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March 15, 2019

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

Re: Derell Green v State, 2015-CP-10- 0375

Dear Clerk Shearouse:

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

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

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc:
Benjamin Limbaugh, Esq
Derell Green 348146
Charleston County Circuit Court Clerk

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Honorable G. Thomas Cooper, Circuit Judge

RECEIVED

MAR 20 2019

S.C. SUPREME COURT

Case No.: 2015-CP-10-0375

Derell Green 348146.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Derrell Green appeals the Honorable G. Thomas Coopers' February 15, 2019 Order of Dismissal. Undersigned counsel received notice of entry of the order on March 11, 2019. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

March 15, 2019

Benjamin Limbaugh, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

Clerk of Court- Charleston CP
100 Broad Street
Charleston, SC 29401

THE STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Benjamin Limbaugh Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549 and the Charleston County Clerk of Court. I further certify that all parties required by Rule to be served have been served this March 15, 2019.

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March 15, 2019

Charleston County Clerk
Common Pleas
100 Broad Street
Charleston, SC 29401

Re: Derell Green, 2015-CP-10-0375

Dear Madam Clerk

Please find the enclosed copy of a Notice of Appeal I filed in the above Post-Conviction Relief action.

Regards

James Falk

Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

CC
AG
RT
ES
SDL

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Derell Green, #348146, Applicant, v. State of South Carolina, Respondent.	Case No. 2015-CP-10-375 **ORDER OF DISMISSAL**

This matter comes before this Court by way of an application for post-conviction relief filed January 16, 2015, by Derell Green (Applicant). The State (Respondent) made its return on July 30, 2015, requesting an evidentiary hearing be held. Thereafter, through his counsel, Applicant filed an amendment to the application for post-conviction relief on February 24, 2018. An evidentiary hearing was convened on December 3, 2018, at the Charleston County Courthouse before the Honorable G. Thomas Cooper, Jr. Applicant was present at the hearing and represented by James K. Falk, Esquire. Respondent was represented by Assistant Attorney General Kelly Oppenheimer of the South Carolina Attorney General's Office.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations and denies this application with prejudice.

PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. On February 8, 2010, Applicant was charged in family court with murder (2010-JU-10-180), unlawful possession of a firearm (2010-JU-10-181), and possession of a weapon

during the commission of a violent crime (2010-JU-182). Assistant Public Defender Megan S. Ehrlich, of the Ninth Circuit Public Defender's Office, represented Applicant on these charges. On August 25-26, 2010, Applicant appeared before the Honorable Judy L. McMahon, family court judge, for a waiver hearing on the murder charge. After all testimony was presented and hearing arguments, Judge McMahon took the matter under advisement. Thereafter, on September 1, 2010, Judge McMahon found there was probable cause to believe Applicant had committed murder and it was in the best interest of Applicant and the protection of the community to transfer Applicant from family court to General Sessions. Applicant filed a motion to reconsider on September 10, 2010, and a hearing into the matter was convened on October 21, 2010, before Judge McMahon. Following argument, Judge McMahon denied the motion to reconsider the waiver.

Thereafter, during its December 2010 term, the Charleston County Grand Jury indicted Applicant for murder (2010-GS-10-08153). On August 22-25, 2011, Applicant proceeded to a jury trial before the Honorable J.C. Nicholson, Jr. Assistant Public Defender Ehrlich represented Applicant, and Chief Deputy Solicitor Bruce DuRant, of the Ninth Circuit Solicitor's Office, prosecuted the case. The jury convicted Applicant as indicted, and sentencing was deferred. On September 1, 2011, Judge Nicholson sentenced Applicant to a term of imprisonment of forty years. Subsequently, on September 9, 2011, Applicant submitted a motion to reconsider the sentence, which was denied.

