25 patience and attention. You may follow your bailiff to

1 your jury room.

2 (Jury excused from the Courtroom)

3 THE COURT: All right, Solicitor. Do you have any  
4 exceptions?

5 SOLICITOR: No, Your Honor.

6 THE COURT: Ms. Parham?

7 MS. PARHAM: No, Your Honor.

8 THE COURT: All right. Thank you very much. I would  
9 like you to check the exhibits and the verdict form.

10 (Brief pause)

11 SOLICITOR: Verdict form is fine, Your Honor.

12 THE COURT: Solicitor and Ms. Parham, there is no live  
13 ammo to go into the jury room with the firearm.

14 SOLICITOR: Yes, sir.

15 THE COURT: Madam Clerk, as you take them into the  
16 jury room, take the guns in there, if they want to see  
17 the ammo, the guns will have to come out and then the ammo  
18 go in.

19 CLERK: Right.

20 (Brief pause)

21 THE COURT: All right, you all have checked the evi-  
22 dence?

23 SOLICITOR: Yes, Your Honor.

24 THE COURT: Are you satisfied, Ms. Parham?

25 MS. PARHAM: Yes, Your Honor.

1 THE COURT: All right, thank you.

2 Bring the alternates out.

3 (Alternate jurors brought out of jury room and separated  
4 from jurors)

5 (Jury commenced deliberations at 4:11 P.M.)

6 (The Court stood in recess until the matter was re-  
7 sumed)

8 THE COURT: Thank you, and be seated.

9 All right, to those of you who may be in the gallery  
10 this evening let me have a word from experiences I have had  
11 in the Courtroom.

12 The receiving presentation or the announcement of a  
13 verdict can be a very emotional time for one side or the  
14 other, or both sides.

15 It is a very difficult task that the jury has in a  
16 case such as this.

17 I do not allow any show of emotions whether by way of  
18 body movement, body language or vocal language, or anything  
19 of that nature.

20 If there is anything of that sort, I would ask the  
21 deputies to take into custody anyone who shows some type  
22 of conduct.

23 I will thereafter have a contempt of court hearing on  
24 those individuals. You are not entitled to a jury trial  
25 and I can sentence you for up to six months -- up to six

1 months and fine you up to Fifteen Hundred Dollars.

2 If you do not feel that you can control your emotions,  
3 I ask you to please leave out. If you stay I will under-  
4 stand and take it that you agree and consent; that you can  
5 control your emotions.

6 All right.

7 (Jury returned to Courtroom at 6:23 P.M.)

8 THE COURT: Madam Clerk.

9 CLERK: Mr. Foreman, have you all agreed upon a ver-  
10 dict?

11 FOREMAN: Yes, maam.

12 (Verdict form exhibited to the Court)

13 THE COURT: All right, the verdict appears to be in  
14 proper form. Madam Clerk, would you publish the verdict,  
15 please?

16 CLERK: Yes, sir. State of South Carolina, County of  
17 Florence, the Court of General Sessions.

18 State of South Carolina versus Cory Nettles Allen,  
19 Indictment Number 2014 GS 21 1340.

20 As to murder, we, the jury, unanimously find the  
21 Defendant guilty. Signed by the Foreperson and dated the  
22 23rd day of March, 2016.

23 Ladies and gentlemen of the jury, if this be your ver-  
24 dict, please raise your right hands.

25 Thank you.

1 THE COURT: Let the record reflect all hands were  
2 raised. Thank you. Thank you very much.

3 Anything additionally for the jury from the State?

4 SOLICITOR: No, Your Honor, other than we realize that  
5 they had a very difficult job to do, and we appreciate the  
6 service.

7 THE COURT: Thank you, Solicitor.  
8 Anything from the Defense, Ms. Parham?

9 MS. PARHAM: No, Your Honor.

10 THE COURT: Thank you.

11 (Whereupon, the jurors were excused by the Court)

12 THE COURT: All right, any motions, Ms. Parham?

13 MS. PARHAM: Your Honor, we would just renew all of  
14 our previous motions that we've made after the State's  
15 case and throughout the trial.

16 THE COURT: All right, thank you. Thank you very  
17 much.

18 Those motions are noted, and I would renew my pre-  
19 vious trial rulings.

20 Any reason that sentence cannot be imposed at this  
21 time?

22 MS. PARHAM: Not that I'm aware of.

23 THE COURT: All right. If you would come around to  
24 the podium, please, you and Mr. Allen.

25 (Defendant and counsel coming before the Court)

1           If you would hand up the sentencing sheets?

2           Anything additional by way of victim impact or any  
3 other matters from the State, Solicitor?

4           SOLICITOR: Your Honor, we have family members here,  
5 and I know at least one of them wishes to address the Court.

6           Your Honor, we have LaSheia Windham, the wife of Mr.  
7 Windham, and his father, his step-mother, the mother, and  
8 another family member.

9           THE COURT: All right. Tell me your name, please.

10          SOLICITOR: This is his uncle, Your Honor.

11          MR. BRAND: My name is Jerome Brand.

12          THE COURT: I'll be glad to hear from you, but if  
13 you would please speak up. Speak up so our Court Reporter  
14 can hear you and take down what you say, and I can hear you.

15          MR. BRAND: Sir, I appreciate what the Solicitor did,  
16 appreciate it all. I think the family was concerned about  
17 Cory.

18          The most important thing is that we were concerned  
19 about justice, and I believe that justice was served and  
20 that mean a lot to the family.

21          My mother is blind too, and I'm sorry the situation  
22 like this happened on Candy Lane, and I pray about it, and  
23 justice was served by leaving it in the hands of the law.

24          THE COURT: Thank you very much, and thank you all  
25 for being here.

1 THE COURT: Anything further, Solicitor?

2 SOLICITOR: Yes, Your Honor. This is Mrs. LaSheia  
3 Windham, the wife of Mr. Windham and she wishes to speak.

4 THE COURT: Yes, maam. All right, Ms. Windham, I  
5 will be glad to hear from you.

6 MRS. WINDHAM: I just want to say that the situation  
7 out there was (portion inaudible). I loved my husband and  
8 I miss him still. He made me stronger, and I just want to  
9 say that I hope that you will have mercy and I forgive.

10 I go to church and they always talk about love and  
11 forgiveness. I forgive because my heart tells me to and  
12 I know it.

13 All I've got to hold on to now is memories. I am  
14 just holding on to memories of my loved one.

15 THE COURT: Thank you. Thank you, Ms. Windham.  
16 Anything further, Solicitor?

17 SOLICITOR: Your Honor, in regards to sentencing, you  
18 heard all of the facts and you know exactly what the case  
19 was about.

20 It seemed to me to be planned out and there seemed  
21 to be retribution; that he came there with a vengeful heart.

22 Your Honor, whatever sentence you think is appropriate  
23 the State is okay with.

24 THE COURT: Thank you, Solicitor.

25 Ms. Parham.

1 MS. PARHAM: I agree with that, Your Honor. You  
2 heard all the evidence and you know all about this case,  
3 and I think there is a lot of mitigation in the incidents  
4 that were presented.

5 I'm not sure if my client wishes to address the Court.

6 DEFENDANT: I . . .

7 THE COURT: Speak up. Speak in your loudest voice,  
8 Mr. Allen.

9 DEFENDANT: I just want to say that the way it happen  
10 is how I say it happened, and I am sorry for it all. †

11 THE COURT: Does anyone in his family want to address  
12 the Court, Ms. Parham?

13 MS. PARHAM: Cory's family is in the back of the Court-  
14 room? Does any family member wish to address the Court?

15 (Brief pause)

16 MS. PARHAM: I don't believe so, Your Honor.

17 SOLICITOR: Your Honor, I just have one other thing.  
18 I really do wish Mr. Farnum's advice to him had been fol-  
19 lowed. Mr. Pete Farnum advised him to let this go.

20 THE COURT: All right. Anything further?

21 MS. PARHAM: No, Your Honor.

22 THE COURT: Thank you. All right.

23 To the Windham family, I am sorry -- the Court is  
24 sorry for your loss. No one wins here.

25 Mr. Windham's uncle, I believe, stated justice is what

1 they desire. Of course, it is only a measure of justice  
2 at the close of any of these cases because Mr. Windham can't  
3 be replaced. His life has been taken from him.

4 I look at that as stealing a life is the worst crime of  
5 any crime. The worst motivation of any crime. To take  
6 someone's life is stealing it when they have a right to live  
7 and God gave them that right.

8 None of us should decide or have a thought to take the  
9 life of another, while I certainly understand the law of  
10 self-defense. I did not see this as a self-defense case.  
11 I understand the law says if you can fire one shot you're  
12 entitled to fire more until the threat is ended. That  
13 threat ended before the seventh shot. He already had four  
14 or five shots in his body before he got the two fatal shots.

15 So he may have survived the first five with the last  
16 two being fatal, the last two being in the back. It  
17 never meets the elements of self-defense.

18 As I say, he might be here today with five gunshot  
19 wounds and saying all he wants is justice. All he wants is  
20 closure. That's what you want, Mr. Allen, for your brother,  
21 and a mother and father never want to bury a child under any  
22 circumstances.

23 I've done that once in my life, and I never want to  
24 do it again.

25 Retribution is never the answer. Ms. Windham says she

1 has forgiven, and I wish I was man enough -- Ms. Windham  
2 is obviously a person who can forgive. It's when you hate  
3 somebody that you should just take two drinks, one for you  
4 and one for the person you hate.

5 On 2014 GS 21 1340, Cory Nettles Allen, the jury hav-  
6 ing returned a verdict of guilty of murder, the Defendant  
7 is committed to the State Department of Corrections for a  
8 determinat time of forty years, with credit for the long  
9 time served.

10 Good luck to you, Mr. Allen.

11 -----END OF REQUESTED TRANSCRIPT OF RECORD-----

12

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## CERTIFICATE

1  
2 I, HARRIET P. BENNETT, Court Reporter for South Carolina  
3 Court Administration, hereby certify that the foregoing Tran-  
4 script was prepared to the best of my ability from the records  
5 of Keshia Reed, having been heard in the Court of General  
6 Sessions for Florence County on March 21, 22 and 23 of 2016.

