ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

June 6, 2018

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

Re: Eric Lamont Owens v. State
2017-CP-42-1496

Dear Mr. Shearouse:

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

Sincerely,

Susannah Ross
Attorney at Law

enclosure

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

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUN 12 2018
S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

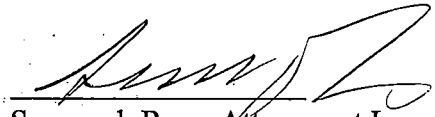
2017-CP-42-1496

Eric Lamont Owens, ... Appellant,
v.
The State, ... Respondent.

NOTICE OF APPEAL

Eric Lamont Owens appeals the Honorable Grace Gilchrist Knie's Order of Dismissal filed June 6, 2018.

This 6 day of June, 2018.



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

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

STATE OF SOUTH CAROLINA	)	
	)	**IN THE SUPREME COURT**
COUNTY OF GREENVILLE	)	
	)	
ERIC LAMONT OWENS ,	)	
APPELLANT,	)	
	)	
	)	
VS.	)	**CERTIFICATE OF SERVICE**
	)	**BY MAIL**
	)	
	)	
THE STATE OF SOUTH CAROLINA,	)	
RESPONDANT.	)	
	)	

1. I am the attorney for the Applicant in the above-captioned matter.

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

3. I have this day served a copy of the **Notice of Appeal** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

Attorney General
Alan Wilson
P.O. Box 11549
Columbia, SC 29211

Attorney for Defendant

This 6 **day of** June **, 2018**

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
Eric Lamont Owens, #252967, Applicant, v. State of South Carolina, Respondent.	2017-CP-42-1496 **ORDER OF DISMISSAL WITH PREJUDICE**

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Eric Lamont Owens (Applicant) on April 28, 2017. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on January 31, 2018 at the Spartanburg County Courthouse. Applicant was present and represented by Susannah C. Ross, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. J. Roger Poole, Esquire, (Counsel) also testified. This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the trial transcript, the direct appeal records, the PCR application and amendment, and Respondent's return.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In June 2014, the Spartanburg County Grand Jury indicted Applicant for murder and possession of a firearm during the commission of a violent crime (2014-GS-42-2236). Roger Poole, Esquire represented Applicant. Assistant Solicitors Abel Gray and Chris Bain represented the State. On April 20-22,

2015, Applicant proceeded to trial before the Honorable Roger L. Couch and a jury. The jury found Applicant guilty as indicted on both charges. Judge Couch sentenced Applicant to imprisonment for concurrent terms of thirty-five years for murder and five years for possession of a firearm during the commission of a violent crime.

Applicant filed a timely notice of appeal. David Alexander, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals dismissed Applicant's appeal on January 25, 2017. State v. Owens, Op. No. 2017-UP-055 (S.C. Ct. App. filed January 25, 2017). The remittitur was returned to the circuit court on February 10, 2017.

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

1. "Ineffective Assistance of Counsel"
   a. "Failure to object to trial court not giving information already in the record
      i. "failing to object to the courts refusal to provide the jury with the relevant dates of the arrest of applicant and the state witnesses as that information was already in the record."
   b. Failure to quash insufficient indictment
      i. "indictment is insufficient because it fails to allege,... A place of death, which is an essential element of the crime of murder."
      ii. "indictment was fatally defective where it contained two distinct offenses in one indictment and this was highly prejudicial."
   c. Failure to poll jury
   d. Failure to move for mistrial due to improper influence
      i. "allowing the decedant brother [Mark Douglas Jones] to sit at the prosecution table throughout jury selection displaying a white tee shirt bearing a duplicate of the decedant throughout the entire jury selection process. Tr. Tr. pg. 92 L-25; pg. 93 L-1-6; pg. 94 L-1-25; pg. 95 L-1-25; pg. 96 L 1"
   e. Failure to object to Solicitor's comments
      i. Tr. Tr. pg. 257 L-1-3, "go nigga, go hit the gas"
      ii. Tr. Tr. pg. 258 L-6-7, "He said I'm going to kill this nigga, Stanley Jones"

