ALAN WILSON
ATTORNEY GENERAL

February 7, 2018

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

Re: **Breyon Toney, Respondent v. State of South Carolina, Petitioner**
Case No. 2014-CP-16-00875

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the orders which are to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. A letter ordering the PCR transcript from the court reporter.

Sincerely,

Johnny E. James Jr.

Johnny E. James Jr.
Assistant Attorney General
SC Bar #101260

JEJ/mm
Enclosures

cc: Jeremy A. Thompson, Esquire
Tricia A. Blanchette, Esquire
South Carolina Department of Corrections
Darlington County Clerk of Court
Solicitor William B. Rogers, Jr.
Office of Appellate Defense
Trisha Allen, Director – Victim Advocacy Division

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

The Honorable Roger E. Henderson, Circuit Court Judge

Case No. 2014-CP-16-00875

Breyon Toney, #346126, ...Respondent,

v.

State of South Carolina, ...Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Roger E. Henderson's order dated October 19, 2017, and filed November 3, 2017, granting post-conviction relief to the Respondent. The State filed a motion to reconsider, which was denied by order dated January 10, 2018, and filed January 29, 2018, and received by the State on February 2, 2018. A copy of the order on appeal is attached to this notice.

[signature page to follow]

Respectfully submitted,

ALAN WILSON
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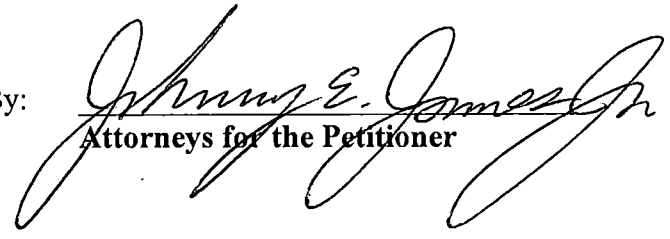
By: 
Attorneys for the Petitioner

Columbia, South Carolina

February 7, 2018

Other counsel of record:

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STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
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S.C. SUPREME COURT

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

The Honorable Roger E. Henderson, Circuit Court Judge

Case No. 2014-CP-16-00875

Breyon Toney, #346126,.....Respondent,

v.

State of South Carolina,.....Petitioner.

PROOF OF SERVICE

I, Johnny Ellis James Jr., Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorneys of record:

Jeremy A. Thompson, Esq.
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Irmo, SC 29063

Tricia A. Blanchette, Esq.
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Leesville, SC 29070

I further certify that all parties required by Rule to be served have been served this 7th day of February, 2018.

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(803) 734-3737
Attorney for the Petitioner

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON	)	FOURTH JUDICIAL CIRCUIT
BREYON TONEY, #346126,	)	CASE NO.: 2014-CP-16-875
Applicant,	)	
v.	)	ORDER GRANTING APPLICATION FOR POST-CONVICTION RELIEF
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed October 23, 2014. An evidentiary hearing into this matter was convened on July 18, 2017. The Applicant was present and was represented by Jeremy A. Thompson, Esquire, and by Tricia A. Blanchette, Esquire. The Respondent was represented by Johnny E. James, Jr., Assistant Attorney General.

I.
PROCEDURAL HISTORY

The Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Darlington County Clerk of Court's orders of commitment. At the January 2010 term of General Sessions, the Darlington County Grand Jury indicted the Applicant for murder (2010-GS-16-00077) and possession of a weapon during the commission of a violent crime (2016-GS-16-00078). On May 16-18, 2011, the Applicant proceeded to trial by jury. Matthews Swilley, Richard Jones, and Tiffany Gibson, all then with the Darlington County Public Defender's Office, represented the Applicant at trial. At the conclusion of the trial, the jury convicted the Applicant as charged. The Honorable J. Michael Baxley, presiding circuit judge, sentenced the Applicant to thirty years' imprisonment for murder and five years' imprisonment for the firearms offense, with the sentences to run concurrently.

The Applicant pursued a direct appeal to the South Carolina Court of Appeals, and was represented in this proceeding by Katharine H. Hudgins, Appellate Defender. On January 8, 2014, the South Carolina Court of Appeals affirmed the Applicant's conviction and sentence in an unpublished opinion. State v. Toney, Op. No. 2014-UP-005 (S.C. Ct. App. filed January 8, 2014). The Applicant did not pursue an appeal to the Supreme Court.

II.
ALLEGATIONS RAISED

In his Application for Post-Conviction Relief, the Applicant alleged that he is being held unlawfully for the following reasons:

1. Ineffective assistance of trial counsel; and
2. Ineffective assistance of appellate counsel.

He alleged generally that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated prior to, during, and after his trial, as well as during his direct appeal.

