



ALAN WILSON
ATTORNEY GENERAL

March 12, 2015

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MAR 12 2015

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

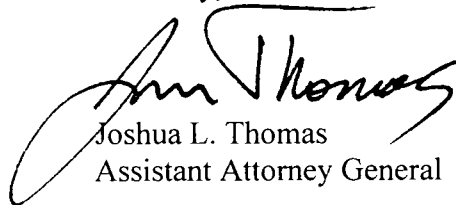
Re: Noah C. Mumford, Respondent v. State of South Carolina, Petitioner
Civil Action No. 2013-CP-13-97

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. Correspondence with the court reporter regarding the transcript.

Sincerely,



Joshua L. Thomas
Assistant Attorney General

JLT/jlt

Enclosures

CC: Jack B. Sweling, Esquire
South Carolina Department of Corrections
The Honorable Faye L. Sellers, Chesterfield County Clerk of Court
The Honorable William B. Rogers Jr., Fourth Circuit Solicitor
Office of Appellate Defense
Ms. Trisha Allen, Victim Services

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Case No. 2013-CP-13-00097

RECEIVED

MAR 12 2015

S.C. Supreme Court

Noah C. Mumford, #348375,Respondent,

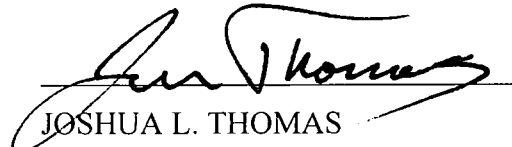
v.

State of South Carolina,Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the order of the Honorable Paul M. Burch, filed November 21, 2014. Petitioner received written notice of the denial of its post-trial motions on February 11, 2015.

March 12, 2015



JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

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(803) 734-3737

Other Counsel of Record:

Jack B. Swerling, Esq.
1720 Main Street, Suite #301
Columbia, South Carolina 29201

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Case No. 2013-CP-13-00097

Noah C. Mumford, #348375,Respondent,

v.

State of South Carolina, Petitioner.

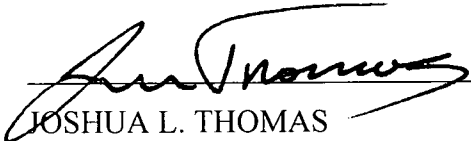
PROOF OF SERVICE

I, Joshua L. Thomas, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Jack B. Swerling , Esq.
1720 Main Street, Suite #301
Columbia, South Carolina 29201

I further certify that all parties required by Rule to be served have been served.

March 12, 2015


JOSHUA L. THOMAS

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S.C. Bar No. 100777

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(803) 734-3737

STATE OF SOUTH CAROLINA

COUNTY OF CHESTERFIELD

Noah C. Mumford, #348375,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) OF THE FOURTH JUDICIAL CIRCUIT

) Case Number: 2013-CP-13-00097

Faye L. Sellers
True Copy. AUSA
CLERK OF COURT C.P. & G.S.
CHESTERFIELD COUNTY, SC


ORDER

2015 FEB 6 PM 4 15
FAYE L. SELLERS
CLERK OF COURT
HESTERFIELD COUNTY, S.C.

This matter is before the Court on Respondent's Motion to Alter or Amend. After carefully reviewing all evidence before me and my prior order in the above-referenced matter, the Respondent's Motion Pursuant to Rule 59(e), SCRCP, is hereby DENIED.

THEREFORE, Respondent's Motion to Alter or Amend is hereby DENIED.

AND IT IS SO ORDERED.


The Honorable Paul M. Burch
Judge, Fourth Judicial Circuit

Chesterfield, South Carolina
February 6, 2015

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTERFIELD)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

Case No. 2013-CP-13-00097

NOAH C. MUMFORD, #348375)

Applicant,

v.

THE STATE OF SOUTH CAROLINA,

Respondent

FILED
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

*True Copy, Amest
State of S.C.*

**ORDER GRANTING
POST-CONVICTION RELIEF**

2014 NOV 21 PM 1 59
FAVE L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

This matter came before the Court by way of an Amended Application for Post-Conviction Relief filed May 13, 2013. The State made its Return on May 16, 2013. An Evidentiary Hearing was convened on July 31, 2014. The Applicant was present and was represented by Jack B. Swerling of the Richland County Bar. The State was represented by Joshua L. Thomas and Megan E. Harrigan of the Attorney General's office.

The following individuals testified at the evidentiary hearing: Applicant; trial counsel Larry W. Knox; Irvin Smith; Michael Jenkins; Steven Teal; Corey Williams; Sherry Mumford; Joyce Cranford; and Frank Cranford. The Court had before it a copy of the trial transcript, the records of the Chesterfield County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief and amendments, the return, and the exhibits introduced at the hearing. The Court finds as follows:

I.

PROCEDURAL HISTORY

pmb

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Chesterfield County Clerk of Court's Order of Commitment. The Applicant was indicted by the Chesterfield County Grand Jury for Attempted Murder (2011-GS-13-0096). The Applicant was represented by Larry W. Knox, of the Chesterfield County Bar. The Applicant proceeded to trial on October 24, 2011, and on October 26, 2011, the Applicant was found guilty of the lesser included offense of Assault and Battery of a High and Aggravated Nature. He was sentenced to ten (10) years by the Honorable Thomas A. Russo. A Notice of Appeal was timely filed on the Applicant's behalf, but was subsequently abandoned in order for the Applicant to file an Application for Post-Conviction Relief.

II.

ALLEGATIONS RAISED

In his Amended Application for Post-Conviction Relief, the Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. The defendant alleges that trial counsel failed to adequately investigate the case.
2. The defendant alleges that trial counsel failed to interview the state's witnesses.
3. The defendant alleges that trial counsel failed to call to trial several witnesses for the defense.
4. The defendant alleges that trial counsel failed to adequately investigate the injuries of the alleged victim in the case.
5. The defendant alleges that trial counsel failed to effectively cross-examine several of the witnesses called by the state during the trial of this case.
6. The defendant alleges that trial counsel failed to adequately investigate the scene of the alleged offense.
7. The defendant alleges that trial counsel failed to have a preliminary hearing.

8. The defendant alleges that trial counsel failed to submit jury instructions relating to the facts of the case.
 9. The defendant alleges that the South Carolina Legislature passed what is known as the "Protection of Persons and Property Act" effective June 9, 2006. The Act provides immunity from prosecution pursuant to section 16-11-450 of the S.C. Code of Laws (1976 amended).
-
10. The defendant alleges that the South Carolina Supreme Court handed down the opinion in State v. Duncan, 709 S.E.2d 662 (May 9, 2011) which held that the defendant was entitled to immunity under the Act.
 - (I) The defendant alleges that trial counsel failed to request a pretrial determination of immunity pursuant to the above-referenced statute and case law.
 - (ii) The defendant alleges that trial counsel failed to request jury instructions that would have been applicable under the Act and case aforementioned.

On July 29, 2014, the Applicant, by letter to Joshua L. Thomas, added three additional grounds to the Application and the Court will consider these grounds as amendments to the original Application for Post-Conviction Relief:

11. The defendant alleges that several witnesses observed the victim talking to a juror and counsel failed to investigate the matter or inform the Court.
12. The defendant alleges that counsel asked several questions of defendant's witnesses which were improper and undermined their credibility.
13. The defendant alleges that counsel failed to investigate or present evidence as to the effect of the defendant's PTSD, and injury to his shoulder and left ear from service related injuries.

At the Post-Conviction hearing the Applicant added the following additional ground which the Court will consider as an amendment to the original Application for Post-Conviction Relief: Simpson v. Moore, 627 S.E.2d 701, 708 (2006), Rule 15(b) SCRPC.

14. The defendant alleges that trial counsel was ineffective for failing to object to portions of Corporal Daniel Scott's testimony.

PMB

III.

