

THE

GIESE

LAW FIRM, LLC

April 28, 2016

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

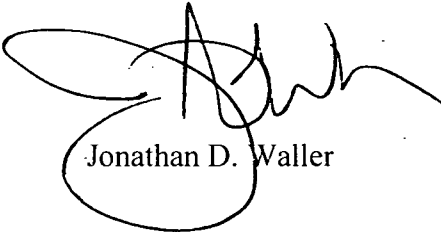
Re: Nathaniel Murray vs. State of South Carolina
C/A No: 2014-CP-40-07482

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Murray in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-708-6767.

Sincerely,



Jonathan D. Waller

RECEIVED

MAY 02 2016

S.C. SUPREME COURT

Cc: J. Clayton Mitchell, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Tanya A. Gee, Circuit Court Judge

2014-CP-40-07482

Nathaniel Murray, #313891,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Nathaniel Murray, #313891, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed January 21, 2016 and served on counsel by letter dated March 31, 2016, issued by the Honorable Tanya A. Gee, Presiding Judge, Fifth Judicial Circuit.


Jonathan D. Waller

Giese Law Firm
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1315 Blanding Street
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803-708-6769 (fax)
jwaller@thegieselawfirm.com
ATTORNEY FOR PETITIONER

RECEIVED

MAY 02 2016

S.C. SUPREME COURT

This 28 day of April, 2016.

Other Counsel of Record:
J. Clayton Mitchell, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Tanya A. Gee, Circuit Court Judge

2014-CP-40-07482

Nathaniel Murray, #313891,

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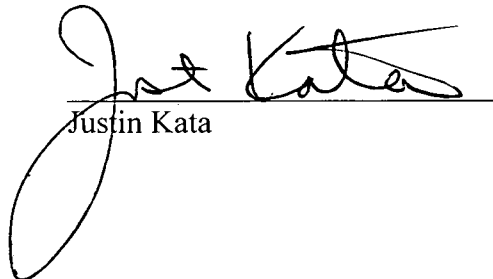
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MAY 02 2016

S.C. SUPREME COURT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, J. Clayton Mitchell, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 28 day of April 2016, to his office located at P.O. Box 11549, Columbia, SC 29211.


Justin Kata

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2014CP4007482

Nathaniel #313891 Murray

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRCP; Rule 41(a), SCRCP (Vol. No. _____); Rule 43(k), SCRCP (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRCP; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** Affirmed; Reversed; Remanded; Other _____

RECORDED
 2016 JAN 21 AM 10:03
 RICHLAND COUNTY
 SUPREME COURT

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

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

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

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

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

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

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

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 21 January 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Nathaniel #313891 Murray

Jonathan D Waller

James Clayton Mitchell III

Nathaniel #313891 Murray

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Janette W. McBride

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Nathaniel Murray, #313891,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2014-CP-40-07482

ORDER OF DISMISSAL

JEANETTE W. MOBRIDGE
C.C.P. & G.S.

2016 JAN 21 AM 10:03

RICHLAND COUNTY
FILED

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed December 4, 2014. Respondent made its Return on June 9, 2015, requesting an evidentiary hearing be convened. Jonathan D. Waller was appointed by the Richland County Clerk to represent Applicant in this action. An evidentiary hearing was held on August 27, 2015, at the Richland County Courthouse. Applicant was present and represented by Counsel Waller. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's counsel, Mark E. Schnee, Esquire. This Court had before it the Richland County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the appellate records, the PCR application, the Return, and the transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the April 2009 term of the Court of General Sessions for Richland County for Failure to Stop for a Blue Light (2009-GS-40-1531) and two counts of Armed Robbery (2009-GS-40-1532; -1533).

At arraignment, Applicant was represented by Mark Sawyer, Esq. At trial, Applicant was represented by Mark E. Schnee, Esq. Applicant proceeded to trial on October 12-14, 2009. He was convicted as indicted. The Honorable L. Casey Manning sentenced Applicant to concurrent terms of three (3) years' imprisonment for Failure to Stop for Blue lights and to life without parole for the charges of Armed Robbery.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Dayne Phillips, Esq. The South Carolina Court of Appeals dismissed the appeal. State v. Murray, No. 2012-UP-228 (filed April 12, 2012). The Remittitur was issued on July 16, 2014.

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

- I. Ineffective assistance of trial counsel in
 - a. Failing to properly challenge the identification made by witness Jimmy Hampton;
 - b. Failing to properly advise Applicant of his 5th amendment rights and the consequences of waiving those right;
 - c. Failing to move to have Deputy Josh Woodley sequestered; and
 - d. Failing to properly prepare a defense strategy.
- II. Ineffective assistance of appellate counsel in failing to raise the issue of whether Applicant was eligible for life without parole under S.C. Code § 17-25-45 (1976).

III. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced 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.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, appellate records, records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

Ineffective Assistance of Trial Counsel

Failing to properly challenge the identification made by witness Jimmy Hampton

First, Applicant alleges Counsel Schnee was ineffective in failing to challenge the identification made by witness Jimmy Hampton. Applicant argues that Counsel Schnee should have objected to the show-up identification. Counsel Schnee testified that identification was never an issue for the jury. He further testified that Applicant would be testifying in his defense. This Court finds Applicant failed to meet his burden of proof. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Counsel Schnee's testimony is credible and persuasive on the issue. This Court finds Counsel Schnee made the strategic decision not to challenge Hampton's identification because identification was never in question. The evidence shows that Applicant pushed Hampton out of his car and stole his car. Applicant was apprehended in Hampton's car after a two to three mile chase. (Trial Tr. p. 120-28). Applicant testified at trial that he did steal Hampton's car but claimed he did not have a gun and did not make representations that he had a gun. This is consistent with the overall strategy that the State could not prove Applicant was armed or that he represented that he was armed. This allegation is denied and dismissed with prejudice.

