

ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

RECEIVED

August 8, 2017

AUG 11 2017

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

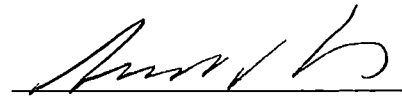
S.C. SUPREME COURT

Re: J'Corey Hull-Kilgore v. State
2013-CP-42-2062

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,



Susannah Ross
Attorney at Law

enclosure

cc: Office of the Attorney General
Office of Appellate Defense
Spartanburg County Clerk of Court

330 E. COFFEE ST. • GREENVILLE/SC • 29601
PHONE: (864) 242-0029
E-MAIL: SUSANNAH@ROSSENDERLIN.COM

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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AUG 11 2017

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Frank R. Addy, Circuit Court Judge

2013-CP-42-2062

J'Corey Hull-Kilgore, Appellant,

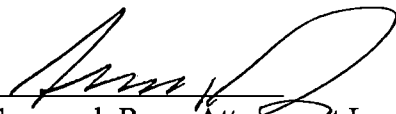
v.

The State, Respondent.

NOTICE OF APPEAL

J'Corey Hull-Kilgore appeals the Honorable Frank R. Addy's Order of Dismissal filed June 15, 2017, as well as the Order of Dismissal and Order denying the Applicant's Motion to Alter or Amend filed on July 27, 2017.

This 8 day of August, 2017.


Susannah Ross, Attorney at Law
330 E. Coffee St.
Greenville, SC 29601
(864) 242-0029
Attorney for Appellant

Other Counsel of Record:
Alicia Olive, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for Respondent

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
J' Corey S. Hull-Kilgore, #340853)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
OF THE SEVENTH JUDICIAL CIRCUIT

2013-CP-42-2062

**ORDER DENYING
MOTION TO ALTER OR
AMEND JUDGMENT**

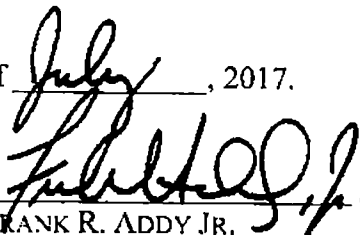
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This matter comes before the Court by way of Applicant's Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRPC, filed June 20, 2017. Respondent made its Return to the motion on or about July 11, 2017. Based upon careful reconsideration of all of the evidence in this case and upon full consideration of Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend the judgment.

IT IS THEREFORE ORDERED:

1. That Applicant's motion is denied and dismissed.
2. Applicant shall remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 20th day of July, 2017.


FRANK R. ADDY JR.
Presiding Judge
Seventh Judicial Circuit

Abbeville, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

J'Corey S. Hull-Kilgore, #340853)

Plaintiff)

v.)

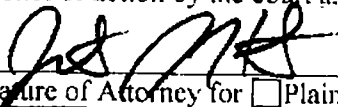
State Of South Carolina)

Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.
2013-CP-42-2062

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Susannah C. Ross, Bar No. 11205 Address: 330 E. Coffee St. Greenville, SC 29601 phone: fax: e-mail: other:	Defendant's Attorney: Valerie Garcia Giovanoli, Bar No. 102524 Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	July 11, 2017 Date submitted
SECTION III: Motion Fee	
<input type="checkbox"/> PAID - AMOUNT: <input checked="" type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other: _____	
JUDGE'S SECTION	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	_____ JUDGE CODE: _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ <input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	Date Filed: _____

CLERK OF COURT
 SPARTANBURG COUNTY
 M. HOPE BLACKBERRY
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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE)	
)	
J'COREY SUAVE HULL-KILGORE,)	
APPLICANT.)	
)	MOTION TO ALTER OR AMEND
)	THE JUDGMENT
)	
VS.)	
)	
STATE OF SOUTH CAROLINA,)	
)	CASE NO. 2013-CP-42-2062
)	
RESPONDENT.)	

