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January 5, 2015

Daniel E. Shearouse
Clerk of Court – SC Supreme Court
Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: Tyrone Beaty v. State of South Carolina, Case No.: 2013-CP-26-5929; John Elvis Bostic vs. State of South Carolina, Case No.: 2012-CP-26-7917; Keion Griffin vs. State of South Carolina, Case No.: 2011-CP-26-10757; Lorenzo Cross vs. State of South Carolina,. Case No.: 2013-CP-26-3958; Nelson H. Castro vs. State of South Carolina, Case No.: 2013-CP-26-1591; Jeffrey Riebe vs. State of South Carolina, Case No.: 2013-CP-26-5292; Shannon T. Parker vs. State of South Carolina, Case No.: 2013-CP-26-2547; and Nearim Blackwell-Selim vs. State of South Carolina, Case No.: 2013-CP-26-6066.

Dear Mr. Shearouse:

Enclosed please find the original Notice of Appeal in each of the above-entitled actions and two copies for each. Please file and return one copy to me in the self addressed stamped envelope enclosed.

If you should have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Daniel A. Selwa, II

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Kristi Lea Harrington, Circuit Court Judge

Case No.: 2011-CP-26-10757

Keion Griffin, #337833, ... Petitioner,

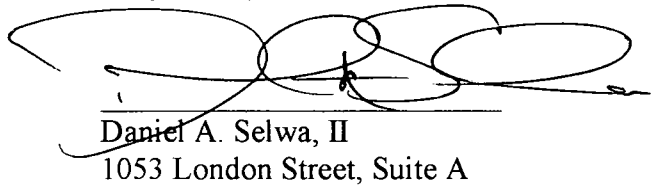
v.

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

NOTICE OF APPEAL

The Petitioner appeals the Honorable Kristi Lea Harrington, November 19, 2014, order, denying the Applicant's Petition for post-conviction relief. Undersigned counsel received notice of entry of the order on December 9, 2014. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Daniel A. Selwa, II
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Attorney for the PCR Applicant

January 5, 2015

Other counsel of record:
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Honorable Kristi Lea Harrington, Circuit Court Judge

Case No.: 2011-CP-26-10757

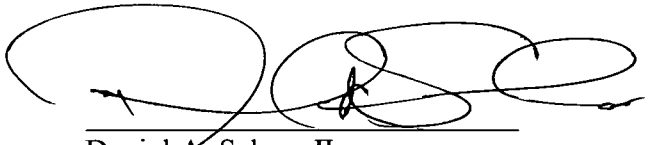
Keion Griffin, #337833 ..... Petitioner,

v.

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

PROOF OF SERVICE

I, Daniel A. Selwa, II, certify that I have served the within Notice of Appeal on the Respondent, the State of South Carolina, by depositing a copy of the same in the United States Mail, postage prepaid, addressed to his attorney of record, Alan Wilson, Attorney General, Post Office Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this 5th day of January 2015.



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Attorney for the PCR Applicant

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Keion Griffin, #337833, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2011-CP-26-10757 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 28, 2011. Respondent made a timely Return on or about February 24, 2012. The Court convened an evidentiary hearing into the matter on August 26, 2014, at the Horry County Courthouse. Applicant was present at the hearing and represented by Daniel A. Selwa II, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, James C. Galmore, Esquire, also testified. The Court had before it a copy of the plea transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the return, and the exhibits introduced at the hearing. 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 Horry County Clerk of Court. In July 2008, the Horry County Grand Jury indicted Applicant for murder (2008-GS-26-2552) and possession of a weapon during the commission of a violent crime (2008-GS-26-2553). James C. Galmore, Esquire ("trial counsel"), represented

Applicant. On November 2, 2009, Applicant proceeded to trial before the Honorable Larry B. Hyman Jr. and a jury. The jury found Applicant guilty as indicted. On November 4, 2009, Judge Hyman sentenced Applicant to concurrent terms of life imprisonment without the possibility of parole for murder and five (5) years for possession of a firearm during the commission of a violent crime.

Applicant filed a timely notice of appeal, and Joseph L. Savitz III, Esquire, of the Office of Appellate Defense, perfected the appeal with the filing of an *Anders*[1] brief. The South Carolina Court of Appeals dismissed Applicant's appeal on August 15, 2011. *State v. Griffin*, Op. No. 2011-UP-387 (S.C. Ct. App. filed August 15, 2011). The remittitur was returned to the circuit court on August 31, 2011.

II. ALLEGATIONS

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

1. "Counsel failed to object to jury Instructions"
    a. "Counsel waived Belcher Instruction to jury"

At the evidentiary hearing, Applicant orally amended the application and proceeded on only the following allegations:

1. Ineffective assistance of counsel for failing to call witnesses.
2. Ineffective assistance of counsel for failing to request a lesser included offense.

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. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

[1] *Anders v. California*, 386 U.S. 738 (1967).