7 FURTHER, I certify that I am neither of kin, counsel, nor  
8 of interest to any party to this matter.

9 August 22, 2016

10 *Harriet P. Bennett*  
11  
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FORM 5

20 19 CP 21 1634

STATE OF SOUTH CAROLINA )  
 )  
County of Florence )  
 )  
Cory Nettles Allen 367495 )  
Full name and prison number (if any) of Applicant )

IN THE COURT OF COMMON PLEAS

v. )

State of South Carolina )  
 )  
 )  
 )  
 )

APPLICATION FOR  
POST-CONVICTION REVIEW

BOBIS P. HILL, CLERK  
COURT & CLERK  
FLORENCE COUNTY, SC

2019 JUN 17 AM 9:41

FILED

**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 Kirkland C.I B2-17A  
4344 Broad River Rd, Columbia, SC, 29210
2. Name and location of Court which imposed sentence Florence County  
Judicial Circuit
3. Name(s) of co-defendant(s) (if any) Frederick Allen
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) 2014-GS-21-01340,
  - (b) \_\_\_\_\_

**SCANNED**

- (c) \_\_\_\_\_
- 5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) March 23, 2016 40 years
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
- 6. Check whether a finding of guilty was made:
  - (a) after a plea of guilty \_\_\_\_\_
  - (b) after a plea of not guilty  \_\_\_\_\_
  - (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. The south Carolina Court of Appeals
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (b) the result in each such Court to which you appealed:
    - i. AFFIRMED
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (c) the date of each such result:
    - i. April 1, 2019
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (d) if known, citations of any written opinion or orders entered pursuant to such results:
    - i. NO. 2019-UP-152
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
- 9. If you answered "no" to (7), state your reasons for not so appealing:
  - (a) N/A
  - (b) \_\_\_\_\_

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

(a) Trial Counsel was ineffective when counsel failed to argue any mitigating circumstance during the sentencing phase that may have reduce the applicant sentence.

(b) Trial counsel was ineffective when counsel failed to object to the same evidences that was already admitted by other witnesses,

(c) Trial Counsel was ineffective for failing to object to the court for not waiting the 24 hour period that the statute requires before sentencing the applicant.

(d) Trial Counsel was ineffective for not adequately argue issues regarding the applicant indictment.

(ii)(d) same as above.

- (c) \_\_\_\_\_
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: see attachment
- (a) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Same as on attachment
- (b) same as on attachment
- (c) same as on attachment
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? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? Yes
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. Appeal
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_
- (b) the name and location of the Court in which each was filed:
- i. The South Carolina Court of Appeals
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

(c) the disposition thereof:

- i. AFFirmed
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

(d) the date of each such disposition:

- i. April 1, 2019
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

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

- i. NO. 2019-UP-152
- 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. N/A
- 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) Trial Counsel failed to raise issues.
- (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?  
\_\_\_\_\_

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. Rosemary Parcham PO. Box 1514 Florence SC. 29503,  
541 W. Evans St. Florence S.C. 29501
  - ii. Robert Michael Dudek, Chief Appellate Defender,  
1330 Lady St. Suite 401, Columbia, SC, 29201-3333
  - iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
  - i. Trial
  - ii. Appeal
  - iii. \_\_\_\_\_

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

Vacate and remand

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

\_\_\_\_\_

STATE OF SOUTH CAROLINA )  
County of Florence )

VERIFICATION

I, Cory N. Allen, 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.

Cory N. Allen

SWORN to and subscribed before me this 20 day of May, 2019.

Melissa Spring (L.S.)  
Notary Public

My Commission Expires: Dec 1, 2025

2019 JUN 17 AM 9:41  
DORIS POULOS O'HARA  
CCCP & GS  
FLORENCE COUNTY, SC

FILED

APPLICATION TO PROCEED WITHOUT PAYMENT  
OF COSTS AND AFFIDAVIT  
IN SUPPORT THEREOF

I, Cory Allen, hereby apply for leave to  
proceed in this action without prepayment of fees or costs or security therefor. In support of my  
application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Cory M. Allen  
Applicant

SWORN or affirmed to and subscribed before me this  
20 day of May, 2019.

Melissa Spring  
Notary Public

My Commission Expires: Dec. 1, 2025

2019 JUN 17 AM 9:41  
FORIS POULOS O'HARA  
CCCP & GS  
FLORENCE COUNTY, SC

FILED

**FILED**

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF FLORENCE ) FOR THE TWELFTH JUDICIAL CIRCUIT

2020 JUL 20 AM 8:21

Cory N. Allen, #367495, ) DORIS POULOS O'HARA ) 2019-CP-21-1634  
Applicant ) CCCP & GS )  
FLORENCE COUNTY, SC )

v. )

RETURN  
(COUNSEL APPOINTED)

State of South Carolina, )

Respondent, )

In response to Cory N. Allen's (Applicant) action for post-conviction relief (PCR) commenced June 19, 2019, the State makes this return:

**I. Procedural History**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. Applicant was indicted at the December 2014 term of the Florence County Grand Jury for murder, accessory to murder before the fact, and accessory to murder after the fact (2014-GS-21-1340). Applicant was represented by Rose Mary Parham (Counsel) of the Parham Law Firm, LLC. Solicitor Ed Clements, III, prosecuted the case.

Applicant's case proceeded to a jury trial on March 21-23, 2016, before Judge R. Knox McMahon. The jury convicted Applicant of murder. Judge McMahon sentenced Applicant to forty years' imprisonment. Applicant appealed.

Chief Appellate Defender Robert M. Dudek perfected Applicant's appeal by filing a brief to the Court of Appeals presenting the following issue:

1. Whether the court erred by refusing to redact the portion of the 911 call where Coc speculated about the motive for the shooting being a prior incident, since this speculation was no longer an excited utterance or present sense impression, and it should have been excluded given its tendency to confuse the jury, and its extremely prejudicial effect?

The Court of Appeals affirmed Applicant's conviction and sentence. *State v. Allen*, Op. No. 2019-UP-152 (S.C. Ct. App. filed May 1, 2019). The case was remitted back to the circuit court on May 23, 2019.

Applicant timely commenced this PCR action on June 19, 2019.

## II. Facts

The State's theory of the case was clear: Applicant waited years to seek revenge on Edward Windham, the man who killed Applicant's brother. Applicant finally succeeded on June 4, 2014, after he spotted Windham riding his moped through the neighborhood, on the same street where Applicant's brother was killed years before. (T. p. 108, line 21 – p. 110, line 10; p. 118, lines 18-21). In contrast, Applicant argued he was terrified of Windham after Windham killed his brother, so he obtained his concealed weapons permit to protect himself and his family from Windham in the future. (T. p. 115, lines 5-14<sup>1</sup>). Applicant argued his encounter with Windham that night was purely coincidental. (T. p. 110, lines 18-23.)

On June 4, 2014, officers responded to a 911 call about a shooting in the Tara Village neighborhood. (T. p. 142, lines 2-14). Edward Windham was lying in the middle of the street near an overturned moped. Blood surrounded him on the pavement. The pathologist found seven gunshot wounds on Windham's body. (T. p. 365, lines 5-7). The wound to the back of the Windham's neck was fatal. (T. p. 365, lines 12-20). The pathologist believed the Windham was shot from at least two to four feet away. (T. p. 367, lines 1-9). A majority of the wounds showed the bullets entered Windham from the left and traveled to the right side of his body, or from his

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<sup>1</sup> Counsel argued in her opening, "Yeah, he had a concealed weapons permit which you will see in evidence, but my client has no criminal history. He got the concealed weapons permit after the jury acquitted Mr. Windham of killing his brother, because he was terrified that Mr. Windham was going to kill him and his other brother." (T. p. 115, lines 5-10.)

back to front. (T. pp. 367-378). One wound to his arm could have been the result of being shot while driving the moped or raising his arm. (T. p. 383, line 10 – p. 384, line 19).

Applicant, and his brother were standing on the curb near the victim. (T. p. 142, lines 5-24). The officer was advised from dispatch that the suspect was waiting with the victim for law enforcement to arrive. (T. p. 143, lines 10-16). When he arrived on scene, he asked Applicant and his brother to show him their hands and to get on their knees. (T. p. 143, lines 17-24). Applicant then removed a pistol from his waistband, set it on the ground, and complied with the officer's request. (T. p. 143, line 22 – p. 144, line 3). The officer handcuffed Applicant, read him his *Miranda* rights, and then escorted him to his patrol car. (T. p. 144, lines 10-23).

Applicant told the officer numerous times that he shot Windham in self-defense because Windham pulled a gun on him. Applicant also told officers he attended a concealed weapons class. (T. p. 145, lines 18-24, p. 150, lines 11-17). Multiple officers arrived on scene because some of the onlookers in the crowd became disorderly. (T. p. 151, lines 2-19).

There were two weapons at the crime scene: the first was the Ruger nine millimeter owned by Applicant, and the second was a .25 caliber Lorschien handgun. (T. p. 288, lines 5-16; p. 298, lines 3-5). Investigators discovered nine millimeter shell casings lying on the ground at the crime scene. (T. p. 170, lines 4-18, p. 190, lines 7-19). Crime scene investigators also found three PMC 25 caliber unfired bullets in a magazine. (T. p. 191, lines 2-8). The clip in the Ruger nine millimeter handgun was full, but a partial clip was lying nearby. (T. p. 193, lines 2-25). The Lorschien handgun was located close to the moped. There were unfired 25 caliber rounds on the ground, but no spent casings from the .25 millimeter. (T. p. 194, lines 5-23.) SLED analysts discovered during the firing of the Lorschien handgun that it would not engage another round into the chamber after firing. The

analyst had to manually push the slide for the next round to enter the chamber. (T. p. 291, lines 10-21).

#### The 911 call

During the pre-trial motions, the Solicitor asked the trial court to proffer the testimony of witness Debra Coe, who was under subpoena but refused to testify against Applicant because she was afraid. (T. p. 47, lines 11-22). Coe was an eye-witness to the murder, called 911, and gave a statement to police at the scene. (T. p. 48, lines 1-5). Counsel objected to the introduction of the 911 call, saying, "So I would object to the 911 conversation because it gets into a lot of extraneous stuff that is not actually accurate as to date and time." (T. p. 61, lines 22-24). The Solicitor acknowledged the shooting of Applicant's brother happened approximately eight years before the instant case and not "last year" as Coe indicated in her call. (T. p. 62, lines 4-10). Counsel argued:

We don't object to the earlier portion of the nine one one tape but toward the latter part she starts talking and telling the nine one one operator, no, I think this shooting must have been because his brother got shot last year and they really hate this guy.

Anyhow, I think the opinion she gave as to why this shooting happened is too prejudicial and not admissible.

(T. p. 62, lines 13-19.)

During the proffer, Coe said Windham was killed in the street in front of her house. (T. p. 51, lines 13-20). Coe also testified Windham was the alleged shooter in a prior killing that also occurred in front of her house. (T. p. 51, line 21 – p. 52, line 2). Coe testified she saw the victim riding past her house on a moped, and she spoke to him, and then she saw Applicant approach. (T. p. 53, line 12 – p. 54, line 10). Coe heard shots, ran to the front yard and saw Windham lying in the street, told Applicant she was calling 911, and then placed the call. (T. p. 54, line 1 – p. 57, line 16). Similarly, in the 911 call, Coe tells the operator she saw Windham ride down her street on the moped, and then saw Applicant walk to the corner to wait for Windham to return and then

saw Applicant shoot Windham. (State's Exhibit 2.)

