



APR 15 2019

S.C. SUPREME COURT

TARA DAWN SHURLING, PA

Attorney and Counselor at Law

3614 Landmark Drive

Suite A

Columbia, South Carolina 29204

(803) 738-8622

(Fax) (803) 738-1600

E-Mail: tDSLAW@shurlinglaw.com

April 10, 2019

The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk
Post Office Box 11330
Columbia, South Carolina 29211-1330

Re: Gary Jerrell Means, Jr.v. State of South Carolina; 2015-CP-02-00711

Dear Mr. Shearouse:

Attached please find for filing a Notice of Appeal on behalf of the above-captioned Post-Conviction Relief client. An Order of Dismissal denying this client's Post-Conviction Relief was filed on January 17, 2019. I subsequently filed my first Motion to Alter or Amend pursuant to Rule 59(e). That motion was denied by Order filed March 12, 2019. I was *retained* by the family to handle this PCR matter in the circuit court only. I do not yet know whether the client and his family intend to hire me for the PCR appeal. I have already received the transcript of the PCR hearing held in this case and understand that the time limits for this appeal would therefore be set from the date this NOA is filed. I will be sure that Applicant and his family know that time is of the essence in deciding whether they intend to hire me for this appeal. I have courtesy copied the Appellate Division of the South Carolina Commission on Indigent Defense on this correspondence so they will make note that I may or may not be handling this appeal. I will notify the Court and SCCID of the client's decision just as soon as possible. I have enclosed two extra copies of the Notice of Appeal which I would appreciate having clocked and returned in the enclosed self-addressed, stamped envelope. I have of course served opposing counsel and the clerk of Court for Aiken County with copies of this Notice. With my thanks for your assistance in this matter, as always, I remain,

Sincerely yours,

A large, elegant handwritten signature in black ink that reads "Tara Dawn Shurling". The signature is written in a cursive style with a large, sweeping flourish at the end.

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg
Attachments

cc: **The Honorable Robert J. Harte**
Clerk of Court, Aiken County (w/enclosures)
Johnny Ellis James, Assistant Attorney General (w/enclosures; by email and U. S. Mail)
South Carolina Commission on Indigent Defense, Office of Appellate Defense (w/enclosures by U. S. Mail)

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APR 15 2019

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
William P. Keesley, Presiding Judge

S.C. SUPREME COURT

2015-CP-02-00711

GARY JERRELL MEANS, JR., 359700

Applicant,

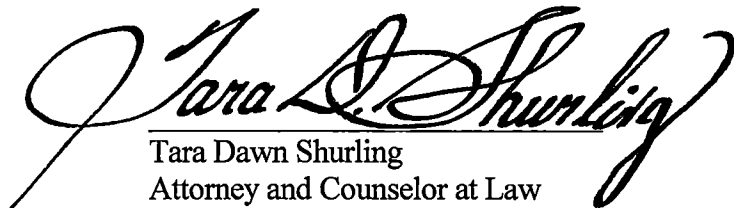
v.

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

NOW COMES the Applicant in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned counsel, giving notice of his appeal from the Order of Dismissal filed January 17, 2019, denying his Post-Conviction Relief Application, and the Order filed with the Aiken County Clerk of Court on March 12, 2019, denying Applicant's Motion to Alter or Amend, pursuant to Rule 59(e), SCRPC.



Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803)738-8622
(803)738-1600 FAX

ATTORNEY FOR APPLICANT

This 10th day of April, 2019
Other Counsel of Record:

Johnny Ellis James,
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-4037

Handwritten scribbles and faint markings, possibly including the number '100'.

Small handwritten mark or signature.

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS

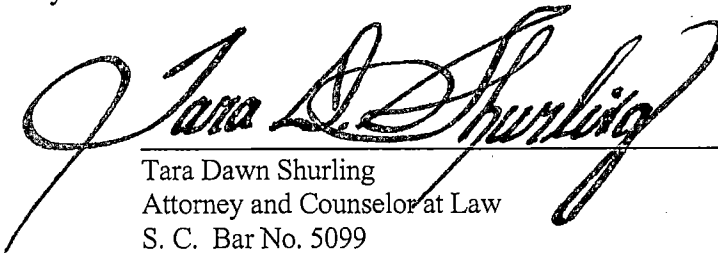
GARY JERRELL MEANS, JR.)
)
Applicant,)
)
v.)
)
STATE OF SOUTH CAROLINA,)
)
Respondent.)
_____)

