THE SOUTH CAROLINA SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Judge

Case No.
(2012-CP-10-3986)

Nathaniel McGee ..... Appellant,

v.

State of South Carolina, ...Respondent.

NOTICE OF INTENT TO APPEAL

Appellant appeals the decision of the Honorable Judge signed October 23, 2013, which was placed in the mail by the Clerk of Court for Charleston County to appellant's counsel's firm on or after October 24, 2013, and received by appellant's counsel on November 1, 2013.

Counsel for Applicant received written notice of the Order on November 1, 2013, and files this Notice by regular mail today, November 21, 2013.

Other Counsel of record:
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Respectfully Submitted:

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PROOF OF SERVICE

I certify that the foregoing was served on the person(s) listed below by placing same in the U.S. Mail postage prepaid this day, November 21, 2013.

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AIJ
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	2012–CP–10–3986
	)	
Nathaniel McGee, #333534,	)	
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

FILED
2013 OCT 24 AM 11:02
JULIE J. ARMSTRONG
CLERK OF COURT

Presiding Judge:	The Honorable Deadra L. Jefferson
Applicant's Attorney:	Jessica L. Means, Esquire
Respondent's Attorney:	Ashleigh R. Wilson, Esquire
Trial Counsel:	James W. Smiley, Esquire
	Laree A. Hensley, Esquire
Date of Hearing:	July 23, 2013
Court Reporter:	Phyllis Norton

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 19, 2012. The Respondent made its return on December 14, 2012. An evidentiary hearing on the matter was convened on July 23, 2013 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Jessica L. Means, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying at the hearing was James W. Smiley and Laree A. Hensley, Esquires. The Court had before it the trial transcript, the Charleston County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the

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Applicant's application, the Respondent's return, the Applicant's appellate records, and one court exhibit.[1]

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Applicant was indicted at the August 2006 term of the Charleston County Grand Jury for Murder (2006–GS–10–7192). He was represented by James W. Smiley and Laree A. Hensley, Esquires. The Applicant proceeded to trial and was found guilty. On March 5, 2009, the Applicant was sentenced by the Honorable Kristi L. Harrington to confinement for thirty (30) years.

A timely Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense, Commission on Indigent Defense, perfected the appeal. The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. McGee, No. 12–UP–047 (S.C. Ct. App. Jan. 25, 2012). The Applicant's Petition for Rehearing was denied by Order dated March 27, 2012. The Remittitur was issued on January 29, 2013.

ALLEGATIONS

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

1. Ineffective Assistance of Counsel
    a. Counsel conceded the Applicant's guilt during his opening statement.
    b. Counsel misspoke and called the Applicant the victim's name during his opening statement.
    c. Counsel failed to perform any pretrial investigation.
    d. Counsel failed to object during the solicitor's closing argument.
    e. Counsel failed to request a voluntary or involuntary manslaughter charge.
    f. Counsel failed to object to the self-defense instruction that impermissibly shifted the burden of proof.

[1] Court's Exhibit #1 is Terrell Wright's statement, dated April 18, 2006.

g. Counsel failed to object to the malice charge that impermissibly commented on matters of fact versus declaring the law.

At the hearing, the Applicant proceeded solely on the allegations he raised in his application. At the conclusion of the evidentiary hearing, the Court took the matter under advisement and directed counsel for the State to provide the Court with a proposed Order within fifteen (15) days of the hearing.

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. CODE ANN. § 17–27–80 (2003).

Summary of the Testimony

The Applicant testified he met with counsel three (3) or four (4) times prior to trial. He testified he reviewed witness statements and discussed with counsel the State's evidence against him. He testified they also discussed the self-defense claim that they would present at trial. The Applicant testified he never viewed the video from the scene prior to trial and did not receive a copy of the witness' statements after asking counsel about them. However, he does acknowledge that counsel told him about the witnesses prior to trial. He testified the first time he saw the video was during the trial.

The Applicant testified he gave counsel the names of the men who were involved in the prior incident with the victim to investigate. He testified that he gave counsel the following names: Rico, Joseph, Quentin Reid, the Jamaicans and "Slice" to look up and investigate. He

further testified that this incident involved him being held in the woods by several individuals. He testified counsel did not follow up with the names of the men who could verify the incident and did not look into the incident. He testified that he gave counsel the names but counsel never said anything to him further about an investigator going out to talk to them. The Applicant testified had he known what the witness' statements were going to be at trial, he would have pled guilty. The Applicant testified further that had counsel investigated his case, he would have found that the prior incident took place.