Applicant filed a timely notice of appeal, and Chief Appellate Defender Robert M. Dudek and Appellate Defender Lara M. Caudy, both of the South Carolina Commission on Indigent Defender, Office of Appellate Defense, perfected an appeal on Applicant's behalf. On appeal, Applicant raised the following issue:

1. Whether the court erred by refusing to suppress [Applicant's] coerced inculpatory statement to the police since [Applicant] was a fourteen-years-old youth with Attention Deficit Hyperactivity Disorder who was in special education classes, and he was handcuffed to a chair for hours, and left handcuffed alone in a small room for at least an hour and a half where an investigator admitted [Applicant's] demeanor showed he was overwhelmed after the police did not believe his first statement?

Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence by unpublished opinion On October 1, 2014. *State v. Green*, Op. No. 2014-UP-345 (S.C. Ct. App. Filed October 1, 2014). The Remittitur was issued on October 17, 2014.

CURRENT APPLICATION

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

1. Ineffective Ass. of Counsel;
   a. Strickland vs. Washington.
2. 8th Amend. Violation; [and]
   a. Miller vs. Alabama.
3. Miranda Violation/Inculpatory.
   a. State vs. Navy Opinion No. 4143.

In his amendment to the application for post-conviction relief, Applicant raises the following additional ground for relief:

1. Respondent [sic] by counsel amends his PCR application to include the following claim of newly discovered evidence, to wit Rashawn Bradley recently advised Respondent's [sic] counsel that his testimony at trial was inaccurate. At [Applicant's] trial, Bradley testified that he made two statements to the North Charleston Police Department on February 12th. In his first statement Mr. Bradley said that he did not see the shooting. However, Mr. Bradley then gave a second statement in which he implicated [Applicant] in the shooting. (T.T. p. 441 l. 24 – p. 445 l. 5). On February 2, 2018 Rashawn Bradley advised [Applicant's] counsel that the first

> statement he gave to North Chalrestion Police department was accurate (the one in which he testified he did not see the shooting) and that he was coerced or persuaded to change his statement so that it implicated [Applicant].

At the hearing, Applicant proceeded forward on an allegation his trial counsel was ineffective for failing to present mitigation evidence of his depression during sentencing. Additionally, Applicant wholly abandoned the allegation raised in his amended application for post-conviction relief, as he failed to present the testimony or any sworn statement of Rashawn Bradley recanting his testimony at trial.

STATEMENT OF FACTS ADDUCED AT TRIAL

On February 5, 2010, Applicant shot the victim, Larry Maybank twice, killing him. One of the gunshot wounds was to the hip, and the other was not life threatening. Trial Tr. 718. The fatal shot went into the victim's body through his right back near the armpit area. Trial Tr. 718. The bullet went through his body, going through a rib in the back on the right, through the right lung and through a number of great vessels, further through the heart and trachea, continuing between the collar bone and first rib. Trial Tr. 718. The bullet stopped in the pectoralis muscle in the front of the chest. Trial Tr. 718. The victim died from that gunshot wound because he bled out. Trial Tr. 728.

Applicant and the Victim Attended the Same School

On the morning of the shooting, both Applicant and the victim attended the same school in North Charleston. Applicant was a regular student at the school, and the victim was at the school as part of a program for students who attended other schools in the school district. Trial Tr. 345-46. The students in the program did not interact with the general student body at the school; they were segregated during the school day. Trial Tr. 347. On February 5, 2010, both

the general student body and the students in the program were dismissed from school at approximately 12:30 p.m. Trial Tr. 348.

The Morning of the Shooting

Jacquintas Washington, another student in the same program as the victim at the school, was friends with the victim. Trial Tr. 368, 369. Jacquintas testified after school, he and the victim walked to the bus together because they rode the same bus. Trial Tr. 373.

Rashawn testified he ran into Applicant on the way to school that morning, and he walked with Applicant to school. Trial Tr. 425-26. Rashawn noted all students were required to go through metal detectors at the school. Trial Tr. 426. He did not know if Applicant went through the metal detectors that morning. Trial Tr. 426.

Antonio, another student at the school, testified he knew both Applicant and the victim. Trial Tr. 454-55. Antonio was friends with Applicant, who was a few years older than him. Trial Tr. 455. He also knew Daqone by his nickname. Trial Tr. 455-56. He knew Daqone did not go to the same school. Trial Tr. 456. Antonio did see Applicant on the morning of the shooting, and he saw him go through the metal detectors. Trial Tr. 458. Shalaine J., another student at the school, gave a statement to police in which she said Applicant had shown her a gun on the way to school that morning. State's Exhibit 43.