STANDARD OF REVIEW

This Application for Post-Conviction Relief raises numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRPC. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that trial counsel: 1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters, and 2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that but for counsel's errors and omission, there is a reasonable probability that the result at trial would have been different. Id.; Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

Where trial counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). However, counsel may not explain away errors and omission which acted to prejudice his client's ability to receive a fair trial by simply labeling them matters of trial strategy or tactics. In the case of Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the South Carolina Supreme Court found that:

Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

IV.

EVIDENCE BEFORE THE COURT

At the Post-Conviction Relief hearing held in this case on July 31, 2014, the Applicant presented his own testimony as well as testimony from Shari Mumford, Joyce Quick, Steven Teal, Frank Cranford, Corey Williams, Ervin Smith and Mike Jenkins. The Respondent presented the testimony of trial counsel Larry W. Knox. In addition to the testimony presented, this Court has before it a transcript of the trial. What follows below are relevant facts from the trial and evidentiary hearing as well as findings of fact and rulings of law made by this Court in accordance with the Uniform Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10, *et seq.*(1995).

On the facts of this case, the Court finds that the combined errors and omissions of trial counsel were such that the Applicant was deprived of a fair trial. Specifically, this Court finds a reasonable probability that but for counsel's errors and omission, the outcome of the trial would have been different. In other words, this Court's confidence in the outcome of the trial is undermined because trial counsel failed to provide the Applicant reasonable, professional assistance of counsel.

V.

THE RELEVANT TRIAL TESTIMONY

Paul Funderburk, who was the injured party in the case, testified on behalf of the State. On December 23, 2010, he was at Todd Harrell's house along with the Applicant, Todd Harrell,

Amos Nivens, Corey Williams and Antonio Sellers. The Applicant and Todd Harrell were going to race motorcycles at some time, but not that night. Mr. Funderburk and the Applicant exchanged words and Mr. Funderburk swung a beer bottle at the Applicant which he testified did not hit Applicant. Tr., p. 65, l. 1. He swung at him again with his hand. Tr., p. 79, ll. 23-25.

They grabbed each other and wrestled for a couple of seconds and he pushed the Applicant away from him. Tr., p. 65, ll. 1-7. Mr. Funderburk then testified that he took a couple of steps back and turned to walk off when the Applicant started shooting. Tr., p. 66, ll. 8-10. He testified further that he was shot four times, one wound under the right butt cheek, one wound in the left kneecap, and two wounds in the lower right ankle. Tr., p. 67, ll. 5-10. Mr. Funderburk agreed that he was much bigger (he testified that he was 6' 2" and about 240 pounds), Tr., p. 102, ll. 6-10, than the Applicant. Tr., p. 81, ll. 16-17, and that he intended to hit the Applicant with the beer bottle, Tr., p. 100, l. 5.

Todd Harrell testified for the State. In addition to the people that Mr. Funderburk noted were present, Mr. Harrell stated that Frank Cranford and another individual he did not know were also present. Tr., p. 109, l. 12. He testified that Mr. Funderburk and the Applicant got into a heated discussion, Tr., p. 108, ll. 14-16, that involved name calling. Tr., p. 110, l. 3. Mr. Funderburk and the Applicant were about four feet apart, Tr., p. 110, l. 25, when Mr. Funderburk swung the beer bottle at the Applicant, the bottle did not hit the Applicant, but fell to the ground. The bottle did not shatter, Tr., p. 124, ll. 17-18, Tr., p. 110, ll. 14-16. As Mr. Funderburk swung the bottle, he approached the Applicant. Tr., p. 126, ll. 4-5, and 9-10. They began to tussle for a few seconds and Mr. Funderburk, then broke loose, Tr., p. 111, ll. 6-8. According to Mr. Harrell, both gentlemen were backing up, Tr., p. 112, ll. 13-15, when the Applicant pulled a gun out. Tr., p. 112, ll. 6-8. The Applicant approached Mr. Funderburk and began shooting, with

the first shot going off as the Applicant pointed to the ground. Tr., p. 120, ll. 8-13. Mr. Harrell stated that Mr. Funderburk was turning away. Tr., p. 130, ll. 4-5. In all, a total of five shots were fired. Tr., p. 113, l. 16.

Antonio Sellers testified for the State. He was present at the incident scene. He stated that the Applicant and Mr. Funderburk were talking "trash" to each other and the Applicant said several derogatory things about Mr. Funderburk's family, Tr., p. 141. Mr. Funderburk said that after he finished his beer he would deal with Applicant. Tr., p. 151, ll. 13-25, Tr., p. 141, ll. 17-20. Mr. Sellers took that to mean something was going to happen, Tr., p. 152, ll. 4-5.

Mr. Sellers said Mr. Funderburk took a step toward the Applicant and he stepped between them and the next thing he knew Mr. Funderburk swung the bottle toward the Applicant and it hit the ground. Tr., p. 141, l. 21, Tr., p. 152, l. 16. The bottle came over Mr. Sellers, Tr., p. 152, l. 17, and hit the ground and did not break. Tr., p. 162, l. 15. At one point during his testimony he said the bottle was thrown at the Applicant, Tr., p. 164, l. 13.

Mr. Sellers testified that Mr. Funderburk and the Applicant grabbed each other, backed off and looked at each other. Tr., p. 142, ll. 1-2. At that point, the Applicant pulled a gun and started firing as Mr. Funderburk went to turn. Tr., p. 142, ll. 2-6. The Applicant fired four or five shots, Tr., p. 142, l. 15, which hit Mr. Funderburk in the legs. According to Mr. Sellers, both the Applicant and Mr. Funderburk were wrong in their actions, Tr., p. 142, l. 7.

Dana Wallace testified for the State. Corporal Wallace has been employed by the Sheriff's Department for nine years. He was one of the officers who received the call on the night of the incident and he proceeded to the hospital. He and Deputy Joe Campbell took statements from Todd Harrell, Antonio Sellers, Amos Nivens, and Corey Williams. Tr., p. 178, ll. 2-3.

He and Deputy Campbell went to the scene. It was dark. Tr., p. 175, l. 7. At the scene, they recovered .22 shell casings along with a beer bottle. Tr., p. 169, ll. 204. They turned the evidence over to John James, who did not testify in the case. According to Corporal Wallace, they took no measurements at the scene, and he was not sure if they marked any of the evidence at the scene or took photos. Tr., p. 176, ll. 3-13. At the conclusion of his testimony, Deputy Joe Campbell was released and did not testify.

Corporal Daniel Scott testified for the State. He is employed by the Chesterfield County Sheriff's Department. On the day of the incident he received a call and proceeded to the hospital. Tr., p. 180, l. 24. Because he knew the Applicant, he called him and asked him to meet, Tr., p. 181, l. 25. The Applicant gave Corporal Scott the gun that was used.

Corporal Scott recorded a video of the Applicant's statement. According to Corporal Scott, the Applicant said that there had been some words between him and Mr. Funderburk and Mr. Funderburk said that as soon as I finish drinking this beer, I'm going to hit you with the bottle. Tr., p. 184, ll. 13-15. The Applicant then said Mr. Funderburk swung at him, Tr., p. 184, ll. 16-17 with the bottle. The Applicant stated that he had a metal plate in his head and wasn't going to allow Mr. Funderburk to hit him in the head. Tr., p. 190, ll. 14-15. The Applicant stated he reached for the gun and fired it in self-defense. Tr., p. 185, ll. 17-18, Tr., p. 184, ll. 16-17. According to the Applicant, he "blanked" out and was trying to shoot at the ground then he said foot. He also said that when he "blanked out," he lost focus and vision. Tr., p. 185, l. 4, Tr., p. 185, l. 15, Tr., p. 192, l. 9.

Corporal Scott also testified that the Applicant was small and Mr. Funderburk was big. Tr., p. 187, ll. 1-2, and that the Applicant was permitted to carry a pistol. Tr., p. 191, l. 11.