The Solicitor informed the trial court he intended to call Coe as a witness and introduce her 911 call because she answered many of his questions during the in-camera hearing. (T. p. 61, lines 4-14). The Solicitor argued the statements on the 911 call were made as excited utterances and present sense impressions. (T. p. 62, lines 2-5). Applicant objected to the introduction of the 911 call, through Coe, because portions of the call referred to the earlier shooting of Applicant's brother. The Solicitor urged the trial court to listen to the 911 call because Coe's excited tone was clear from the recording. (T. p. 63, lines 1-5).

The trial court advised Coe she was under subpoena and informed her she would be held in contempt if she refused to testify. The trial court then asked an attorney with the Florence County Public Defender's Office to talk to Coe about the consequences of her refusal to testify. (T. p. 64, line 6 – p. 67, line 21).

The trial court did not rule on the admissibility of the tape prior to trial, but instead heard arguments from the State and the defense when the State attempted to introduce the tape during the testimony of the 911 operator. (T. pp. 119-123).

The court found any discrepancies between what Coe said she saw on the 911 call and what she testified to was a matter for the jury to decide in weighing the credibility of the testimony. (T. p. 125, lines 2-9). The trial court also found the testimony was relevant and not unfairly prejudicial to Applicant, as long as the jury heard the correct information about when the prior shooting actually occurred. (T. p. 124, lines 14-23, p. 125, lines 2-16). Applicant objected preliminarily to the admissibility of the 911 call because Coe was potentially unavailable to testify and Allen would not be able to cross examine her on the statements she made in the call. (T. p. 125, line 17 – p. 126, line 1). The trial court told Applicant it could only rule on the issue before it. (T. p. 126, lines

7-20). The recording, marked as State's Exhibit #2, was published to the jury. (T. p. 127, lines 1-2.)

The State rested its case without calling Coe as a witness. (T. p. 389, line 14.) Applicant moved for a mistrial on the grounds the 911 call should not have been admitted because the recording contained inadmissible hearsay, and because Applicant did not have the opportunity confront Coe. (T. p. 391, lines 1-23). The Solicitor informed the trial court Coe was still available for the defense to call as a witness, but he declined to call her because he was unsure if she would tell the truth. (T. p. 393, lines 16-25).

The trial court found there was no gap in the tape where it could be easily redacted. (T. p. 394, lines 11-20). The trial court then went on to make an extensive analysis of the Confrontation Clause and the applicability of Supreme Court case law:

In this case, the statements were made to a nine one one emergency operator by Ms. Debra Coe who called in to report an emergency, that an individual had been shot; that he was dead in the road in a particular location in Florence County.

That the shooter was still in the area, and the nine one one operator was not interrogating Ms. Coe for purposes of future presentation in Court or at trial, but was responding to a citizen emergency complaint.

Obviously, in the excited state and stress of the moment, the operator knowing no history whatsoever, Ms. Coe relates that history to the operator and the operator then properly and correctly and professionally follows up on it because law enforcement officers were responding to the scene of a shooting.

Now, whether the individual was responsible for the shooting or not, he was still at the scene.

So I would find that it is non-testimonial, that Ms. Coe is available, number one, although not presented by the State, and, number two, [Applicant] has had the opportunity to cross-examine Ms. Coe during the in-camera hearing.

So with those two prongs, the clause would not apply. Therefore, it

then goes to State evidentiary law, and that evidentiary law, as I ruled previously, under 803 one, a hearsay exception. The availability of declarant – the following is not excluded by the hearsay rule even though the declarant is available to be a witness.

One, present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter. Two, excited utterance – a statement relating to a startling event or condition, and I emphasize a statement relating to a startling event or condition, made while the declarant was under the stress of the excitement following the crime, the event or the matter at issue.

(T. p. 397, line 21 – p. 399, line 5). Finding no constitutional prohibition against the earlier admission of the call, as well as no state evidentiary considerations, the court denied Applicant's motion for mistrial. (T. p. 399, lines 6-7).

Evidence of Applicant's motive to kill Windham

Pete Farnum employed Applicant at his automotive body repair business. (T. pp. 304-305). Applicant worked at the body shop for about six months, and Farnum described him as "very smart." (T. p. 306, lines 8-23). One day Farnum realized Applicant was carrying a handgun, and he confronted him about it. (T. p. 307, lines 1-3). Applicant told Farnum he had a concealed weapons permit because a man killed his brother. The man was in prison, but not for the murder of his brother. (T. p. 307, lines 9-14). Applicant told Farnum he would kill the man eventually, and Farnum tried to talk him out of it. (T. p. 307, lines 15-23). When Farnum later heard Applicant killed Windham, he regretted not talking to police about Applicant's plan. (T. p. 308, lines 6-9). Farnum said Applicant eventually stopped coming in to work. (T. p. 309, lines 7-11).

Counsel made a motion in limine to exclude the testimony of Mr. Farnum as too remote in time to be relevant and as unfairly prejudicial. (T. p. 94, line 18 – p. 96, line 22). The trial court denied the motion, finding the statements to Farnum met the threshold test of admissibility for relevance. (T. p. 97, lines 14-16).

To corroborate and clarify the charges against Windham involving the death of Applicant's brother, the Florence County Clerk of Court testified about the indictment of Edward Windham for the murder of Robert Allen, Applicant's brother. The clerk told the jury Windham was acquitted of the murder charge and found guilty of the weapons charge. (T. p. 128, line 14 – p. 130, line 12). The jury also learned Windham received five years' imprisonment for the weapons charge related to the brother's death. (T. p. 130, lines 2-4).

Windham's wife, LaSheia Windham, testified her husband discussed the Allen brothers with her following his release from prison. (T. p. 132, line 13 – p. 133, line 13). Ms. Windham described her husband's behavior in the months leading to his death as nervous and restless. (T. p. 133, lines 20-25).

#### Applicant's opportunity to kill Windham

Vonquell Pittman lived with his brother on the street where the murder occurred. (T. p. 314, line 23 – p. 316, line 3). His house was two houses away from where Windham was shot. (T. p. 318, lines 3-9). On the night of the incident, Pittman arrived home from work and found Applicant, who was friends with Pittman's brother, cooking out with some friends at Pittman's house. (T. p. 318, line 13 – p. 319, line 23). Another witness testified Windham visited the neighborhood on his moped almost every day. (T. p. 340, lines 8-22). Windham had lived next door to Debra Coe with his grandmother years before. (T. p. 341, lines 3-20). The same witnesses testified it was not usual to see Applicant in the neighborhood. (T. p. 342, lines 10-22).

#### Applicant's Version of Events

Applicant told the jury his version of what happened that night. According to Applicant, he had family and friends who lived in Tara Village. (T. p. 414, lines 2-24). On the day of the shooting, Applicant said he went with his brother to a cook out in Tara Village and to help a friend

with his car. (T. p. 415, lines 15-18). Applicant brought his Ruger nine millimeter and an extra clip with him. (T. p. 415, lines 19-22, p. 417, lines 3-7). Applicant said he obtained his concealed weapons permit after his brother's death because he and his family received threats. (T. p. 416, lines 12-24). While at the cookout, a friend called Applicant and asked him to walk down to his house and help him with an old car that needed work. (T. p. 418, lines 6-17). Applicant claimed as he was walking, he saw Windham, who was riding on a moped, point a gun at him. (T. p. 419, lines 1-7). Applicant said that once he saw Windham raise his gun, he fired until Windham "went down." (T. p. 419, lines 14-25). Applicant claimed he asked Ms. Coe to call 911 and then stayed at the scene, despite his brother's efforts to convince him to leave. (T. p. 420, line 9 – p. 421, line 12). While he was waiting for the police, he reloaded his weapon because he feared of repercussions from Windham's friends in the neighborhood. (T. p. 422, lines 3 – 20).

On cross-examination, Applicant denied telling his former employer he had the gun because he intended to kill Windham, but he acknowledged he may have mentioned "something connected with [his] brother." (T. p. 427, lines 6-21). Applicant denied knowing Windham was frequently in the neighborhood. (T. p. 433, lines 13-21).

### III. Current Application

Applicant claims he is being held in custody unlawfully, alleging:

1. Ineffective assistance of counsel:
  - a. Failing to argue any mitigating circumstances during the sentencing phase that may have reduced Applicant's sentence;
  - b. Failing to object to the same evidence that was already admitted by other witnesses;
  - c. Failing to object to the trial court not waiting the twenty-four hours period that the statute requires before sentencing Applicant; and
  - d. Failing to adequately argue issues regarding the indictment.

Applicant requests relief in the form of a new trial.

Attached to this return and incorporated herein are the Florence County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, the trial transcript, and the records of this PCR action.

#### IV. Response to Allegation of Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of trial counsel are without merit. To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To establish prejudice, the applicant must prove "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.

*Strickland* requires 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*, 466 U.S. 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). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

Applicant cannot satisfy either requirement of *Strickland*. However, the record likely does not refute or disprove Applicant's allegations of ineffective assistance of trial counsel; therefore, the State requests an evidentiary hearing to fully resolve the issues. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (providing an evidentiary hearing shall be held when a PCR application "alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court").

#### V. Any Future Amendments & Invocation of Discovery

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, SCRPC. *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 Id.* at 245, 834 S.E.2d at 203 (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.”).

Pursuant to section 17-27-150 of the South Carolina Code, 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. Further, 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. As noted above, 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. *See Love*, 428 S.C. 231, 834 S.E.2d 196.

**VI. Any and All other Allegations**

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

**VII. Conclusion**

WHEREFORE, the State requests an evidentiary hearing be held on the claims of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

SAMUEL L. KEY  
Assistant Attorney General

By: s/ Samuel L. Key  
ATTORNEYS FOR RESPONDENT  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211

July 15, 2020

1 State of South Carolina ) **TRANSCRIPT OF RECORD**

2 COUNTY OF FLORENCE ) CASE NO. : 2019-CP-21-1634

3 -----

4 June 13, 2023

5 **BEFORE:** The Honorable Debra McCaslin

6 -----

7

8 Corey N. Allen, )

9 Applicant, )

10 vs. )

11 State of South Carolina, )

12 -----

13 **APPEARANCES:**

14 Russell Barlow, Esquire  
Attorney for the State of South Carolina

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16 Jonathan D. Waller, Esquire  
Attorney for the Defendant.

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19 Julie A. Kevish  
Official Court Reporter

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June 13, 2023

**P-R-O-C-E-E-D-I-N-G-S**

THE COURT: Call the case, please.

MR. BARLOW: Thank you, Your Honor, may it please the Court?

THE COURT: Yes, sir.

MR. BARLOW: Russ Barlow on behalf of the State of South Carolina. This is the post-conviction relief -- Your Honor, we need to take a moment, they need to secure him.

THE COURT: Sure. Alright, let's try it again.

MR. BARLOW: Thank you, Your Honor. May it please the Court?

THE COURT: Yes, sir.