2015-CP-02-00711

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that one copy of the Notice of Appeal from the Order of Dismissal in the above captioned Post-Conviction Relief matter, filed January 17, 2019, as well as his appeal from the subsequent Order granting in part and denying in part his Motion to Alter or Amend, pursuant to Rule 59(e), SCRCPC, filed March 12, 2019. Opposing counsel, Johnny J. James, Jr., Assistant Attorney General, has been served with this Notice of Appeal by email and U.S. Mail on April 10, 2019, at the following address:

Johnny E. James, Jr., Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211
JJames@scag.gov


Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Dr., Ste. A
Columbia, SC 29204
(803) 738-8622
(803) 738-1600 (Fax)
Email: tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE me this 10th day

of April, 2019.

Rose Doreen King (L.S.)
Notary Public for South Carolina

My Commission Expires: May 27, 2025

RECEIVED

APR 15 2019

S.C. SUPREME COURT

TDSLAW

From: efiledonotreply@sccourts.org
Sent: Tuesday, March 12, 2019 3:00 PM
To: tdslaw@shurlinglaw.com
Subject: Courtesy NEF RE: 2015CP0200711

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2015CP0200711

Official File Stamp: 03-12-2019 02:59:53 PM
Court: CIRCUIT COURT
Common Pleas
Aiken
Case Caption: Gary Jerrell Means Jr VS South Carolina State Of
Document(s) Submitted: Order/Reconsideration. PCR Application is denied. Order/Other
Filed by or on behalf of: Shadell Parks

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Tara Dawn Shurling for Gary Jerrell Means, Jr
Megan Harrigan Jameson for South Carolina State Of

