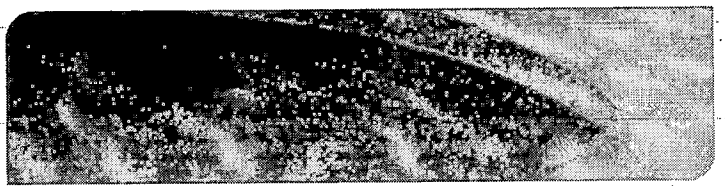

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March 7, 2019



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

RE: Domoneik Washington v. State of South Carolina, Case No.: 2015-CP-10-2257

Dear Mr. Shearhouse:

Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post Conviction Relief (PCR) case. Also enclosed are the following:

(1) Proof of service of the Notice of Appeal on the respondent;

(2) The Order of Dismissal &

(3) A Request for Representation on Appeal.

The Applicant-Appellant was represented by me as an indigent pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR cases. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

The Request for Representation on Appeal and the Affidavit in Support thereof are signed by me as attorney for Applicant-Appellant. If you need anything further, do not hesitate to contact me. Thank you for your time and attention to this matter.

Sincerely,

Rodney D. Davis
South Carolina Bar #: 12396
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(843) 882-5065
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CC: Donald Zelenka
Deputy Attorney General

Paula Murdoch
Appellate Division, SCCID

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

RECEIVED
MAR 12 2019
S.C. SUPREME COURT

Case No.: 2015-CP-10-2257

Domoneik Washington, Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Domoneik Washington appeals the denial of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable G. Thomas Cooper on December 6, 2018. Applicant's attorney received a copy of the Order of Dismissal on or about February 13, 2019.

3/6, 2019

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

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Case No.: 2015-CP-10-2257

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Domoneik Washington, Appellant,

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

---

Case No.: 2015-CP-10-2257

---

Domoneik Washington, Appellant,

v.

State of South Carolina, Respondent.

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PROOF OF SERVICE

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I certify that I have served the Notice of Appeal on the State by mailing a copy of it to the address of record, Benjamin Limbaugh, P.O. Box 11549, Columbia, South Carolina 29211-1549, on 3/6, 2019.

3/6, 2019

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Attorney for Respondent

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF CHARLESTON | ) | IN THE COURT OF COMMON PLEAS<br>NINTH JUDICIAL CIRCUIT |
| Domoneik Antwan Washington, #359194,<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | ) | 2015-CP-10-2257<br><br>**ORDER OF DISMISSAL** |



This matter comes before this Court Applicants *pro se* application for post-conviction relief filed on April 20, 2015. Respondent made a Return to the application on February 5, 2016. On December 6, 2016, the matter was heard before this Court. Applicant was present and represented by his court-appointed counsel Rodney D. Davis.[1] The Respondent was represented by Assistant Attorney General Alicia Olive. Testimony at the hearing was received from the Applicant and his trial counsel Assistant Public Defenders Lorelle Proctor and John Kozelski. At the conclusion of the hearing, the Court took the matter under advisement. This Court has also received the transcript of the Record on Appeal and proposed Orders from both sides. This Order dismissing the Application follows.

## PROCEDURAL HISTORY

Applicant, Domoneik Washington, #359194, is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of

[1] At the outset of the PCR hearing, it was brought to this Court's attention that Mr. Davis had handled Washington's preliminary hearing after the arrest in 2011, but did not continue to work on the case after that matter according to the records of the Public Defender's Office. Applicant asserted that he had no objection to Mr. Davis continuing to handle the post-conviction matter.

Court. Applicant was indicted at the November 2011 term of the Charleston County Grand Jury for three (3) counts of Attempted Murder (2011-GS-10-6881(victim Antwan Wilson), 6882 (victim Edward Wittrell, Jr.), 6883 (victim Ronald Bryant).Public Defenders Lorelle Proctor and John J. Kozelski represented him. Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted for attempted murder and lesser included offenses of assault and battery of a high and aggravated nature. The Honorable Deadra L. Jefferson sentenced Applicant to incarceration for twenty (20) years for all three convictions, each to run concurrently.

A notice Appeal was filed on Applicant's behalf and the Appeal perfected. In the Appeal, Applicant was represented by LaNelle DuRant. On March 14, 2014, appellate counsel filed an *Anders* brief and requested to be relieved asserting as the sole arguable ground the following:

> Did the trial court err in denying Appellant Washington's motion for a mistrial when one state's witness referred to the autopsy of Antwon Wilson, who was one of the victims of the attempted murder charge, and another state's witness referred to Wilson as the decedent after the state and defense had agreed to a stipulation that no mention would be made of the subsequent death of Wilson because there was no connection between the death of Wilson and Appellant Washington?

*Anders* Brief of Appellant

The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. *State v. Washington*, 2014-UP-434 (Filed on December 3, 2014). The Remittitur was issued on December 22, 2014.

**ALLEGATIONS**

In his April 20, 2015 *pro se* application, Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
   a. "Will explain at hearing;"
2. "Due Process 14th Amendment:"

a. "Will explain at hearing:"

3. "Denied of Six(sic) Amendment at Trial:"
   a. "Will explain at hearing."

During the PCR hearing, Applicant appeared to raise the following issues:

I. Ineffective Assistance of Counsel.

a. Applicant rejected an 18 year plea offer because he thought the shooting was in self-defense.

b. Applicant did not know his counsel's defense theory was that he was a shooter at a blue Lincoln rather than the gold Impala.
   i. Applicant asserts that he was shooting at the gold Impala, not the blue car (note – stipulation that no one from the gold Impala shot at Applicant at the Kangaroo on March 30, 2011.)
   ii. Applicant claims he learned of the "blue car" theory in the defense counsel's closing argument.
   iii. Applicant denied at the PCR hearing that he shot at the blue car.

c. Applicant asserts that the prosecution asked leading questions of witnesses without objection from counsel.
   i. Applicant asserts that leading questions were asked of Edward Wittrell at pages 197,199, 203.
   ii. Applicant asserts that leading questions were asked of Evette Robinson at pages 231, 235.

d. Counsel advised Applicant to not testify.
   i. Applicant claims he should have testified and asserted that someone in the gold Impala shot at him and Applicant shot back.
   ii. There was evidence from a 911 call that someone in the gold Impala was shooting and defense counsel knew about the call.
   iii. Applicant's prior record had been suppressed by the Court which did not preclude his testifying and counsel should have recognized this fact in their strategy on advising Applicant whether or not to testify.

e. Counsel was deficient in agreeing with the stipulation (even though it kept out the later shooting that resulted in a death.).

i. Counsel was aware that the gold Impala had gunshot residue, a gun, casings and DNA evidence.
ii. Counsel was deficient because the jury learned that a victim was dead.

Upon review of the Record on Appeal, including the trial transcript, *State v. Washington*, 2014-US-434 (Filed on December 3, 2014), and the PCR hearing transcript, this Court DENIES the application for post-conviction relief. The Court makes the following findings of fact and conclusions of law pursuant to S.C. Code §17-27-80.