f. Failure to object to trial court's jury charge where court failed to instruct the jury of Applicant's constitutional right to remain silent.
    i. "the jury sent a note making inquiries before the trial court recognized the unconstitutional omission before the court attempted to make the charge and no one can invade upon the jury deliberations."
    ii. "Tr. Tr. pg. 291 L-22-23; Tr. Tr. pg. 293 L-11-25 – pg. 294 L-1-6"
g. Failure to "aggressively" cross-examine the State's expert witness
    i. "failed to question state's expert witness regarding his degree of certainty as to whether it was a 12 gauge shotgun slug that killed Stanley Jones."

At the start of the hearing, Applicant outlined the allegations it would be pursuing. Respondent objected to the late addition of new allegations at the hearing without any pleading beforehand, arguing it prejudiced the State in not allowing time to prepare to defend the allegations. The new allegations included ineffective assistance of counsel, in that:

1. Counsel failed to quash indictment based on date discrepancies in indictments;
2. Counsel failed to move to strike witness's testimony on ultimate issue, tr. p. 114-116 and p. 132-133;
3. Counsel failed to take exception to jury charge where trial judge did not instruct jury on Applicant's right to remain silent, tr. p. 288;
4. Counsel failed to object to jury instruction on inferred malice, pursuant to Gibson; and
5. Counsel failed to give Applicant a plea offer, review case with Applicant, prepare for trial, or discuss with Applicant whether he should testify.

Respondent requested dismissal of the late amendments or, in the alternative, to be allowed to supplement the record with additional argument or case law if the need arose. This Court allowed Applicant to proceed on his late allegations and allowed Respondent until February 28, 2018 to submit any further case law or briefs to this Court.

SUMMARY OF TESTIMONY AT PCR

I. Applicant testified to the following:

Applicant testified he never really talked to his attorney. Counsel brought the discovery to him in jail, told him to review it to see if Counsel needed any additional information or witnesses, and then told Applicant he would come back to discuss. However, Counsel did not return until one or two weeks before trial. At that time, Counsel told him he would come again to prepare Applicant for trial. Counsel did come to size him up for a trial suit, but did not do any prep work for the trial. Applicant testified Counsel never discussed his right to testify or not. However, Counsel informed him he could not tell Applicant to testify or not because it was Applicant's decision. Counsel only told Applicant that his prior criminal record would be revealed if he were to place his character into evidence while testifying.

Applicant testified Counsel never gave him the opportunity to plead guilty. Counsel never mentioned a plea to him. At one point, Applicant told Counsel he did not want to proceed with trial and wanted to plead guilty, to which Counsel responded no and did not allow him to plead guilty. Applicant claimed Counsel would not let him plead guilty because Counsel thought he could win at trial.

Applicant claimed he never saw his indictment prior to trial. He further claimed there are defects in his indictment because the State did not allege therein the address at which the murder took place. Applicant also took issue with the date discrepancy between the date on the face of the indictment and within the body of the indictment. Applicant also testified he felt that although the trial court addressed an issue involving the victim's brother wearing a shirt bearing the victim's image at trial, that he was still prejudiced because it was not called to the trial court's attention sooner.

Applicant also complained Counsel did not move to strike testimony from Shaina Williams after Counsel's objection to it was sustained. With regard to Dr. Wren's testimony, Applicant claimed Counsel should have objected to the State's questioning about what kind of gun was used because Dr. Wren himself said he was not a gun expert. Applicant further believed he was prejudiced because the judge did not let him answer the jury's question. Applicant believed the testimony the jury wanted was in the record.

On cross examination, Applicant argued that all of the State's witnesses lied. Applicant claimed they all had ample time after the shooting to come up with a story to pin the murder on him. He could not recall if Counsel pursued that same theory and argument at trial. Applicant also testified the State's witnesses were charged with obstruction of justice and it was not until then that they began to change their stories.