The Applicant testified counsel did not make proper objections at trial. He testified he asked counsel to ask for the lesser included offense at trial. He testified he did not have time to prepare with counsel before trial. He further testified that he and counsel discussed self-defense. He also testified that he left decisions at trial to Mr. Smiley. He testified that counsel did give him updates during his pretrial detention. Lastly, the Applicant testified counsel subpoenaed Terrell Wright to testify at trial, but did not call him as a witness.

Also present and testifying was James W. Smiley, Esquire. Counsel testified he has been practicing law for about twenty (20) years and has spent ninety-nine (99) percent of his career practicing criminal law. Counsel testified he was retained by the Applicant and he met with the Applicant about twelve (12) times prior to trial. He testified the Applicant was detained for a "good while" pretrial. He testified he filed Brady and Rule 5 motions for discovery. Counsel testified he reviewed the discovery material he received with the Applicant. Counsel testified it is not his practice to provide clients with discovery material in jail. Counsel testified he spoke with the Applicant in detail about the evidence. He testified he went over the witness statements with the Applicant. He further testified that the witness statements were not exculpatory and did not exonerate the Applicant. He testified he discussed with him the elements of the charge he was

facing, range of penalty, his constitutional rights and what the State was required to prove. He testified he discussed with the Applicant his version of the facts, which were not disputed. He further testified that at the point he was aware the Applicant had fired a weapon, the scene was chaotic with a lot of weapons being fired and it would be difficult to say who killed the victim. He testified that a lot was missing from the scene; he didn't believe the State's case was particularly strong on Murder and that he felt the better case for the Applicant was self-defense. Counsel also testified he discussed possible defenses with the Applicant and that the Applicant's only available defense was self-defense. Counsel testified that he was prepared for trial and ready to try the case.

Counsel testified the Applicant gave him several witnesses to investigate. Counsel testified he did not need to hire an investigator because he thought he had all the information that was needed in the case. Counsel testified that among the names he was given to investigate by the Applicant was Terrell Wright. Counsel testified Wright fired a weapon at the scene of the murder and was seen holding a weapon before the shooting while with the Applicant. Counsel testified Wright was represented by counsel and had pending charges related to the shooting. He also testified that he discussed Wright's statement with the Applicant prior to trial and made a tactical decision not to call Wright as a witness at trial. Counsel testified he did not call Wright as a witness because he did not think the testimony would be advantageous to the Applicant's case. Counsel testified it would not have helped the Applicant at trial for the jury to know that the Applicant was walking around with Wright who was armed prior to the shooting. Counsel also testified he did not want the State to be able through cross examination and impeachment to impugn the Applicant's great trial testimony with Wright's behavior.

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Counsel testified he also looked into finding the other men involved in the prior incident with the victim. He testified even if he found the men, he would not have been able to enter their testimony as evidence at trial because it would have been extrinsic evidence. He also testified he did not think that talking to the Reed family would have been very helpful and it would have been unlikely that the Reeds would have admitted the prior incident took place. Counsel testified he was still able to present testimony about the prior incident through one of the officers who testified at trial.

Counsel also testified he reviewed the statements of two other witnesses, Sierra Smith and Tiffany Jenkins. He testified Smith, who did not show up for trial, gave a statement identifying the Applicant. Counsel testified Jenkins' statement identified the Applicant and said the person standing in the Applicant's position shot the gun. Counsel testified Jenkins testified poorly at trial for the State which ultimately benefitted the Applicant. Counsel testified he discussed both witnesses' statements with the Applicant in preparation for trial.

Counsel testified he reviewed the video from the scene the night of the incident. He testified the first time the Applicant saw the video was at trial. He testified the video was indecipherable, very grainy, very hazy, in black and white, that the parking lot and video lighting was poor, the general quality of the video was very poor, and the contents were left to interpretation. He further testified that while a viewer could make out some vehicles in the video, the Applicant's vehicle was not visible in the back of the parking lot. Counsel testified he objected to the admissibility of the State's written interpretation (transcript) of the video and was successful, as it was excluded at trial. He testified he did not object to the video, as it did have some relevance and was not prejudicial to the Applicant's case. Counsel testified in retrospect, he should have objected to the Solicitor's interpretation of the video during his closing argument.

He testified he did not know if an objection during the Solicitor's closing would have been successful.

Counsel testified he did not realize he called the Applicant by the victim's name during his opening statement. He testified it was unintentional and he is certain the jury knew who he was speaking about when he made the references during his opening statement. Counsel testified the jury was aware of who the victim was and who the Applicant was.

