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October 15, 2017

Clerk of Court  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

RECEIVED

OCT 19 2017

Re: Christopher Boling 360859  
2015-CP-10-04672

S.C. SUPREME COURT

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Charleston County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc: Megan Harrigan Jameson, Esq., Christopher Boling 360859

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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OCT 19 2017

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Honorable William H Seals, Jr. Circuit Judge

Case No.: 2015-CP-10-04672

Christopher Boling 360859.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Christopher Boling appeals the Honorable William H. Seals Jr's September 24, 2017 Order of Dismissal. Undersigned counsel received notice of entry of the order on October 5, 2017. A copy of the order on appeal is attached hereto.



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PO Box 1058  
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October 15, 2017

Megan Harrigan Jameson, Esq.  
Office of S.C. Attorney General  
PO Box 11549  
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

OCT 19 2017

APPEAL FROM CHARLESTON COUNTY

S.C. SUPREME COURT

Court of Common Pleas

Honorable William H. Seals Jr. Circuit Judge

Case No.: 2015-CP-07-2010


Christopher Boling 360859.....PETITIONER

V.

State of South Carolina.....RESPONDENT

PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Megan Harrigan Jameson, Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this October/5, 2017.



James K Falk  
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cc.  
AG  
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STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )  
Christopher Boling, SCDC No. 360859, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2015-CP-10-4672

ORDER OF DISMISSAL

FILED  
2017 SEP 29 PM 3:49  
JULIE J. AMMONS  
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed August 21, 2015, by Christopher Boling (Applicant), alleging ineffective assistance of counsel. Respondent made its Return on June 2, 2016, requesting an evidentiary hearing be held. Thereafter, on January 4, 2017, Applicant, through counsel, filed an amended application for post-conviction relief alleging four specific grounds of ineffective assistance of counsel. An evidentiary hearing into the matter was convened January 11, 2017, at the Charleston County Courthouse. Applicant was present at the hearing and represented by James K. Falk, Esquire. Assistant Attorney General Alicia Olive from the South Carolina Attorney General's Office appeared on behalf of the State. Following the hearing, this Court denied the application. This order follows.

**PROCEDURAL HISTORY**

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During it April 2011 term, the Charleston County Grand Jury indicted Applicant for first-degree burglary (2011-GS-10-2405).

On July 28, 2014, Applicant proceeded to a jury trial before the Honorable Deadra L. Jefferson. William Runyon, Esquire, represented Applicant. The case was prosecuted by Assistant Solicitors Emmanuel Ferguson and Jennifer Shealy. The jury convicted Applicant as indicted. Judge Jefferson sentenced Applicant to fifteen years imprisonment.

Applicant filed a timely notice of appeal and Appellate Defender Robert M. Pachak of the South Carolina Commission on Indigent Defense—Division of Appellate Defense represented him on appeal. Following the submission of an Anders<sup>1</sup> brief, the South Carolina Court of Appeals affirmed the conviction and sentence. State v. Christopher Boling, Op. No. 1025-UP-374 (Ct. App. filed July 29, 2015). The Remittitur was returned to the circuit court on August 14, 2015.

### FACTUAL HISTORY

This case arose from a home invasion and assault that occurred on the early morning hours of January 1, 2011, on Johns Island in Charleston County. Joseph Owens was at his home with his common law wife when Tad Dempsey came to his home asking if Owens wanted to buy a cell phone. (Trial Tr. 80-81). Owens declined to purchase the cell phone. (Trial Tr. 81). Shortly thereafter, while Dempsey was still present, Applicant and Kevin Russell kicked open the door to Owens home, causing damage to the doorframe, and began assaulting Dempsey. (Trial Tr. 81-82). During the fracas, Owens, his wife, and Dempsey were all assaulted and the home was damaged. (Trial Tr. 86-88). Owens eventually got all three of the men out of his home and the fight continued outside. (Trial Tr. 87-88). Owens's wife went to a neighbor's home and asked her to call the police. (PCR Tr. 88-89).

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<sup>1</sup> Anders v. California, 386 U.S. 738 (1967).

A few minutes later, Dempsey came back and Owens informed him the police had been called. (Trial Tr. 89). Dempsey asked to borrow Owens truck to leave and Owens refused. (Trial Tr. 89). Upon Owens's refusal, Dempsey used a two-by-four piece of wood to smash all the windows and lights in Owens's truck. (Trial Tr. 89-91).