After School

Jacquintas testified he remembered passing a group of four people as they left school. Trial Tr. 373. One of those individuals was Applicant, but he didn't know the others. He knew them from seeing them at school. He also noted Applicant was wearing a camouflage jacket and khaki pants, and another in the group was wearing all black. Trial Tr. 374-75. Jacquintas also testified there was no interaction between the victim and the group of four. Trial Tr. 375-76.

Rashawn testified they got out of school sometime between 12 and 12:30 that afternoon. Trial Tr. 427. When he went outside, he saw Daqone, who was wearing all black clothing. Trial Tr. 427. Rashawn noted Applicant was wearing the same thing as Rashawn was wearing, except Applicant was also wearing a green jacket. Trial Tr. 428-29. Rashawn also noted Antonio showed up by the group. Trial Tr. 429. As all four were standing together, Rashawn saw the victim and someone else walk past them. Trial Tr. 429. He noted he did not hear anyone say anything to the two, and he saw no interaction between the two groups. Trial Tr. 429-31. Their group of four eventually started walking in the same direction as the victim and his friend. Trial Tr. 431.

Antonio indicated after school, he saw the victim and his friend walk by Antonio, Rashawn, Applicant, and Daqone. Trial Tr. 460. Antonio also stated he saw no interaction between his group and the victim.[1] Trial Tr. 460-61. According to Antonio, Applicant was wearing a camouflage jacket, and Daqone was wearing a black shirt and black pants. Trial Tr. 463-64. After the victim and his friend walked past the group, Antonio stated his group started walking in the same direction. Trial Tr. 467.

The Shooting

When the victim was shot, Jacquintas indicated he saw Applicant following them. Trial Tr. 377-78. He noted the three other guys were further back and were closer to the school. Trial Tr. 378-79. Jaquintas testified he knew Applicant was the one who shot the victim because when he turned around, he saw Applicant shooting at the victim. Trial Tr. 379-80, 402. He was not sure how many times Applicant shot the gun; he knew it was definitely more than once and it may have been three times. Trial Tr. 380.

[1] In his statement to Detective Kramitz, Antonio indicated there was some "mean mugging" between the two groups. Trial Tr. 466-67.

Rashawn testified he saw Daqone pass Applicant something, but he was not able to identify what was passed between the two. Trial Tr. 431. Rashawn asked Daqone what he brought, and Daqone said nothing. Trial Tr. 431. Rashawn stopped, and Daqone told Rashawn and Antonio to back up. Trial Tr. 432-33. The two backed up and headed back in the direction of the school. Trial Tr. 433. Rashawn testified he saw Applicant pull out the gun. Trial Tr. 433. Applicant shot once, and then Rashawn ran. Trial Tr. 433. Rashawn noted Applicant had fired the shot at the victim. Trial Tr. 433. He heard other shots. Trial Tr. 433.

Antonio noted Applicant and Daqone pulled away from the other two, and Antonio believed they were going to fight with the victim and his friend. Trial Tr. 467-69. Antonio testified while they were standing there, he heard gunshots. He saw Applicant pull out the gun and start shooting. Trial Tr. 469. Specifically, Applicant was shooting at the victim, who at that time was near the laundromat. Trial Tr. 470. In his statement to police, Antonio had indicated that Daqone gave Applicant the gun.[2] Trial Tr. 471.

After the Shooting

Afterwards, Jaquintas saw Applicant run to the opposite side of Bonds Avenue, and he saw him run cross the street. Trial Tr. 381. Jacquintas was also able to identify Applicant in a photo lineup, and he was able to describe to law enforcement where Applicant lived. Trial Tr. 389-92, 408-09.

Rashawn noted after the shooting, he ran back by the school, and then ran to his grandmother's house. Trial Tr. 433. Antonio also indicated he ran home after the shooting. Trial Tr. 472-73.

