ALAN WILSON
ATTORNEY GENERAL

April 6, 2017

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

Re: **David Allen Goins, Respondent v. State of South Carolina, Petitioner**
Case No. 2012-CP-20-0362

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 which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.

The transcript for the post-conviction relief hearing has already been received. Therefore, we have calendared the State's Petition for Writ of Certiorari to be due May 8th. If this date, **May 8, 2017**, is incorrect or inconsistent with your records please contact this office.

Sincerely,

DeShawn H. Mitchell
Assistant Attorney General
SC Bar #101813

DHM/jacc
Enclosures

cc: Ernest M. Spong, III, Esquire
South Carolina Department of Corrections
Fairfield County Clerk of Court
Solicitor Randy E. Newman, Jr.
Office of Appellate Defense
Trisha Allen, Victim Services

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-20-0362

David Allen Goins, ...Respondent,

v.

State of South Carolina, ...Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable R. Markley Dennis, Jr.'s order dated December 13, 2016 and filed December 19, 2016, granting post-conviction relief to the Respondent. The State filed a motion to reconsider, which was denied on February 6, 2017, and received by the State on March 7, 2017. A copy of the order on appeal is attached to this notice.

[signature page to follow]

Respectfully submitted,

ALAN WILSON
Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General
S.C. Bar # 101813

Office of the Attorney General
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Columbia, SC 29211
(803) 734-3737

By: _____
Attorneys for the Petitioner

Columbia, South Carolina

April 6, 2017

Other counsel of record:

Ernest M. Spong, III, Esquire
110 South Vanderhorst Street
Winnsboro, SC 29180

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PROOF OF SERVICE

I, DeShawn H. Mitchell, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Ernest M. Spong, III, Esquire
110 South Vanderhorst Street
Winnsboro, SC 29180

I further certify that all parties required by Rule to be served have been served this 6th day of April, 2017.

DESHAWN H. MITCHELL
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
Attorney for the Petitioner

STATE OF SOUTH CAROLINA COUNTY OF FAIRFIELD	)	IN THE COURT OF COMMON PLEAS SIXTH JUDICIAL CIRCUIT
David Allen Goins, #210510 Applicant	)	2012-CP-20-0362
v.	)	PCR ORDER
State of South Carolina, Respondent	)	

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed by Applicant Goins. Respondent subsequently filed its responsive pleadings. An evidentiary hearing into the matter was convened on July 12, 2015 at Lancaster County Courthouse. Applicant was present and was represented by Ernest M. Spong, III, Esq.. Respondent was represented by Patrick L. Schmeckpeper, Esq., of the Office of the Attorney General.

PROCEDURAL STORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to Orders of Commitment of the Clerk of Court for Fairfield County. The Applicant was indicted for Murder and Assault and Battery with Intent to Kill at the July 2005 term of the Fairfield County Grand Jury. The matter came to trial on January 4, 2010. The Applicant was represented by Michael Hemlepp, Esq. The jury returned a verdict of Guilty on the Murder charge and Not Guilty for Assault and Battery with Intent to Kill. The Applicant was sentenced by the Honorable Clifton Newman to confinement for thirty-five (35) years. Applicant appealed his conviction which was dismissed by State v. Goins, 2012-UP-331 (Ct. App. 2012). He filed his PCR application on September 10, 2012, the PCR hearing was heard July 12, 2016.

FACTS

On June 30, 2005, Applicant Goins and Michael Robertson got into an argument outside of Michael Robertson's residence in Winnsboro, S.C. Michael Robertson was shot and later died of his wounds. During the argument, Jamie Robertson, Michael Robertson's nephew, emerged from the residence with a gun and also suffered a gunshot but survived. Subsequently, but before the trial in this matter, Jamie Robertson died of unrelated causes. There were several witnesses to facts before the argument and to events immediately after the shooting but there were no witnesses to the shooting itself, other than the Applicant. The State presented testimony that Applicant had previously stated he was going to get a gun and confront Michael Robertson. There was no testimony that Applicant had actually gotten a gun

or had one in his possession prior to arriving at the Robertson residence.

The State's case was essentially that Applicant had heard that Michael Robertson had been spreading rumors about him, Applicant got angry and threatened to arm himself and go confront Michael Robertson, he arrived at the Robertson residence angry and during the ensuing argument, Applicant pulled a gun and shot both Michael Robertson and Jamie Robertson.