In an Amended Application for Post-Conviction Relief filed July 7, 2017, the Applicant submitted the following specific allegations of trial counsel:

1. Trial counsel was ineffective for failing to object to the trial court's failure to charge the jury on the general permissive malice inference instruction.
2. Trial counsel was ineffective for failing to require the State to deliver a closing argument on the law prior to his closing argument. See Tr. p. 393, lines 6-17.
3. Trial counsel was ineffective for failing to adequately research and prepare a request to charge on the lesser-included offense of involuntary manslaughter. See Tr. p. 386, line 19-p. 389, line 14.

4. Trial counsel was ineffective for failing to request that the jury be charged on the defense of accident.

5. Trial counsel was ineffective for failing to request that the jury be recharged on the law of murder and voluntary manslaughter in response to two notes from the jury requesting the definition of murder and the definition of manslaughter. See Courts Exhibits #4 and 5.

6. Trial counsel was ineffective for failing to object to the trial court's instructions on self-defense which repeatedly placed the burden of proof on establishing the defense on the Applicant. See Tr. p. 457, line 17-p. 461, line 18.

7. Trial counsel was ineffective for failing to prepare the Applicant to testify and to meet on a sufficient number of occasions prior to trial with the Applicant to prepare the Applicant for trial generally.

8. Trial counsel was ineffective during his closing argument in:

    a. Stating that he did poorly in philosophy and then comparing Proverbs to Friedrich Nietzsche at the outset of his argument, see Tr. p. 395, line 15-p. 396, line 15;

    b. Arguing that the Applicant should not have gone to the park where he encountered LaVincent Hankins, see Tr. pp. 404-406;

    c. Failing to discuss the elements of self-defense and how they were met by the Applicant's testimony, see Tr. pp. 410-412;

    d. Arguing that a friend who died as a result of a fall was comparable to the victim, see Tr. pp. 414-415.

9. Trial counsel was ineffective for failing to adequately cross-examine the witnesses who were at the scene regarding their discussions with each other about the case.

10. Trial counsel was ineffective for failing to present readily available witnesses who could have testified in support of the Applicant regarding his altercation with LaVincent Hankins.
11. Trial counsel was ineffective in failing to object to improper hearsay, vouching, and opinion testimony given by Investigator Mike Anderson in the following respects:
    a. Testimony walking through the incident with the jury based entirely on accounts given to him by witnesses at the scene; see Tr. pp. 126-129;
    b. Testimony that other witnesses that he interviewed substantially matched the accounts given by Marcus Brunson and Crystal Robinson, see Tr. p. 131, lines 10-24;
    c. Testimony that the victim's fingerprints were on the bottle matched the version of events that he got from four witnesses at the scene, see Tr. p. 132, line 12-p. 133, line 5.
12. After-discovered evidence exists to show that the primary witnesses against the Applicant collaborated to falsify their statements against the Applicant in order to make the case against the Applicant stronger.

At the evidentiary hearing in this matter, the Applicant proceeded on these allegations, and waived any claims of ineffective assistance of appellate counsel. Accordingly, this Court has only considered the allegations raised in the Amended Application.

III.
EVIDENCE BEFORE THE COURT

At the Post-Conviction Relief hearing held in this case on July 18, 2017, the Applicant presented testimony from defense counsel Matthew Swilley, Esquire, Johnetta Wheeler Evans, Phillip Franklin, and his own testimony. In addition to this testimony, this Court has before it a transcript of the trial, a copy of the briefs filed on the direct appeal, a copy of the Court of Appeals'

opinion affirming the Applicant's convictions and sentences on the direct appeal, a copy of the records of the Darlington County Clerk of Court regarding the subject conviction, a copy of the Applicant's records with the South Carolina Department of Corrections, and the exhibits introduced by the parties during the evidentiary hearing. What follows below are findings of fact and rulings of law made by this Court in accordance with the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 *et seq.*

IV.
RELEVANT FACTS

The Applicant was charged with murder following the death of James Tucker during the early morning hours of March 24, 2009. According to the State's witnesses, the Applicant wanted to fight Tucker because Tucker purchased diapers for the Applicant's child's mother. See Tr. p. 146, lines 7-24 (Crystal Robinson); p. 177, line 22-p. 178, line 1 (Marcus Brunson). The Applicant and the victim met near the corner of Marion Avenue and Chaplin Circle. They then began to fight, and the victim audibly stated that the Applicant had a knife. See Tr. p. 147, lines 14-21 (Robinson); p. 178, lines 2-7 (Brunson); p. 207, lines 2-12 (Phillip Franklin); p. 239, lines 11-18 (LaVincent Hankins). The victim ran away from the Applicant, who gave chase despite the victim throwing bottles at the Applicant. During the subsequent encounter, the victim was apparently stabbed. See Tr. p. 148, line 17-p. 149, line 25 (Robinson); p. 179, lines 4-20 (Brunson); p. 207, line 13-p. 209, line 25 (Franklin); p. 240, lines 1-10 (Hankins).

