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April 4, 2017

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

Wanda C. Miles, Clerk of Court
Courthouse, 200 West Main Street
P.O. Box 529
Chesterfield, SC 29709

RE: William Outlaw, #308544, v. State of South Carolina
2012-CP-13-113

Dear Mr. Shearouse and Ms. Miles:

Enclosed for filing is a Notice of Appeal pursuant to *White v. State* in the above-referenced case. Also enclosed are the following:

(1) Proof of Service of the Notice of Appeal;
(2) A copy of the Order which is to be challenged on appeal; and
(3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Outlaw in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Outlaw in this appeal.

Yours very truly,

Lance S. Boozer

cc: Valerie Giovanoli, AAG
Office of Appellate Defense
William Outlaw, #308544

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
APR 06 2017
S.C. SUPREME COURT

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 12-CP-13-113

William Outlaw, #308544,.....Petitioner,

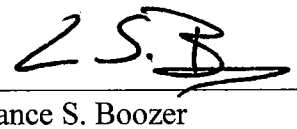
v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Now comes the Petitioner, by and though his undersigned and appointed Attorney, stating Petitioner's Notice of Appeal should be heard pursuant to the Final Order of the Honorable G. Thomas Cooper, Jr., which granted a *White* review of the Petitioner's trial held April 6, 2005 (2002-GS-13-159). The Final Order denied Petitioner's remaining allegations. The Petitioner received written notice of the Final Order granting a *White* review and denying Petitioner's remaining allegations on March 24, 2017. A copy of the Final Order is attached herewith.

Respectfully submitted,



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PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Valerie Giovanoli, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 4th day of April, 2017.

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STATE OF SOUTH CAROLINA COUNTY OF CHESTERFIELD	)	IN THE COURT OF COMMON PLEAS FOURTH JUDICIAL CIRCUIT
William Outlaw, SCDC #308544, Applicant,	)	2012-CP-13-0113
v.	)	**ORDER OF DISMISSAL GRANTING WHITE V. STATE[1] APPEAL**
State of South Carolina, Respondent.	)	

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by William Outlaw (Applicant) on February 16, 2012. The State (Respondent) made a return and motion to dismiss on April 2, 2012, based on the statute of limitations and the doctrine of laches. On May 21, 2012, a conditional order of dismissal was filed, that later became a final order of dismissal filed on September 4, 2012. Applicant appealed this order to the South Carolina Court of Appeals (App. Ca. No. 2012-213200). In an unpublished opinion filed on June 18, 2014, the Court of Appeals reversed the PCR court's summary dismissal and, because there was a question of whether Applicant knowingly waived his right to direct review, remanded the case back to this PCR court for an evidentiary hearing. Respondent made an amended return and partial motion to dismiss on December 30, 2016, requesting summary dismissal of all claims except on the issue of whether Applicant knowingly waived his right to appellate review.

An evidentiary hearing into the matter was convened on January 10, 2017 at the Marlboro County Courthouse. Applicant was present and represented by Lance S. Boozer,

[1] White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

Esquire. Valerie Garcia Giovanoli, Esquire, represented Respondent. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Paul V. Cannarella, Esquire, also testified. This Court had before it a copy of the Chesterfield County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the records of this PCR action, and the trial transcript.

Respondent called the case and proceeded with the motion to dismiss all claims except for the issue of whether Applicant knowingly waived his right to appeal. Applicant provided this Court with an affidavit dated October 27, 2011 and executed by Applicant's prior trial counsel, James T. Irvin, Esquire, stating that he did not receive the September 2, 2010 order denying Applicant's motions for a new trial and reduction in sentence. This Court made the document part of the record of this action over Respondent's objection for failing to lay the proper foundation and failure to authenticate. Irvin could not be present or testify due to medical reasons. The affidavit further stated that Irvin represented Applicant in the motion hearings and did not receive a copy of the order until October 17, 2011 via fax from Applicant's mother. This Court finds that Applicant did not knowingly waive his right to a direct appeal and further that this case was remanded from the South Carolina Court of Appeals to consider the merits of Applicant's entire application and all claims therein. Therefore, this Court respectfully denies Respondent's motion to dismiss.

PROCEDURAL HISTORY

Applicant is presently confined to South Carolina Department of Corrections pursuant to orders of commitment of the Chesterfield County Clerk of Court. Applicant was indicted at the March 2002 term of the Chesterfield County Grand Jury for murder (2002-GS-13-0159). Paul V.

