

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Eugene C. Griffith, Circuit Court Judge

JONTA GREEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000329

APPENDIX

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

BENJAMIN LIMBAUGH
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

RECEIVED
JUL 26 2019
S.C. SUPREME COURT

INDEX

INDEX	i
TRIAL TRANSCRIPT DATED APRIL 19-22, 2010.....	1
INDICTMENTS AND SENTENCING SHEETS	915
APPLICATION FOR POST-CONVICTION RELIEF (2013-CP-10-6337) FILED OCTOBER 28, 2013.....	922
RETURN.....	930
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED FEBRUARY 18, 2015.....	935
PLAINTIFF'S EXHIBIT NO. 1 (LETTER DATED 11/10/08 FROM SHONDA GENNINGS).....	983
PLAINTIFF'S EXHIBIT NO. 2 (STIPULATION).....	984
ORDER OF DISMISSAL FILED JULY 7, 2015.....	985
RULE 59(e) MOTION FILED JULY 23, 2015.....	996
ORDER DENYING RULE 59(e) MOTION FILED AUGUST 3, 2015	999
APPLICATION FOR POST-CONVICTION RELIEF (2015-CP-10-6633) FILED DECEMBER 9, 2015	1000
RETURN AND MOTION TO DISMISS ALL CLAIMS EXCEPT <u>AUSTIN</u> REVIEW FILED AUGUST 11, 2016.....	1007
CONSENT ORDER GRANTING RIGHT TO SEEK BELATED APPELLATE REVIEW FILED DECEMBER 5, 2017	1015
PETITION FOR WRIT OF CERTIORARI FILED JULY 10, 2018	1020
PETITION FOR WRIT OF CERTIORARI PURSUANT TO <u>AUSTIN V. STATE</u> , 305 S.C. 453, 409 S.E.2D 395 (1991) FILED JULY 10, 2018	1028
RESPONDENT'S MOTION FOR REMAND FILED NOVEMBER 26, 2018	1038

ORDER GRANTING RESPONDENT’S MOTION FOR REMAND FILED
FEBRUARY 1, 2019..... 1042

AMENDED ORDER OF DISMISSAL DATED FEBRUARY 18, 2019.....1045

- (c) _____
- 6. Check whether a finding of guilty was made:
 - (a) after a plea of guilty N/A
 - (b) after a plea of not guilty Yes
 - (c) after a plea of nolo contendere N/A

7. Did you appeal from the judgment of conviction or the imposition of sentence?
 _____ Yes

8. If you answered "yes" to (7), list:

- (a) the name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii. _____
 - iii. _____

- (b) the result in each such Court to which you appealed:
 - i. Conviction and sentence affirmed
 - ii. _____
 - iii. _____

- (c) the date of each such result:
 - i. January 31, 2013
 - ii. _____
 - iii. _____

- (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. _____
 - ii. _____
 - iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) _____
- (b) _____
- (c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Applicant was denied the right to seek
- (b) appellate review of the denial of his
- (c) post-conviction relief application.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) PCR counsel (James Falk) failed to file a
- (b) timely notice of appeal in C/A No. 2013-CP-10-6337
- (c) following denial of the PCR application and
- (d) subsequent Rule 59(e) motion.

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. post-conviction relief application (2013-CP-10-6337)
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. Charleston County Court of Common Pleas
 - ii. _____
 - iii. _____
 - iv. _____
- (c) the disposition thereof:
 - i. denied and dismissed with prejudice
 - ii. _____
 - iii. _____

iv. _____

(d) the date of each such disposition:

i. July 13, 2015

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) PCP counsel failed to file timely notice of appeal.

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
- i. Deniel Mattson, esq., Mt. Pleasant, SC
 - ii. S.C. Office of Appellate Defense
 - iii. James Falk, esq., Charleston, SC
- (b) the proceedings at which each such attorney represented you:
- i. Trial, sentencing, sentence reconsideration
 - ii. Direct Appeal
 - iii. Post-conviction relief

19. State clearly the relief you seek in filing this application:

Related petition for writ of certiorari

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

County of Charleston)

VERIFICATION

I, John Green, #340485, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

[Signature] #340485

SWORN to and subscribed before me this 3rd day of December, 2015

Ludrean Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

John Green #340485
I, John Green, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

John Green #340485
Applicant

SWORN or affirmed to and subscribed before me this
3rd day of December, 2015.

Ludheen Bryant
Notary Public

My Commission Expires: May 26, 2020

STATE OF SOUTH CAROLINA)
 COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT

Jonta Green,
 SCDC No. 340485,

2015-CP-10-6633

Applicant,

v.

**RETURN AND MOTION TO DISMISS ALL
 CLAIMS EXCEPT AUSTIN REVIEW**

State of South Carolina,

Respondent.

FILED
 2016 AUG 11 PM 12:37
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY

The Respondent, making its Return to the Application for post-conviction relief filed December 9, 2015, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the January 2009 term of the Charleston County Grand Jury for murder (2009-GS-10-0113) and possession of a weapon during the commission of a violent crime (2009-GS-10-0116). The Applicant was represented by Demal Mattson, Esquire.

On April 22, 2011, the Applicant proceeded to trial and was found guilty of the lesser include offense of voluntary manslaughter. The Applicant was sentenced by the Honorable Deadra L. Jefferson to confinement for a period of twenty-three (23) years. The Applicant's sentence was amended on May 11, 2011 to twenty (20) years.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Susan Hackett, Esquire, of the Office of Appellate Defense. The Applicant's appeal was dismissed by

the Court on January 30, 2013 after review pursuant to Anders v. California. The Remittitur was issued on February 21, 2013.

First PCR Application: 2013-CP-10-6337

The Applicant subsequently filed an application for post-conviction relief (PCR) on October 28, 2013, in which he raised the following allegations:

1. Ineffective assistance of counsel
 - a. Failure to object to improper and insufficient foundation where the medical examiner Amy Shield was unavailable to attest to the medical examination report
 - b. Failure to object to Dr. Schandl's hearsay testimony of Dr. Shield's medical examination report
 - c. Failure to object where the question of the cause of death would call for speculation
 - d. Failure to advise that stipulation waived his right to prove every element of the alleged crimes
 - e. Failure to advise that the stipulation would create a burden shifting affect and cause the Petitioner to prove self-defense
 - f. Failure to advise the Petitioner of serious medical issues from brain surgery

The Respondent made its Return and Motion to Dismiss on December 22, 2014. An evidentiary hearing on the matter was convened on February 18, 2015 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by James Falk, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent. The Honorable Eugene C. Griffith, Jr. issued a Final Order dated July 1, 2015 dismissing the application with prejudice. The Applicant then subsequently filed a Notice of Appeal with the South Carolina Supreme Court that he later asked to be dismissed without prejudice so that he could file Rule 59 Motion. This Rule 59 motion was denied by Order dated August 5, 2015.