COMES NOW the Applicant and hereby moves pursuant to Rule 59(c), SCRPC, to alter or amend the judgment of this Court filed on June 15, 2017. The Applicant takes issue with the findings of fact and conclusions of law set fourth resulting in the denial of post-conviction relief in his case. He argues each allegation set fourth amounted to undue prejudice. He further argues that if each allegation did not amount to ineffective assistance of counsel standing alone, the cumulative effect of counsel's performance was deficient and prejudiced him to the degree that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 386 S.E.2d 624, 625 (1989)

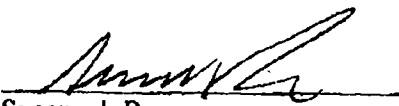
Regarding issue preclusion and double jeopardy, the Order of Dismissal rules that Yeager v. United States, 557 U.S. 110 (2009) does not prevent a retrial for homicide after prior trial resulted in an acquittal for armed robbery and hung jury on the homicide. However, the ruling does not fully address the allegation that trial counsel failed to effectively argue that the State was precluded from presenting evidence of an armed robbery though witnesses D'Angelo Miller and Keevin Anderson in the second trial as

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they did on pages 285, 321 and 323 of the trial transcript. While trial counsel did place a full objection on the record on page 373, he did not reference Yeager v. United States, 557 U.S. 110 (2009) and failed to request an instruction that Mr. Hull-Kilgore had been acquitted of the referenced armed robbery. Alternatively, if the record reflects that trial counsel adequately argued issue preclusion and double jeopardy without referencing Yeager v. United States, 557 U.S. 110 (2009), appellate counsel failed to brief the issue and challenge the trial judge's ruling on appeal. In either case, the Applicant was denied a fair trial and is due post-conviction relief. The order fails to address these arguments.

For the foregoing reasons, the Applicant requests this Court to alter or amend its Order of Dismissal.

Respectfully submitted,



Susannah Ross
Attorney for the Applicant
333 E. Coffee Street,
Greenville, SC 29601
(864) 242-0029

Greenville, South Carolina
This 16 day of June, 2017.

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SPRINGFIELD COUNTY
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M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

J'Corey Suave Hull-Kilgore,)
S.C.D.C. No. 340853,)

Case No. 2013-CP-42-2062

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)
_____)

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This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 6, 2013. Respondent made a Return and Motion to Stay the Proceedings on September 20, 2013, requesting that the PCR be stayed pending the outcome of Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014).¹ Thereafter, Respondent made an amended Return and Partial Motion to Dismiss on February 11, 2016, requesting that the claims related to Aiken v. Byars be dismissed and an evidentiary hearing be held solely as to the allegations of ineffective assistance of counsel.² On August 29, 2016, Respondent made an Amended Return and Motion for More Definite Statement. Applicant filed an Application Addendum on November 1, 2016.

The Court convened an evidentiary hearing into the matter on November 8, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Susannah Ross, Esquire. Alicia A. Olive, Esquire of the South Carolina Attorney General's Office represented Respondent.

As a preliminary matter, Applicant requested a continuance pending his resentencing

¹ The Aiken v. Byars case concluded on June 1, 2015 when the United States Supreme Court denied the petition for writ of certiorari.

² Simultaneously, Respondent sent a letter to the Spartanburg County Clerk of Court requesting that Applicant be appointed counsel.

pursuant to Aiken v. Byars. For the reasons stated at the hearing, the Court declined to grant a continuance, and a hearing on the merits was held.

At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Clay T. Allen, Esquire, ("Counsel") also testified. The Court had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, the pleadings and amendments. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In August 2009, the Spartanburg County Grand Jury indicted Applicant for murder (2009-GS-42-4486). Clay T. Allen, Esquire, represented Applicant. Applicant proceeded to trial May 18-20, 2010, before the Honorable J. Derham Cole and a jury. The jury convicted Applicant as incited, and Judge Cole sentenced him to confinement for life.

Applicant filed a timely notice of appeal. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence on September 19, 2012. State v. Hull-Kilgore, No. 1212-UP-531 (S.C. Ct. App. filed September 19, 2012). The remittitur was returned to the court on October 5, 2012.

