

March 29, 2019

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APR 02 2019

The Honorable Daniel E. Shearouse
P.O. Box 11330
Columbia, SC 29201

S.C. SUPREME COURT


RE: State of South Carolina v Larry Chestnut
Notice of Appeal
2016-CP-26-00652

Dear Honorable Shearouse:

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

- (1) Proof of Service of notice of appeal on the respondent.
- (2) A copy of the order(s) which are to be challenged on appeal.
- (3) This appeal is being filed with the Supreme Court

Sincerely,



Stephen D. Geoly
222 Phoenix Street
Greenwood, SC 29646
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2016-CP-26-00652

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APR 02 2019

S.C. SUPREME COURT

State of South Carolina,

Respondent,

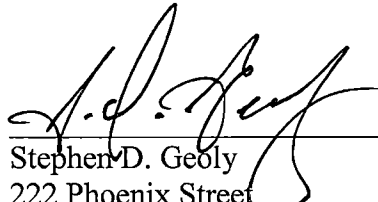
v.

Larry Chestnut,

Appellant.

NOTICE OF APPEAL

Larry Chestnut appeals the order denying his Application for Post-Conviction Relief by the Honorable Larry B. Hyman, Jr., dated July 17, 2018 and filed July 20, 2018 with the Horry County Clerk's Office. Appellant timely filed a Motion to Reconsider on August 10, 2018, which was denied by way of the Honorable Larry B. Hyman, Jr's order signed February 19, 2019 and filed February 25, 2019. Appellant received written notice of the entry of this order on March 5, 2019. Appellant respectfully, by and through his attorney of record, Stephen Geoly, gives Notice of his Appeal of this decision.


Stephen D. Geoly
222 Phoenix Street
Greenwood, SC 29646
864-223-3352
Attorney for Appellant

March , 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APR 02 2019

APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2016-CP-26-00652

State of South Carolina,

Respondent,

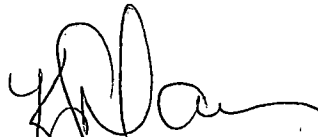
v.

Larry Chestnut,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on The Supreme Court by depositing a copy of said Notice of Appeal in the United States Mail, postage prepaid, on March 28, 2019, addressed to The State Carolina Supreme Court, Honorable Daniel Shearouse, P.O. Box 11330 Columbia, SC 29211-1549



Katrina S. Davis
Legal Assistant to Stephen D. Geoly
222 Phoenix Street
Greenwood, SC 29646
864-223-3352
Attorney for Appellant

March 29, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APR 02 2019

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2016-CP-26-00652

State of South Carolina,

Respondent,

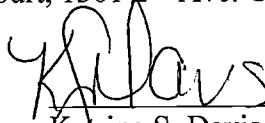
v.

Larry Chestnut,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Horry County Clerk of Court, by depositing a copy of said Notice of Appeal in the United States Mail, postage prepaid, on March 29, 2019, addressed to Horry County Clerk of Court, 1301 2nd Ave. Conway, SC 29526



Katrina S. Davis
Legal Assistant to Stephen D. Geoly
222 Phoenix Street
Greenwood, SC 29646.
864-223-3352
Attorney for Appellant

March 29, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APR 02 2019

APPEAL FROM Horry COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2016-CP-26-00652

State of South Carolina,

Respondent,

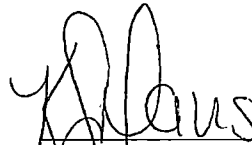
v.

Larry Chestnut,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Johnny E. James, by depositing a copy of said Notice of Appeal in the United States Mail, postage prepaid, on March 29, 2019, addressed to attorney of record Johnny E. James, Office of the Attorney General, P.O. Box 11549 Columbia, SC 29211



Katrina S. Davis
Legal Assistant to Stephen D. Geoly
222 Phoenix Street
Greenwood, SC 29646
864-223-3352
Attorney for Appellant

March 29, 2019

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	
Larry T. Chestnut,)	Case No.: 2016-CP-26-00652
S.C.D.C. No. 352116,)	
)	
Applicant,)	ORDER OF DISMISSAL
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	