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

~~~~ CONFIDENTIALITY NOTICE ~~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.


|                                  |   |                                  |
|----------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA          | ) |                                  |
|                                  | ) | IN THE COURT OF COMMON PLEAS     |
| COUNTY OF AIKEN                  | ) |                                  |
| Gary Jerrell Means, Jr., 359700, | ) |                                  |
| Applicant,                       | ) |                                  |
| -vs-                             | ) | ORDER ON RECONSIDERATION         |
| State of South Carolina,         | ) |                                  |
| Respondent.                      | ) | Case Number No. 2015-CP-02-00711 |

By order filed January 17, 2019, the application by Mr. Gary Jerrell Means, Jr. for post-conviction relief was denied. The applicant moved to alter or amend. By order filed January 31, 2019, the attorneys were notified that the motion would be decided on written submissions. Having reviewed the submissions and reconsidered the matter, the court denies the motion, with the exception that the last sentence of the first full paragraph on page 8 of the prior order is deleted.<sup>1</sup> In all other respects, the prior order is confirmed.

**THEREFORE, IT IS ORDERED** that the Application for Post-Conviction Relief is denied and dismissed with prejudice.

**AND IT IS SO ORDERED.**

March 11, 2019

  
 \_\_\_\_\_  
 William P. Keesley  
 Presiding Circuit Judge

<sup>1</sup> The deleted sentence is, "Dr. Diehl's report included the applicant's denial of hearing voices instructing him to kill his friend."

**From:** efiledonotreply@sccourts.org  
**Sent:** Thursday, January 17, 2019 4:29 PM  
**To:** tdslaw@shurlinglaw.com  
**Subject:** Courtesy NEF RE: 2015CP0200711

\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\*

NOTICE OF ELECTRONIC FILING [NEF]

---

**A filing has been submitted to the court RE:** 2015CP0200711

**Official File Stamp:** 01-17-2019 04:28:20 PM  
**Court:** CIRCUIT COURT  
Common Pleas  
Aiken  
**Case Caption:** Gary Jerrell Means Jr VS South Carolina State Of  
**Document(s) Submitted:** Order Denying PCR Order/Other  
**Filed by or on behalf of:** Shadell Parks

This notice was automatically generated by the Court's auto-notification system.

---

**The following people were served electronically:**

Tara Dawn Shurling for Gary Jerrell Means, Jr  
Megan Harrigan Jameson for South Carolina State Of

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

| | | |
|----------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA |) | |
| |) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF AIKEN |) | |
| Gary Jerrell Means, Jr., 359700, |) | |
| |) | |
| Applicant, |) | |
| |) | |
| -vs- |) | ORDER ON POST-CONVICTION |
| |) | RELIEF |
| State of South Carolina, |) | Case Number No. 2015-CP-02-00711 |
| |) | |
| Respondent. |) | |

Heard: October 31, 2018 at Aiken County Judicial Center
 Attorney for the Applicant: Tara Dawn Shurling, Esquire
 Attorney for the State: Assistant Attorney General Johnny Ellis James
 Court Reporter: Steven E. LeBlanc

Mr. Gary Jerrell Means, Jr. (the applicant) seeks post-conviction relief (PCR).

WPK
#1

This court finds deficient performance in the failure of plea counsel to pursue a definitive ruling from the sentencing judge on plea counsel's request for the judge to exercise his discretionary ability to give the applicant credit for time served while on home detention, and deficient performance in failing to correct the judge at sentencing when the judge indicated that the applicant took a gun to the residence of the victim.¹ However, the applicant has failed to prove the prejudice prong regarding those deficiencies. The sentencing judge indicated at various stages prior to the sentencing hearing that he was going to give the applicant all the time that he could under the plea bargain. In all other respects, the applicant has failed to prove deficient performance by plea counsel and resulting prejudice. The application for PCR is denied.

¹ Judge Early stated, "he went over there with a gun." Counsel failed to correct the court's mistaken belief that the applicant had gone to where the victim was with a gun, but instead responded, "Exactly. Thank you, Your Honor." (See PCR Tr. p. 36) This was in the context of there being no reason for the killing.

The applicant, who has a history of mental illness, shot and killed his friend, John, at the applicant's residence. On that day, the applicant had called his sister in an anxious state, which alarmed her to the point that she decided to drive from Spartanburg to Aiken to pick up the applicant. While she was on the phone with the applicant, she heard someone come into the applicant's home and the applicant told her that John (the victim) was there. The applicant's mental state had apparently been deteriorating since the relationship with his girlfriend had ended.

While his sister was in route, the shooting occurred. Following the shooting, the applicant went straight to the law enforcement center and called to let officers know that he had shot John. The 911 recording is in evidence. It is estimated that 30 minutes or less transpired between the time that the victim arrived at the house and the time that the applicant was at the law enforcement center.

WPK
#2