Counsel testified to the following:

Counsel has been practicing criminal law for 38 years. He is, and was at the time of Applicant's trial, an Assistant Public Defender for Spartanburg County. Counsel testified he received discovery from the State and immediately took it to Applicant. He told Applicant to review it and they would discuss it when he returned. Counsel testified he returned and reviewed all the discovery with Applicant. Counsel testified he did not interview the witnesses because he had numerous contradictory statements from each. Counsel testified the case boiled down to credibility and he discussed that with Applicant prior to trial.

Counsel testified he did not notice any fatal defects in the indictment. He testified he reviewed the body of the indictment and believed it served the purpose of an indictment – to put a defendant on notice of the charges against him. Had he noticed the date discrepancy, he may

have raised it to the court's attention but believes it would be an error that could easily be remedied by the State.

Counsel advised Applicant he could testify or not and that he had a right to remain silent. Counsel told Applicant it was Applicant's decision that Counsel could not make for him, but informed Applicant of the potential consequences of testifying. Counsel also made a pre-trial motion to ensure Applicant's prior criminal history would not come out, in the event Applicant chose to testify. Counsel testified he did not relay any plea offers to Applicant because the State did not make any offers. Although Counsel requested an offer, there was never an offer. Counsel informed Applicant he could plead guilty to murder, but never stopped Applicant from doing so. Counsel recalled Applicant wanted to go to trial.

Counsel made a strategic decision not to question the State's expert witness Dr. Wren. This was based on both Dr. Wren's extensive background in forensic pathology and history of testifying for the State as an expert. Additionally, Counsel had a previous experience in which he tried to aggressively cross-examine Dr. Wren and it backfired by Dr. Wren testifying even more favorably for the State in response to Counsel's questions. Counsel also did not have any questions to ask Dr. Wren that could be beneficial to the defense.

Counsel also testified he did not object to the trial court's response to the jury's question because he believed it was the appropriate answer. Counsel explained there was a conference in chambers when the jury submitted their question. Counsel could not remember exactly who brought the issue up, but there was a discussion at that time about the judge's failure to instruct the jury regarding the defendant's right to remain silent. After the conference, the judge did in fact instruct the jury regarding the defendant's right to remain silent.

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 hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency. A Post-Conviction Relief application is not a venue for questioning each and every decision of trial counsel. Rather, the Applicant must demonstrate by a preponderance of the evidence that trial counsel was deficient and that the deficiency prejudiced the outcome of his trial. Applicant has failed to do so.

I. Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged 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, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive

relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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 (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.

Failure to object to trial judge's answer to jury's question

Applicant alleged the trial judge improperly responded to the jury's question by failing to provide the jury with the arrest dates of Applicant and a State's witness. This Court finds Counsel was neither deficient nor Applicant prejudiced on this issue.

On page 292 of the transcript, Judge Couch read the jury's question. His response was,

> To the extent that that information is not already in the record I cannot provide that information to you at this point in time. In other words, the date of arrest, if it was testified to, would, would be in the record. I don't know whether it was or wasn't, but, at any rate, I can't add that information into the record at this time.

This Court not only finds the response appropriate, but also notes there was never any evidence of the State's witness's arrest date. The only evidence admitted regarding arrest dates appeared on page 147, which was "March of 2014." Judge Couch correctly told the jury that if testimony regarding the arrest dates was given, it was in the record. It would have been inappropriate to reiterate that testimony for them as this would have constituted a comment on the facts. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). Therefore, this Court finds Counsel was not deficient for failing to object to the trial judge's response.

Additionally, Applicant has failed to prove he was prejudiced by this alleged deficiency. Had Counsel objected, and the March 2014 date been given to the jury, there is no reasonable probability the outcome of the trial would have been different. The State presented numerous witnesses who implicated Applicant in the murder of the victim. Counsel was diligent in impeaching each witness with their prior inconsistent statements. But, the evidence was clear that the witnesses did not implicate Applicant until Applicant was arrested and in custody, at which time they no longer feared reprisal.