The Applicant testified in his own defense and gave a significantly different version of the facts. According to the Applicant, the victim was angry and threatened the Applicant throughout the day because he had learned that the Applicant had a sexual encounter with the victim's girlfriend. Tr. pp. 343-347. The Applicant agreed to meet the victim and the victim wanted to fight the Applicant. During the altercation, the victim picked up a broken bottle and came after the

Applicant. When the victim grabbed his shirt while holding the broken bottle, the Applicant stabbed the victim once. Tr. pp. 347-350.

At trial, the jury was charged on murder, voluntary manslaughter, and self-defense. The jury returned a guilty verdict for murder. Additional facts that were presented both at trial and at the evidentiary hearing held in the case before this Court are discussed in more detail below when pertinent.

V.
STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRCP. In evaluating an Application for Post-Conviction Relief, the Applicant must demonstrate that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standard for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

VI.
FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Allegations Which Are Meritorious

Although the Applicant has raised numerous allegations for relief, this Court concludes that two specific allegations are meritorious: (1) ineffective assistance of counsel for failing to object to the trial court's failure to charge the jury on the general permissive malice inference instruction; and (2) ineffective assistance of counsel for committing numerous errors during his closing argument. This Court also finds that relief should be denied as to the remaining claims presented by the Applicant. This Court will begin with an analysis of the claims warranting relief before turning to the remaining claims which this Court has concluded should be denied.

1. Permissive Malice Inference Instruction (Allegation #1)

The trial judge's instruction on murder reads in full:

> All right. Let's talk about the charge of murder. The defendant is charged with murder, as you are aware. In order to prove this charge, the state must prove that the defendant killed another person with malice aforethought.
>
> Malice is hatred, or ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent.
>
> Malice aforethought does not require that malice exists for any particular time before the act is committed, but malice must exist in the mind of the defendant just before and at the time the act is committed. Therefore, there must be a combination of the previous evil intent and the act itself.
>
> Malice aforethought may be expressed or it may be inferred. Now, these terms express and inferred do not mean different kinds of malice, but merely the manner in which it may be shown to exist. That is either by direct evidence, or by inference from the facts and circumstances which are shown to have existed and which are proved here by the state. Express malice is shown when a person speaks words which express hatred or ill will for another person, or

> when the person prepares beforehand to do some act which was later accomplished; for example, lying in wait for someone, or some other act of preparation going to show that the deed was within the defendant's mind. That would be expressed malice.
>
> Malice may also be inferred from conduct that shows a total disregard for human life. And ladies and gentlemen, that is the charge of murder.

Tr. p. 453, line 15-p. 454, line 22. Defense counsel did not object to this portion of the charge at the conclusion of the trial court's charge to the jury, nor did defense counsel make any additional requests to charge on the law of malice prior to the instruction.

The trial court's charge lacks the general permissive inference instruction that is required when a judge charges the jury on inferred malice: "If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive." State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) (footnote 9). While Belcher deals specifically with a charge that permits the inference of malice from the use of a deadly weapon, the Supreme Court has stated that all inferences should be accompanied by the general permissive inference instruction. See State v. Mattison, 276 S.C. 235, 238 277 S.E.2d 598, 600 (1981) ("[W]e strongly suggest to the Trial Bench that a more appropriate instruction on implied malice would deal with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it"), overruled on other grounds by Belcher.

A trial attorney's failure to object to the lack of a general permissive inference instruction when it is warranted constitutes deficient conduct. Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016). This Court concludes that it is clear that the general permissive inference instruction should have been given because the trial judge instructed the jury that "[m]alice may also be inferred from

conduct that shows a total disregard for human life." Tr. p. 454, lines 20-21. Defense counsel's failure to object to the lack of the charge is, therefore, deficient conduct. To his credit, defense counsel testified before this Court that the charge was warranted and that it was a mistake not to object.

Turning to the question of prejudice, this Court "must decide whether the erroneous malice instruction contributed to the jury's verdict based on all the evidence presented to the jury." Id. at 265, 786 S.E.2d at 265. "The Court must weigh the significance of the presumption to the jury against the other evidence of malice considered by the jury without the erroneous malice charge." Id.

