THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE COUNTY OF GEORGETOWN

Court of Common Pleas

The Honorable Circuit Court Judge, PAUL M. BURCH

Case No. 2017-CP-22-0521

DOMINIC A. LEGGETTE, SCDC # 340047..... Petitioner,

v.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Judge PAUL M. BURCH'S Order filed on September 24, 2018, denying post conviction relief to the Petitioner.

The Order was received by the undersigned counsel on October 2, 2018. A copy of the said Order on appeal is attached to this Notice.

This is the 2nd day of October, 2018.

Steven W. Fowler
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North Myrtle Beach, SC 29582
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S.C. SUPREME COURT

Leggette, Dominic A.

THE STATE OF SOUTH CAROLINA

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PROOF OF SERVICE

I, Steven W. Fowler, court- appointed attorney for Petitioner, certify that I have today served within Notice of Appeal and Copy of the Order signed by the presiding Judge upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the following:

1) Assistant Attorney General, PO Box 11549, Columbia, SC 29211 and
2) Clerk of the South Carolina Supreme Court , 1231 Gervais St, Columbia, SC 29201
3) SCCID Appellate Defense, PO Box 11433, Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served on this below named date.

This is the 2th day of October, 2018.

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	
Dominic A. Leggette, S.C.D.C. No. 340047,	)	Case No.: 2015-CP-22-00521
Applicant,	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

FILED
GEORGETOWN COUNTY, S.C.
2018 SEP 24 AM 8:54
ALMA Y. WHITE
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed by Dominic A. Leggette ("Applicant") on May 21, 2015. Respondent made its return on or about February 23, 2016. The Court convened an evidentiary hearing into the matter on Monday, May 9, 2016, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Steven W. Fowler, Esq. Jessica E. Kinard, Esq., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Ronald W. Hazzard, Esq. ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Georgetown County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. Applicant was indicted at the November 2008 term of the Georgetown County Grand Jury for murder (2008-GS-22-00944),

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assault and battery with intent to kill (2008-GS-22-00945). Ronald W. Hazzard, Esq., represented Applicant, and Scott R. Hixson, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On March 29, 2010, Applicant proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. The jury found Applicant guilty of the lesser-included offenses of voluntary manslaughter and assault and battery of a high and aggravated nature on April 1, 2010. Judge Culbertson sentenced Applicant to imprisonment for concurrent terms of 30 years for manslaughter, and 10 years for ABHAN.

Applicant filed a timely notice of appeal and a direct appeal was perfected by LaNelle Cantey Durant, Esq., who raised the following issue:

> Did the trial court err in denying Leggette's directed verdict motion when the state did not disprove self-defense pursuant to State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998)?

By unpublished opinion decided March 28, 2012, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Leggette, Op. No. 2012-UP-203 (S.C. Ct. App. filed March 28, 2012). Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari, which was denied by order dated May 7, 2014. The Remittitur was issued on May 15, 2014.

Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel"
    a. "I will amend to the issues raise in question 10 in support of question 11; after the court appoint counsel"
2. "Constitutional and statutory violation"

Despite Applicant's assertion, no amendment was thereafter filed. At the evidentiary hearing, Applicant proceeded broad allegations of ineffective assistance of counsel without objection by the State. This Court is left to draw specifics from the testimony at the evidentiary hearing

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

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." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at

689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

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 at 117, 386 S.E.2d at 625 (citing Strickland at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry at 117-18, 386 S.E.2d at 625 (citing Strickland at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

1. Failure to Object to Conviction for Voluntary Manslaughter

Applicant alleges that he was improperly convicted for voluntary manslaughter when he was only indicted for murder. Murder is the killing of a person with malice aforethought, either express or implied. S.C. Code Ann. § 16-3-10. Voluntary manslaughter is the unlawful killing of another in sudden heat and passion, under reasonable provocation, without premeditation or malice. State v. Smith, 363 S.C. 111, 115, 609 S.E.2d 528, 530 (Ct. App. 2005) (quoting State v.

Cooley, 342 S.C. 63, 67, 536 S.E.2d 666, 668 (2000)); S.C. Code Ann. § 16-3-50. Voluntary manslaughter is a lesser-included offense of murder. State v. Sams, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014). "The law to be charged to the jury is determined by the evidence presented at trial." Id., 410 S.C. at 308, 764 S.E.2d at 513 (quoting State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993)). "The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense." Id. (citing State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986)). "When the record contains no evidence to support it, a voluntary manslaughter charge should not be given." Smith, 363 S.C. at 115, 609 S.E.2d at 530 (citing Cooley, 342 S.C. at 67-68, 536 S.E.2d at 668-69).