II.

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

1. Applicant was denied the right to seek appellate review of the denial of his first PCR application
 - a. PCR Counsel (James Falk) failed to file a timely notice of appeal following denial of the PCR application (2013-CP-10-6337) and subsequent Rule 59(e) motion

Attached herewith and incorporated herein are the records of the Charleston County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the Record on Appeal, the Applicant's prior PCR application, and the Applicant's appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Except for the Applicant's claim that he was denied an appeal from the denial of his first PCR application, the Respondent submits that this application for post-conviction relief should also be summarily dismissed because it is successive to the Applicant's prior application for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding Applicant has taken to secure relief, may not be the basis for a subsequent Application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended Application.

Successive applications are disfavored and the burden is on the Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

The Respondent submits that the current allegations were or could have been raised in the proceedings based on the Applicant's prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code § 17-27-90. The Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

IV.

The Respondent further submits that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offenses he challenges in this Application on April 22, 2011. The South Carolina Court of Appeals dismissed the Applicant's appeal on January 30, 2013, and

the remittitur was issued on February 21, 2013. The Applicant was therefore required to file a PCR application by February 22, 2014. This application was filed on December 9, 2015, which was well after the one-year statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent requests that this Court summarily dismiss the application for post conviction relief for failure to file within the time mandated by the Post Conviction Procedure Act.

V.

The Respondent further submits that the Applicant's allegation of ineffective assistance of PCR counsel is without merit. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under § 17-27-90." Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails

to appeal the denial of the application. Id. Austin "is limited to its particular factual situation..." Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. Accordingly, the Respondent requests an evidentiary hearing solely on the matter of the Applicant's entitlement to an Austin Review.

VI.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VII.

WHEREFORE, with the exception of the Applicant's allegation that he is entitled to belated review of his first application for post-conviction relief, the Respondent moves to summarily dismiss the application because it is successive to the Applicant's prior post-conviction relief application and was filed after the statute of limitations had expired. The Respondent requests an evidentiary hearing solely on the matter of the Applicant's entitlement to an Austin Review.

[Signatures on the following page]

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General


JOHANNA VALENZUELA
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Deputy Attorney General

CAITLIN BAZAN HASTINGS
Staff Attorney

P.O. Box 11549
Columbia, S.C. 29211

By:


ATTORNEYS FOR RESPONDENT

August 5, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

JONTA GREEN, #340485)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

2015-CP-10-6633


FILED
AUG 11 PM 12:37
JULIE J. ARMSTRONG
CLERK OF COURT

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss All Claims Except Austin Review** in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Jonta Green, #340485
Lieber Correctional Institution
136 Wilborn Avenue
Ridgeville, SC 29472

DATED this 5th day of August, 2016.


Brianna Arnone, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)
 COUNTY OF CHARLESTON)
 Jonta Green, SCDC # 340485,)
 Applicant,)
 vs.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2015-CP-10-6633

**CONSENT ORDER GRANTING RIGHT
 TO SEEK BELATED APPELLATE REVIEW
 PURSUANT TO AUSTIN V. STATE**

FILED
 11 DEC 5 PM 4:17
 CLERK OF COURT
 JUDGE

This matter comes before the Court by way of an application for post-conviction relief filed December 9, 2015. Respondent made its Return and Motion to Dismiss all Claims Except Austin Review on August 5, 3016.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. During its January 2009 term, the Charleston County Grand Jury indicted Applicant for murder and possession of a weapon during the commission of a violent crime. Demal Mattson, Esquire, represented Applicant. On April 22, 2010, Applicant proceeded to a jury trial in the Charleston County Court of General Sessions before the Honorable Deadra L. Jefferson, circuit court judge. At the conclusion of the trial, the jury convicted Applicant of the lesser-included offense of voluntary manslaughter and as indicted of possession of a weapon during the commission of a violent crime. Judge Jefferson sentenced Applicant to twenty-three years imprisonment for voluntary manslaughter and five years imprisonment for possession of a weapon during the commission of a violent crime, with both sentences to be served concurrently.

Thereafter, Applicant filed a motion to reconsider his sentence on April 30, 2010. On

1/24
 [Handwritten signature]

May 11, 2010, Judge Jefferson convened a hearing on Applicant's motion, and after hearing arguments from both parties, granted Applicant's motion and reduced his sentence for voluntary manslaughter to twenty years imprisonment.

Applicant filed a timely notice of appeal and an appeal was perfected on his behalf by Appellate Defender Susan B. Hackett of the South Carolina Commission on Indigent Defense—Division of Appellate Defense. Following the submission of a brief pursuant to Anders v. California, 386 U.S. 738 (1967), the South Carolina Court of Appeals granted counsel's request to be relieved and dismissed Applicants appeal. State v. Jonta Green, 2013-UP-046 (Ct. App. filed Jan. 30, 2013). The remittitur was returned to the circuit court on February 21, 2013.

First PCR Application: 2013-CP-10-6337

Applicant filed his first PCR application on October 28, 2013, alleging the following grounds for relief:

1. Ineffective assistance of counsel
 - a. Failure to object to improper and insufficient foundation where the medical examiner Amy Shield was unavailable to attest to the medical examination report
 - b. Failure to object to Dr. Schandl's hearsay testimony of Dr. Shield's medical examination report
 - c. Failure to object where the question of the cause of death would call for speculation
 - d. Failure to advise that stipulation waived his right to prove every element of the alleged crimes
 - e. Failure to advise that the stipulation would create a burden shifting affect and cause the Petitioner to prove self-defense
 - f. Failure to advise the Petitioner of serious medical issues from brain surgery

The State made its return to the application on December 22, 2014. An evidentiary hearing was held on February 18, 2015 before the Honorable Eugene C. Griffith, Jr. James K. Falk, Esquire, represented Applicant. Assistant Attorney General Ashleigh R. Wilson of the South Carolina Attorney General's Office represented Respondent. Following the hearing, Judge Griffith denied

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and dismissed the application with prejudice by written order filed July 1, 2015. Applicant filed a timely notice of appeal, but later asked the Supreme Court to dismiss his appeal without prejudice so he could file a motion to alter or amend Judge Griffith's order pursuant to Rule 59(e), SCRCP. The Court dismissed Applicant's appeal, and Judge Griffith later denied his motion to alter or amend by written order filed August 3, 2015. Applicant did not file a notice of appeal following this order.

