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October 3, 2017

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



The Honorable Mary Brown
Clerk, Berkeley County
300 California Dr.
Moncks Corner, SC 29461

**RE: Ron McCray, #353031, v. State of South Carolina**
***2015-CP-08-2692***

Dear Mr. Shearouse and Ms. Brown:

Enclosed for filing is a Notice of Appeal 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. McCray in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. McCray in this appeal.

Yours very truly,

Lance S. Boozer

cc: Lindsey McCallister, AAG
Office of Appellate Defense
Ron McCray, #353031

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

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Case No. 2015-CP-08-2692

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Ron McCray, #353031,.....Petitioner,

v.

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

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**NOTICE OF APPEAL**

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The Petitioner appeals the Honorable Michael G. Nettle's Order dated September 6, 2017, denying post-conviction relief to the Petitioner. Undersigned counsel received notice of entry of the Order on October 2, 2017. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,

Lance S. Boozer
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October 3, 2017

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
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State of South Carolina,.....Respondent.

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**PROOF OF SERVICE**

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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 Lindsey McCallister, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 3rd day of October, 2017.

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| STATE OF SOUTH CAROLINA<br>COUNTY OF BERKELEY | ) | IN THE COURT OF COMMON PLEAS<br>NINTH JUDICIAL CIRCUIT |
| Ron Santa McCray, #353031,<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | ) | C. A: No. 2015-CP-08-2692<br><br>**ORDER OF DISMISSAL** |



This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed by Ron Santa McCray (Applicant) on November 25, 2015, and amended on August 11, 2016. Respondent made its Return on June 6, 2016. An evidentiary hearing into the matter was convened on August 2, 2017, at the Charleston County Courthouse. Lance Boozer, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Applicant testified on his own behalf. Chris Beiring, Esquire, also testified. This Court had before it a copy of the records of the Berkeley County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application and amendment, the State's Return, the trial transcript, and Applicant's appellate records.

## PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Berkeley County Clerk of Court's orders of commitment. Applicant was indicted at the July 2011 term of the Berkeley County Grand Jury for one count of Murder (2011-GS-08-0947). Christopher Beiring, Esquire, represented him. On November 2, 2012, Applicant proceeded to a



LAM/NC

jury trial pursuant to which he was found guilty as indicted. The Honorable Kristi Lea Harrington sentenced Applicant to a term of life imprisonment.

A notice of appeal was filed on Applicant's behalf and an appeal was perfected by James Falk, Esquire, and Robert Dudek, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. McCray, 413 S.C. 76, 773 S.E.2d 914 (Ct. App. 2015). The Remittitur was issued on July 14, 2015.

## SUMMARY OF FACTS ADDUCED AT TRIAL

Officer Tony Daniels of the Charleston City Police Department was dispatched to a shooting in the area of Underlie Road and Jack Primis Road on September 16, 2009. Trancript, pp. 89-90. Officer Daniels arrived at 4:50 p.m. Transcript, p. 90. When Officer Daniels arrived on the scene, he observed "a black female on the ground on her knees. She had a male's head cradled up next to her body." Transcript, p. 91. Officer Daniels saw blood all around the body, and he noted that the victim did not appear to be conscious. Transcript, p. 91. According to Officer Daniels, the woman "was screaming, [']shot him, shot him, shot him.[']" Transcript, p. 91. The man the woman was cradling was Reggie Porcher. Transcript, pp. 123-24, 126. Officer Daniels proceeded to clear a group of people that was gathered around the woman and to secure the scene. Transcript, pp. 91-92. Officer Daniels did not see any weapons in the area near where the victim was lying, nor did he see anyone at the scene with a weapon. Transcript, p. 93.

A number of witnesses testified about the events surrounding Reggie Porcher's death. Tianna Chanice Mack-Collins testified that she was at her aunt's house when her cousin and son came in and told her that she needed to come outside because "the bad man Ron, bad man Ron shot Reggie." Transcript, pp. 123-24. Mack-Collins ran outside, where she saw Applicant walking to his car. Transcript, p. 124. Mack-Collins called out to the victim, and he staggered

toward Mack-Collins holding his neck. Transcript, pp. 125-26. According to Mack-Collins, "he was like, help me, Ron just shot me." Transcript, p. 126. He then took his hand off of his neck, and blood started coming out of his neck. Transcript, p. 126. Mack-Collins tried to help the victim— staying with him until the police came. Transcript, p. 126.

Another witness, Joyce Wright, testified she was sitting on a friend's porch the day the victim was shot. Transcript, pp. 96-97. She saw him pull up to the area and saw him talking with one of her nieces. Transcript, p. 97. Wright testified "later on [she] saw somebody tall with a white T-shirt on walking towards the crowd where a lot of kids was at. And he had something long in his hand." Transcript, p. 97. Then, Wright heard a gunshot, and some of the children came up to her and shouted, "Ron shot Reggie." Transcript, p. 97. She also observed the victim walking around in a circle and holding his neck before he fell to the ground. Transcript, p. 97.