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II. ALLEGATIONS

In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Applicant's sentence of life without parole, imposed for a crime he committed when he was a juvenile, violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution.

2. Applicant's sentence of life without parole violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution because the proceedings which led to its imposition were both procedurally and substantively inadequate, in that:
 - a. The proceedings which led to the imposition of Applicant's sentence of life without parole failed to comply with fundamental Eighth Amendment mandates pursuant to Miller v. Alabama.
3. Ineffective Assistance of Counsel, in that:
 - a. Counsel failed to object and failed to make the record sufficient for review.

In his amended Application filed November 1, 2016, applicant also alleged:

4. Ineffective assistance of counsel, in that:
 - a. Counsel failed to adequately advise, investigate, preserve the record, request charges for self-defense or accident, and object to the assistant solicitor's comment in closing that his job is to find the truth and seek justice.

At the evidentiary hearing, Applicant raised additional grounds for relief and proceeded on the following grounds: ineffective assistance of counsel for failing to argue issue preclusion and double jeopardy, failing to request a voluntary manslaughter instruction, failing to adequately impeach and cross-examine State's witnesses, failing to object to impeachment using juvenile convictions, failing to request self-defense instruction, and failing to object to closing argument.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

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A. Evidence Adduced at Trial

On May 24, 2008, at 8:24 PM, authorities were dispatched to the intersection of South Liberty and Amos Street in Spartanburg following reports of a shooting. (Tr. at 18, 21). Upon arriving at the scene, first responder Deputy Bradford James explained he observed a black male, later identified as Victim, with several individuals around him attempting to render aid. (Tr. at 3, 21). Upon approaching Victim, James noticed a gunshot wound to the base of Victim's neck near the collarbone. (Tr. at 22). As James applied pressure to the wound to try to stop the bleeding, Victim grabbed James and stated "I'm going to die." (Tr. at 22). Victim's statement proved to be prophetic as the wounds were indeed fatal. (Tr. at 3, 13).

While James and others were attempting to aid Victim, Officer Derrick Canada, understanding the shooting had happened nearby, responded to a residence located on East Columbia Avenue. (Tr. at 36). Upon arrival at the residence, Canada encountered its occupant, Sandra Dandy, and her then-boyfriend, Dwight Mills. (Tr. at 37). After observing what appeared to be blood on the front porch, Canada turned the scene over to investigators who sought a search warrant to process the scene. (Tr. at 38-39, 63).

Processing the scene, authorities swabbed the blood-like substance in order to conduct DNA analysis. (Tr. at 64, 74). SLED Analyst Lindsay Thompson would later confirm the swabs taken from the blood-like substance on the front porch matched Victim's blood. (Tr. at 213). Additionally, authorities observed what appeared to be a bullet hole in the wall nearest the front porch and recovered a shell casing from a .380 handgun with the head stamp "RP." (Tr. at 66, 75, 81). Six days later, Acting on a tip from Applicant's brother James and James' friend, Demetrius Reid, authorities also recovered a loaded handgun containing five .380 rounds at the intersection of Williams Street and Harmony Drive in Spartanburg near Applicant's grandmother's house. (Tr. at 78-80, 81, 332-33). Of the five rounds that were found in the

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handgun, two rounds carried an "RC" head stamp, while the remaining rounds revealed an "FC" head stamp. (Tr. 214). SLED analyst Frank Dan Defreeze later determined the shell casing found at the scene was fired by the .380 handgun recovered near Applicant's grandmother's house. (Tr. at 219).

At trial, the State called a number of witnesses who were in and around Dandy's residence at the time Victim was shot. First, the State called Dandy who testified she observed Applicant and Victim briefly talking to one another near the doorway to the front porch of her residence when she heard a "loud sound." (Tr. at 121-22). This testimony was essentially echoed by witness Keevin Anderson who added that, in addition to hearing the shot, he witnessed Applicant shoot Victim and take his money. (Tr. at 277).