ALLEGATIONS

In his current application, Applicant alleges he is being held in custody unlawfully for the following reason:

1. Ineffective Assistance of PCR Counsel
 - i. PCR Counsel was ineffective in failing to file an appeal following the denial of application.

In support of this allegation, Applicant presented an affidavit from former PCR counsel, James K. Falk, wherein Falk states, "I neglected to file a Notice of Appeal from the decision to deny relief under 59(e). . . . Mr. Green it was my error for failing to file a timely notice of appeal, and I regret the inconvenience that this has caused the parties hereto." See attached affidavit from James K. Falk.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges he was denied the right to seek an appeal following the dismissal of his previous post-conviction relief application. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his or her PCR application.

After review of the facts and circumstances surrounding the waiver of Applicant's right to appeal the denial of allegations in Applicant's post-conviction relief application, the parties

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Boyle
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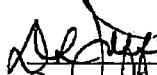
below have consented to the granting of an appeal of Applicant's first post-conviction relief application (2013-CP-10-6337) pursuant to Austin v. State. The parties agree Applicant did not voluntarily waive his right to seek an appeal of the post-conviction relief court's denial and dismissal of Applicant's first application for post-conviction relief. Based on the documents submitted from the previous PCR file, it appears to the parties and this Court Applicant did not freely and voluntarily waive the right to appeal his first application for post-conviction relief, and PCR counsel failed to file a timely Notice of Appeal of the application.

Based upon the foregoing, this Court finds granting Applicant's request to seek belated appellate review of his first PCR (2013-CP-10-6337) pursuant to Austin v. State is warranted. Counsel for the State and Applicant's current PCR counsel consented to the granting of leave to pursue a PCR appeal in this matter. Applicant's current PCR counsel is instructed to file a Notice of Appeal with the South Carolina Supreme Court pursuant to Rule 243, SCACR.

IT IS THEREFORE ORDERED:


1. Applicant remain in the custody of the South Carolina Department of Corrections; and
2. Applicant is granted the right to seek a belated appellate review of case 2012-CP-21-2999 pursuant to Austin v. State.

AND IT IS SO ORDERED this 4th day of Dec, 2017.


 DEBRA L. JEFFERSON,
 Chief Administrative Judge for Common Pleas
 Ninth Judicial Circuit

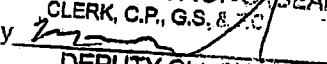
Chat, South Carolina.

We move and consent:


 Christopher L. Murphy, Esquire
 Attorney for Applicant


 Megan Harrigan Jameson
 Attorney for the State



ATTEST: A TRUE COPY
 JULIE J. ARMSTRONG (SEAL)
 CLERK, C.P., G.S. & J.C.
 By 
 DEPUTY CLERK

STATE OF SOUTH CAROLINA)	COURT OF COMMON PLEAS
COUNTY OF ^{Charleston} Horry)	FOR THE ^{9th} 15th JUDICIAL CIRCUIT
Jonta Green)	2013-CP-10-6337
Applicant)	2015-CP-10-6633
Vs.)	
State of South Carolina)	AFFIDAVIT OF TRIAL COUNSEL
Respondent,)	

Affiant James K Falk, having been duly sworn hereby deposes and states:


1. I was appointed to represent Jonta Green in PCR action 2013-CP-10-6337.
2. I represented Mr. Green and his evidentiary hearing at which the Honorable Eugen Griffith Jr. dismissed Mr. Green's PCR application.

3. I initially filed notice of appeal and then withdrew the notice so that Mr. Green could file a motion for relief under SCRPC 59(e).
4. Mr. Green's motion for relief under 59(e) was denied.
5. I neglected to file a Notice of Appeal from the decision to deny relief under 59(e).
6. Mr. Green it was my error for failing to file a timely notice of appeal, and I regret the inconvenience that this has caused the parties hereto.

Further the Affiant sayeth Naught!


 James K Falk

Subscribed and Sworn to me this July 25, 2017


 Notary Public
 My commission expires: 4/6/2021

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Eugene C. Griffith, Circuit Court Judge

JONTA GREEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000004

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX i
ISSUE PRESENTED 1
STATEMENT 2
ARGUMENT 4
CONCLUSION 5

ISSUE PRESENTED

Did the PCR judge correctly find that Petitioner did not knowingly and voluntarily waive his right to appeal the denial of his first PCR application and is entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991)?

STATEMENT

In January of 2009, the Charleston County Grand jury indicted Petitioner, Jonta Green with murder and possession of a weapon during the commission of a violent crime, indictments #2009-GS-10-113, 116. On April 19, 2010, Petitioner proceeded to jury trial before the Honorable Deadra L. Jefferson. Demal Mattson represented Petitioner at trial. Rutledge Durant and Peter McCoy prosecuted the case. The jury found Petitioner guilty of the lesser included offense of voluntary manslaughter and the weapon charge. Judge Jefferson initially sentenced Petitioner to twenty-three (23) years for the voluntary manslaughter charge but that sentence was later amended to twenty (20) years. (App. p. 920). Judge Jefferson sentenced Petitioner to five years concurrent for the weapon charge. A timely notice of intent to appeal was filed and the direct appeal perfected. On January 30, 2013, the South Carolina Court of Appeals dismissed the appeal. State v. Green, Op. No. 2013-UP-46 (S.C. Ct.App. filed January 30, 2013).

On October 28, 2013, Petitioner filed an application for post-conviction relief [PCR], 2013-CP-10-6337. The State filed a return on December 22, 2014. On February 18, 2015, an evidentiary hearing was held before the Honorable Eugene Griffith. James K. Falk represented Petitioner at the PCR hearing. Ashleigh R. Wilson represented the State. In a written order signed July 1, 2015, Judge Griffith denied relief and dismissed the application. On July 23, 2015, Petitioner filed a timely motion to reconsider pursuant to Rule 59(e), SCRCP. On July 29, 2015, Judge Griffith denied the motion. A notice of intent to appeal was not filed.

On December 9, 2015, Petitioner filed a second PCR application, 2015-CP-10-6633. The State filed a return on August 11, 2016. On December 4, 2017, the parties entered into a consent agreement to seek a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). (App. pp. 1015-1019). Christopher L. Murphy represented Petitioner. Megan Harrigan

Jameson represented the State. The Honorable Deadra L. Jefferson signed the order. A timely notice of intent to appeal was served on December 19, 2017. This petition for writ of certiorari and the accompanying separately filed Austin petition follow.

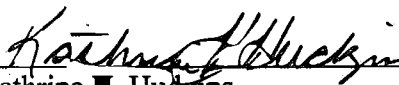
ARGUMENT

The PCR judge correctly found that Petitioner did not knowingly and voluntarily waive his right to appeal the denial of his first PCR application and is entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

In support of the grant of a belated appeal pursuant to Austin, Petitioner presented an affidavit from the first PCR attorney admitting to failing to file the notice of intent to appeal after Judge Griffith denied the Rule 59(e) motion. (App. p. 1019). The second PCR judge correctly found that Petitioner did not knowingly and intelligently waive his right to appeal the denial of his first PCR application and is entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari and allow the belated appeal.


Kathrine M. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of July, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Eugene C. Griffith, Circuit Court Judge

JONTA GREEN,

PETITIONER

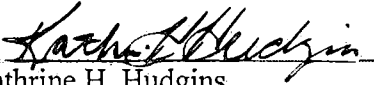
V.

STATE OF SOUTH CAROLINA,

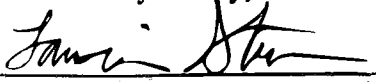
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Jonta Green, #340485, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 10th day of July, 2018.


Kathrine H. Hudgins
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 10th day of July, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Eugene C. Griffith, Circuit Court Judge

JONTA GREEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000004

PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX.....	i
ISSUE PRESENTED.....	1
STATEMENT.....	2
ARGUMENT.....	4
CONCLUSION.....	7

ISSUE PRESENTED

Did the PCR judge err in refusing to address in the order of dismissal all of the issues raised during the PCR hearing and included in the motion pursuant to Rule 59(e)?

STATEMENT

In January of 2009, the Charleston County Grand jury indicted Petitioner, Jonta Green with murder and possession of a weapon during the commission of a violent crime, indictments #2009-GS-10-113, 116. On April 19, 2010, Petitioner proceeded to jury trial before the Honorable Deadra L. Jefferson. Demal Mattson represented Petitioner at trial. Rutledge Durant and Peter McCoy prosecuted the case. The jury found Petitioner guilty of the lesser included offense of voluntary manslaughter and the weapon charge. Judge Jefferson initially sentenced Petitioner to twenty-three (23) years for the voluntary manslaughter charge but that sentence was later amended to twenty (20) years. (App. p. 920). Judge Jefferson sentenced Petitioner to five years concurrent for the weapon charge. A timely notice of intent to appeal was filed and the direct appeal perfected. On January 30, 2013, the South Carolina Court of Appeals dismissed the appeal. State v. Green, Op. No. 2013-UP-46 (S.C. Ct.App. filed January 30, 2013).

On October 28, 2013, Petitioner filed an application for post-conviction relief [PCR], 2013-CP-10-6337. The State filed a return on December 22, 2014. On February 18, 2015, an evidentiary hearing was held before the Honorable Eugene Griffith. James K. Falk represented Petitioner at the PCR hearing. Ashleigh R. Wilson represented the State. In a written order signed July 1, 2015, Judge Griffith denied relief and dismissed the application. On July 23, 2015, Petitioner filed a timely motion to reconsider pursuant to Rule 59(e), SCRPC. On July 29, 2015, Judge Griffith denied the motion. A notice of intent to appeal was not filed.

On December 9, 2015, Petitioner filed a second PCR application, 2015-CP-10-6633. The State filed a return on August 11, 2016. On December 4, 2017, the parties entered into a consent agreement to seek a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). (App. pp. 1015-1019). Christopher L. Murphy represented Petitioner. Megan Harrigan

Jameson represented the State. The Honorable Deadra L. Jefferson signed the order. A timely notice of intent to appeal was served on December 19, 2017. This Austin petition and the accompanying separately filed petition for writ of certiorari follow.

ARGUMENT

The PCR judge erred in refusing to address in the order of dismissal all of the issues raised during the PCR hearing and included in the motion pursuant to Rule 59(e).

In the order of dismissal the PCR judge acknowledges the issues raised at the PCR hearing writing, "At the hearing, Applicant proceeded solely on the allegations of ineffective assistance of counsel for the following reasons:

1. Ineffective assistance of counsel.
 - a. Failure to investigate witnesses.
 - b. Failure to call Shonda Gennings.
 - c. Stipulating about the gun turned in by the Applicant at trial.
 - d. Failure to object to Dr. Schandl's hearsay testimony of Dr. Shjeld's medical examination report.
 - e. Failure to advise the Petitioner of serious medical issues from brain surgery.

(App. p. 987). In the body of the order, however, the PCR judge only addresses two issues: 1.) the stipulation about the gun (App. pp. 992-993); and 2.) the failure to call witnesses (App. pp. 993 - 994). The order does not address the failure to investigate witnesses, the failure to object to Dr. Schandl's hearsay testimony of Dr. Shield's medical examination report or the failure to advise the Petitioner of serious medical issues from brain surgery. In the order the PCR judge found that all other allegations were abandoned. (App. p. 994).

Petitioner filed a timely motion pursuant to Rule 59(e). (App. pp. 996-997). In paragraph three (3.) of the motion counsel for Petitioner lists the issues raised at the PCR as follows:

- a. Failure to investigate witnesses.
- b. Failure to call Shonda Gennings.
- c. Stipulating about the gun turned in by the Applicant at trial.
Failure to object to Dr. Schandl's hearsay testimony of Dr. Shjeld's medical examination report.
- d. Failure to advise the Petitioner of serious medical issues from brain surgery.

(App. pp. 996-997). In the motion Petitioner specifically notes that the PCR judge failed to rule on the issues involving the failure to object to Dr. Schandl's hearsay testimony of Dr. Shield's medical examination report and the failure to advise the Petitioner of serious medical issues from brain surgery. (App. p. 997). Additionally, in paragraph six (6.) counsel for Petitioner writes, "Counsel for Applicant respectfully contends that the evidence regarding all issues was presented at the PCR hearing and that none of the issues described in numerical paragraph 3 above were abandoned." (App. p. 997). This would include the allegation that trial counsel failed to investigate witnesses. The failure to investigate witnesses allegation is not addressed in the order of dismissal. The issue addressed in the order is the failure to call witnesses rather than the failure to investigate witnesses. The PCR judge, however, denied the Rule 59(e) motion. The PCR judge erred.

In Marlar v. State, 375 S.C. 407, 408, 653 S.E.2d 266, 266 (2007), the South Carolina Supreme Court, "Pursuant to S.C.Code Ann. § 17-27-80 (2003), the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. The failure to specifically rule on the issues precludes appellate review of the issues. Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992)." The order of the PCR judge in this case fails to address three allegations raised by Petitioner at the PCR hearing: 1. failure to investigate witnesses; 2. failure to object to Dr. Schandl's hearsay testimony of Dr. Shield's medical examination report; and 3. failure to advise the Petitioner of serious medical issues from brain surgery.

Additionally in Marlar the Court wrote:

We take this opportunity to reiterate our admonition that "[c]ounsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and

the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCF, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by 17-27-80 and Rule 52(a), SCRCF." Pruitt v. State, 310 S.C. at 256, 423 S.E.2d at 128.


375 S.C. at 410, 653 S.E.2d at 267. Counsel for Petitioner followed the rule of Marlar, filed a Rule 59(e) motion noting that the order of dismissal failed to address three issues. After the omissions were brought to the attention of the PCR judge in the Rule 59(e) motion, the PCR judge failed to correct the order of dismissal and address the omitted issues.

All three of the omitted issues were raised during the PCR hearing. In regard to the allegation that trial counsel was ineffective for failing to investigate witnesses, trial counsel admitted at the PCR hearing that he did not ask one of the character witnesses who testified on Petitioner's behalf, George Thomas, if he had a prior criminal record. (App. p. 967, line 8 – p. 968, 969, lines 1-2). Counsel admitted that he was surprised when the State questioned the witness about a burglary conviction from fourteen years ago. (App. p. 969, lines 3-6; pp. 492-493).

In regard to the allegation that trial counsel was ineffective in failing to object to Dr. Schandl's testimony about Dr. Shield's autopsy report, trial counsel was questioned about whether he considered moving to exclude the report. (App. pp. 955-964). In regard to the allegation that trial counsel was ineffective in failing to advise the Petitioner of serious medical issues from brain surgery, trial counsel testified about having brain surgery fifteen years ago to remove a tangerine size tumor. (App. p. 975, line 5 – p. 976, lines 1-7). The PCR judge failed to address all three of the above issues raised at the PCR hearing and included in the Rule 59(e) motion. The issues are not preserved for appellate review because the judge failed to address the issues. In this unusual situation, a remand is necessary.

CONCLUSION

Counsel for Petitioner respectfully asks this Court to vacate the order of dismissal and remand the case to the circuit court for the issuance of an order that addresses, in addition to the issues included in the original order, the three issues omitted from the order of dismissal yet raised at the PCR hearing and in the Rule 59(e) motion.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of July, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Eugene C. Griffith, Circuit Court Judge

JONTA GREEN,

PETITIONER

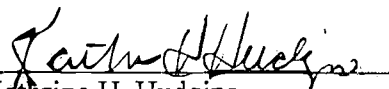
V.

STATE OF SOUTH CAROLINA,


RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari pursuant to Austin v. State in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari pursuant to Austin v. State has been served on Jonta Green, #340485, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 10th day of July, 2018.


Kathrine H. Hudgins
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 10th day of July, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
The Honorable Eugene C. Griffith, Circuit Judge

APPELLATE CASE NO 2018-000004

Jonta Green,

Petitioner,

vs.

State of South Carolina,

Respondent.

**RESPONDENT'S MOTION FOR REMAND FOR SPECIFIC FINDINGS OF FACT AND
CONCLUSIONS OF LAW PURSUANT TO S.C. CODE SECTION 17-27-80**

This matter is before the court on Petitioner's appeal pursuant to Austin v. State challenging the denial of his post-conviction relief application. In this initial PCR action (2013-CP-10-6337) a hearing was held before the Honorable Eugene C. Griffith Jr. on February 18, 2015. The State was represented by former assistant attorney general Ashleigh Wilson and Petitioner was represented by James Falk. In a written order signed July 1, 2015, Judge Griffith denied relief and dismissed the application. On July 23, 2015, Petitioner filed a timely motion to reconsider pursuant to Rule 59(e), SCRPC asking the court rule on the three remaining issues not addressed in the original order and on July 29, 2015, Judge Griffith denied the motion. A notice of intent to appeal was not filed.

On December 9, 2015, Petitioner filed a second PCR application, 2015-CP-10-6633 seeking belated Austin review of his prior PCR. The State filed a return on August 11, 2016. On December 4, 2017, the parties entered into a consent agreement granting Petitioner a belated appellate review of his prior PCR pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). The Honorable Deadra L. Jefferson, acting in her capacity as Chief Administrative Judge of Charleston County Common Pleas, signed the order. A timely notice of intent to appeal was served on December 19, 2017.

Petitioner filed a petition for writ of certiorari on July 10, 2018. Petitioner raised the following issue: "The PCR judge erred in refusing to address in the order of dismissal all of the issues raised during the PCR hearing and included in the motion pursuant to Rule 59 (e). Pet. p. 4. Petitioner requested as relief that the "Court vacate the order of dismissal and remand the case to the circuit court for the issuance of an order that addresses, in addition to the issues included in the original order, the three issues omitted from the order of dismissal yet raised at the PCR hearing and in the Rule 59 (e) motion."

This case has been reassigned to undersigned counsel who has reviewed the record and the PCR order from Petitioner's initial PCR Proceeding. Respondent agrees that in the present case, remand is appropriate for detailed findings of fact and conclusions of law on the numerous issues raised. Therefore, Respondent moves that this case be remanded to enable the PCR court to issue an order in accordance with Section 17-27-80.

WHEREFORE, Respondent prays that this Court remand this matter to the PCR court so the PCR court may enter an amended order pursuant to Section 17-27-80.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

BENJAMIN HUNTER LIMBAUGH
Assistant Attorney General

By: *Benjamin Limbaugh*
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

NOV 26, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHARLESTON COUNTY
The Honorable Eugene C. Griffith, Circuit Judge

APPELLATE CASE NO 2018-000004

JONTA GREEN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

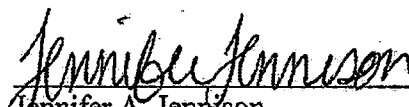
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Respondent's Motion for Remand for Specific Findings of Fact and Conclusions of Law Pursuant to S.C. Code Section 17-27-80 has been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211-1589

This 26th day of November, 2018.


Jennifer A. Jennison
Legal Assistant for Petitioner

The Supreme Court of South Carolina

Jonta Green, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-000004

Lower Court Case No. 2013-CP-10-06337

ORDER

Petitioner's application for post-conviction relief (PCR) and his timely Rule 59(e), SCRCP, motion were denied by Judge Griffith. No notice of appeal was served. Petitioner seeks a writ of certiorari from an order issued by Judge Jefferson finding Petitioner was entitled to a belated review of Judge Griffith's order pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). The State has filed a motion to remand, in essence, conceding that Judge Griffith did not address all of the issues raised by Petitioner at the PCR hearing.

We grant the petitions for writs of certiorari from the orders of both Judge Jefferson and Judge Griffith and dispense with further briefing.


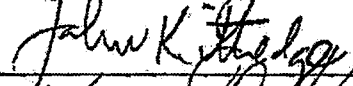

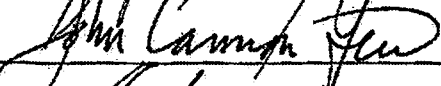
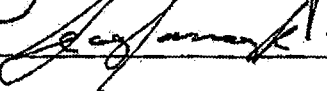
Both parties were asked by Judge Griffith to submit proposed orders. The order signed by Judge Griffith, presumably prepared by the State, sets forth the following issues on which Petitioner proceeded at the PCR hearing—ineffective assistance of counsel for failing to investigate and call certain witnesses, stipulating the gun belonged to Petitioner, failing to object to hearsay evidence, and failing to advise Petitioner of counsel's serious medical issues resulting from brain surgery. However, the order discusses only the allegations concerning the failure to call witnesses and the stipulation about the gun. Although Petitioner argued in his Rule 59(e) motion that Judge Griffith erred in failing to address all of the issues raised, Judge Griffith summarily denied the motion.

In his petition for a writ of certiorari, Petitioner again argues Judge Griffith erred in failing to address all of the allegations raised at the PCR hearing. The State concedes this was error and moves to remand this matter to Judge Griffith for a

new PCR order.

This Court has recently addressed our continuing concerns over PCR orders that do not comply with S.C. Code Ann. § 17-27-80 (2014) (requiring the PCR court to "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented"), and Rule 52(a), SCRCP ("In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon"). *See Reese v. State*, 425 S.C. 108, 110, 820 S.E.2d 376, 377 (2018) ("Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it." (quoting *Pruitt v. State*, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992))). In *Reese*, we noted *Pruitt* was decided twenty-six years earlier and cited numerous cases in which we repeated the law and our admonition that we expected it to be followed. *Id.* at 109-11, 423 S.E.2d at 377-78.

Because there was evidence presented at the PCR hearing on the issues raised by Petitioner, Judge Griffith's order, which did not rule on the merits of all of the issues raised, did not comply with the law. Accordingly, we vacate Judge Griffith's orders dismissing Petitioner's PCR application and denying the Rule 59(e) motion and dismiss the proceedings before this Court without prejudice. This matter is remanded to Judge Griffith to issue a PCR order containing specific findings on each of the allegations raised by Petitioner at the hearing and in his Rule 59(e) motion. The new PCR order shall be issued within thirty (30) days of the date of this order. Judge Griffith shall notify this Court, in writing, that he has complied with this order. Following the issuance of a legally sufficient PCR order and a ruling on any Rule 59(e) motion, the aggrieved party may serve and file a new Notice of Appeal.

	_____	C.J.
	_____	J.
	_____	J.
	_____	J.
	_____	J.

Columbia, South Carolina

February 01, 2019

cc:

Kathrine Haggard Hudgins, Esquire
Benjamin Hunter Limbaugh, Esquire
The Honorable Eugene C. Griffith, Jr.
The Honorable Deadra L. Jefferson
The Honorable Julie J. Armstrong

RECEIVED
2019
APPELLATE DIVISION

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Jonta Green, #340485,

2013-CP-10-6337

Applicant,

v.

**AMENDED
ORDER OF DISMISSAL**

State of South Carolina,

Respondent.

Presiding Judge:	The Honorable Eugéné C. Griffith, Jr.
Applicant's Attorney:	James Falk, Esquire
Respondent's Attorney:	Ashleigh R. Wilson, Esquire
Trial Counsel:	Demal Mattson, Esquire
Date of Hearing:	2/18/2015
Court Reporter:	Karen V. Anderson

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed October 28, 2013. The Respondent made its return on December 22, 2014. An evidentiary hearing on the matter was convened on February 18, 2015 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by James Falk, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also testifying was Demal Mattson, Esquire. The Court had before it the trial transcript, the Charleston County Clerk of Court records, and the Applicant's records from the South Carolina

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Department of Corrections, the Applicant's application, the Respondent's return, the appellate records, and the exhibits submitted by the Applicant during the evidentiary hearing¹.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the January 2009 term of the Charleston County Grand Jury for murder (2009-GS-10-0113). The Applicant was represented by Demal Mattson, Esquire.

On April 22, 2011, the Applicant proceeded to trial and was found guilty of the lesser included offense of voluntary manslaughter. The Applicant was sentenced by the Honorable Deadra L. Jefferson to confinement for the period of twenty-three years. The Applicant's sentence was amended on May 11, 2011 to twenty years.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Susan Hackett, Esquire, of the South Carolina Office of Appellate Defense. The Applicant's appeal was dismissed by the Court on January 30, 2013 after review pursuant to Anders v. California. The Remittitur was issued on February 21, 2013.

ALLEGATIONS

In his application for PCR, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
 - a. Failure to object to improper and insufficient foundation where the medical examiner, Dr. Amy Shield, was unavailable to attest to the medical examination report.
 - b. Failure to object to Dr. Schandl's hearsay testimony of Dr. Shield's medical examination report.

¹ Applicant's exhibit 1- a letter to the Applicant from Shonda Gennings; Applicant's exhibit 2- the stipulation of the parties regarding the gun turned in to police.

- c. Failure to object where the question of the cause of death would call for speculation.
- d. Failure to advise that stipulation waived his right to prove every element of the alleged crimes.
- e. Failure to advise that the stipulation would create a burden shifting affect and cause the Petitioner to prove self-defense.
- f. Failure to advise the Petitioner of serious medical issues from brain surgery.

At the hearing, Applicant proceeded solely on the allegations of ineffective assistance of counsel for the following reasons:

1. Ineffective assistance of counsel
 - a. Failure to investigate witnesses.
 - b. Failure to call Shonda Gennings.
 - c. Stipulating about the gun turned in by the Applicant at trial.
 - d. Failure to object to Dr. Schandl's hearsay testimony of Dr. Shield's medical examination report.
 - e. Failure to advise the Petitioner of serious medical issues from brain surgery.

All allegations raised in the application and not addressed in this order are deemed abandoned as the Applicant failed to present any evidence, argument, or testimony regarding such claims.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2014).

Summary of the Testimony

The Applicant, Jonta Green, was present and testified he retained Dermal Mattson to represent him at trial. He testified he met with counsel four times within seventeen months. He testified counsel mentioned having a tumor removed before he went to trial. The Applicant also

testified he told counsel to investigate witnesses, but trial counsel already had prepared the witnesses to call as character witnesses. The Applicant testified he showed counsel a letter from his child's mother and told him he wanted to call her as a witness at his trial. The Applicant testified trial counsel said he would look into it, but he never put the letter into evidence. He testified further he also wanted counsel to call his fiancé's father as a character witness.

The Applicant testified he reviewed his discovery materials with counsel shortly before trial. He testified trial counsel told him to set aside funds for a private investigator. He testified he did not discuss stipulating to testimony with counsel prior to trial. The Applicant testified counsel stipulated that the gun turned in by the Applicant was used to shoot the victim. He testified trial counsel helped him turn himself in. The Applicant testified counsel told him the solicitor wanted the weapon, so he turned the weapon in.

Also present and testifying was Demal Mattson, Jr., Esquire. Mr. Mattson testified he was retained to represent the Applicant. Counsel testified he has been a trial lawyer since 1967. He testified he was always available to speak to and meet with the Applicant and his family. He testified he also met with the Applicant several times at the jail about his bond.

Counsel testified the first thing he did was get the discovery materials and try to develop a defense theory for the case. He testified the difficulty with the case was that several people at the party personally knew the Applicant and had identified the Applicant as the shooter. Counsel testified "who done it" was not an issue and they could not go forward on factual innocence. Counsel also testified he discussed his trial strategy with the Applicant. Counsel testified he discussed the strengths and weakness of self-defense with the Applicant. Counsel testified that Applicant was missing an arm lost from an earlier yet unrelated injury from an accident. Counsel testified they ultimately decided to go forward on self-defense. He testified the defense was a

distant shot, but at least it would decrease the Applicant's exposure to something other than murder. Counsel testified they presented testimony about self-defense with the hopes that the Applicant would get voluntary or involuntary manslaughter.

Counsel testified during his investigation, he looked for anything to challenge the credibility of the State's witnesses. He testified he made a list of questions for each State witness. Counsel testified they hired a private investigator. He testified the investigator did not get much because the community was hostile. Counsel testified he took all witness statements and reports and made notes and looked for inconsistencies and discrepancies.

Counsel testified he stipulated to certain facts at trial. He testified he believed that stipulating the weapon belonged to the Applicant was because nearly every witness present at the altercation saw the Applicant and the victim fighting and that they had seen the Applicant with a gun in his possession. He further testified he discussed with the Applicant why they should turn over the gun to the police. He also testified that the strategy of presenting self-defense required them to agree and not challenge that the Applicant shot the victim. Counsel testified his strategy was to argue people saw the Applicant and the victim fighting over the gun and the victim was shot. Counsel testified stipulating the weapon being in the possession of the Applicant immediately prior to the altercation was part of his trial strategy. He testified the only question about the gun was who pulled the trigger. Counsel testified he did not believe in challenging the State about a factual issue that many witnesses' statements consistently said that Applicant introduced the gun to the altercation. Counsel testified it was obvious and common sense that the gun was involved, and he did not want the jury to think that they was misleading them.

Counsel testified the State called Dr. Schandl at trial. He testified there was no question that the victim died from a head wound and that the gun was close to his head. He testified the

angle of the shot was not relevant because the Applicant and the victim were seen wrestling over the gun. He testified he recalled the victim's wound being classified as an exit wound.

Counsel testified there was no use excluding the autopsy report when witnesses testified the victim was shot in the head by the Applicant. He testified he did not consider having the report excluded because so many witnesses had already said what took place. Counsel testified no matter how close the gun was to the victim's head during the struggle, he did not want to try to convince the jury that something was false when it was obviously true.

Counsel testified he is aware that the Applicant has a Sixth Amendment right to confront his accusers. He testified he was aware that the autopsy report contained hearsay, but he did not think that the report had any real significance with all the eye witnesses to the shooting. He testified without the autopsy report the outcome would have been the same and he would have stuck with the same strategy. Counsel testified it was his trial strategy not to alienate the jury by having something excluded that did not matter. He testified he also wanted to elicit helpful testimony from the pathology expert. Counsel testified the stippling noted in the autopsy report showed that the Applicant could not have been standing over the victim when he was shot as one witnesses testified.

Counsel testified he discussed the stipulation about the gun with the Applicant before he signed it. He testified he always discusses stipulations with clients because it is the client's case not his. Counsel testified he was aware of George Thomas as a potential character witness. He testified he spoke to all the witnesses before they testified. He testified he went to the Applicant's church to meet the pastor and an elderly lady who the Applicant drove to church to verify issues. Counsel testified he was surprised that Thomas had a prior criminal record, but he did not need to object to something that was explained by the witness. He testified that a witness with criminal

conviction fourteen years prior does not mean the witness will lie and cannot be an effective witness. He testified with all of the Applicant's other character witnesses, Thompson's testimony and prior conviction were not damaging to the defense's case.

Counsel testified he had seen the letter from Gennings to the Applicant prior to trial. He testified he tried contacting Gennings prior to trial, but was unable to make contact with her. Counsel testified Gennings was the reason for the hostility between the victim and Applicant which led to the murder. Counsel testified Gennings had a child with the victim before the victim was incarcerated on drug charges. Counsel further testified that Applicant had been out at a local club and saw Gennings, bought her a cocktail, and danced with her at the local club. Counsel testified Gennings called the victim and told him about her interaction with the Applicant and the victim got upset. Counsel testified he tried to talk to Gennings at trial, but all she said was that the victim was reformed after his incarceration. Counsel testified he found Gennings to be very hostile and thus he did not want to call her as a defense witness.

Lastly, Counsel testified that he had surgery to remove a benign tumor that was attached to his skull fifteen years ago. He testified he did not practice law for four and a half months after the surgery to allow his brain to recover. Counsel testified the tumor did not affect his ability to effectively represent the Applicant.

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For the Applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under

prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668 (1984), Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

Stipulation to the gun as evidence

Applicant alleges Counsel was ineffective for stipulating to the gun as evidence as part of the State's case. This Court finds this issue meritless. While Applicant alleges Counsel did not consult with him before stipulating to the gun as evidence, Counsel testified to the contrary. Counsel also testified that many eye-witnesses stated they saw Applicant in possession of the gun just before the altercation and shoot the victim. Counsel further testified it was fruitless to argue about the gun to the jury as he did not want to alienate the jury over a non-issue.

Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d, 529 (1992).

This Court finds Counsel articulated valid reasons for stipulating to the gun as evidence based on the facts of the case and his professional assessment of the case. This Court agrees with Counsel that it would have discredited his defense of self-defense to argue over who possessed the gun during the incident when many witnesses stated it was the Applicant's. This could have alienated the jury and detracted from his valid defense strategy. This Court also notes that Counsel's strategy of self-defense or voluntary manslaughter was highly effective as Applicant was convicted of the lesser included offense of voluntary manslaughter instead of murder.

Therefore, this Court finds Applicant failed to meet his burden of proof as to this argument, thus, this allegation is denied.

Failure to Call Witnesses

Applicant also alleges Counsel was ineffective for failure to call certain witnesses on his behalf at trial. Applicant specifically wanted Ms. Gennings and Mr. Thomas to testify on his behalf.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

This Court finds Applicant can prove no prejudice for Counsel's failure to call these witnesses on his behalf at trial as these witnesses did not testify at the PCR hearing. Further, Counsel testified he investigated these witnesses and found Ms. Gennings to be hostile. This Court finds Applicant has failed to meet his burden of proof as to this allegation. Thus, this allegation is denied.

Failure to Investigate Witnesses

Applicant alleged in his application that Counsel was ineffective in not investigating witnesses. Regarding his strategy of calling several character witnesses as to the Applicant's peaceful demeanor, Applicant testified that he did not know that the father of his fiancé had a fourteen year old conviction for burglary. Applicant testified that he believed this impacted the character testimony which was sought to be elicited from this witness. Counsel testified at the

9 504

hearing that he did not ask the witness about any prior convictions but may have handled the witness differently if he had known of this conviction. Counsel further stated that he did not think that it made a big impact considering all of the character witnesses that were presented. Therefore, this Court finds Applicant to meet his burden of proof as to this argument. Thus, this allegation is denied.

Failure to Object to Hearsay Testimony of Dr. Shield's Medical Examination Report

Applicant alleges in his application that Counsel's failure to object to hearsay testimony of the physician who performed the autopsy and prepared a written report. At the jury trial, the State called Dr. Cynthia Anne Schandl, who was employed by the Medical University of South Carolina as a forensics pathologist. Dr. Schandl testified that Dr. Shield had participated in a fellowship for one year at the Medical University in the autopsy department under the supervision of Dr. Schandl and three other pathologists. Dr. Schandl testified from review of the report from autopsy of Dr. Shield. Thus, the testimony provided by Dr. Schandl was hearsay.

Counsel testified that he did not object to this hearsay testimony for two reasons: first, challenging the report and testimony as hearsay would appear that the defense was hiding "unfavorable-to-their-theory" findings in the report and second, the findings in the report were consistent with and helpful to the defense theory. Counsel testified that the findings in the autopsy were very consistent with a contact gunshot to the head. Every fact witness described a close physical altercation between the victim and Applicant. All of the witnesses testified that the gun was in possession of the Applicant at the onset of the altercation. The defense's theory of self-defense was consistent with the victim being shot at close range in the head. The findings in the report indicated that the gun shot was made while the mussel was touching the head of the

victim. Counsel for the Applicant needed this opinion to further the defense theory and to offset the testimony of one the eyewitness who stated that Applicant struck the victim with his fist and gun. Therefore, this Court finds Applicant failed to meet his burden of proof as to this argument, and thus, this allegation is denied.

Failure to Advise Applicant of Prior Serious Medical Issues

Applicant alleges in his application that Counsel did not advise him of a prior serious medical issue which arose from having a tumor removed. Counsel testified that he had surgery to remove a benign tumor that was attached to his skull fifteen years before the representation of applicant began. He testified he did not practice law for four and a half months after the surgery to allow his brain to recover. Counsel testified the tumor did not affect his ability to effectively represent the Applicant. Applicant presented absolutely no testimony at the PCR hearing that Counsel was not able to effectively, reasonably, and functionally ambulate, communicate, see, hear, react, organize, or participate as his attorney during the trial. Therefore, this Court finds Applicant to meet his burden of proof as to this argument. This allegation is denied.

In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668).

It is all too tempting for a defendant to second-guess counsel's assistance after conviction or 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. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent

in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland at 689, 104 S. Ct. at 2065

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with the Applicant, conducted a proper investigation, and provided thorough representation. This Court finds that counsel's representation did not fall below an objective standard of reasonableness. Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test- that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in their representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland- that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

CONCLUSION

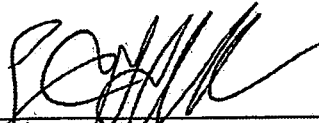
Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 17th day of February 2019



Eugene C. Griffith, Jr.
Presiding Judge
9th Judicial Circuit

Newberry, South Carolina.