Felicia Denise Coaxum testified she had been in her mother's room asleep before being awakened by a loud noise. Transcript, p. 103. Coaxum testified she looked outside and "saw Ron McCray and Reggie. Reggie was down on the ground, and I saw Ron McCray was standing over Reggie stomping him and telling him, die mother-fucker, die." Transcript, p. 104. According to Coaxum, Applicant was carrying something with "a metal, wooden handle." Transcript, p. 105. As the victim was laying on the ground, Applicant "asked the other people in the area did they have a problem, and [said] that he's God." Transcript, p. 105. Coaxum then saw Applicant get in a car and leave the scene. Transcript, p. 105.

Akeem Asby testified that he was hanging out under the tree with the victim the day the victim was killed. Transcript, p. 113-114. Asby saw Applicant get out of his car with what looked like a shotgun in his hand. Transcript, pp. 114-15. Asby ran off, but he heard Applicant yelling at the victim, then heard a gunshot. Transcript, p. 115. When Asby returned, he saw the

victim clutching his neck, with blood coming out. Transcript, p. 115. Asby heard Applicant say "[s]omething like, God is a faggot. I assure you all I'm God. Things like that." Transcript, p. 115.

The State also called James Boykin, a friend of Applicant, to testify about what Applicant said and did after the shooting. Boykin testified he spoke with Applicant on the phone around the time of the incident, and Applicant told him he had shot the victim. Transcript, p. 263. Applicant came over to Boykin's house the morning after the shooting and "said that he needed to go get his check and stuff because he had to handle some business because he knows he was in trouble I guess." Transcript, p. 264. According to Boykin, Applicant called his supervisor to have his check put in Boykin's name. Transcript, p. 266. Boykin then dropped Applicant off and went to pick up the check and some of Applicant's work tools. Transcript, p. 267. When Boykin arrived to pick up the check from Applicant's supervisor, Boykin decided to change course—he called 911 and was given instructions on what to do to assist the police. Transcript, pp. 269-71. Boykin then went to the bank, got the check cashed, and gave Applicant the cash. Transcript, p. 271. Applicant directed Boykin to go to the Money Man pawn shop and "pawn the tools so he could make some more cash." Transcript, p. 272. Because Boykin had informed police of Applicant's plans, police were waiting at the pawn shop, and they arrested Boykin and Applicant when they pulled into the parking lot. Transcript, pp. 273-74.

## ALLEGATIONS

In his original application and the subsequent amendment thereto, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
    a. Counsel and the private investigator had actual conflicts of interest;
2. "Malicious Prosecution"
    a. The solicitor improperly argued inferred malice from the use of a deadly weapon

in violation of Belcher;

3. Ineffective Assistance of Counsel
    a. Counsel failed to subpoena and/or call key witnesses for trial;
4. Ineffective Assistance of Counsel
    a. Counsel failed to introduce the victim's mental health records and failed to preserve the issue for appellate review;
5. Ineffective Assistance of Counsel
    a. Counsel failed to impeach the State's witness;
6. Ineffective Assistance of Counsel
    a. Counsel failed to object to improper testimony of a SLED agent;
7. Ineffective Assistance of Counsel
    a. Counsel failed to subpoena necessary records;
8. Ineffective Assistance of Counsel
    a. Counsel failed to pursue admission of victim's past behavior after State's witness opened the door;
9. Ineffective Assistance of Counsel
    a. Counsel informed the trial court of Applicant's trial strategy, which resulted in witnesses changing their testimony;
10. Ineffective Assistance of Counsel
    a. Counsel failed to object to Applicant being shackled during trial.
11. Ineffective Assistance of Counsel
    a. Counsel failed to obtain documents or hire services of other private investigators;
12. Ineffective Assistance of Counsel
    a. Counsel failed to object to hearsay testimony;
13. Ineffective Assistance of Counsel
    a. The trial court's self-defense instruction was improper and Counsel failed to object.

## 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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

### Ineffective Assistance of 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).

Where the application alleges ineffective assistance of counsel 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 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. 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 rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. 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).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 at 688). 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.

Applicant testified he was arrested on September 17, 2009 for murder. Applicant testified his first appointed attorney was Debbie Littlejohn, who represented him for about a year. Applicant testified Counsel was his fourth attorney, appointed after Jerry Theos and one other person, and Counsel was appointed in November 2011. Applicant testified he met with Counsel six to eight times prior to trial and discussed with him the facts of what happened. Applicant testified the relationship started out well but began falling apart as trial approached because Applicant wanted Counsel to obtain certain documents, which Counsel did not do.