GTC #2

Cannarella, Esquire represented him at trial. On April 6, 2005, Applicant was found guilty as indicted by a jury of his peers. On April 6, 2005, the Honorable Paul M. Burch sentenced him to confinement for twenty-five (25) years.

On April 11, 2005, Mr. Cannarella filed two post-trial motions: (1) motion for a new trial and (2) motion to reconsider sentence. Before these motions could be ruled upon, Applicant terminated the representation of Mr. Cannarella and alleges that he then retained the services of Kenneth Martin, Esquire. While the motions were still pending, Applicant filed his first PCR application on January 10, 2007 (2007-CP-13-0029). After Respondent filed its Return and Motion to Dismiss, the application was dismissed *without* prejudice by the Honorable John M. Milling on June 1, 2007 because an application for PCR may not be made during the time when an appeal is pending or during the time in which an appeal may be perfected.

In the interim, Applicant retained new counsel, James T. Irvin, Esquire, who argued the motion for a new trial and motion to reconsider sentence. Judge Burch denied these motions by order dated September 1, 2010 and filed on September 2, 2010. Applicant did not appeal his conviction or sentence.

Applicant filed this current application for post-conviction relief on February 16, 2012, in which Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel.
    a. "Applicant Trial Counsel was ineffective for not filing the notice of intent to appeal..."
    b. "Applicant trial counsel was ineffective for not pre-trialing the murder charge based upon the prob. cause mandates..."
    c. "Trial Counsel was ineffective for not objecting to the improper malice charge given by the Court..."
    d. "Trial Counsel was ineffective when he failed to properly investigate the facts and circumstances..."

e. "Counsel for trial failed to interview potential witnesses..."
f. "Trial Counsel failed to present ten (10) factual relevants to the jury..."
(sic)

At the evidentiary hearing, Applicant proceeded on claims a, c, d, e, and f.

SUMMARY OF TESTIMONY

Applicant testified to the following:

Applicant is incarcerated for voluntary manslaughter. He was originally tried for murder. Applicant's family hired Paul Cannarella ("Counsel") to represent Applicant in his murder trial. Applicant was arrested in January of 2002 and Counsel was hired immediately after, sometime in January. Over the course of the three (3) years of representation, Applicant testified that he met Counsel only twice – once at the time he was retained and once at trial. Applicant claims he killed the victim in self-defense. Applicant testified that he discussed his version of the events with Counsel and that Counsel was in agreement with his self-defense claim. Applicant testified that he discussed the evidence with Counsel a little bit, but not much. They also discussed witnesses. Applicant also recalls discussions of post-trial motions, reconsideration of sentence, third party guilt, newly discovered evidence, and the Court's failing to charge involuntary manslaughter.

Applicant stated that he later (after conviction) released Counsel as his attorney. He hired another attorney, briefly, by the name of Kenneth Martin. Martin had some medical issues so he released him and hired James T. Irvin. Irvin represented Applicant in court on the post-trial motions that Counsel had filed after the trial. A hearing was held at the Marlboro County Courthouse sometime in 2010. Applicant believed that Irvin would appeal his case after the

denial of the post-trial motions. In the post-trial motions, Irvin argued that a ballistics report, from a test done two (2) months after trial, was newly discovered evidence as were eight (8) new statements made after Applicant's conviction by Applicant's friends and acquaintances that Applicant did not shoot or kill the victim.[2] Applicant testified that after reviewing the post-trial ballistics report, he realized that the victim was killed by buckshot, but that birdshot was introduced at trial.[3] Applicant further testified that the shell introduced at trial did not match the gun that he claimed at trial he fired. Applicant claims that his gun and a spent birdshot shell were found next to a creek two (2) miles from the victim's home, where the killing occurred.

Applicant admitted that he did not supply Counsel with any list of witnesses. Applicant was aware that Counsel had spoken to one witness, but that Counsel believed he was incompetent. Applicant testified that the gun he shot at victim had to be breached in order for the empty shell to eject and that he did not breach it at the scene of the incident. Applicant testified that all of the shells in his trunk were birdshot and he never shot the gun after leaving the scene.

