STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Bamberg County
James R. Barber, III, Circuit Court Judge

Frankie Lee Bryant, III,

Respondent,

vs.

State of South Carolina,

Petitioner.

REPLY BRIEF OF PETITIONER

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STATEMENT OF ISSUE ON APPEAL

The PCR court erred in finding that counsel was ineffective for failing to object to the jury instructions on self-defense which were not erroneous; the instructions substantially charged the correct law and were not prejudicial.

REPLY ARGUMENT

Out of an abundance of caution, Petitioner would incorporate and crave reference to all arguments stated in the State's Brief of Petitioner. The State replies as follows:

Respondent Bryant claims that the State is trying to "bootstrap itself" out of error when citing to post-Campbell case law affirming the holding of Golden v. State, 1 S.C. 292 (1870). Golden is the source of the complained about language in the jury instructions in the instant case. Respondent only provides a conclusory argument as to why this charge is incorrect and fails to cite any case law suggesting that Golden was overruled. Counsel is not required to be clairvoyant. Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial") *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). His willingness to engage in hindsight does not amount to evidence of ineffectiveness either. See Wright v. Hopper, 169 F.3d 695, 707 (11th Circuit 1999) (the issue of ineffectiveness is for the court to decide, so admissions of deficient performance by attorneys are not decisive – no error in finding trial strategy, even though counsel categorically denied making a strategic choice); Edwards v. LaMarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc) (a trial court is not obligated to "accept a self-proclaimed assertion of trial counsel"); Gentry v. Sinclair, 576 F.Supp.2d 1130, 1154 n.38 (W.D.

Wash. 2008) (finding "counsel's current regret about their performance . . . does not support a claim that trial counsel performed deficiently at the time of trial").

Respondent cites the following portion of Campbell:

> A person assaulted, being without fault and bringing on the difficulty, has the right to use such force as is necessary for this complete self-protection . . . The defendant, if without fault, has the right to use such necessary force as required for his complete protection from loss of life or serious bodily harm and cannot be limited to the degree or quantity of attacking opposing force.

State v. Campbell, 111 S.C. 112, 96 S.E. 543, 544 (1918). However, the trial court instructed similar language when the trial court instructed the jury:

> The force used in self-defense does not have to be limited to the degree or amount of force used by the victim. The defendant has the right to use so much force as appeared to be necessary for complete self-protection in which a person of ordinary reason and firmness would have believed to be needed to prevent death or serious bodily harm.

App. p. 197, lines 17-23. The trial court also clearly instructed the jury that: "A person cannot be required to make an exact calculation as to the degree or amount of force which may be needed to avoid death or serious bodily harm." Tr. p. 197, lines 11-13. This contradicts the assertion that Petitioner needed to determine "in a mathematical like fashion" the danger passed. See Br. of Resp. p. 16.

However, Golden is a correct statement of law, one cannot pile on force after the danger has passed, because if the danger has passed, it is no longer self-defense, it is unlawful vindication. This statement of law was confirmed after Campbell in State v. Jones, 133 S.C. 167, 130 S.E.2d 747 (1925) *overruled on other grounds by* State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). Jones held the following:

> Once conceded that the defendant in repelling the attack of his assailant, has used more force than was reasonably necessary, his plea of self-defense, which up to the moment of his repelling attack was perfect, immediately falls to the ground, and he is held in law as the aggressor from the beginning of his attack; the degree of his responsibility must be determined therefore by the character of his attack, the nature of the weapon used, and the extent of the injury inflicted, just as if there had been no previous attack upon him.

Jones, 130 S.E. at 750. Tellingly, Petitioner made no attempt to distinguish Jones.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the PCR court's grant of relief.

Respectfully submitted,

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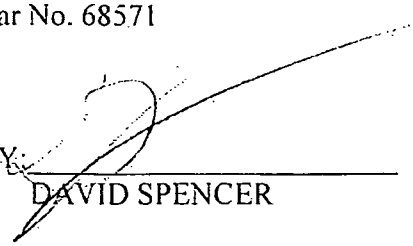

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February 17, 2015

STATE OF SOUTH CAROLINA

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Appeal From Bamberg County

Honorable James R. Barber, III, Circuit Court Judge

Frankie Lee Bryant, III,

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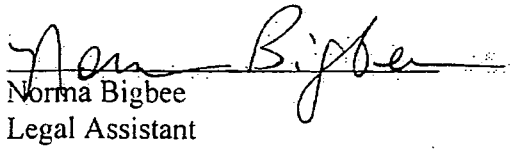
PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Reply Brief of Petitioner on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Glenn Walters, Sr., Esquire, P.O. Box 1346, Orangeburg, SC 29116.

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

This 17th day of February, 2015.



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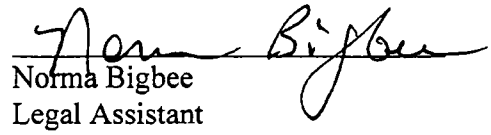
AMENDED PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Reply Brief of Petitioner on Respondent by depositing one copy of the same in the United States mail, postage prepaid, addressed to his attorney of record, Lara M. Caudy, Esquire, Appellate Defender, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

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

This 20th day of February, 2015.



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