This Court finds that the Applicant was prejudiced by the trial court's failure to include the general permissive inference charge. As noted by the Supreme Court in Belcher, additional context for an inference charge is required because an inferred malice instruction can lead a jury to disregard defenses raised by a criminal defendant:

> Say, for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because if one intentionally kills another with a deadly weapon, the implication of malice may arise. ... That highlights the "half-truth" of the charge.

386 S.C. at 610, 685 S.E.2d at 809 (internal quotation marks omitted). Similarly, the jury was instructed in this case that they could infer malice from conduct showing a total disregard for human life. That charge is just as much as a "half-truth" as the deadly weapon charge because killing another in self-defense is unmistakably an activity that shows total disregard for human life. The jury needs context in which to evaluate an inferred charge and the general permissive inference instruction provides that context. Since the jury did not receive that context due to

defense counsel's deficient performance, it is highly likely that the jury followed the trial judge's instructions and found malice simply due to the Applicant's admitted actions, defensible as they might have been.

Moreover, the jury made it known that they had difficulty processing the trial court's instructions as evidenced by their request to be recharged on the law of murder and voluntary manslaughter. If the jury was absolutely convinced that the Applicant had acted with malice, then there would have been no reason for the jury to request to be recharged on the law again. Had they been provided the proper context for the murder charge in the first instance, then there is a reasonable probability that the jury would have found the Applicant either guilty of voluntary manslaughter or not guilty by reason of self-defense. In either circumstance, the result of the trial would have been different.

Finally, there is a significant lack of evidence tending to prove malice in this case. The fight occurred in the dark and there was very little testimony from the State's witnesses as to how the fatal blow was struck. Furthermore, the Applicant testified in his own defense that he only struck at Tucker when Tucker rushed at him with a broken bottle. This case came down to whether or not these actions constituted malice, and the Applicant's testimony provided a complete defense to the charge. Under these circumstances, there is a reasonable probability that the result of the trial would have been different. Accordingly, this Court concludes that the Applicant has proven both prongs of Strickland with regard to this claim. Therefore, a new trial is warranted.

2. Closing Argument (Allegation #8)

A defense attorney's deficient performance during closing argument can serve as a basis for ineffective assistance of counsel. See Lounds v. State, 380 S.C. 454, 465, 670 S.E.2d 646, 652

(2008) (granting relief because "petitioner's own counsel damaged the defense case because the closing argument did not support petitioner's account of what had happened.")

In this case, defense counsel committed three major errors during his closing argument. First, he tried to argue to the jury that a quotation by Friedrich Nietzsche—"[n]o one is such a liar a[s] the indignant man"—was comparable to the Book of Proverbs and that Nietzsche's quotation explained the State's witnesses' testimony. See Tr. p. 395, line 15-p. 396, line 15. Nietzsche is also famous for his quotation "God is dead ... [a]nd we have killed him," making a comparison to the Book of Proverbs less than apt. Additionally, defense counsel prefaced his remarks by stating that he had not done much "by way of my career" and had not learned anything in philosophy other than to remember some of Nietzsche's quotations. Defense counsel testified before this Court that he felt it was a mistake to argue Nietzsche as a persuasive authority to a Darlington County jury.

Second, defense counsel argued that the Applicant was wrong to go to a park while out on bond where he encountered LaVincent Hankins, and that the Applicant bore a portion of the blame for the subsequent fight:

> And yeah, you know, he probably shouldn't have gotten into that petty little scuffle at a park where kids play. It shouldn't have happened. But it has nothing to do with what happened on Marion Avenue and Chaplin Circle as far as whether or not he is guilty of these crimes or not. It doesn't have anything to do with that. It makes him look bad. All right. And it does. I wish you didn't hear about it, and I wish he hadn't gotten in this altercation with Quintell. And it may not have been all Breyon's fault, and it may not have been all of Quintell's fault, but he shouldn't have been there. We all know that. All right?

Tr. p. 405, lines 9-20. Contrary to his attorney's argument, the Applicant testified that he was talking with Hankins' girlfriend at the park when Hankins approached him in a threatening manner and they got into a fight. Tr. pp. 352-353. He did not go to the park looking for trouble as there was no indication that Hankins would be at the park before he arrived, nor was there any reason

for his attorney to be arguing that "he shouldn't have been there." Defense counsel testified before this Court that it was a "poor choice of words" to make this argument.

