



Esquire, represented him. On March 21, 2000, the Applicant proceeded to trial and was found guilty. The Honorable J. Derham Cole sentenced the Applicant to confinement for the balance of his natural life for Murder and to five (5) years for Possession of a Firearm during Commission of a Violent Crime.

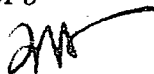
A timely Notice of Appeal was filed and an appeal was perfected on Applicant's behalf. The South Carolina Court of Appeals reversed and remanded Applicant's case by written opinion filed June 21, 2004. State v. Hill, 360 S.C. 13, 598 S.E.2d 732 (Ct. App. 2004).

The Applicant was then granted a new trial. E. Charles Grose, Jr., Esquire, represented the Applicant again. The Applicant proceeded to trial on July 11, 2005, after which he was found guilty of Voluntary Manslaughter as a lesser-included offense of Murder, and of Possession of a Firearm during Commission of a Violent Crime. The Honorable Wyatt T. Saunders sentenced Applicant to confinement for a period of thirty (30) years for Voluntary Manslaughter and to five (5) years for Possession of a Firearm during Commission of a Violent Crime (1999-GS-01-0494), sentences running consecutively.

A timely Notice of Appeal was filed and an appeal was perfected on the Applicant's behalf. This time the South Carolina Court of Appeals affirmed the conviction by written order filed February 6, 2008. State v. Hill, Op. No. 2008-UP-081 (Ct. App. Filed February 6, 2008).

The Applicant then submitted a Petition for Writ of Certiorari to the Supreme Court of South Carolina. The Petition was denied by written order dated February 19, 2009. The Remittitur was issued February 24, 2009.

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



1. Ineffective Assistance of Trial Counsel, and
2. Ineffective Assistance of Appellate Counsel.

At the hearing, the Applicant proceeded on his claims of ineffective assistance of trial counsel and ineffective assistance of appellate counsel.

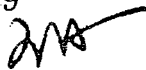
### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

#### Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300



S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing Strickland*. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

*Failure to call witnesses*

The Applicant alleges Counsel failed to call certain witnesses at trial. The Applicant testified there were a few witnesses, who testified at his first trial but not at his second trial. He also claimed these witnesses would have testified that he was entitled to use self-defense in this case. The Applicant further testified Counsel failed to call an expert to testify concerning the blood stain found outside of the vehicle on the ground.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

*JNA*

This Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. This Court also has read the trial transcript, all of which assists the Court in judging the witnesses' credibility. This Court finds the Applicant's testimony regarding Counsel's ineffectiveness is not credible while also finding Counsel's testimony credible.


The Applicant claims Counsel failed to call witnesses that would have testified on his behalf. However, the Applicant presented none of these witnesses at the PCR hearing, and therefore, no prejudice can be shown pursuant to Underwood.

Additionally, where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Counsel testified he consulted with an expert in this case concerning the blood stain located outside of the car on the ground. Counsel then testified he did not call this witness because he was able to obtain the same information through the cross-examination of the State's expert witness. Counsel articulated valid reasons for not calling his expert witness in rebuttal of the State's expert, and the Applicant has not shown that Counsel was deficient in that choice of tactics. I, therefore, find the Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby. Accordingly, this allegation is denied.

I further find that Counsel was effective in all respects concerning his representation of the Applicant at trial.

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

The Applicant claims he also received ineffective assistance of appellate counsel. A



defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983).

The Applicant claims he received ineffective assistance of appellate counsel because Ms. Cleary did not brief the issue of self-defense correctly. He also claims he was prejudiced because neither Mr. Savitz nor Ms. Cleary argued malice should not be inferred from the use of a deadly weapon where evidence exists which would reduce or mitigate the homicide in the appellate brief.<sup>1</sup>

Mr. Grose testified he contacted Mr. Savitz, who was Chief of the Office of Appellate Defense at the time, and expressed his concerns about the malice instruction given to the jury by the trial judge. Mr. Grose, in an email, advised Mr. Savitz to brief the malice issue on direct appeal.

Mr. Savitz testified he remembered the communication from Mr. Grose and agreed to pursue the issue. However, Mr. Savitz testified he must have lost track of the case between the filing of the notice of appeal and the filing of the appellate brief.

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<sup>1</sup> See State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). This Court also notes the Applicant's direct appeal was denied and concluded on February 24, 2009, while Belcher was not decided until October 12, 2009. Therefore,



Ms. Cleary testified she worked for the Office of Appellate Defense for eight years and was assigned to write the appellate brief in this case. She testified that she was unaware of the communication between Mr. Grose and Mr. Savitz. She also stated when she is assigned a case, she reads the entire transcript, writes down the meritorious issues, researches those issues, and briefs those issues based on the transcript and her research. Ms. Cleary further testified she did not consider arguing against the one hundred years of legal precedent in South Carolina, which held that malice could be inferred by the use of a deadly weapon. She also stated she could not have predicted the shift the South Carolina Supreme Court made in Belcher.

In Gilmore, the South Carolina Supreme Court stated, "[w]e have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial." Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

This Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. This Court also has read the trial transcript, all of which assists the Court in judging the witnesses' credibility. This Court finds the Applicant's testimony regarding Appellate Counsel's ineffectiveness is not credible while also finding Ms. Cleary's testimony credible. I find Ms. Cleary was not ineffective for not pursuing this theory pursuant to Gilmore in that she is not required to be clairvoyant of changes in the law, especially in the light of over one hundred years of legal precedent in this state. While Mr. Grose and Mr. Savitz communicated about briefing the malice charge, Ms. Cleary was not made aware of such communications. Additionally, I find Ms. Cleary, in her professional judgment, decided to brief the issues according to their potential merit. Furthermore, the Applicant has failed to demonstrate that any alleged errors in the factual recitation on appeal by

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Belcher was not effective during the pendency of the Applicant's direct appeal and hence, not applicable to this case.

the applicant's

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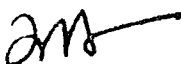
appellate counsel prejudiced the Applicant. Accordingly, this allegation is denied.

### CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

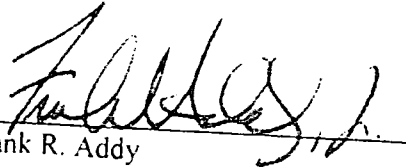
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has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



**IT IS THEREFORE ORDERED:**

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

**AND IT IS SO ORDERED!**



Frank R. Addy  
Presiding Circuit Court Judge  
Eighth Judicial Circuit

April 17, 2012

Greenwood, South Carolina