Applicant believes Counsel failed to investigate because he should have gotten a witness statement that Applicant was not the one who shot the victim. The judge had a copy of the witness's statements and reviewed them in order to rule on the post-trial motions. Applicant

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[2] This Court notes that Applicant testified during his trial that he shot the victim out of self-defense. Applicant did not, nor any other witness at trial, testify to hearing more than the first warning shot fired in the air by the victim and then Applicant's alleged self-defense shot.

[3] According to the transcript, birdshot was not introduced at trial. Rather, an empty shell casing that bore markings on its side indicating it had been originally loaded with birdshot pellets had been introduced.

claims that Counsel did not seek involuntary manslaughter because he wanted to get Applicant off on self-defense.[4]

Applicant testified that he did not receive the order denying his post-trial motions until September 12, 2011. Irvin indicated that he never received the order so Applicant's mother faxed it to him. Irvin provided Applicant an affidavit claiming he received the order via fax from Applicant's mother October 17, 2011 and Applicant has never heard from Irvin since. Although Applicant did not request that Irvin file a notice of appeal at that juncture, Applicant recalls discussing filing an appeal at the time of the post-trial motions with Irvin and expected him to file a notice for him.

Counsel testified to the following:

Counsel testified that he has been practicing law since 1980, although not exclusively criminal law. Counsel was retained shortly after the incident. He does not recall how many meetings he had with Applicant from the time he was retained in January 2002 to the date of his trial in April 2005, but finds it reasonable to conclude he met with Applicant more than twice, as testified to by Applicant. It is Counsel's practice to meet with his clients much more than twice before a criminal trial. Counsel received discovery, reviewed it with Applicant, and reviewed Applicant's charge and Applicant's version of the facts with him.

Counsel recalled the facts of the case as follows: Applicant spent the day with the victim. They were under the influence of alcohol and spent most of the time at the victim's house. Another guy, described as a "brute," showed up later. There was bad blood between this new

[4] Counsel requested an involuntary manslaughter charge and the Court denied his request. Trial Tr. pp. 246-252.

arrival and Applicant. The brute cold clocked Applicant. Applicant got in his car and the brute smashed his fist through the windshield. Applicant drove around then returned to the victim's home. The victim, and homeowner, was standing outside of his residence. Applicant pulled up to the home and got out of his vehicle. The victim fired a warning shot in the air and threatened Applicant, but Counsel did not recall in what order. There was not enough light for Applicant to see where gun was pointed or who was holding it. Applicant fired his shotgun in his defense.[5] Applicant then drove off and threw his breached shotgun in a remote area a couple miles away from the incident. Counsel said that according to the ballistics report, the birdshot shell found near[6] Applicant's breached shotgun was not the same shot type that killed the victim. In Counsel's opinion, an injustice may have been done.[7] Counsel was unsure if Applicant really shot the victim in self-defense because Applicant was so intoxicated that he did not have much memory. Counsel testified that only two shots were heard.

At trial, Counsel stipulated to the guns and shotgun shells as evidence and to the cause of death being a shot fired by Applicant. Counsel testified that he stipulated to this information and evidence because it was consistent with the truth, that Applicant had shot and killed the victim out of self-defense. It was consistent with all of the evidence in the case, Counsel's investigation of the case, and Applicant's version of the facts. Counsel testified that based on Applicant's version of the facts, the trial strategy was a claim of self-defense and that by stipulating to the

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[5] Applicant testified in his trial that Applicant actually exited his vehicle, stood behind the opened driver's side door and when he heard a gunshot and saw a flame, he ran to the trunk of his vehicle, used the keys to open the truck, retrieved a shotgun, fumbled blindly around the trunk for a shell, loaded his shotgun, returned behind the open driver's side door and shot his gun from his hip toward the flame.

[6] The evidence in record reflects that the birdshot shell was found on a dirt road and the breached shotgun was found *in* the creek by the road.

[7] Counsel does not make mention of the finding in the ballistics report that "[d]ifferences in the breechface impressions were sufficient to conclude that the Item 10 shotshell [found near defendant's shotgun] **was not fired** by the [defendant's] shotgun." Applicant's Ex. 2. (emphasis added.)

shooting and killing, he was not giving up anything. Counsel testified that the victim had fired a warning shot with a 20 gauge shotgun and Applicant fired a 12 gauge shotgun.