Applicant testified that he had not been upset at Michael Robertson, the rumors were no big deal that he and some friends ran into Michael or Michael's cousins at a store and were invited over to Michael's house to drink some beers. Applicant testified that he did not have a gun with him, until he took one away from Michael Robertson, after arriving at what was expected to be a friendly gathering. Applicant stated that while standing outside of the residence, Michael Robertson had become inexplicably belligerent about some tire rims he had previously lent to Applicant which he now wanted back immediately and while yelling at Applicant, Michael Robertson drew a gun from under his shirt and raised it up at him. Applicant testified that he grabbed Michael Robertson's arm while he was raising the gun and wrestled with him, they both fell to the ground where he wrestled the gun away from Michael Robertson. Applicant then managed to get up and was trying to run away when Michael Robertson grabbed him around his ankle and he started to fall. At the same time, Jamie Robertson arrived with a rifle pointed and pulled the trigger but the gun misfired and he heard it "click". It was at this time and while falling, he shot at both victims. He then ran away, not knowing for sure if he had hit anyone. There was no other testimony about where the gun came from or who had it prior to the wrestling.

At the PCR hearing, the Applicant testified he was being held illegally on the limited allegations of ineffective assistance of counsel for the following reasons:

1. That counsel failed to take reasonable steps to investigate all avenues of defense
2. That Counsel failed to make timely objections and to assert a proper defense.

SUMMARYOF EVIDENCE PRESENTED AT THE PCR HEARING

At the PCR hearing, Counsel testified that he had been appointed to represent the applicant in 2006 and he had interviewed witnesses back then. He made notes but did not speak with anyone else prior to the onset of the trial in 2010. He had ten years of criminal law experience but had stopped practicing law when he took employment with the Trial Lawyers Association several years prior to this trial, this

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case had been pending for several years and he was surprised when it was called for trial on January 4, 2010, the first case after the Christmas break. Two days before the scheduled trial he had ruptured his tricep muscle weight lifting and was in considerable pain but the trial court denied his motion for a continuance. He testified that he did not think his injury affected his performance at trial. He did not know when he had last spoken with the Applicant about the trial but he was familiar, from his prior employment with the Solicitor's Office, with both the Robertson victims' extensive criminal history and substantial criminal reputations for violence in the community. He was unable to find anyone who would testify to their criminal reputation in the community and agreed it would have been important to the case. He expressed that his trial strategy was to rely solely on the direct threats of the victims to the Applicant at the time of the shooting to establish self-defense. He expressed that, other than actual threats made at the time, general reputation for violence evidence was very difficult to get admitted. He testified that he did not seek a jury charge on voluntary manslaughter because of both trial strategy and that he did not think he had grounds to get it. (see PCR transcript pg 34 lines 5-15). Counsel testified that he did not recall discussing the decision to not seek a charge of voluntary manslaughter with Applicant because he thought the Applicant was going to be found not guilty based upon self-defense. He did not object to the trial court's denial of his request for a charge on the violent reputation of the victims apparently agreeing with the Solicitor that there was little evidence presented. As to the video of Applicants interview with law enforcement, Counsel agreed that the entire video had been admitted into evidence and that it contained statements by law enforcement that they believed applicant had a good self-defense claim and that the victims had a reputation for violence. Counsel acknowledged that the Solicitor published those parts of the video that it felt were helpful to it's case. His explanation was that he did not publish any of the video it because he considered the law enforcement officers statements hearsay. Counsel agreed that the inclusion of the charge of voluntary manslaughter could have made a significant difference in the outcome of the case.

Applicant Goins testified that he had been incarcerated seven years during which time he had only some minor disciplinary problems related to unauthorized use of the telephone. He testified he had not met with counsel since 2006 at his bond hearing. He testified that he was certain that there was no consultation with him about the decision to not ask for a voluntary manslaughter charge, that if he had been asked he would have considered it. He testified that he felt he had done something wrong in the shooting but that it wasn't murder. He testified that Mr. Fleming Anderson, a friendly witness, was present at the trial and that he wanted him to testify he could not recall if he asked Counsel to call him to testify.