Applicant also testified he was upset because Judge Dennis's "personal assistant," a man named "Tim," began to sit in on meetings between Counsel and Applicant to determine if Counsel should be relieved.

Counsel testified he had approximately fifteen years of experience as a practicing attorney at the time of Applicant's trial, with about one third of his practice in criminal law. Counsel was appointed as Applicant's fourth attorney on this case, and he received the appointment approximately one year before the trial. Counsel testified he met with Applicant at least ten times, and he and Applicant began in-depth discussion about the issues in Applicant's case. Counsel testified this was always a self-defense case, as there was no question as whether or not Applicant was the shooter. Counsel testified he explained all of the State's evidence to Applicant, the elements of the offense, and explored possible defenses, including "Stand Your Ground," since Applicant claimed an ownership interest in the property where the shooting occurred. Counsel further testified he was given access to the solicitor's file, discussed the case with the solicitor on multiple occasions, and hired a private investigator to help locate potential witnesses. Counsel also testified he was able to review items of evidence collected from the scene, interviews and statements from witnesses who were present for the immediate aftermath of the shooting, and Applicant's video statement. Counsel testified Applicant never denied shooting the victim and gave a very clear statement to law enforcement indicating he was the shooter, but raising issues of ongoing disputes within the community to explain his actions.

Counsel testified his relationship with Applicant was cordial and cooperative at first. Counsel testified Applicant told him there were two witnesses, EJ and Sleepy, who would testify the victim also had a gun, but it was removed from the scene before law enforcement arrived. Counsel testified he hired James Scarborough as an investigator and asked Applicant to help Mr.

Scarborough locate these witnesses because the community was not cooperative in speaking with Counsel or Mr. Scarborough. Counsel testified the main impediment to securing favorable witnesses was that he did not have an "in" with the community, because it was a small, insular area in the county where everyone knows each other, and Applicant did not provide that help despite Counsel's repeated requests. Counsel testified he asked explained to Applicant his need for someone "on the ground" to help him locate witnesses and asked Applicant to direct his brother to assist in the investigation, but Applicant did not do so. Counsel also testified he tried to build on the work done by previous attorneys on the case, and he requested and received additional time to prepare. Counsel testified this was always a case that was going to trial, and he felt he had sufficient time to get ready. Counsel testified that the relationship between himself and Applicant became tense and steadily declined as trial approached, culminating in Counsel's request to be relieved at Applicant's behest. Counsel testified no one ever sat in on meetings with him and Applicant, other than the private investigator, Mr. Scarborough. Counsel testified he did not know anyone named Tim, and Judge Dennis never sent anyone to his meetings with Applicant, although there may have been courthouse security present outside the room.

Issues #1 and #11 – Counsel and private investigator had conflict of interest; Counsel failed to obtain reports from previous investigators or hire other investigators

"An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). The South Carolina Supreme Court has further stated that a conflict of interest occurs when "a defense attorney places himself in a situation inherently conducive to divided loyalties." Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation.

Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)); see also Burger v. Kemp, 483 U.S. 776, 783 (1987). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005).

Applicant testified he felt Counsel had a conflict of interest because he presented Applicant with a video tape obtained from the police showing Applicant's brother and other community members and asked Applicant to identify the people in the video. Applicant testified he refused to do so because he felt Counsel was improperly working with law enforcement on an investigation. Counsel testified he learned about the video from a tip by a law enforcement source, but he tracked it down himself on YouTube. Counsel testified the video was completely unrelated to the shooting, and he only showed it to Applicant because he thought some of the people in the video might have been witnesses to the shooting because the video was filmed in the same neighborhood. Counsel testified he showed Applicant the video because he recognized Applicant's brother in it and thought the brother might be able to help locate witnesses. Counsel further testified the video helped for his theory of the case that this was a violent community with extensive past history between families, and the area had issues with drugs, guns, and gangs. The transcript reflects Applicant raised this issue during Counsel's motion to be relieved, and Judge Dennis found it was not a reason to remove Counsel from his representation of Applicant.

Applicant also testified he felt the private investigator hired by Counsel, James Scarborough, had a conflict of interest because Mr. Scarborough's brother was a deputy with the Charleston County Sherriff's Office and was the arresting officer in this case. Applicant testified previous investigators were able to get people to talk to them, but Mr. Scarborough was not, and

Applicant believed Counsel was ineffective for not obtaining the reports of the previous investigator(s) because those reports would have helped show witnesses were changing their stories. Counsel testified he had been working with Mr. Scarborough since 1999, and to his knowledge, the brothers did not have a relationship and never discussed the case with each other. Counsel testified he was more concerned about a possible conflict of interest because he had represented several members of the Berkeley County Sherriff's Office in the past. Counsel testified he raised both of these issues in his motion to be relieved, and Judge Dennis found there was no conflict in either situation. Counsel further testified he had no reason to believe Mr. Scarborough's relation to Deputy Scarborough impeded the investigation of Applicant's case in any way. Counsel testified the previous attorneys on the case used their own investigators, and he did attempt to obtain the investigator's file from the Public Defender's office but was unable to do so.