The State also called Taquil "Penny Red" Nabors, who was an eyewitness to the shooting. (Tr. at 165, 168-69). Nabors was friends with both Applicant and Victim, and Nabors explained he was on the front porch playing cards when Victim pulled up in front of Dandy's residence, prompting him to approach Victim. (Tr. at 167, 168-69). Nabors testified he spoke with Victim briefly before Victim walked onto the porch and entered the residence. (Tr. at 168-69). Nabors explained he did not see Victim again until he heard a "gun cock back" causing him to look into the residence. (Tr. at 169-70). Upon doing so, Nabors witnessed Applicant shoot Victim in the neck while Victim was walking out the front door. (Tr. at 169-70). Nabors added Victim was digging in his pocket when Applicant shot him. (Tr. at 169-70).

D'Angelo Miller also testified. Miller was dating Dandy's daughter and was friends with both Applicant and Victim. Miller explained that when Victim pulled into the driveway, Applicant went around the side of the house with his brother, James, and Applicant asked James for his gun so he could rob Victim. (Tr. at 235, 239-240). Miller then observed Victim was int

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the house. (Tr. at 236). Understanding Applicant was armed and intended to rob Victim, Miller walked into Dandy's house to get Dandy's young son and his girlfriend's young daughter out of harm's way. (Tr. at 236-37, 238-39). After getting the children, Miller locked himself and the children in a nearby bedroom, and he then heard a gunshot. (Tr. at 238).

Applicant's brother, James Kilgore, like Dandy, Anderson, Nabors and Miller, testified against Applicant. In particular, Kilgore repeated Miller's testimony that Applicant approached him and asked for his handgun. Kilgore added that the handgun he gave Applicant was the handgun recovered near Applicant's grandmother's house. (Tr. at 297).

After the close of the State's case, Applicant elected to present a defense. Specifically, Applicant's younger brother, Javaris Hull-Smith, told the jury he was playing video games with Applicant until sometime after dark when the two began talking to some girls. (Tr. at 361-62). Hull-Smith explained Applicant only briefly left the house after hearing sirens in the neighborhood. (Tr. at 361-62). Consistent with his younger brother's testimony, Applicant testified he was playing video games, then talked to some girls who happened to be in the neighborhood. Applicant then maintained he left the house around 9:00 PM or 10:00 PM (Tr. at 376) to check on his older brother, James, because he knew James was at Dandy's house, and Applicant believed the sirens were coming from that direction. (Tr. at 377). Finally, Applicant denied ever seeing Victim that day, stated he never asked his brother for a gun, and maintained he never shot Victim. (Tr. at 380).

B. Summary of Testimony


Applicant testified that, in his first trial on the murder charge, he was also tried for armed robbery. He testified the jury acquitted him of the armed robbery charge, and the jury was hung on the murder charge. Applicant testified that his juvenile record was referenced in closing. He



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testified he told his previous attorney about an alibi witness. He testified the State offered to allow him to plead guilty to murder with a sentence of thirty (30) years. Applicant declined this offer prior to the first trial.

Counsel testified he has been practicing law for thirty-seven (37) years. He testified that he was appointed in October of 2009, prior to Applicant's first trial, and that he met with Applicant approximately four times prior to his first trial, and five (5) or six (6) times prior to his second trial. Counsel testified he reviewed the indictments with Applicant as well as the elements of the offense. He discussed with Applicant the State's burden of proof at trial. He filed discovery motions and reviewed discovery with Applicant. Counsel testified the defense they discussed was always alibi. He testified he was not aware of the claim regarding the girls. Counsel testified that his theory was that Applicant was not present and did not commit the crime, but that Applicant's brother, James, did. James testified he hid his brother's gun and had his name all over the case. Counsel testified James was in jail for the pendency of trial and was charged as an accessory. Counsel testified he cross-examined State's witnesses to bring out inconsistencies. Counsel testified that it is difficult to argue alibi and self-defense together. Counsel testified he never requested instructions on voluntary manslaughter or accident. He testified there was no evidence in the record of legal provocation or sudden heat of passion to support a voluntary manslaughter charge. Counsel testified the trial judge first ruled that he would not allow the juvenile convictions, but the court then ruled the convictions would be allowed for impeachment purposes. Counsel testified juvenile convictions can be used for impeachment. Counsel testified he saw no reason to object to the charge to "find truth and seek justice" and did not feel the solicitor made an improper comment in closing. Counsel testified he was trying to point out that James had an incentive to cast blame on Applicant.