Mr. Fleming Anderson testified that he was present all week in the courtroom the week of trial. He was not sure who subpoenaed him but he was present. He testified he was not interviewed by Counsel though he was on the witness list provided by the State. Had he been called

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he stated he would have testified that he had been with the Applicant the entire day, that he knew Applicant did not have a gun, that they were not mad at anyone but only went to Michael Robertson's house by invitation and to drink some beers. He would have testified that Michael Robertson started the argument with the Applicant about the tire rims and became very belligerent and that Michael Robertson told Jamie Robertson to go get a gun and that was when he ran. He did not see either party pull a gun but knew that Applicant did not have a gun with him. He testified that he had known Michael Robertson for a long time and was aware that he had a very bad reputation in the community.

FINDING OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary heating; observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the applicant's convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. 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. The Court finds that Applicant has met his burden of proof and that he was deprived of constitutionally effective assistance of counsel on the allegations in dispute. I find that the Applicant is entitled to a new trial.

APPICABLE LAW

In a post-conviction relief action, where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that counsel's performance was deficient, and the deficient performance prejudiced the applicant's case.

Strickland v. Washington, 466 U.S. 668 (1984) 688-89 104 S.CT. 2052, 80 L.Ed.2d 674 (1984); Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625. To show counsel was deficient, the applicant must establish counsel failed to render reasonably effective assistance under prevailing professional norms. Strickland, 466 U.S. at 688, 104 S.Ct. 2052; Cherry, 300 S.C. at 117, 386 S.E.2d at 625. To show prejudice, the applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052; Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson, 325 S.C. at 186, 480 S.E.2d at 735.

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 tendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668. The Applicant must overcome this presumption in order to receive relief, Cherry v. State. 300 S.C. 115, 386 S.E.2d 624 (1989).

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Failure to investigate: Ard v Catoe,372 SC 318, 642 S.E. 2d 590 (2007); Freiburger v State, 413 SC 243, 775 S.E. 2d 391(2015)

Without a doubt, "[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation." Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir.1986); see also Strickland v. Washington, 466 U.S. at 691, 104 S.Ct. 2052. When evaluating the reasonableness of counsel's conduct, "the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland v. Washington, 466 U.S. at 690, 104 S.Ct. 2052. Moreover, while the scope of a reasonable investigation depends upon a number of issues, "at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D.Fla.1986), aff'd, 828 F.2d 670 (11th Cir.1987) (emphasis in original).

Failure to request charges:
Stone v State, 294 SC 286, 363 S.E.2d 903 (1988); Roseboro v State, 317 SC 292, 454 S.E. 2d 312 (1995)

Failing to call a witness: Martinez v State, 304 SC 39, 403 S.E. 2d 113
(1991) the court also note trial counsel admitted his failure could have made a difference.

Where voluntary manslaughter charge should have been given: State v Knoten,
347 SC 296, 555 S.E. 2d 391 (2001)

Character of Victim: Rule 404(a) (2) and State v Boyd, 126 SC 300, 119 S.E.
839 (1923)

In the present case this Court finds that: Counsel's performance was ineffective in the following particulars:

1) *Counsel failed to introduce evidence of the victims' reputation for violence.*

Counsel testified that evidence of the victims' reputation for violence was important but that it was difficult to find anyone to testify to that and difficult to get that evidence admitted. Counsel testified that he was personally aware of both victims' history of violence, in that while employed with the Solicitor's office in the past he had prosecuted both victims both as juveniles and as adults. It appears from the transcript both the Applicant and his only witness, Mr. Kauffin, were knowledgeable of the victims reputation but no effort was made to include it in their testimony. Mr. Kauffin actually began to testify about the victims' reputation but was prevented from doing so by objection from the State. Counsel did not oppose the objection nor raise Rule 402 A as an exception. It appears to the Court based upon the trial transcript and the PCR testimony that Counsel was either unaware of Rule 402A or overlooked it.

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Mr. Fleming was also available for the purpose of establishing the victims' reputation for violence. Additionally, there was also video evidence of Applicant's statement to law enforcement which was admitted in its entirety. It contained statements of law enforcement on the victims' reputation for violence. Counsel did not publish this. Counsel's explanation was that he considered the law enforcement comments hearsay does not adequately explain his failure to publish in so much as it had already been admitted in its entirety. Due to the lack of evidence , Counsel was denied on his request for a jury charge on victim's reputation for violence. This court finds there was ample opportunity to get into evidence the violent reputation of both victims and that the failure to do so could have had a significant impact on the outcome of the trial.

