RECEIVED

JUL 29 2019

S.C. SUPREME COURT

AIKEN & HIGHTOWER, PA
Attorneys at Law
2231 Devine Street, Suite 201
Columbia, SC 29205
Phone: 803-799-5205
Fax: 803-799-5206

Arthur K. Aiken ***A. Bea Hightower***

July 25, 2019

The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

Re: Bilal S. Haynsworth #360072 v. State of South Carolina
Civil Action No.: 2018-CP-32-00397

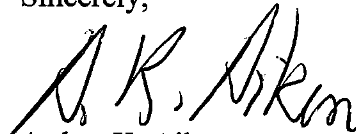
Dear Mr. Shearouse:

I am appointed counsel for the Applicant, Bilal S. Haynsworth, in the above captioned post-conviction relief case. I have enclosed an original and one (1) copy of a Notice of Appeal for this case. Please file the original and return the file stamped copy in the enclosed SASE.

By copy of this letter with the filing enclosed, I have filed the filing with the Clerk of the Lexington County Court of Common Pleas. I have also served the filing on the Office of the Attorney General for South Carolina. Please call with any questions.

Thank you for your help

Sincerely,



Arthur K. Aiken
art@aikenandhightower.com

cc: Clerk, Lexington County Court of Common Pleas (w/enclosures)
Office of the Attorney General for South Carolina (w/enclosures)
Bilal S. Haynsworth (w/enclosures)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUL 29 2019

S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, IV, Circuit Court Judge

Case No. 2018-CP-32-00397

Bilal S. Haynsworth #360072...Applicant/Appellant

v.

State of South Carolina..Respondent/Respondent

NOTICE OF APPEAL

This is a post-conviction relief case. Appellant appeals from the Order of Dismissal filed on June 27, 2019 in this case. Appellant received written notice of the Order of Dismissal by mail on June 28, 2019. A copy of the Order of Dismissal appealed from is attached.

July 25, 2019

Arthur K. Aiken
Aiken & Hightower, PA
2231 Devine Street, Suite 201
Columbia, SC 29205
Telephone: 803-799-5205
Fax: 803-799-5206
Email: art@aikenandhightower.com
ATTORNEYS FOR APPELLANT

OTHER COUNSEL OF RECORD:
South Carolina Attorney General's Office
Assistant Attorney General Johnny E. James, Jr.
PO Box 11549
Columbia, SC 29211
ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
JUL 29 2019
S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, IV, Circuit Court Judge

Case No. 2018-CP-32-00397

Bilal S Haynsworth 3360072..Applicant/Appellant

v.

State of South Carolina...;......Respondent/Respondent

PROOF OF SERVICE AND FILING

I certify that, on July 25, 2019, I served and filed the Notice of Appeal in this case by mailing copies of the Notice to:

South Carolina Attorney General's Office
Assistant Attorney General Johnny E. James, Jr.
PO Box 11549
Columbia, SC 29211

and

The Honorable Lisa M. Comer
Lexington County Clerk of Court
205 E. Main Street
Lexington, SC 29072

SIGNATURE ON THE FOLLOWING PAGE

Arthur K. Aiken
Aiken & Hightower, PA
2231 Devine Street, Suite 201
Columbia, SC 29205
Telephone: 803-799-5205
Fax: 803-799-5206
Email: art@aikenandhightower.com

Columbia, SC
July 25, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
Bilal S. Haynesworth, S.C.D.C. No. 360072,	)	Case No.: 2018-CP-32-00397
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

COPY

FILED
2019 JUN 27 PM 2:40
LISA M. COMER
CLERK OF COURT
LEXINGTON CO. SC

This matter comes before the court by way of an application for post-conviction relief filed by Bilal S. Haynesworth ("Applicant") on February 2, 2018. Respondent made its return on or about May 9, 2018. The court convened an evidentiary hearing into the matter on April 5, 2019, at the Marc H. Westbrook Judicial Center in Lexington, South Carolina. Bilal S. Haynesworth ("Applicant") was present at the hearing and represented by Arthur K. Aiken, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented the State of South Carolina ("Respondent").

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, David M. Mauldin, Esq. ("Counsel"), and Applicant's sister, Monisha Coleman, also testified. The court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Lexington County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the August 2013 term of the Lexington County Grand Jury for attempted murder (2013-GS-32-02373), possession of a firearm or knife during the commission of a violent crime (2013-GS-32-02374), and conspiracy

(2013-GS-32-02375). David M. Mauldin, Esq. represented Applicant before and during the trial. Kate W. Usry and Gil Bell, Esqs., of the Eleventh Circuit Solicitor's Office, prosecuted the case. On May 19, 2014, Applicant proceeded to trial before Judge Thomas A. Russo and a jury. The jury found Applicant guilty as indicted on May 21, 2014. Judge Russo sentenced Applicant to imprisonment for concurrent terms of 12 years for attempted murder, 5 years for the weapons charge, and 5 years for conspiracy.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Robert M. Pachak, Esq., who raised the following issue:

> Whether the trial court erred in instructing the jury in part of its opening remarks that a trial "is a search for the truth in an effort to make sure that justice is done between the parties that appear before the Court," because such a remark could alter the jury's perception of the burden of proof and deprive appellant of a fair trial?

By unpublished opinion decided March 2, 2016, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Haynesworth, Op. No. 2016-UP-119 (S.C. Ct. App. filed March 2, 2016). Applicant timely petitioned for rehearing, and the South Carolina Court of Appeals denied the petition on April 21, 2016. Applicant petitioned the South Carolina Supreme Court for a writ of certiorari, which was denied by order dated March 8, 2017. The Remittitur was issued on March 17, 2017.

Present Application

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

1. "Applicant was denied the right of effective assistance of counsel, rights that are guaranteed by the Sixth and Fourteenth Amendment to the U.S. Constitution and by Article I, §§ 3 and 14 of the S.C. Constitution, before trial, during trial, and the critical stages of being represented by the counsel, etc. during guilt or innocence phase of trial being represented by trial counsel."
    a. "Supporting Facts: Trial Counsel performance during his representation was both unreasonable and pre-judicial [sic], *see Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but were not limited

to the following:"

i. "Counsel failed to file pretrial and posttrial [sic] motions,"

1. "Counsel failed to file pretrial and posttrial [sic] motion for the purposes to a fast speedy trial, immediate charge disposition for dismissals, and for the purposes to have the court to disallow the prosecution to charge for murder/attempted murder based upon the lack of evidence and just on statements that was given through coercion tactics."

ii. "Brady violation, Rule 5 disclosure violations, etc.,"

1. "State failed to disclosed [sic] State witness's statements to [Applicant] prior to trial, counsel allowed this violation to be committed by the State and did not move the court to have the sanction applied toward State for the Brady and Rule 5 violations, as this violated the Applicant's rights to a fair trial."

iii. "Counsel failed to conduct independent investigation to include hire [sic] an investigator to do a proper examination of the case pursuant to the applicable laws to case matter, as the case consisted of multiple felony charges,"

1. "Counsel violated the ABA, NBA, and the Strickland court when counsel failed to investigate and hire an investigator for investigation and examination purposes and for the ultimate stances to sought [sic] and establish a defense for the Applicant at trial. *Ingle v. State* (2002) and *Simpson v. Moore*, (2006)."

iv. "Counsel failed to interview credible defense witnesses and have at [sic] to testify on defense behalf, pursuant to have witnesses to testify at trial for the purposes to defend against charges not guilty of,"

1. "Counsel failed to interview and examine potential defense witnesses to be beneficial and for trial because the jury would not have convicted Applicant if counsel would have presented vital witnesses to testify for the defense."

v. "Counsel failed to serve the 10 day notice for a [sic] alibi defense including the trial counsel did not call on primary witness to testify at Applicant's trial,"

1. "Counsel failed to give notice for Applicant to place formal alibi defense, and counsel failed to comply to rules of trial pursuant to an alibi defense notice and or defense utilizing alibi defense."

2. "Ineffective assistance of appellate counsel, failed to raise meritorious issues that are preserved in trial record, etc.,"

a. "Appellate counsel failed to raised [sic] the available meritorious record issues to the appellate court at the time they should have been raised on appeal and appellate counsel failed to do so, plainly and clearly ignoring the fixed law,

policies, instruction through the State Supreme Court, see at *Gilchrist v. State*, (2005); *Anderson v. State*, (2003); *Southland v. State*, (1990). Applicant will simply take the stance pursuant to well settled laws that he is entitled to effective assistance of the appeal and appellate counsel so the proper appeal exhaustion doctrine can properly followed and complied with in Applicant's case matters."

3. "Actual innocence claim . . ., improperly charged and or indicted for the attempt murder offense, etc."
    a. "Applicant moves with a claim of actual innocence based on the factual and evidentials [sic] according to court records that the primary charge of murder/attempt [sic] murder is without basis and clear evidence due to the lack of evidence and the only evidence was by false statements given by persons of ill intents against the Applicant and the case failed examine affidavits accordingly to the duties of the counsel, etc. see at Schlup V, Delo, (1995); House V. Bell, (2006)."
4. "No bind over hearing as juvenile, due process rights violated."
    a. "Applicant was the age of seventeen (17) and charges in the nature being murder according to the mandates of *Aiken v. Byars* court makes it clear that the Applicant should have had a hearing to determine if he could have been charged for such offense but the case counsel failed to seek such hearing for Applicant as a pretrial motion for binding over the Applicant to fact charges convicted for."

Applicant, by and through counsel Art Aiken, thereafter amended his application by filing on July 31, 2018, to raise the following additional grounds for relief:

1. "Ineffective assistance of counsel"
    a. "Trial counsel rendered ineffective assistance when he failed to cross-examine Nehemiah Dixon, and this ineffective assistance prejudiced Haynesworth."
    b. "Trial counsel rendered ineffective assistance when he failed to object to the admissibility of Nehemiah Dixon's statement, and this ineffective assistance prejudiced Haynesworth."

Applicant, by and through counsel Arthur Aiken, again amended his application by filing on January 24, 2019, to raise the following additional grounds for relief:

2. "Ineffective assistance of counsel"
    a. "The trial court erred in giving a jury instruction that '[I]nferred malice may also arise when the deed is done with a deadly weapon." (Tr. p. 374, ll. 16-17), <u>State v. Belcher</u>, 385 S.C. 597, 685 S.E.2d 802 (2009). Trial counsel rendered defficient representation to Haynesworth at trial when he failed to object to the trial court's jury instruction

permitting the jury to infer malice from the use of a deadly weapon. Haynesworth was prejudiced by that failure."

b. "Trial counsel rendered deficient performance to Haynesworth by failing to call Haynesworth's sister, Monisha Coleman, as a witness in support of Haynesworth's alibi. Haynesworth was prejudiced by this deficient performance."

Applicant requests relief as follows:

- "Charges dismissed and released and restored with my rights to live without being falsely prosecuted."

At the evidentiary hearing, Applicant proceeded forward only on the allegations set forth in the amendments of July 31, 2018, and January 24, 2019.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); Butler, at 441, 334 S.E.2d at 813.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696.

A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97.

1. Failure to Cross-Examine Nehemiah Dixon

The court finds Applicant cannot show ineffectiveness by way of his claim that Counsel was ineffective for failing to cross-examine the prosecution witness Nehemiah Dixon. "When counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)).

At trial, Nehemiah Dixon reluctantly testified on behalf of the State. (Tr. 198-222). Dixon was dating Applicant's sister and was present at Applicant's house on January 3, 2013. (Tr. 198-99). Dixon testified he, Applicant's mother Tammy Coleman (a/k/a "Princess"), and co-defendant Lywone Capers took Applicant to school, dropped him off, and then returned to the house. (Tr. 199-200; Tr. 207, ll. 6-15). Princess received a text from Applicant indicating he was not comfortable at the school, so they returned to sign him back out. (Tr. 200-01). Dixon testified he did not see JayQuan Bell at the school because he stayed in the truck. (Tr. 201, ll. 10-18). Dixon admitted he overheard Capers say something about settling some things. (Tr. 201-02). Princess stayed at the school in order to fill out forms to sign Applicant out while Applicant, Capers, and Dixon returned to the house. (Tr. 203-06). Dixon did not recall how the three ended up in separate cars, but Dixon testified he drove the Nissan to the Exxon gas station. (Tr. 205-06). Applicant drove the Camaro while Capers drove the Mercedes-Benz SUV, with Princess along with them. (Tr. 206-07). At the Exxon, the group saw Bell there with "some lady." (Tr. 207, ll. 21-25). Bell and Applicant exchanged words and Bell left the Exxon; Dixon followed him but lost sight of Bell's car in front of the school. (Tr. 208-09).

Dixon drove back to the Exxon, and recalled saying something but could not recall what he said or to whom he spoke at the gas station. (Tr. 209-10). Dixon testified he pulled away from the Exxon and was almost in front of the school when he heard two shots, followed by two more. (Tr. 210-13) Dixon testified he saw Applicant's Camaro pull into the school but could not recall where Capers' Mercedes-Benz went. (Tr. 213, ll. 10-19). The State confronted Dixon with his own statement to law enforcement written January 7, 2013, and impeached him with the prior statement: "I drove back to the Exxon and drove back to the bottom looking for a car, spotted the car and then two shots were fired and two more shots and we drove home." (Tr. 215-19). Dixon claimed that "Chief Hayes of the Swansea Police Department" kept making him rewrite his statement after revealing evidence to him. (Tr. 219-21). Asked by the State, Dixon affirmed he did not want to be in court that day and that he was still dating Applicant's sister. (Tr. 222, ll. 1-10). Counsel did not ask any cross-examination questions. (Tr. 222, ll. 12-13).

At the evidentiary hearing, Applicant asserted that Dixon was coerced by law enforcement to write his statement multiple times. Counsel observed that Dixon did not identify Applicant or Capers as the shooters. Counsel explained that Dixon's testimony was so confusing and poor that he did not believe he needed to cross-examine Dixon or that he could gain anything by doing so. Counsel described Dixon's testimony as "gobbledygook." On cross-examination, Applicant drew Counsel's attention to Dixon's testimony that he was made to write his statement repeatedly. (Tr. 220-21). Counsel noted that the damaging impeachment and answers came out on direct and that if he highlighted them on cross-examination, he could give the State an opportunity to cure the testimony and make Dixon reaffirm the truth of the written statement.

The court finds Counsel articulated a valid, reasonable strategic reason for not cross-examining Dixon at trial. Though a written trial transcript is devoid of innumerable characteristics crucial to judging the quality of testimony, the text of the transcript clearly corroborates Counsel's

judgment of Dixon's testimony as confusing and of very poor quality. Additionally, Counsel's affirmative decision cut off any chance for the State to cure particularly self-defeating testimony from late in Dixon's testimony is precisely the kind of tactical decision Strickland safeguards. Finally, Applicant has not presented any compelling questions Counsel could have asked or answers Counsel could have elicited on cross which would have been of greater value than the foreclosure of redirect examination. For all of these reasons, Applicant cannot show ineffectiveness from Counsel's decision to not cross-examine Dixon, and his request for relief by way of this allegation is **DENIED**.

2. Failure to Object to Introduction of Nehemiah Dixon's Statement

Applicant's contention that Counsel was ineffective for failing to object to the introduction of Nehemiah Dixon's prior inconsistent statement is explicitly refuted by the record. Counsel objected to the introduction of State's Exhibit #18 (Dixon's written statement)—twice. (Tr. 218, ll. 2-5; Tr. 219, ll. 1-6). Counsel could do no more. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

3. Failure to Object to Jury Charge – Inference of Malice from Use of Deadly Weapon

Applicant's claim that Counsel was ineffective for failing to object to the trial court's charge to the jury that it could infer malice from the use of a deadly weapon is without merit as a matter of law. Where evidence is presented that reduce, mitigate, excuse, or justify a homicide (or attempted homicide)[1] caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon. State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009). It is well established that a trial court is to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense. State v. Sams, 410 S.C. 303, 764 S.E.2d 511 (2014). "The mere contention that the

[1] Belcher specifically refers to assault and battery with intent to kill, but this court reasons that the same would also be true in a case where, as was the case here, the defendant is charged with attempted murder.

jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty of only the lesser offense." State v. Geiger, 370 S.C. 600, 609, 635 S.E.2d 669, 674 (Ct. App. 2006); see also State v. Franks, 376 S.C. 621, 624, 658 S.E.2d 104, 106 (Ct. App. 2008); State v. Gilmore, 396 S.C. 72, 79-80, 719 S.E.2d 688, 692 (Ct. App. 2011).

At trial, Counsel requested the trial court charge the jury on assault and battery, first degree, as a lesser-included offense. (Tr. 323-24). The State objected, arguing that the defense advanced by Applicant was the defense of alibi and that there was no evidence to support an instruction on the lesser-included offense. (Tr. 324-25). The State argued that shooting a gun into a house reflected intent to kill the victim. (Tr. 325, ll. 10-19). Counsel argued that the jury "was free to believe that somebody shot at the house but they didn't really mean to hit anybody inside." (Tr. 325-26). The State followed up by noting Belcher, and argued that the inference of malice from the use of a deadly weapon instruction could be used in the case because there was no indication of mitigation evidence in the case. (Tr. 326, ll. 9-18). Counsel did not argue against the availability of the instruction but instead merely observed that the use of a deadly weapon provided for a permissible inference and did not constitute a *per se* showing of malice. (Tr. 326, ll. 19-23). The trial court concluded it would instruct the jury on the lesser-included offense and noted the State's objection. (Tr. 327, ll. 5-12). The trial court charged the jury on the inference of malice from the use of a deadly weapon, and Counsel did not object. (Tr. 374, ll. 15-25). The trial court also charged the jury on the lesser-included offense of assault and battery, first degree. (Tr. 375-76).

At the evidentiary hearing, Counsel testified that he did not object to the inference charge because he did not believe he needed to do so, given that the defense strategy was that Applicant had an alibi. Counsel opined that he did not think his success in obtaining a charge on the lesser-included

offense of assault and battery, first degree, would by itself trigger the mandate of Belcher. Counsel expressed his belief that Belcher required self-defense.

The court finds Belcher was distinguishable to the present case. Notwithstanding the trial court's cautious concession to Applicant to charge the jury on the lesser-included offense of assault and battery, first degree, no evidence was presented at trial to reduce, excuse, mitigate, or justify the acts committed. Applicant shot into a house in which the victims were known to reside. Applicant did not advance any facts to show self-defense, accident, that his intent was something other than the death of the victims, or that his actions were compelled by the sudden heat of passion. Applicant's defense was that he was not there and did not commit the acts alleged. Counsel incorrectly narrows the applicability of Belcher to only cases of self-defense but is correct in his belief that the instruction of a lesser-included offense *alone* does not trigger Belcher's prohibition, especially where the lesser-included was instructed based exclusively on the jury's ability to reject the State's evidence in part and accept it in part. Geiger, supra; see also State v. Price, 400 S.C. 110, 114-15, 732 S.E.2d 652, 653-54 (Ct. App. 2012) ("Belcher does not prohibit the trial court from instructing the jury that it may infer malice from the use of a deadly weapon where the only jury question created by the evidence is whether the defendant is the person who committed ABWIK[,]" where the trial court also charged ABHAN.).

Applicant argues the court should embrace the reasoning of the South Carolina Court of Appeals in State v. Shands, which held an inference of malice from the use of a deadly weapon instruction was not appropriate in a trial for attempted murder where there was evidence to support the charge of the lesser-included offense of assault and battery of a high and aggravated nature. 424 S.C. 106, 131, 817 S.E.2d 524, 837 (Ct. App. 2018).[2] This court does not find Shands availing to Applicant for two reasons: (1) it only became final after the evidentiary hearing, let alone trial, such

[2] The court observes that petitions for certiorari were denied during the pendency of this order on May 9, 2019.

that Counsel could not be held to the standard of anticipating its reasoning;[3] (2) contrary to the facts in Shands, this court cannot find any facts to reduce, excuse, mitigate, or justify shooting into the victim's house. As to the Shands court's questioning of whether "an implied malice instruction is proper in any attempted murder trial," Id., this court notes that the thought appears to be *dicta*, and did not serve as the basis for the holding in Shands.

However, even if the court were to find that Counsel was deficient for failing to object to the inferred malice jury charge, the court must then determine whether the erroneous malice instruction contributed to the guilty verdict based on all the evidence presented to the jury. See Gibson v. State, 416 S.C. 260, 266, 786 S.E.2d 121, 123 (2016). The court must weigh the significance of the presumption to the jury against the other evidence of malice considered by the jury without the erroneous malice charge. Id., 416 S.C. at 265, 786 S.E.2d at 124. Thus, there must be evidence of malice aside from the use of a gun in order for the court to find that an applicant was not prejudiced by trial counsel's failure to object to the charge on the inference of malice from the use of a deadly weapon. Id., 416 S.C. at 266, 786 S.E.2d at 124.

In Gibson, the solicitor stated twice during her closing that "malice may be inferred from the use of a deadly weapon alone." Id., 416 S.C. 263, 786 S.E.2d at 123. The only other evidence of the defendant shooting the gun indicated that he shot his weapon in the air after other shots were fired and that it was possible his gun may have dropped down toward the victim while he was driving away. Id., 416 S.C. at 265-66, 786 S.E.2d at 124. The Court in Gibson determined that "this was not overwhelming evidence of malice." Id.

In the case at hand, the State never mentioned that one can infer malice due to the use of a deadly weapon during its closing. Instead, she stated, "going to the cul de sac and turning around to

[3] Notably, the trial also predates State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), aff'd as modified 422 S.C. 47, 810 S.E.2d 18 (2017), but nonetheless charged the jury that attempted murder was a specific intent crime. (Tr. 375, ll. 7-20).

pick up your gun. Malice." Other evidence of malice in this case included a video of the confrontation at the gas station, verbal and written threats and statements between Applicant and others, and testimony that Applicant was hanging out of the car with a firearm during the shooting. The court finds that the record consists of overwhelming evidence of malice aside from the use of a firearm during the incident.

The court finds Counsel was not deficient in declining to object to the inference instruction. However, even if Counsel was deficient for this reason, the court finds that because the State refrained from arguing the impermissible language during its closing and the fact that there is an overwhelming amount of evidence suggesting malice, no prejudice came to Applicant from the deficiency alleged. Applicant's request for relief by way of this allegation is **DENIED**.

4. Failure to Call Witness – Monisha Coleman

Applicant's allegation that Counsel was ineffective in failing to call Applicant's sister, Monisha Coleman, as a witness is without merit. At the evidentiary hearing, Applicant testified that at the time in question he was at home watching television with Ms. Coleman. Applicant recalled giving Counsel a list of witnesses to interview to support his alibi, including his mother, his brother, his sister, and his cousin. Applicant asserted Counsel only interviewed his mother.

Applicant presented Ms. Coleman as a witness at the evidentiary hearing. Ms. Coleman testified that she remembered the day of the shooting. Ms. Coleman recalled seeing Applicant around 9:00 to 9:10 a.m. Ms. Coleman explained Applicant was coming home from school after being signed out from school and that she was at home because she was sick. Applicant stayed at home, in his room, after arriving at the house, and Ms. Coleman could hear music playing from his room. Ms. Coleman testified Applicant was at home until at least when their mother came home at around 11:00 a.m., and that he did not leave until around 2:00 p.m. Ms. Coleman asserted that she did not see him leave before then and that she would have noticed if he had left.

On cross-examination, Ms. Coleman clarified that she did not see Applicant that morning until 9:00 or 9:10 a.m. Ms. Coleman testified she did not see Applicant leave for school or leave from school. Ms. Coleman admitted that she was not really sick but that she did not feel like going to school that day. Ms. Coleman told her mother as much around 6:45 to 7:00 a.m., and promptly went back to sleep. Ms. Coleman explained that on a typical morning she would take the bus to school while Applicant would drive himself. Applicant drove a loud car at the time, a Mustang or a Camaro, and Ms. Coleman heard him pull up when he arrived home. Ms. Coleman recalled that Applicant came home alone and that their mother was out shopping. Ms. Coleman testified that she, Applicant, and a few other then-present family members lounged about watching television but that Applicant went to his room after a few minutes. Ms. Coleman testified she did not recall speaking with Counsel but did testify she went to an office or place of business and spoke with a woman; Ms. Coleman wrote down the events of the day for that woman. Ms. Coleman admitted she never spoke to law enforcement about the day. Ms. Coleman was not aware of any disputes between Bell and Applicant and expressed that she thought they were friends but was able to vaguely recall a near-fight at the Exxon one time returning home from a basketball game.

Counsel admitted that he never personally met with Ms. Coleman but that his paralegal did. Counsel recalled that Ms. Coleman was at the house when applicant got home and that she did not have any personal knowledge of events that occurred before he got home. Counsel explained his theory of the case was that the victim and the victim's friends had been threatening Applicant and were trying to get him in trouble. Counsel proceeded with an alibi defense, tried to point out the victim's inconsistent statements, and tried to show the bad history between Applicant's group and the victim's group.

The court finds Applicant has failed to meet his burden of proof as to either prong of Strickland by way of this allegation. Counsel's staff met with Ms. Coleman prior to trial and took a written

statement from her. Applicant's contention that Counsel never met with Ms. Coleman is only accurate in the literal sense—it is perfectly reasonable for an attorney to delegate investigatory tasks to staff. Counsel relied upon that meeting and reasonably concluded that Ms. Coleman had no personal knowledge of anything that occurred before Applicant returned home.

Ms. Coleman's testimony at the evidentiary hearing raises a host of problems and questions which would have been harmful to Applicant's case. First, Ms. Coleman's timeframe fails to match up with any of the other evidence in the trial record: the Exxon video evidently shows Applicant's vehicle (and the others) leaving at 9:12 a.m., after the time Ms. Coleman testified Applicant returned home and stayed home; and Applicant himself testified at trial that he went to pick up his friend from the school at 9:00 or 9:30 a.m. (Tr. 302, ll. 3-24; Tr. 342, ll. 19-24). Second, Ms. Coleman's recollection that Applicant returned home alone and that their mother stayed out shopping is inconsistent with their mother's testimony at trial that she followed Applicant home. (Tr. 315, ll. 3-13). Third, Ms. Coleman's belief that there was no bad blood between Applicant and the victim and that they were friends, runs contrary to the strategy articulated by Counsel and Applicant's testimony at trial that Bell was threatening and feuding with him. (Tr. 287-93). Fourth, the entire alibi that Applicant was at home watching television with Ms. Coleman at the time of the shooting runs contrary to Applicant's trial alibi that he was trying to pick up his friend from the alternative school at the time of the shooting. Finally, this court had the opportunity to closely observe Ms. Coleman at the evidentiary hearing and pass upon her credibility; the court feels that her testimony was foggy and uncertain. Her testimony would have been of little use to Applicant at trial and could have been more harmful than helpful. Thus, even if Counsel was deficient in deciding not to call her as a witness because she lacked personal knowledge of Applicant's whereabouts prior to coming home, Applicant has failed to demonstrate any reasonable probability the outcome at trial would have been different if

only Ms. Coleman had testified. For all of these reasons, Applicant has failed to meet his burden of proof under either prong of Strickland, and his request for relief by way of this allegation is **DENIED**.

III. CONCLUSION

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

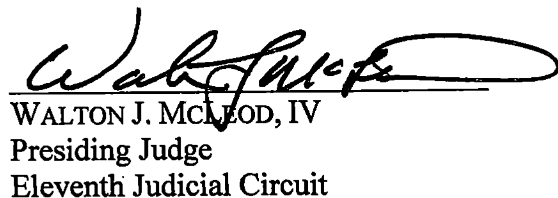
This court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS, THEREFORE, ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 27 day of JUNE, 2019.



WALTON J. MCLEOD, IV
Presiding Judge
Eleventh Judicial Circuit

Lexington, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2018CP3200397

Bilal S Haynesworth 360072		South Carolina State of	

PLAINTIFF(S) | DEFENDANT(S)

Submitted by: | Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: ____________

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: ____________

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: ____________

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	Judge Code	Date
		6/27/2019

For Clerk of Court Office Use Only

This judgment was entered on **June 27th 2019**, and a copy mailed first class or placed in the appropriate attorney's box on **June 27th 2019**, to attorneys of record or to parties (when appearing pro se) as follows:

Arthur Kerr Aiken 2231 Devine St. Ste. 201 Columbia, SC 29205

Taylor Zane Smith PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

LISA COMER/jp

Court Reporter

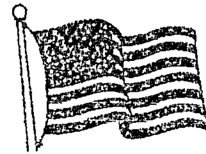
Lisa M. Comer - Clerk of Court

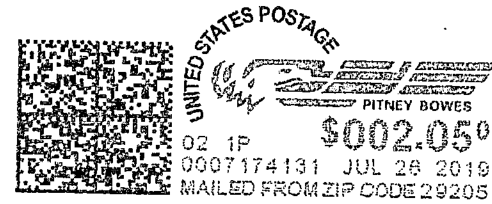
Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.





te 201

The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211