The applicant was charged with murder. Defense counsel retained a mental health expert, Dr. Diehl, a clinical psychologist, to examine the applicant. Eventually, the applicant entered a plea of guilty to voluntary manslaughter before The Honorable Doyet A. Early pursuant to a plea agreement which imposed a cap of twenty years on the possible sentence. No appeal was filed.

In his original application for PCR, filed March 23, 2015, the applicant alleged generally that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, §14, of the South Carolina Constitution, was violated prior to and during his guilty plea proceeding, and that his plea was not knowingly and voluntarily entered in that it was entered in reliance upon erroneous advice from counsel.

After PCR counsel was obtained, the Amended Application specifically alleged the following Sixth Amendment claims in addition to his original pro se allegations.

1. Plea Counsel was ineffective for allowing Applicant to enter a plea of guilty without first being evaluated for competency where on the facts of this case his competency to stand trial, or enter a plea, was in issue.
2. Plea Counsel was ineffective for neglecting to formally request that Applicant be evaluated for competency in light of the facts of this case.
3. Plea Counsel was ineffective for representing to the Court that Applicant had been found competent to stand trial absent a factual basis for that assertion.
4. Applicant's plea of guilty was not knowingly and voluntarily entered inasmuch as it was entered in reliance upon Plea Counsel's erroneous advice that Applicant would have to serve 65% of any sentence he received for voluntary manslaughter.
5. Plea Counsel was ineffective in his representation of Applicant at the Castle Doctrine hearing held in this matter on January 17, 2013, where he failed to put Applicant on the stand to testify to the facts and circumstances surrounding the shooting involved in this case.
6. Plea Counsel was ineffective for neglecting to adequately advise Applicant concerning the need for his testimony during the Castle Doctrine hearing held in this case.
7. Plea Counsel was ineffective for neglecting to present any factual basis for a claim of self-defense during the Castle Doctrine Hearing.
8. Plea Counsel was ineffective for failing to be prepared to cite for the Court recent authority for the Court's power to give Applicant credit for his time served while on home detention on electronic monitoring.
9. Plea Counsel was ineffective for failing to file a Motion to Reconsider Sentence within the ten day time period following Applicant's sentencing procedure in order to provide the sentencing judge with authority for Applicant's

WPC
#3

request to be given credit for time served prior to his plea while on home detention under electronic monitoring.

10. Plea Counsel was ineffective for neglecting to provide the Court with all the salient facts in mitigation during the sentencing proceeding.

STANDARD OF REVIEW

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

WPC
#4

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, supra. 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.

A defendant who pleads guilty on advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases and there is a reasonable probability that, but for counsel's errors, defendant would not have pled guilty and would have insisted on going to trial. Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

MENTAL ILLNESS ISSUES²

WPK
#5

As to items related to competency and mental illness, specifically including Items 1, 2, and 3 of the Amended Application, no evidence was produced at the PCR hearing that any expert has opined that the applicant was incompetent to stand trial or to assist counsel in his defense at any relevant time. Even if the attorney was deficient in not getting additional mental health evaluations or scheduling a Blair hearing (which the court does not find), the PCR court is asked to speculate as to what the results of such an

-
- ² (1). Plea Counsel was ineffective for allowing Applicant to enter a plea of guilty without first being evaluated for competency where on the facts of this case his competency to stand trial, or enter a plea, was in issue.
 - (2). Plea Counsel was ineffective for neglecting to formally request that Applicant be evaluated for competency in light of the facts of this case.
 - (3). Plea Counsel was ineffective for representing to the Court that Applicant had been found competent to stand trial absent a factual basis for that assertion.

examination would be. There is a failure of proof as to the prejudice prong on these assertions, regardless of whether or not plea counsel was deficient.³

ADVICE RELATED TO NO-PAROLE PROVISIONS

As to Item 4⁴ and the assertion that the applicant's guilty plea was not entered knowingly and intelligently due to erroneous information that the applicant would only have to serve 65% of his sentence, the transcript of the guilty plea shows that Judge Early informed the applicant that voluntary manslaughter requires a minimum service of 85% of the sentence. While both the applicant and his mother testified that plea counsel told the applicant that this offense had a 65% service requirement, counsel testified at the PCR hearing that he told the applicant that voluntary manslaughter requires service of at least 85%. Counsel admitted that mistakes are possible, but does not believe that he ever told the applicant that eligibility for release would arise at 65%. The applicant acknowledged that he heard the judge tell him that voluntary manslaughter is a no-parole offense which carries the 85% requirement, but that he "tried to speak with my lawyer and he said don't worry about it." The applicant and his mother testified about the misinformation concerning parole eligibility. There is evidence that the attorney discussed with them the collateral consequences of different levels of offenses related to the murder charge, from murder (which is day-for-day) to involuntary manslaughter. It appears more likely that confusion arose from the discussions about the service