MR. BARLOW: Russ Barlow on behalf of the State of South Carolina. This is the post-conviction relief matter of Corey N. Allen versus the State, case number 2019-CP-21-1634 out of Florence County. Applicant was indicted at the December 14th term of Florence County Grand Jury for murder, 2014-GS-21-1340. Applicant was represented by Rosemary Parham and Solicitor Ed Clements, III prosecuted the case. Applicant's case proceeded to a jury trial on March 21st through 23rd, 2016 before the Judge R. Knox McMahon. The jury convicted Applicant of murder. Judge McMahon sentenced Applicant to 40 years imprisonment and Applicant appealed. Chief of Public Defender, Robert M. Dudek perfected Applicant's

1 appeal and the Court of Appeals affirmed Applicant's conviction  
2 and sentence in an unpublished Opinion, State V. Allen, Opinion  
3 Number 2019-UP-152 filed May 1, 2019. The Remittitur was  
4 returned to the lower court on May 23, 2019. Applicant timely  
5 commenced this PCR action on June 19, 2019 asserting various  
6 allegations of ineffective assistance of counsel. Applicant is  
7 requesting relief in the form of a new trial. Before this  
8 Court are the Florence County Clerk of Court records,  
9 Applicant's records from the South Carolina Department of  
10 Corrections, Applicant's appellate records which include the  
11 entire trial transcript, and the records of this PCR actions.  
12 At this time we would ask Mr. Waller to indicate which  
13 allegations he intends to move forward on.

14 THE COURT: First, let me address you, Mr. Allen.  
15 This is your PCR hearing, your post-conviction relief. The  
16 only thing this Court can do for you, I can't reduce your time,  
17 I can't send you home, all I can do is send you back to the  
18 lower court where you would be tried again. Do you understand  
19 that?

20 THE APPLICANT: Yes, Your Honor.

21 THE COURT: Do you wish to proceed?

22 THE APPLICANT: Yes, Your Honor.

23 THE COURT: Alright, tell me about it, Mr. Waller.  
24 I've got, one, two, three, four, it looks like four  
25 allegations. If you could let the Court know what you're

1 moving forward on?

2 MR. WALLER: Yes, Your Honor. Essentially, we're  
3 going forward on the allegation listed as B. Your Honor, as  
4 far as C and D, those aren't applicable in this case, and as  
5 the Court just addressed with Mr. Allen, there's nothing in  
6 mitigating circumstances during the sentencing that would be  
7 able to help him today. So essentially, there were some  
8 complex evidentiary issues that we felt ultimately led to this  
9 conviction, and so we're going forward under what he has  
10 alleged as item B.

11 THE COURT: Okay. So if I'm looking, I want to make  
12 sure I'm looking at the right allegation, that trial counsel  
13 was ineffective when she failed to object to the same evidence  
14 that was already admitted by another witness.

15 MR. WALLER: That's correct, Your Honor. There were  
16 some unique evidentiary issues involved in this case that  
17 ultimately were pivotal in Mr. Allen's conviction, that's  
18 correct.

19 THE COURT: Alright, well, let me ask you, Mr. Allen,  
20 do you agree with what your attorney just said?

21 THE APPLICANT: I'm not sure, Your Honor.

22 THE COURT: Well, then let me go over it with you  
23 because this is your day in court and this is going to be your  
24 only day in court, do you understand? He's saying that you're  
25 withdrawing your first allegation, that your lawyer failed to

1 argue any mitigating circumstances. He says that you all are  
2 withdrawing that allegation and also withdrawing "C", which is  
3 failing to object to the Court for not waiting for a 24-hour  
4 period. I'm not aware of any statute that requires a 24-hour  
5 period before sentencing someone, Mr. Allen, and your lawyer  
6 has acknowledged that and says you all are going to withdraw  
7 that allegation. You're going to go forward on B. What about  
8 D, Mr. Waller, for not arguing issues regarding the indictment?

9 MR. WALLER: Your Honor, I'm not aware of any issues  
10 that we could one thousand percent regarding the indictment, I  
11 don't believe there are any issues that could have been raised  
12 prior to the jury being sworn in or any issues with the waiving  
13 those once the trial commenced without them being raised before  
14 the jury sworn, so I'm not aware of any issues.

15 THE COURT: So Mr. Allen, you're withdrawing all the  
16 other, one, two, three allegations, and going forward on one.  
17 Do you understand that?

18 THE APPLICANT: Yes, Your Honor.

19 THE COURT: Is that what you wish to do?

20 THE APPLICANT: Can I talk to my lawyer first?

21 THE COURT: Sure, you can.

22 THE APPLICANT: I'm ready, Your Honor.

23 THE COURT: Did you have enough time to talk to your  
24 lawyer, Mr. Allen?

25 THE APPLICANT: Yes.

1 THE COURT: And you're withdrawing those three counts  
2 that I mentioned earlier and going forward on the one?

3 THE APPLICANT: Yes, Your Honor.

4 THE COURT: And you're in agreement with that?

5 THE APPLICANT: Yes, Your Honor.

6 THE COURT: Okay, then let's proceed. Mr. Waller,  
7 you can call your first witness.

8 MR. WALLER: Thank you, Your Honor. I will call  
9 Rosemary Parham.

10 ROSEMARY PARHAM WAS DULY SWORN AT THIS TIME AND  
11 TESTIFIED AS FOLLOWS:

12 DIRECT EXAMINATION

13 BY MR. WALLER:

14 Q. Good morning, Ms. Parham, how are you today?

15 A. Good morning. I'm fine.

16 Q. How did you come to represent Mr. Allen?

17 A. His family came to my office and met with me and ended  
18 up hiring me.

19 Q. And if you could, would you, I guess, a little bit,  
20 explain to the Court what the allegations were surrounding Mr.  
21 Allen?

22 A. Well, he was charged with murder. It was never a  
23 question of whether he shot the victim. The victim was armed  
24 on a moped in Tara Village which is a real dangerous --  
25 probably the most dangerous neighborhood, one of the most in

1 Florence, and so Corey had always told me that he went there  
2 for a barbecue and he was called to go down the street. He had  
3 a concealed weapons permit. His brother had been murdered, you  
4 know, years earlier, and so he was always fearful of his  
5 safety, and Mr. Windham, who is actually the man who killed his  
6 brother, was riding on a moped, and my client, Corey, said that  
7 when Mr. Windham saw him he pulled a gun up and then Corey  
8 pulled his concealed weapon and shot and killed Mr. Windham,  
9 and so there was a real debate over who pulled the gun first.  
10 You know, the State's theory was that Corey had gone there  
11 because he knew Mr. Windham would be coming through the  
12 neighborhood on his moped routinely, and our theory was that  
13 Mr. Windham was a terribly violent man who had already done  
14 harm to Mr. Allen's family and that Mr. Allen was just  
15 protecting himself.

16 Q. So Mr. Windham had killed Mr. Allen's brother years  
17 prior?

18 A. Correct.

19 Q. Was he found not guilty of the murder but convicted of  
20 some other ancillary?

21 A. He was. So he was -- Mr. Windham was acquitted of the  
22 murder but found guilty of the gun charge, so I think his  
23 sentence was, like, five years.

24 Q. And so, obviously, Mr. Corey Allen had had some  
25 involvement with this victim at some point?

1 A. Yes, I believe so, yeah.

2 Q. Do you know if he obtained his concealed weapons permit  
3 before or after his brother's death?

4 A. I'm not sure. I think it was after his brother's death  
5 for his safety.

6 Q. Okay. So there was no question that Mr. Allen, Corey  
7 Allen, shot Mr. Windham?

8 A. Right. There's no question. In fact, after he shot him  
9 he stayed there and called 911, he stayed at the scene.

10 Q. Was Mr. Windham armed at the time?

11 A. He was.

12 Q. Do you know if any GSR testing was done on Mr. Windham?

13 A. There was GSR evidence, if I remember correctly, and it  
14 was by the female that ended up getting in trouble with SLED  
15 that she -- you know, her GSR reporting, so I kind of thought  
16 this case might be reversed on those grounds, but then I think  
17 SLED gave a letter to the Solicitor's Office in Florence saying  
18 that this case was not impacted by that, but I was not his  
19 appellate lawyer and so I don't know all the details of that.

20 Q. Sure. And that took place at -- well, came to light  
21 after this trial?

22 A. Right, right.

23 Q. So as you were representing Mr. Allen, what was your  
24 all's theory of the case?

25 A. That he shot Mr. Windham in self defense.

1 Q. And what steps did you take to, you know, assist with  
2 that in developing that as you got ready for trial?

3 A. Well, I met with my client a lot. We talked about it.  
4 His story never changed in all of the time that I talked with  
5 Corey. I mean, his story was always consistent about what  
6 happened that day. You know, we interviewed witnesses, we  
7 watched and listened to tapes, there was a 911 call in this  
8 case. I interviewed the medical examiner before trial, because  
9 that was a big issue. I don't remember all the details, but  
10 the trajectory of how the bullet went through his body and  
11 whether he had discharged the gun or pulled the gun, you know,  
12 it was an issue of who pulled the gun first type of thing so,  
13 you know, we tried to look at everything.

14 Q. Okay. I want to talk a little bit about the 911 tape,  
15 and that was, the call was made by a neighbor, is that your  
16 understanding?

17 A. Correct, Ms. Coe (ph) I think was her name.

18 Q. And did she testify in front of the jury?

19 A. She did not. That was one of the basis of the appeal, I  
20 think, was that issue.

21 Q. I know it's been nine years now, but do you recall kind  
22 of how that unfolded? Did she testify at all?

23 A. No. I don't think she did. I think I objected to the  
24 911 call as being prejudicial and having some hearsay. I mean,  
25 I thought pieces of the 911 call were excited utterances, I

1 think we concede to that, but the last part of the 911 call  
2 dealt with, she talked about, I don't know, something about the  
3 other shooting, and so I thought it kind of gave rise to the  
4 previous shooting between Mr. Windham and his brother, and so I  
5 objected, and I think the Solicitor said, well, she's gonna  
6 testify later so we think it should come in. So the judge ends  
7 up letting it in, but then the Solicitor never called her  
8 before he rested so then I moved for a mistrial on that ground  
9 and the judge overruled it.

10 Q. Okay. She sensibly said it was related to the shooting,  
11 she said last year, but it was farther back, but it was Mr.  
12 Allen's brother and Mr. Windham?

13 A. Correct. I think that's what she was talking about, but  
14 she had the time wrong, I just thought it was prejudicial and  
15 it shouldn't have been in front of the jury.

16 Q. Okay. The State also called a former employee --  
17 employer of Mr. Allen to testify. Do you recall that?

18 A. I do, but I don't remember -- was that the fellow that  
19 testified about whether he told him, why he had the gun?

20 Q. Correct.

21 A. Okay. Yes, I do remember that.

22 Q. When did you learn of that witness and what did you do  
23 to prepare for that?

24 A. I don't think they ever told me about that witness, if I  
25 remember correctly, and I was not able to prepare.

1 Q. Okay. During, as you got ready for trial what -- I  
2 guess, what further -- what details did you and Mr. Allen  
3 discuss that you may not have known at the beginning? I know  
4 that's not a great question.

