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September 13, 2019

RECEIVED

SEP 18 2019

S.C. SUPREME COURT

The Supreme Court of South Carolina
ATTN: Daniel Shearouse, Clerk of Court
PO Box 11330
Columbia, SC 29211

RE : Kerwin S. Parker v. State of SC
2014CP3203172

Dear Mr. Shearouse:

Enclosed please find a Notice of Appeal along with a Certificate of Service and a copy of the Order being appealed. Also enclosed is a copy which I request you stamp as "filed" and return to me in the enclosed stamped envelope.

Thank you for your assistance in this matter.

Yours very truly,



Christina Metze
Paralegal

cc: Caroline Scrantom, Office of The Attorney General
Lisa Comer, Lexington County Clerk of Court
Kerwin S. Parker

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

SEP 18 2019

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

R. Keith Kelly, Circuit Court Judge

Case No.: 2014CP3203172

State of South Carolina,

Respondent,

v.

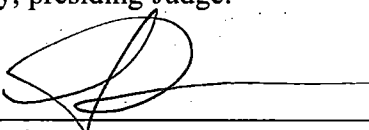
Kerwin S. Parker,

Appellant.

NOTICE OF APPEAL

Kerwin S. Parker, #337544, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed July 15, 2019, and the Order Denying Rule 59(E) Motion filed August 19, 2019 issued by the R. Keith Kelly, presiding Judge.

September 13, 2019



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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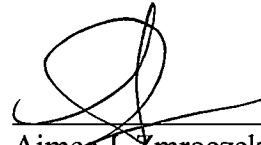
Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Caroline Scrantom by depositing a copy of it in the United States Mail, postage prepaid, on September 13, 2019, addressed to her office at:

PO Box 11549
Columbia, SC 29211

September 13, 2019



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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Kerwin S. Parker, #337544,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE ELEVENTH JUDICIAL CIRCUIT

) C/A No. 2014-CP-32-03172

) **ORDER OF DISMISSAL**

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This matter comes before the undersigned by way of a post-conviction relief (PCR) application filed by Kerwin S. Parker (Applicant) on September 2, 2014. This matter convened for an evidentiary hearing on November 10, 2016, at the Lexington County Judicial Center, at which Applicant and appointed PCR counsel Aimee J. Zmroczek, Esquire, were present. Assistant Attorney General Johanna Valenzuela appeared on behalf of Respondent, the State of South Carolina (the State). In addition to the pleadings in this action, this Court had before it at the hearing the records of the Lexington County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the complete transcript of Applicant's trial,¹ and Applicant's remaining direct appeal records. At the hearing, Applicant presented testimony from trial counsel John Duncan, Esquire (trial counsel), and the State presented testimony from appellate counsel Wanda Carter, Esquire (appellate counsel).

After carefully considering the testimony presented at the hearing, the arguments presented by the parties, and the records pertaining to this action, the undersigned denies and

¹ For clarity, Applicant's complete trial record includes not only the trial transcript, but also transcript of a latter sentencing proceeding, and of a latter reconstruction hearing. Each is contained in chronological order within the record on appeal filed in Applicant's direct appeal, and that is the document to which this Court will cite. (See R. pp. 1, 744, and 779).

dismisses the PCR application and this Court issues the following findings of fact and conclusions of law in accord with S.C. Code Ann. § 17-27-80.

I. PROCEDURAL HISTORY

Applicant is serving an aggregate 20-year sentence within the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment by the Lexington County Clerk of Court. This sentence stems from April 2007 indictments for murder (2007-GS-32-1540), assault and battery with intent to kill (ABWIK) (2007-GS-32-1542), and possession of a weapon during commission of a violent crime (2007-GS-32-1541).

Applicant proceeded to a jury trial taking place September 14 through 18, 2009 before the Honorable Robin B. Stillwell. Applicant was jointly tried with Curtis T. Johnson. The jury convicted Applicant as indicted of ABWIK and the weapons offense, and acquitted Applicant of murder. (R. p. 741). Judge Stillwell postponed sentencing to October 21, 2009, at which time Applicant received a sentence of 20 years for assault and battery with intent to kill and a concurrent five years on the weapons charge. (R. pp. 775-76).

A timely notice of appeal was filed on Applicant's behalf and perfected by appellate counsel. During the pendency of the appeal, Applicant's case was remanded to the trial court for the purpose of reconstructing a portion of the record. The reconstruction hearing convened before Judge Stillwell on October 3, 2011. (R. p. 779). Following the submission of appellate briefs, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion. *State v. Parker*, 2013-UP-403, 2013 WL 8541548 (S.C. Ct. App. filed Oct. 30, 2013). Applicant subsequently petitioned for rehearing which was denied on December 27, 2013. The Court of Appeals issued the Remittitur on August 5, 2014, and this action commenced thereafter.



II. THE ALLEGATIONS BEFORE THIS COURT

By and through PCR counsel and pursuant to Rule 71.1(d), SCRCP, the claims to be pursued were defined by counsel at the evidentiary hearing as follows:

- i. Ineffective assistance of trial counsel for the failure to move for immunity pursuant to the South Carolina Protection of Persons and Property Act;
- ii. Ineffective assistance of counsel in regards to the reconstruction hearing;
- iii. Ineffective assistance of trial counsel for the failure to object to statements by the prosecution during closing argument;
- iv. Ineffective assistance of trial counsel for the failure to object to a jury instruction issued pursuant to *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009).

(PCR Tr. pp. 5-9).

III. STANDARD OF REVIEW

An applicant may seek PCR upon the following types of allegations:

- (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
- (2) That the court was without jurisdiction to impose sentence;
- (3) That the sentence exceeds the maximum authorized by law;
- (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
- (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

RKK
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Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive the assistance of counsel guaranteed them by the Sixth Amendment to the United States Constitution. "In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case." *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984) (seminal case developing the ineffective assistance of counsel standard)). In regards to the first prong, "[t]he proper measure of attorney performance remains reasonableness under prevailing professional norms." *Strickland v. Washington*, 466 U.S. at 688, 104 S.Ct. at 2065. The second prong requires a showing that counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018), *reh'g denied* (Mar. 29, 2018) (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)).

At all times during any PCR proceeding, the applicant maintains the burden of establishing that he is entitled to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). A PCR applicant must produce facts or testimony in support of each individual allegation in order to establish that the claim meets the standard warranting relief. S.C. Code. Ann. § 17-27-50. Otherwise, dismissal is appropriate. *See Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005); *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998).

Moreover, the proceeding is coupled with "a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Morris v. State*, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006). "Judicial

scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011).

Therefore, Applicant must demonstrate that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 441(1985) (quoting *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064). A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

As PCR counsel defined the allegations being pursued in this action at the outset of the evidentiary hearing and presented testimony in furtherance of those claims, this Court finds all other claims from the filed *pro se* PCR application inadequately raised and without merit in accord with S.C. Code Ann. § 17-27-90, Rule 71.1(d), SCRCP, and the record in this action. As to the surviving allegations, this Court finds that Applicant has failed to satisfy either requirement of the standard established in *Strickland v. Washington, supra*. This Court has reviewed and weighed the testimony presented at the evidentiary hearing after observing the witnesses and evidence presented at the hearing and passing upon its credibility. This Court makes the following findings based upon the probative evidence presented:

As a matter of general impression, this Court finds credible and persuasive the testimonies of trial and appellate counsel, who each presented well-recalled testimony of relevant events leading up to and during Applicant's jury trial and appellate proceedings. This Court accordingly finds applicable the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in their representation of Applicant at all stages. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland, supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Any post-conviction relief court must be wary of second-guessing trial counsel's tactics. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

i. Counsel's Failure to Pursue an Immunity Hearing

This Court finds that trial counsel did not render deficient performance or prejudice Applicant by failing to request a pre-trial immunity hearing pursuant to S.C. Code Ann. § 16-11-440, South Carolina's Protection of Persons and Property Act (the Act). This Court finds the Act does not apply to Applicant's case such that neither deficient performance nor prejudice results from trial counsel's failure to pursue a pre-trial immunity hearing.

At PCR, trial counsel recalled the basic facts of the case which are compelling to this Court's finding. Applicant was in a car with his half-brother, who alone had engaged in a physical scuffle with some of the victims earlier in the day. (PCR Tr. pp. 43-44). Later on, Applicant and the co-defendant drove over to the house of the victims and things escalated. (PCR

Tr. pp. 44-47). At the conclusion of the incident, one victim suffered a broken femur when the co-defendant intentionally struck him with his truck, another victim was paralyzed from one of several gunshots fired by the co-defendant, and another victim died from two gunshot wounds also fired by the co-defendant. (PCR Tr. pp. 44-46, 70). The jury acquitted Applicant of murder but otherwise found him guilty as indicted for ABWIK and the weapons charge. (PCR Tr. p. 51). Applicant otherwise failed to present any PCR testimony from any witness which rationalized the importance of an immunity hearing in relation to the self-defense claim he presented at trial. See *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (a PCR 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); *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (mere speculation as to un-presented witness' testimony does not satisfy PCR applicant's burden); see also *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992).

As explained by trial counsel at PCR, Applicant's defense at trial was rooted in self-defense and in defense of others and was consistent with that posed by his co-defendant who was his half-brother. (PCR Tr. p. 12). Trial counsel testified at PCR that he strategized to emphasize that the co-defendant pointed the finger at himself. Trial counsel sought to encourage that the facts in support of conviction did not apply to Applicant. (PCR Tr. pp. 32, 52). Trial counsel argued that Applicant was merely present at the scene and that if Applicant were to be convicted of any charge, he would have to be found guilty under the hand of one, hand of all. (PCR Tr. p. 77). Trial counsel elsewhere testified that he "had strong evidence that Kerwin never had a gun, that there was no gunshot residue," and there was other evidence in existence that Applicant had

himself been shot to some degree. (PCR Tr. pp. 69, 71). However, another witness testified at trial that he saw the man with shorter hair, which would have been Applicant, "on the patio with a gun pointing down" just prior to the gunshots being fired. (PCR Tr. p. 71). This particular testimony matched the injuries sustained by the paralyzed victim, leaving a question of fact as to Applicant's involvement. (PCR Tr. p. 72).

Trial counsel's assessment of the applicability of the Act evolved throughout the course of the evidentiary hearing. Initially, trial counsel testified that he did not recall why he did not consider moving pursuant to the Act but that, at the time of the PCR hearing, he saw immunity "as a legitimate issue that should have been raised." (PCR Tr. pp. 12-13). Then trial counsel later expounded that he appeared on an investigator's radio show sometime after Applicant's trial to discuss the Act because it had become prevalent in the public eye. That experience, he testified, gave him cause in hindsight to think about the Act, but that it was not in "anybody's consciousness at the time" of trial as a viable defense. (PCR Tr. pp. 42-43). Of course, hindsight does not govern the standard for determining effective assistance of counsel. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

As to the relevant, contemporaneous preparation of trial counsel's defense, counsel explained that Applicant's case "was hard to prepare" due to parallel stories given of "a complicated, chaotic scene." (PCR Tr. p. 43). Trial counsel fully acknowledged that Applicant was not invited to the victim's residence where the incident took place. (PCR Tr. p. 47). He described the confrontation as beginning out on the street or sidewalk and moving towards the common areas and arguably the curtilage of an apartment building. (PCR Tr. pp. 47-48). He identified his client's location during the incident as being within a common area at the apartment complex. (PCR Tr. p. 48).

Regardless of whether counsel researched or was informed on the Act pre-trial, this Court finds that the Act did not in fact apply, and thus finds no error or prejudice on the part of trial counsel for the failure to pursue an immunity hearing under the Act. Whether a defendant is entitled to immunity under the Protection of Persons and Property Act must be decided prior to trial if either party moves for a determination regarding the Act's application to a defendant's case. *State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). "[W]hen a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." *Id.* at 411, 709 S.E.2d at 665. "Section 16-11-450 provides immunity from prosecution if a person is found to be justified in using deadly force under the Act." *Id.* "Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. This includes all elements of self-defense, save the duty to retreat." *Id.* at 371, 752 S.E.2d at 266.