**Trial Record**

Prior to trial, the State offered Applicant a plea deal for 18 years and concurrent sentences. Applicant stated, upon inquiry by the trial judge, he rejected the offer and confirmed he was not forced to reject the plea.

*Defense Counsel's Opening Statement*

In his opening statement, defense counsel Kozelski specifically asserted that Domoneik did shoot that night and that "he shot because somebody was shooting at him." He stated that when somebody shoots a gun at you "you have the absolute right to shoot back as long as you were not the first aggressor." He further stated the following without objection:

> . . . And I encourage all of you to pay very close attention to what is going on in that video and even at the end of this trial when you go back to your jury rooms you are going to be able to take that video back with you. And no matter how many times you watch it from different angles, on different speeds, it is not going to be able to tell you the events that led up to this night. It is not going to be able to reveal who shot the first shot. What it shows is chaos. And about midway through that chaos Domoneik can be seen running and shooting at a person he believes is shooting at him.
>
> This is natural law. Self-defense has always existed. And it will continue to exist to preserve the most fundamental aspect of our society, human life. Saving his life was why Domoneik shot. Saving his life is why Domoneik ran.

*The Trial*

On March 30, 2011, a famous rapper named Lil Phat was to perform at the Palm Tree Club on James Island in Charleston County. About 2:30 in the morning a fight broke out between some James Island people, which included Applicant and three people from downtown Charleston, the victims in this case: Antwan Wilson, Edward Wittrell, and Ronald Bryant.

The club closed after the fight, and a crowd gathered at the Kangaroo station nearby. The three "downtown" men pulled up in a gold Impala to get gas. Shots rang out from the adjacent car wash. Applicant then appeared and began arguing with the men in the gold Impala. He pulled a gun and fired shots that went into the Impala where Antwan Wilson, Edward Wittrell, and Ronald Bryant were seated. The only person hit was the driver, Antwan Wilson, who was shot in the leg. The gold Impala then left heading towards town. All of this was caught on the store's video. No testimony was presented that any shots came from the gold Impala. A later shooting on Folly Road led to Antwan Wilson's death.

Equette Robinson, the clerk at the Kangaroo station during the incident, testified at trial. She identified Applicant as the person who shot at the gold Impala on March 30, 2011. She had seen him come in the Kangaroo almost every Saturday for over a year, usually late at night after the clubs closed. She did not know his name. When Applicant came to the door of the station just

prior to the shooting, she was going to ask him to pay for a hot dog he had stolen the previous Saturday. He did not come into the store, but began arguing with the men in the gold Impala. She saw Applicant shoot into the Impala and at the people inside it.

Edward Wittrell, one of the men from Charleston, was a passenger in the gold Impala. He testified the men had been to the Palm Tree Club to celebrate his birthday. They were involved in the earlier fight at the club. They left and went to the Kangaroo when the club closed. Wittrell admitted that he was intoxicated that night and did not remember much. He did remember Antwan Wilson getting shot at the Kangaroo station. He stated they left to go downtown to the hospital because Antwan was shot in the leg. According to Wittrell, neither he, Antwan, nor Ronald Bryant fired any shots while at the Kangaroo station.

In an *in camera* hearing, Wittrell explained that as they were on the way to the hospital, traveling down Folly Road, someone started shooting at them from behind. Their car wrecked because Antwan, who was driving, was shot in the back of his head and died. Wittrell was shot in his shoulder, and Bryant was shot in his head but survived. A gun was found in the Impala but Wittrell did not remember anyone shooting from the Impala.

Defense counsel objected to any testimony concerning this subsequent chase and shooting as it was not relevant to whether Applicant shot at and allegedly attempted to murder the "downtown men". The defense also argued it was too prejudicial, even if the trial court found it relevant. The State conceded that there was no evidence Applicant was associated with either the subsequent shooting or the vehicle from which the later shooting came. However, the state argued, it was part of the *res gestae* and should be admitted because the jury needed to know Antwan Wilson was dead and that was the reason he was not present at trial. The State also wanted to show that the gun and shell casings found in the gold Impala were from the shooting during the chase,

not at the Kangaroo station, because Applicant was claiming self-defense from the incident at the Kangaroo. The men in the Impala had gunshot residue on them as well.[2]

Contrary to the version of Applicant at the PCR hearing, defense counsel argued that their theory was not that the gold Impala occupants shot at Applicant at the Kangaroo station, but other people were shooting at him, and he was shooting back in self-defense. At least twenty-seven shots were fired during this "shoot-out."

The trial judge asked the State and defense to work out a stipulation that both could agree to since the defense was not arguing the victims were shooting at Applicant.[3] The State agreed to

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[2] The underlying issue of self-defense was discussed throughout the trial as decisions were made on stipulations and argument as a result of the opening statement by the defense. During the discussions leading up to the stipulations about the subsequent event involving the gold Impala, Judge Jefferson noted that whether individuals shot a gun from the gold Impala was relevant based upon what the defense said in opening statement. At that point the prosecution was trying to argue that they wanted to offer testimony about the guns being fired in the subsequent car chase to rebut the potential claim of self-defense at the Kangaroo. Deputy Solicitor DuRant feared that the defense would claim that the fired weapon in the Impala with 5 empty shells, would be used to suggest it was done at the Kangaroo, when it was the state's contention that it was likely used in the car chase. However, Kozelski was asserting that they did not need the gun in the Impala. When asked by the trial judge what their contention of self-defense was, counsel Proctor noted that it was based upon the video where there were a lot of people shooting. The trial judge then inquired about the defense's willingness to enter into a stipulation so that there was "no confusion about your contention that Antwan, Ronald and Edward did not shoot guns at the Kangaroo and that you are not going to mention anything about gunshot residue on their hands or anything about a gun in their car with spent shells.

[3] The trial judge clarified her concerns about the limitations:

> THE COURT: You said one thing. Now you are saying something else. You know, I. - in terms of strategy and how y'all are going to try this case, I am not an advocate. My only job is to make sure there is a level playing field. And he is correct. I am not going to let you argue to this jury that only gunshots happened at this Kangaroo if they happened someplace else and there was alternate theories as to when those guns — that gun was shot.
>
> Because the State has the burden of disproving self-defense. You have no burden. And I am not going to hamstring them in presenting their case and then

say Antwan was killed in an unrelated incident. The State wanted to call the medical examiner to illicit testimony about into the bullet removed from Antwan's leg, but not the cause of Antwan's death.

The parties agreed on a stipulation which provided:

1. The parties agree that no one from the gold Impala shot at the defendant, Domoneik Washington, at the Kangaroo station in the early morning of March 30, 2011.

2. The parties agree that Antwan Wilson died from causes unrelated to being shot at the Kangaroo station and is not available to testify.