A. Summary of Testimony

Applicant testified he was dressed similarly to a co-defendant, Demario Stukes, the night of the murder. He testified he was not wearing a hat, but Stukes was. Applicant testified trial counsel James Galmore did not share the State's discovery response with him. He testified trial counsel should have interviewed the other witnesses to the crime to determine Stukes was actually the shooter. Applicant maintained he was not present at the scene and was not the shooter.

Applicant also testified trial counsel did not explain the decision to reject a charge on the lesser included offense of voluntary manslaughter. He stated trial counsel explained the jury would find him guilty if they requested a manslaughter charge. Applicant testified the fact the trial judge had to issue an *Allen*[2] charge indicates they would have likely convicted him of manslaughter if presented with the option. Applicant believed he did not have enough information to make the decision to reject a voluntary manslaughter charge.

Trial counsel testified he had several meetings with Applicant, and discussed the State's evidence and his defenses. Trial counsel testified Applicant never denied being present at the shooting, but he also would not reveal who the actual shooter was. Trial counsel testified he reviewed each and every interview of witnesses at the scene before trial. He recalled there were certain witnesses who identified a person with a hat and glasses as having the gun. On cross-examination, he testified he did not call Dan Sweeny, Keith Griffin, or any other members of the victim's party because their statements indicated they had no clear recollection of the events. He also testified he was afraid members of the victim's party would shape their testimony to implicate Applicant. Trial counsel testified he did not call Emma Chandler, a witness to the incident, as a witness because her statement indicated she did not see

[2] *Allen v. United States*, 164 U.S. 492 (1896).

the actual shooting. He also recalled being unable to locate Chandler to serve her with a subpoena. Trial counsel also recalled an interview with Michael Bennett, a witness to the incident, which indicated the shooter had on a red bandana. Ultimately, trial counsel admitted he did not know if the testimony of these witnesses would have made a difference in Applicant's trial.

Trial counsel recalled cross-examining the co-defendants on their plea deals. He also remembered presenting the testimony of Asia Harris to show Demario Stukes was the shooter. Trial counsel recalled the statements of the other witnesses were consistent with their trial testimony. He also recalled discussing the potential of a manslaughter charge with Applicant at the time of the charge conference. Trial counsel testified he did not ask for a manslaughter charge because he argued to the jury Applicant was not the shooter. He testified his strategy was not to get a conviction on a lesser included offense.

B. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing *Griffin v. Martin*, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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." *Id.* at 442, 334 S.E.2d at 814 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Id.* (citing *Strickland*, 466 U.S. at 687; *Turner v. Bass*, 753 F.2d 342 (4th Cir. 1985); *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel 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 in order to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. *Id.* at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. *Id.* Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." *Id.* (citing *Strickland*, 466 U.S. at 688). Second, any deficient performance must have prejudiced 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." *Id.* at 117-18, 386 S.E.2d at 625.

1. Failure to call witnesses.

The Court finds Applicant failed to meet his burden of proving trial counsel ineffective for failing to call further witnesses on Applicant's behalf. The evidence linking Applicant to this crime came largely through eyewitness testimony. Trial counsel was thoroughly familiar with all the witness statements prior to trial. He read the statements, reviewed the State's other evidence, and was not surprised by the testimony at trial. *Edwards v. State*, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011) (citing *Daniels v. State*, 676 S.E.2d 13 (Ga. 2009)). Regarding Sweeny and Griffin, trial counsel articulated he did not want to call any members of the victim's party for two reasons. First, those witnesses did not have a clear recollection of the events the night of the murder. Second, trial counsel feared those witnesses would harm Applicant's case by testifying in the State's favor. Regarding Chandler, trial counsel articulated he attempted to subpoena her, but was unsuccessful. The Court finds trial counsel articulated valid strategic reasons for not calling these witnesses to testify in Applicant's defense. *See Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a

valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992))).

The Court further finds Applicant failed to demonstrate he was prejudiced by not having these witnesses testify at this trial. None of these witnesses testified at the evidentiary hearing. Thus, any finding of prejudice would be purely speculative. *Dempsey v. State*, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995))). Furthermore, the testimony of these witnesses, even if consistent with their recorded statements, is "cumulative to or does not otherwise aid evidence introduced at trial[.]" *Edwards*, 392 S.C. at 459, 710 S.E.2d at 66 (citing *Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998); *Glover*, 318 S.C. at 498, 458 S.E.2d at 540; *Cherry*, 300 S.C. at 118–19, 386 S.E.2d at 625–26). Neither of the testifying members of the victim's party, Zachary Mathis and Jeffrey King, could positively identify Applicant as the shooter. However, they consistently testified the shooter was not wearing a hat and was not the individual who initiated the fight. Sweeny and Griffin's statements are not inconsistent on these points. Likewise, Bennett's statement did not positively identify Stukes as the shooter. Chandler's statement indicates she did not actually see the gun or the shooting. Accordingly, the Court agrees with trial counsel's assessment that testimony from these witnesses may not have affected the outcome of Applicant's trial.