At trial, the court instructed the jury on the lesser-included offense of voluntary manslaughter. (Tr. 414-16). Counsel did not object when prompted after the jury instructions. (Tr. 424, ll. 9-14). At the evidentiary hearing, Applicant attested that murder and voluntary manslaughter are different things, and took issue with being convicted of voluntary manslaughter when he was indicted for murder. Counsel testified he explained the indictments and the elements of each offense.

The Court finds Applicant has failed to meet his burden of showing either a deficiency on the part of counsel, or prejudice therefrom. Applicant offered no reason why voluntary manslaughter should not have been charged, and appears to not recognize it as a lesser-included offense of murder. A review of the complete trial record shows that the voluntary manslaughter instruction was appropriate and supported by facts in the record. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

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2. Failure to Seek Involuntary Manslaughter

Applicant faults Counsel for failing to seek an instruction on involuntary manslaughter for the killing of Tisdale. As with voluntary manslaughter, involuntary manslaughter is a lesser-included offense of murder. Sams, 410 S.C. at 309, 764 S.E.2d at 514. "Involuntary manslaughter is defined as the unintentional killing of another without malice while engaged in either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the doing of a lawful act with a reckless disregard for the safety of others." Id. (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); S.C. Code Ann. § 16-3-60 (2003)). As noted above, the law to be charged is to be determined by the facts of the case.

The Court will not belabor this allegation—a thorough review of the trial record does not indicate facts to show that a charge of involuntary manslaughter would be appropriate. In particular, the Court notes the trial court's acknowledgement that Applicant was in possession of a firearm in violation of 18 U.S.C. § 922(g), which is a federal felony punishable by up to 10 years in prison. (Tr. 286-87; Court Exhibit #9); see also 18 U.S.C. § 924(a)(2) (penalty provision). As Applicant was otherwise engaged in an unlawful act amounting to a felony, that alone would foreclose the possibility of involuntary manslaughter, let alone the remaining facts of trial. Accordingly, the Court finds Applicant could not meet his burden under either prong of Strickland, and his request for relief by way of this allegation is **DENIED.**

3. Failure to Call a Character Witness

Applicant alleges Counsel was ineffective in failing to call a character witness to contest law enforcement testimony. An applicant for post-conviction relief "*must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence*

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at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis original). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Id. (quoting Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995)). As Applicant was non-specific in this portion of his testimony, and *no* proposed witnesses were presented at the evidentiary hearing, Applicant cannot show ineffectiveness for failing to call a character witness. Applicant has failed to meet his burden and his request for relief by way of this allegation is **DENIED**.

4. Failure to Call Witness Sheron Magee

Applicant also alleges Counsel was ineffective in failing to call Sheron Magee as a witness in his defense. The Court will not belabor this allegation, as it is resolved on the same basis and law as above—Applicant presented no such witness at the evidentiary hearing. Accordingly, Applicant has failed to meet his burden, and his request for relief by way of this allegation is **DENIED**.

5. Failure to Call Witness Jamie White

Applicant also alleges Counsel was ineffective in failing to call Jamie White as a witness in his defense. Once again, it is resolved on the same basis and law as above—Applicant presented no such witness at the evidentiary hearing. Accordingly, Applicant has failed to meet his burden, and his request for relief by way of this allegation is **DENIED**.

6. Failure to Obtain Dispatch Records

Applicant alleges Counsel was ineffective for failing to obtain records from 911 emergency dispatch regarding when law enforcement was called at or around the time of the killing. In order to prevail upon a claim that counsel did not adequately prepare or investigate a

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case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Here the Court faces much of the same as in Sections II.2-4, above. Applicant presented no dispatch records at the evidentiary hearing. Accordingly, Applicant has failed to meet his burden, and his request for relief by way of this allegation is **DENIED**.