The agreement was also that:

> " ...there will be no mention by either party on direct or cross-examination or argument of any weapon found in the gold Impala after the crash or any positive gunshot residue tests performed on the occupants of the gold Impala."

Defense counsel Proctor stated she had explained the stipulation to Applicant and he agreed to the stipulation and agreement.

Witness Ervette Robinson testified he went to the Palm Tree club that evening where a fight broke out. He stated Shawn Walker drove him to the Kangaroo station. He stated he was

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> allow you to argue a completely opposite theory when the case is done and they can't present any testimony to refute self-defense.

Kozelski responded: "we are not arguing that the gold shot ...shot him."

> MR. KOZELSKI: When, we mentioned self-defense in our. opening you were saying that they — as an explanation for why Mr. Washington was shooting his gun in the first place, that people were shooting at him, he. was shooting in self-defense.
>
> THE COURT: So you are not going to say these people were shooting at him?
>
> MR. KOZELSKI : No, Your Honor.

sitting in the back seat and Zadie Truesdale was sitting in the front. He stated they pulled in first, but subsequently moved the car so it wouldn't be jammed in. Robinson stated that while there, he talked to the Applicant who was yelling. Robinson did not know who Applicant was talking to. He stated he was trying to talk some sense into Applicant to get him to "chill out". Robinson said he was not able to see who started the shooting because he had his back turned. He stated he heard people calling for Applicant by his nickname "Chip".

Witness Zadie Truesdale testified she went to the Palm Tree club with Ervette Robinson and Shawn. She testified she saw her best friend's son, Ronald Bryant, taken from the club. She recognized that he was with Antwan Wilson. She said she tried to get Bryant to come in the car with her because he was from downtown. She stated there was always a "beef" between the people from downtown and James Island. She said Bryant left with Wilson. She left with her girlfriends to go to the Kangaroo station. She said she was on the telephone with Ronald's mother to tell her to come get him because she couldn't get him to go with her. She testified "I knew something was going to happen." She stated she saw a gold Impala arrive. She also saw people from the "Westchester" area show up. These included Applicant (Chip), Javon, Ishmael Lemon and James Washington. She said she had known them for years, but did not associate with them. She said they parked at the car wash. After both groups got there, "they were just acting real rowdy." At some point, there was fighting. She said when Applicant realized the guys from the club were in the gold Impala, he started shouting "y'all mother fuckers looking for me or some[thing] in that nature." When Applicant confronted them, she went into the Kangaroo while on the phone with Bryant's mom. She stated she went in because she saw that Applicant had a gun. She told the clerk she needed to call the police because something was about to happen. When she came back outside they were still fighting. She saw Applicant walking toward the gold Impala. She said she

heard a shot fired in the air and saw that James Washington shot upwards from the car wash. When the shooting started, she said she "hauled ass." She testified she did not see anyone else with guns because she left when she heard the gunshots.

Witness Don Manigault testified he was at the Palm Tree club with friends. They drove in John (Poppa John) Pendergrass's blue Lincoln. He stated he went to the club with Laval Hazel, Poppa John, and Jim. He said fights broke out at the club and everyone left because the club closed. They went to the Kangaroo station. In viewing the surveillance video, he pointed out the location of the blue Lincoln he was in, and a gold Impala parked next to them. He stated he did not know the people in the gold Impala by name. He recalled there were no shots coming from the gold Impala. He stated after they drove off, they heard shots in the background. However, Manigault confirmed that "a guy in my car shot back." He stated that when they were about to leave, a guy in his car shot back, but he did not know where he was shooting because he was ducking and in the back seat. Manigault stated he did not see who shot first. He stated that Hazel fired the shot "way after the first shot went off."

Witness Laval Hazel testified that he had gone to the club in the blue Lincoln to see the rapper. He stated while he was at the Kangaroo, a gold Impala pulled up in front of them. He stated nobody from that car was causing any problems and he recalled seeing them at the club. He recalled seeing a person start arguing with the people in the Impala, but he didn't pay attention to what they were arguing about. He recalled one of them saying "y'all are going to pay or y'all going to play." At that point all of them started arguing. Then shots were fired from the carwash area. He stated that he did not see any of the shots come from the gold Impala. He denied seeing anyone shooting a gun that night, but asserted he heard 4 or 5 shots come from the carwash area. He stated they took off after they heard the gunshots.

On cross examination, Hazel confirmed that he was in the blue Lincoln that night. He stated that the next day he talked to the police after he met with a lawyer. He learned from Joe McKelvey that McKelvey told the detectives Hazel had been shooting at the scene and that a detective was looking for him. Hazel gave the police a four-page statement at that time. In the statement he did not include any information that he had been shooting a gun that night. In his testimony, Hazel denied that he shot a gun that night.

*In limine* the crime scene investigator, Kathy Kjellman, with the Sheriff's Department testified she located shell casings and projectiles at the Kangaroo station parking lot. The shell casings were either .380 shell casings manufactured by TulAmmo, Blazer 9 millimeter shell casings, or GFI .380 shell casings. The gold Impala was subsequently searched and 4 bullet holes were found consistent with the area where the video showed someone shooting at the car. Further a projectile was located in the floorboard of the Impala. An objection was made for lack of foundation describing where the shots came from. The investigator testified the bullet holes in the vehicle were entrance as opposed to exit holes near the driver's side door. The Court sustained the objection to the extent that the witness could not testify as to what direction she perceived the bullets came from after reviewing the video.

The stipulation, signed by Applicant, was introduced, but not published at that time.

Kjellman testified that she had examined vehicles previously that were shot with gunfire. She opined that that three bullet holes on the driver's side door of the gold Impala originated from outside the car. She said the front windshield was struck by a bullet from outside and that she recovered a projectile from the driver's side floorboard.

Kjellman, using a diagram, placed the casings she found in the locations on the diagram. She testified that TulAmmo .380 shell casings were located together in one area. The Blazer nine

millimeter casings were located in a different area. The GFI shells casing were located in other identified areas.

SLED firearm and tool mark examiner, Susan Cromer, testified that the shell cases from each group were fired from the same weapon within each group, and different weapons between the groups of casings.[4] She testified that the bullet found in Wilson's right thigh, the projectiles from the Kangaroo parking lot and the projectile from the floorboard of the Impala were all fired from one firearm. She opined it was a .38 caliber including possibly a 9 millimeter Luger, a .38 special, or .357 magnum. She further opined that based upon her review of the casings and other projectiles, there were at least four different weapons that night.

*The Stipulation for the Jury*

The state then proffered the stipulation to which the parties had agreed, to the jury. The stipulation was read which provided:

1. "The parties agree that no one from the gold Impala shot at the defendant, Domoneik Washington, at the Kangaroo in the early morning of March 30, 2011.

2. The parties agree that Antwan Wilson died from causes unrelated to being shot at the Kangaroo and is not available to testify."

*Waiver of Right to Testify and Testimony*

The Applicant waived his right to testify after inquiry by the trial judge. No evidence was presented by the defense.