Horry County
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 REBEH L. ELY'S
 CLERK OF COURT
 HORRY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed by Larry T. Chestnut (“Applicant”) on January 29, 2016. Respondent made its return on or about February 16, 2017. The Court convened an evidentiary hearing into the matter on Monday, May 21, 2018, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Stephen D. Geoly, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General’s Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant’s trial counsel, Ralph J. Wilson, Sr., Esq. (“Counsel”) also testified. The Court had before it Applicant’s records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant’s direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the July 2006 term of the Horry County Grand Jury for murder (2006-GS-26-02998). Ralph J. Wilson, Esq. represented Applicant, and Nancy Livesay, Esq., of the Fifteenth Circuit Solicitor’s Office,

prosecuted the case. On August 13, 2012, Applicant proceeded to trial before the Honorable Steven H. John and a jury. The jury found Applicant guilty of the lesser-included offense of voluntary manslaughter on August 17, 2012.¹ Judge John sentenced Applicant to imprisonment for a term of 20 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Jeremy A. Thompson, Esq. While pending in the Court of Appeals, the case was certified by the Supreme Court of South Carolina for review pursuant to Rule 204(b), SCACR. By memorandum opinion decided January 14, 2015, the Supreme Court affirmed Applicant's conviction and sentence. State v. Chestnut, Op. No. 2015-MO-002 (S.C. Sup. Ct. filed January 14, 2015). The Remittitur was issued on January 30, 2015.

Present Application

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

1. Ineffective assistance of counsel, due to:
 - a. "Counsel's failure to properly and adequately prepare for trial prior to the case being called for trial."
 - i. "While the case was pending for six years prior to the call or the case, the Applicant rarely met with and prepared for the trial with his attorney."
 - b. "Counsel's failure to strike a juror who he knew to be biased against the Applicant."
 - i. "Counsel sat a juror who he knew to have fired Applicant's father, and who he knew had knowledge of the matter at hand. Said juror had obvious prejudices against the Applicant, was not stricken, and eventually became foreman of the jury."
 - c. "Counsel's failure to file a speedy trial motion."
 - i. "A speedy trial motion was never filed during the six years this matter was pending."
 - d. "Counsel's failure to make a motion for severance."

¹ Applicant's co-defendant, Kendrick Chestnut, represented by Russell B. Long, Esq. was acquitted.

- i. "Despite the co-defendant making multiple statements against the Applicant's interest prior to trial, Counsel for the Applicant made no motion to [sever] the trial, and this failure continued to impact the trial of the case throughout the course of the proceedings. Eventually, the counsel for the Applicant admitted to the Court that this would be an issue for the Appellate Court or a PCR proceeding."
- e. "Counsel's failure to object to the Judge's instructions on the law."
 - i. "Typically in a murder case counsel is given an opportunity to review the proposed charge prior to the Judge giving instructions to the jury. Counsel failed to object to the improper mutual combat charge, so the matter was not preserved for Appellate counsel. Also, trial counsel failed to object to the misstatement of law that by using a deadly weapon in his own home while being attacked with a deadly weapon, the jury could presume malice. The Assistant Solicitor trying the case actually objected to the charge."
- f. "Counsel's failure to object to the Judge's correction of his misstatement of law and/or for failing to request the corrective charge include self-defense language in a timely manner."
 - i. "When the Judge made his corrected charge, trial counsel did not request that self-defense language be included in a timely [manner]. He eventually made a request after the jury had returned to deliberate, and the judge refused to bring them out again for the additional charge."
- g. "Counsel's failure to make a motion for mistrial when the Judge made a misstatement of law to the jury during his instructions."
 - i. "A bell cannot be unrung. Trial counsel should have made a motion for a mistrial when the Judge improperly instructed the jury."
- h. "Counsel's failure to object to a mutual combat charge being included in the Jury instructions"
 - i. "There was no evidence to support a mutual combat charge. Mutual combat effectively ruins a self defense claim."
- i. "Counsel's failure to present evidence on behalf of his client when he had just announced to the court that it was necessary to properly try his case."
 - i. "Trial counsel knew that [it] was imperative that he present a defense."
- j. "Counsel's failure to preserve the record adequately by presenting evidence to the court regarding the matter of last argument."

- i. "Trial counsel made no proffer of evidence. Soon after this case the court proposed a rule change regarding last argument in this state."
- k. "Counsel's failure to put the Applicant's interests above those of his co-defendant and in failing to properly advise the Applicant regarding his decision not to take the stand."
 - i. "Same as (j) above"
- l. "Counsel's failure to properly prepare and present a defense that the co-defendant was the individual that actually caused the injuries that resulted in the death of the victim for which the Applicant was on trial."
 - i. "Applicant did not cause the injuries to the victim in this matter that resulted in his death, the Applicant was seriously injured and remained in critical condition for weeks fighting for his life. Someone got a pair of scissor sand stabbed the victim to death in this case. It was physically impossible for the Applicant to accomplish this in his wounded state. The co-defendant or some other individual was the killer and trial counsel did nothing to present this defense on behalf of the Applicant."