Failure to quash indictment

Applicant alleged Counsel failed to quash indictment based on two separate issues: because the indictment failed to allege a place of death and because the face of the indictment shows a date stamp of June 16, 2014 while the body of the indictment shows a date stamp of June 12, 2014. This Court finds Counsel was neither deficient nor Applicant prejudiced on this issue.

"An indictment is adequate and valid on its face if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent prosecution." State v. James, 321 S.C. 75, 472 S.E.2d 38, 40 (Ct. App. 1996); See also State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952) (an indictment is valid on its face if it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet). Furthermore, "[t]he regularity of grand jury proceedings is presumed absent clear evidence to the contrary; the burden is on the defendant to prove facts upon which a challenge to the legality of the grand jury proceedings is predicated." State v. Batchelor, 377 S.C. 341, 344, 661 S.E.2d 58, 59 (2008)

(citing Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005); State v. Griffin, 277 S.C. 193, 285 S.E.2d 631 (1981)).

Here, the fact that the date stamps on the face and body of the indictment are four days apart does not render the indictment fatally flawed nor does it provide "clear evidence" that the grand jury proceedings were irregular or tainted. This Court notes the date stamp beside the grand jury foreperson's signature is also June 12, 2014. The obvious scrivener's error, standing alone, is not sufficient to overcome the presumption of regularity and legality in the Grand Jury proceedings. The indictment served its fundamental purpose – to give Applicant sufficient notice of the charges for which he was accused. Counsel testified although he reviewed Applicant's indictment, he did not notice the date discrepancy. However, Counsel correctly believed the indictment was sufficient to put Applicant on notice of the charges. Therefore, Applicant failed to prove by a preponderance of the evidence that Counsel was deficient.

In addition to no evidence presented of any irregularity in the Grand Jury proceedings, the scrivener's error does not implicate subject matter jurisdiction. As such, had Counsel moved to quash the indictment based on the date discrepancies, the State would have simply moved to amend the indictment to reflect the correct date. See State v. Means, 367 S.C. 374, 387, 626 S.E.2d 348, 356 (2006) ("[A] motion to amend an indictment **should** be granted when the proposed amendment does not change the nature of the offense or affect the sufficiency of the indictment."), abrogated on other grounds by Talley v. State, 371 S.C. 535, 640 S.E.2d 878 (2007); Morris v. State, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006). (emphasis added). Therefore, Applicant cannot prove he was prejudiced by Counsel not moving to quash the indictment, as the motion would have been denied.

Failure to poll jury

Applicant alleged Counsel was ineffective for failing to request a polling of the jury. This Court finds Counsel was neither deficient nor Applicant prejudiced on this issue. Applicant failed to produce any evidence of either deficiency or prejudice. Additionally, the record shows after the Clerk read the jury's verdict, the jury members were asked to raise their right hands if the verdict was theirs. All of the jurors raised their right hands. Tr. p. 296.

Failure to move for mistrial

Applicant alleged Counsel was ineffective for failing to move for a mistrial because the victim's brother was present in the courtroom wearing a shirt with the victim's face on it. This Court finds Counsel was neither deficient nor Applicant prejudiced on this issue.

After jury selection, there was short recess and a bench conference was held, after which the trial judge confronted the victim's brother, Mark Jones ("Jones"), about the shirt he was wearing in the courtroom. Tr. pp. 93-96. The trial judge ordered Jones to cover up his shirt or change his shirt if he wanted to stay in the courtroom during the trial. Jones then left the courtroom. This Court notes that this occurred in the very beginning of the trial, when the jury had not even heard any evidence and knew very little about the evidence, and even less about who Jones was or what the victim looked like. Not only has Applicant failed to present any evidence of deficiency, the record supports Counsel was not deficient. The matter was in fact addressed by the trial judge prior to the start of the trial. Applicant has also failed to prove he was prejudiced by this incident. Jones was required to leave the courtroom and was not permitted to be in the courtroom wearing a shirt bearing the image of the victim.