Counsel testified he discussed requesting a Voluntary Manslaughter charge with the Applicant during trial. He testified that they did not request a Manslaughter charge and the jury could have found evidence to support a Manslaughter charge. However, counsel also testified at trial he thought the Applicant's case was strong and did not want to give the jury a middle ground to consider during their deliberations. He testified it was a strategic decision and he thought it was best at the time not to request a Voluntary Manslaughter charge. He testified their trial strategy was to seek an acquittal, that a request for a lesser included offense conflicted with that strategy, and he felt they had been successful in their strategy until the jury returned with a guilty verdict.

Counsel testified further that he should have objected to the self-defense jury instruction because it shifted the burden of proof to the Applicant. Counsel testified the Applicant's case was a self-defense case and the language charged by the judge was improper. Lastly, counsel testified he did not object to references by the Solicitor to "you" and "your" during his closing. He testified at the time, he did not think the State was asking the jurors to place themselves in the victim's shoes, but in retrospect an objection was warranted.

Also present and testifying was Laree A. Hensley, Esquire. Counsel testified her limited role was to assist Smiley at trial. She testified that she and Smiley have been friends for twenty-

five (25) years and that they reciprocate backing one another up during the trial of cases. She testified she was not present for jury selection but was present at the start of the case. She testified that when assisting Smiley, she takes notes, keeps track of motions and conducts legal research. She testified she does not question any witnesses, does not participate in trial preparation, makes no strategic decisions, and does not review discovery. She testified she heard all the testimony. Lastly, she testified she did not notice Smiley's mix-up in the victim's and defendant's names. She testified the mix-up was not important and it was obvious from the opening that the jury was aware of the identity of the parties.

The Applicant also called Terrell Wright to testify at trial. However, after Wright was called to testify, the parties stipulated that Wright was present and willing to testify consistent with his statement given to the police which was labeled Court's Exhibit #1.

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 allegation 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), SCRCP).

For the Applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, he must show both: (1) that his "counsel failed to render reasonably effective assistance under prevailing professional norms," and (2) that he was prejudiced by his counsel's ineffective performance. See Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing Strickland v. Washington, 466 U.S. 668, 687–88, 144 S. Ct. 2052, 2064–65 (1984)). In order to prove prejudice, an applicant must show "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Cherry

v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

This Court finds the Applicant's testimony is not credible and finds trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation. This Court finds that counsel has extensive experience in the practice of criminal law and has been practicing criminal law for the past twenty (20) years. This Court finds that counsel met with the Applicant numerous times prior to trial and fully investigated the Applicant's case. This Court finds that counsel reviewed all received discovery with the Applicant. This Court finds that counsel discussed with the Applicant the elements of the charges against him and what the State was required to prove. This Court finds that counsel discussed the Applicant's version of the facts, range of penalty, constitutional rights and possible defenses with the Applicant.

Conceding guilt during his opening statement.

This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for conceding the Applicant's guilt during his opening statements. This Court finds counsel's concession that the Applicant shot the victim was not improper since the Applicant's defense at trial was self-defense. The record also reflects that during his testimony at trial, the Applicant conceded that he pulled out his gun and shot the victim. (Tr. Vol. III, 29:19–30:3). This Court finds this allegation is without merit and no prejudice resulted from counsel's performance.

Misspeaking and calling the Applicant by the victim's name

This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for inadvertently calling the Applicant by the victim's name during his opening statement. This Court finds counsel's misspeaking had no effect on the jury and the record was sufficient to make the jury aware of the identity of both the victim and the defendant at trial. This Court finds this allegation is without merit and no prejudice resulted from counsel's performance.

Failure to investigate

This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for failing to investigate the Applicant's case prior to trial. "'[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.'" Walker v. State, 397 S.C. 221, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (quoting Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011)). "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." Porter v. State, 368 S.C. 378, 385–86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521–22, 123 S. Ct. 2527, 2535 (2003) (citing Strickland, 466 U.S. at 691, 104 S. Ct. at 2066).

This Court finds that counsel fully investigated the Applicant's case and potential witnesses prior to trial. The Applicant alleges that counsel did not investigate several potential

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witnesses including Terrell Wright and the men involved in the Applicant's alleged prior incident with the victim. This Court finds counsel provided credible testimony that he investigated both Wright and the other men identified by counsel as the Reeds. This Court finds counsel provided credible testimony that he obtained Wright's statement, spoke with Wright prior to trial, and decided not to call Wright as a witness at trial because he thought it would impugn the Applicant's beneficial trial testimony. This Court finds counsel articulated a valid strategic reason for failing to call Wright at trial as a defense witness. This Court also finds counsel fully investigated Wright and discussed the substance of Wright's testimony with the Applicant prior to trial.