Corporal Scott then testified without objection, that he and the Applicant had the same military training and that they were taught that if one shoots someone in the femoral artery, the person can "bleed out," which could kill the person shot. Tr., p. 188, ll. 9-10, Tr. 188, ll. 17-20. On cross-examination Corporal Scott admitted that had the Applicant wanted to kill Mr. Funderburk, he had the training to do so. Tr., p. 194, ll. 13-15.

Steven Teal was called as a witness for the Applicant. He was a crucial witness because he was there at the time of the argument and the shooting. Trial counsel brought out the fact that his own witness had a thirty-five (35) year old conviction for vehicular homicide and DUI and served a four (4) year sentence back when he was eighteen (18) years old. Tr., p. 209, ll. 10-24. He is 53 years old now and was 18 at the time of the offense. Then trial counsel continued to impeach his own witness by asking if he used illegal drugs to which he answered yes. Tr., p. 210, ll. 24-25. Counsel then asked how long ago the witness last used illegal drugs and the witness answered five (5) years ago. Tr., p. 211, ll. 1-7. Mr. Teal was present at Mr. Harrell's home. Mr. Funderburk and the Applicant were arguing. He saw Mr. Funderburk hit the Applicant with a bottle of beer. Tr., p. 215, ll. 18-19. He was three (3) feet from the Applicant when that happened. According to Mr. Teal, Mr. Funderburk came down across the top of the Applicant's head and on his shoulder and the Applicant went down, Tr., p. 256, l. 18, and when the Applicant went down Mr. Funderburk was on top of him, Tr., p. 216, ll. 19-20. When the Applicant was going down, Mr. Funderburk went off and started "whooping up" on the Applicant. Tr., p. 218, ll. 14-18.

Mr. Teal then heard shots as Applicant was down on his knee or about to hit the ground. Tr., p. 219, ll. 2-3. He said the shots were coming from the middle of them. Tr., p. 219, ll. 10-11, and then Mr. Funderburk jumped up and ran off, Tr., p. 219, l. 15, and came back, Tr., p.

219, l. 17. Trial counsel again asked Mr. Teal if he had been convicted of vehicular homicide. Tr., p. 220, ll. 4-5.

The defense then called Frank Cranford who was also present at the scene of the incident at Todd Harrell's house. He, Mr. Teal and the Applicant rode over there together. According to Mr. Cranford, Mr. Funderburk started talking "junk" to the Applicant and they had a few words. Tr., p. 235, ll. 3-5. When they were fussing back and forth, Mr. Funderburk said "We'll see about all that when I finish drinking this beer." Tr., p. 235, ll. 15-16 and Tr., p. 236, ll. 8-9.

At some point Mr. Funderburk swung the beer bottle at the Applicant. Tr., p. 236, ll. 16-18. The beer bottle hit the Applicant on the right shoulder. Tr., p. 236, ll. 19-22. Mr. Funderburk then came in between them and charged the Applicant. Tr., p. 237, ll. 7-8. After he swung the bottle, he went back after the Applicant again. Tr., p. 237, ll. 15-16. Tony grabbed Mr. Cranford, and the Applicant "spent" around and he then saw the gunshot. Tr., p. 237, ll. 16-21. After Tony pulled him away was when he observed Mr. Funderburk hit the Applicant. Tr., p. 238, ll. 16-18. He did not see who did the shooting, but heard it. Tr., p. 238, ll. 19-25. He testified that the bullet hit the ground, Tr., p. 239, ll. 4-6. He then looked at and saw the Applicant shooting at the ground, and Mr. Funderburk came back at him and he shot again, Tr., p. 239, ll. 12-15.

Noah Mumford testified on his own behalf. He served seven (7) years in the military and went to Iraq. Tr., p. 258, ll. 16-17. He was honorably discharged. Tr., p. 259, ll. 20-21. On December 23, 2010, he went to Todd Harrell's house with his friends.

The Applicant said that when Mr. Funderburk got out of his truck, he started talking "junk," and the Applicant fired "junk" back. Tr., p. 267, ll. 5-6. The Applicant described the language as very vulgar. Tr., p. 267, ll. 21-22. The Applicant had his pistol with him and it was

legally purchased, Tr., p. 268, l. 23-24. While he took training with the pistol, he did not have the money to send in for a license. Tr., p. 269, ll. 14-16.

The words they exchanged with each other eventually led Mr. Funderburk to say "When I get through drinking this beer, I'm going to hit you in the head." Tr., p. 270, ll. 2-4. The Applicant said to his friend Todd that Mr. Funderburk was acting crazy and he was going to go. Tr., p. 270, ll. 4-6. Mr. Funderburk said he would hit him with the bottle in the head. Tr., p. 270, ll. 22-25.

The Applicant said he was prepared to leave and Mr. Funderburk came out with the bottle and hit him. Tr., p. 271, ll. 2-10. Mr. Funderburk came around Tony to hit him with the bottle, Tr., p. 271, ll. 15-18. The Applicant was struck with the bottle, went down and came up with the pistol, Tr., p. 272, ll. 3-13. The Applicant fired into the ground with the pistol, Tr., p. 272, l. 15. After firing two shots in the ground, Mr. Funderburk came back at him and he felt like he was not going to stop. Tr., p. 272, ll. 18-21.

The Applicant described that he had a previous head injury and he was afraid he would end up in a coma. Tr., p. 272-273, ll. 25-1. The Applicant stated he went down and Mr. Funderburk tried to hit him in the face. Tr., p. 173, ll. 3-8. The Applicant said he fired the gun, but Mr. Funderburk came back at him. Tr., p. 273 and he shot down again, tr., p. 273, ll. 15-17, but the bullet ricocheted and hit Mr. Funderburk. He stated he did not intend on shooting him. Tr., p. 273, ll. 15-17. He just wanted him to stop and not hurt him. Tr., p. 273, l. 19.

The Applicant testified that he cooperated fully with law enforcement. He went down to the sheriff's office, brought the gun and gave a video statement. Tr., p. 276, ll. 1-25.

Trial counsel also had the Applicant describe what he meant by "blinking out." He said he was dazed. Tr., p. 278, ll. 16-23. The Applicant testified he shot Mr. Funderburk to protect

himself, but if he had wanted to kill him he certainly could have. Tr., p. 280, ll. 13-15. He stated there was no other way to repel the attack – Mr. Funderburk was 200 pounds or something and he was 170 pounds. Tr., p. 290, ll. 17-18.

On cross-examination the Applicant testified that he did not have a permit to carry a concealed weapon. Tr., p. 286, ll. 7-9. He also testified that the bottle hit him in the shoulder, Tr., p. 286, l. 24. As for blacking out, he said he was receiving help. Tr., p. 288, l. 16.

The Court charged the jury. Trial counsel offered no objection to the charge nor did he submit any proposed instructions. The Court charged the jury on Attempted Murder, Tr., p. 351, l. 17. The Court also charged, without objection, the law of Assault and Battery of a High and Aggravated Nature. Tr., p. 353, l. 10. The Court also instructed the jury on the law of self-defense, Tr., p. 354, l. 2. The jury found the Applicant guilty of Assault and Battery of a High and Aggravated Nature. Tr., p. 366, l. 23.

VI.

RELEVANT TESTIMONY FROM THE EVIDENTIARY HEARING ON THE PCR APPLICATION

Mike Jenkins was called by the Applicant. He testified that he knew both Mr. Funderburk and the Applicant and he worked with Mr. Funderburk. He had an altercation with Mr. Funderburk at work because he closed the door of a truck and the radio went off. Mr. Funderburk got upset and pushed him down. He also testified that he had heard of other altercations Mr. Funderburk had been involved in. He was advised by the Applicant that he might be needed at trial, but he was never contacted by Mr. Knox or subpoenaed for trial. He did not know the Applicant to get into any trouble.

Ervin Smith was called to testify on behalf of the Applicant. He knew both Mr. Funderburk and the Applicant from Chesterfield County. Although he was not present at the incident, he was aware that Mr. Funderburk had gotten into altercations with other people. He described Mr. Funderburk as having a short fuse and the least little thing would set him off. He himself had an altercation with Mr. Funderburk. Mr. Smith was prepared to tell the jury about his interaction with Mr. Funderburk if he had been called as a witness during the trial. He testified that he was never contacted by Mr. Knox or subpoenaed for trial. Mr. Smith also testified that the Applicant was just an ordinary person and to his knowledge had not been in any fights.

Corey Williams testified for the Applicant. Mr. Williams is a resident of Cheraw and he was present at the altercation between the Applicant and Mr. Funderburk. He stated that he would have been willing to testify on behalf of the Applicant at his trial, but he was never interviewed by Mr. Knox or subpoenaed for the trial. He testified that both the Applicant and Mr. Funderburk were "talking trash" to each other and Mr. Funderburk hit the Applicant with a bottle. Mr. Funderburk then grabbed the Applicant and they tussled. The Applicant got loose and shot at the ground. According to Mr. Williams, if the Applicant had not shot, the fight would have continued. He also testified that Mr. Funderburk was facing the Applicant and still being aggressive at the time of the shooting.

Steven Teal testified at the PCR hearing and also at the Applicant's trial. Mr. Teal said that he never said to Mr. Knox, as claimed by Mr. Knox, that his prior crime was less than ten (10) years ago. Furthermore, he was surprised that Mr. Knox brought out anything about his prior drug use. Mr. Teal said that Mr. Knox told him he was going to bring out the information about his drug use and prior conviction because even if he did not, the state would question him

about it. Mr. Teal also testified that he saw Mr. Funderburk's father talking to one of the jurors that was seated in the trial. He described the juror as a white man, short and stocky with grey hair. Mr. Teal was not interviewed by Mr. Knox until the day of the trial, and he told him what he saw at the altercation. He told the Applicant what he saw regarding Mr. Funderburk's father and was present when the Applicant told Mr. Knox about it. He believed that the trial could have ended in a mistrial, but it did not, and he did not know what Mr. Knox did with the information.

Frank Cranford also testified at the hearing and at Applicant's trial. Mr. Cranford observed a white haired juror talking to Funderburk's father and he told the Applicant about it. He did not know what happened with the information.

Sherri Mumford, the Applicant's sister and Joyce Quick, the Applicant's mother, also testified at the PCR hearing. Ms. Mumford saw Mr. Funderburk's father talking to two jurors, a black man and a white man with grey hair. She testified she told Mr. Knox and the Applicant and Mr. Knox said he would take care of it. Ms. Quick said she saw Mr. Funderburk's father talking to a white hair, male juror and told Applicant about it.

Noah Mumford testified that he is currently at Wateree River Correctional Institution and was sentenced to 10 years. He went to prison on October 28, 2011.

Prior to the incident, Mr. Mumford was a Spec 4 in the military working as a mechanic in Iraq. He received a medical discharge from the army for PTSD, tinnitus, and a left shoulder injury. Mr. Mumford testified that he discussed his service related injuries with Mr. Knox including the fact that he was more susceptible to being injured because of the plate in his head. However, Mr. Knox never brought this fact out at trial.

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Mr. Mumford knew of Mr. Knox prior to the incident. To prepare for the trial he met with Mr. Knox six to eight times. Mr. Mumford testified that he did not know the process of a criminal trial and fully depended on Mr. Knox.

Mr. Mumford stated that he never received any Rule 5 materials. He did not know that he had a right to it. Further, Mr. Mumford never saw the victim's hospital records until Mr. Swerling showed him the records. Mr. Mumford testified that he did not know that he could get expert testimony regarding the entry/exit wounds of the victim.

Mr. Mumford stated that he did not have a preliminary hearing because Mr. Knox said he did not need one and Mumford relied on his advice. Mr. Mumford stated that he now understands that a preliminary hearing would give him a preview of the state's evidence. Mr. Mumford further testified that he feels that all of the police officers should have been interviewed, but no effort was ever made to do so. Mr. Knox never talked to Daniel Scott about the video statement he made. Mr. Knox received no information regarding the crime scene and very little investigation was done by the police.

Regarding the witnesses, Mr. Mumford did not understand why Corey Williams and Amos Nivens were not testifying as they were both at the scene of the incident. The two men were not interviewed by Mr. Knox, so he did not know what they would say.

As for Steven Teal and Frank Cranford, Mr. Mumford testified that he provided Mr. Knox with their names, and even brought Mr. Cranford to Knox's office so that he could interview him prior to the trial. Mr. Mumford felt as though Mr. Teal's credibility was ruined after Knox asked him about his prior convictions and drug use. Mr. Mumford also stated that he felt Mr. Knox could have elicited better answers on cross examination of the state's witnesses if he had interviewed them prior to the trial.

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Mr. Mumford was working for Marlboro EOC prior to the trial. This incident was his first offense. Mr. Mumford stated Paul Funderburk had a tendency for violence and provided Mr. Knox with a list of names of other people who had altercations with Mr. Funderburk. Mr. Mumford stated that Mr. Knox did not seem interested in interviewing these people.

Mr. Mumford said the location of the bottle and shell casings would show he was attacked. There was no question Mr. Funderburk struck Mr. Mumford first with the bottle. Mr. Mumford asked for photos but Mr. Knox never took any photos of the crime scene. Mr. Knox also never asked Mr. Mumford to come off the stand to show the jury what happened. In fact, Mr. Mumford stated that Mr. Knox did not effectively explain his injuries to the jury.

Mr. Mumford testified that he told Mr. Knox about Paul Funderburk, Sr. talking to the jury. He was unaware what Mr. Knox did about it, but said that nothing was done in open court about the issue.

Mr. Mumford also stated that Mr. Knox failed to discuss the legal issues with him, failed to explain the burden of proof, his right to testify or not testify, jury instructions, the castle doctrine, the charge instructions on Attempted Murder and ABHAN, and the lesser included charge of Assault and Battery in the First Degree. Mr. Knox did not explain that Assault and Battery in the First Degree carried a lower minimum sentence as well as being a parole eligible offense. Mr. Mumford testified that he was uncomfortable that Mr. Knox did not know what he was doing. He felt as though he was not represented properly and his due process was violated.

Larry W. Knox was called as witness for the Respondent. His testimony is summarized as follows:

Mr. Knox acknowledged that he was told about Mr. Funderburk's father talking to a juror. He testified that he believed he told the judge about it in chambers, but cannot recall

exactly what happened and doesn't now why the issue was not put on the record or why an inquiry was not made.

He also testified that he believed the juror in question was an alternate and since he was not taking part in the deliberations, it did not matter.

Mr. Knox testified that he did ask Mr. Teal about his conviction for vehicular homicide and claimed that Mr. Teal told him that the conviction was less than ten (10) years old, but he did not investigate the date of the offense. He also claimed that he brought out the conviction to show the jury that Mr. Teal had nothing to hide. Mr. Knox claimed that impeaching Mr. Teal's credibility did not hurt the Applicant's case because Mr. Teal was not the individual on trial.

Mr. Knox also admitted that he asked Mr. Teal about his prior drug use. He testified that he asked Mr. Teal about his drug use "to clear the air," and show that Mr. Teal had nothing to hide or lie about and to show that Mr. Teal had a "high veracity" and that Mr. Teal was not under the influence of drugs. In summary, he did not feel he impeached his own witness and that this all was his "trial strategy." It should be pointed out here that at the trial, Mr. Teal's record was discussed outside of the jury's presence and the Solicitor acknowledged that Mr. Teal's convictions were not admissible because they were beyond the ten (10) year limit. Tr., pp. 204-205, ll. 25-1.

Mr. Knox testified that he knew the Applicant was getting disability but did not know why and he did not pursue any of these medical or physical problems because he did not think it had any bearing on the case. The Applicant recalled events clearly and he did not believe it would affect his fear or apprehension. Mr. Knox recalled that someone at trial said the Applicant had a serious head injury and that he was not aware that the Applicant had PTSD or that the

Applicant had Tinnitus. He also testified he was not aware of the fact that the Applicant had a plate in his head and would blank out at times.

As for investigation, Mr. Knox admitted that he did not interview Mr. Teal until the day of trial even though he was retained months before. Mr. Knox did not interview Todd Harrell, Antonio Sellers, Dana Wallace, Daniel Scott, Cory Williams, Amos Nivens, Joe Campbell or John James. These were individuals who either had some role in the case as law enforcement officers or who were witnesses at the scene of the shooting. He also admitted that the Applicant had given him a list of witnesses but that the Applicant did not give him any contact information for them. When asked, Mr. Knox could not provide any documentation to show he made any effort to contact these or any witnesses. Mr. Knox claimed that he did not have a budget to hire an investigator from the fees obtained. He stated that he probably did not leave the office on one occasion to investigate the case on his own.

Mr. Knox testified that his investigation consisted of reading the police reports, the GSR report, interviewing Frank Cranford and the Applicant and watching his video. He did not receive a copy of the hospital records until after the trial started. It was also brought out that he never visited the crime scene with or without the Applicant, took no pictures of the crime scene, and took no measurements of the crime scene. Mr. Knox issued no subpoenas for the trial. Mr. Knox testified that he did not ask any law enforcement officer who testified at trial why they failed to take crime scene photos, measurements or diagrams because he did not believe it was important.

When questioned about whether he knew Mr. Funderburk had a reputation for getting into fights, Mr. Knox admitted he was told that by the Applicant. He stated he did not know the names Ervin Smith or Mike Jenkins who both testified at the PCR hearing. Mr. Knox testified

that he did not believe witnesses who would say Mr. Funderburk had a propensity for violence would be good because it did not fit his trial strategy. According to Mr. Knox, he felt Steven Teal was his best witness because he stated Mr. Funderburk was the aggressor in the situation.

Mr. Knox knew Corey Williams and Amos Nivens were also at the scene of the altercation and did not know why they were not testifying. Of course, he never interviewed them to determine what they would say. Corey Williams testified at the PCR hearing as outlined above.

Mr. Knox was also questioned about Mr. Funderburk's injuries and the hospital records. In response to a question as to why he did not seek to obtain Mr. Funderburk's medical records from the hospital, Mr. Knox stated – what would I need the records for? (This was a case where the Applicant raised the self-defense and the entrance and exit of the bullets was important in determining whether Mr. Funderburk was heading towards the Applicant or away from the Applicant). Mr. Knox received the hospital records from the state after the trial started. He never moved to compel their disclosure by the State or subpoenaed them from the hospital. Mr. Funderburk had testified that one of his wounds was in the left kneecap, Tr., p. 67, 11. 5-10, which would have indicated Mr. Funderburk was facing the Applicant when he was shot and not running away. Mr. Knox admitted that he failed to elaborate on this frontal shot issue and failed to argue that issue before the jury.

Mr. Knox was questioned about his failure to request a preliminary hearing. He testified he did not think it would aide his defense. Even though it would have been an opportunity to examine one or more police officers regarding the investigation, he did not think it was necessary.

Consistent with this line of questioning was Mr. Knox's testimony regarding S.C. Code § 16-11-450, *et. seq.*, otherwise known as the "Protection of Persons and Property Act," or the "Castle Doctrine." Mr. Knox testified that he did not believe the Castle Doctrine was applicable to this case and therefore he did not request one or discuss the Castle Doctrine with the Applicant. Mr. Knox testified that he did not feel he gave away anything by not having a Castle Doctrine hearing. Even though he conceded a Castle Doctrine hearing would give him more information about the case, he felt he had all the information he needed.

Mr. Knox was questioned regarding the submission of jury instructions. He did not submit any jury instructions. He did not submit any jury charge that a person can be acting lawfully even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting. He did not submit any jury instructions regarding the size disparity between the Applicant and Mr. Funderburk on the issue of self-defense. He did not submit any jury instructions regarding alcohol even though Mr. Funderburk was drinking at the time of the incident.

When the Court decided to submit the lesser included offense of Assault and Battery of a High and Aggravated Nature to the jury, Mr. Knox did not request that the Court instruct the jury on the additional lesser included offense of Assault and Battery First Degree. Mr. Knox testified that he did not feel it was a mistake to not request a lesser included charge of Assault and Battery First Degree because he felt the Applicant was going to be acquitted. In fact, he testified that he intentionally did not ask for the lesser included charge, even though it was parole eligible. He did not discuss the giving or asking for lesser included charges with the Applicant.

Mr. Knox testified that he never provided the Applicant with a copy of the discovery in the case although he let him review the discovery in his office. He stated that the Applicant never asked for a copy of the discovery.

Mr. Knox also testified that in hindsight he should have objected to the solicitor's questioning of Daniel Scott regarding the training the Applicant would have received in the military and that the Applicant would have known that shooting someone in the femoral artery would cause a person to "bleed out" and die.

VII

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Application for Post-Conviction Relief raises several allegations of ineffective assistance of trial counsel. This Court finds that the errors and omissions of trial counsel require reversal of the Applicant's conviction and sentence. The allegations will be addressed below:

A. THE DEFENDANT ALLEGES THAT COUNSEL ASKED SEVERAL QUESTIONS OF DEFENDANT'S WITNESSES WHICH WERE IMPROPER AND UNDERMINED THEIR CREDIBILITY. (#12)

The Applicant alleges that trial counsel was ineffective for asking several question of Applicant's witnesses which were improper and undermined their credibility. The Court disagrees with the Applicant and finds that the Applicant has not met his burden on this allegation.

Applicant has failed to demonstrate trial counsel was ineffective for asking Teal questions about his prior record and drug use. The Court finds credible trial counsel's testimony Teal indicated the vehicular homicide conviction was less than ten (10) years old. Correspondingly, the Court finds not credible Teal's testimony on this issue. Trial counsel could not have anticipated Teal would provide incorrect information about his prior record. Although

this conviction was likely not admissible under Rule 609(b), SCRE, trial counsel was entitled to act on the misleading information given by Teal. Cf. Rodriguez v. State, 74 S.W.3d 563, 568 (Tex. App. 2002) (“Moreover, we opt not to fault trial counsel for the intentional withholding of vital information by his client.” (citations omitted)). Therefore, trial counsel wisely asked Teal about his prior conviction to preempt the State from effectively impeaching him with the conviction. The Court finds trial counsel articulated a valid strategy of putting Teal’s record before the jury to add credibility to his testimony. Stokes, 308 S.C. at 548, 419 S.E.2d at 779. The Court also finds trial counsel articulated a valid strategy regarding Teal’s drug use. Id. The Court finds credible trial counsel’s testimony he wanted to demonstrate Teal was not drinking or on drugs the night of the shooting, thereby showing his memory of events was more reliable than the witnesses who had been drinking.

Regardless, the Court further finds Applicant has not shown he was prejudiced by trial counsel eliciting this testimony from Teal. Teal’s conviction was several years old and dissimilar to Applicant’s charges. The State did not use Teal’s conviction to challenge his credibility in cross-examination or closing argument. Thus, the Court finds the introduction of the prior conviction was not so harmful to Teal’s credibility as to prejudice Applicant. Furthermore, the introduction of the drug use was not mentioned in the State’s cross-examination or closing arguments. In light of the evidence several persons at the scene were consuming alcohol that day, Teal’s admission he was sober may have actually bolstered his account of events leading up to the shooting. Accordingly, the testimony trial counsel elicited about Teal’s prior conviction and drug use did not likely contribute to the verdict in this case.

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B. THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO SUBMIT JURY INSTRUCTIONS RELATING TO THE FACTS OF THE CASE. (#8)

The Court finds Applicant failed to demonstrate he was prejudiced by trial counsel's failure to submit jury instructions on self-defense and lesser included offenses.

Applicant has not shown he was prejudiced by the lack of jury charges on the disparity in size between Applicant and the victim or about the victim's alcohol intake. The trial judge gave a through charge on self-defense. His charge begins with a recitation of the model charges promulgated by the South Carolina Supreme Court in State v. Davis, 282 S.C. 45, 317 S.E.2d 452, 453 (1984). He also charged the jury on Applicant's right to act on appearances and that words, accompanied by hostile acts, could establish self-defense. State v. Fuller, 297 S.C. 440, 443, 377 S.E.2d 328, 331 (1989). In light of the trial judge's through charge, Applicant has not shown he was prejudiced by trial counsel's failure to request additional instructions on self-defense. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) ("In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." A jury charge which is substantially correct and covers the law does not require reversal." (citing State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003); State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996))).

The Court further finds trial counsel was not ineffective in failing to request a charge on the lesser included offense of first degree assault and battery. The Court finds credible trial counsel's testimony his strategy was to get the jury to acquit on the indicted charge, not convict on a lesser included. Because trial counsel argued Applicant's actions were completely justified, he had no reason to ask the jury to consider a lesser degree of culpability. Accordingly, the

Court finds trial counsel articulated a valid strategy for not requesting a first degree assault and battery charge. Abney v. State, 408 S.C. 41, 46, 757 S.E.2d 544, 547 (Ct. App. 2014), reh'g denied (Apr. 24, 2014) (failing to ask for a jury charge on a lesser included offense is a valid trial strategy); see also State v. Walker, 605 S.E.2d 647, 654 (N.C. Ct. App. 2004), overruled on other grounds, 695 S.E.2d 750 (N.C. 2006) ("The record indicates defendants' counsel were employing an 'all or nothing' strategy[.] ... The fact that it failed does not mean that defendants were deprived of effective assistance of counsel."). Therefore, trial counsel was not deficient for not requesting a lesser included offense.

Regardless, Applicant was not prejudiced by the lack of a first degree assault and battery charge in this case. Although first degree assault and battery is a lesser included offense of ABHAN, S.C. Code Ann. § 16-3-600(C)(3), a judge can only charge the jury on offenses which are supported by the facts of the case. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006) (citations omitted). Here, the facts support a charge on ABHAN based on Applicant's use of a firearm. State v. Dennis, 402 S.C. 627, 638, 742 S.E.2d 21, 27 (Ct. App. 2013) ("Under the common law, ABHAN 'requires an unlawful act of violent injury accompanied by circumstances of aggravation,' which may include 'the use of a deadly weapon, the infliction of serious bodily injury, [or] the intent to commit a felony.'" (citing State v. Coleman, 342 S.C. 172, 536 S.E.2d 387 (Ct. App. 2000))). However, there is no evidence from which the jury could have convicted Applicant of the lesser included offense of first degree assault and battery. The evidence is clear Applicant inflicted great bodily harm on the victim by shooting him. S.C. Code Ann. § 16-3-600(A)(1) (defining great bodily injury). His plea of self-defense and the supporting evidence may reduce the attempted murder to ABHAN. Dennis, 402 S.C. at 638, 742 S.E.2d at 27 ("An ABHAN charge is appropriate when the evidence

demonstrates the defendant lacked the requisite intent to kill.” (citing Coleman, 342 S.C. 172, 536 S.E.2d 387)). However, there is no evidence to reduce it further to a first degree assault and battery because the victim was actually injured. See State v. Middleton, 407 S.C. 312, 316, 755 S.E.2d 432, 435 (2014), reh'g denied (Apr. 2, 2014) (distinguishing the two subsections of the first degree assault and battery statute where subsection (a) requires an injury to the victim and subsection (b) does not require an injury to the victim). Because Applicant actually inflicted great bodily harm on the victim, he was not entitled to a charge on first degree assault and battery. Accordingly, Applicant was not prejudiced by trial counsel’s failure to request a charge on the lesser included offense.

C. THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO CALL TO TRIAL SEVERAL WITNESSES FOR THE DEFENSE. (#3)

The Court also finds Applicant has not demonstrated trial counsel was ineffective for failing to call Smith, Jenkins, and Williams as defense witnesses. The Court finds credible trial counsel’s testimony Applicant never told gave him the names of Smith or Jenkins as potential witnesses, and finds Applicant’s testimony on this issue to be not credible. Because Applicant did not provide these leads to trial counsel, the Court finds trial counsel was not deficient in failing to call them as witnesses. Rodriguez, 74 S.W.3d at 568.

Regardless, Smith and Jenkins testimony was likely not admissible at trial. Both individuals testified at the evidentiary hearing to prior incidents of violence by the victim. However, both also testified they were not social acquaintances with Applicant or the victim. Rule 404(a)(2) allows testimony about “pertinent trait of character of the victim[,]” but not testimony about specific instances of conduct. See Rule 405, SCRE (“In all cases in which

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evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion.”); see also United States v. Bautista, 145 F.3d 1140, 1152 (10th Cir. 1998) (“Here, Bautista sought to introduce Martinez’s testimony that Carrillo made a pass at him and Whitt’s testimony that Martinez told her about the incident. This testimony, however, shows specific conduct of the victim rather than reputation or opinion concerning the character of the victim.”). Because Smith and Jenkins provided testimony at the evidentiary hearing about specific conduct of the victim, and not about his reputation, Applicant has not shown their testimony would have been admitted at trial if trial counsel had called them as witnesses.

Furthermore, the Court finds the result of the trial would not have been different had Smith or Jenkins testified. The fact the victim was the initial aggressor in the incident was not disputed at trial. The victim even admitted in his testimony that he started the fight. Thus, evidence the victim had a short temper and was aggressive was cumulative to the information provided at trial. Edwards, 392 S.C. at 459, 710 S.E.2d at 66 (“[W]here evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel’s failure to bring it forward.” (citations omitted)).

The Court further finds Applicant was not prejudiced by trial counsel’s failure to call Williams as a witness. Williams’ testimony at the evidentiary hearing was largely cumulative to the testimony provided at trial. Id. Furthermore, the testimony at the evidentiary hearing indicates Williams’ testimony actually would have been harmful to Applicant’s case. Williams’ description of the shooting involves Applicant engaging in a verbal altercation with the victim. The victim then threw a beer bottle at Applicant, and a fight ensued. However, Williams testified Applicant was able to disengage himself from the fight. It was once Applicant had

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escaped the victim's grasp that he pulled out his gun and began firing. This testimony established Applicant had an opportunity to retreat from the fight, but chose to draw a weapon and fire it. Therefore, Williams' testimony indicates Applicant was not acting in self-defense when he pulled the gun and fired. Specifically, Applicant could not have entertained a reasonable fear of danger where the victim was not armed with the beer bottle and was not engaged with him. Curry, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4 (valid claim of self-defense based upon a belief of imminent danger requires "a reasonably prudent man of ordinary firmness and courage would have entertained the same belief" (citing State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984))). Because Williams' testimony does not further Applicant's theory of self-defense, the Court finds Applicant has not shown he was prejudiced by trial counsel's failure to call Williams as a witness.

D. THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO HAVE A PRELIMINARY HEARING. (#7)

THE DEFENDANT ALLEGES THAT THE SOUTH CAROLINA LEGISLATURE PASSED WHAT IS KNOWN AS THE "PROTECTION OF PERSONS AND PROPERTY ACT" EFFECTIVE JUNE 9, 2006. THE ACT PROVIDES IMMUNITY FROM PROSECUTION PURSUANT TO SECTION 16-11-450 OF THE S.C. CODE OF LAWS (1976 AMENDED). (#9)

THE DEFENDANT ALLEGES THAT THE SOUTH CAROLINA SUPREME COURT HANDED DOWN THE OPINION IN STATE V. DUNCAN, 709 S.E.2D 662 (MAY 9, 2011) WHICH HELD THAT THE DEFENDANT WAS ENTITLED TO IMMUNITY UNDER THE ACT. (#10)

(I) THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO REQUEST A PRETRIAL DETERMINATION OF IMMUNITY PURSUANT TO THE ABOVE-REFERENCED STATUTE AND CASE LAW.

(II) **THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO REQUEST JURY INSTRUCTIONS THAT WOULD HAVE BEEN APPLICABLE UNDER THE ACT AND CASE AFOREMENTIONED.**

Applicant alleges trial counsel was ineffective in failing to request a preliminary hearing and in failing to request a hearing pursuant to the Protection of Persons and Property Act.¹ The Court finds Applicant failed to meet his burden of proving trial counsel ineffective in failing to request either of these hearings.

Initially, the Court notes Applicant does not have a constitutional right to a preliminary hearing. State v. Keenan, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982) (citing State v. McClure, 277 S.C. 432, 289 S.E.2d 158 (1982)). Additionally, Applicant's indictment by the grand jury established probable cause and mooted his entitlement to a preliminary hearing. McClure, 277 S.C. at 434, 289 S.E.2d at 160 (citing U.S. v. Werbrouck, 589 F.2d 273 (7th Cir. 1978)). Because Applicant was not entitled to a preliminary hearing, trial counsel was not ineffective in failing to request one. Furthermore, the Court finds credible trial counsel's testimony he did not feel a preliminary hearing was necessary to develop the facts of the case. Stokes, 308 S.C. at 548, 419 S.E.2d at 779. There were few facts in dispute in this case, and trial counsel was familiar with the evidence in the case. Therefore, Applicant has not demonstrated what further evidence would have been discovered had a preliminary hearing been held.

The Court further finds Applicant has not demonstrated he was prejudiced by the lack of a hearing pursuant to the Protection of Persons and Property Act ("the Act"). Generally, the Act provides for a pre-trial determination of a defendant's immunity from prosecution. State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). Trial counsel candidly admitted

¹ S.C. Code Ann. § 16-11-450(A).

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Applicant was entitled to an immunity hearing under the Act. However, mere entitlement to such a hearing does not automatically render trial counsel's performance deficient in failing to request one. Trial counsel testified he did not request an immunity hearing because, in part, he did not believe it was necessary to develop the facts of the case. The Court finds this rationale

can be a valid strategic decision under the facts of this case. Stokes, 308 S.C. at 548, 419 S.E.2d at 779.

Regardless, Applicant has not shown he was prejudiced by trial counsel's failure to request an immunity hearing. At an immunity hearing, a defendant must prove he was acting in self-defense by preponderance of the evidence. Duncan, 392 S.C. at 411, 709 S.E.2d at 665. The Court finds the record before it does not show Applicant would have been successful in meeting such a burden. The evidence in this case consisted entirely of competing testimony from the various witnesses. Furthermore, the facts, even including the testimony presented at the evidentiary hearing, do not indicate Applicant was more likely than not acting in self-defense. Therefore, this case "presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution." State v. Curry, 406 S.C. 364, 372, 752 S.E.2d 263, 267 (2013). Accordingly, the Court finds Applicant has not shown he would have been granted immunity from prosecution had trial counsel requested a hearing under the Act.

E. THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE THE CASE. (#1)

THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO INTERVIEW THE STATE'S WITNESSES. (#2)

THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO EFFECTIVELY CROSS-EXAMINE SEVERAL OF THE WITNESSES CALLED BY THE STATE DURING THE TRIAL OF THIS CASE. (#5)

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THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE THE SCENE OF THE ALLEGED OFFENSE. (#6)

Applicant alleges trial counsel was ineffective for failing to adequately investigate his case. The Court finds Applicant's failed to meet his burden of proving trial counsel was ineffective in these regards. Failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). Although trial counsel candidly admitted he did not perform many of the tasks Applicant alleges should have been performed, the Court finds Applicant failed to demonstrate how he was prejudiced by trial counsel's failures in these regards. See Strickland, 466 U.S. at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies ... [i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice[.]").

Regarding Applicant's allegation trial counsel failed to interview the State's witnesses, the Court finds Applicant failed to demonstrate how interviewing the State's witnesses would have changed the result of his trial. Trial counsel received all the witness statements prior to trial and thoroughly reviewed them. He was not surprised by any of the testimony at trial. Such an investigation was reasonable under the circumstances. Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011) (citing Daniels v. State, 676 S.E.2d 13 (Ga. 2009)). To the extent the testimony at trial differed from the statements, trial counsel thoroughly cross-examined the witnesses on these inconsistencies. Applicant has not shown how a pre-trial interview of these witnesses would have helped him more thoroughly cross-examine them.

The Court finds Applicant has not demonstrated trial counsel ineffective for failing to more thoroughly cross-examine the State's witnesses. The record indicates trial counsel thoroughly cross-examined witnesses on their prior statements and their criminal records. Trial counsel impeached several eye-witnesses on the fact their trial testimony included a statement by Applicant after the shooting that was not previously disclosed to investigators. Trial counsel got the victim to admit he was the initial aggressor and Applicant was defending himself. Trial counsel further got the investigating officer to testify to Applicant's cooperation and contrition. In light of trial counsel's thorough cross-examination of the witnesses, the Court finds Applicant has not shown either a deficiency or prejudice from trial counsel's performance. See Skeen v. State, 325 S.C. 210, 216-17, 481 S.E.2d 129, 133 (1997) (court will not "speculate whether a 'better' cross examination would have helped" a defendant's case).

The Court further finds Applicant failed to demonstrate a further investigation of the crime scene would have assisted in his defense. Regarding this allegation, the Court finds trial counsel's testimony credible, and Applicant's not credible. There was no debate about the location of either of the parties when Applicant began shooting. Rather, the ultimate question was whether the victim was attacking or retreating when shot. The Court agrees with trial counsel's assessment that the best evidence of the events was the testimony of the witnesses. Thus, he articulated a valid strategy for foregoing a crime scene reconstruction. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). Applicant has also not presented any evidence, other than his testimony, to show what further information would have been discovered had trial counsel procured photographs and diagrams of

the crime scene. Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (“Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial.” (citations omitted)). Accordingly, the Court finds Applicant was not prejudiced by trial counsel’s failure to further investigate the crime scene.

F. THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE THE INJURIES OF THE ALLEGED VICTIM IN THE CASE. (#4)

The Court also finds Applicant failed to demonstrate trial counsel’s failure to investigate the victim’s injuries would have yielded any helpful evidence. The victim’s testimony was consistent that he was shot from behind, and the extent of his injuries was clarified in his rebuttal testimony. The Court finds credible trial counsel’s testimony he did not think the victim’s medical records were relevant to the facts at issue in this case. Regardless, the Court cannot determine the value of these records because Applicant failed to produce them at the evidentiary hearing. Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (“Since the contents of these documents were never revealed at the PCR hearing, Defendant has failed to present any evidence of probative value demonstrating how the failure to obtain the unproduced statements or acquire the other documents in a more timely fashion prejudiced the defense.” (citations omitted)).

G. THE DEFENDANT ALLEGES THAT SEVERAL WITNESSES OBSERVED THE VICTIM TALKING TO A JUROR AND COUNSEL FAILED TO INVESTIGATE THE MATTER OR INFORM THE COURT. (#11)

Applicant failed to meet his burden to show trial counsel ineffective in failing to bring to the court's attention an allegation the victim's father was interacting with a juror during trial. The Court notes the testimony regarding this allegation was wholly inconsistent among witnesses. Trial counsel testified the juror he recalled being alerted about was not actually on Applicant's jury. Teal testified the juror's name was Griggs, but the record indicates nobody by that name was seated on Applicant's jury. Applicant's sister testified the victim's father was speaking to a black female and a white male with red hair. The only consistent testimony came from Mr. and Mrs. Cranford, who indicated a white male with white hair was speaking to the jury. In light of the other inconsistencies in the testimony about this juror, the Court finds the testimony of Mr. and Mrs. Cranford not credible. Furthermore, neither the victim's father nor the alleged juror testified at the evidentiary hearing. Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, without a witness's testimony, "any finding of prejudice is merely speculative"). The Court also finds credible trial counsel's testimony that he brought the issue to the attention of the trial judge, and no further action was necessary. Ultimately, the Court has no evidence any alleged exchange between the victim's father and a juror prejudiced Applicant's right to a fair and impartial jury.

H. THE DEFENDANT ALLEGES THAT COUNSEL FAILED TO INVESTIGATE OR PRESENT EVIDENCE AS TO THE EFFECT OF THE DEFENDANT'S PTSD, AND INJURY TO HIS SHOULDER AND LEFT EAR FROM SERVICE RELATED INJURIES. (#13)

The Court finds Applicant has not demonstrated trial counsel should have further investigated Applicant's service related injuries. Here, the Court finds trial counsel's testimony credible, and Applicant's not credible. Trial counsel was fully aware of Applicant's service

related injuries. However, the Court cannot discern how these injuries are relevant to the facts of this case. There is no evidence these injuries inhibited Applicant's ability to understand the danger allegedly posed by the victim or his ability to avoid the danger. Trial counsel was also aware of Applicant's prior head injury. Trial counsel used the head injury to explain Applicant's reaction to having a bottle thrown at him and his belief the bottle could pose a risk of harm. To the extent they were helpful in the case, trial counsel utilized Applicant's service related injuries to his advantage.

On the other hand, Applicant never informed trial counsel of his PTSD diagnosis. Because trial counsel was not aware of this diagnosis, he was under no duty to further investigate its relevance to the crime. C.f. Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992) (trial counsel may rely on his own perceptions as well as communications with client and client's family in determining competency issues).

Regardless, the only value of the PTSD diagnosis would be to explain Applicant's mental state at the time of the shooting. It would not have provided a complete defense to Applicant's actions because it would not impede his ability to distinguish right from wrong. State v. South, 310 S.C. 504, 508, 427 S.E.2d 666, 669 (1993) (under the M'Naughten test, a defendant is not criminally responsible "if, at the time of the offense, he lacked the capacity to distinguish moral or legal right from wrong" (citing S.C.Code Ann. § 17-24-10 (Supp.1989); Davenport v. State, 301 S.C. 39, 389 S.E.2d 649 (1990))). Here, Applicant's statement to investigators, his testimony at trial, and his testimony at the evidentiary hearing indicate he fully understood his actions the day of the shooting. Thus, information about his PTSD would not have exculpated him from responsibility for his actions. See, e.g., State v. Angel, 330 N.C. 85, 93, 408 S.E.2d 724, 728-29 (1991) ("Though defendant presented evidence that he may have suffered from

post-traumatic stress disorder and that he may have 'dissociated' at the time of the killing, this evidence was met by plenary, credible evidence by the State in rebuttal."). Instead, the information merely would have served as mitigation evidence. However, the jury clearly found Applicant had no intent to kill the victim when it convicted him of the lesser included offense of ABHAN. Therefore, the Court finds a further investigation into Applicant's prior injuries would not have affected the outcome of his trial.

I. THE DEFENDANT ALLEGES THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO PORTIONS OF CORPORAL DANIEL SCOTT'S TESTIMONY. (#14)

The Applicant alleges that trial counsel was ineffective in failing to object to Corporal Daniel Scott testifying that he and the Applicant had the same military training and that they were taught that if one shoots someone in the femoral artery, the person can bleed out which would kill the person who was shot. Tr., p. 188, ll. 9-10, ll. 17-20. This testimony was clearly not admissible. The witness was never qualified as an expert to render such an opinion, and the witness should not have been allowed to testify essentially to what the Applicant would have known from his military training. This testimony certainly was prejudicial and allowed the jury to speculate that the injury was more serious than it was and could have killed Mr. Funderburk. Further, this testimony could infer to a jury that, because of his military training, the Applicant's state of mind was to kill Mr. Funderburk by shooting him in his femoral artery, which was inappropriate and prejudicial testimony given against the Applicant by Corporal Scott's lay testimony here.

The Court is of the opinion that the Applicant has shown that there is a reasonable probability that but for counsel's errors or omissions that the result of the proceeding would have

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been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case.

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The Court finds that there are multiple errors that may not individually amount to the Applicant receiving ineffective assistance of counsel, but when taken as a whole, they could amount to such, excluding Corporal Daniel Scott's testimony, which in the Court's opinion does, by itself, amount to ineffective assistance of counsel. These issues are individually noted and discussed above. The Court also finds that even if no one issue demonstrates actual prejudice, (which the Court has found issue that demonstrates actual prejudice), an Applicant may be relieved of showing actual prejudice, if counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary. Frett v. State, 378 S.E.2d 249 (1988); Green v. State, 569 S.E.2d 318 (2002).

In the Green case, *supra.*, the Court noted that the question of whether cumulative errors, which by themselves are not prejudicial, would warrant the granting of post-conviction relief was an unsettled question in South Carolina, but the Court said:

"While it is unsettled law whether individual errors, which may not be independently prejudicial, may be prejudicial when taken as a whole, we recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors. Multiple errors do not exist in this case to form any cumulative prejudicial effect." At p. 324.

Here the Court is of the opinion and so finds that, in addition to the issue of Corporal Scott's testimony, there are multiple errors and they could form a cumulative prejudicial effect to

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warrant the granting of post-conviction relief. See, also, State v. Peterson, 335 S.E.2d 800 (1985), and State v. Freeman, 459 S.E.2d 867 (Ct. App. 1995).

VIII

CONCLUSION

The Application for Post-Conviction Relief is hereby granted. The Applicant's conviction and sentence for Assault and Battery of a High and Aggravated Nature is vacated, and the Applicant's case is remanded to the Chesterfield County Court of General Sessions for a new trial.



PAUL M. BURCH, PRESIDING JUDGE
FOURTH JUDICIAL CIRCUIT

November 21, 2014



ALAN WILSON
ATTORNEY GENERAL

March 12, 2015

The Honorable Faye L. Sellers
Chesterfield County Clerk of Court
Post Office Box 529
Chesterfield, South Carolina 29709

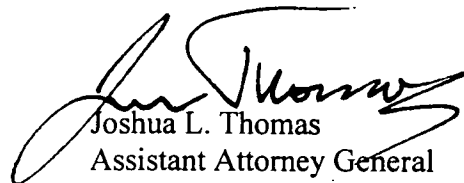
Re: Noah C. Mumford, Respondent v. State of South Carolina, Petitioner
Civil Action No. 2013-CP-13-97

Dear Ms. Sellers:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. Correspondence with the court reporter regarding the transcript.

Sincerely,



Joshua L. Thomas
Assistant Attorney General

JLT/jlt

Enclosures

CC: Jack B. Swerling, Esquire
South Carolina Department of Corrections
The Honorable Daniel E. Shearouse, Clerk of the South Carolina Supreme Court
The Honorable William B. Rogers Jr., Fourth Circuit Solicitor
Office of Appellate Defense
Ms. Trisha Allen, Victim Services