The Court finds Applicant has failed to meet his burden of proof on his claims Counsel and Mr. Scarborough, the private investigator, had conflicts of interest because Counsel testified the relationship between the brothers had no impact on his ability to investigate and prepare Applicant's case for trial, and the issue was raised to and ruled upon by the trial court, which found no conflict existed. Further, Applicant failed to explain what it is Mr. Scarborough failed to do as a result of this alleged conflict. This Court specifically finds there was no adverse effect, especially in light of the fact Deputy Scarborough worked for Charleston County, which was not the lead investigative agency handling the case, and he was only tangentially involved in the case as the arresting officer. This Court finds Counsel was under no obligation to seek out a different investigator.

Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms because Applicant failed to present compelling evidence of any actual conflict of interest. This Court also finds Applicant has failed to prove he was prejudiced by Counsel's performance because Counsel testified his investigation and preparation of Applicant's defense was not affected in any way. See Padgett v. State, 324 S.C. 22, 27, 484 S.E.2d 101, 103 (1997) (finding no conflict existed where "[c]ounsel specifically denied his relationships with two of the victims or his representation of the sheriff affected his representation of petitioner"). This allegation is therefore denied and dismissed.

Issues #2 and #13– Counsel's failure to object to "malicious prosecution[1]" and improper self-defense jury instruction

In State v. Belcher, the South Carolina Supreme Court held a "jury charge instruction that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify homicide." 385 S.C. 597, 600, 685 S.E.2d 802, 803-04 (2009). The Supreme Court further found that because "the evidence presented a jury question on self-defense, it was error to charge the jury that it may infer malice from the use of a deadly weapon." Id. at 601, 685 S.E.2d at 804.

Applicant testified he believed the self-defense charge given by the court was inadequate. Applicant testified the State's witnesses at trial only told the jury the victim had marijuana in his system at the time of his death. Applicant contends there were other drugs in victim's system and victim took prescription medication for mental health issues; however, Applicant asserts the

[1] Based on the testimony Applicant presented at trial, this allegation refers to Counsel's failure to object when the solicitor misstated the law of inferred malice during his closing argument, rather than an allegation the solicitor abused his prosecutorial discretion in pursuing this case against Applicant.

jury was unable to hear any testimony about the potential effects of that combination because Counsel was not allowed to call victim's doctors and did not cross examine the State's witnesses on these issues. Applicant testified because that testimony was not admitted, the self-defense instruction given by the trial court "downplayed" the issue of the victim's mental state. Further, Applicant testified Counsel should have objected when the solicitor argued inferred malice from the use of a deadly weapon in closing in violation of Belcher, 385 S.C. 597, 685 S.E.2d 802.

Counsel testified he proffered testimony regarding the victim's criminal history and previous violent acts, and the issue of whether the testimony was properly excluded was preserved for review and raised on direct appeal. Further, Counsel testified he requested specific instructions on self-defense, and while the trial court might not have given the exact instructions requested, he believed the instructions given were proper and saw no reason to object. Counsel also testified he does not object every single time there is a ground.

This Court finds Applicant has failed to prove Counsel was deficient or failed to render reasonably effective assistance under prevailing professional norms. The transcript reflects the trial court's jury instruction complied with the rule of Belcher, as the court did not instruct the jury malice could be inferred from the use of a deadly weapon. See Transcript, p. 743 ("Malice aforethought may be expressed or inferred. . . . Express malice is shown when a person speaks words which express hatred or ill will for another person, or when the person prepared beforehand to do the act later accomplished. Malice may be inferred from conduct showing a total disregard for human life.") As this allegation raises a legal issue, this Court has reviewed the full charge, as well as the solicitor's closing arguments. The Court finds Counsel was not deficient for failing to object because Counsel testified he doesn't always object even if he has grounds. The Court finds it was reasonable to believe an objection would call more attention to

the issue. Additionally, the issue raised in Belcher involved an error in the jury instructions, not in the solicitor's closing argument, and the jury charge given in this case comports with Belcher's requirements. Counsel cannot be deficient for failing to object to a proper jury instruction. Although the solicitor's argument was objectionable, the trial court's charge on malice was legally correct and was immediately followed by the charge on self-defense, so any prejudice from the solicitor's statement was cured by the thorough and correct instructions given by the trial court. See Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) ("Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.") (internal citation omitted). This allegation is therefore denied and dismissed.