7. Failure to Challenge State's Theory of "Ambush Killing"

Applicant alleges Counsel was ineffective in failing to adequately challenge the State's theory of the case describing the killing as an ambush. At trial, Counsel challenged Investigator Michael Thacker, of the Georgetown County Sheriff's Office, on cross-examination as to whether he found anything inconsistent with the defense theory of the case that the victims attacked Applicant. (Tr. 172-73). On re-direct, the State asked Thacker if the evidence he looked at was consistent with an ambush killing, to which Thacker replied "[i]t could be, yes, sir." (Tr. 173, ll. 15-18). Later, during cross-examination of forensic pathologist Cynthia Schandl, Counsel emphasized the bullet killing Tisdale entered from his front, and asked "so, wasn't like any type of ambush or anything like that?" (Tr. 190-91). Schandl was equivocal in

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her answer, and admitted "I cannot tell you where the two individuals were in space." (Appx. 191, ll. 3-5). No other references to an "ambush" appear in the record.

At the evidentiary hearing, Applicant protested that all of the State's witnesses described him as leaving the scene with two victims in pursuit, and questioned how he could ambush the victims if they were in active pursuit. Applicant suggested Counsel could have asked the pathologist how close the shooter and the victim were. The State had Applicant review the above cited portion of Schandl's testimony on cross-examination. Counsel did not testify to this allegation.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. The Court does not discern from the record that the State's theory was of an ambush killing, though the testimony does show that as the victims coincidentally followed Applicant to a store, he veiled his face, turned around, and suddenly started firing at them. (Tr. 203-04). The word appears only twice in the record, and one of those instances is where Counsel asked of the pathologist the very question demanded by Applicant. Applicant does not offer what else Counsel should have done. Accordingly, Applicant has failed to meet his burden of proof for either prong of Strickland, and his request for relief by way of this allegation is **DENIED**.

8. Failure to Provide Discovery

Applicant alleges Counsel was ineffective by failing to ever provide the entirety of his Rule 5 discovery. At the evidentiary hearing, Applicant claimed that though he requested his full discovery prior to trial, he never received it. Applicant speculated that Counsel did not bother doing so out of confidence in the self-defense strategy. Applicant testified proceeding to trial without his discovery was hard on him, and that although he persisted in efforts to obtain it after trial, he still believed he never received all of it. Applicant affirmed his belief that Counsel had

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all the discovery materials available in his possession at the time of trial, but did not offer what, if anything, he expected to find.

Counsel testified that motions for discovery were filed long before he took over the case. Counsel recalled that he met with Solicitor Hixson on March 24, 2010, for a discovery review conference to confirm that he had everything, ensuring that nothing was missing. Counsel affirmed that he reviewed everything with Applicant, and confirmed that Applicant probably did not get a copy of his discovery. Counsel explained Applicant did not want a copy of his discovery at the time, largely because he did not have his glasses while incarcerated and his eyesight was sufficiently poor that he could not read the materials. Instead, Counsel read the contents of Applicant's discovery to him and then discussed it. Counsel opined that Applicant understood and had a grasp of everything in his discovery. Counsel could not speak to the status of Applicant's complete file at the time of the hearing, but offered to do all he could to recover and provide it if Applicant so desired.

This Court, upon Applicant's motion, agreed to leave the record open for 20 days for Applicant to obtain any documents not in his possession and submit them to the Court. Applicant did not submit anything to this Court.

This Court finds no deficiency on the part of Counsel, nor prejudice therefrom. The Court finds credible Counsel's testimony that Applicant affirmatively did not desire a copy of his discovery due to his inability to read it, and that Counsel undertook efforts to inform and explain to Applicant the materials in light of his disability. The Court additionally finds Applicant failed to show what, if anything, could have been done differently at trial had he bene provided a copy of his complete discovery. Accordingly, Applicant has not met his burden of proof under either prong of Strickland, and his request for relief by way of this allegation is **DENIED**.

9. Failure to Communicate Meetings in Chambers

Applicant alleges Counsel was deficient in failing to communicate to him discussions which took place between Counsel, the prosecution, and the trial judge in chambers. Shortly after reconvening on March 31, 2010, the State marked as Court's Exhibit Nine certified record of conviction of Applicant for criminal domestic violence, first offense. (Tr. 286, ll. 4-17). The State indicated the subject had been discussed prior. (Tr. 286, ll. 11-12). The Court indicated its understanding the record was offered to satisfy a legislative statute "that basically says a person engaged – not engaged in any unlawful activity has no duty to retreat. That more or less does this away – does away with your getting a charge on that statute; correct?" (Tr. 287, ll. 6-11). Counsel confirmed as much and also indicated the subject had previously been brought up in chambers. (Tr. 287, ll. 12-14). Counsel reaffirmed, however, that Applicant was still entitled to consideration under common law self-defense. (Tr. 287, ll. 16-20).