2) *Counsel's failure to investigate, identify, or call to testify Mr. Fleming Anderson as a witness favorable to the Applicant.*

Mr. Anderson's testimony at the PCR hearing was that he was present all week at the trial, under a subpoena from the State, listed on the State's witness list and willing to testify on behalf of the Applicant. His testimony would have directly contradicted the State's case in several significant particulars. He was prepared to contradict the State's theory on issues concerning Applicant's possession of the gun. Mr. Anderson would have testified he was with Applicant the day of the incident and was certain that Applicant did not have a gun in his possession when they arrived at the victims' residence. He would have disputed the State's theory of motivation, that they were at Michael Robertson's residence not to seek revenge but by an invitation from the Robertson's cousin and to "drink some beers". He would have testified that Michael Robertson started the argument and was the aggressor. Though Mr. Anderson's testimony would have been similar to Applicant's other witness, Mr. Kauffin, this Court does not find it to be cumulative. This was a murder trial with a self- defense claim, the principal witnesses were either related or friends of the victims. Mr. Kauffin, Applicant's only witness, was the brother of the Applicant. Mr. Fleming, though a friend of applicant, in the Court's view could have had a substantial impact on the outcome of a trial that depended heavily on the credibility of the witnesses. Applicant did not testify that he asked Counsel to call Mr. Anderson, but this Court finds that Counsel should have and easily could have located him, identified the importance of his testimony, and called him to testify.

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3) *Counsel's failure to request a charge of voluntary manslaughter and to consult with his client on significant trial strategy.*

Counsel testified that the decision to not seek a voluntary manslaughter charge was both a trial strategy and a belief that it was not appropriate for the facts of the case. As to the latter, this court finds that such a charge was appropriate and if requested likely would have been given. This court finds that based upon its review of the trial record, a request for a voluntary manslaughter charge was clearly supported by the evidence. At trial, Applicant testified he was unarmed when Michael Robertson, standing less than an arm's length away, pulled a gun from under his shirt and pointed it at him and called out for his nephew to go get more guns, threatened to "teach them a lesson" and in the ensuing struggle Applicant was prevented from running away while another gun was pointed at him and the trigger pulled, that he was saved only by that gun misfiring and that is when he fired at both victims. Counsel's statement to the trial court (see page 550 lines 17-25 and page 551 lines 1-5) suggests that Counsel considered a voluntary manslaughter jury charge not supported by the facts, not just a trial strategy. He stated to the trial court that he would object to the State seeking it if they had. He also testified that he did not seek it because he thought the jury was going to find the Applicant not guilty based on self-defense.

The differential punishment for murder and voluntary manslaughter is significant. Considering the jury's not guilty verdict on the assault and battery with intent to kill charge on Jamie Robertson, it is clear that the jury was not convinced that the entire responsibility for events fell on Applicant. However, even if the decision to not seek a voluntary manslaughter charge was an acceptable trial strategy to maximize Applicant's self-defense claims, this court finds that Counsel had a duty to discuss this decision with the Applicant and that he did not. The Court acknowledges that not every trial decision can be discussed and approved by Defendants during the course of a trail nor does this court believe that trial counsel has a duty to do so. However, the decision to go for "all or nothing" on the self-defense claim in a murder trial was such importance that it should have been discussed with Applicant. The outcome could have meant a difference of 15-20 years in jail. Counsel agrees at the PCR hearing that this decision could have had a substantial impact on the outcome of the case. If there had been a plea negotiation involving a voluntary manslaughter offer, Applicant would have been entitled to know and decide.

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Applicant testified unambiguously that this trial strategy was not discussed with him. Counsel could not recall if it had been or not, but upon reflection agreed that it should have been. Applicant testified that if he had been consulted he would have strongly considered it. He testified that he felt responsible in some fashion for the outcome of events though he did not believe he was guilty of murder.

CONCLUSION

Based on all of the foregoing, this Court finds and concludes that the Applicant has established his claim of ineffective assistance of counsel and that he is entitled to a new trial on the indictment for murder.

IT IS THEREFORE ORDERED

The Applicant is granted a new trial on the murder indictment.

AND IT IS SO ORDERED this 13th day of Dec, 2016.

R. Markley Dennis, Jr.
Presiding Judge