5 A. I don't know. You know, we obviously talked about  
6 whether he should testify or not, and you know, I kind of  
7 thought he had to testify because of just the circumstances of  
8 the case and because it was self defense. I don't remember,  
9 you know, what else.

10 Q. Was he able to help you in developing the self defense  
11 arguments?

12 A. Not really. I mean, he was always very consistent on  
13 his -- the events of that day and why he did what he did, but  
14 Mr. Allen is more of a simple-minded man, and so he was not  
15 able to help with the conceptional legal arguments.

16 Q. He was able to provide you with information and  
17 potential witnesses, maybe?

18 A. Correct.

19 Q. But he never moved? I mean, he shot Mr. Windham and  
20 then he stayed right there?

21 A. He did.

22 Q. And waited for law enforcement and cooperated with law  
23 enforcement, right?

24 A. He did, uh-huh.

25 Q. His was also -- his other brother was also charged and

1 indicted; is that right?

2 A. Right.

3 Q. Were they tried together?

4 A. No.

5 MR. WALLER: May I beg the Court's indulgence?

6 THE COURT: Take your time.

7 MR. WALLER: Thank you, Ms. Parham. I have no  
8 further questions.

9 THE COURT: Thank you, Mr. Waller. Mr. Barlow?

10 MR. BARLOW: Your Honor, may it please the Court?

11 THE COURT: Absolutely. Go ahead.

12 **CROSS-EXAMINATION**

13 BY MR. BARLOW:

14 Q. Ms. Parham, how are you doing today?

15 A. Good. How are you?

16 Q. Good. Thank you. As to the allegation about the 911  
17 call, you objected today that, correct?

18 A. I did.

19 Q. And do you recall what the judge's finding was on that?

20 A. Well, I think the judge ended up allowing the evidence  
21 about the prior shooting to come in to the case, he did, in  
22 fact, because I think they let the Clerk testify about the  
23 prior shooting. Right.

24 Q. And do you recall that the judge found that the jury  
25 weighs the evidence?

1 A. Yes, yes.

2 Q. And do you recall what the Appellate Court found in the  
3 issue that was raised?

4 A. I think they found that it was proper for motive.

5 Q. And do you recall objecting to Mr. Farnam (ph)  
6 testifying?

7 A. Which one was Barnam (ph)?

8 Q. Mr. Farnam (ph) --

9 A. Farnam (ph) --

10 Q. -- is the employer.

11 A. I did object to him.

12 Q. Do you recall making a motion in limine first?

13 A. I believe I did that, yes --

14 Q. Okay.

15 A. -- because they hadn't told me about him. Was that the  
16 basis, I think so, yeah.

17 MR. BARLOW: Nothing further, Your Honor.

18 THE COURT: Anything else, Mr. Waller?

19 MR. WALLER: Nothing further, Your Honor.

20 THE COURT: May I excuse Ms. Parham?

21 MR. WALLER: Yes, Your Honor, no objection.

22 THE WITNESS: Thank you.

23 THE COURT: Thank you, Ms. Parham. Have a safe trip.

24 Mr. Waller, you can call your next witness.

25 MR. WALLER: Your Honor, I would call Allen.

1                   **COREY ALLEN WAS DULY SWORN AT THIS TIME AND TESTIFIED**  
2 **AS FOLLOWS:**

3                                   **DIRECT EXAMINATION**

4 BY MR. WALLER:

5       Q.     Good morning, Mr. Allen. How are you today?

6       A.     Good morning. Alright.

7       Q.     Mr. Allen, if you could make sure you speak into that  
8 microphone. Keep your voice up. I talked to you and you've  
9 got a little bit of a quiet voice so make sure our court  
10 reporter can hear everything you say so we can make a good  
11 record. I want to kind of take you back in time, if I can, to  
12 when you were first arrested on these charges. Do you recall  
13 that?

14      A.     Somewhat, yeah?

15      Q.     Okay. Now, when you were first arrested, how long after  
16 you were arrested did you get a lawyer?

17      A.     I want to say within a week, maybe somewhere around  
18 there.

19      Q.     Was Ms. Parham your first and only lawyer, or did you  
20 have someone else before her?

21      A.     They issued a lawyer.

22      Q.     Before Ms. Parham?

23      A.     Before her, yeah.

24      Q.     Okay. Did you have any -- did you have a bond hearing  
25 or anything with that prior lawyer?

- 1 A. No.
- 2 Q. Did you meet with them in any way?
- 3 A. Just that once, yes, once.
- 4 Q. Right before your bond hearing?
- 5 A. Uh-huh.
- 6 Q. Okay. How did you come to retain Ms. Parham?
- 7 A. My family.
- 8 Q. Do you recall when you first met with her?
- 9 A. No, I don't -- no.
- 10 Q. How long did she represent you, how long between when  
11 you were arrested until your trial?
- 12 A. That pretty much, the time between when I was arrested  
13 before my trial and I think she did my appeal, I think that was  
14 the last time.
- 15 Q. Do you remember about how long a time frame that was?
- 16 A. Time frame? About two years.
- 17 Q. In that time how many times do you think you met with  
18 Ms. Parham?
- 19 A. Maybe three to four.
- 20 Q. And did you all have a chance to go over your  
21 constitutional rights?
- 22 A. No, I can't say that I have, I can't say I didn't  
23 either, though.
- 24 Q. Did you all have a chance to go over any of the  
25 discovery in your case, I know there was a lot of it?

1 A. Yeah.

2 Q. At one point Ms. Parham in a motion to the Court said  
3 there was over, I believe, 11 thousand pages of stuff. Did you  
4 all have a chance to --

5 A. No.

6 Q. -- to at least discuss that? I know you all didn't look  
7 at -- you didn't look at all thousand pages, but --

8 A. Yeah, somewhat.

9 Q. Did you understand all your conversations with her?

10 A. No, I haven't, I did not.

11 Q. During your conversations with Ms. Parham, when was the  
12 decision made that you were going to go to trial?

13 A. I don't know when that was made. I never received a  
14 offer or anything so --

15 Q. Let me ask it this way. When did you decide you wanted  
16 to go to trial?

17 A. When she came and told me I was going.

18 Q. Okay.

19 A. I think --

20 Q. There was no question ever of pleading guilty or  
21 anything like that?

22 A. No.

23 Q. Okay. So you always maintained that you shot Mr.  
24 Windham because he pulled out a gun and pointed at you; is that  
25 correct?

1 A. Yeah, that's correct.

2 Q. And you had -- or your family had some history with  
3 him --

4 A. Yes.

5 Q. -- that he was involved in your brother's killing?

6 A. Yeah.

7 Q. I asked this of Ms. Parham, when did you get your  
8 concealed weapons permit, before or after your brother was  
9 killed?

10 A. After he passed, after he was killed.

11 Q. Did you have any sort of mental health issues related to  
12 his death or anything like that?

13 A. If it was it wasn't diagnosed, I can't say I haven't.

14 Q. So you weren't seeing any counselor for anxiety or  
15 anything like that?

16 A. No.

17 Q. Okay. When the trial was getting ready to start were  
18 you and Ms. Parham able to talk back and forth and then she  
19 answer your questions and you answer her questions? Were you  
20 able to have communication, you know, the day of the trial and  
21 as the trial got going?

22 A. Yeah.

23 Q. Did you all talk about any potential witnesses that  
24 would be involved?

25 A. Yeah.

1 Q. Okay. Did you give her any names of any witnesses that  
2 you wanted her to talk to?

3 A. Yeah, I did that before the trial.

4 Q. Do you know if she talked to them?

5 A. I don't know if she talked to them or not.

6 Q. In your application you raise an allegation that there  
7 was evidence that had already been admitted by the witnesses  
8 that she didn't object to. What specifically are you talking  
9 about when you say that?

10 A. Can you repeat that one more time for me?

11 Q. Sure. In your application you said that Ms. Parham was  
12 ineffective for failing to object to the same evidence that was  
13 already admitted by other witnesses. I just, so Judge McCaslin  
14 can be clear, I just want to see what exact evidence you're  
15 talking about.

16 A. I'm not sure at the time. I got -- when I first did  
17 that PCR I got the paperwork but I didn't bring it.

18 Q. Let me ask it this way. What do you think Ms. Parham  
19 did wrong in your case?

20 A. I would say I have a witness, I had two witnesses that  
21 never came, I don't know if she talked to or not.

22 Q. Who are those witnesses?

23 A. One of them was a daughter of one of my friends, and the  
24 other one is somebody, my brother knew him, I didn't know him.

25 Q. And that was somebody you asked her to talk to?

1 A. Yeah.

2 Q. Mr. Allen, as you all were preparing for trial, did you  
3 and Ms. Parham discuss what you would have to show to be able  
4 to claim self defense?

5 A. No.

6 Q. Did you all discuss the fact that even though you had a  
7 concealed weapons permit the fact that you were carrying a  
8 weapon? Did you discuss how that might affect your self  
9 defense claim?

10 A. Can you repeat that one more time, please?

11 Q. Did you and Ms. Parham discuss the fact that you were  
12 carrying a weapon and how that might affect your ability to  
13 raise a self defense claim?

14 A. No.

15 Q. When you were getting ready for court what did you think  
16 you all were going to present that would help you?

17 A. The two witnesses along with the third witness that  
18 didn't come.

19 Q. How did you think those witnesses were going to help  
20 you? What did you think that the jury would understand from  
21 their testimony?

22 A. Well, a friend of mine, her daughter is friends with --  
23 her daughter is friends with -- is close friends with somebody  
24 that friends with him, and she said that she told him that we  
25 was out there, that's one of them.

1 Q. Okay.

2 A. And the other guy, he was locked -- incarcerated with  
3 the deceased, and what he said that the deceased told him, so  
4 that would have helped.

5 Q. And you're not sure if she was able to get in contact  
6 with him or not?

7 A. The one guy I think she was able to get in contact with,  
8 but I'm not sure. I know she didn't get in contact with the  
9 friend of mine's daughter.

10 Q. Were you all able to discuss the 911 call from Ms. Coe  
11 (ph) at all?

12 A. I want to say I did, but I can't remember, this was over  
13 close to nine years ago.

14 Q. How about your former employer, were you able to discuss  
15 him?

16 A. No.

17 Q. Was that something that you all were aware of until you  
18 got to court that he was going to testify?

19 A. I wasn't, I don't know about her.

20 Q. About how long before your trial had you last worked for  
21 him?

22 A. Before the trial? The trial was 2016. I worked for him  
23 in 2010, so about six years.

24 Q. Okay. Mr. Allen, I don't have any further questions for  
25 you. Is there anything you think I've left out or neglected to

1 ask you that Judge McCaslin should know about Ms. Parham's  
2 representation of you?