Failure to object to Solicitor's comments

Applicant alleged Counsel was ineffective for failing to object to various parts of the Solicitor's closing comments. This Court finds Counsel was neither deficient nor Applicant prejudiced on this issue.

The first comment Applicant believes is objectionable is on page 257 of the transcript, "[g]o, nigga, go." This Court fails to see what objection the comment warranted. The State is entitled to refer to the evidence presented in the trial during their closing arguments. On page 197-198 of the transcript, the State's witness, Derrick White, testified to those exact words. White explained Applicant told him, "go, nigga, go" after Applicant shot the victim from the vehicle White was driving. Because there is no reason to have objected to the State's reference to the evidence admitted at trial, Counsel was not deficient.

Similarly, Applicant alleged the Solicitor's comment, "[h]e said I'm going to kill this nigga, Stanley Jones[,]" was improper and Counsel should have objected. Tr. p. 258, ll. 6-7. Again, there is nothing objectionable about the Solicitor's statement. The State's witness, Blaine Seay, also testified to these exact words. On page 171, line 16 and on page 173, line 16, Seay testified Applicant said he was going to "kill this nigga[,]" referring to the victim. Because there is no reason to have objected to the State's reference to the evidence admitted at trial, Counsel was not deficient.

Applicant also alleged Counsel should have objected to the Solicitor's comments regarding the kind of projectile with which the victim was shot, which Dr. Wren testified was a large caliber slug. Tr. p. 259. This Court finds nothing objectionable about this comment. Dr. Wren was a qualified expert in forensic pathology. He performed the autopsy of the victim. It was his opinion, based on his knowledge, experience, and the diameter of the bullet entry wound,

that victim's gunshot wound was caused by a large caliber slug, not a bullet or pellets. Tr. p. 235, l. 13 – p. 236, l. 15). Dr. Wren testified he did not know if such a large slug could be shot from a handgun, because he was not a gun expert. The Solicitor's closing comments reflected this testimony accurately. Because there is no reason to have objected to the State's reference to the evidence admitted at trial, Counsel was not deficient.

Failure to object to jury charge

Applicant alleged Counsel was ineffective for failing to object to two portions of the trial judge's jury charge. This Court finds Counsel was neither deficient nor Applicant prejudiced on this issue.

The first contested jury instruction issue occurred when the trial judge completed his jury instructions and asked both sides if either took any exception, to which both Counsel and the State indicated they did not. Tr. pp. 287-288. Applicant contends that Counsel should have brought it to the trial judge's attention that he did not read any instruction regarding Applicant's right to remain silent, which was important because Applicant did not testify. However, on pages 291-294, the jury returned from deliberations and the trial judge ultimately gave a very thorough instruction on Applicant's right to remain silent and again reinforced the State's burden of proof. Counsel testified there was a conference in-chambers, and the issue of the judge's failure to charge on Applicant's fifth amendment right came up. Although Counsel did not recall if he specifically brought it to the judge's attention, this Court finds it most important that it was addressed and ultimately charged to the jury. Because the jury was ultimately thoroughly instructed of Applicant's fifth amendment right, Applicant cannot prove he was prejudiced by any alleged deficiency.

The other contested jury charge appears at page 283, that "[m]alice can be inferred from any conduct showing a total disregard for human life." Applicant cites to Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016), to support his argument that Counsel should have objected to this jury instruction. As a threshold matter, Gibson was not decided until May 11, 2016. Applicant was tried April 20-22, 2015. Therefore, Gibson was not even applicable law at the time of Applicant's trial. Notwithstanding Gibson was decided after Applicant's trial, Gibson is wholly inapplicable to the jury instruction in Applicant's trial because the trial court did not instruct the jury that malice can be inferred from the use of a deadly weapon.