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure

of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry at 117-18, 386 S.E.2d at 625 (citing Strickland at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel’s performance was deficient before examining

the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

1. Failure to Communicate, Prepare for Trial

Applicant alleges Counsel was ineffective in failing to adequately meet with him and prepare for trial. In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). “The brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation.” Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012) (citing Harris, 377 S.C. at 75, 659 S.E.2d at 145). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

The Myrtle Beach Police Department originally sought and obtained a warrant for Applicant’s arrest on May 22, 2006. Applicant was indicted two months later, but the case did not proceed to trial until August 13, 2012, more than six years later.

At the evidentiary hearing, Counsel confirmed he represented Applicant for several years, but did not see Applicant very often until trial drew near. Counsel noted his original retainer was paid by Christie Hucks, Applicant’s then-girlfriend and the victim’s sister, with an indication that

Applicant's family would bear future expenses. Counsel reported the family paid only a very small amount and speculated Applicant avoided him due to the outstanding bills. Counsel would tell Applicant's parents that Applicant needed to come meet with him. Applicant was out on bond pending trial. Counsel did not recall ever suggesting a motion for a speedy trial to Applicant. To the contrary, on cross-examination, Counsel expressed his opinion that a long wait for trial generally benefits defendants. Counsel noted there were multiple solicitors reassigned to prosecution of the case, and recalled his hope that the charges would eventually be dropped as the case weakened with age. Counsel explained he focused on self-defense based on Applicant's insistence and Applicant's firm belief that Christie would be cooperative with his defense. Counsel met with Christie and was able to get a short statement from her prior to trial, but it was not helpful. Counsel testified he met with doctors, subpoenaed medical records, spoke with Applicant's girlfriend, and reviewed all of the evidence produced pursuant to Rule 5 and Brady.²

Applicant testified he met Counsel two to three times between 2006 and 2012. During the meetings they discussed strategy. Applicant recalled he told police that he didn't kill the victim, and he recalled telling the same version of the facts to Counsel.

The Court finds no deficiency on the part of Counsel, nor prejudice therefrom. First, Applicant has failed to meet his burden of showing what, if anything, Counsel could have discovered or developed had he met more frequently with Applicant. Applicant's own testimony confirms that he communicated his version of facts to Counsel and that they discussed trial strategy prior to trial. The Court is left only with mere speculation as to what else could have been communicated had Applicant and Counsel spent more time in consultation. Second, where a defendant is out on bond, the impetus for meeting with defense counsel must fall largely on the

² Brady v. Maryland, 373 U.S. 83 (1963).

defendant; an attorney is not obliged to go hunting for his or her client when his or her client is free from custody. Nonetheless, Counsel credibly testified regarding his efforts to contact Applicant and have him visit during the long pendency in order to discuss the case. Third, Counsel's testimony clearly and credibly demonstrated familiarity with the facts of the case and that he was fully prepared for trial to the extent that any attorney could be. For all these reasons, Applicant's request for relief by way of this allegation is **DENIED**.

2. Failure to Strike Juror

Applicant alleges Counsel was ineffective for failing to strike a juror who was biased against Applicant and had pre-existing knowledge of the case. Jury selection is a process that inherently falls within the expertise and experience of trial counsel. Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999) (citations omitted). "The selection of a jury is inevitably a call upon experience and intuition. The *trial lawyer* must draw upon his own insights and empathetic abilities." Id. (quoting Romero v. Lynaugh, 884 F.2d 871, 878 (5th Cir. 1989)). "[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Id. (citing State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997)). Consequently, in order to prevail upon a claim that the trial attorney should have struck a juror, the applicant "must provide credible evidence that the trial attorney's refusal to strike a juror prejudiced the defense." Id. Further, "where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodston v. U.S., 564 F.2d 1071 (4th Cir. 1977)).

Larry Chestnut, Sr., Applicant's father, ("Senior") testified nobody talked to him during *voir dire*, but that he expressed to Counsel a concern about one of the jurors—namely that

foreperson James Spain had fired him from previous employment. Senior recalled Counsel replied he did not want to scratch a black juror.

Counsel testified he didn't know the juror in question. Counsel affirmed he asked Applicant if he wanted Mr. Spain on the jury and that Applicant must have expressed no concerns. Counsel noted he would have wanted a black juror. This Court interceded and inquired of Applicant's counsel whether there was any evidence to show the juror in question was biased or unfair. Applicant's counsel conceded there was nothing to show any problems in deliberation.