Third, defense counsel failed to argue all of the elements of self-defense and how the Applicant's testimony met those elements to the jury. Instead of reviewing the elements, defense counsel focused on only one: whether or not the Applicant was without fault in bringing on the difficulty. See Tr. pp. 410-412. There were three other elements, therefore, that went completely unexamined by defense counsel during his closing argument. Given that self-defense was the only realistic path to a not guilty verdict for the Applicant, it was imperative for defense counsel to focus on the elements and how the Applicant's testimony satisfied those elements. As with the prior errors, defense counsel testified before this Court that it was a mistake to focus on only one of the elements of self-defense.

Taken together, defense counsel began his argument with a tone-deaf quotation from Friedrich Nietzsche, proceeded to place blame on his client for being in a location he had every right to be, and failed to argue how the Applicant's primary defense was shown through his testimony. In each instance, defense counsel admitted his error to this Court. This closing argument was clearly deficient, especially given that the argument contravened the Applicant's own account of his encounter with Hankins.

Turning to the question of prejudice, this Court concludes that there is a reasonable probability that the result of his trial would have been different had defense counsel made a stronger closing argument. The evidence of guilt was not overwhelming and the Applicant's testimony provided a complete defense to the crimes charged. Furthermore, the jury evidently had doubts about the Applicant's guilt since they requested to be reinstructed on the definitions of murder and voluntary manslaughter. Consequently, there is a reasonable likelihood that the jury

would have carried that doubt to a verdict of either voluntary manslaughter or not guilty had defense counsel not admitted fault on the part of the Applicant and actually argued that self-defense was met by the Applicant's testimony. As with the prior claim, this Court finds that the Applicant has proven both prongs of Strickland with regard to this claim. A new trial, therefore, is warranted on this claim as well.

B. Claims Which Are Not Meritorious

Although this Court's disposition of the previous issue is dispositive of the Applicant's PCR application, this Court "must make specific findings of fact and state expressly the conclusions of law relating to each issue presented" pursuant to S.C. Code Ann. § 17-27-80. Marlar v. State, 375 S.C. 407, 408, 653 S.E.2d 266 (2007). Consequently, this Court will address the Applicant's remaining contentions in turn.

1. Defense Counsel's Failure to Require the State to Deliver a Closing Argument on the Law (Allegation #2)

At trial, the prosecutor stated that he did not intend to deliver a closing argument on the law prior to defense counsel's closing argument. Tr. p. 393, lines 8-11. In response, defense counsel stated that he had no objection to the prosecution waiving its opening argument. Tr. p. 393, lines 15-17.

The Applicant alleges that defense counsel was ineffective for failing to require the State to open fully on the law prior to beginning his closing argument. This Court disagrees. Defense counsel testified before this Court that he made a strategic decision not to require the opening argument by the prosecution, particularly since he did not want the State to be able to argue his client's guilt twice. This Court finds this explanation reasonable and finds that defense counsel's performance was not deficient with regard to this claim. Accordingly, this allegation is denied and dismissed.

2. Defense Counsel's Failure to Sufficiently Request a Charge on Involuntary Manslaughter or Accident (Allegations #3 & 4)

During the colloquy on the jury charge at trial, the trial judge requested an explanation from defense counsel as to how involuntary manslaughter was applicable in this case. Tr. p. 386, line 19-p. 387, line 15. Defense counsel argued that the lesser-included charge should be given because the Applicant's stabbing motion towards the victim may not be "an unlawful activity ... depending on the facts." Tr. p. 387, lines 22-23. The trial judge then denied the request. See Tr. p. 388, line 22-p. 389, line 7. Defense counsel did not request that the jury be charged on the defense of accident.

The Applicant argues that defense counsel was ineffective for failing to present a more prepared and researched argument in support of his request to charge involuntary manslaughter. This Court disagrees. This Court does not find, under the facts of this case, that involuntary manslaughter was applicable. "[I]nvoluntary manslaughter is the unintentional killing of another without malice and while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others." State v. Light, 378 S.C. 641, 647, 664 S.E.2d 465, 468 (2008). Here, the killing was not unintentional because the Applicant intentionally struck at the victim. See Tr. p. 350, lines 1-3("And when he grabbed on my shirt that is when I backed up and moved the knife towards him.") Consequently, the Applicant cannot demonstrate that a stronger argument would have resulted in the trial court charging the jury on the lesser-included offense of involuntary manslaughter. This allegation is denied and dismissed.

Similarly, the Applicant argues that defense counsel was ineffective for failing to request a charge on the defense of accident. "For a homicide to be excusable on the ground of accident, it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was

exercised in the handling of the weapon." State v. Burriss, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999). This Court finds that this defense was inapplicable because the Applicant intentionally struck at the victim. Accordingly, this allegation is denied and dismissed.