WPA
#6

³ Dr. Diehl's report is an exhibit in the PCR case. The report indicated that he was not evaluating for competency, but his findings were interpreted by applicant's counsel as there being no valid challenge to competency. An email exchange between the Solicitor's office and counsel discussed having the applicant evaluated, but that was not done. So, no Blair hearing was ever conducted.

⁴ (4). Applicant's plea of guilty was not knowingly and voluntarily entered inasmuch as it was entered in reliance upon Plea Counsel's erroneous advice that Applicant would have to serve 65% of any sentence he received for voluntary manslaughter.

requirements for the various levels of criminal responsibility. In any event, the transcript refutes the applicant's assertion in this regard. Having weighed the testimony and reviewed the plea transcript, the greater weight of the evidence supports the finding that the applicant was aware of the 85% requirement at the time of his plea.

IMMUNITY HEARING

A great deal of the testimony of plea counsel relates to how the immunity hearing was conducted and the alleged deficiencies in representation cited in Items 5, 6, and 7.⁵ Only two people were present when the shooting occurred, the applicant and the person he killed. Plea counsel elected, in conjunction with the Solicitor, to present no live witnesses on the issue of immunity under the Defense of Persons and Property statute. The hearing was conducted on stipulations of fact and a report from the defense's mental health expert. The order of the judge denying immunity includes a recitation of facts. Plea counsel determined that the focus of any self-defense claim (and related immunity issues) would be the threat perceived by the applicant based on the applicant's mental state, not an assertion that the victim posed an actual threat. That is reasonable under these facts.

The applicant had given statements to defense counsel that he was in fear of the victim because the victim was acting strangely, refused to leave when asked, and refused to take his hand out of his pocket. There is an indication that the applicant told his

-
- ⁵ (5). Plea Counsel was ineffective in his representation of Applicant at the Castle Doctrine hearing held in this matter on January 17, 2013, where he failed to put Applicant on the stand to testify to the facts and circumstances surrounding the shooting involved in this case.
- (6). Plea Counsel was ineffective for neglecting to adequately advise Applicant concerning the need for his testimony during the Castle Doctrine hearing held in this case.
- (7). Plea Counsel was ineffective for neglecting to present any factual basis for a claim of self-defense during the Castle Doctrine Hearing.

attorney that the victim had said previously that he was involved in killing a girl. On the other hand, there was evidence that the applicant allowed the victim to enter the house, the victim had stayed there previously, that he and the victim had smoked a large amount of marijuana leading up to the incident, that the reason the applicant gave to the victim for the need to leave was because the applicant's sister was coming to pick him up (and that the victim asked if she would be able to give him a ride when she got there), that the victim had a lit cigarette between his fingers at the time he was shot and when his body was seen by law enforcement, and that there might be any number of reasons why the victim may have been reaching into his pocket that did not involve any weapon or threat. There is no indication that the applicant saw the victim possessing or attempting to retrieve any weapon at any time.

*WPK
#8*

The explanation given to Dr. Diehl, included in Judge Early's order, is that the victim brought a basket of fruit to the applicant, and one or more pieces of the fruit were decaying. Apparently, the applicant believed that giving someone decayed fruit was a threat. Dr. Diehl's report included the applicant's denial of hearing voices instructing him to kill his friend.

The applicant also focuses on an uncorrected statement by the State to the court at the immunity hearing that John was living at the residence. The victim was not staying at the residence on the day of the shooting. There is no assertion that the victim entered the house without the applicant's consent. Officers found no sign of a struggle.

In his order, Judge Early recited that the applicant claimed to have no memory of the events that occurred after the victim entered his house. However, the order recites

that the applicant told Dr. Diehl that there was not much of a problem or fuss. There is no evidence in this record of any verbal threat.