Applicant and Russell then returned to Owens's home and again busted through the front door without permission. (Trial Tr. 91). Owens's wife was hit several times. (Trial Tr. 91) Russell walked up to Owens with a chrome revolver, placed the weapon to Owens's head, and said, "I'm going to fuck you up." (Trial Tr. 91-92). Applicant was standing directly behind Russell and encouraged Russell, stating "Go ahead and do him; fuck him up." (Trial Tr. 92). Applicant and Russell then exited the house and Owens followed behind him. (Trial Tr. 92).

Deputy Michael Buenting with the Charleston County Sheriff's Office arrived on scene and saw Applicant and Russell fleeing Owens's property. (Trial Tr. 130-135). Deputy Buenting announced himself as law enforcement and was greeted by two gunshots from Applicant and Russell. (Trial Tr. 136-138). After a chase, Deputy Buenting was able to apprehend Applicant. (Trial Tr. 138). Russell was apprehended later hiding naked in the closet of a neighboring trailer. (Trial Tr. 141).

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At trial, Applicant argued he had not come to Owens's home with any intent to commit a crime, but merely to assist Russell in retrieving Russell's phone that Dempsey had stolen. Applicant argued Owens, who managed a pawn shop, was a "fence" who routinely purchased stolen items. (Trial Tr. 238-248).

#### **ALLEGATIONS RAISED**

In his application, Applicant alleged he is being held in custody unlawfully based on

allegations of ineffective assistance of counsel. In his amended application, he asserted the following specific allegations:

1. Trial counsel failed to call witnesses whose testimony would have exculpated Applicant, namely Samantha Keith, Thomas Dempsey, and or Nick Chavis.
2. Trial counsel failed to advise applicant of his potential exposure under the “hand of one hand of all jury charge” thereby misadvising him whether he should reject the state’s plea offer.
3. Trial counsel failed to object to the “hand of one hand of all” jury charge.
4. Trial counsel failed to seek a charge to a lesser included offense.

#### **SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING**

At the evidentiary hearing, Applicant called counsel to testify. Counsel testified he has been practicing law since 1967 and approximately half of his practice is criminal defense. (PCR Tr. 24). Counsel testified he was retained by Applicant in early July and knew Applicant’s case was “mandated” to proceed forward on July 28<sup>th</sup>. (PCR Tr. 4, 24, 26-28). Despite being retained a short time before trial, counsel testified he was prepared for trial. (PCR Tr. 27). Counsel testified he told Applicant he needed to think hard about what he wanted to do because he was in “serious trouble” and might want to consider taking a plea offer if available. (PCR Tr. 4). He testified he filed a discovery motion once retained and the assistant solicitor promptly provided him with discovery. (PCR Tr. 4-5, 25). He testified he sat down with Applicant and went over everything Applicant could remember about the incident, which was limited because Applicant “had a lot of drugs and alcohol in him that day.” (PCR Tr. 5-6, 29). Counsel testified he personally visited the scene to familiarize himself with the physical layout. (PCR Tr. 5-6, 10, 28). He testified he also interviewed potential witnesses, including Owens’s wife, whom he discovered had pending warrants and likely would not (and ultimately did not) show up at trial.

(PCR Tr. 10, 32). He testified Applicant had previously provided a statement to law enforcement on June 16, 2014, and stated he was certain he never saw Russell with a gun. (PCR Tr. 6, 9). Applicant also insisted to counsel that he and Russell were let into the house voluntarily to retrieve Russell's phone, but had no intention to commit a crime. (PCR Tr. 6-7).

Counsel testified the crux of the case, and the reason the State was intent on proceeding forward with a first-degree burglary charge, was because of the allegation that Applicant and Russell shot at a deputy. (PCR Tr. 7-8, 32-33). He testified this was why the State was intent on only offering Applicant a favorable plea deal if he testified Russell had a gun. (PCR Tr. 8, 10, 11-12, 20). He testified based on his review of the evidence, he thought Applicant should have been charged with aggravated trespass and/or aggravated assault, but not first-degree burglary. (PCR Tr. 11, 33).

Counsel testified Judge Young had ordered Applicant's trial would begin in July 28<sup>th</sup> with or without counsel after the court and solicitor's office became frustrated with Applicant switching counsel. (PCR Tr. 8-9, 26-27). Counsel testified he talked with Russell's attorney, who assured him Russell would not be testifying against Applicant. (PCR Tr. 9).