In Gibson v. State, Gibson's brother was involved in a fight between two groups at a bar. Gibson's brother called Gibson for a ride home. When Gibson arrived, the fight had spilled out into the parking lot between numerous members of each group. During the fight, several gunshots were heard and the victim was killed by a shot to the back of his shoulder. Gibson testified that although he was "doing some shooting," he did not aim or intend to shoot the victim. The trial court instructed the jury that "inferred malice may also arise when the deed is done with a deadly weapon." Gibson's trial counsel did not object to the charge based on the trial court's failure to use the "permissive inference language"[1] in addition to the "standard implied malice charge."[2]

Similarly, in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), Belcher shot and killed the victim. Belcher testified he shot the victim after the victim confronted him, unprovoked, with a gun. Belcher also testified he fled to a vehicle and retrieved a gun and fired

[1] In State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), the Court referred to the charge that "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" as the "permissive inference instruction."
[2] The Belcher Court referred to the charge that malice can be implied from the use of a deadly weapon charge as "the standard implied malice charge."

it at the victim while the victim was approaching him, gun in hand. The Court held that a jury charge instructing 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 the homicide.** However, the Court also stated in a footnote that "[t]he standard implied malice charge remains valid, as does the general permissive inference instruction.

Applicant argued Counsel was ineffective for failing to object, based on Gibson, to the trial court's charge that, "malice can be inferred from any conduct showing a total disregard for human life." Trial Tr. p. 283, ll. 22-23. First, as an initial matter, Gibson was decided approximately one year after Applicant's trial. No South Carolina court has ever required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of trial. Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). The relevant time frame for analysis is when the alleged ineffectiveness occurred. Id. at 310. While the rules of preservation require that objections to the admissibility of evidence be specific, they most certainly do not require clairvoyance. State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012). Therefore, Counsel cannot reasonably be held ineffective for failing to object based on case law that had not even been decided at the time of trial.

Second, the prohibited and scrutinized "standard implied malice charge" in Gibson and Belcher was not even read at Petitioner's trial. Applicant errantly argues that an objection pursuant to Gibson should have been lodged against the jury charge that malice can be inferred from conduct showing total disregard for human life. Not only do the decisions in Gibson and Belcher not apply to the challenged jury instruction, they do not even mention the charge. To the extent Applicant argues for an extension of Gibson and Belcher to the challenged jury

instruction, Applicant overlooks the crux of those decisions and the analysis the Court detailed in arriving at their conclusion regarding the "standard implied malice charge."

Thirdly, unlike Gibson and Belcher, in Applicant's case there was no "evidence presented that would reduce, mitigate, excuse or justify the homicide." Both Gibson and Belcher involved "gun fights" that resulted in alleged unintentional killings or self-defense. Applicant was convicted for shooting the victim, who was unarmed, with a large caliber slug using a pistol grip shotgun, without provocation. There was no evidence or testimony presented that Applicant acted in self-defense, was provoked by the victim at the time of the shooting, or that Applicant did not aim at or intend to shoot the victim. Therefore, Gibson and Belcher are inapplicable to Applicant's case and had the "standard implied malice charge" been given to the jury, it would have been proper. See Belcher, 385 S.C. at 612 n.9 ("The standard implied malice charge remains valid, as does the general permissive inference instruction [...]In addition, we neither restrict the State from arguing to the jury for a finding of malice from the use of a deadly weapon...."

Failure to "aggressively" cross-examine the State's expert witness

Applicant alleged Counsel was ineffective for failing to question Dr. Wren, the State's expert forensic pathologist, regarding his degree of certainty as to what gun killed the victim. This Court finds Counsel was neither deficient nor Applicant prejudiced on this issue.