Counsel was candid in overlooking what he viewed a critical piece of evidence. Counsel opined that had he ordered the ballistics report prior to trial, he would not have missed the fact that the empty shell casing collected a couple miles from the incident, was not the shell shot to kill the victim. And, that had he known of this detail, the trial may have been different. Counsel lamented that he could have used the birdshot in his closing to create a reasonable inference that Applicant did not kill the victim. Counsel testified that neither he nor the prosecution had requested a ballistics analysis prior to trial. His understanding of the ballistics report was that the shell found near the defendant's shotgun, collected by law enforcement, and introduced at trial could not have been fired from defendant's gun. Counsel believes that the shell that *was* fired from defendant's gun was never recovered.

Counsel also testified that he wanted the jury to have four options – murder (as charged), voluntary manslaughter, involuntary manslaughter and not guilty by reason of self-defense. Counsel testified, and the record reflects, that he did request an involuntary manslaughter charge and Judge Burch refused his request. The list of statements and names used in Counsel's post-trial motion for a new trial were collected by Applicant and his mother after the trial. Counsel and the family had been unable to develop this information prior to trial. Counsel believes that the ballistics report could have convinced Judge Burch of giving an involuntary manslaughter charge.[8] Counsel recalled that the ten facts he laid out in his motion for a new trial and reduction

[8] This Court is unsure of how alleged evidence of third party guilt would give rise to an involuntary manslaughter charge.

in sentence arguing that the jury should have been allowed to consider involuntary manslaughter: Applicant's drunken state, drug usage, being attacked by John Talbert, obscured vision as a result of attack, not aiming the gun, discharging gun from the hip, testimony that he did not intend the result, the victim was Applicant's friend, the victim was not a part of the initial altercation, and impaired state of mind causing him to overreact to initial gun fire.

Counsel testified that the implied malice instruction was given at the trial, but that the trial occurred over four years prior to the change in law after Belcher.[9] Counsel recalled some discussion of an appeal and that process, but insisted his focus was more on post-trial motions up until the time he was relieved from Applicant's case. Counsel was not Applicant's attorney when the time was proper to file a notice of appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP).

[9] State v. Belcher, 385 S.C. 897, 685 S.E.2d 802 (2009). (finding the "use of deadly weapon" implied malice instruction has no place in a murder prosecution where evidence is presented that would reduce, mitigate, excuse, or justify the killing.)

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

A. Failure to file notice of appeal

This Court finds Applicant did not knowingly and intelligently waive his right to a direct appeal. Counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by Anders v. California, 386 U.S. 738 (1967). Id. Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive their appellate rights, the

applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State. See Rule 243(i)(1), SCACR; Davis v. State, 288 S.C. 290, 291 n.1, 342 S.E.2d 60, 60 n.1 (1986) ("Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a White v. State review.").

In the present case, Applicant testified that Counsel did not file a notice of appeal on his behalf. Applicant provided this Court with an affidavit executed by his attorney of record at the time when it was proper to file a notice of appeal (after Judge Burch's order denying Applicant's post-trial motions), James T. Irvin. The affidavit specified that Irvin did not receive notice of the September 2, 2010 order denying Applicant's post-trial motions until it was faxed to him by Applicant's mother on October 17, 2011. Applicant testified that he had no further communication with Irvin, but that at the time of the post-trial motions hearing, he had discussed an appeal with Irvin and expected him to pursue an appeal in the event that he lost the motion hearing.[10] Because Irvin is unable to testify, this Court finds Applicant's testimony regarding his waiver of his right to appeal credible. In light of the testimony elicited at the PCR hearing, Respondent does not oppose a belated review of Applicant's trial and post-trial motions pursuant to White. Id. It does not appear that Applicant knowingly and intelligently waived his right to appeal; therefore, he is entitled to a belated appeal. As such, the Court finds Applicant did not knowingly and voluntarily waive his appellate rights and is entitled to an appeal from his conviction. Applicant's lack of an appeal shall be remedied pursuant to White v. State. Id.

[10] Applicant was not sleeping on his rights. This is further illustrated by his first, premature pro se PCR application filed on January 10, 2007, at the time his post-trial motions continually pended for five years after his trial.

B. Failure to object to malice charge

This Court finds Counsel was not ineffective for failing to object to the implied malice charge given by the Court in Applicant's 2005 trial. At the time of Applicant's trial, April 4-6, 2005, it was common practice to instruct a jury that malice could be implied by the use of a deadly weapon. However, in October of 2009, the Supreme Court of South Carolina held in Belcher that this was no longer good law in a case where there is evidence that would reduce, mitigate, excuse, or justify the homicide. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). This Court recognizes that Belcher applies squarely to Applicant's case, had he been tried over four years later. No South Carolina court has ever required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial. Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). The relevant time frame for analysis is when the alleged ineffectiveness occurred. Id. at 310. While the rules of preservation require that objections to the admissibility of evidence be specific, they most certainly do not require clairvoyance. State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012).

Applicant has failed to put forth sufficient reason why Counsel should have objected to a charge on the law that was appropriate at the time it was given. As such, this Court finds that Applicant has failed to meet his burden in proving a deficiency in Counsel's performance as required by Strickland. This Court also notes, that even if Counsel was deficient in failing to object to the implied malice charge, Applicant was not prejudiced by that failure. The jury convicted Applicant of voluntary manslaughter, instead of murder, which does not require malice. Therefore, this claim is denied and dismissed with prejudice.

C. Failure to properly investigate

This Court finds Applicant has not met his burden to prove Counsel was ineffective by failing to properly investigate his case. Specifically, Applicant contends that a ballistics report produced after his trial yields evidence that could have been used at his trial. Applicant claims that trial counsel was deficient in failing to request the report prior to trial. Applicant provided this court with the ballistics report as Applicant's exhibit 2, over Respondent's objection. This Court has had the opportunity to review the contents of the report and pass upon its authenticity.

This Court finds the ballistics report to be an authentic report produced by South Carolina Law Enforcement. Counsel testified that he requested and received the report approximately two months after trial. The document is also dated June 27, 2005, approximately two months after Applicant's trial. This Court notes the relevant portion of the report concludes that a spent shell casing found in the same vicinity as where the Applicant's shotgun was found was not shot from Applicant's gun. The report further concluded that the shell bore markings that indicate it was originally filled with birdshot pellets. This Court fails to see the relevance of this evidence to Applicant's trial.

First, as the ballistics report indicates, if the shell casing that was located near the Applicant's shotgun, miles from the shooting, was not shot from Applicant's gun, then it is abundantly clear that it was not the shell casing that was used to kill the victim. Whether that shell casing had been loaded with birdshot or buckshot is also irrelevant, as it was located miles away from the shooting. Absent a nexus between Applicant's gun and the shell, there is no evidence the shell has any connection to the shooting. At best, the report illustrates that the shell casing from the fatal shot was never recovered – a detail that is irrelevant in a case where Applicant has confessed to shooting the victim out of self-defense.

Second, Applicant's version of the facts, from the very beginning and up to the PCR hearing, has been that he shot and killed the victim out of self-defense. This Court finds very credible Applicant's testimony that he believes he shot the victim in self-defense. Counsel's testimony with regard to discussing Applicant's version of the facts is also very credible. Applicant's own testimony at his trial, and that of the State's witnesses present during the shooting, was that there were *only* two gunshots fired and heard.[11] The testimony was also consistent that the first gunshot came from the victim and the second shot was from Applicant. The record shows that neither the State nor the Defense ever offered evidence of any other gunshots to support a claim of third party guilt. This Court fails to see how this questionable evidence of third party guilt based on the ballistics report could have helped Applicant in his self-defense claim. The proposition made *after* the production of this report that a third party shot the victim is not credible in light of the consistent and overwhelming evidence that there were two shots fired that night – a warning shot from the victim and the fatal shot by Applicant. Even if known prior to trial and addressed solely in Counsel's closing, as Counsel proposed, this argument would only serve to confuse the jury, discredit Applicant's testimony and his theory of the case. The report does not support or prove a claim of third party guilt. Rather, it only supports a claim that law enforcement picked up a stray shell from the same vicinity of Applicant's gun that has *no* connection to the shooting and that the shell used to kill the victim was never found.

Third, to the extent that it is Applicant *or* Counsel's contention that had they known the shell admitted into evidence during the trial was not the fatal shell used to kill the victim, the trial strategy would have been different, this Court finds that contention inherently flawed. In the PCR hearing, Counsel and Applicant both testified that Applicant shot the victim, or at least shot

[11] State's witness, Susan Wilson, wife of the victim, testified that she only heard one gunshot.

toward the victim, in self-defense. To put forth a different theory at trial, essentially that someone else shot the victim that night, would require Applicant to violate his oath to testify truthfully and Counsel to violate his duty as an officer of the court to put forth evidence known to be untrue.

Additionally, this Court finds that it was reasonable to forego a request for a ballistics analysis given the circumstances *at the time*. "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). Going into the trial, Counsel had no reason to believe, based on what Applicant told him happened and Counsel's own investigation of the facts and evidence, that a ballistics report would yield anything of value. In his professional judgement, it was more prudent to focus on perfecting Applicant's self-defense claim where there had been absolutely *no* indication that someone other than Applicant shot the victim. This decision was more than reasonable in light of the prevailing professional norms. This Court finds no deficiency in Counsel's performance as required by Strickland.

Assuming *arguendo* that Counsel's failure to request a ballistics report was unreasonable, Applicant still cannot prove he was prejudiced by that failure. Applicant contends, and Counsel seems to agree, that had they had the report prior to trial, the trial *may* have been different. As discussed in the paragraphs supra, this Court finds that it would not have made a difference. Counsel's entire theory of the case, based on his investigation, revolved around Applicant's claim of self-defense. Had Counsel addressed the unrelated shell casing collected by law enforcement in his closing to infer someone other than Applicant had shot the victim, at best, the jury would have been left confused. It is likely that the jury would discredit the entire defense for alleging self-defense, but at the same time inferring someone else shot the victim. In light of

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the overwhelming evidence against Applicant, the fact that the shell in evidence was not shot from defendant's gun nor was the shell used to kill the victim is insufficient to establish, even by a reasonable inference, third party guilt.

This Court having found Applicant has failed to prove either prong of Strickland, finds this allegation meritless. Therefore, this claim is denied and dismissed with prejudice.

D. Failure to interview potential witnesses.

This Court finds Applicant has failed to meet his burden in proving that Counsel was ineffective for failing to interview potential witnesses. Applicant contends that he provided a list of eight witnesses who provided statements *after* Applicant's trial alleging that someone other than Applicant shot the victim. Counsel testified that Applicant and his family obtained these statements and that the witnesses had never been brought to his attention prior to trial. This Court finds Counsel's testimony on this issue to be credible. Nonetheless, Counsel filed a post-trial motion for a new trial and a reduction in sentence using these eight statements as newly discovered information.

This Court finds that Counsel was not deficient in failing to interview witnesses he had no reason to know existed or the substance of what their testimony would be. Applicant testified that Counsel was retained sometime shortly after his arrest in August of 2002. Applicant's trial was in April of 2005. This Court notes that Counsel had over three years to prepare for Applicant's trial. This Court finds credible Counsel's testimony that he would have met with Applicant much more than two times prior to his trial. This Court finds not credible Applicant's allegation that Counsel only met with him twice or that Counsel could have interviewed and gotten similar statements from these eight witnesses. The alleged witnesses had over three years to come forward to share this information with Applicant and his Counsel, but instead withheld

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the information until after Applicant was convicted. Counsel cannot be expected to interview and investigate those who he does not know exist. Although Counsel has a duty to investigate, that duty can only be discharged with a cooperative and forthcoming Applicant. In this case, Applicant was forthcoming, not with witnesses, but with his story of self-defense. The witnesses that came forth after Applicant's trial did not provide information to help Applicant's claim of self-defense, but rather an entirely different theory of third party guilt. Therefore, it was reasonable for Counsel not to find and interview the late-coming witnesses. This Court finds no deficiency in Counsel's performance as required by Strickland.

Additionally, this Court finds the statements offered by the after-discovered witnesses to be not credible. Even if this Court were to view this alleged newly discovered evidence to be credible, this Court does not have authority to grant post-conviction relief on that basis. This alleged newly discovered evidence was put before the trial court and ruled upon in the post-trial motions; making this issue a matter for direct appeal. Understanding that Applicant did not receive his direct appeal, this Court is granting Applicant relief in the form of a belated review of his conviction pursuant to White and as discussed in the section A, supra. Should this alleged newly discovered evidence have merit, relief may be granted by the appropriate Court tasked with reviewing Applicant's conviction. Lastly, § 17-27-45 (c) of the South Carolina Code of Laws states that a newly discovered evidence claim can be timely raised within one year of actual discovery or within one year of when, by the exercise of due diligence, such evidence could have been ascertained. This evidence, while newly discovered after the trial and at the time of the post-trial motions, is no longer newly discovered in his current PCR action. This information was discovered some time prior to the filing of his post-trial motions in June of

2005. This application for PCR was filed on February 16, 2012, well beyond the one year statute of limitations.

Finding Applicant has failed to meet his burden under Strickland to prove Counsel was either deficient or that his deficiency prejudiced the Applicant's trial, this claim is denied and dismissed with prejudice.