At the evidentiary hearing, Applicant took exception, and argued he was never made aware of any meeting in chambers or anything pertaining to the exhibit in question. Applicant argued the confusion and surprise was stressful and bad for his health. Counsel noted conferences in chambers are common during trials, and that he immediately communicated the substance of such meetings to Applicant whenever he returned from them.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. The Court finds credible Counsel's assertion that he immediately communicated the substance of chambers conferences to his client. Additionally, the Court notes that Applicant promptly learned of the substance of the conference in question when it was memorialized on the record at the time the exhibit was introduced. Furthermore, the Court finds Applicant has not shown what, if anything, could have been done differently had he been more quickly notified of the substance of the

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chambers conference, and thus fails to show how he was prejudiced. Applicant has failed to meet either prong of Strickland by way of this allegation, and his request for relief is **DENIED.**

10. Failure to Move for Mistrial – Juror

Applicant alleges Counsel should have moved for a mistrial after a juror realized late in the trial that the victim's father was a coworker of his. "The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way." State v. Bantan, 387 S.C. 412, 417, 692 S.E.2d 201, 203 (2010) (citing State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999)). "A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial." Id. (citing State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000)). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Id. (quoting State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct.App. 1999)). "The trial court should exhaust other methods to cure possible prejudice before aborting a trial." Id., 387 S.C. at 417, 692 S.E.2d at 203-04 (citing State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999)).

At the close of jury instructions, the trial court sent the jury into the jury room and instructed them "please do not begin your deliberations at present." (Tr. 424, ll. 2-4). Confirming no objections to the jury instructions, the Court directed the bailiff to take exhibits to the jury room and to bring out the alternates. (Tr. 424, ll. 22-25). Just as the trial court was about to dismiss the alternate jurors, the bailiff informed the Court that a juror had "a question about somebody in the audience that he knows and he was asking about." (Tr. 425, ll. 1-14). After directing the question be written, the juror produced a note indicating he recognized a co-worker in the audience in the courtroom with the last name of Mitchum, but did not know if he

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was related to the witness with the same last name. (Tr. 426, ll. 15-23). The State indicated its belief the juror had not misled anybody in *voir dire*, but Counsel noted that the potential connection was enough to inspire the juror to bring it to the Court's attention. (Tr. 426-27). Rather than question he juror on the matter, the parties and the Court agreed to simply seat an alternate out of an abundance of caution, and dismiss the concerned juror. (Tr. 426-31). The Court finally instructed the jury to begin its deliberations after seating the alternate. (Tr. 430, ll. 6-8).

At the evidentiary hearing, Applicant speculated the juror, permitted to deliberate, could have hurt his case. Applicant indicated he told Counsel he should get a new jury, but instead Counsel moved to seat the alternate. On cross-examination, Applicant argued deliberations began when the trial court directed bailiffs to begin taking exhibits to the jury room. Counsel testified seating the alternate was the one way he knew to handle the situation, and asserted there was no indication the juror had acted inappropriately for any deliberation.

The Court finds no deficiency on the part of Counsel, nor prejudice therefrom. The record is clear that the jury was not instructed to begin deliberations until after the juror of concern was removed and replaced with an alternate. Contrary to Applicant's assertion, the logistical effort of moving exhibits to the jury room does not constitute an instruction to begin deliberations. There is no evidence to show the jury did anything contrary to the Court's instructions, and this Court presumes the jury follows all instructions provided. See State v. Young, 420 S.C. 608, 623, 803 S.E.2d 888, 896 (Ct.App. 2017); Richardson v. Marsh, 481 U.S. 200, 206 (1987) ("the almost invariable assumption of the law [is] that jurors follow their instructions"). Counsel properly exercised his judgment in seeking to have the juror replaced with an alternate. It is evident the jury was conscientious and thoroughly reviewed the evidence

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before them in light of their numerous questions, difficulty in reaching a verdict, and ultimate verdicts returned for lesser-included offenses. Accordingly, Applicant has failed to meet his burden as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED.**

11. Failure to Move for Mistrial – Hung Jury

Applicant alleges Counsel was ineffective for failing to object to the Allen[1] charge given to the jury during deliberations. "The trial judge has the duty to urge, but not coerce, a jury to reach a verdict." Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002) (citing Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002)). "An Allen charge cannot be directed to the minority voters on the jury panel, but must instead be even-handed, directing both the majority and the minority to consider the other's views." Id. "Whether an Allen charge is unconstitutionally coercive must be judged 'in its context and under all the circumstances.'" Id. (quoting Tucker v. Catoe, 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001)).