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C. Ineffective Assistance of Trial Counsel

In a PCR action, Applicant bears the burden of proving the allegations in his 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 [it] cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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.

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As a matter of general impression, this Court finds Counsel's strategy was reasonable and he provided competent, effective representation of Applicant. Therefore, the Court denies Applicant's request for relief for the reasons that follow:

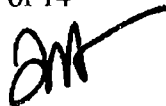
1. Failure to argue issue preclusion and double jeopardy

Applicant maintains that trial counsel was ineffective for failing to argue issue preclusion and double jeopardy. In his first trial, applicant was found not guilty of armed robbery, but the jury could not reach a verdict on the murder charge. When subsequently retried on the murder count in the instant case, Applicant maintains that counsel was ineffective for failing to argue that the acquittal on the armed robbery charge negates the possibility of guilt on the murder charge. In essence, Applicant argues that, because the jury in his first trial found him not guilty of armed robbery, the issue of whether he was armed with a gun at the time of the murder is settled, and the State should not have been allowed to prove that he was armed at the time of the homicide. On this question, Applicant misstates the law. The jury on the first case could have concluded that no property was taken from the victim, and as Counsel stated, the State's case for armed robbery was not very strong. Put plainly, an acquittal on an armed robbery does not negate the possibility of retrial on the homicide charge. These offenses are separate and distinct, and therefore, Yeager v. United States, 557 U.S. 110 (2009) is not controlling as a matter of law. Accordingly, Applicant has failed to establish either deficiency or prejudice with respect to this allegation.

2. Failure to request self-defense instruction

Applicant next complains that trial counsel failed to request a self-defense instruction. Applicant is correct that one witness did allude in passing that the shooting may have been in self-defense; however, Applicant's defense was alibi. Counsel testified it is difficult to argue both

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alibi and self-defense. Where “counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance[.]” Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992)). Because, as Counsel testified, presenting conflicting defense theories often operates to confuse the jury or lessen the effectiveness of the primary defense, the Court finds that Counsel articulated a valid trial strategy for not requesting a self-defense instruction. Similarly, trial counsel was not ineffective for failing to request an accident or involuntary charge in light of the brief testimony of Applicant’s brother, James Kilgore, at trial. James testified he asked Applicant over the phone if he did “it,” and Applicant “said he don’t know—he don’t know. He didn’t mean to if he did. He don’t know.” (Tr. at 352, lines 4-9). Again, Counsel testified regarding the difficulty of presenting the conflicting defenses alibi and self-defense. The same rationale applies to alibi and accident or involuntary manslaughter. In addition, Applicant has failed to show there is a reasonable probability that, but for the alleged deficiency, the outcome would have been different. Therefore, Applicant’s requested relief on these grounds is denied.

3. Failure to request a voluntary manslaughter instruction

Applicant asserts that trial counsel should have requested and argued for a voluntary manslaughter charge. On pages 436-39, the transcript reflects that counsel requested a voluntary manslaughter charge; however, the trial judge declined to give that instruction. After the jury was instructed on the law, Counsel renewed his request for a voluntary instruction (Tr. at 477, lines 13-16). In addition, this issue was raised and decided on the merits in Applicant’s direct appeal. Accordingly, relief on this ground is denied.

4. Failure to adequately impeach and cross-examine State’s witnesses



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Applicant argues Counsel was ineffective for failing to move to “reveal the deal” with State’s witness, Deangelo Miller, but Applicant offered no evidence that any such deal existed. Similarly, Applicant makes a bare assertion that Counsel failed to adequately cross-examine State’s witnesses. Cross-examination is a matter of trial strategy and is subject to the presumption that Counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690). The Court has reviewed the transcript and finds these arguments to be without merit; Counsel effectively cross-examined witnesses concerning any deals or leniency they might receive in return for testifying. Further, Counsel effectively impeached all testifying witnesses concerning discrepancies in their statements. Accordingly, Applicant has failed to satisfy his burden of proving either deficiency or prejudice, and relief is denied on these grounds.