Instead, the Court notes testimony of these witnesses actually may have bolstered the State's case against Applicant. The members of the victim's party indicate two individuals were involved in the shooting. The first individual approached Harris's car to speak to Harris and Chandler. The second

individual remained near the back of the car. This version of events is supported by Harris and Chandler. Harris and Chandler also indicate the first individual then engaged in a fight with a member of the victim's party. The victim attempted to break up this fight. The members of the victim's party, who actually saw the shooting, indicate the second individual was the actual shooter. Their testimony and statements were corroborated by Applicant's co-defendants. Thus, the Court is left with the conclusion Stukes was the first individual who engaged in a fight with a member of the victim's party, and Applicant was the second individual who shot the victim when the victim attempted to break up the fight. Accordingly, the Court finds Applicant has not shown any prejudice from trial counsel's decision to not call further witnesses on Applicant's behalf.

2. Rejection of voluntary manslaughter charge.

The Court also finds Applicant failed to meet his burden of proof to show trial counsel ineffective for rejecting an instruction on the lesser included offense of voluntary manslaughter. Trial counsel's defense strategy was to show Applicant was not the shooter. He attempted to elicit testimony indicating Applicant did not have the gun. He argued to the jury Stukes was the shooter. Trial counsel's theory of the case did not involve Applicant shooting the victim under circumstances indicating he committed manslaughter. *State v. Starnes*, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010) ("Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." (citing *State v. Wharton*, 381 S.C. 209, 672 S.E.2d 786 (2009))). Thus, a charge on voluntary manslaughter would have been incompatible with trial counsel's trial strategy. Accordingly, the Court finds trial counsel articulated a valid strategy for declining the manslaughter charge. *Abney v. State*, 408 S.C. 41, 46, 757 S.E.2d 544, 547 (Ct. App. 2014), *reh'g denied* (Apr. 24, 2014) (failing to ask for a jury charge on a lesser included offense is a valid trial strategy); *see also State v. Walker*, 605

S.E.2d 647, 654 (N.C. Ct. App. 2004), *overruled on other grounds*, 695 S.E.2d 750 (N.C. 2006) ("The record indicates defendants' counsel were employing an 'all or nothing' strategy[.] ... The fact that it failed does not mean that defendants were deprived of effective assistance of counsel."). Thus, trial counsel was not deficient in rejecting the manslaughter instruction.

Furthermore, under the facts of this case, a voluntary manslaughter instruction would have been improper. No testimony was presented at trial that Applicant was involved in a fight prior to firing the fatal shots. Instead, all the testimony indicated Stukes was fighting with a member of the victim's party when the victim intervened. Although it may be proper to charge manslaughter when the defendant and the victim engage in an argument, *State v. Locklair*, 341 S.C. 352, 360, 535 S.E.2d 420, 424 (2000) (citations omitted), no such evidence was presented here. Instead, the evidence indicates the victim was engaged in a fight with Stukes. It is axiomatic that the provocation necessary to reduce a murder to manslaughter must come from the deceased and be directed toward the defendant. *See id.*; *see also Harris v. State*, 354 S.C. 382, 387, 581 S.E.2d 154, 156 (2003) ("Since Clifton put forth no evidence that Linda Jean provoked him, he cannot prove his entitlement to a charge on voluntary manslaughter."); *State v. Harris*, 998 P.2d 524, 528 (Kan. Ct. App. 2000) ("A theory of a sudden quarrel between the victim and a third party will not support a conviction of voluntary manslaughter." (citing *State v. Clark*, 949 P.2d 1099 (Kan. 1997))); *People v. Ford*, 516 N.E.2d 766, 770 (Ill. App. Ct. 1987) (finding "nothing in [the defendant's] testimony to indicate that he acted under sudden and intense passion due to provocation" when the defendant stabbed a victim who was engaged in a fight with a third party). Because Applicant has not demonstrated the victim provoked him, he has not shown how he was prejudiced by the lack of a manslaughter instruction.

C. <u>All Other Allegations</u>

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

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.

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.

AND IT IS SO ORDERED this 7th day of October, 2014.

THE HONORABLE KRISTI LEA HARRINGTON
Presiding Judge

Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
	)	2011-CP-26-10757
	)	
KEION GRIFFIN, #337833	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a filed copy of the Order of Dismissal the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Daniel A. Selwa, II, Esquire
1053 London St., Suite A
Myrtle Beach, SC 29577

DATED this 8TH day of December, 2014.

Norma Bigbee, Legal Assistant
For Respondent

DANIEL A. SELWA, II
ATTORNEY AT LAW, L.L.C.

1053 London Street, Ste. A
Myrtle Beach, S.C. 29577

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