This Court also finds counsel fully investigated the alleged prior incident with the victim. This Court finds counsel provided credible testimony that he thought investigating the other men involved in the incident would have likely been futile and it is unlikely their testimony about the prior incident would have been admissible at trial. This Court finds counsel was able to fully present to the jury testimony about the prior incident without tracking down the other men involved through the Applicant's own testimony at trial. (Tr. Vol. III, 8:24–16:16). This Court further finds that counsel was also able to fully present to the jury the testimony about the prior incident through one of the officers who testified at trial. This Court finds this allegation is without merit and no prejudice resulted from counsel's performance.

Failure to object during the solicitor's closing argument

This Court finds the Applicant has failed to carry his burden of proving counsel should have objected during the solicitor's closing argument.[2] The Applicant alleges counsel should have objected to "Golden Rule" violations made by the solicitor during his closing. South

[2] This Court notes the record reflects that counsel objected several times throughout the State's closing argument. (Tr. Vol. III, 126:8–15, 129:12–20, 139:7–12).

Carolina prohibits Golden Rule arguments that ask the jurors to place themselves in the victim's shoes in both criminal and civil cases. See State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006) (citing Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004) ("A solicitor's closing argument must be carefully tailored not to appeal to the personal biases of the jury" and "must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom."); State v. McDaniel, 320 S.C. 33, 37–38, 462 S.E.2d 882, 884 (Ct. App. 1995) (citing State v. White, 246 S.C. 502, 505–06, 144 S.E.2d 481, 482 (1965)).

This Court finds the Solicitor's closing argument did not include any violations of the "Golden Rule." This Court finds that in the State's closing argument, the Solicitor did not ask the jury to place themselves in the victim's shoes. Although the Solicitor's argument placed himself at the scene and attempted to place the jury at the scene this argument was merely his rendition, explanation or dramatization of the crime scene as depicted in the video.

This Court also finds that the Solicitor's use of the words "you" and "your" during his closing argument alone does not indicate a violation of the "Golden Rule." This Court finds the Solicitor's closing argument was proper in this regard.

The Applicant also alleges counsel should have objected to the solicitor's interpretation of the video recording of the scene the night of the shooting.

> [C]losing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions.

State v. Mouzon, 321 S.C. 27, 31–32, 467 S.E.2d 122, 125 (Ct. App. 1995), aff'd, 326 S.C. 199, 485 S.E.2d 918 (1997) (citing Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 2555 (1975)).

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen, 360 S.C. at 609, 602 S.E.2d at 744 (citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996); State v. Linder, 276 S.C. 304, 311, 278 S.E.2d 335, 339 (1981)). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609–10, 602 S.E.2d at 744 (citing Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); Copeland, 321 S.C. at 324, 468 S.E.2d at 624). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (citing Simons, 331 S.C. at 338, 503 S.E.2d at 166). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

This Court finds the Solicitor's interpretation of the video recording was not objectionable and counsel was not ineffective for failing to object to the argument. This Court finds the Solicitor's interpretation of the video was proper and reflected the inferences the State wanted the jury to take from the video. This Court finds the Solicitor's argument in no way affected the Applicant's ability to receive a fair trial. This Court also finds that any alleged improper statements made by the Solicitor during his closing argument were cured by the trial court's instructions to the jury that opening and closing arguments were arguments and not evidence. The Court gave curative instructions emphasizing this in response to objections made by Mr. Smiley regarding the Solicitor's closing argument. (Tr. Vol. II, 33:22–34:11; 43:8–14; 109:18–25; 126:17–22). However, the Court notes that Mr. Smiley objected several times to the

Solicitor's interpretation of the evidence during closing argument, which objections were sustained, and curative instructions subsequently were given by the Court. This Court finds these allegations are without merit and no prejudice resulted from counsel's performance.

Failure to request voluntary or involuntary manslaughter charge

This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for failing to request a Manslaughter charge at trial. This Court finds and the record reflects counsel considered requesting a jury instruction on Voluntary Manslaughter at trial and made a valid strategic decision not to request the charge at the end of trial. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S. at 693, 104 S. Ct. at 2067. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689, 104 S. Ct. at 2065. 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, 294, 454 S.E.2d 312, 313 (1996); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (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 will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). Furthermore, "[t]here is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646,

650 (2008) (citing Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 403 (2002); Stokes, 308 S.C. at 548, 419 S.E.2d at 779).

This Court finds counsel provided credible testimony that he considered requesting a Voluntary Manslaughter charge, but after the Applicant's beneficial and compelling testimony at trial, he felt he had a strong case for acquittal based on self-defense and did not want to give the jury middle ground to consider. This Court finds this strategic decision was valid. This Court finds counsel's testimony that in retrospect he should have requested a Voluntary Manslaughter charge is not dispositive, as this Court must evaluate counsel's performance based on counsel's view at the time of the proceeding. See Strickland, 466 U.S. at 688, 144 S. Ct. at 2065.

Failure to object to self-defense instruction

This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for failing to object to the self-defense instruction given to the jury. The Applicant alleges counsel should have objected to the self-defense jury instruction given at trial because it shifted the burden of proof from the State to the Applicant. The Applicant argues the court's instruction to the jury that "[s]elf-defense is a complete defense. And if it is established, you must find the defendant not guilty" was improper and objectionable. (Tr. Vol. III, 160:3–5). The Court also instructed, "The State has the burden of disproving self-defense by proof beyond a reasonable doubt." (Tr. Vol. III, 160:6-8). This Court finds and the record reflects the jury instruction given by the court was proper. The Court can discern no language in the charge shifting the burden of proof from the State of establishing guilt beyond a reasonable doubt and disproving self-defense beyond a reasonable doubt. In fact, the Court very clearly charges on the presumption of innocence, more specifically, that, "A person charged with committing a criminal offense in South Carolina is never required to prove himself innocent." (Tr. Vol. III, 151:17-19).

This Court finds the instruction given to the jury was the standard self-defense jury instruction given in South Carolina until State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) and substantially similar to the instruction approved by the Supreme Court in State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984).[3] This Court finds this allegation is without merit and no prejudice resulted from counsel's performance.

Failure to object to the malice charge

This Court finds the Applicant failed to present any argument or testimony in support of this allegation; therefore, this Court considers this allegation abandoned by the Applicant.

Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test: that trial counsel failed to render reasonably effective assistance under prevailing professional norms. See Strickland, 466 U.S. at 688, 104 S. Ct. at 2065. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the

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[3] The self-defense jury instruction approved by the South Carolina Supreme Court in State v. Davis read as follows:

> Self-defense is a complete defense. If established, you must find the defendant not guilty. There are four elements required by law to establish self-defense in this case. First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense. These are the elements of self-defense.
>
> If you have a reasonable doubt of the defendant's guilt after considering all the evidence including the evidence of self-defense, then you must find him not guilty. On the other hand, if you have no reasonable doubt of the defendant's guilt after considering all the evidence including the evidence of self-defense then you must find him guilty.

282 S.C. at 46, 317 S.E.2d at 453.

second prong of Strickland: that he was prejudiced by trial counsel's performance. See id. at 694, 104 S. Ct. at 2065. In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

All Other Allegations

As to any and all allegations that were raised in the application at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant has failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant abandoned such allegations. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

17 1/10/18

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 23rd day of October, 2013

DL Jefferson

The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina.
At Chambers

18-18

Means Law Firm, LLC
JESSICA L. MEANS
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November 21, 2013

By USPS
Daniel E. Shearouse, Clerk of Court
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: Notice of Intent to Appeal
Nathaniel McGee, 333534 v. State of South Carolina
From Case Number: 2012-CP-10-3986

Dear Mr. Shearouse:

Enclosed for filing please find the Notice of Intent to Appeal, Proof of Service on the Attorney General's Office, and the Order of Dismissal regarding the above referenced matter.

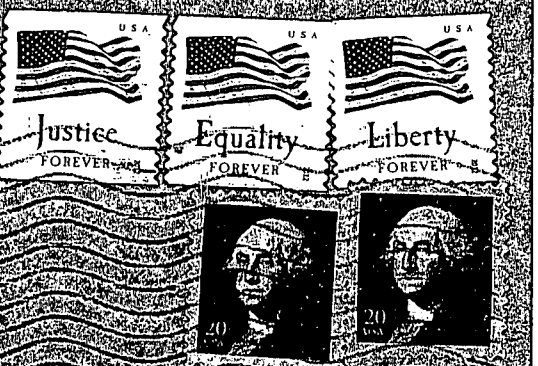
I was the Court Appointed Attorney for Mr. McGee's Post-Conviction Relief matter, and I suspect appellate defense will probably handle the appeal. By copy of this letter, I am also serving notice on Counsel for the State in regards to this appeal.

Please do not hesitate to contact me should you require any further documentation. Thank you for your time and assistance with this matter.

Respectfully Submitted,

Jessica L. Means

JLM/
Enclosures: as stated
Cc: Nathaniel McGee, ID 333534 (by USPS w/o order of dismissal)
Ashleigh R. Wilson, Esquire (by USPS w/o order of dismissal)
Sharon A. Graham, Coordinator at South Carolina Appellate Defense (by USPS)



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