Counsel testified a plea offer to second-degree burglary (violent) was extended to Applicant immediately prior to trial. (PCR Tr. 11-14). He testified there was a discussion on the record about whether the sentence would require Applicant to serve 65% or 85% of a sentence for second-degree burglary (violent) and the solicitor called the Department of Corrections to try to resolve the issue. (PCR Tr. 14-15). Counsel testified he advised Applicant he could not assure Applicant of any particular sentence he would be required to serve because those computations are made by the Department of Corrections. (PCR Tr. 30).

He explained to Applicant that if he entered a guilty plea prior to his co-defendant's trial, then Applicant could still be subpoenaed to testify for the State. (PCR Tr. 15-16, 31). Counsel testified he advised Applicant he should accept the State's plea offer before "they sobered up" and rescinded the offer. (PCR Tr. 17). Counsel testified an internal memorandum from the Solicitor's office indicated Applicant's co-defendant Russell had been made a advantageous plea offer but Applicant had not received a favorable offer. (PCR Tr. 20).

Counsel testified he explained accomplice liability to Applicant and the impact it would have on his case. (PCR Tr. 18-19). He testified their defense strategy was consensual entry onto the premises without any intention to commit a crime. (PCR Tr. 21). Counsel testified it was on these grounds that he made a directed verdict motion, arguing the State had failed to establish Applicant had any intent to commit a crime when he entered the home. (PCR Tr. 29-30). He testified he did not request jury instructions on any lesser-included offenses as part of a trial strategy of "all-or-nothing" where Applicant would hopefully be acquitted of all charges. (PCR Tr. 22-23, 33). He testified it was Applicant's decision not to testify. (PCR Tr. 29). Counsel testified he did not object the accomplice liability/"hand-of-one, hand-of-all" jury instruction because he thought it was a proper instruction based on the facts presented at trial. (PCR Tr. 40-41).

Applicant testified next. Applicant testified he was originally represented by a public defender, but moved to have her relieved because "she just wasn't telling me what I wanted to hear. She wasn't getting me no plea offer and didn't seem she was working for me." (PCR Tr. 36-37). He denied ever going before Judge Young prior to trial or ever having any court dates. (PCR Tr. 37). He testified he had not received any plea offers when he retained counsel. (PCR

Tr. 34). He testified the only plea offer he received was made the day of trial for second-degree burglary. (PCR Tr. 34). He testified counsel advised him to turn down this offer and proceed to trial because the State would be unable to prove he was guilty of first-degree burglary. (PCR Tr. 34-35, 37-38). Applicant testified he only took the risk of going to trial based on counsel's advice. (PCR Tr. 38-39). However, he testified he ultimately received a fifteen year sentence—the same sentence as the plea offer he now regrets turning down. (PCR Tr. 38-39)

He testified counsel never spoke to him about testifying in his co-defendant's trial or the possibility his co-defendant would testify against him. (PCR Tr. 35). He testified he was aware the State had a greater interest in prosecuting his co-defendant and he offered to testify, but did not ever see a gun. (PCR Tr. 35-36). He testified counsel never explained accomplice liability or "hand-of-one, hand-of-all" to him. (PCR Tr. 36).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearings. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

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In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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." Strickland v.

Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel. Below are this Court's specific finding regarding each of Applicant's allegations of ineffective assistance of counsel:

*Allegation: Failure to call witnesses on Applicant's behalf*

Applicant alleges counsel failed to call witnesses whose testimony would have exculpated him, namely Samantha Keith, Thomas Dempsey, and or Nick Chavis. Applicant failed to call any of these witnesses at the evidentiary hearing or failed to otherwise offer

evidence of what their testimony would have been at trial. Therefore, Applicant has failed to meet his requisite burden of proof as to this allegation. See Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (holding a post-conviction relief 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 post-conviction relief hearing or otherwise offer testimony within the rules of evidence); Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (same). Therefore, this allegation is denied and dismissed with prejudice.

*Allegation: Failure to Advise Applicant of Accomplice Liability*

Applicant alleges counsel failed to advise him of his potential exposure under the "hand-of-one, hand-of-all" jury charge, thereby misadvising him whether he should reject the State's plea offer. Applicant testified counsel never advised him of accomplice liability or the "hand-of-one, hand-of-all" and also claimed counsel never advised him of a defense nor had any other meaningful conversations with him other than to reject the State's plea offer. In contrast, counsel testified he advised Applicant of accomplice liability, the impact it would have on his case, and how it would impact their overall defense strategy (consensual entry with no intent to commit a crime). Counsel testified he advised Applicant to accept the State's plea offer but that the decision was ultimately up to Applicant.