3. Defense Counsel Was Ineffective for Failing to Request that the Jury Be Recharged on the Law of Murder and Voluntary Manslaughter (Allegation #5)

During deliberations, the jury sent two notes, which were recounted verbatim in the list of court exhibits. Court Exhibit #4 stated simply: "The definition of murder." Tr. p. 7. Court Exhibit #5 stated: "Definition of Manslaughter." Tr. p. 7. There is no indication from the record that the jury was recharged on either principle of law after they began deliberations.

The Applicant alleges that defense counsel was ineffective for failing to require that the jury be recharged on the law of murder and voluntary manslaughter once the jury sent these notes back during deliberations. This Court disagrees. Specifically, this Court finds that the Applicant cannot prove that there is a reasonable probability that he would have either been acquitted or convicted of voluntary manslaughter had the jury been recharged on the law. Notably, had the trial court recharged the jury on murder and voluntary manslaughter, the same errors present in the trial court's charge on murder would have been given again, which would have made it only more likely that the jury would have convicted the Applicant of murder. Accordingly, this Court concludes that the Applicant has failed to meet Strickland's second prong with regard to this claim. This allegation is denied and dismissed.

4. Defense Counsel Was Ineffective for Failing to Object to Burden-Shifting Self-Defense Instructions (Allegation #6)

The trial court charged the jury on self-defense at trial. See Tr. p. 457, line 17-p. 461, line 18. Specifically, the trial court charged the jury that "[t]he state has the burden of disproving self-defense beyond a reasonable doubt." Tr. p. 457, lines 21-22.

The Applicant alleges that the charges were burden-shifting as they shifted the burden of proof from the State to disprove self-defense beyond a reasonable doubt to the defense to prove the existence of self-defense. This Court disagrees. This Court does not find the charge to be burden-shifting and notes that the trial court specifically reminded the jury that the burden remained on the State to disprove self-defense beyond a reasonable doubt. Accordingly, this allegation is denied and dismissed.

5. Defense Counsel Was Ineffective for Failing to Prepare the Applicant to Testify (Allegation #7)

At trial, Applicant took the stand and testified regarding details of the night in question. Trial Transcript pp. 342-384. During the evidentiary hearing, Applicant also took the stand in support of his allegation that counsel failed to sufficiently meet with him and prepare with him for trial.

While on the stand at the evidentiary hearing, the Applicant recalled meeting with counsel one time at the jail and only speaking over the phone while out on bond. He stated that he did not trust counsel because he did not meet with him or put effort into building an attorney client relationship with him. He further stated that he did not know the "plan" for the defense or the trial strategy. He did not recall counsel engaging in any trial testimony preparations with him prior to or during trial. He concluded that he did not feel prepared or read to testify.

He also testified regarding facts that he felt counsel failed to elicit from him at trial that would have supported his defense. Specifically, he addressed his long-standing friendship with the victim, the underlying dispute with victim over a female, his interaction with the victim and female over the phone, his knowledge that the victim carried a gun, his belief that victim carried a gun in his jacket and was reaching for it during their altercation, that he did not intentionally stab the

victim, that the victim was being aggressive, that he was in fear of his life and that the stabbing was accidental.

Defense counsel also testified before this Court. He testified that he had been practicing law since 2009, with two stints at the Fourth Circuit Public Defender's Office. He explained that he was appointed to represent the Applicant following representation by another public defender. He did not have his file, but he thought he represented the Applicant for about ten months prior to trial. He recalled meeting with the Applicant five to six times at the jail, and not times while he was out on bond. He stated that the Applicant's case was his first murder trial.

He made it clear that self-defense was the primary defense. He recalled discussing self-defense with the Applicant and informing the Applicant that he would need to testify to establish self-defense. He explained that now he prepares defendants to take the stand with a mock trial, and he would prepare the Applicant in that way if he had the case again.

With regard to this allegation, the Applicant must show what evidence could have been presented or what other defenses could have been pursued had counsel more adequately prepared. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998). This Court has carefully reviewed the Applicant's trial testimony and considered the testimony offered at the evidentiary hearing. This Court is not convinced that counsel was deficient in his preparation with the Applicant prior to trial. This Court is also not convinced that the Applicant has shown that prejudice resulting from counsel's alleged deficient performance. Therefore, this claim must fail on both prongs of the Strickland analysis. This allegation is denied and dismissed.