E. Failure to put forth ten "facts" during Applicant's trial.

This Court finds that Applicant has failed to prove his burden of proving Counsel was ineffective for failing to put forth ten "facts" during his trial. These facts included Applicant's drunken state, drug usage, being attacked by John Talbert, obscured vision as a result of attack, not aiming the gun, discharging gun from the hip, testimony that he did not intend the result, the victim being Applicant's friend, the victim not being a part of the initial altercation, and the Applicant's impaired state of mind causing him to overreact to initial gun fire. Applicant's testimony that Counsel failed to put forth evidence of these ten "facts" is not credible. The record is replete with this evidence. Counsel addressed these issues in his opening statement, he elicited it from numerous witnesses, including Applicant, and he addressed it again in his closing. Counsel also drew the Court's attention again to those facts in his motion to reconsider Applicant's sentence.

Applicant has failed to show any deficiency on the part of Counsel. Therefore, this Court finds Applicant has failed to meet his burden under Strickland. Counsel rendered effective assistance in putting forth any and all evidence favorable to Applicant's claim of self-defense. Therefore, this claim is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court grants Applicant a belated review of his conviction pursuant to White v. State. With regard to all other claims, this Court finds Applicant has not established any violations that would require this Court to grant further relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice. This Court also finds that Applicant failed to present evidence as to the other allegations, and thus, this Court deems the other allegations abandoned.

[*Remainder of page left blank intentionally*]

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This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Within **thirty (30) days** of service of this Order, counsel for Applicant must file a notice of appeal to secure the appropriate review of Applicant's conviction. Counsel and Applicant are directed to Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986), and Rule 243(i), SCACR, for the appropriate procedure for securing appellate review; and
3. 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 9th day of March, 2017.

G. THOMAS COOPER, JR.
Presiding Judge
Fourth Judicial Circuit

Chesterfield, South Carolina

2017 MAR 13 AM 11:37
Wanda C. Miles
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

CHESTERFIELD COUNTY CLERK OF COURT

200 West Main Street • P. O. Box 529
Chesterfield, South Carolina 29709

Telephone (843) 623-2574

Court of General Sessions
Court of Common Pleas
Register of Deeds

NOTICE OF APPOINTMENT OF COUNSEL:

DATE: February 27, 2015

APPLICANTS NAME: William Outlaw, # 308544

Lance Boozer OF THE LEXINGTON COUNTY BAR IS HERE BY APPOINTED TO REPRESENT THE ABOVE NAMED APPLICANT IN THE FOLLOWING COMMON PLEAS NON JURY POST CONVICTION RELIEF CASE, CASE NUMBER 2012CP-1300-113 THIS APPOINTMENT IS MADE PURSUANT TO A STANDING ADMINISTRATIVE JUDGE FOR FOURTH JUDICIAL CIRCUIT.

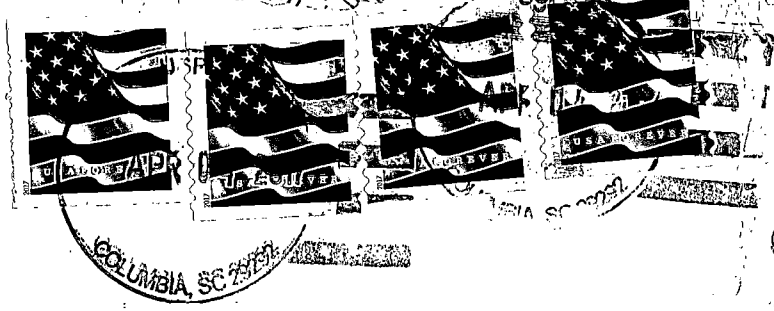
Faye L. Sellers
CLERK OF COURT,
CHESTERFIELD COUNTY

ADDRESS OF APPOINTED ATTORNEY: Lance Boozer
803 Gervais Street Suite 203
Columbia S.C. 29201

ADDRESS OF APPLICANT: William Outlaw
990 Wisacky Highway
Bishopville, SC 29010

CC: ATTORNEY GENERAL'S OFFICE APPLICANT

THE BOOZER LAW FIRM, LLC
1400 Laurel Street, Suite 4A
Columbia, SC 29201



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