[2] Antonio later testified he believed Daqone was the one who gave Applicant the gun because he knew neither he nor Applicant nor Rashawn could have taken the gun to school. Trial Tr. 486. Antonio also stated he never actually saw the gun. Trial Tr. 486.

7

Vadrein Simmons, who was picking up her son from the school as it got out around 12:30, testified on the day of the shooting, she saw two guys walking ahead of another group of three. Trial Tr. 495-98. She indicated one guy ran in front of her car, and she almost hit him. Trial Tr. 498. She saw a gun in the guy's hand, and he was wearing a camouflage jacket. Trial Tr. 498, 499, 511, 512. Simmons testified she saw him shoot towards the bushes with the gun, but she did not see anyone else until she drove up the road. Trial Tr. 499. When she pulled up, she saw the victim laying on the ground. Trial Tr. 500.

Kaylyn Heyward, who was transporting a car to the school's parking lot around the time of the shooting, testified she saw two boys running as she was driving towards the school. Trial Tr. 520-22. One was heavy-set and was wearing a white shirt and khaki pants. The other was wearing a shirt, khaki pants, and a camouflage jacket. Trial Tr. 521, 523. She noted the one with the camouflage jacket ran in front of the car she was driving, and she saw he had a gun in his hand. Trial Tr. 521-22.

Discoveries Made during the Police Investigation

A SLED expert in firearms and tool mark identification determined the projectile that killed the victim was fired by either a .38 or .357 magnum firearm. Trial Tr. 706. He noted approximately eighteen different types of firearms could have fired the projectile, and all but one of those types were revolvers. Trial Tr. 708-09. No shell casings or projectiles were found at the scene. Trial Tr. 553-54. Law enforcement was also unable to recover the firearm or the camouflage jacket Applicant wore on the day of the shooting. Trial Tr. 613-14.

After the shooting, law enforcement learned Applicant's address. Detective Alan Kramitz and Sergeant Reynolds, another detective on the case, both responded to Applicant's home. Trial Tr. 572-73. Kramitz indicated two other detectives met them at Applicant's

address, and the North Charleston Police Department's high-risk warrant service team had also responded to that location. Trial Tr. 575. Initially, law enforcement got no response from anyone when they knocked on the door of the residence. Trial Tr. 575-76. Applicant's stepfather and mother eventually arrived at the residence, and they allowed Detective Kramitz and Detective Reynolds into the home. Trial Tr. 576. Applicant and Daqone were in the residence, sitting on a couch in front of a television in the living room. Trial Tr. 579. Kramitz testified he informed Applicant's stepfather Applicant was a suspect in a shooting, and they would be taking him into custody. Trial Tr. 576, 579.

Applicant gave two statements to law enforcement. In his first statement, which began around 3:55 p.m., Applicant denied any involvement in the shooting. Trial Tr. 596-600. He stated he did not have a gun that day, nor did he fire a gun that day. Trial Tr. 599. In his second statement, which began around 7:45 p.m., Applicant admitted his first statement was not truthful. Trial Tr. 608. In the statement, Applicant indicated he had been jumped by the victim and some others a few weeks prior to the shooting. Trial Tr. 608. Applicant saw the victim after school. Trial Tr. 609. He noted the victim had been mean mugging him. Trial Tr. 609. Applicant stated he went and got a gun, which he had hidden in an abandoned house near the school. Trial Tr. 610. He described the gun as being a .38 revolver. Trial Tr. 610, 611. Applicant told Detective Kramitz he walked up behind the victim and started shooting. Trial Tr. 610. He indicated he did not know how many times he fired the gun, but he thought it may have been four or five times. Trial Tr. 610. After the shooting, Applicant ran home. Trial Tr. 610. Applicant stated he threw the gun into a vacant lot as he ran. Trial Tr. 611.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant presented the testimony of Assistant Public

Defender Ehrlich (Counsel) and Dr. Donna Schwartz Maddox. Respondent presented the testimony of Chief Deputy Solicitor DuRant. This Court also had before it a copy of Applicant's trial transcript; a copy of the transcripts from all family court proceedings, including the waiver hearing; the records of the Charleston County Clerk of Court; Applicant's appellate records; the record on appeal; and Applicant's records from the South Carolina Department of Corrections.