Plea counsel testified that he had conducted about seven Castle Doctrine hearings and that this was the only one where he did not call any witnesses. He said at one point that he was not able to provide specific explanations as to why he chose not to call the applicant or any other witnesses, except to say that there were items that he wanted to keep out and that he felt that this was the best way to conduct this particular hearing. However, on redirect examination at the PCR hearing, plea counsel testified and explained his reasoning and strategy more specifically on pages 90-95. He testified that he felt that the judge had the information necessary to evaluate the immunity claim, though he admits that the judge did not know aspects of the applicant's claim that the victim was acting in a peculiar manner, that the victim did not leave when asked, that the victim put his hand into his (victim's) pants, and that the victim had previously told the applicant about an incident where a girl was killed.

WPC
#9

On page 94, counsel notes that Judge Early was "hung up" on the reasonable person standard, which this court finds was a critical aspect for the judge to consider. It is an issue that essentially negates any legitimate claim of immunity.

The order from the immunity hearing found no evidence of forcible entry or violence toward the applicant, and it discusses the part of the statute that deals with immunity for actions that occur when the protected person is in a place where he has the right to be. Judge Early found the statute to be inapplicable here.

At the PCR hearing, the applicant failed to show a likelihood that a reasonable person under the circumstances would have perceived a threat from this victim. The

greater weight of the evidence establishes that these perceptions arose from the applicant's flawed mental state and do not meet a reasonable person standard. The record shows that the attorney focused on his client's state of mind. He could not change the facts to make them fit into a granting of immunity, even if every alleged fact is construed in the light most favorable to the applicant.

At the PCR hearing, after explaining that he asked the victim to leave because his sister was coming, the applicant stated that the victim just sat on the couch and began smoking a cigarette. The applicant testified on direct examination as follows, beginning on page 119, line 13.

Q. Okay. Did you tell Mr. Brannon how your friend was acting that night?

A. Yes, ma'am.

Q. What did you tell him?

A. I told him that he was acting funny and that he placed his hand in his crotch area and that's when I asked him to take his hand out and he wouldn't take his hand out.

Q. Could you have said pocket or did you say crotch area?

A. I said crotch area.

Q. Okay. And you asked him to remove his hand?

A. Yes, ma'am.

Q. And did he do so?

A. No, ma'am.

Q. And that's when you decided you were in danger and shot him?

A. Yes, ma'am.

Again, on pages 126 and 127 of the PCR transcript, the applicant stated in general terms that he felt that he was in danger because the victim would not leave and would not take his hand out of his pants. The applicant said that the victim was acting funny. On page 126, beginning on line 25, the applicant testified, "I think about it all the time. I just hate that it happened. I just wish everybody could know the truth of how my mental state was that night." [Emphasis added]

WPK
#10

On redirect examination at the PCR hearing, beginning on page 134, line 17, the applicant testified:

Q. Okay, Would it be fair to say that you were having some serious mental issues around the time this happened?

A. Yes, ma'am.

Q. And did you have a breakdown of sorts after the shooting occurred?

A. Yes, ma'am.

Q. Okay. So your recollection of some things might not be as clear as at other times in your life your memory would have been, right?

A. Yes, ma'am.

It is certainly unusual not to call witnesses in an immunity hearing, which the attorney knew from prior experience. His client was admittedly fearful of testifying, and the attorney believed that the applicant and his family did not think that the applicant would "survive" testifying (which counsel repeatedly stated as a reason for not calling him as a witness). There are obvious difficulties in making the applicant's version of events fit within the parameters of the immunity statute. These were issues that the attorney took into consideration. There were damaging items that the attorney felt could be kept out of evidence to the benefit of his client, if the applicant did not testify. According to Judge Early's order, the stipulation was that the applicant claimed not to remember critical events. The attorney felt that he could bring the essential aspects of the immunity claim to the judge's attention through stipulations and the report of his mental health expert.

The evidence at the PCR hearing demonstrates that the attorney was familiar with the law concerning self-defense and immunity, and he had researched related issues, as demonstrated by documents he testified were in his file. The attorney testified that he discussed with his client and the applicant's family members (at least one of whom was

always present, except during the period when the applicant was in jail) principles of self-defense and the strategy of proceeding as they did with the immunity hearing. He testified that he understood that they were in agreement to proceeding without testimony. The applicant's claims that he did not know he could testify are not credible.

Admittedly, the PCR testimony of the attorney is troubling concerning his failure to make sure that the judge knew the specific things that caused the applicant to perceive being under a threat of violence. However, the record has indications that the applicant had denied memory and that he had told Dr. Diehl that there was not much of a fuss or struggle. At this point, the court accepts that, had the applicant testified at the immunity hearing, he would have said the same things he did at the PCR hearing.

WPK
#12

There has been an insufficient showing that anything offered in that regard would have been likely to have changed the judge's determination that the immunity statute does not apply to this situation. The statute does not grant immunity to persons where a threat does not really exist, unless a reasonable person under the circumstances would have had the same belief. The statute does not excuse use of deadly force based on unreasonable responses to perceived threats. Since self-defense based on perception incorporates a reasonable person standard, the PCR hearing failed to produce evidence sufficient to establish that the outcome of the immunity hearing would likely be changed, if the applicant or others had testified. The remedy for a deranged mental state would be an insanity defense, and this record indicates that Dr. Diehl ruled that out.⁶

⁶ South Carolina has a guilty but mentally ill law, but the result of establishing that the accused lacks the ability to conform his conduct to the requirements of law does not reduce the length of the sentence. Dr. Diehl's findings were used by applicant's counsel as indicating that there was no basis for a verdict of not guilty by reason of insanity. The conduct of the applicant immediately after the incident undermined an assertion that he was incapable of knowing right from wrong.

If the applicant gave the same testimony about the events of that evening that he did at the PCR hearing, the only thing he would have put before the judge (aside from the mental health issues) is that he perceived that the victim was acting funny, thought that the victim had been involved in some way in killing a girl previously, saw that the victim did not leave immediately when asked, and saw the victim put his hand into the crotch area of his pants and not move his hand when asked. Any testimony about decayed fruit could not form the basis for any reasonable perception of a threat.

The applicant has failed to prove that any action or inaction of the plea attorney was the likely cause of the denial of immunity. Likewise, the applicant has failed to prove the likelihood that an appeal of the denial of immunity would have resulted in a reversal.

CREDIT FOR TIME SERVED ON HOME DETENTION

WPAC
#13

The strongest assertion of error against the plea attorney relates to how counsel dealt with the issue of his client receiving credit for time served while on house arrest with electronic monitoring, including Items 8 and 9 of the Amended Application.⁷ There is also evidence of deficiency in performance related to counsel's failure to correct the sentencing judge's misstatement about the applicant taking a gun to the incident location.

Counsel was familiar with the law about credit for time spent on house arrest. He was in the General Assembly when the law was passed. He cited the law to the judge.

-
- ⁷ (8). Plea Counsel was ineffective for failing to be prepared to cite for the Court recent authority for the Court's power to give Applicant credit for his time served while on home detention on electronic monitoring.
- (9). Plea Counsel was ineffective for failing to file a Motion to Reconsider Sentence within the ten day time period following Applicant's sentencing procedure in order to provide the sentencing judge with authority for Applicant's request to be given credit for time served prior to his plea while on home detention under electronic monitoring.

The applicant criticizes the failure of plea counsel to have a copy of the law printed and passed up to the judge. That failure does not amount to a deficiency in performance since it would be expected that the judge had access to the law and would ask for it if he did not. The law was cited correctly to the judge. [See Sentencing Hearing Tr. p. 35-36]

The judge expressed concern about whether the law was to be applied retroactively, and the PCR court finds that the attorney responded appropriately in saying to the judge that it was enacted prior to the sentencing. However, in order for the applicant to receive credit, it was necessary for the sentencing judge to specifically rule that the applicant was to receive that credit. It is a matter of judicial discretion. The applicant maintains that his attorney did not do enough to pursue this issue, and the PCR court agrees.

WPC
#14

When the sentencing judge stated that he was going to give credit that the Department of Corrections (DOC) deemed appropriate, it was incumbent upon counsel to point out that the DOC could not give credit for home detention, unless the judge ordered it. A clarification or specific determination was required to be pursued. If it was not obtained at the sentencing proceeding, the attorney knew that he could file a motion to reconsider the sentence within 10 days, and he could have obtained a definitive ruling. No motion was filed. Instead, after a year had passed, counsel wrote to the judge seeking clarification and credit. No response of any kind was received, and it was not pursued.

Though it was deficient performance, it is understandable under these circumstances why the attorney did not press the judge further. Counsel testified credibly that there had been several meetings with the judge in chambers at various stages, spread out over time. There were at least three separate hearings conducted by the same judge