Applicant testified Spain knew of his situation. Applicant could not remember what was said about Mr. Spain during *voir dire*, only that Senior told Counsel there was a concern.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. First, Applicant provided no evidence to show that Counsel's failure to strike the juror prejudiced the defense, but only expressed a belief the juror was hostile. To the contrary, that the jury acquitted Applicant of the charge indicted and instead returned a verdict of guilt for the lesser-included offense of voluntary manslaughter reflects diligent and fair consideration of the facts of Applicant's case. Second, Applicant provided no evidence he asked Counsel to strike the juror and was refused; the only testimony was that Senior may have mentioned something about *Senior's* relationship with Spain to Counsel. Third, Counsel articulated a valid strategic reason for not exercising a strike against the juror insofar as he wished for a racially representative jury. For all these reasons, Applicant's request for relief by way of this allegation is **DENIED**.

3. Failure to File a Speedy Trial Motion

Applicant alleges Counsel was ineffective for failing to file a motion for a speedy trial. The relevant facts are set forth in Section II.A.1, above. Applicant articulated multiple valid strategic reasons to not seek a speedy trial motion, no evidence exists to show Applicant ever

asked for one, and Applicant was out on bond during the pendency of trial. This Court finds no deficiency on the part of Counsel, nor prejudice therefrom, and accordingly Applicant's demand for relief by way of this allegation is **DENIED**.

4. Failure to File a Motion for Severance

Applicant alleges Counsel was ineffective for failing to file a motion for severance of his case from that of co-defendant Kendrick Chestnut. "Criminal defendants who are jointly tried are not entitled to separate trials as a matter of right." Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001) (citing State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999)). "The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a co-defendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime." Id., 346 S.C. at 559, 552 S.E.2d at 317. "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt." Id. (emphasis removed). "A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial." Id. (citing State v. Holland, 261 S.C. 488, 494, 201 S.E.2d 118, 121 (1973)).

Counsel testified that there must be more than adverse co-defendants in order to prevail on a motion for severance. Counsel acknowledged prior statements by Kendrick to law enforcement gave rise to a Bruton³ issue, but that after an extensive Bruton hearing, the statements were redacted and excluded from trial. Counsel noted considerable time was spent redacting Kendrick's third statement to law enforcement.

³ Bruton v. U.S., 391 U.S. 123 (1968).

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. Counsel accurately deduced that, with the Bruton issue resolved by way of redaction, there was no basis for a motion for severance. Applicant has presented no basis upon which any such motion could have or should have been granted. To the contrary, Applicant's case is precisely the sort of adversarial joint trial contemplated by Hughes and Dennis. Additionally, the Court notes the trial judge properly gave a cautionary instruction that "[t]he case of each Defendant and the evidence and law concerning that Defendant must be considered separately and individually." (Tr. 888-89; quotation at 888, ll. 15-17). Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

5. Failure to Object to Erroneous Jury Instruction: Inference from Use of Deadly Weapon

Applicant alleges Counsel was ineffective in failing to object to the trial court's instruction to the jury that it may infer malice from the use of a deadly weapon. Where evidence is presented that would reduce, mitigate, excuse or justify a homicide [or attempted homicide] caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon. State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009). "Generally, a curative instruction is deemed to have cured any alleged error." State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) (quoting State v. Walker, 336 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005)).

At trial, the trial court instructed the jury on self-defense and charged them with not only murder, but the lesser-included offense of voluntary manslaughter. The trial court also instructed the jury on malice:

It can either be expressed or inferred. Obviously expressed can be shown when a person speaks words or when a person prepared beforehand to do something. It can be inferred by conduct showing a total disregard for human life. *Inferred malice can arise when the deed is done with a deadly weapon.* Now, a deadly

weapon is any kind of article, instrument, substance which is likely to cause death or great bodily harm. Whether or not something has been used as a deadly weapon depends on the facts and circumstances of each case.

(Tr. 879, ll. 4-13) (emphasis added). Immediately after completion of jury instructions, the State alerted the Court to its error and to the change in law brought about by Belcher. (Tr. 893-95). The Court corrected its error and instructed the jury that “[m]alice cannot be inferred by the use of a deadly weapon. That is not part of a murder charge, so disregard that. It is not part of this case. Disregard that completely.” (Tr. 895-96; quotation at 896, ll. 5-8). The jury acquitted Applicant of murder, but convicted him of voluntary manslaughter.