First, Applicant presented the testimony of Dr. Maddox, who was qualified as an expert in forensic psychiatry without objection. Dr. Maddox testified she met with Applicant for a few hours and reviewed the trial transcript, the application for post-conviction relief, the discovery, the evaluations of Applicant from the Department of Juvenile Justice (DJJ), Applicant's records from the Medical University of South Carolina, Applicant's school records, Applicant's waiver evaluation, Dr. Halavonich's report, and Applicant's mental health records in preparation for this hearing. She explained in reviewing these materials, she looked for anything that was not considered at the time of Applicant's trial and also focused on issues prevalent in younger defendants. She also testified Applicant underwent extensive evaluations prior to his trial.

Dr. Maddox further testified at the time of this crime, Applicant lived with his mother and stepfather and his five siblings. She explained it was possible Applicant shared a room in that household with his three brothers, which would have been stressful. She further explained the family had not been referred to the Department of Social Services (DSS), as Applicant's home was a stable environment; but certain stressors present were sharing a bathroom and school. She also testified Applicant had some relationship with his biological father, who had been previously incarcerated. She explained when his father was out of prison, Applicant developed a relationship with him, but his father was sent back to prison shortly thereafter.

She also testified Applicant was in special education classes at the time of this crime and

also has a low average IQ. She further testified Applicant had previously been ordered to participate in the STAR program through DJJ due to prior disturbing school charges. She testified Applicant was kicked out of the STAR program because he was not motivated. She explained at the time although Applicant was described medication, his mother did not believe he was taking his medication.

Dr. Maddox diagnosed Applicant with attention deficit disorder (ADD), substance abuse disorder, behavioral disorder, and depression. She explained although there were clear indications of depression in Applicant's history, he had never been diagnosed with depression. She further explained after his evaluation at the Department of Mental Health (DMH), Applicant was diagnosed with ADD, a behavior problem—either opposition defiant disorder (ODD) or conduct disorder, and substance abuse disorder. She testified when she met with Applicant, he was not on medication for depression, and he did not show a lot of emotion. She further explained Applicant was prescribed medication for ADD, but that prescription caused side effects, so Applicant stopped taking the medication and began deteriorating. She testified, however, once Applicant was on the appropriate medication for ADD, he stabilized.

She testified ADD is manageable with medication and typically stimulants which slow motor behavior down are prescribed. Dr. Maddox testified Applicant's ADD is more treatable than others with the disease, and he was prescribed Concerta at the time of this crime. She further testified some people grow out of ADD and ODD. She explained about twenty percent of people diagnosed with ADHD exhibit symptoms of ADHD into adulthood. She also testified people with ADHD get into a lot more trouble with school; and if there is no diagnosis of ADHD, teachers usually believe the student is merely being oppositional. She testified someone diagnosed with ODD does not like rules and regulations and typically acts out verbally. She

further explained, however, conduct disorder is more serious than ODD, as an individual with conduct disorder can be aggressive and the diagnosis can progress into anti-social personality disorder in adulthood. She testified Applicant has not been diagnosed with anti-social personality disorder.

Dr. Maddox further testified at the age of fourteen, which was Applicant's age at the time of the crime, there is a lack of brain development. She explained fourteen-year-old males are in the second phase of brain development, and at that time adolescent brains are beginning to process things, which usually begins around the age of twelve or thirteen. She further explained the emotional parts of the brain develop first, so young adolescents are typically aggressive and hotheads. Dr. Maddox also testified the judgment portions of the brain are usually finished developing around the age of seventeen. She testified typical fourteen-year-old do not like their parents, want to hang out with their friends, and do no appreciate the consequences of their actions. Dr. Maddox also testified a fourteen-year-old knows that murder is wrong, but does not understand the full consequences. She further testified Applicant was not a typical functioning fourteen-year-old, however, because he brain was less developed due to his learning disability, depression, and ADD. She further explained the combination of these diagnoses and the lack of brain development made Applicant more impulsive and easily irritable.