After considerable deliberations and numerous notes from the jury, the jury informed the Court that it was at an impasse, and asked: "Do we have any other recourse? Do you have any suggestions to help us get through this?" (Tr. 465-66). The Court indicated to the parties its intention to give an Allen charge, but warned if they came back a second time he would declare a mistrial. (Tr. 466, ll. 6-11). The Court gave an Allen charge and the jury returned to deliberations. (Tr. 466-68). The jury returned a verdict a few hours later. (Tr. 469, l. 12).

Applicant posed Counsel should have pushed harder for a ruling that the jury was hung when instead it was given an Allen charge. Applicant speculatively argued that the charge encouraged holdout juror(s) to just find him guilty. Counsel found no issues with the charge.

[1] Allen v. U.S., 164 U.S. 492 (1896).

The Court finds no deficiency on the part of Counsel, nor prejudice therefrom. Applicant does not take issue with any substance within the Allen charge, but the giving of any charge at all. Applicant's position is without foundation—the Court was obliged to give the charge in the circumstances and Counsel had no basis to seek a mistrial at that time. Accordingly, Applicant has failed to meet his burden as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED**.

12. Failure to Suppress Pre-Miranda Statement

Applicant alleges Counsel was ineffective for failing to challenge and suppress statements he made without being notified of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). Under Miranda, a suspect in custody must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. State v. Hoyle, 397 S.C. 622, 725 S.E.2d 720 (Ct.App. 2012) (quoting Miranda at 479). If an individual indicates in any manner at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease. Id. (quoting Miranda at 473-74).

Two statements were raised to the trial court in Jackson v. Denno[2] hearings prior to trial, both of which were found by the trial court to have been given freely and voluntarily in satisfaction of Denno. (Tr. 27-63). The State exhaustively used Applicant's statements against him during closing arguments.

At the evidentiary hearing, Applicant explained he was not read his Miranda rights when he turned himself in to the U.S. Marshalls, but only before his interview. Applicant noted the Marshalls turned him over to Patrick Cumby, of the Andrews Police Department, who was

[2] 378 U.S. 368 (1964).

related to Applicant and transported him back to the county. Applicant reported that during transport, Cumby asked Applicant a question and he answered. Applicant argued the statement was a pre-Miranda questioning that should have been excluded.

Counsel stated he did not believe Cumby ever asked Applicant any specific questions, and that Applicant's two damaging statements were made after he was Mirandized. Counsel noted Applicant was read Miranda before each statement; in one statement, spoke with law enforcement for about six minutes, then requested counsel and the interview was terminated.

The Court finds Applicant has failed to meet his burden of showing deficiency on the part of Counsel, or any prejudice therefrom. The Court cannot discern from the record any statements that were given prior to Miranda warnings as claimed by Applicant. Applicant was not specific as to which of many statements were supposedly provided to Cumbee. Rather, the record only indicates the exhaustive consideration of two recorded statements provided to law enforcement, and Counsel expressed his belief that there was no statements to Cumbee. There is no indication of Cumbee ever being referenced at trial. In the absence of evidence to the contrary, the Court finds Counsel's recollection credible and accurate. Accordingly, Applicant has failed to meet his burden of proving either prong of Strickland, and his request for relief by way of this allegation is **DENIED**.

B. Direct Appeal Issues – State Failed to Disprove Self-Defense; Unduly Harsh Sentence

Aside from his many allegations of ineffective assistance of counsel, Applicant raised allegations that the State failed to disprove his assertion of self-defense, and that the punishment was unduly harsh for voluntary manslaughter. These claims constitute allegations of trial court error not cognizable in a post-conviction relief action. An application for post-conviction relief does not serve as a substitute for direct appeal, and an issue that could have been raised at

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applicant's trial or on appeal is not cognizable in an application for PCR. S.C. Code Ann. § 17-27-20(b); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). Trial court error is not a cognizable claim for PCR. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Because these allegations could have been (or were) raised on appeal, Applicant's allegations that the State failed to disprove self-defense and that the sentence was unduly harsh are **DENIED** as not cognizable under the Uniform Post-Conviction Procedure Act.