3 A. No, not at the moment, no.

4 Q. Please answer any questions Mr. Barlow has.

5 A. Alright.

6 MR. BARLOW: Beg the Court's indulgence.

7 THE COURT: Yes, take your time.

8 MR. BARLOW: Your Honor, no questions from the State.

9 THE COURT: Thank you.

10 MR. WALLER: Nothing further from the Applicant, Your  
11 Honor.

12 THE COURT: Okay. Anything further from the State?

13 MR. BARLOW: Your Honor, the State has no witnesses.

14 THE COURT: Thank you. Mr. Waller, anything you want  
15 to add? I'm going to take it under advisement.

16 MR. WALLER: Just, we would ask Your Honor to review  
17 the portions of the transcript that deal with the 911 call, as  
18 well as Ms. Parham's motions to exclude the witness, as well as  
19 motion for mistrial based on the evidentiary rules and the fact  
20 that Ms. Coe (ph) did not testify. We'd just ask you to review  
21 those.

22 THE COURT: Okay. I certainly will. I'll go over  
23 all of that. I have a copy of the transcript. Thank you, Mr.  
24 Allen, I'll issue an order hopefully in the next couple of  
25 weeks.

1           MR. WALLER: Your Honor, one thing, before I forget,  
2 I had previously filed a motion for discovery and funding for  
3 discovery seeking, and I believe Ms. Parham touched on it. The  
4 GSR analyst for SLED was subsequently terminated and had been,  
5 I guess her analysis, her methodology was improper, and so I  
6 sought to gain some of those records, there is a letter, I  
7 believe it's in your packet is the reason we're bringing it up  
8 to the Court, that was provided from SLED to the Solicitor's  
9 Office, actually, that this case and actually no cases in this  
10 circuit were affected by her testing results. So that's in  
11 your packet and so I wanted to address it before you saw it and  
12 didn't know what it was, and we have no objection to it being  
13 made a Court's Exhibit, but it was something inadvertently in  
14 your packet.

15           MR. BARLOW: Yes, Your Honor. My assistant  
16 inadvertently added it to your packet. I believe it is in your  
17 packet that she sent to you and it is a letter from SLED that  
18 Mr. Waller got through discovery.

19           THE COURT: And correct me if I'm wrong, all of that  
20 was determined by the Appellate Court, wasn't it?

21           MR. BARLOW: No.

22           MR. WALLER: No. It was mentioned in a footnote, but  
23 it wasn't --

24           THE COURT: Is this part of your PCR? I don't see it  
25 as your allegations in here. I'm going on the one allegation.

1                   MR. WALLER: It's not, Your Honor. I just wanted to  
2 address it because Mr. Barlow had mentioned that it had been  
3 inadvertently put in your packet, that's the only reason I'm  
4 mentioning it.

5                   THE COURT: Alright. Well, I'm going to take it  
6 under advisement.

7                   MR. BARLOW: Thank you, Your Honor.

8                   MR. WALLER: Thank you, Your Honor.

9                   THE COURT: Thank you.

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1 CERTIFICATE

2 STATE OF SOUTH CAROLINA

3 COUNTY OF FLORENCE

4 I, Julie A. Kevish, Official Court Reporter for the  
5 State of South Carolina, do hereby certify that the foregoing  
6 is a true, accurate and complete Transcript of Record of the  
7 proceedings had and evidence introduced in the Court of Common  
8 Pleas for Florence County, South Carolina, on the 13th of June,  
9 2023.

10 I do further certify that I am neither of kin,  
11 counsel, nor interest to any party hereto.

12 June 13, 2023

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JULIE A. KEVISH  
OFFICIAL COURT REPORTER

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FILED

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF FLORENCE 2023 NOV 13 PM 3:45 ) FIFTH JUDICIAL CIRCUIT

Cory N. Allen, #367495, )  
DORIS POULOS O'HARA )  
CCCP & GS )  
FLORENCE COUNTY, SC )  
Applicant, )

v. )

**ORDER OF DISMISSAL  
WITH PREJUDICE**

State of South Carolina, )  
Respondent. )

Presiding Judge: Hon. Debra R. McCaslin  
Applicant's Attorney: Jonathan D. Waller, Esq.  
Respondent's Attorney: D. Russell Barlow, II, Esq.  
Trial Counsel: Rose Mary Parham, Esq.  
Date of Hearing: June 13, 2023  
Court Reporter: Julie A. Kevish

This matter comes before the Court by way of Cory N. Allen's (Applicant) application for post-conviction relief (PCR) filed on June 19, 2019. Respondent, the State of South Carolina, filed its Return on July 20, 2020, requesting an evidentiary hearing to resolve the claims set forth in the application.

On June 13, 2023, an evidentiary hearing was held at the Florence County Courthouse before the Honorable Debra R. McCaslin. Applicant was present and represented by Jonathan D. Waller, Esquire. Assistant Attorney General D. Russell Barlow, II, represented Respondent. Applicant proceeded forward on the second claim set forth in his original application. In support of these claims, Applicant testified on his own behalf, and Respondent presented testimony from Rose Mary Parham, Esquire (Trial Counsel).

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish

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*Doris Poulos O'Hara*  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice.

#### **PROCEDURAL HISTORY**

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted at the December 2014 Florence County Grand Jury term for Murder, Accessory to Murder Before the Fact, and Accessory to Murder After the Fact (2014-GS-21-1340). Applicant was represented by Rose Mary Parham, Esquire, of the Parham Law Firm, LLC. Twelfth Circuit Solicitor E. L. Clements, III, prosecuted the case.

Applicant's case proceeded to a jury trial on March 21-23, 2016, before the Honorable R. Knox McMahon. The jury convicted Applicant of Murder. Judge McMahon sentenced Applicant to forty years imprisonment.

Applicant filed a timely Notice of Appeal. Chief Appellate Defender Robert M. Dudek perfected Applicant's appeal by filing a brief to the Court of Appeals presenting the following issue:

- I. Whether the court erred by refusing to redact the portion of the 911 call where Coe speculated about the motive for the shooting being a prior incident, since this speculation was no longer an excited utterance or present sense impression, and it should have been excluded given its tendency to confuse the jury, and its extremely prejudicial effect

The Court of Appeals affirmed Applicant's conviction and sentence. State v. Allen, Op. No. 2019-UP-152 (S.C. Ct. App. filed May 1, 2019). The Remittitur was returned to the lower court on May 23, 2019.

#### **FACTS GIVING RISE TO THE CONVICTION**

The State's theory of the case was clear: Applicant waited years to seek revenge on Edward

Windham (Windham), the man who killed Applicant's brother. Applicant finally succeeded on June 4, 2014, after he spotted Windham riding his moped through the neighborhood on the same street where Applicant's brother was killed years before. (Trial Tr. p. 108, l. 21 – p. 110, l. 10; p. 118, ll. 18-21). In contrast, Applicant argued he was terrified of Windham after Windham killed his brother, so he obtained his concealed weapons permit to protect himself and his family from Windham in the future. (Trial Tr. p. 115, ll. 5-14<sup>1</sup>). Applicant argued his encounter with Windham that night was purely coincidental. (Trial Tr. p. 110, ll. 18-23.)

On June 4, 2014, officers responded to a 911 call about a shooting in the Tara Village neighborhood. (Trial Tr. p. 142, ll. 2-14). Windham was lying in the middle of the street near an overturned moped. Blood surrounded him on the pavement. The pathologist found seven gunshot wounds on Windham's body. (Trial Tr. p. 365, ll. 5-7). The wound to the back of Windham's neck was fatal. (Trial Tr. p. 365, ll. 12-20). The pathologist believed the Windham was shot from at least two to four feet away. (Trial Tr. p. 367, ll. 1-9). Most of the wounds showed the bullets entered Windham from the left and traveled to the right side of his body or from his back to front. (Trial Tr. pp. 367-378). One wound to his arm could have resulted from being shot while driving the moped or raising his arm. (Trial Tr. p. 383, l. 10 – p. 384, l. 19).

Applicant and his brother were standing on the curb near the victim. (Trial Tr. p. 142, ll. 5-24). Dispatch advised the officer that the suspect would remain with the victim until law enforcement arrived. (Trial Tr. p. 143, ll. 10-16). When he arrived on the scene, he asked Applicant and his brother to show him their hands and to get on their knees. (Trial Tr. p. 143, ll.

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<sup>1</sup> Trial Counsel argued in her opening, "Yeah, he had a concealed weapons permit which you will see in evidence, but my client has no criminal history. He got the concealed weapons permit after the jury acquitted Mr. Windham of killing his brother, because he was terrified that Mr. Windham was going to kill him and his other brother." (Trial Tr. p. 115, ll. 5-10.)

17-24). Applicant then removed a pistol from his waistband, set it on the ground, and complied with the officer's request. (Trial Tr. p. 143, l. 22 – p. 144, l. 3). The officer handcuffed Applicant, read him his Miranda<sup>2</sup> rights, and then escorted him to his patrol car. (Trial Tr. p. 144, ll. 10-23).

Applicant told the officer numerous times that he shot Windham in self-defense because Windham pulled a gun on him. Applicant also told officers he attended a concealed weapons class. (Trial Tr. p. 145, ll. 18-24, p. 150, ll. 11-17). Multiple officers arrived on the scene because some of the onlookers in the crowd became disorderly. (Trial Tr. p. 151, ll. 2-19).

There were two weapons at the crime scene: the first was the Ruger nine-millimeter owned by Applicant, and the second was a .25 caliber Lorisin handgun. (Trial Tr. p. 288, ll. 5-16; p. 298, ll. 3-5). Investigators discovered nine-millimeter shell casings lying on the ground at the crime scene. (Trial Tr. p. 170, ll. 4-18, p. 190, ll. 7-19). Crime scene investigators found three PMC 25 caliber unfired bullets in a magazine. (Trial Tr. p. 191, ll. 2-8). The Ruger nine-millimeter handgun clip was full, but a partial clip was lying nearby. (Trial Tr. p. 193, ll. 2-25). Law enforcement located the Lorisin handgun close to the moped. There were unfired 25 caliber rounds on the ground, but no spent casings from the .25 millimeter. (Trial Tr. p. 194, ll. 5-23.) During the firing of the Lorisin handgun, SLED analysts discovered that it would not engage another round into the chamber after firing. The analyst had to manually push the slide for the next round to enter the chamber. (Trial Tr. p. 291, ll. 10-21).

#### *THE 911 CALL*

During the pre-trial motions, the Solicitor asked the trial court to proffer the testimony of witness Debra Coe (Coe), who was under subpoena but refused to testify against Applicant because she was afraid. (Trial Tr. p. 47, ll. 11-22). Coe was an eyewitness to the murder, called 911, and

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

gave a statement to police at the scene. (Trial Tr. p. 48, ll. 1-5). Trial Counsel objected to the introduction of the 911 call, saying, "So I would object to the 911 conversation because it gets into a lot of extraneous stuff that is not actually accurate as to date and time." (Trial Tr. p. 61, ll. 22-24). The Solicitor acknowledged the shooting of Applicant's brother happened approximately eight years before the instant case and not "last year," as Coe indicated in her call. (Trial Tr. p. 62, ll. 4-10). Trial Counsel argued:

We don't object to the earlier portion of the nine one one tape but toward the latter part she starts talking and telling the nine one one operator, no, I think this shooting must have been because his brother got shot last year and they really hate this guy. Anyhow, I think the opinion she gave as to why this shooting happened is too prejudicial and not admissible.