She also testified Applicant's head injury was not explored at the time of his trial, and the defense expert at trial was unaware of the head injury. She testified Applicant has a scar on his head from when he was hit in the head with a board while working for his grandfather, and he was also hit by a car when he was on his bicycle. Dr. Maddox further testified she did not perform any neuropsychological testing, so it is difficult to tell what effects these injuries had on Applicant; but Applicant does report headaches. She explained Applicant's brain injury needs to

12

be considered.

She also testified Applicant appeared more passive and appeared to be a follower. She explained Applicant was easily suggestible and subject to bullying by his peers. She testified the victim had "ganged" Applicant and stolen his necklace prior to this shooting. She explained waiting a month to do something to the victim could have been part of Applicant's depression.

Dr. Maddox testified at sentencing, the court had all of the information concerning Applicant's learning disability, but did not have any information regarding depression. She explained the court had all of Applicant's prior evaluations and diagnoses at the time of sentencing, but did not have any information regarding Applicant's head injury nor his depression. She testified juveniles with depression typically get angry, are impulsive, and have an impaired capacity, all of which should have been presented as mitigating factors at sentencing. She explained Applicant's depression existed before he was sentenced, which constricted his affect. She further explained Applicant would not have shown a lot of emotion and his speech would have been flat. She further testified, however, depression does not cause someone to commit murder. She testified people with depression are more likely to harm themselves and commit suicide than they are to commit homicide. She testified there was nothing impulsive about Applicant following the victim down the street, nor shooting the victim twice. She explained these actions exhibited poor judgment.

She further testified the life expectancy for someone who is incarcerated is 21.8 years less than someone who is not incarcerated. She testified the average life expectancy of an individual in prison is fifty-five years.

Following Dr. Maddox's testimony, Applicant presented the testimony of Counsel. Counsel testified Applicant was fourteen at the time of the crime, so he was initially in family

court. She testified the State then wanted to waive Applicant up to General Sessions, so Applicant went through the evaluation process. She explained Applicant was initially evaluated by DJJ, but he had difficulty understanding the form, so DJJ was not comfortable moving forward. She further explained Applicant then underwent competency evaluations by DMH and the Department of Disabilities and Social Needs (DDSN), and he was found competent in both of those evaluations. She testified Applicant then underwent evaluations through DJJ and Counsel's defense experts, whom she hired, Dr. Halavonich and Dr. Holmstrom, who evaluated Applicant's IQ. She further testified Applicant had a low IQ, but the tests Dr. Holmstrom was using were outdated, which caused the scores to be lower, so she disregarded Dr. Holmstrom's tests. She further testified Dr. Halavonich testified in family court. Counsel testified after this process, Applicant was waived up to General Sessions.

Counsel testified none of Applicant's co-defendants were waived up to General Sessions. She explained Daqone, who provided the gun to Applicant, was charged as an accessory after the fact and not waived up. She further explained Rashawn, who was charged with accessory after the fact, was also not waived up. She further testified none of Applicant's co-defendants were adults, and Applicant was the only one with "adult charges."

She also testified at the time of trial, there was a lot of focus on Applicant's ADHD and anxiety issues. She testified there were signs of depression indicated, but no one ever diagnosed Applicant with depression at the time. She further testified she provided the court with a sentencing memorandum[3], arguing Applicant was, indeed, a child. She explained she attempted to bring to the court's attention brain development in juveniles and also attempted to reiterate to the court Applicant was sixteen years old at the time of the trial but only fourteen years old at the time of the shooting. She further explained the sentencing memorandum included Applicant's

[3] A copy of the sentencing memorandum was introduced at the hearing as Respondent's Exhibit #1.

background, his limited treatment, Dr. Halavonich's evaluation, the waiver evaluation, the fact adolescents are different than normal adults, and letters from Applicant's language arts teacher and guidance counselor. Counsel testified she submitted all of the information she had at the time to the court. She stated, however, she did not have any information regarding Applicant's depression and head injury. She testified in her motion to reconsider the sentence[4], she presented some additional information to the court. Counsel further testified Applicant's case was before *Aiken v. Byars*[5] and also before the life expectancy studies for inmates, which Dr. Maddox cited. She testified, however, Applicant was not subject to a mandatory life without the possibility of parole (LWOP) sentence, and Applicant was only sentenced to forty years.