The Court finds no possible prejudice from the erroneous Belcher charge. First, the trial court clearly and unequivocally cured its error upon prompt correction from the prosecution. Second, Applicant was convicted of voluntary manslaughter, for which malice is not an element; any error in the malice instruction could not have contributed to the verdict. See, e.g. State v. Burdette, Op. No. 2017-UP-237 (S.C. Ct. App. filed June 7, 2017). Accordingly, Applicant’s request for relief by way of this allegation is **DENIED**.

6. Failure to Object to Cure, Timely Request Self-Defense Language

Applicant alleges Counsel was ineffective in failing to timely object and demand the Court re-charge the jury on self-defense as part of its cure of the erroneous Belcher charge. “Because a trial court’s curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient or move for a mistrial to preserve an issue for review.” White, 371 S.C. at 445, 639 S.E.2d at 163 (quoting State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 850 (Ct. App. 1999)).

After the trial court cured its error in its charge on malice, it inquired as to further objections or deletions on the malice charge, to which Counsel replied it had none. (Tr. 896, ll.

14-19). After an hour and forty minutes of deliberations, and upon request by the jury, the trial court re-charged the jury on the law of voluntary manslaughter, mere presence, and “hand of one, hand of all”. (Tr. 897-902). Once the jury again returned to deliberations, the trial court again inquired as to any exceptions, deletions, or additions to the charge, at which time Counsel requested the jury be re-charged on self-defense. (Tr. 902, ll. 11-21). Because the jury had not asked about self-defense, the trial court declined the request. (Tr. 902-03).

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. There is no indication of any confusion on the part of the jury as to the law regarding self-defense. As noted in Section II.A.6, above, the trial court properly cured its error in its malice charge—no further instruction was necessary. Additionally, the jury clearly did not rely on the erroneous malice charge as evidenced by their verdict for voluntary manslaughter, so any speculation as to what if any additional curative instructions could have been given is purely academic. As to the request raised after the jury’s requests for reinstruction, the Court finds Counsel raised his request in the appropriate form and at the appropriate time. For all of these reasons, Applicant’s request for relief by way of this allegation is **DENIED**.

7. Failure to Motion for Mistrial

Applicant alleges Counsel was ineffective in failing to move for a mistrial after the trial court’s erroneous malice instruction. “The decision to grant or deny a mistrial is within the sound discretion of the trial judge.” State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (2005). “The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes stated into the record by the trial judge.” Id., 365 S.C. at 34, 615 S.E.2d at 460. “The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed no other way.” Id. “A mistrial should only be granted when ‘absolutely

necessary,' and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." Id. (quoting State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000)). "To prove prejudice resulting from counsel's failure to move for a mistrial, an applicant must demonstrate that, had counsel moved for a mistrial, the trial court's denial of the motion would have amounted to an abuse of discretion." Early v. State, 418 S.C. 255, 266, 792 S.E.2d 226, 232 (2016).

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. The facts and legal reasoning relevant to the disposition of this allegation are largely the same as that set forth in Sections II.A.5 & 6, above—the Court cured its erroneous malice instruction and the jury demonstrably did not rely upon the instruction. As such, there was no adequate basis for Counsel to move for a mistrial and, even if there was, no conceivable prejudice. Applicant's assertion that "[a] bell cannot be unrung" is entirely without merit and runs contrary to well-settled caselaw—the overwhelming majority of bells can be judiciously muffled. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

8. Failure to Object to Erroneous Jury Instruction: Mutual Combat

Applicant alleges Counsel was ineffective in failing to object to the trial court's instructions to the jury on the doctrine of mutual combat. "The law to be charged to the jury is to be determined by the evidence at trial." State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 14 (2011) (citing State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989)). Voluntary manslaughter is the unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation. State v. Smith, 363 S.C. 111, 609 S.E.2d 528 (Ct. App. 2005). "Fighting is sufficient legal provocation to warrant giving a voluntary manslaughter charge." State v. Grubbs, 353 S.C. 374, 381-82, 577 S.E.2d 493, 497 (Ct. App. 2003) (citing State v. Davis, 278 S.C. 544, 546, 298 S.E.2d 778, 779 (1983)). "If the defendant is engaged in mutual

combat, self-defense is unavailable unless the defendant withdraws from the conflict before the killing occurs.” State v. Taylor, 356 S.C. 227, 232, 589 S.E.2d 1, 3 (2003) (citing by footnote State v. Graham, 260 S.C. 449, 450-51, 196 S.E.2d 495, 495-96 (1973)). The doctrine of mutual combat is applicable only where there is a pre-existing dispute, an antecedent agreement to fight, and where both parties are equally armed with deadly weapons. Id., 356 S.C. at 233, 589 S.E.2d at 4.