Issues #3, #5, #7 – Counsel failed to impeach State's witness regarding previous statements,[2] failed to request cell phone records, and failed to subpoena or call favorable witnesses at trial

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012), overruled on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 744 (2014). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying

[2] Applicant frames this issue as a "Brady violation" in his original Application. However, this appears to be a misnomer for Applicant's contention that a third statement from James Boykin existed, and Counsel failed to obtain it and/or use it for impeachment at trial.

a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). Additionally, in order to prevail on a claim of ineffectiveness based on counsel's failure to call a favorable witness, the South Carolina Supreme Court has repeatedly held a PCR applicant *must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis added). Applicant's speculation that the witnesses' testimony would have been favorable cannot, by itself, satisfy his burden of showing prejudice. Glover v. State, 318 S.C. 396, 498-99, 458 S.E.2d 538, 540 (1995).

Applicant testified Counsel failed to properly investigate the issue of telephone call made from Applicant to the State's witness James Boykin, during which Applicant allegedly confessed to murdering the victim because the victim had robbed Applicant's brother. Applicant testified this statement was contained in Boykin's statement to police, which he received in discovery, and when Boykin described the phone call at trial, he ascribed an entirely different motive for the shooting. Applicant testified this phone call never happened at all, and he asked Counsel to obtain phone records and Boykin's employment records to prove Boykin's statement was false. Applicant testified he felt it was important to discredit Boykin because the motive Boykin testified to at trial was fabricated. Applicant introduced Boykin's cell phone records at the evidentiary hearing as support for his contention the phone call did not occur as Boykin said. However, Applicant's cell phone records for the period in question are no longer available, and Applicant did not introduce the phone home records of either himself or Boykin. Further, Applicant testified Boykin gave police a third statement, which Counsel allegedly failed to use for impeachment.

Counsel testified he recalled discussing the phone-call issue with Applicant, and Applicant did request subpoenas be issued to obtain the cell phone records. However, Counsel testified there was never a question of whether Applicant shot the victim, and he did not feel he could argue self-defense while also denying Applicant did it. Counsel further testified this issue was not the focus of the self-defense theory, and what he really needed was a legal justification for why Applicant shot the victim. Counsel testified he told Applicant he did not think this was a useful issue to pursue and explained his reasoning. Counsel also testified he received the original witness statement in discovery and was aware of discrepancies between that statement and trial testimony. Counsel testified it was not unusual for some details of witness's stories to change, and he felt he cross examined Boykin on the inconsistencies to Applicant's benefit. Further, Counsel testified he knew from early on in the case that Applicant intended to testify and would not deny being the shooter. Additionally, Counsel testified from his review of the transcript and the arrest report, Applicant and Boykin were together in a car driven by Boykin at the time of Applicant's arrest, indicating some communication must have taken place between them. Counsel also testified he did not recall any third statement given by Boykin.

Applicant also testified there were three witnesses he believed could have provided favorable information, but those witnesses were either not subpoenaed for trial, or Counsel did not call them. Applicant testified the witnesses were his brother, David McCray; Jermaine or Jerome Kinlaw; and Gerald Green, all of whom appeared on the video Counsel played for Applicant. Applicant testified these witnesses were important to his case because they could testify the shooting was gang-related, and gang members were retaliating on Applicant due to the actions of Applicant's brother.

Counsel testified the three witnesses listed by Applicant were people who appeared in the video, but Applicant refused to help locate them. Counsel testified he did want to call witnesses who could testify to the undercurrent of violence in the community, but the trial court limited much of the evidence Counsel tried to introduce on that topic. Counsel testified he not think the trial court would have allowed this testimony to come in, and it would not have added to the defense because none of these people witnessed the shooting directly. Counsel testified he did an extensive investigation to find favorable witnesses, including visiting the scene on his own and with his investigator and attempting to contact community members privately and through law enforcement. Applicant did not call any of these witnesses to testify at the evidentiary hearing.

This Court finds Applicant has failed to prove Counsel was deficient or failed to render reasonably effective assistance under prevailing professional norms in regards to the investigation of the case or his presentation of witnesses at trial. This Court finds the cell phone records introduced at the evidentiary hearing do not definitively establish the phone call in question did not take place, as the records are only for Boykin's cell phone, not Applicant's, and the call could have taken place on another line, such as a home number. Additionally, Applicant did not call any of the witnesses he alleges should have been called at trial to testify at the evidentiary hearing. Applicant's assertion alone these witnesses would have provided favorable testimony is not enough to meet his burden as to this allegation. See Glover, 318 S.C. at 499, 458 S.E.2d at 540 ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). Furthermore, Counsel credibly testified he determined the witnesses would not help advance the self-defense theory. While the witnesses may have been useful to show the general atmosphere in which the

shooting took place, the trial court had already limited Counsel in that regard, and Counsel placed his objection on the record. This Court also finds no third statement by Boykin exists, and Applicant could not articulate any reason for his belief that it does. Further, the Court finds Applicant did not discuss the issue with Counsel if he did have such concern. Finally, the Court finds Counsel articulated a logical reason for failing to challenge Boykin's testimony regarding Applicant's motive, and it was a valid trial strategy to focus on self-defense, rather than trying to introduce evidence Applicant was not the shooter. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by any deficiencies in Counsel's performance. This Court finds neither the testimony of the three witnesses nor the cell phone records would not have changed the result at trial, especially given the fact Applicant himself admitted to being the shooter, and multiple witnesses testified Applicant and Boykin were together in Boykin's car at the time Applicant was arrested, indicating the two had a conversation at some point during the timeframe in question. This allegation is therefore denied and dismissed.

Issues #4 and #8 – Victim's SCDC records and medical records, testimony regarding victim's prior drug use were improperly excluded because the State opened the door to admission, and Counsel failed to preserve that argument for appellate review

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) (citing State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001)). See also State v. Stokes, 345 S.C. 368, 374 n.9, 548 S.E.2d 202, 205 n. 9 (2001) ("To the extent Stokes sought admission of the redacted portions in order to demonstrate the victim's bad character, i.e., that she was willing to go along to participate in a murder, we find the evidence was properly excluded."); State v. Whipple, 324 S.C. 43, 53, 476 S.E.2d 683,

688-89 (1996) (finding trial court proper excluded "testimony that the Victim had told both a boyfriend and friends of her parents that she had used drugs and crack cocaine when she lived in New Jersey, and that she had driven people in Myrtle Beach to an area to buy drugs" as irrelevant to defendant's guilt); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ).

Applicant testified the trial court improperly refused to allow Counsel to introduce the victim's SCDC and mental health records to show the victim had a history of violence and drug use, and Counsel did not preserve this issue for appellate review. Applicant testified Counsel stated he would proffer the testimony of medical witnesses who could testify the victim had illegal drugs in his system other than marijuana, and those drugs would interact with his prescription medications for his mental illness. However, Applicant testified Counsel later failed to call the witnesses to proffer the testimony and records. Counsel testified he obtained the victim's medical records from MUSC and SCDC, and he wanted to introduce them at trial. Applicant also testified the State opened the door to evidence of the victim's violent behavior when its witness, James Boykin, testified at trial Applicant's motive for the shooting was that the victim had raped Applicant's girlfriend. Applicant testified Counsel was ineffective because he did not object to the hearsay or pursue further inquiry into the victim's previous bad acts.

Counsel testified he did want to use the issue of victim's previous bad acts, and he felt Boykin's testimony was helpful to the self-defense argument, rather than harmful, so he saw no reason to object. Counsel also testified he did not feel the statement about the alleged rape of Applicant's girlfriend or the robbery of Applicant's brother opened the door because he did not

any direct testimony that the victim had a gun at the time of the shooting. Counsel testified he would have pursued the bad-acts issue further if he had a witness who saw the victim with a gun, because he needed both in order to make a credible argument for relevance to Applicant's self-defense theory. However, Counsel testified the trial court made clear it would not allow the records to be introduced and stated Counsel was not going to "put the victim on trial." Counsel further testified he did not believe the introduction of the records themselves or testimony about them would have made a difference in the outcome of Applicant's trial because the main problem with Applicant's defense was that no witness ever came forward to say the victim had a gun at the time of the shooting. Counsel testified this was the key piece of evidence he was trying to obtain that would have helped advance the self-defense theory. Counsel testified the witnesses Applicant promised did not show up until the day of trial, so Counsel had no chance to prepare their testimony; they violated the sequestration order which resulted in a curative instruction addressing their credibility; and none of them testified to the extent Applicant lead him to believe they would. Counsel did proffer the testimony of several law enforcement officers regarding victim's criminal history, as well as the testimony of a witness who said he saw the victim using drugs the night before the murder. The transcript reflects the trial court declined to admit any of that testimony, and Counsel did not pursue the issue at any other point during trial.

This Court finds Applicant has failed to prove Counsel's performance was deficient, and Counsel rendered reasonably effective assistance under prevailing professional norms. The trial court has wide discretion as to what evidence and testimony is admissible. This Court finds credible Counsel's explanation of his overall strategy for the case, and finds self-defense was indeed the only reasonable theory for Counsel to pursue. The Court finds credible Counsel's

explanation as to why the testimony of the medical examiner did not open the door to the victim's drug use, as well as why the evidence Applicant alleges should have been introduced would not have affected the outcome of the case. Applicant did not produce any witnesses at the evidentiary hearing who could testify (a) whether victim was using illegal drugs at the time of the murder, and (b) whether Applicant had knowledge of any contemporaneous drug use by the victim at the time of the murder. Further, while Counsel may have had grounds to pursue admission of the prior bad acts testimony based on the State's examination of Boykin, this Court finds it would not have affected the outcome of the case. This Court finds credible Counsel's testimony he did not pursue the issue further because it was insufficient without also having a witness who could place a gun in the victim's hand at the time of the shooting. Therefore, this Court finds Applicant has not met his burden of proving he was prejudiced by the lack of testimony on these issues or that he would have been likely to prevail on this issue on appeal even if it had been preserved. See, e.g., Walker v. State, 397 S.C. 226, 241-42, 723 S.E.2d 610, 618 (Ct. App. 2012) (finding evidence victim was an alcoholic was not admissible under Rule 404(a)(2), SCRE, to prove victim was intoxicated at time of assault), overruled on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 744 (2014). This allegation is therefore denied and dismissed.

Issue #6 – failure to object to SLED agent testimony

Applicant testified Counsel should have objected when one SLED agent testified in place of another. Applicant testified Counsel did timely object to DNA reports being introduced, but did not object to the introduction of photographs, and Counsel should have moved for a mistrial. However, Applicant offered no testimony as to which photographs were objectionable or what basis Counsel had to request a mistrial.

This Court finds this allegation raises a legal issue which was addressed on its merits on direct appeal. The Court of Appeals found it was error for the trial court to admit the SLED agent's testimony, but the error was harmless in light of the overwhelming evidence of Applicant's guilt. State v. McCray, 413 S.C. 76, 90-91, 773 S.E.2d 914, 921-22 (2015). The Court therefore finds Applicant has failed to prove Counsel's performance was deficient in his handling of this issue or that Applicant suffered any prejudice as a result. This allegation is denied and dismissed.

Issue #9 – Counsel revealed Applicant's trial strategy to trial court and solicitor in chambers, and trial court instructed a witness to change his testimony as a result

Applicant testified the transcript indicates Counsel had a meeting in chambers with the trial judge and the solicitor regarding the testimony of Chavis Wright. Applicant testified he believed Counsel told the judge what his witness would say, and then the witness's testimony changed, but Applicant acknowledged he was not present in chambers for this discussion. Applicant testified he believed Counsel should not have told the judge or the solicitor about this witness because it was key to Applicant's defense.

Counsel testified the judge required him to proffer several witnesses, including Chavis Wright, and after the proffer, the trial court would rule on which statements were admissible. This Court's review of the transcript confirms Counsel's recollection. Transcript, pp. 576, 593-95, 610-19. The transcript further reflects Chavis Wright was eventually called as a witness and testified in front of the jury to seeing the victim the night before the shooting, discussing plans to retaliate against Applicant the next day for beating up a friend.

This Court finds no meeting ever took place in which the trial court instructed a witness to change his or her testimony. This Court finds Counsel's description of events leading up to the testimony of Chavis Wright to be credible and finds Applicant's testimony was not credible.

Therefore, this Court finds Counsel's performance was not deficient in proffering testimony as required by the trial court. This Court finds Applicant did not suffer any prejudice as Chavis Wright ultimately testified favorably for Applicant in front of the jury. Further, this issue was raised on direct appeal, and the Court of Appeals found the trial court properly excluded testimony by Wright as to the victim's potential drug involvement and firing a gun the night before the murder. State v. McCray, 413 S.C. 76, 94-95, 773 S.E.2d 914, 924 (2015). This allegation is therefore denied and dismissed.

Issue #10 – Counsel failed to object to jury seeing Applicant in shackles

"The law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need." Deck v. Missouri, 544 U.S. 622, 626 (2005). This is because "*visible* shackling undermines the presumption of innocence" and is a violation of a criminal defendant's right to Due Process. Id. at 630-31 (emphasis added).

Applicant testified he was in leg irons during trial because the judge ordered it, but never gave a reason. Applicant testified the shackles were tight, which caused him to grimace, and they could be heard when he moved. Further, Applicant testified he was wearing the leg shackles when he walked to the witness stand, in front of the jury. Applicant also testified the table in the courtroom was open, and he couldn't recall if there was a curtain blocking the jury's view of his feet. Applicant testified he did not have a waist chain or wrist irons, and he was dressed in street clothes throughout the trial. Applicant testified he believed Counsel was ineffective because no hearing was held to determine if the shackles were necessary, and Counsel did not object.

Counsel testified the judge was very concerned about safety and security issues in the courtroom. Counsel testified Applicant was always seated at the table before the jury came in, and his hands were always free. Counsel further testified, to the best of his knowledge, the tables did have curtains that would block the jury's view of Applicant's feet. Counsel testified he did not recall Applicant walking to or from the stand in front of the jury, and Applicant would have been seated before the jury entered the room. Counsel further testified he did not recall being able to hear the shackles when Applicant moved around.

This Court finds no deficiency on Counsel's part in handling the issue of Applicant's restraints during trial. This Court finds Applicant's testimony the jurors could hear the ankle chains when he moved was not credible. Applicant himself affirmed he was in street clothes, and his arms and waist were not shackled. The Court finds credible Counsel's testimony Applicant was seated at the trial table before the jurors entered the courtroom and remained seated while they were present. This Court finds Applicant did not walk in front of the jury with ankle shackles and was seated on the witness stand before the jury entered the room. This Court finds Applicant did not suffer any prejudice from wearing ankle shackles during the trial because the shackles were not visible to the jury, and there is no indication the jury was aware Applicant was restrained. This allegation is therefore denied and dismissed.

Issue #12 – failure to object to hearsay testimony

Applicant testified Counsel failed to object to multiple instances of hearsay introduced by the State's witnesses, Joyce Wright and Tina Collins. Applicant testified Counsel should have objected because pictures showed Joyce Wright couldn't see the shooting from her front window, and Counsel should have objected when Tina Collins testified the children at the scene told her "the bad man Ron" shot the victim. Counsel conceded some of the statements may have

been objectionable, but he testified repeatedly that the identity of Applicant was not contested and his focus was on the self-defense theory.

This Court finds Applicant has failed to meet his burden of proof regarding this allegation. This Court finds Counsel was not deficient for failing to object to Joyce Wright's statement because the statement was admissible as an excited utterance. See Rule 803(2), SCRE ("A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule.) Additionally, the Court finds Counsel may have had a basis to object to Tina Collins' testimony as to the phrase "the bad man" shot the victim, but given the context of the statement and the lack of emphasis on it in Collins' testimony as a whole, it was reasonable for Counsel not to object. Additionally, because Applicant's identity as the shooter was not in question, Applicant suffered no prejudice from the testimony of either witness.

## CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by any alleged deficiencies in Counsel's representation. This Court finds the issues Applicant raises are problems of his own creation due to this lack of cooperation with Counsel, despite Counsel's repeated requests for Applicant to produce witnesses who could corroborate Applicant's claim the victim had a gun. This Court finds Counsel was unable to locate the witnesses due to Applicant's lack of cooperation or because the witnesses never existed, not because of any errors or deficiencies in Counsel's investigation, preparation, or presentation at trial. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from 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 appellate review, Applicant must serve and file a notice of appeal. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant is remanded to the custody of Respondent.

**AND IT IS SO ORDERED** this 6 day of Sept, 2017.

THE HONORABLE MICHAEL G. NETTLES
Presiding Judge
Ninth Judicial Circuit

Florence, South Carolina.

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| STATE OF SOUTH CAROLINA<br>COUNTY OF BERKELEY<br>Ron Santa McCray 353031,<br>Plaintiff(s),<br>-vs-<br>State of South Carolina,<br>Defendant(s). | )<br>)<br>)<br>)<br>)<br>)<br>) | IN THE COURT OF COMMON PLEAS<br>JUDICIAL CIRCUIT<br>CASE NO.: 2015CP0802692<br>APPOINTMENT OF COUNSEL OR GAL<br>(*Select one.*)<br>☒ ORDER<br>☐ AMENDED ORDER |

TYPE OF CASE/PROCEEDING: (*Check one.*)

| | | |
|---|---|---|
| ☐ Post-Conviction Relief (PCR)/habeas case | ☐ Adoption | ☐ Juvenile |
| ☐ SVP case | ☐ Custody and/or Visitation | ☐ Abuse and Neglect |
| ☐ Minor Name Change | ☒ Other: Post Convict Rel 500 | |

It appears Ron Santa McCray 353031, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: *(Select only one.)*

☒ counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.

☐ counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on:

☐ counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.

☐ court appointed counsel has obtained , Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.

☐ Other: .

FILED
2016 FEB -2 PM 2:29
BERKELEY COUNTY, SC
CLERK OF COURT

Therefore, it is ordered that Lance Boozer hereby is appointed as (*Select one.*)

☒ counsel ☐ lead counsel (*if capital PCR case*) ☐ guardian ad litem for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

☐ (*If Death Penalty PCR Case*) It is further ordered that , Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED
February 2, 2016

Mary P Brown AW

☐ Circuit Judge ☒ Clerk of Court

Plaintiff Attorney:

| | |
|---|---|
| Lance Boozer | |
| 807 Gervais Street, Ste 203 | |
| Columbia, SC 29201 | |
| | |

Defendant Attorney:

| | |
|---|---|
| James Rutledge Johnson | |
| PO Box 11549 | |
| Columbia, SC 29211 | |
| | |

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

CP20 (08/08)
SCCA/267 (03/07)


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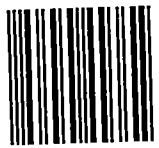

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The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
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