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[4] During the testimony of Suzanne Cromer, the SLED expert in fire arms' identification, she referred to the bullet removed from Antwan Wilson during his autopsy. Defense counsel objected at a bench conference because the use of the word "autopsy" by the witness was outside their agreement and should be in the stipulation. Defense counsel said it was out of the bag, and she moved for a mistrial. The judge denied the motion but offered to give a curative instruction which defense counsel rejected.

*Charge Conference about Self-Defense*

During a charge conference, Judge Jefferson inquired whether Applicant was planning to assert any defenses because she had not heard any testimony about self-defense. No argument was raised by counsel about the need for a self-defense instruction.

A motion for directed verdict by the defense was denied. The trial judge then explained the instructions she was giving (which did not include self-defense). Defense counsel did not have any further objections or requests concerning the charge.

*Closing Arguments*

At the outset of his argument, Deputy Solicitor DuRant argued Applicant did not act in self-defense:

> Defense counsel tells you that Mr. Washington was there and he was acting in self-defense. You have now heard two days of testimony in this case. And what you have not heard is one shred of evidence indicating that this defendant was acting in self-defense. Not one shred.
>
> They have now entered into a stipulation which will go back to you in the jury room where they have agreed that no one from the gold Impala shot at the defendant, Domoneik Washington, at the Kangaroo that night. That matter has been decided. It is not an issue for you. Nor is self-defense an issue for you in this case. It is out of the case. Forget about it. It is time to move on. So what you need to decide next is whether or not this man, Domoneik Washington, was the one shooting the rounds into that gold Impala. And all the evidence points to the fact that he was.

The Solicitor's closing argument, through the use of the surveillance video, revealed that no one from the gold Impala shot at Applicant.

The argument by defense counsel Proctor sought to create a different version of the events based upon the viewing of the video. She contended that the State was asking the jury to make assumptions based upon seeing Applicant shoot into the gold Impala. She noted that Manigault and Hazel were in the blue Lincoln and that Manigault had stated that Hazel was shooting a gun.



CR 4,13

[ - "a guy in my car shot back. . . a guy in my car did a couple shots back at them too"]. She pointed out that Hazel denied shooting in his testimony but the shell casings found indicated otherwise. She asserted the first thing he did was hire a lawyer before talking with the police. Proctor argued the blue car shooting was at the Kangaroo station.

Counsel then stated:

> "And who were they shooting at? They were shooting at Domoneik Washington. Domoneik- Washington shot back at them because they were shooting at him. And the State has just assumed. When Mr. Kozelski gave his opening argument he said he shot in self-defense. So the State just again they assumed he must be talking about the gold Impala. But he wasn't. He is talking about the blue car that was shooting."

Proctor then played the video and asserted that Applicant enters the picture as the blue Lincoln was leaving. She further asserts that the video revealed that the Applicant's arm is up and he is not shooting down at the Impala's door. Proctor claimed Applicant was shooting at the blue car that was shooting at him and that there is evidence in the record that someone in the blue car was shooting. Counsel stated that the video reveals who was shooting. Laval Hazel and James Washington also had guns. Counsel claimed that the only reason Applicant was in court' rather than the others, is because he was the only one on the video.

Counsel concluded her argument stressing that Applicant was shooting at the blue Lincoln, not the gold Impala.

Applicant was convicted of two counts of attempted murder and one count assault and battery of a high and aggravated nature. A motion for new trial was denied.

**POST-CONVICTION RELIEF TESTIMONY**

**Applicant**

Domoneik Washington testified he was represented at trial by Lorelle Proctor and John Kozelski of the Charleston County Public Defender's Office. He stated that after his conviction he was sentenced to 20 years. He stated that prior to trial he had been offered an 18 year sentence if he pled to all three charges. Although his attorney advice was to take the offer, Washington stated he rejected it because "I just didn't felt guilty or whatever and I wasn't going to plead to 18 years."

Applicant stated that counsel's advice about the success at trial was "50/50." However, he said his attorneys really did not say whether they would win or lose, but just that he needed to take the plea offer. Applicant stated that counsel Proctor met with him often. When they were getting close to trial, Proctor advised him it was not a good idea to go to trial and to take the plea offer. Applicant confirmed that he was provided a copy of the Rule 5 discovery material. He stated this material was reviewed with him by counsel. Applicant stated that counsel advised him of the potential punishment he was facing for attempted murder was 30 years. Applicant did not recall discussions about whether his charges could be run consecutive. He stated that he was aware the offenses carried sentences that required 85% service.

Applicant estimated that he met with counsel around 6 or 8 times. Although he had not been through a jury trial before, Applicant indicated that counsel had discussions with him about the process of a trial. He stated counsel discussed what defenses were available including self-defense. Applicant stated he suggested self-defense and not the attorneys. Applicant acknowledged there were stumbling blocks with this defense, but they got over it and agreed to self-defense. He testified there were several discussions about self-defense and how it would be presented at trial. Applicant stated counsel had not fully explained how they were going to argue self-defense, "besides the trial strategy." He claimed that he knew the theory of self-defense, but not the details.

*Waiver of Right to Testify*

Applicant testified he told the judge that he was waiving the right to testify. He stated that counsel Proctor told him that it was not a good idea to testify because he would be examined by Solicitor DuRant. Applicant stated he did not know why counsel thought it would be a bad idea. However, after the discussions, Applicant admitted that he knew that he could have testified and ultimately told Judge Jefferson that he was not going to testify.

*Self-Defense*

Applicant claimed if he had testified the jury would have understood what happened that night.

Applicant stated he would have told the jury he had acted in self-defense after "some guys in a gold Impala, they started shooting at random people and I shot back in self-defense." He acknowledged that this would have been his testimony even though no trial witnesses said they observed any shooting coming from the Impala. He claimed that if he had "that witness" (who made a 911 call), the result would have been different. He confirmed that he spoke with counsel Proctor about the 911 call. However, he testified that counsel Proctor stated that the 911 call was irrelevant because the State could say the murder happened down Folly Road.

*The Stipulation*

Applicant stated that his counsel and the solicitor entered into a stipulation about evidence from the gold Impala. He said counsel Kozelski insisted to Applicant that if a jury saw a dead body, the jury would automatically find him guilty. He stated solicitor DuRant wanted to keep out evidence about the GSR and gun found in the gold Impala and his attorneys wanted to keep out

what happened down Folly Road. Applicant claimed he had no issue with the State talking about the later shooting and Antwan Wilson being dead and advised his attorneys of that position.

Applicant opined the information the defense attorneys gave up by the stipulation was the GSR, the gun found in the gold Impala, the five spent shell casings in the car, the positive DNA and GSR on the victim's hands. He felt that these would have given him a basis for a self-defense claim.

In hindsight, Applicant claims he wished that he would have testified in his defense. He stated that he did not because his lawyers felt he would be asked a lot of questions about other things. He had a prior record for two marijuana possession convictions. However, Judge Jefferson had already excluded those if he had testified.