6. Defense Counsel Was Ineffective for Failing to Adequately Cross-Examine the State's Witnesses (Allegation #9)

At trial, one of defense counsel's principal strategies was to show that the State's witnesses coordinated with one another to synchronize their version of events. The Applicant alleges that defense counsel's performance with regard to this strategy was ineffective. This Court disagrees.

At the evidentiary hearing before this Court, defense counsel testified that he discussed with the Applicant the "poor" quality of the State's witnesses. He further recalled that his trial strategy was to highlight their poor quality by impeaching them with their original statements and by emphasizing their inconsistencies. Defense counsel indicated that he was as prepared as he could be to execute that strategy.

This Court finds that the Applicant has failed to carry his burden and establish that defense counsel was deficient in his preparation and cross-examination of the State's witnesses at trial. As the transcript and counsel's testimony establish, defense counsel thoroughly cross-examined the witnesses in execution of his valid trial strategy. Consequently, this claim must fail on the first prong of the Strickland analysis. This allegation is denied and dismissed.

7. Defense Counsel Was Ineffective for Failing to Present Witnesses to Testify in Support of the Applicant's Testimony Regarding His Altercation with LaVincent Hankins (Allegation #10)

At trial, LaVincent Hankins testified about being present during the incident between the Applicant and the victim. Tr. pp. 238-9. He also testified, over counsel's motion to suppress and contemporaneous objection, to a subsequent encounter with the Applicant while with Hankins' girlfriend in a local park. Hankins detailed how the Applicant physically attacked and verbally threatened him. Tr. pp. 240-43.

During the evidentiary hearing before this Court, Johnetta Wheeler Evans testified that she was dating LaVincent Hankins in March 2009, but she was not present on Marion Avenue on

March 24, 2009, for the incident between the Applicant and the victim. She testified that she questioned whether Hankins was present on Marion Avenue as he testified to at trial.

She further testified she was present for the incident in the park that Hankins testified about at trial. She recalled that she was speaking with the Applicant in the park while her children were playing, and Hankins was in the car. She testified that Hankins, not the Applicant, initiated the contact and Hankins was upset because they were speaking. She made it clear that Hankins was the aggressor and initiated the fight with Applicant. She remembered Hankins making her leave her kids behind at the park to take him to the police station to report the incident.

She did not recall being contacted by anyone prior to trial regarding the incident in the park or Hankins. She explained that she was in an abusive relationship with Hankins, so she would not have been willing to testify against him at Applicant's trial. When asked, defense counsel stated that he did not look into finding any witnesses from the park incident, and he would have "wanted" Evans' testimony at trial.

After reviewing the trial transcript and considering the evidentiary hearing testimony this Court is concerned that counsel may have been deficient for failing to investigate possible witnesses from the park incident and utilize Evans as a witness. Yet, this Court is troubled with finding any resulting prejudice when Evans testified that she would not have cooperated or testified at trial. Therefore, this claim must fail under the second prong of the Strickland analysis. This allegation is denied and dismissed.

8. Defense Counsel Was Ineffective for Failing to Object to Improper Testimony Given by Investigator Mike Anderson (Allegation #11)

At trial, Investigator Mike Anderson testified that he walked through the incident scene with Marcus Brunson and Crystal Robinson. Tr. p. 127, line 17-p. 128, line 6. He then testified about the details of the altercation based on the information he received from Brunson and

Robinson. Tr. pp. 128-129. He further testified that information he received from other witnesses matched the accounts given by Brunson and Robinson. Tr. p. 131, lines 10-24. Finally, he testified that the fact that the victim's fingerprints were found on the bottle matched the accounts he was given by the witnesses at the scene. Tr. p. 132, line 12-p. 133, line 5. Defense counsel testified before this Court that he found portions of Investigator Anderson's testimony.

The Applicant alleges that defense counsel should have objected to this line of testimony on the grounds of hearsay, vouching, and improper testimony in the form of an expert opinion as an unqualified crime scene analyst. While this Court concludes that the testimony was objectionable, this Court finds that the Applicant was not prejudiced by defense counsel's failure to object to the testimony. Investigator Anderson's walkthrough testimony was largely cumulative to Brunson and Robinson's testimony. Furthermore, Investigator Anderson's testimony that the accounts given by Brunson and Robinson matched other accounts given to him by unidentified witnesses is vague and not unduly prejudicial to the Applicant. Finally, Investigator Anderson's testimony that the victim's fingerprints were found on the bottle was cumulative to both the State's witnesses' and the Applicant's testimony at trial. Accordingly, this Court finds that the Applicant has failed to meet his burden of proof with regard to Strickland's second prong as to this claim. This allegation is denied and dismissed.