(Trial Tr. p. 62, ll. 13-19.)

During the proffer, Coe said Windham was killed in the street in front of her house. (Trial Tr. p. 51, ll. 13-20). Coe also testified Windham was the alleged shooter in a prior killing that also occurred in front of her house. (Trial Tr. p. 51, l. 21 – p. 52, l. 2). Coe testified she saw the victim riding past her home on a moped, and she spoke to him, and then she saw Applicant approach. (Trial Tr. p. 53, l. 12 – p. 54, l. 10). Coe heard shots, ran to the front yard, saw Windham lying in the street, told Applicant she was calling 911, and then placed the call. (Trial Tr. p. 54, l. 1 – p. 57, l. 16). Similarly, in the 911 call, Coe tells the operator she saw Windham ride down her street on the moped, saw Applicant walk to the corner to wait for Windham to return, and then saw Applicant shoot Windham. (State's Exhibit 2.)

The Solicitor informed the trial court he intended to call Coe as a witness and introduce her 911 call because she answered many of his questions during the in-camera hearing. (Trial Tr. p. 61, ll. 4-14). The Solicitor argued the statements on the 911 call were made as excited utterances and present sense impressions. (Trial Tr. p. 62, ll. 2-5). Applicant objected to introducing the 911

call through Coe because portions of the call referred to the earlier shooting of Applicant's brother. The Solicitor urged the trial court to listen to the 911 call because Coe's excited tone was clear from the recording. (Trial Tr. p. 63, ll. 1-5).

The trial court advised Coe she was under subpoena and informed her she would be held in contempt if she refused to testify. The trial court then asked an attorney with the Florence County Public Defender's Office to talk to Coe about the consequences of her refusal to testify. (Trial Tr. p. 64, l. 6 – p. 67, l. 21).

The trial court did not rule on the admissibility of the tape before trial but instead heard arguments from the State and the defense when the State attempted to introduce the tape during the testimony of the 911 operator. (Trial Tr. pp. 119-123).

The court found any discrepancies between what Coe said she saw on the 911 call and what she testified to was a matter for the jury to decide in weighing the credibility of the testimony. (Trial Tr. p. 125, ll. 2-9). The trial court also found that the testimony was relevant and not unfairly prejudicial to Applicant, as long as the jury heard the correct information about when the prior shooting occurred. (Trial Tr. p. 124, ll. 14-23, p. 125, ll. 2-16). Applicant objected preliminarily to the admissibility of the 911 call because Coe was potentially unavailable to testify, and Allen could not cross-examine her on the statements she made in the call. (Trial Tr. p. 125, l. 17 – p. 126, l. 1). The trial court told Applicant it could only rule on the issue before it. (Trial Tr. p. 126, ll. 7-20). The recording, marked State's Exhibit #2, was published to the jury. (Trial Tr. p. 127, ll. 1-2.)

The State rested its case without calling Coe as a witness. (Trial Tr. p. 389, l. 14.) Applicant moved for a mistrial because the 911 call should not have been admitted where the recording contained inadmissible hearsay and because Applicant did not have the opportunity to

confront Coe. (Trial Tr. p. 391, ll. 1-23). The Solicitor informed the trial court Coe was still available for the defense to call as a witness, but he declined to call her because he was unsure if she would tell the truth. (Trial Tr. p. 393, ll. 16-25).

The trial court found there was no gap in the tape where it could be easily redacted. (Trial Tr. p. 394, ll. 11-20). The trial court then went on to make an extensive analysis of the Confrontation Clause and the applicability of Supreme Court case law:

In this case, the statements were made to a nine one one emergency operator by Ms. Debra Coe who called in to report an emergency, that an individual had been shot; that he was dead in the road in a particular location in Florence County. That the shooter was still in the area, and the nine one one operator was not interrogating Ms. Coe for purposes of future presentation in Court or at trial, but was responding to a citizen emergency complaint. Obviously, in the excited state and stress of the moment, the operator knowing no history whatsoever, Ms. Coe relates that history to the operator and the operator then properly and correctly and professionally follows up on it because law enforcement officers were responding to the scene of a shooting. Now, whether the individual was responsible for the shooting or not, he was still at the scene. So I would find that it is non-testimonial, that Ms. Coe is available, number one, although not presented by the State, and, number two, [Applicant] has had the opportunity to cross-examine Ms. Coe during the in-camera hearing. So with those two prongs, the clause would not apply. Therefore, it then goes to State evidentiary law, and that evidentiary law, as I ruled previously, under 803 one, a hearsay exception. The availability of declarant – the following is not excluded by the hearsay rule even though the declarant is available to be a witness. One, present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter. Two, excited utterance – a statement relating to a startling event or condition, and I emphasize a statement relating to a startling event or condition, made while the declarant was under the stress of the excitement following the crime, the event or the matter at issue.

(Trial Tr. p. 397, l. 21 – p. 399, l. 5). Finding no constitutional prohibition against the earlier

admission of the call, as well as no state evidentiary considerations, the court denied Applicant's motion for mistrial. (Trial Tr. p. 399, ll. 6-7).

***EVIDENCE OF APPLICANT'S MOTIVE TO KILL WINDHAM***

Pete Farnum (Farnum) employed Applicant at his automotive body repair business. (Trial Tr. pp. 304-305). Applicant worked at the body shop for about six months, and Farnum described him as "very smart." (Trial Tr. p. 306, ll. 8-23). One day, Farnum realized Applicant was carrying a handgun and confronted him about it. (Trial Tr. p. 307, ll. 1-3). Applicant told Farnum he had a concealed weapons permit because a man killed his brother. The man was in prison, but not for the murder of his brother. (Trial Tr. p. 307, ll. 9-14). Applicant told Farnum he would kill the man eventually, and Farnum tried to talk him out of it. (Trial Tr. p. 307, ll. 15-23). When Farnum later heard Applicant killed Windham, he regretted not talking to the police about Applicant's plan. (Trial Tr. p. 308, ll. 6-9). Farnum said Applicant eventually stopped coming to work. (Trial Tr. p. 309, ll. 7-11).

Trial Counsel made a motion *in limine* to exclude the testimony of Mr. Farnum as too remote in time to be relevant and as unfairly prejudicial. (Trial Tr. p. 94, l. 18 – p. 96, l. 22). The trial court denied the motion, finding the statements to Farnum met the threshold test of admissibility for relevance. (Trial Tr. p. 97, ll. 14-16).

To corroborate and clarify the charges against Windham involving the death of Applicant's brother, the Florence County Clerk of Court testified about the indictment of Windham for the murder of Robert Allen, Applicant's brother. The Clerk told the jury Windham was acquitted of the murder charge and found guilty of the weapons charge. (Trial Tr. p. 128, l. 14 – p. 130, l. 12). The jury also learned Windham received five years' imprisonment for the weapons charge related to the brother's death. (Trial Tr. p. 130, ll. 2-4).

Windham's wife, LaSheia Windham, testified her husband discussed the Allen brothers with her following his release from prison. (Trial Tr. p. 132, l. 13 – p. 133, l. 13). Ms. Windham described her husband's behavior in the months leading to his death as nervous and restless. (Trial Tr. p. 133, ll. 20-25).

#### ***APPLICANT'S OPPORTUNITY TO KILL WINDHAM***

Vonquell Pittman (Pittman) lived with his brother on the street where the murder occurred. (Trial Tr. p. 314, l. 23 – p. 316, l. 3). His house was two houses away from where Windham was shot. (Trial Tr. p. 318, ll. 3-9). On the night of the incident, Pittman arrived home from work and found Applicant, who was friends with Pittman's brother, cooking out with some friends at Pittman's house. (Trial Tr. p. 318, l. 13 – p. 319, l. 23). Another witness testified Windham visited the neighborhood on his moped almost every day. (Trial Tr. p. 340, ll. 8-22). Windham had lived next door to Debra Coe with his grandmother years before. (Trial Tr. p. 341, ll. 3-20). The same witnesses testified it was not usual to see Applicant in the neighborhood. (Trial Tr. p. 342, ll. 10-22).

#### ***APPLICANT'S VERSION OF EVENTS***

Applicant told the jury his version of what happened that night. According to Applicant, his family and friends lived in Tara Village. (Trial Tr. p. 414, ll. 2-24). On the day of the shooting, Applicant said he went with his brother to a cookout and to help a friend with his car in Tara Village. (Trial Tr. p. 415, ll. 15-18). Applicant brought his Ruger nine-millimeter and an extra clip with him. (Trial Tr. p. 415, ll. 19-22, p. 417, ll. 3-7). Applicant said he obtained his concealed weapons permit after his brother's death because he and his family received threats. (Trial Tr. p. 416, ll. 12-24). While at the cookout, a friend called Applicant and asked him to walk down to his house and help him with an old car that needed work. (Trial Tr. p. 418, ll. 6-17). Applicant

claimed that as he was walking, he saw Windham riding a moped, pointing a gun at him. (Trial Tr. p. 419, ll. 1-7). Applicant said that he fired once he saw Windham raise his gun until Windham "went down." (Trial Tr. p. 419, ll. 14-25). Applicant claimed he asked Ms. Coe to call 911 and stayed at the scene despite his brother's efforts to convince him to leave. (Trial Tr. p. 420, l. 9 – p. 421, l. 12). While waiting for the police, he reloaded his weapon because he feared repercussions from Windham's friends in the neighborhood. (Trial Tr. p. 422, ll. 3 – 20).

On cross-examination, Applicant denied telling his former employer he had the gun because he intended to kill Windham, but he acknowledged he may have mentioned "something connected with [his] brother." (Trial Tr. p. 427, ll. 6-21). Applicant denied knowing Windham was frequently in the neighborhood. (Trial Tr. p. 433, ll. 13-21).

#### **CURRENT ACTION BEFORE THIS COURT**

In his application for post-conviction relief, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:<sup>3</sup>
  - a. Failing to argue any mitigating circumstances during the sentencing phase that may have reduced Applicant's sentence;
  - b. Failing to object to the same evidence that was already admitted by other witnesses;
  - c. Failing to object to the trial court not waiting the twenty-four hours period that the statute requires before sentencing Applicant; and
  - d. Failing to adequately argue issues regarding the indictment.

Applicant requests relief in the form of a new trial.

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<sup>3</sup> At the call of the case, Applicant withdrew allegations 1(a), 1(c), 1(d), and proceeded on allegation 1(b) only. (PCR Tr. pp. 5 – 6).

Before this Court is the Florence County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, the trial transcript, and the records of this PCR action.

#### **STANDARD OF REVIEW**

The Uniform Post-Conviction Procedure Act<sup>4</sup> (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a

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<sup>4</sup> S.C. Code Ann. §§ 17-27-10 to -160.

question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; accord. Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384

(1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625; see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be

*substantial*, not just conceivable." Richter, 562 U.S. at 112.