The facts elicited at trial altogether showed that the altercation between Applicant and Victim began after Applicant physically assaulted Christie Hucks, who was seven months pregnant at the time, and then assaulted another of Victim’s sisters, Cindy Evans, when she tried to assist Christie. Victim produced a knife and ordered Applicant to leave the women alone. Applicant then retreated to the kitchen, where he armed himself with a pair of scissors. Both men suffered severe injuries, with Applicant hospitalized for nearly a month and Victim killed.

In closing argument, Counsel emphasized that Applicant withdrew to the kitchen, was pursued by the armed Victim, and there had a right to arm himself and engage the physically intimidating Victim in self-defense. (Tr. 841-44). Counsel emphasized that Victim prevented Applicant from retreating out of the house and that Applicant had no choice but to fight. (Tr. 848-49). Counsel argued Applicant had no duty to retreat, but attempted to anyway, only for Victim to pursue him into the kitchen. (Tr. 849-50). Counsel again circled back around to his argument that even if the jury believed Applicant brought about the difficulty by attacking Christie, that “it was over and done with when he started to leave, when he started to walk out to leave to go get his daughter, and [Victim] confronts him with a knife.” (Tr. 853, ll. 1-3).

The trial court instructed the jury on mutual combat as part of its instruction on self-defense:

If the defendant voluntarily participated in mutual combat for the purposes other than protection, the killing of the victim would not be self-defense. This is true even if during the combat the defendant feared death or serious bodily injury. However, *if before the killing is committed the defendant withdraws and tried in good faith to avoid further conflict and either by word or act makes that fact known to the victim, he would be without fault in bringing on the difficulty.*

For mutual combat, there must be a mutual intent and willingness to fight. This intent may be shown by the acts and conduct of the parties and the circumstances surrounding the combat. In addition, it must be shown that both parties were armed with a deadly weapon.

(Tr. 884, ll. 11-25) (emphasis added). Counsel did not object to the charge.

At the evidentiary hearing, Counsel expressed his understanding that a mutual combat charge was possible and appropriate where the combatants were equally armed and equally willing to fight. Counsel noted the evidence showed Victim was armed with a knife and Applicant was armed with scissors. Counsel explained a person may withdraw from mutual combat. Counsel explained the entire strategy for self-defense was emphasizing that Applicant disengaged and the Victim followed despite disengagement. As such, the withdrawal element of the mutual combat charge was a helpful instruction to his theory of the case. Under intense redirect examination, Counsel firmly stood by his judgment that the charge was appropriate.

Applicant testified Victim was his best friend and that there had been no "bad blood" or prior agreement to fight. Though the fight only lasted a matter of minutes, the injuries resulted in Applicant's hospitalization for 25 to 26 days, including a week in intensive care, and the death of Victim.

The Court finds no prejudice from Counsel's representation for a variety of reasons. First, the Court finds Counsel articulated a valid strategic reason not to object to the mutual combat charge. Aside from some effort to disabuse the jury of the idea that Applicant injured Christie and Cindy, the crux of Applicant's defense was to argue that he retreated from the

difficulty such that he was restored to a position that he could justifiably and legally defend himself. Counsel's articulated judgment that the withdrawal portion of the mutual combat instruction was helpful, while precarious, is valid considering the totality of the circumstances.

Second, the Court finds that even if Counsel should have objected to the mutual combat instruction, the jury's return of a verdict of guilt for voluntary manslaughter, rather than murder, indicates an affirmative finding against mutual combat and obviates any prejudice that could have followed from the erroneous instruction. In order to find mutual combat, the jury would have had to have found antecedent mutual willingness to fight. Antecedent willingness is mutually exclusive with the "sudden heat of passion" required for a voluntary manslaughter conviction.⁴

Third, the Court finds that notwithstanding the prior two points, any error from instructing the jury on mutual combat was harmless. As noted above, the crux of Applicant's defense was his effort to withdraw from the confrontation with Victim, only for Victim to pursue him into the kitchen. The mutual combat instruction contained language making clear that where a defendant withdraws and tries in good faith to avoid further conflict, he may yet still be without fault in bringing on the difficulty. As such, the instruction did not muddy or confuse the central