and they occurred in different counties. The judge had clearly indicated on more than one occasion that he was going to impose the maximum sentence under the plea agreement. Counsel testified that everyone involved, including the applicant, knew that the judge was going to impose the maximum allowable sentence and, though counsel was free to argue for a lesser sentence, nothing less than the maximum was likely to occur.

At the conclusion of the PCR hearing, the attorneys were asked to provide briefs on the issue of allowable relief. Normally, prevailing in a PCR action only allows the court to grant a new trial, which the applicant indicated that he is pursuing. He also indicated that he is pursuing relief in the form of a new sentencing hearing. Granting a completely new sentencing proceeding does not seem appropriate because the deficiency in representation here did not cause or contribute to the determination by the judge that a 20-year sentence is the appropriate one to be imposed. The issue is whether there is some remedy that would allow the matter to be presented to the judge to see if he would have granted credit for time served on house arrest. It is noteworthy that there is no indication that the plea agreement required credit for time served on house arrest. Clearly, the judge knew that the applicant had been on house arrest for an extended period of time.

WSPK
#15

Here, there is credible evidence that the judge indicated at various times that he was going to impose the maximum amount of time that he was allowed to impose under the plea agreement. In this unique circumstance, there is a failure of proof that the judge might have (or was likely to have) credited additional time.

MITIGATION

- Item 10. Plea Counsel was ineffective for neglecting to provide the Court with all the salient facts in mitigation during the sentencing proceeding.

The sentencing hearing was not conducted at the time of the plea. It was postponed in order to allow Dr. Diehl to be present, and it was held in Spartanburg rather than Aiken to enable the defense to have Dr. Diehl present. Having reviewed the record, there is some uncertainty as to exactly what deficiencies are alleged related to mitigation, aside from those already discussed. There is evidence that counsel put before the sentencing judge information about the applicant having a child during the time that the applicant had been on bond, presented evidence about mitigation due to mental issues and the improvement of his client's mental state, and sought a sentence below the cap.

Having reviewed the record, the court finds no deficiency in offering mitigation information to the sentencing judge, with the exception of the deficiencies previously discussed. As to all such allegations, the applicant has failed to meet his burden of proof as to the prejudice prong.

#16

GENERAL ALLEGATIONS

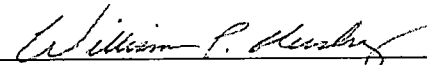
The court believes that every issue raised has been addressed. If any issue has not been specifically mentioned in this order, the court denies PCR as to all issues.

THEREFORE, IT IS ORDERED

1. That the Application for Post-Conviction Relief is denied and dismissed with prejudice; and,
2. The applicant must be remanded to the custody of respondent

AND IT IS SO ORDERED.

January 15, 2019



William P. Keesley, Judge

LAW OFFICE OF



TARA DAWN SHURLING, PA

Attorney and Counselor at Law

3614 Landmark Drive

Suite A

Columbia, South Carolina 29204

(803) 738-8622

(Fax) (803) 738-1600

E-Mail: tdslaw@shurlinglaw.com

April 10, 2019

The Honorable Robert J. Harte
Clerk of Court, Aiken County
Post Office Box 583
Aiken, South Carolina 29802

Re: Gary Jerrell Means, Jr., #359700 v. State of South Carolina; 2015-CP-02-00711

Dear Mr. Harte:

Enclosed please find for filing one copy of the Notice of Appeal from the Orders entered by the Honorable William P. Keesley in the above captioned matter as well as a copy of my proof of service on opposing Counsel Johnny E. James, Jr., Assistant Attorney General on April 10, 2019.

Thank you for your time and attention to this matter.

Sincerely,

A handwritten signature in black ink that reads "Tara Dawn Shurling". The signature is written in a cursive style with a large initial "T".

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/rk
Enclosures

cc: Johnny J. James, Jr., Assistant Attorney General (w/enclosure)

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS

GARY JERRELL MEANS, JR.)
)
Applicant,)

2015-CP-02-00711

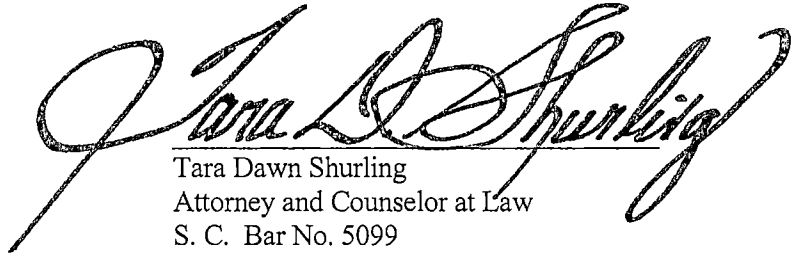
CERTIFICATE OF SERVICE

v.)

STATE OF SOUTH CAROLINA,)
)
Respondent.)

The undersigned attorney hereby certifies that one copy of the Notice of Appeal from the Order of Dismissal in the above captioned Post-Conviction Relief matter, filed January 17, 2019, as well as his appeal from the subsequent Order granting in part and denying in part his Motion to Alter or Amend, pursuant to Rule 59(e), SCRPC, filed March 12, 2019. The Honorable Robert J. Harte, Clerk of Court, Aiken County, has been served with this Notice of Appeal by U.S. Mail on April 10, 2019, at the following address:

The Honorable Robert J. Harte
Clerk of Court, Aiken County
Post Office Box 583
Aiken, South Carolina 29802



Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099
3614 Landmark Dr., Ste. A
Columbia, SC 29204
(803) 738-8622
Email: tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT

SWORN TO BEFORE me this 10th day

of April, 2019.

Rose Doreen King (L.S.)
Notary Public for South Carolina

My Commission Expires: May 27, 2025