She further testified she would have wanted Dr. Maddox to testify at sentencing. She explained there was a lot of focus on Applicant's anxiety issues, and he was afraid to testify. She explained Dr. Maddox's testimony at sentencing would have helped Applicant, particularly in light of the depression and head injury Dr. Maddox noted. She further testified in light of the head injury, she would have wanted to have had additional testing done on Applicant.

Counsel also testified Applicant went to the same school as Rashawn, and Applicant, Rashawn, Daqone, and Antonio all met up in front of the school on the day of the shooting. She further testified Rashawn initially told law enforcement he did not see the shooting but later gave a statement, which he did not sign, implicating Applicant. She explained the first statement was taken on February 12, 2010, and Rashawn indicated he did not see the shooting but heard the shots and ran away. She further explained Rashawn's second statement was given later that same day, and he stated he saw Daqone pass Applicant something and then saw Applicant shoot. She testified at trial, Rashawn testified Daqone told him to back off, and then he saw Applicant

[4] A copy of the motion to reconsider the sentence was introduced at the hearing as Respondent's Exhibit #2.
[5] 410 S.C. 534, 765 S.E.2d 572 (2014).

shoot the victim. She explained Rashawn's testimony was harmful to Applicant at trial. Counsel testified her investigator met with Rashawn, and he did not recant seeing Applicant shoot the gun at that time.

She also testified there were two other witnesses to the shooting, and each of them gave an initial statement but changed their stories later, indicating they saw the shooting. She explained both Antonio and Jacquintas identified Applicant and gave varying accounts of what they saw to law enforcement. She further explained a school administrator identified Applicant and indicated Applicant was wearing a camouflage jacket. Counsel also testified one witness gave a different description of the shooter, stating the shooter had dreadlocks, but also stated the shooter was wearing a camouflage jacket. She further testified she was able to bring out every witness's inconsistencies in their statements at trial.

Counsel also testified Applicant had a difficult time opening up to her, and she believed he was holding things back. She explained she did not know if Applicant's demeanor was due to fear, as his family was receiving threats at the time. She further explained Applicant was not difficult with her. She testified Applicant was both polite and soft spoken.

Applicant then rested his case, and Respondent presented the testimony of Chief Deputy Solicitor DuRant. Chief Deputy Solicitor DuRant testified he has been practicing law since 1981 and has been employed with the Ninth Circuit Solicitor's Office for twenty-seven years. He testified he primarily handles homicide cases.

He testified his theory of this case was it was a revenge killing. He explained the victim had robbed Applicant at some point prior to the shooting, and Applicant had shot the victim in order to get back at him. Chief Deputy Solicitor DuRant testified he had a good video, which showed the events leading up to the shooting. He further testified there were three eyewitnesses

to the shooting: (1) Jacquintas, who was friends with the victim; (2) Rashawn, who was friends with Applicant; and (3) Antonio, who was also friends with Applicant. He testified everyone knew Applicant's friends were not being truthful in their initial statements because of the video. He explained the video showed Applicant and his friends walking behind the victim and also showed Rashawn and Antonio watching the shooting. He also testified two other witnesses identified Applicant by his clothing, and a school administrator indicated Applicant was wearing a camouflage jacket. Chief Deputy Solicitor DuRant testified another witness gave a statement she had seen Applicant the morning of the shooting with a gun. He also testified this was not a mandatory LWOP case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Applicant's sole allegation is ineffective assistance of counsel for failing to present mitigation evidence of his depression and prior head injuries to the court during sentencing.