5. Failure to object to impeachment using juvenile convictions

Applicant maintains that Counsel was ineffective for failing to object to Applicant’s impeachment based upon juvenile convictions for burglary. This allegation is without merit. The Supreme Court of South Carolina “has found that there is no direct prohibition against the use of juvenile adjudications to impeach either a defendant, or a non-party witness. State v. Sparkman, 287 S.C. 489, 492, 339 S.E.2d 865, 867 (1986) (citing State v. Mallory, 270 S.C. 519, 242 S.E.2d 693 (1978); State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981)). See also Rule 609(a)(1), SCRE. This Court also notes that in his direct appeal Applicant raised the issue of whether the trial court erred in allowing the solicitor to impeach Applicant with prior convictions, and the Court of Appeals decided the issue on the merits. Therefore, because the use of juvenile adjudications for impeachment is permitted under the rules, and because

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was apparently raised and ruled on at trial (Tr. at 388-89; 412, lines 7-12; 433), this allegation is without merit and relief is denied on this ground.

6. Failure to object to closing argument

Finally, Applicant maintains trial counsel should have objected to Solicitor Bulsa's closing argument when he apparently vouched for a witness and then stated that the Solicitor's job was to seek truth and justice. (Tr. at 455, lines 3-4). "The prosecution may not comment, directly or indirectly, on the defendant's decision not to testify or present a defense; however, any improper comments do not require reversal unless they prejudice the defendant." State v. Cooper, 334 S.C. 540, 554, 514 S.E.2d 584, 591 (1999). On appeal, an appellate court will review the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003) (citations omitted). Appellate review "of the closing argument is based upon whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000). "The appellant has the burden of proving she did not receive a fair trial because of the alleged improper argument." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624-25 (1996) (citing State v. Dawkins, 297 S.C. 386, 388, 377 S.E.2d 298, 299 (1989)).

Although this Court finds the argument was likely objectionable improper vouching, the argument was not so improper or inflammatory as to prejudice Applicant. Therefore, Applicant has failed to satisfy his burden of proving that there is a reasonable probability the outcome of the proceeding would have been different had an objection been made. See State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003) (citation omitted) ("the appropriateness of a solicitor's



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closing argument is a matter left to the trial court's sound discretion [and the] appellate court will not disturb a trial court's ruling regarding closing argument unless there is an abuse of that discretion."'). Accordingly, relief is denied on this ground.

7. Miller v. Alabama

Applicant's allegation pursuant to Miller v. Alabama, 567 U.S. 460 (2012) and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014) is hereby dismissed. In its amended return, Respondent moved to summarily dismiss this allegation as improper for consideration in PCR, noting the South Carolina Supreme Court specifically ordered "any individual affected by [the] holding may file a motion for resentencing within one year from the filing of this opinion in the court of general sessions where he or she was originally sentenced." Byars, 410 S.C. at 545, 765 S.E.2d at 578 (emphasis added). Applicant's PCR counsel informed the Court that Applicant currently has a motion for resentencing pursuant to Miller v. Alabama and Aiken v. Byars pending in General Sessions Court. Accordingly, this allegation is dismissed.

IV. 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. 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



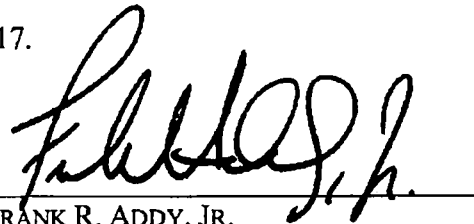
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appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

IT IS SO ORDERED this 7th day of June, 2017.



FRANK R. ADDY, JR.
Presiding Judge
Seventh Judicial Circuit

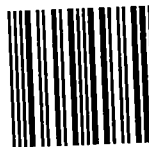
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