Not only does the record prove this allegation meritless, Counsel testified that he made a strategic decision not to cross-examine Dr. Wren based on his experience with Dr. Wren at trial. This decision was reasonable. Additionally, Applicant has failed to prove how further cross-examination of Dr. Wren would have helped Applicant or affected the outcome of his trial. Dr. Wren himself testified he did not know what kind of gun was used to shoot the victim and

admitted he was not an expert in guns. However, he could tell, based on his experience, knowledge, and autopsy on the victim, that the victim was shot with a large caliber slug.

Failure to give plea offer

Applicant alleged Counsel failed to give him a plea offer. This Court finds Counsel was neither deficient nor Applicant prejudiced on this issue.

Counsel credibly testified the State did not make any offers, but he begged for one. This Court notes the Solicitor, and only the Solicitor, has the discretion to offer a plea deal. Counsel cannot force them to make an offer. Applicant always had a right to plead straight up, and Counsel advised him of such. However, Counsel's testimony that Applicant wanted to go to trial is credible.

Failure to review case and prepare for trial

Applicant alleged Counsel failed to review his case with him. This Court finds Counsel was neither deficient nor Applicant prejudiced on this issue.

This Court finds Applicant's testimony on this issue absolutely not credible. It strains credulity to believe, as Applicant testified, that Counsel only came to drop off his discovery and then returned shortly prior to trial only to size him for a trial suit, but not to discuss his case. Counsel, on the other hand, gave credible testimony that he provided Applicant with discovery and also reviewed all of it with him. Counsel also came up with his strategy in preparation for trial, to challenge the credibility of the State's witnesses (who had each given multiple different statements). This strategy was reasonable and appears to be the only viable strategy given the evidence against Applicant. This Court finds the record further supports Counsel adequately discussed Applicant's case with him and prepared for trial.

Improper advice regarding testifying

Applicant alleged Counsel was ineffective for failing to tell him whether or not he should testify and, rather, leaving the decision up to Applicant. This Court finds Counsel was neither deficient nor Applicant prejudiced on this issue.

This Court notes it is only a defense attorney's obligation to advise his client of his right to testify and help him weigh the pros and cons of doing so, but it is not to make that decision for his client. Counsel credibly testified that he did just that. Counsel advised his client of his right to testify or remain silent and discussed with him the consequences of testifying. This advice was reasonable. The colloquy between the trial judge and Applicant regarding Applicant's decision not to testify demonstrates Applicant's decision was made knowingly and voluntarily.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. This Court finds Applicant has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove prejudice from any alleged deficiencies in Counsel's representation of him. Upon review of the transcript of the jury trial for the criminal offense, the Application, the Return, and all other pertinent documents, the Court concludes that the Applicant does not meet the required standard articulated in *Strickland*, in which Applicant is required to prove by a preponderance of the evidence that counsel was deficient and that he was prejudiced by any deficiency. Therefore, the Applicant has failed to meet his burden of proof. The application for post-conviction relief is denied and dismissed with prejudice.

This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453

(1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 1st day of June, 2018.

GRACE GILCHRIST KNIE
Presiding Judge
Seventh Judicial Circuit

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 JUN -6 P 1:56
M. HOPE BLACKLEY

Spartanburg, South Carolina

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

June 1, 2018

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Eric Lamont Owens #252967
Applicant

VS

Respondent

IN THE COURT OF COMMON PLEAS

7TH JUDICIAL CIRCUIT

CASE # 2017CP42-1496

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Order of Dismissal w/prejudice
In this action dated 6-1 2018 on 6-1-18

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

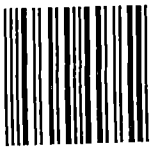
Megan Jameson
Susannah Ross

6-1-18
(Date)

Eric Owens
(Signature)

SUSANNAH ROSS
330 EAST COFFEE ST.
GREENVILLE SC 29601

1000



29211

U.S. POSTAGE
PAID
GREENVILLE, SC
29602
JUN 08, 18
AMOUNT
$1.84
R2304M109948-7

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