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the 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, 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 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

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

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

After careful review based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

Counsel's alleged failure to present mitigation evidence

Applicant alleges Counsel was ineffective for failing to present evidence of his depression and head injuries to the sentencing court in mitigation. Defense counsel is not required to investigate "every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins v. Smith*, 539 U.S. 510, 533

(2003). Furthermore, defense counsel is not required to present mitigating evidence at sentencing in every case. *Id.*

Here, Counsel had Applicant evaluated by numerous mental health professionals prior to trial, and she presented the court with those reports at sentencing. Indeed, Counsel submitted a thirty-page sentencing memorandum to the court at the time of sentencing, which included not only all of the evaluations but also letters and statements from people in Applicant's community who spoke to his good character. Additionally, ten days after sentencing Counsel submitted to the court a motion to reconsider the sentence and included additional information with that motion. In fact, Counsel submitted a considerable amount of information regarding Applicant's mental health, including his diagnoses of ADHD and ODD, to the trial court. Moreover, these evaluations did not find any history of any head injury to Applicant and further indicated Applicant was on medication to treat his ADHD. The evaluations further indicated Applicant could manage his anger. Accordingly, Counsel presented all of the information she had at the time to the trial court. Based on the foregoing, this Court finds Applicant has failed to establish Counsel was deficient.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. A trial court has broad discretion in imposing criminal sentences within the limits prescribed by law. *State v. Franklin*, 267 S.C. 240, 226 S.E.2d 896 (1976); *Clark v. State*, 259 S.C. 378, 192 S.E.2d 209 (1972). The courts normally have no discretion to correct a sentence given within statutory limits. To be entitled to relief, the applicant must prove the alleged excessive sentence was the result of partiality, prejudice, oppression or corrupt motive, or that the sentence constitutes cruel and unusual punishment per se. *Clark*, 259 S.C. 378, 192 S.E.2d 209; *State v. Cogdell*, 273 S.C. 563, 257 S.E.2d 748 (1979). Additionally, in *Miller v.*

Ex. 19

Alabama,[6] the United States Supreme Court established "an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered" when sentencing a juvenile defendant.[7] *Byars*, 410 S.C. at 543, 765 S.E.2d at 577.

At sentencing, the trial court took the time to review the thirty-page sentencing memorandum, which Counsel had introduced. *See* Sentencing Tr. 4-5. In that memorandum, Counsel particularly highlighted the fact Applicant was only fourteen years old at the time of the murder, and his learning disability and other mental health diagnoses made him more like a child than a typical juvenile criminal defendant. The court thoroughly reviewed the memorandum; and following its review, the court was particularly concerned Applicant had been kicked out of the STAR program because of threatening other participants in the program and then committing this murder shortly thereafter. Sentencing Tr. 14-15. Moreover, after taking not only Counsel's sentencing memorandum but also the victim impact letters into account, the court sentenced Applicant to a term of imprisonment of forty years. Sentencing Tr. 24-26.

[6] 567 U.S. 460 (2012).

[7] It is important to note the Supreme Court's holding in *Miller* applied to juveniles who were subject to a mandatory LWOP sentence. Here, Applicant was not subject to a mandatory LWOP sentence, but the trial court still took his juvenility into account when sentencing him.

CONCLUSION

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

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

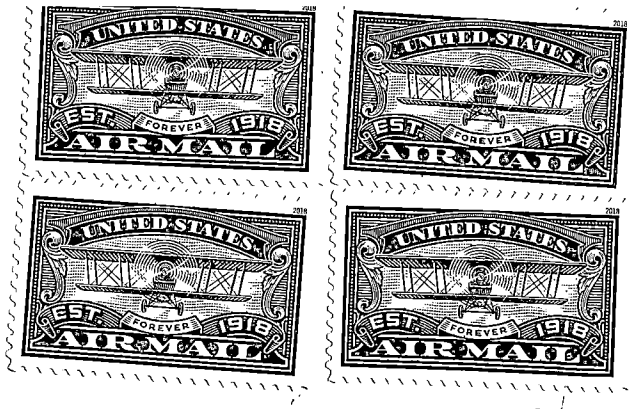
IT IS THEREFORE ORDERED:

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State

AND IT IS SO ORDERED this 15 day of February, 2018.

G. THOMAS COOPER, JR.
Presiding Judge
Ninth Judicial Circuit

Charleston, South Carolina



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