Failing to properly advise Applicant of his 5th amendment rights and the consequences of waiving those rights

Next, Applicant alleges Counsel Schnee was ineffective in failing to properly advise Applicant of his 5th amendment rights and the consequences of waiving those rights. He also argues that he was not advised that the jury would be instructed not to take into account whether he testifies or not. Applicant testified that Counsel Schnee advised him to testify to get his version of events before the jury. Counsel Schnee testified he did not believe he advised Applicant of his right to remain silent. This Court finds Applicant has met his burden in proving

Counsel Schnee was ineffective in failing to properly inform Applicant of his Fifth amendment rights and the consequences of exercising those rights. See Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (“A defendant's decision to testify or not must be made with knowledge of the consequences of either choice”). However, this Court finds Applicant failed to demonstrate that he was prejudiced by Counsel Schnee’s ineffectiveness. The result of the proceeding would not likely have been different had Applicant been properly advised. The only way for Applicant to refute the State’s case was to testify that he did not have a weapon and did not represent that he had a weapon. Notably, Applicant’s prior record was not revealed during his testimony. Also, Applicant failed to prove that, but for Applicant’s testimony, there was a reasonable probability that the result of the trial would have been different. This allegation is denied and dismissed with prejudice.

Failing to move to have Deputy Josh Woodley sequestered

Applicant alleges Counsel Schnee was ineffective for failing to have Josh Woodley of the Richland County Sheriff’s Department sequestered during the trial. Applicant testified that multiple witnesses were not sequestered during the trial. Counsel Schnee testified that only the lay witnesses were to be sequestered. He noted sequestering of witness^{es} is typically handled in this manner.

This Court finds Counsel Schnee’s testimony credible on the issue. Applicant has failed to show Counsel was ineffective. The record reflects that the lay witnesses were sequestered and that law enforcement was allowed to be present during the testimony. Further, Applicant cannot show that the result of the trial would have been different had Deputy Woodley been sequestered. This allegation is denied and dismissed with prejudice.

Failing to properly prepare a defense strategy

Applicant also alleges Counsel Schnee was ineffective in failing to properly prepare an effective defense strategy. Applicant testified that he did not communicate very much with Counsel Schnee. He alleges Counsel Schnee did not present a reasonable strategy in his defense. Counsel Schnee testified he hoped to get an acquittal on the armed robbery charge and was “shooting for” a strong armed robbery conviction. To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). This Court finds Counsel Schnee crafted a reasonable and effective trial strategy in attacking the State’s theory that Applicant was either armed with a weapon or represented that he had a weapon. Counsel Schnee’s testimony on the issue is credible. This Court finds Applicant has failed to prove prejudice. Applicant has not presented this Court with any alternative defenses or strategies that would have been stronger and more effective. The evidence against Applicant was strong. He was arrested in Hampton’s car just minutes after robbing him. This allegation is denied and dismissed.

Ineffective Assistance of Appellate Counsel

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-

conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

“Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is ‘difficult to demonstrate that counsel was incompetent.’” United States v. Mason, No. 3:06–607–CMC, 2012 WL 5845807 at *1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). While 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 v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990), citing Jones v. Barnes, 463 U.S. 745 (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. Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). “‘Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.’” Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not deficient performance. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

“To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal.” United States v. Mason, 2012 WL 5845807 at *1 (citing Smith v. Robbins, 528 U.S. at 285-86, 120 S. Ct. at 764).

Here, appellate counsel argued the trial judge erred in having Applicant remain in shackles while he testified. Appellate Counsel relied on Deck v. Missouri, 544 U.S. 622 (2005) in his argument that forcing him to remain shackled during his testimony prejudiced him in front of the jury. As an initial matter, this Court notes that appellate counsel did not testify at the PCR hearing. This Court finds that a presumption of effectiveness applies and that it is Applicant's burden to prove that appellate counsel was ineffective in failing to raise stronger issues that would have resulted in a reversal of Applicant's conviction. This Court cannot speculate as to whether appellate counsel considered raising these issues or believed they would have any merit. See Bannister v. State, 333 S.C. at 303, 509 S.E.2d at 809. Applicant alleges appellate counsel was ineffective in failing to raise the issue of Applicant's eligibility for an LWOP sentence. This issue is not clearly stronger than the issue raised. This Court finds Applicant was a proper candidate for a sentence of life without parole pursuant to South Carolina Code § 17-25-45. Applicant failed to present compelling or credible evidence proving otherwise. Applicant also cannot show that his conviction would have been reversed by the appellate courts had the issue been raise^d. The issue is therefore without merit.

All Other Allegations

As to any and all allegations that were raised in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

V. CONCLUSION

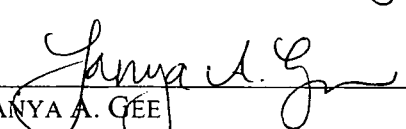
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 19th day of January, 2015.


TANYA A. GEE
Presiding Judge

Columbia, South Carolina

THE

GIESE

LAW FIRM, LLC

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Columbia, SC 29201

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