This Court finds counsel's testimony to be credible as to this issue and finds counsel adequately conferred with Applicant about accomplice liability and whether to accept the State's plea offer. This Court finds Applicant's testimony on this issue to be not credible and find this allegation is without merit. Therefore, this allegation is denied and dismissed with prejudice.

*Allegation: Failure to Object to the Accomplice Liability Jury Instruction*

Applicant alleges counsel failed to object to the trial court's accomplice liability jury instruction. Counsel testified he believed this charge was proper based on the evidence presented by the State. This Court agrees.

During a trial, the law to be charged is determined by the evidence presented. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). When instructing the jury on the law, the trial judge is required to charge only the current and correct law of South Carolina. State v. Buckner, 341 S.C. 241, 246, 534 S.E.2d 15, 18 (Ct. App. 2000). A trial judge's jury instructions are appropriate if they are substantially correct and adequately cover the law applicable to the particular case. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); see State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.").

Here, as counsel noted during the evidentiary hearing, the record supports an accomplice liability charge, as there was evidence presented that Applicant entered the dwelling of another and assaulted numerous people in concert with a co-defendant who, based on testimony from multiple witnesses, was armed with a handgun. The trial court properly instructed the jury. Therefore, this allegation is denied and dismissed with prejudice.

*Allegation: Failure to request jury instructions on lesser-included offenses*

Applicant alleges counsel was ineffective for failing to request jury instructions on lesser-included offenses and denied counsel ever discussed this with him. Counsel testified he made a strategic decision not to request lesser-included offenses because he did not want to risk the jury

compromising on a lesser-included offense such as second-degree or third degree burglary rather than acquitting Applicant.

This Court finds counsel's reasoning for not requesting jury instructions on lesser-included offenses was a valid trial strategy. "Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Abney v. State, 408 S.C. 41, 46, 757 S.E.2d 544, 546-47 (Ct. App. 2014) (citing Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)). When counsel articulates a strategy, it is measured under an objective standard of reasonableness. Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 691. Counsel's decision not to request jury instructions on lesser-included offenses was a valid trial strategy. See Abney, 408 S.C. at 46-47, 757 S.E.2d at 546-47 (recognizing counsel's decision not to request a jury instruction on lesser included offenses can be a valid trial strategy). Therefore, this allegation is denied and dismissed with prejudice.

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### CONCLUSION

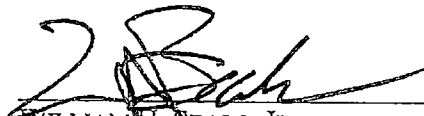
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

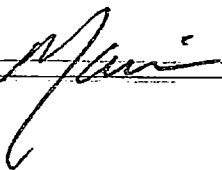
This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

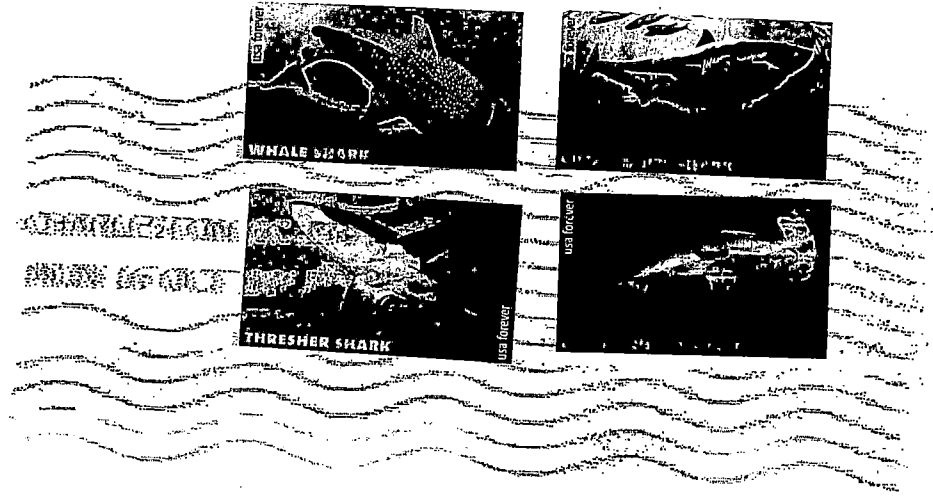
**IT IS THEREFORE ORDERED:**

1. This application for post-conviction relief must be denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 24 day of September, 2017.

  
WILLIAM H. SEALS, JR.  
Presiding Judge  
Ninth Judicial Circuit

, South Carolina



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