⁴ The Supreme Court in State v. Taylor notes that a finding of mutual combat does not preclude a finding of manslaughter, but does so (1) in a case regarding a murder, (2) on the basis of an old mutual combat charge not thoroughly reviewed in State v. Andrews due to deficient issue preservation, and (3) *before* formally adopting "antecedent agreement to fight" as a factual prerequisite to a mutual combat charge. Taylor, 356 S.C. at 232, 589 S.E.2d at 3-4 (citing Andrews, 73 S.C. 257, 53 S.E. 423 (1906)); *see also*, State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973). This Court has extensively considered and contemplated how *any* set of facts might provide for an "antecedent agreement to fight" with deadly weapons that could still result in the "sudden heat of passion" necessary to convict an individual for voluntary manslaughter—this Court cannot conceive of any. Nor can this Court find any authority other than Taylor's off-hand remark to show a case where both "sudden heat of passion" and "mutual combat" were together charged, either in this jurisdiction or in Texas and Colorado, on whose precedents Taylor relied. The antecedent agreement to mutual combat with deadly weapons is tantamount to malice aforethought, not the sudden heat of passion. *See, e.g.* Ward v. Commonwealth, 116 S.W. 786, 788 (Ky. Ct. App. 1909) ("A duel has none of the elements of sudden heat and passion."); State v. Romero, 111 N.M. 99, 101, 801 P.2d 681, 683 (N.M. Ct. App. 1990) (citing Ward); Baker v. Supreme Lodge K. P., 60 So. 333, 334 (Miss. 1913) ("A duel, as the term is ordinarily understood, and as used in this policy, 'is the fighting together of two persons by previous concert with deadly weapons to settle some antecedent quarrel,' and has none of the elements of sudden heat and passion.")

question before the jury—did Applicant withdraw from the confrontation or did go to the kitchen seeking a weapon? Despite inquiries for additional instruction, the jury never expressed any confusion regarding the law of self-defense or mutual combat. The verdict is clear and consistent with the evidence.

For all these reasons, the Court finds no ineffectiveness on the part of Counsel, and Applicant's request for relief by way of this allegation is **DENIED**.

9. Failure to Present a Defense Case⁵

Applicant alleges Counsel was ineffective for failing to present a case in his defense. A criminal defendant is not required to present evidence, and an attorney may properly determine the best defense is to put the State to its burden of proving the charges beyond a reasonable doubt. Jackson v. State, 329 S.C. 345, 352, 495 S.E.2d 768, 771-72 (1998) (finding defense counsel not ineffective for not presenting any witnesses at trial); see also State v. Attardo, 263 S.C. 546, 550, 211 S.E.2d 868, 870 (1975) (“A basic principle of criminal law is that the State has the burden of proof as to all of the essential elements of the crime.”). And again, where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992).

At trial, discussing the issue of “last argument,” Attorney Long put on the record the dilemma he presented to Applicant and Counsel:

Now, if they put up testimony – my client has no criminal record, there's nothing – there's no reason in the world for him not to testify for himself [. . .] if they put up evidence. If they don't put up evidence, then he's got a reason not to testify because I get to argue last, and he agrees with that a hundred percent.

⁵ The Court here addresses together the overlapping allegations regarding failure to present a defense.

(Tr. 751-52). Long boasted he “dropped a monster bomb on them by bringing that up, but that’s just the way it is.” (Tr. 753, ll. 6-7).

Attorney Long testified that he did not talk to Counsel before trial and that he wouldn’t have told him anything had Counsel asked, in light of attorney-client privilege. Long told Counsel at trial that Kendrick Chestnut would testify against Applicant in the event Applicant presented evidence in his defense such that both defendants lost “last argument.” Long expressed his considerable respect for Counsel and described him as “one of the best.”

Counsel explained he originally intended to call Applicant as a witness in his own defense, but changed plans after attorney Russell Long, counsel for co-defendant Kendrick Chestnut (“Kendrick”), indicated that if they lost last argument then Kendrick would take the stand and testify against Applicant. Counsel recalled he discussed the issue for hours with Applicant and Applicant’s family after Long disclosed his own strategic thinking. Counsel explained that while Applicant’s testimony as to his own injuries would have been helpful, and he would have been able to conduct cross-examination, Kendrick’s testimony would have been absolutely devastating. Counsel additionally noted Applicant never told him before trial that anybody else was responsible for the killing. Counsel further explained while he knew Kendrick had to be considered adverse, Counsel was unsure whether he would testify prior to Long’s disclosure. Counsel affirmed the final decision to not present evidence was Applicant’s and that Counsel agreed with the decision.

Applicant testified to his version of events. Applicant denied ever grabbing his girlfriend Christie Hucks. Applicant explained the dispute started over a birthday card that included a picture discovered by Christie; when Applicant returned home he was ambushed by Christie and her family with an allegation of cheating. Applicant noted that Victim was drunk, and that the two had never quarreled before the night of the killing. Applicant asserted Victim was armed

with a knife and called Applicant a racial epithet before swinging at him; Applicant swung back, but Applicant was cut by Victim. Applicant then retreated to the kitchen. Applicant denied ever touching scissors during the fight, but instead asserted he suffered substantial blood loss and blacked out. Additionally, Applicant admitted he did not wish to see Kendrick get in trouble, and that his care for Kendrick's outcome at trial played a factor in his decision not to testify or otherwise present evidence.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. Counsel clearly articulated a strategic decision of enormous gravity, made in close consultation with Applicant and Applicant's family. The Court will not disturb or question Counsel's judgment that the harm of Kendrick's testimony would have outweighed the value of Applicant's testimony. Accordingly, Applicant's demand for relief by way of this allegation is **DENIED**.

10. Failure to Proffer Evidence to Preserve "Last Argument" Issue for Appeal

Applicant alleges Counsel was ineffective for failing to proffer evidence in order to support its argument as to "last argument." Under the common law, "in cases in which no defendant introduces evidence, the defendant(s) have the right to open and close, but may waive the right to both or may waive opening and present full argument after the State's closing argument." State v. Beaty, ___ S.C. ___, 813 S.E.2d 502, 510 (2018) (citations omitted). "[I]f two or more defendants are jointly tried, if any one defendant introduces evidence, the State has the final closing argument." Id. (citing State v. Huckie, 22 S.C. 298 (1885)). Same goes if any defendant introduces evidence through a prosecution witness. Id., 813 S.E.2d at 510-11.

At trial, recognizing the predicament explored in Section II.A.9, above, Counsel raised the issue of last argument to the trial court. (Tr. 749, ll. 1-8). The Court replied:

I'll be glad for you to put anything on the record that you would like to, you know, argue against precedent, but obviously there is a long established rule in

the State of South Carolina that says when defendants are jointly tried and any one of them introduces evidence, the State is entitled to the closing argument, the last argument. So, that's clearly extremely, a lengthy time period, been the law of the State of South Carolina.

(Tr. 749, ll. 16-23). Long then argued against precedent to request last argument in the event Applicant testified. (Tr. 755-56). Counsel also argued in support of Long's motion, stating "I can control what happens to Mr. Long. That should never happen. I have absolutely no legal right to control what happens to his client, and to affect his ability to make a decision for his client." (Tr. 757-58). The Court acknowledged the predicament, but denied the motion, relying on State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972). (Tr. 758-60).

The Court finds no deficiency on the part of Counsel, nor prejudice therefrom. The decision whether to prioritize last argument or presenting testimony is one made in every criminal trial that occurs in the State of South Carolina. There is no question Applicant would have himself lost "last argument" had he testified in his own defense; the issue was whether *Kendrick* and attorney Long would have been able to retain last argument in the event Applicant testified. Despite the tremendous strategic choice he faced, Counsel could not motion or proffer to argue against precedent to achieve a right for Kendrick, only his own client, and there was no possibility of retaining last argument for Applicant if he testified. The impetus to present a proffer on Long's motion for last argument fell only on Long. Furthermore, even had Counsel been able to present some kind of proffer on the issue, it would not have changed the outcome at trial, and the Court is not convinced it would have changed the outcome on appeal. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

11. Failure to Properly Advise Applicant as to Whether to Testify

Applicant alleges Counsel was ineffective in failing to properly advise him as to whether to testify. This allegation is largely resolved by the same law, facts, and reasoning set forth in

Section II.A.9, above; the Court again finds Counsel fully and accurately explained the strategic costs and benefits of testifying to Applicant. Additionally, the Court finds Applicant knowingly, intelligently, and voluntarily decided against presenting evidence or testifying based both on the advice of counsel and his personal desire to see a good outcome for Kendrick. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

III. CONCLUSION

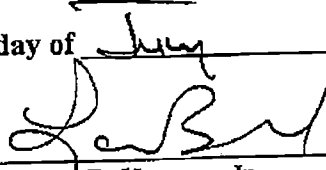
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

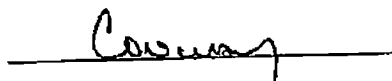
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has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

IT IS THEREFORE ORDERED:

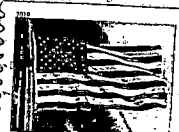
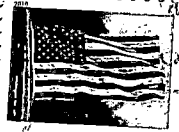
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 17 day of July, 2018.


LARRY B. HYMAN, JR.
Presiding Judge
Fifteenth Judicial Circuit

, South Carolina

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