[*Conclusion and signature on following page*]

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III. CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 5th **day of** September**, 2018.**

PAUL M. BURCH
Presiding Judge
Fifteenth Judicial Circuit

_____, South Carolina

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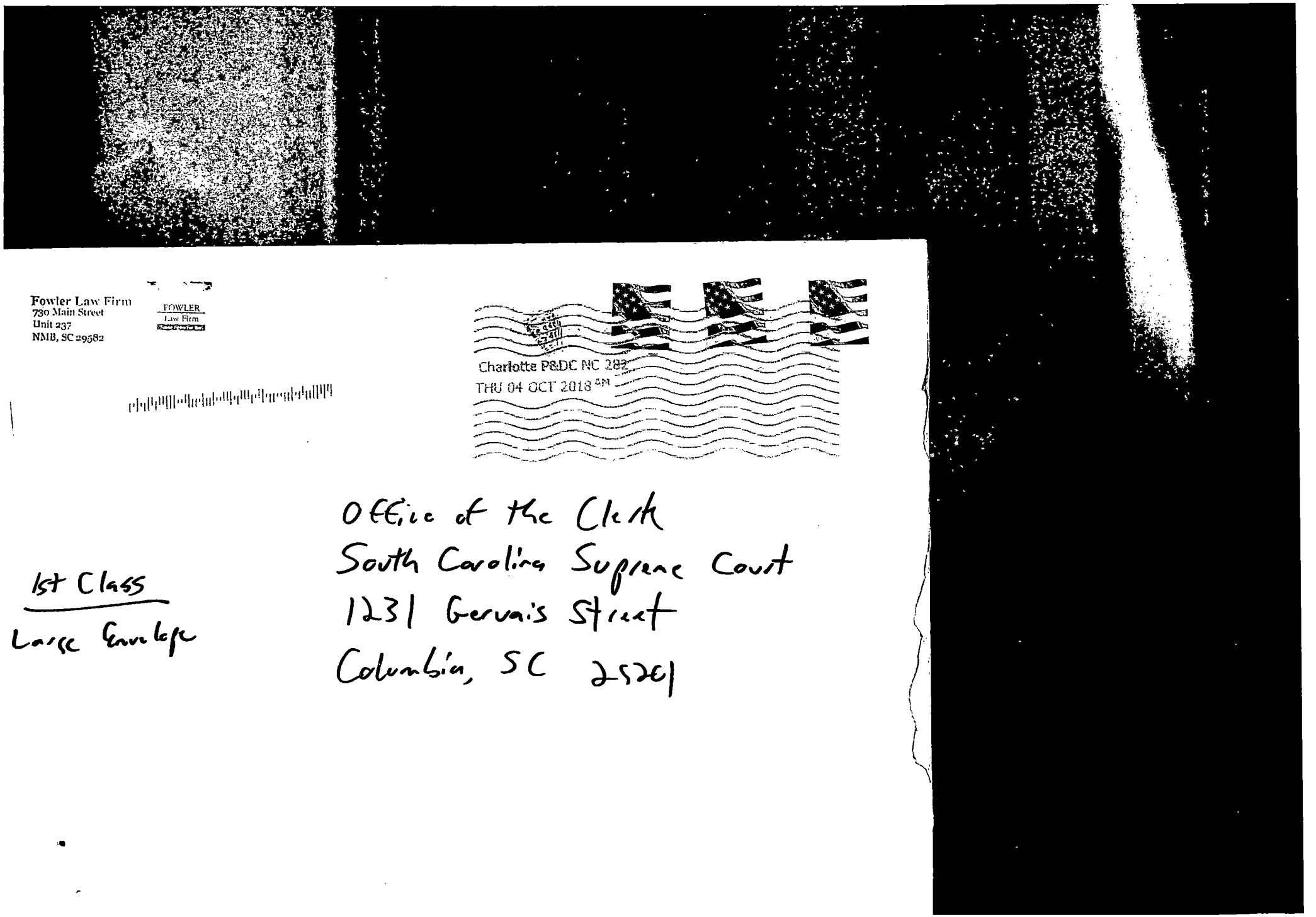

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