9. After-Discovered Evidence Exists to Show that the Primary Witnesses Against the Applicant Collaborated to Falsify Their Statements (Allegation #12)

This Court denies relief with regard to this claim as this Court does not find that any evidence was presented to support it. No witness provided after-discovered evidence about collaboration between the State's witnesses, particularly given the nature of the questioning of the State's witnesses at trial on the matter. Accordingly, this allegation is denied and dismissed.

VII.
CONCLUSION

This Application for Post-Conviction Relief is hereby **GRANTED**. This Court finds that the appropriate remedy is a new trial. The Applicant's convictions and sentences are hereby vacated and this matter is remanded to the Darlington County Court of General Sessions for a new trial.

IT IS SO ORDERED.

Roger E. Henderson
Presiding Circuit Court Judge
Fourth Judicial Circuit

This 19 day of October, 2017
Chesterfield, South Carolina.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON)

BREYON TONEY, #346126,) CASE NO. 2014-CP-16-875
☒ Applicant,)

v.) MOTION AND ORDER INFORMATION FORM AND COVER SHEET

THE STATE OF SOUTH CAROLINA)
☐ Respondent.)

COPY

Applicant's Attorney:	Respondent's Attorney:
Jeremy A. Thompson, Bar No. 76091 Address: P.O. Box 1834 Irmo, SC 29063 phone: 803-779-2555 fax: 803-753-9732 e-mail: jeremyatlaw@yahoo.com other:	Johnny E. James, Jr., Asst. Attorney General Bar No. Address: Office of the Attorney General P.O. Box 11549 Columbia, South Carolina phone: 803-734-3737 fax: 734-4113 e-mail: other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒Applicant / ☐ Respondent — October 31, 2017 Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

2017 NOV -3 AM 11:01
DARLINGTON COUNTY, S.C.

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by:

☐ MOTION FEE COLLECTED:
☐ CONTESTED – AMOUNT DUE:

Date Filed:
TRUE CERTIFIED COPY,
Scott B. Suggs
CLERK OF COURT/RMC
DARLINGTON COUNTY, SC

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON	)	FOURTH JUDICIAL CIRCUIT
BREYON TONEY, #346126,	)	**CASE NO.: 2014-CP-16-875**
Applicant,	)	
v.	)	**ORDER**
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

THIS MATTER comes before the Court by way of a Motion to Reconsider filed pursuant to Rule 59(e), SCRCP, by the Respondent. This motion is in response to this Court's Order Granting Application for Post-Conviction Relief, which was filed on November 3, 2017.

After careful consideration of the matters addressed in the Respondent's Rule 59(e), SCRCP, motion, this Court finds that the allegations are adequately responded to in this Court's Order filed November 3, 2017, and that the allegations are without merit. Specifically, this Court would note that the arguments presented in the Respondent's Rule 59(e) motion were largely presented in its Memorandum Opposing Post-Conviction Relief filed following the evidentiary hearing in this case. This Court already rejected those arguments by granting the Applicant's Post-Conviction Relief Application in its Order. Consequently, this Court is unpersuaded by the Respondent's motion to alter or amend the Order Granting Application for Post-Conviction Relief. Accordingly, the Respondent's Motion to Reconsider is hereby **DENIED** and **DISMISSED.**

IT IS SO ORDERED.

Roger E. Henderson
Presiding Circuit Judge
Fourth Judicial Circuit

This 10 day of January, 2018.
Chesterfield, South Carolina.

FILED
2018 JAN 29 AM 11:25
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON)
)
BREYON TONEY, #346126,) CASE NO. 2014-CP-16-875
☒ Applicant,)
)
v.) MOTION AND ORDER INFORMATION
) FORM AND COVER SHEET
THE STATE OF SOUTH CAROLINA)
☐ Respondent.)

Applicant's Attorney:	Respondent's Attorney:
Jeremy A. Thompson, Bar No. 76091 Address: P.O. Box 1834 Irmo, SC 29063 phone: 803-779-2555 fax: 803-753-9732 e-mail: jeremyatlaw@yahoo.com other:	Johnny E. James, Jr., Asst. Attorney General Bar No. Address: Office of the Attorney General P.O. Box 11549 Columbia, South Carolina phone: 803-734-3737 fax: 734-4113 e-mail: other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Applicant / ☐ Respondent — Date submitted: January 29, 2018

FILED
2018 JAN 29 AM 11:25
SCOTT SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:
Collected by:

☐ MOTION FEE COLLECTED:
☐ CONTESTED – AMOUNT DUE: