THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra Jefferson Dennis Circuit Court Judge

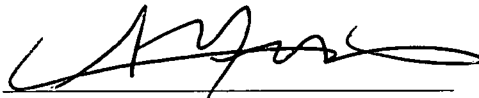
Case Nos.: 2012-CP-10-7465

Roger Raynard Parker .... Appellant
v.
State of South Carolina .... Respondent

NOTICE OF APPEAL

Roger Raynard Parker appeals the order of Deadra Jefferson filed September 18, 2014 denying his PCR application. Appellant received a copy of this order on September 24, 2014. Attached is order of the Honorable Deadra Jefferson denying the matter.

September 30, 2014



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S.C. SUPREME COURT

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PROOF OF SERVICE

I CERTIFY that I have served PROOF OF SERVICE on counsel of record for Respondent by delivering a copy via U.S. Mail First-Class postage prepaid on the 31st day of September, 2014, addressed as follows:

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Attorney for Respondent

APRIL JENNINGS

RECEIVED
OCT 03 2014
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Roger Raynard Parker, #326778, Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS 2012–CP–10–7465 **ORDER OF DISMISSAL**

FILED
2014 SEP 18 PM 12:21
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Christopher L. Murphy, Esquire
Respondent's Attorney:	Ashleigh R. Wilson, Esquire
Trial Counsel:	Andrew Grimes, Esquire
Date of Hearing:	May 19, 2014
Court Reporter:	Joyce C. Rueger

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed November 14, 2012. The Respondent made its Return on or about July 5, 2013. An evidentiary hearing on the matter was convened on May 19, 2014 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Christopher L. Murphy, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying was Andrew Grimes, Esquire. 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 Applicant's application, the Respondent's Return, and the Applicant's appellate records.

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 March 2007 term of the Charleston County Grand Jury for Murder[1] (2007–GS–10–4293). He was represented by Andrew Grimes, Esquire.

On February 25–27, 2008, the Applicant proceeded to trial and was found guilty. The Honorable R. Markley Dennis sentenced the Applicant to confinement for life in prison.

A timely Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Robert Dudek, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Parker, Op. No. 2010-UP-378 (S.C. Ct. App. filed August 2, 2010). The Applicant filed a Petition for Rehearing in the Court of Appeals which was denied on September 24, 2010. The Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court which was denied on January 11, 2012. The Remittitur was issued on February 3, 2012.

ALLEGATIONS

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

1. Ineffective assistance of trial counsel.
    a. Counsel failed to adequately investigate the facts and circumstances surrounding the death of the victim.
    b. Counsel failed to pre-trial the murder indictment based upon the fact that the indictment failed to set forth the greater including only the greater charge, and in the Applicant's indictment the greater is including the lesser charge also.
    c. Counsel failed to call Applicant's witnesses to testify at trial as Applicant made several demands to counsel to contact his witnesses.

[1] A person who is convicted of or pleads guilty to Murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty (30) years. See S.C. CODE ANN. § 16–3–20 (2006). The offense of Murder is a violent, most serious felony. See S.C. CODE ANN. § 16–1–60 (2006); S.C. CODE ANN. § 17–25–45 (2006).

   d. Counsel failed to proffer evidence to the court to compel the court to give the Applicant's trial jury a self-defense charge.
2. Ineffective assistance of appellate counsel.
   a. Appellate counsel failed to pursue all appeal remedies by the S.C. Appellate Court processes for the sake of being in compliances with the proper exhaustion doctrine.

At the evidentiary hearing, the Applicant proceeded solely on the following allegations:

1. Ineffective assistance of trial counsel.
   a. Counsel failed to call the Applicant's mother to testify at trial.
   b. Counsel failed to request a jury instruction on the lesser included offense of voluntary manslaughter.
2. Ineffective assistance of appellate counsel.
   a. Counsel failed to exhaust all appellate remedies.

This Court finds the Applicant failed to present any evidence or testimony regarding any other allegations, therefore, this Court deems any other allegations to have been abandoned by the Applicant.

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 his or her credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. CODE ANN. § 17–27–80 (2003).

Summary of the Testimony

At the commencement of the Applicant's evidentiary hearing, the Applicant moved to relieve PCR counsel, Christopher L. Murphy, Esquire. The Applicant stated he had not met with Counsel to review or discuss his case. The Applicant testified he had witnesses that he wanted to present to the Court and that he did not feel comfortable going forward with Mr. Murphy.

Mr. Murphy testified he was ready to proceed and that he had corresponded with the Applicant by mail prior to the hearing. This Court took a ninety (90) minute recess to allow the Applicant additional time to speak with PCR counsel prior to the beginning of his evidentiary hearing.

At the conclusion of this Court's recess, PCR counsel advised the Court that the Applicant wished to have his hearing continued in order to allow the Applicant to retain private counsel. The Applicant's original PCR hearing was continued one time before; was continued a second time with new appointment of counsel; then continued a third time because of a flu outbreak at the correctional institute and the Applicant was not transported.

The grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record. Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007) (citing Bridwell v. Bridwell, 279 S.C. 111, 112, 302 S.E.2d 856, 858 (1983)). See Hudson v. Blanton, 282 S.C. 70, 74, 316 S.E.2d 432, 434 (Ct. App. 1984) (noting a moving party must show the absence of some material evidence and due diligence on his part to obtain such evidence to justify a continuance). Cf. Beasley v. Kerr–McGee Chem. Corp., 273 S.C. 523, 532, 257 S.E.2d 726, 730 (1979) (finding a movant failed to show due diligence to justify a continuance when he had eight months from filing of the complaint until trial to prepare).

Ruling on the record, this Court denied the Applicant's request for a continuance, but gave the Applicant thirty (30) days from the date of the hearing to retain private counsel. This Court ruled that newly retained counsel should then file a notice of appearance and supplement the record if necessary. The Applicant was also given thirty (30) days to supplement the record with any additional testimony if necessary. This Court also found the Applicant was not prejudiced in any way by proceeding at the hearing with his current PCR counsel. The Court was

never advised that new Counsel was retained by the Applicant after the evidentiary hearing. Thereafter, on June 23, 2014 this Court issued an order finding that the Applicant did not hire private counsel, did not seek to supplement the record as instructed by the June 20, 2014 deadline and denying the Applicant's application for PCR.[2] Pursuant to that Order the State was instructed to provide the Court and opposing counsel with a proposed order within twenty (20) days of receipt of the June 23, 2014 Order.

The Applicant was present at the evidentiary hearing and testified he was convicted of murder. The Applicant testified he met with his attorney frequently—more than twenty (20) times. He testified he reviewed the evidence and witnesses with Counsel. He testified he also discussed trial strategy with Counsel. The Applicant testified the defense theory at trial was self-defense.

The Applicant testified the State made no guilty plea offers prior to trial. He testified the State made a plea offer of thirty (30) years on the second day of trial. He testified he discussed the offer with Grimes and rejected the plea offer. The Applicant testified Counsel should have called his mother to testify at trial on his behalf. He testified his mother could have explained his version of the facts. He testified he made the choice to testify in his defense.

The Applicant testified he discussed the lesser-included offenses with Counsel. He testified his verdict form did not include the lesser-included offenses. The Applicant testified he did not ask Counsel to request Manslaughter at trial, but that the number one strategy was Self-Defense and he would have wanted a Manslaughter conviction rather than a Murder conviction. The Applicant also testified appellate counsel failed to exhaust his appellate remedies.

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[2] Out of an abundance of caution the Court inquired of Mr. Murphy to see if the applicant had retained counsel. He advised that he had no indication from the applicant although he had followed up with him by letter and had received no response as of June 23, 2014. Further, there is no indication that a notice of appearance was ever filed with the Charleston County Clerk of Courts office.

Andrew Grimes, trial counsel, was present and testified he has been practicing law since 1995. He testified he has spent the majority of his career practicing criminal law. Counsel testified he was appointed to represent the Applicant in January 2007. He testified he met with the Applicant frequently prior to trial. Counsel testified he filed Brady and Rule 5 motions, as well as motions to compel, on the Applicant's behalf. He testified he reviewed the discovery materials he received with the Applicant.

Counsel testified he discussed with the applicant the elements of the charges he was facing, the State's burden of proof, what the State was required to prove to convict the Applicant, and the Applicant's version of the facts. Counsel testified he also discussed possible defenses with the Applicant. He testified that they fully discussed the pros and cons of a self-defense theory. He testified they pursued self-defense, the defense of others because the Applicant's father started the fight and it escalated from there, and habitation, which had just come out, at trial. He testified he did not pursue alibi or identification defenses but tried a "castle" type of argument prior to passage of the Protection of Persons and Property Act (The Act), see S.C. CODE ANN. § 16–11–440 (Supp. 2009), even though it was not applicable. He testified his investigation of the Applicant's case included going to the scene, speaking with the Applicant's father who was his co-defendant, speaking with several witnesses given to him by the Applicant, and reviewing with the Applicant his trial testimony. Counsel stated that he "assumed" he pursued any witnesses and leads the Applicant provided him. Counsel affirmed that he discussed the pros and cons of the Applicant testifying and that unfortunately, the Applicant got "stage fright" on the stand and his demeanor suffered.

Counsel testified he and the Applicant discussed calling his mother to testify at trial. He testified he did not call the Applicant's mother to testify at trial because she was upstairs and did

not see the incident and her testimony did not add anything to the facts of the case. Counsel testified he had ample time to prepare for trial.

Counsel testified he discussed lesser included offenses briefly and not in any great detail with the Applicant during breaks in the record. He testified he debated requesting a Voluntary Manslaughter[3] jury instruction at trial. Counsel testified the summer before the Applicant's trial, he tried another self-defense case where he did not request a Voluntary Manslaughter jury instruction and the jury acquitted the defendant on Murder. He testified the way the Applicant's trial was progressing, he felt the judge probably would have charged Voluntary Manslaughter. He testified at trial he thought that the State would have trouble proving malice, but that the jury could compromise and find him guilty of Voluntary Manslaughter, for which he could have received thirty (30) years' imprisonment, and that strategically they thought it would be the Applicant's best chance to pursue an "all or nothing" defense by going for Murder or nothing.

Virginia Johnson, the Applicant's mother, also testified at the evidentiary hearing as to her recollection of events. She testified the day of the incident she worked the night shift. She testified she was upstairs when she heard her husband downstairs. She testified she saw her husband arguing with the victim. She testified she told the victim to leave and the victim threatened her husband arguing all in his face. Mrs. Johnson testified she ran back upstairs to put on clothes while the victim was still in her home. She testified the victim said he was going to come back and hurt someone.

Mrs. Johnson testified the altercation with the victim was caused by an argument with the neighbors because the pit bulls barked, loud music played all night, along with banging on the

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[3] Voluntary Manslaughter is a violent, most serious felony punishable by a mandatory minimum two (2) years' imprisonment and maximum thirty (30) years' imprisonment. See S.C. CODE ANN. § 16-3-50 (2006). The offense of Murder is a violent, most serious felony. See S.C. CODE ANN. § 16-1-60 (2006); S.C. CODE ANN. § 17-25-45 (2006).

walls, and the victim and neighbors really got loud over there. She testified the victim and her husband were arguing when the Applicant came over and tried to calm things down. Mrs. Johnson testified she interpreted the victim's hand motions as a physical threat. She testified the victim was reaching in his pocket and she did not know what the victim had in his pockets. She testified that the young man kept disrespecting her husband in their home and that while the group was on the steps, the Applicant said "go ahead and call the police." She testified that she asked the victim to leave after he threatened to "mess" her husband "up" because he had just left dialysis treatment and she was scared at that point. She claimed the victim "was reaching" and was holding something, then she heard gunshots, and ran. She also testified that her son was peaceful and went to his daughter's school for lunch. Lastly, Mrs. Johnson testified she did not see the Applicant shoot the victim.

Ineffective Assistance of Trial Counsel

I. Standard

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 622, 300 S.E.2d 482, 483 (1983)). Where the Applicant alleges ineffective assistance of counsel 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, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2064).

The proper measure of performance is whether the attorney provided representation

within the range of competence required in criminal cases. See Strickland at 690, 104 S. Ct. at 2066. The Courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See id. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. See id. at 117–18, 386 S.E.2d at 625. Under this prong, attorney performance is measured by its "'reasonableness under prevailing professional norms.'" Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052). 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.'" Id. at 117–18, 386 S.E.2d at 625 (citing 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 the 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 Counsel is a trial practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on numerous occasions. During conferences with the Applicant, Counsel discussed the pending charges, range of penalty, the elements of the charges and what the State was required to prove, Applicant's constitutional rights, Applicant's version of the facts, and possible defenses or lack thereof.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that the Applicant's attorney

demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 5, 239 S.E.2d 750, 752 (1977); Strickland, 466 U.S. at 687–88, 104 S. Ct. 2052, 2064–65; Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687–88, 104 S. Ct. at 2064–65, Turner v. Bass, 753 F.2d 342, 348 (4th Cir. 1985), *rev'd on other grounds*, Turner v. Murray, 106 S. Ct. 1683 (1986); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977)). This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, and provided thorough representation. This Court finds that Counsel's representation did not fall below an objective standard of reasonableness.

II. Failure to Call Witnesses

The Applicant asserts trial counsel was ineffective for failing to call the Applicant's mother to testify as a witness for the defense at trial. This Court finds this allegation is without merit. 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, 778–79 (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, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. U.S., 564 F.2d 1071 (4th Cir. 1977)).

Trial counsel provided credible testimony that he discussed with the Applicant calling the Applicant's mother, Virginia Johnson, as a witness at trial. Counsel testified he ultimately decided not to call Mrs. Johnson because she was not present when the shooting took place and he did not think her testimony would add to the facts of the case or the Applicant's testimony.

This Court finds counsel did not provide deficient performance when deciding not to call a witness whose testimony he did not think would be supportive of the Applicant's defense.

After hearing the testimony of the Applicant's mother at the evidentiary hearing, this Court finds her testimony would not have added anything to the Applicant's version of facts. This Court finds Mrs. Johnson's testimony was particularly unhelpful to the defense since she was not present when the shooting occurred and did not witness the final interaction between the Applicant and the victim, which became the basis for the Applicant's self-defense claim at trial. This Court finds further no prejudice resulted from Counsel's failure to call Mrs. Johnson as a witness at trial since the Applicant took the stand to testify as to his version of events the night of the murder and any testimony from Mrs. Johnson would likely have been cumulative to the Applicant's trial testimony. This Court finds the Applicant has failed to carry his burden of proving trial counsel was ineffective for failing to call the Applicant's mother as a witness at trial.

II. Failure to Request Jury Charge on Lesser Included Offenses

The Applicant asserts trial counsel was ineffective for failing to request a voluntary manslaughter jury instruction. This Court finds this allegation is without merit. This Court finds Counsel articulated a valid strategic basis for failing to request a jury instruction on the lesser included offense. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland, 466 U.S. at 688–689, 104 S. Ct. at 2065. "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 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. "A fair assessment of attorney performance requires that every effort be made 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." Id. at 689, 104 S. Ct. 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, 778–79 (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, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. U.S., 564 F.2d 1071 (4th Cir. 1977)).

At the evidentiary hearing, Counsel testified he considered requesting a Voluntary Manslaughter jury instruction, but ultimately decided not to request the lesser included offense. Counsel testified he felt the State would have trouble proving the malice element of Murder therefore, Counsel testified, he thought the best strategy was to go "all or nothing" and not give the jury the option of Voluntary Manslaughter, if the jury felt the State did not prove malice. Counsel testified he tried another self-defense case similar to the Applicant's and in that case, he did not request a jury instruction on Voluntary Manslaughter and the jury acquitted the defendant of Murder.

This Court finds counsel articulated a valid strategic basis for his decision not to request a Voluntary Manslaughter jury instruction. The South Carolina Court of Appeals recently held in Abney v. State, that trial counsel is not ineffective where he can articulate a valid strategic reason for failing to request a lesser offense jury instruction. 408 S.C. 41, 45–47, 757 S.E.2d 544, 546–

12-?-16

47 (Ct. App. 2014), *reh'g denied* (April 24, 2014). See Dempsey v. State, 363 S.C. 365, 370–72, 610 S.E.2d 812, 815–16 (2005) (counsel not ineffective for failure to request charge on lesser included offense); State v. Funchess, 267 S.C. 427, 429, 229 S.E.2d 331, 332 (1976) ("[I]t is not error to refuse to submit a lesser included offense unless there is testimony tending to show that the defendant is only guilty of the lesser offense."). This Court finds the strategy employed by Counsel was valid and did not result in any failure by Counsel to meet an objectionably reasonable standard of performance. This Court finds the Applicant has failed to carry his burden of proving trial counsel was ineffective in this regard.

Ineffective Assistance of Appellate Counsel

The Applicant alleges ineffective assistance of appellate counsel. "A defendant is constitutionally entitled to the effective assistance of appellate counsel." Southerland v. State, 337 S.C. 610, 615-16, 524 S.E.2d 833, 836 (1999) (Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L.Ed.2d 821 (1985)) (to be effective appellate counsel must give assistance of such quality as to make appellate proceedings fair); Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990) (appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record). "In deciding a claim of ineffective assistance of counsel, the focus is on 'the fundamental fairness of the proceeding whose result is being challenged.'" Id. (citing Strickland v. Washington, 466 U.S. 668, 685, 696, 104 S. Ct. 2052, 2063, 2069, 80 L.Ed.2d 674, 692, 699 (1984)). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift, 302 S.C. at 539, 397 S.E.2d at 526 (citing Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308 (1983)). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a

client would disserve the very goal of vigorous and effective advocacy." Jones, 463 U.S. at 754, 103 S. Ct. 3308. See Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland, 337 S.C. at 616, 524 S.E.2d at 836 (citing Strickland, 466 U.S. at 117–18, 386 S.E.2d at 625.Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 307–308, 680 S.E.2d 273, 275–76 (2009) (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052; Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006)). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052; Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997)).

The Applicant asserts appellate counsel failed to exhaust all appellate remedies. This Court finds this allegation is without merit. This Court finds and the record reflects appellate counsel pursued the Applicant's claims in South Carolina's Court of Appeals and Supreme Court. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Parker, Op. No. 2010-UP-378 (S.C. Ct. App. filed August 2, 2010). The Applicant filed a Petition for Rehearing in the Court of Appeals which was denied on September 24, 2010. The Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court which was denied on January 11, 2012.

"[I]n all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing and certiorari following an adverse decision of the

Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies." In re Exhaustion of State Remedies in Criminal & Post-Conviction Relief Cases, 321 S.C. 563, 564, 471 S.E.2d 454 (1990). Exhaustion "turns on an inquiry into what procedures are available under *state* law." Osullivan v. Boerckel, 526 U.S. 838, 847, 119 S. Ct. 1728, 1734 (1999). Cf: State v. McKennedy, 348 S.C. 270, 274–75, 559 S.E.2d 850, 852 (2002) ("Appellant must at least *seek* discretionary review in this Court in order to exhaust Appellant's state remedies for purposes of federal habeas.").

This Court finds that the Applicant's appellate counsel exhausted all appellate remedies beyond that required under state and federal law by, after receipt of an unfavorable ruling from the Court of Appeals, petitioning for discretionary review to the state's highest court, even though review was denied. This Court also finds the Applicant has failed to show that appellate counsel had any duty to exhaust all appellate remedies on the Applicant's behalf. This Court finds appellate counsel provided vigorous and effective advocacy. This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for failing to exhaust all appellate remedies.

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 Applicant 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

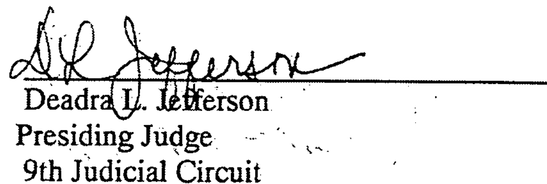
Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this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

IT IS THEREFORE ORDERED:

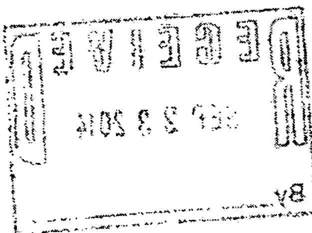
1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

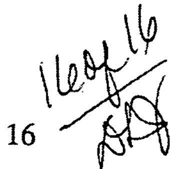
AND IT IS SO ORDERED this 16th day of Sept., 2014



Deadra L. Jefferson
Presiding Judge
9th Judicial Circuit

Charleston, South Carolina
At Chambers





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September 31, 2014

The Honorable Daniel E. Shearouse
Clerk of South Carolina Supreme Court
Supreme Court Building1231 Gervais Street
Columbia, South Carolina 29201

Re: Roger Parker v. State of South Carolina
Case No.: 2012-CP-10-7465

Dear Mr. Shearouse:

Enclosed for filing, please find an original and two copies of Mr. Parker's Notice of Appeal of the denial of his application for Post Conviction Relief. If you find everything in order, please file the original and return the clocked in copies in the enclosed self-addressed envelope.

Please note I was appointed and copy the Office of Appellate Defense who will handle the appeal. Please call if you have any questions.

With kindest regards, I am

Sincerely,

Christopher L. Murphy

CLM/aj

Enclosures

c: Mr. Roger Parker
Ms. Ashleigh R. Wilson
Robert M. Dudek, Esq..
PO Box 11433
Columbia, SC 29211-1433

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Christopher L. Murphy
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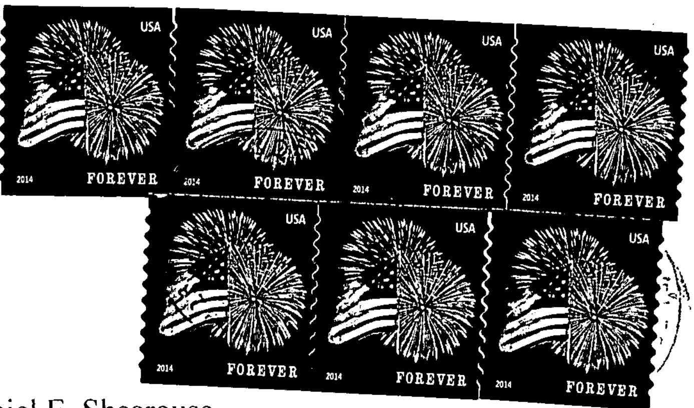

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