But in order for the Act to apply, the claimant must have been in a place where he enjoyed either an ownership interest or some other right to be present during the offense charged. S.C. Code Ann. § 16-11-440(A) and (C). On this point, the record fails to establish that the Act applied to Applicant's case. Applicant presented no evidence or testimony to support a finding the presumption afforded by S.C. Code Ann. § 16-11-440(A) would apply. S.C. Code § 16-11-440(A) states:

A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

(1) **against** whom the deadly force is used is in the process of **unlawfully and forcefully entering**, or has **unlawfully and forcibly entered** a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; **and**

(2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

S.C. Code Ann. § 16-11-440(A)(emphasis added).

Applicant also presented no evidence or testimony that would support a finding the presumption afforded by S.C. Code Ann. § 16-11-440(C) would apply. S.C. Code § 16-11-440(C) states:

A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C).

The record in this case provides no evidence bearing significance to any provision of the Act. There was no evidence presented at trial or at PCR that would support a finding that the victims were in the process of unlawfully and forcefully entering Applicant's dwelling, residence, or occupied vehicle. S.C. Code Ann. § 16-11-440. Further, there was no evidence presented at trial or at PCR reflecting the victims were removing or attempting to remove Applicant or his co-defendant against their will from their dwelling, residence, occupied vehicle, or other place where they had a right to be. *Id.* Applicant was not at any location over which he had any dominion or control, or was even invited to be present. (*E.g.* R. pp. 46, 616-17). At best, Applicant was located in a common area of an apartment complex where he did not live and was not invited to. At worst, Applicant was acting with his co-defendant to forcibly encroach upon

the common places and curtilage of the victims' apartment in an unwanted fashion. (*E.g.* R. pp. 59-67, 105-07). Witnesses saw Applicant with a gun. (R. pp. 39, 211, 231-32). And no eyewitness testimony identified any victim as attempting to gain access to the co-defendants' vehicle. (R. pp. 115-16, 153-60). Applicant was in no way entitled to the presumption afforded pursuant to the Act and an immunity hearing was not warranted.

Additionally, insofar as Applicant and his co-defendant decided to drive over and initiate and armed confrontation about a previous altercation, they were at fault in bringing about the difficulty and had no valid claim to self-defense at the victims' apartment complex. *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013) (stating elements of self-defense and concluding appellant's immunity claim was appropriately submitted to the jury); *Duncan, supra* at 371, 752 S.E.2d at 266 (requiring valid self-defense claim in order to succeed at immunity hearing). The record otherwise establishes that Applicant's case was one concerning mutual combat and was properly submitted to the jury as such. *See State v. Young*, 424 S.C. 424, 434, 818 S.E.2d 486, 491 (Ct. App. 2018).

Further, to the extent Applicant posited at the evidentiary hearing that prejudice flows from counsel's failure to pursue an immunity hearing for the purposing of preserving the outcome of that hearing for interlocutory appeal, Applicant cannot prevail. Although not the law at the time of the case, our courts have since decided the denial of a request for immunity under the Act is not immediately appealable. *State v. Isaac*, 405 S.C. 177, 185, 747 S.E.2d 677, 681 (2013).

Based upon the totality of the record in Applicant's case, this Court finds trial counsel's failure to pursue an immunity hearing pursuant to the Act constituted neither deficient

performance nor prejudice because the trial record itself fails to promote Applicant's immunity claim. Accordingly, this court **DENIES and DISMISSES** this ineffective assistance allegation.

ii. Counsel's Alleged Failure to Adequately Reconstruct the Trial Record

This Court finds no basis upon which a finding of deficient performance or prejudice is warranted in relation to trial or appellate counsels' performance at the reconstruction hearing ordered to occur prior to the resolution of Applicant's direct appeal. That hearing took place on October 3, 2011, and included extensive testimony by Applicant's co-defendant and the incorporation of exhibits and witness testimony received at trial. (R. pp. 779-866). It is apparent from the record in this action that the jury heard the complete defense case prior to reaching its verdict and, at the reconstruction hearing itself, the court gave the parties ample opportunity to present everything they wished to allege was incomplete with the trial record. (*E.g.* R. pp. 789-817). This testimony fails to demonstrate how Applicant could in any way have been prejudiced by the reconstruction procedure.