Finally, the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. 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). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

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

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility.

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRPC (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code:

#### ***INITIAL FINDINGS***

As a matter of general impression, this Court finds Trial Counsel's testimony at the evidentiary hearing **credible and persuasive**, where she presented well-recalled testimony of relevant background, facts, and discussions leading up to and during the trial. This Court finds Applicant's testimony at the evidentiary hearing generally **not credible or persuasive**. This Court further finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant, she rendered adequate assistance and exercised reasonable professional judgment in her representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, supra). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689, 104 S.Ct. 2052; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

*INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS ON THE MERITS*

**Allegation: Trial Counsel Failed To Object To The Evidence  
That Was Already Admitted By Other Witnesses**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to evidence that had been admitted by other witnesses. Specifically, Applicant avers Trial Counsel should have objected to the following: 1. 911 call being entered into evidence, and 2. Farnum's testimony regarding what Applicant told him. This Court disagrees and finds the record refutes Applicant's allegations and finds these allegations are without merit.

"An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

This Court finds the record wholly refutes Applicant's allegations. At the evidentiary

hearing, Trial Counsel credibly testified that during the trial, she objected to the 911 call on the grounds that the later portion of the 911 call was prejudicial. The trial judge overruled Trial Counsel's objection and allowed the 911 call into evidence. (Trial Tr. p. 61-62; 120-126). Also, Trial Counsel credibly testified that she filed a motion *in limine* and objected to the introduction of Applicant's employer's testimony. (Trial Tr. pp. 94-98). The trial court denied the motion, finding the statements to Applicant's employer met the threshold test of admissibility for relevance. (Trial Tr. p. 94-98). The trial court further cited case law on the record to substantiate its findings. Id. This Court finds any further objection to either issue would not have been meritorious, and Trial Counsel cannot be deficient for failing to make a non-meritorious objection, nor can Applicant be prejudiced by this failure.

Accordingly, Applicant's allegation that Trial Counsel failed to object to evidence that other witnesses had admitted is **DENIED** and **DISMISSED**.

**Allegations Raised At The PCR Evidentiary Hearing But Not In Applicant's Application**

**Allegation: Trial Counsel Failed To Interview And Call Witnesses To Testify**

Applicant alleged Trial Counsel was constitutionally ineffective for failing to speak with and call witnesses to testify for him. Specifically, Applicant avers Trial Counsel should have called the daughter of one of his friends and the one he did not know, but his brother knew him.<sup>5</sup> (PCR Tr. p. 18). This Court finds this allegation is without merit.

At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. Ard. v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). To show counsel was ineffective by failing to call a witness, the witness(es)

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<sup>5</sup> Applicant later testified that it was three witnesses. (PCR Tr. p. 19).

must be produced at the PCR evidentiary hearing, or their testimony must otherwise be presented, consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

At the evidentiary hearing, Applicant averred that Trial Counsel did not call two or three witnesses to testify for him. This Court finds Applicant's testimony **not credible**. Furthermore, Applicant did not present any of those witnesses or any evidence to this Court of what those witnesses would have testified to that would have changed the outcome of his trial. Thus, Applicant has failed to overcome his burden, and this Court finds Trial Counsel was not deficient and Applicant has shown no prejudice from this alleged deficiency.

Accordingly, Applicant's allegation that Trial Counsel failed to interview and call witnesses to testify for him is **DENIED** and **DISMISSED**.

**Allegation: Trial Counsel Failed To Explain Self-Defense And Prepare Applicant For Trial**

Applicant alleged Trial Counsel was constitutionally ineffective for failing explain what they would have to show to be able to claim self-defense and prepare Applicant for trial. (PCR Tr. p. 18). This Court finds this allegation is without merit.

This Court finds that the record refutes Applicant's allegations. Applicant testified and was able to present his side of the story to the jury. Importantly, Applicant did not present any testimony or evidence of how additional preparation would have changed the outcome at trial. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial.). Thus, Applicant has failed to overcome his burden, and this Court finds Trial Counsel was not deficient and Applicant has shown no prejudice from this alleged

deficiency.

Accordingly, Applicant's allegation that Trial Counsel failed to explain self-defense and prepare Applicant for trial is **DENIED** and **DISMISSED**.

**[CONCLUSION PAGE FOLLOWS]**

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE.**

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking a review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 1 day of Nov, 2023.

*Debra McCaslin*  
 THE HONORABLE DEBRA R. MCCASLIN  
 Presiding Judge  
 Twelfth Judicial Circuit

Florence, South Carolina

2023 NOV 13 PM 3:20  
 DORIS POULOS O'HARA  
 CLERK OF COURT C.P. & G.S.  
 FLORENCE COUNTY, SC

FILED

CERTIFIED: A TRUE COPY  
*Doris Poulos O'Hara*  
 CLERK OF COURT C.P. & G.S.  
 FLORENCE COUNTY, S.C.

FORM 4  
FILED

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

JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2019CP2101634

Cory Nettles Allen 2023 NOV 13 PM 3:27 South Carolina State Of  
DORIS POULOS O'HARA  
CCCP & GS

PLAINTIFF(S) FLORENCE COUNTY DEFENDANT(S)  
Submitted by: Attorney for:  Plaintiff  Defendant  
 Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other:

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

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

**ORDER INFORMATION**

This order  ends  does not end the case.

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

**INFORMATION FOR THE JUDGMENT INDEX**

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

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

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

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

**Note: Title abstractors and researchers should refer to the official court order for judgment details.**

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

11/13/2023

Circuit Court Judge

Judge Code

Date

**For Clerk of Court Office Use Only**

CERTIFIED: A TRUE COPY

This judgment was entered on **November 13, 2023**, and a copy mailed first class or placed in the appropriate attorney's box on **November 14, 2023**, to attorneys of record or to parties (when appearing pro se) as follows:

*Cory Nettles Allen*  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

Jonathan D Waller 210 Newberry Street, NW Aiken, SC  
29801

D Russell Barlow II PO Box 11549 Columbia, SC 29211

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ATTORNEY(S) FOR THE PLAINTIFF(S)

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ATTORNEY(S) FOR THE DEFENDANT(S)

*Doris P O'Hara*

Court Reporter

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Doris Poulos O'Hara - Clerk of Court

**Court Reporter:**

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

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

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

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**WITNESSES**

Thomas McFadden

Florence County Sheriff

E. L. Clements, III

**ARREST WARRANT NUMBER**

2014A2110200569

2014A2110200568

2014GS2101340A

**ACTION OF GRAND JURY**

**TRUE BILL**

*Wendy Sanders*  
Foreperson of Grand Jury  
Date: 11/20/2014

**VERDICT**

Foreperson of Petit Jury

Date:

DOCKET NO. 2014-GS-21-01340

The State of South Carolina

County of

**FLORENCE**

**COURT OF GENERAL SESSIONS**

**DECEMBER**

**TERM**

**2014**

**THE STATE**

vs.

**CORY NETTLES ALLEN**

**FREDERICK NETTLES ALLEN**

Indictment for

**MURDER,**

**ACCESSORY BEFORE THE FACT**

**TO MURDER, AND**

**ACCESSORY AFTER THE FACT OF**

**MURDER**

2014 NOV 20 11:11:40

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF FLORENCE )

INDICTMENT FOR  
 MURDER,  
 ACCESSORY BEFORE THE FACT TO MURDER,  
 AND ACCESSORY AFTER THE FACT OF MURDER

At a Court of General Sessions, convened on NOVEMBER 20, 2014 the Grand Jurors of FLORENCE County present upon their oath:

**COUNT ONE- MURDER**

CDR: 0116                      16-03-0010,0020, 16-01-0060

That COREY NETTLES ALLEN did in Florence County on or about June 04, 2014, feloniously, wilfully and with malice aforethought kill one Edward J. Windham, by means of shooting him with a handgun, and that the said Edward J. Windham did die as a proximate result thereof; in violation of Sections 16-03-0010, 0020, and 16-01-0060, S.C. Code of Laws, 1976, as amended.

**COUNT TWO- ACCESSORY BEFORE THE FACT TO MURDER**

CDR: 0002                      16-01-0040, 0050

That FREDERICK NETTLES ALLEN did in Florence County on or about June 04, 2014, aid in the commission of, or was an accessory before the fact in the commission of a felony, to wit: Murder, by counseling, hiring, or otherwise procuring the said felony to be committed, to wit: by aiding and abetting his brother, COREY NETTLES ALLEN in the Murder of Edward J. Windham by driving him to the scene, putting him out, and then waiting for him down the road until the shooting occurred; in violation of Sections 16-01-0040, 0050, S.C. Code of Laws, 1976, as amended.

**COUNT THREE - ACCESSORY AFTER THE FACT OF MURDER**

CDR: 2413                      16-01-0055

That FREDERICK NETTLES ALLEN did in Florence County on or about June 04, 2014, render assistance after the fact to a felon, namely COREY NETTLES ALLEN, who, on or about June 04, 2014 committed the felony of Murder, by aiding and abetting the said COREY NETTLES ALLEN by waiting on him and helping him to leave the scene after he shot and killed one Edward J. Windham; in violation of Section 16-01-0055, S.C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



E.L. Clements, III  
 TWELFTH CIRCUIT SOLICITOR

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State, Respondent,

v.

Cory Nettles Allen, Appellant.

Appellate Case No. 2016-000686

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Appeal From Florence County  
R. Knox McMahon, Circuit Court Judge

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Unpublished Opinion No. 2019-UP-152  
Heard April 1, 2019 – Filed May 1, 2019

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**AFFIRMED**

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Chief Appellate Defender Robert Michael Dudek, of  
Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior  
Assistant Deputy Attorney General Melody Jane Brown,  
and Assistant Attorney General Susannah Rawl Cole, all  
of Columbia, and Solicitor Edgar Lewis Clements, III, of  
Florence, for Respondent.

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**PER CURIAM:** Cory Nettles Allen appeals his murder conviction, arguing the trial court erred in refusing to redact a portion of a 911 call. We affirm pursuant to

Rule 220(b), SCACR, and the following authorities: *State v. Washington*, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008) (identifying three elements that qualify a statement as an excited utterance: "(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition"); *id.* at 123-24, 665 S.E.2d at 604 (stating the admission of evidence "is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion"); *id.* at 124-25, 665 S.E.2d at 604 (finding although speaker was "certainly upset as the result of the stabbing," statements in a formal interview with law enforcement did not qualify as excited utterances); *State v. Wyatt*, 317 S.C. 370, 373, 453 S.E.2d 890, 891 (1995) (holding error without prejudice does not warrant reversal); *State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93-94 (2011) ("Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless."); *State v. Hughes*, 419 S.C. 149, 159, 796 S.E.2d 174, 179 (Ct. App. 2017) (finding no reversible error when evidence was erroneously admitted because the same evidence was admitted by other witnesses without objection).

**AFFIRMED.**

**LOCKEMY, C.J., and SHORT and MCDONALD, JJ., concur.**