**Defense Counsel Lorelle Proctor**

Counsel Proctor testified she had been an attorney with the Public Defender for around 33 years. She stated that after she received the file from Mr. Davis, it became clear this was not going to resolve itself as a guilty plea. She confirmed that there were discussions about self-defense and Applicant intended for his counsel to defend the case as a self-defense case. She confirmed that the majority of witnesses did not see where the shots came from and did not see shots coming from the gold Impala. She stated the biggest problem for the defense was the video. She confirmed there was more than one witness asserting that Applicant was there and shooting into the gold Impala. Proctor did not remember if she advised Applicant to not testify. She was sure that if he said he wanted to testify, she would have agreed to it. She was sure she would have gone over the pros and cons with him if he happened to testify, "but that's always their decision."

She stated that she had tried prior cases with Deputy Solicitor DuRant . She confirmed that his cross-examination tactics would have been a concern. She confirmed that given the complexity of the case, there was a concern that Applicant's testimony would open the door to otherwise inadmissible testimony. Counsel opined that she met many of times with the Applicant. She recalled reserving a room at the jail where they watched the video and reviewed many pictures. She recalled specifically discussing self-defense with Applicant and that no other defenses were available because of the video. She felt the video was state's biggest piece of evidence because the Applicant was on the video. She testified that they discussed with Applicant that the defense had to be consistent with the video.

Counsel Proctor confirmed the theory at trial was that Applicant was being shot at by the people in the blue Lincoln. She again stated that the reason for the stipulation was to keep from the jury the fact that the victim died shortly after the Applicant was alleged to have shot him. It was resolved by the stipulation.

Counsel again confirmed she discussed the Applicant's right to testify and but left the decision up to Applicant. Counsel stated that Applicant knew that if he testified, he opened the door to matters outside the stipulation. She was sure that the Applicant and counsel came to the conclusion that Applicant would not testify. She said that if they thought it was going to help the case, they would have had him testify.

**Defense Counsel John Kozelski**

Counsel Kozelski testified that he was second chair in the case. He stated that he briefed the issue to limit the crime scene to the Kangaroo station and exclude the car chase and shoot out that followed. He believed this information was highly prejudicial to his client.

Counsel stated that on the video, it was hard for him to see whether or not shots were coming from the gold Impala. Importantly, Kozelski opined that there were witnesses within the discovery that stated there were bullets coming from the blue Lincoln that was directly adjacent to the gold Impala. Further, counsel stated that there were no witnesses at trial who testified that any shots were fired from the gold Impala.

He vaguely recalled discussing the Applicant's right to testify, but could not recall if he advised him to testify or not. He thinks that if they were aware the judge was not going to charge self-defense, it would have affected their discussions. The theory rested upon the video and the fact that guns were being fired from multiple people and from multiple directions.

On cross-examination, Kozelski opined that DuRant thought Applicant was the person who killed Wilson but could not prove it. Kozelski expressed his fear that the dead body would make the jury think that Applicant may get away with murder and see the later shootout as an extension of the crime. Kozelski insisted the video showed shots were from the blue car. This matched up with the forensics and the path of the blue car. As Kozelski stated, "we tried to avoid the gold Impala at all costs."

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### *INEFFECTIVE ASSISTANCE OF COUNSEL*

In a post-conviction relief action, Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

"We begin, as we always begin, with the presumption that counsel was effective." Greiner v. Wells, 417 F.3d 305, 320 (2d Cir.2005). "Actions or omissions by counsel that 'might be considered sound trial strategy' do not constitute ineffective assistance." Strickland, 466 U.S. at 690).The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

Pertinent to this case is the issue concerning presenting inconsistent defense theories. The choice of defense theories is a tactical decision. Tactical decisions in aid of trial strategy are at the core of a lawyer's exercise of professional judgment. Only rarely will a court second-guess those choices and find that they constituted ineffective assistance of counsel. Strickland, supra, at 689, 104 S.Ct. at 2065. A lawyer is not required by the Sixth Amendment to present a single, coherent defense theory. Hendricks v. Calderon, 70 F.3d 1032, 1041 (9th Cir.1995), cert. denied, 517 U.S. 1111, 116 S.Ct. 1335, 134 L.Ed.2d 485 (1996). Counsel for a criminal defendant may, in the exercise of his or her professional judgment, present inconsistent defense theories without running

the risk that such tactics will later be deemed ineffective assistance of counsel. Brown v. Dixon, 891 F.2d 490, 495 (4th Cir.1989), cert. denied, 495 U.S. 953, 110 S.Ct. 2220, 109 L.Ed.2d 545 (1990); see also White v. Singletary, 972 F.2d 1218, 1221 (11th Cir.1992), cert. denied, 515 U.S. 1170, 115 S.Ct. 2636, 132 L.Ed.2d 875 (1995) (rejecting claim that trial counsel's decision not to present inconsistent defense theories constituted ineffective assistance of counsel); Jones v. Kemp, 678 F.2d 929, 931 (11th Cir.1982) (same), cert. denied, 459 U.S. 1113, 103 S.Ct. 745, 74 L.Ed.2d 965 (1983); Fritchie v. McCarthy, 664 F.2d 208, 214 (9th Cir.1981) (same).

**Claim of Self-Defense**

This Court must determine whether the Applicant is credible in his assertion that his defense was that he was shooting at the gold Impala after its occupants had fired at him. This Court must find that the theory of self-defense intended by defense counsel and Applicant was knowingly presented to the jury. Counsel's theory was that Applicant was shooting into the blue Lincoln after an occupant had fired shots. Contrary to the PCR testimony of Applicant, a review of the testimony and trial record supports this conclusion. The record only appears confusing because, at trial, the prosecution was anticipating the Applicant was going to claim he was firing in self-defense at the occupants of the gold Impala. All the other testimony was that the Kangaroo station video revealed no shots being fired from the gold Impala prior to the Applicant firing his weapon. After the verdict, Judge Jefferson acknowledged that "the video certainly doesn't show them shooting". During the state's closing argument, the video was replayed showing the position of the occupants of the gold Impala and that no one from the car shot.

This conclusion is supported by testimony from state witness Don Manigault who was in "Poppa John" Pendergrass's blue Lincoln. He testified that an occupant in the Lincoln shot from



Ex 21

the vehicle. Manigault confirmed that "a guy in my car shot back." Manigault stated that he did not see who shot the first shot but that Hazel fired a shot "way after the first shot went off," even though Hazel denied it in his testimony. Manigault recalled that there were no shots fired from the gold Impala.

The defense's intent to present the "blue car" theory is supported by counsel Kozelski's opening statement when he stresses to the jury to watch the video closely because they intended to show that Applicant shot, " because somebody was shooting at him." This is supported by the credible testimony of counsel Proctor and Kozelski. Contrary to Applicant's claim, the gold Impala defense claim, Proctor testified that she thought her client told her that he fired shots at the blue car, "because that's what's on the video." She did not recall whether Applicant had ever told her about shooting at the gold Impala in response to being fired upon. She admitted that the video of the shooting was the critical piece of evidence that they had to deal with at trial. She recalled specifically discussing self-defense with Applicant and that no other defenses were available because of the video. She confirmed that their theory at trial was that Applicant was being shot at by the people in the blue Lincoln. Kozelski testified that there were witnesses within the discovery that indicated there were bullets coming from the blue car. In addition he recalled there were no witnesses who testified that any shots were fired from the gold Impala.

Contrary to his presentation before this Court, Applicant acknowledged that the "blue car" self-defense theory was discussed before the trial when discussing strategy. Contrary to the Applicant's assertions, he also confirmed that Proctor's closing argument was not the first time that he had heard that theory.

This Court rejects Applicant's claim that he never told his counsel that he was firing at the blue car in self-defense. Further, the Applicant's assertion that the people in the gold

Impala started shooting at random people and "I shot back in self-defense" is what he intended to tell the jury if he testified at trial, is found not credible.

In his testimony before this Court, Applicant suggests that he was never aware that counsel was going to present the "blue car" defense theory until just before the trial. Counsel Proctor testified that there were discussions prior to trial and that they had met frequently. She asserted that the "blue car" matter came up at least when she reviewed the videos with Applicant if not before. Her testimony was that they met with Applicant in a room at the jail and went through the video a number of times. She stated that the defense was consistent with what was on the video. Kozelski confirmed that it was hard to say from the video that any shots were being fired from the gold Impala having watched it "over 500 times". Kozelski stated the defense that Applicant shot at the blue Lincoln was consistent with the video. He stated, "we tried to avoid the gold Impala at all costs." The theory rested upon the video and the fact that guns were being fired from multiple people and multiple directions.

Even if Applicant learned of the manner that his counsel were going to present the theory of self-defense related to the blue car just before the trial, that would not entitle him to relief. As noted above, there was a factual basis for the "blue car" defense and counsel was reasonable in presenting this defense at the trial. Although the defense's expectation was that the State would call more witnesses from the scene to corroborate that there was shooting from the blue Lincoln based upon the witness list, this does not suggest any deficiency on the part of defense counsel. A review of the record reveals the defense theory was consistently presented throughout the trial. Counsel believed there was a significant strategic advantage in having the last argument because of the prosecution's mistaken belief. The defense was never claiming that

shots came from the gold Impala. Thus, the defense lost nothing by the stipulation under their actual theory of the case.

Further, as counsel Proctor noted at sentencing,

> "...I think from the video you saw and through the number of shots being fired, he was not the instigator of this shooting. He did not start shooting first. And there had already been at least 12 to 13 shots before he fired his gun."

In conclusion, this Court finds that defense counsel did not present a defense theory contrary to the Applicant's wishes. He was informed and it was consistent with his expectation of the strategy that they were presenting at his trial.[5]

**Agreement Concerning the Stipulation**

Under Strickland v. Washington, the Court looks to standards for the handling of criminal defense cases. "Prevailing norms of practice as reflected in American Bar Association standards ... are guides to determining what is reasonable, but they are only guides." Strickland, 466 U.S. at 688.

*Standard 4- 5.2 Control and Direction of the Case.*

> (a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:
>
> (i) what pleas to enter;

[5]Applicant notes that the trial judge did not instruct on self-defense to suggest that there was no evidence. However, that determination was made before the "blue car" defense was revealed. The trial court and prosecution thought the self-defense was related to the gold car. Although it is correct that the instruction was not given, the Applicant's counsel was not precluded in his opening or his closing from presenting the argument that he was acting in self-defense based upon the evidence that was presented. Applicant is now claiming the evidence should have been different at trial, not that counsel should have revealed their "blue car" defense to the prosecution and received an instruction, or requested such an instruction, after the closing argument.



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(ii) whether to accept a plea agreement;

(iii) whether to waive jury trial;

(iv) whether to testify in his or her own behalf; and

(v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

(c) If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

ABA Standards for Criminal Justice, Defense Function, § 4–5.2 (2d ed.1980)).

The Applicant questions the decision to enter the stipulation that excluded evidence from the gold Impala involving the GSR of the occupants, a weapon, the shell casings and the fact of Wilson's death. This Court concludes that counsel was not deficient in seeking to exclude those matters in return for the exclusion of evidence of Wilson's death.. The defense prepared a memorandum to exclude this evidence prior to the trial - it was a strategic decision they acknowledged they had discussed in trying to keep Wilson's death a from being presented. This supported the strategic decision and maintained a consistent defense theory. The jury had the video of the Kangaroo station event which did not reveal any shots from the gold Impala. To have pursued alternative theories to the jury about the focus of Applicant's intentional shooting would

not be consistent in counsel's mind and less persuasive.[6] This strategic decision was reasonable and not deficient.

**Advice about Testifying**

This Court finds that counsel's advice about testifying was not deficient. The record shows the Applicant was questioned by Judge Jefferson about his right to testify after the court concluded that his prior convictions for possession of marijuana could not be used to impeach him. The Applicant affirmed under oath that he understood his rights including his right to testify, his right to not testify and that a jury instruction would be given that his failure to testify was not be considered and that the State has the burden of proof. He confirmed he had discussed this decision with his lawyers. He was told he would be given overnight to decide. The next day, Judge again inquired of the Applicant. Applicant advised the court that he had a full opportunity to discuss his right to testify with counsel overnight. He stated he did not wish to testify . The court then inquired of counsel Proctor whether Applicant understood her conversations with him about his right to testify. She indicated that he did and confirmed that his answer was correct. Counsel Proctor then confirmed that she did not feel that the Applicant had been coerced or forced not to testify. Judge Jefferson returned to the Applicant who responded that he had not been forced to testify or not testify and that he was making the decision freely and voluntarily of his own free will. Importantly the following occurred:

> THE COURT: Did they place any duress or try to discourage you from testifying?
>
> WASHINGTON: No, ma'am.

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[6] As noted above, this Court acknowledges that defense counsel is permitted to present inconsistent defensive theories in a trial. See Mathews v. United States, 485 U.S. 58, 64, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988)).

"Solemn declarations in open court carry a strong presumption of verity," forming a "formidable barrier in any subsequent collateral proceedings." Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). A criminal defendant has a fundamental constitutional right to testify on his own behalf at trial, a right that cannot be waived by defense counsel. United States v. Teague, 953 F.2d 1525, 1532 (11th Cir. 1992) (en banc). "A claim that a defendant's right to testify was violated by defense counsel is analyzed as a claim of ineffective assistance of counsel." Teague, 953 F.2d at 1534). "Defense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide....Counsel may advise the client in the strongest possible terms not to testify, but the choice whether to testify lies with the defendant....Counsel has the responsibility of ensuring that any waiver of the right to testify is knowing and voluntary." Id. (internal citations omitted).

As found previously by the Court, the Applicant was aware, at the time these questions were asked by Judge Jefferson, that the basis of self-defense that was being presented was a strategy that Applicant was shooting in response to shots from the blue car, not the gold Impala. He claims now that he wanted to testify concerning his PCR assertion that shots came from the gold Impala. However, it is clear that his statements to Judge Jefferson were much different about his desires testify. Applicant has failed to give this Court a cogent reason why he should not held to the truth of his statements before Judge Jefferson.

This Court finds that Applicant freely and voluntarily waived his right to testify about his own theory of self-defense. Because the record conclusively refutes Applicant's allegation that counsel deprived or coerced him of his right to testify, he cannot establish Strickland's first requirement that counsel's performance was deficient. Further, testimony from both trial counsel



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supports the conclusion that the decision to not testify was the Applicant's. However, counsel felt that if they thought it was going to help the case, they would have allowed him testify. Kozelski recalled discussing the Applicant's right to testify, but could not recall if he advised him to testify or not. See United States v. Nohara, 3 F.3d 1239, 1243-44 (9th Cir. 1993) (defendant's waiver of his right to testify foreclosed claim of ineffective assistance of counsel); *see also* Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000) (petitioner failed to prove deficient performance or prejudice from counsel's alleged pressure on him not to testify where, in part, "at no time during the trial did [petitioner] ever indicate that he wanted to testify or that he was prevented from doing so by counsel").[7] Petitioner therefore cannot now claim ineffective assistance of counsel because they did not call him as a witness. See McElvain v. Lewis, 283 F. Supp. 2d 1104, 1118 (C.D. Cal. 2003).

**The Strategy Failed to Secure a Self-Defense Instruction**

The Applicant argues that that the alleged failure to present Applicant's PCR assertion that he was shooting at the gold Impala in self-defense was error because it did not allow him

[7] It is disingenuous for Applicant to claim that counsel deprived him of his right to testify. As the trial transcript shows, Applicant declared under oath that he understood his right to testify, that he discussed the decision whether or not to testify with counsel, that it was his own decision not to testify, and that his decision in this regard was of his own free will. "Solemn declarations in open court carry a strong presumption of verity." Blackledge v. Allison, 431 U.S. 63, 74 (1977) "[I]f an accused desires to exercise [his] constitutional right to testify the accused must act affirmatively and express to the court [his] desire to do so at the appropriate time or a knowing and voluntary waiver of the right is deemed to have occurred." United States v. Kamerud, 326 F.3d 1008, 1017 (8th Cir.2003) (citation omitted). Further, he fails to demonstrate prejudice by showing a reasonable possibility that the results of the proceeding would have been different had he testified. See Fishbone v. Sec'y for Dep't. of Corrs., 165 Fed.Appx. 800, 801–02 (11th Cir.2006) (defendant not prejudiced by trial counsel's alleged ineffective assistance in failing to inform him he had the right to testify when, even in light of defendant's proposed testimony, there was no reasonable possibility that result of proceedings would have differed had defendant testified).

to secure a self-defense instruction. This assertion is rejected. As noted above, the defense strategy, agreed to by the Applicant, was that he was firing at the blue Lincoln in self-defense and hit the occupants of the gold Impala. This finding of fact precludes the basis for his argument that his version of the facts would have been supported by evidence based on the items found within the wrecked Impala and the GSR on its occupants. The problem with this argument is that it must re-write history and the strategic decisions that were made by counsel. The defense presented was different and Applicant fails to prove that at the time of the trial he would have testified.[8] As stated above, his sworn statements to the Court were that he did not want to testify and had not been discouraged from counsel about testifying. If Applicant, contrary to the earlier findings by this Court, testified he was firing at the blue car because its occupants were shooting at him, it could have supported a self-defense instruction. However, the Applicant knowingly and voluntarily waived that right to testify.

**Counsel Not Deficient in not Objecting to Leading Questions.**

In the PCR proceeding, Applicant contended counsel Proctor was deficient in failing to object to the leading questions from the prosecution. However, Applicant presented evidence that she did object to leading questions and that her objections were sustained. Applicant is making a conclusory assertion that there were other unspecified leading questions that counsel should have objected to. With respect to leading questions to which counsel would or should

[8] The Applicant also claimed in his PCR testimony that he had a witness to support his self-defense claim. He claimed that he had a 911 call saying "there was a guy, a gold Impala shooting at a guy with a white t-shirt on foot." He claimed that if he had that witness (who made the 911 call) the result would have been different. He confirmed that he spoke with counsel Proctor about the 911 call. Applicant testified that counsel Proctor stated that the 911 call was irrelevant because the State could say that happened down Folly Road. Evidence about any 911 call was not presented at trial or in the PCR proceeding. The strategic decision by counsel in not presenting that evidence must be determined to be reasonable.



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have objected, Applicant gives few cites. Even in hindsight, this Court cannot make for Applicant objections that may have been helpful at trial. See State v. Strodtman, 399 N.W.2d 610, 616 (Minn. Ct. App. 1987). This Court must conclude that the Applicant, has failed in his burden of proof of showing deficient performance or prejudice under Strickland. The Applicant fails to prove that counsel was deficient.

Whether to interrupt testimony by repeatedly objecting to leading questions is a strategic decision best left to counsel, one that the Court cannot second guess. However, even if the failure to object to leading questions satisfied the first prong of the Strickland test, which this Court does not find, Applicant is unable to show that the second prong of prejudice is satisfied. United States v. Gibson, 690 F.2d 697, 703–04 (9th Cir.1982) (failure to make evidentiary objections does not render assistance ineffective unless challenged errors can be shown to have prejudiced the defense.) Applicant did not show that the lack of objection to leading questions allowed testimony into trial that would not have otherwise been admitted, and, that because of that, there was a reasonable probability the testimony would have resulted in a different outcome. See Clark v. Collins, 19 F.3d 959, 966 (5th Cir.1994) ("Failure to raise meritless objections is not ineffective lawyering; it is the very opposite.").

Such speculation and conjectural allegations do not demonstrate that counsel's performance was not reasonable or affirmatively prove that Applicant was prejudiced. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693, 104 S.Ct. at 2067. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. at 2068.[9]

**Rejected Plea Offer**

The Applicant testified during the PCR hearing that he rejected a plea offer because he thought he acted in self-defense. This Court finds that any assertion of ineffective assistance about the offer has been abandoned. Although the attorney's advice was to take the offer, Applicant stated that he rejected it because "I just didn't felt guilty or whatever and I wasn't going to plead to 18 years." The record shows the state offered Applicant a plea deal for 18 years and concurrent sentences. The Applicant in open court stated, upon inquiry by the trial judge, that he rejected it and confirmed that he was not forced to reject the offer. These statements prior to trial carry a presumption of verity. This assertion is dismissed.

**CONCLUSION**

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

The Court notes that Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d

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[9] Even if this Court assumes, arguendo, that counsel's performance was deficient for not lodging an objection in unidentified instances, Applicant would still not entitled to relief because his claim fails under the prejudice prong of Strickland. This Court finds the Petitioner has simply failed to provide this Court with any evidence, aside from the blanket statement that the Petitioner was prejudiced, to show there is a reasonable probability that but for Counsel's failure to object to the cited leading questions, there is a reasonable probability that the Petitioner would have been acquitted.

395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on his behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED THAT:**

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

**AND IT IS SO ORDERED** this 8TH day of FEBRUARY

G. THOMAS COOPER, JR.
Presiding Circuit Court Judge

CHESTER, South Carolina

| | |
|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE SUPREME COURT OF SOUTH CAROLINA |
| ) | |
| COUNTY OF CHARLESTON ) | |
| ) | Case No.: 2015-CP-10-2257 |
| ) | |
| DOMONEIK WASHINGTON, ) | |
| Applicant. ) | |
| ) | |
| -versus- ) | REQUEST FOR REPRESENTATION ON APPEAL |
| ) | |
| STATE OF SOUTH CAROLINA, ) | |
| ) | |
| Respondent. ) | |

On behalf of the request of the above-named Applicant, to be represented by the South Carolina Commission of Indigent Defense, Appellate Division (SCCID), the undersigned attorney would show unto this Honorable Court that:

1. He is the attorney for the Applicant-Appellant in the above captioned case. The Applicant-Appellant was in custody during and taken into custody immediately following the Post Conviction Relief (PCR) hearing and was not available to personally sign this request;

2. The Applicant-Appellant was represented by the undersigned attorney as an indigent, pursuant to a contract with the SCCID;

3. The Applicant-Appellant has been informed that he may request assistance from the SCCID Appellate Division in perfecting his appeal;

4. A timely Notice of Intent to Appeal has been filed on the Applicant-Appellant's behalf;

5. The Applicant-Appellant has been informed that nothing requires SCCID Appellate Division to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

At this time, the Applicant-Appellant requests the aid of the SCCID Appellate Division in perfecting his appeal to the South Carolina Court of Appeals.

Respectfully Submitted,

Rodney D. Davis
South Carolina Bar #: 12396

3/6, 2019
Charleston, South Carolina.

STATE OF SOUTH CAROLINA )
)
COUNTY OF CHARLESTON )

**VERIFICATION**

PERSONALLY appeared before me, Rodney D. Davis, being first duly sworn, deposes and says that he has read the foregoing *Request for Representation on Appeal* on behalf of Domoneik Washington and the same is true of his knowledge except those matters alleged on information and belief, and as to those matters, he believes them to be true.

Rodney D. Davis
South Carolina Bar #: 12396

SWORN to and subscribed to me
this 6 day of March, 2019.

Notary Public for South Carolina
My Commission expires 7/28/21

FILED
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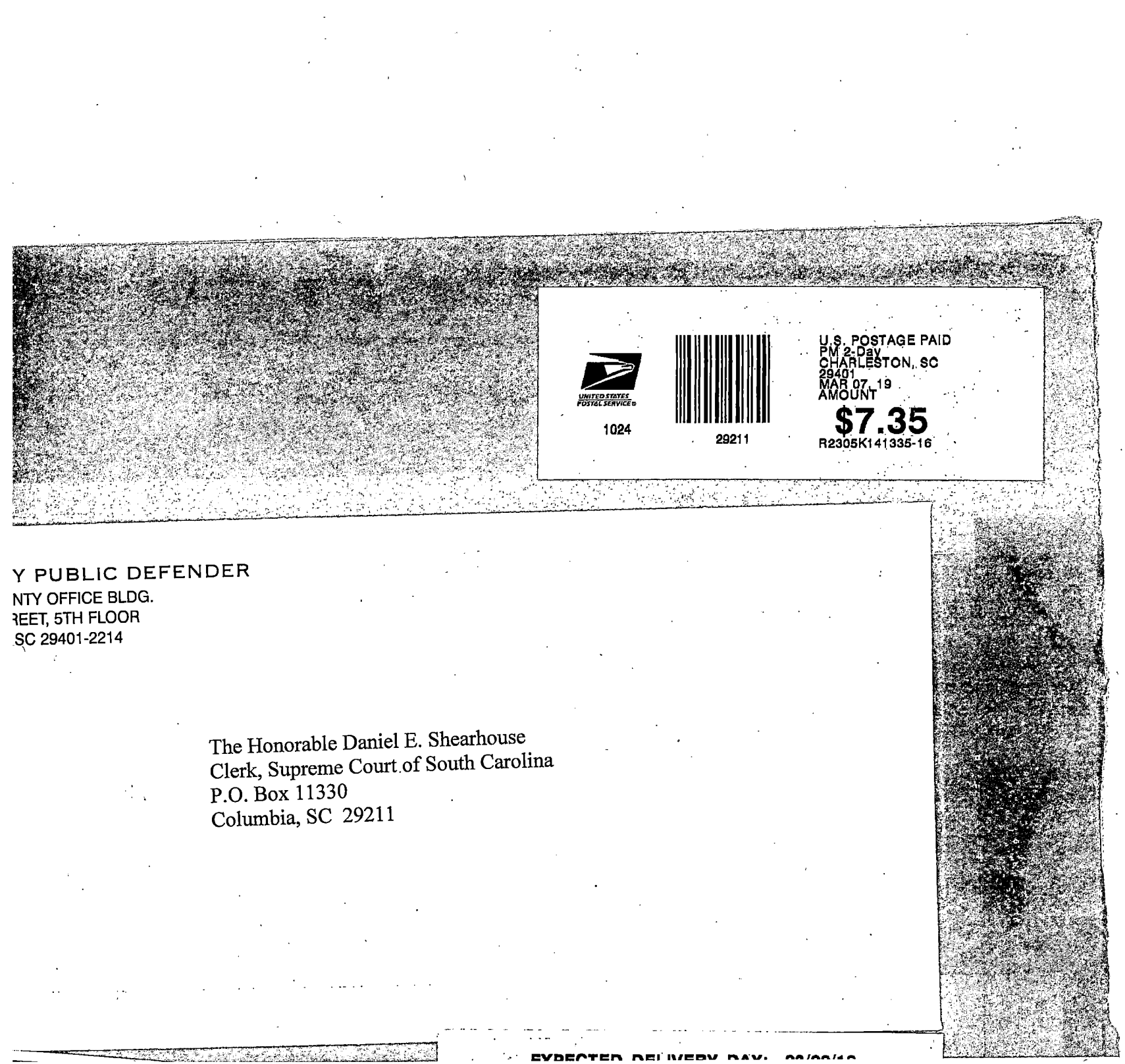
JULIE J. ARMSTRONG
CLERK OF COURT
BY



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The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
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