Nor does the record evidence deficient performance by counsel. Trial counsel's impression of the reconstruction hearing was that it was neutral to his client because nothing was missing from the trial record that affected Applicant, and therefore required reconstruction on his behalf. (PCR Tr. p. 49). Trial counsel testified at PCR that he did not recall there being any potential issues with the reconstruction hearing as it pertained to his client other than the fact that one witness was out of state and could not be compelled to appear for the purposes of reconstructing his or her testimony, which trial counsel felt was insignificant. (PCR Tr. pp. 14-15). Appellate counsel similarly testified that only a small portion of the total record required

reconstruction. (PCR Tr. p. 82). Appellate counsel assessed that the reconstruction was completed without difficulty. (PCR Tr. p. 87). Crucially, appellate counsel recalled that the reconstructed portion had no bearing on Applicant's appeal. (PCR Tr. pp. 82-83).

The undersigned agrees with counsels' assessment. To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court. *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). This Court can identify no basis for error by trial counsel during the record reconstruction, which was done for the benefit of Applicant's direct appeal. The full record (including the PCR testimony pertaining to this issue) fails to demonstrate that any potential appellate issue arose during the defense's presentation at trial which was not recorded for appellate purposes. For example, the reconstruction record states that the defense called Walter Gadson to the stand in order to enter into evidence a CD of an interview he conducted, but that the CD, which was part of the record in this case, was entered "without objection" *at trial*. (R. p. 782). And the State's and co-defendant's cross-examinations of co-defendant Johnson were fully contained in the original trial transcript even though a portion of his direct examination required reconstruction. (R. p. 817). And the parties to the reconstruction hearing at that time recalled no objections were lodged to any of missing witness Frankie Blue's testimony or to the exhibits entered through his testimony. (R. p. 856).

The undersigned further finds persuasive on this issue the trial court's express finding at the reconstruction hearing that "unequivocally and without reservation that there were no legal decisions made in [Applicant's] case that weren't put fully on the record during the trial." (R. p. 840). This Court finds the trial court demonstrated a solid recollection of Applicant's trial when conducting the reconstruction hearing. The trial court also found at the conclusion of the reconstruction testimony: "I don't find any evidence that there are omissions in the transcript that

we have not addressed here today. I know that there are anecdotal suggestions that perhaps there are some sentences, words, portions missing, but based on what I've heard today I can't make a finding that there are any portions that have been omitted that are material to the appellate issues in this case." (R. p. 863).

As there is no evidence that any objection preserving an issue for appellate review was omitted from the reconstructed record, this Court can identify no basis for a finding of error or prejudice by Applicant's counsel in regards to the reconstruction hearing and **DENIES and DISMISSES** this allegation.

iii. Counsel's Alleged Failure to Object to The State's Closing Argument

Applicant next asserts trial counsel was ineffective for not objecting to several portions of the State's closing argument which Applicant alleges impermissibly acted to enflame the passion of the jury. (PCR Tr. pp. 25-35). The undersigned finds no merit to this claim.

Trial counsel testified that the portions of the closing pointed to by PCR counsel were the Solicitor's "version of the facts." (PCR Tr. p. 29). Trial counsel exemplified a familiarity with this Solicitor's typical closing argument. He opined that this Solicitor's presentations could be "over the top, aggressive, flamboyant, [and] excessive," but that his closing in Applicant's case was "rather mild" in comparison. (PCR Tr. pp. 25, 50). Trial counsel testified he did not object to the closing, which he "did not consider that to be excessive." (PCR Tr. pp. 27, 50). He further testified he "tactically" made the decision not to object to any portions of the Solicitor's closing which could be perceived as inflammatory because he assessed any objection would be overruled by the trial court and he did not wish to emphasize the jury's attention to any particular part of the closing. (PCR Tr. pp. 27-28). Trial counsel explained that in his experience judges "give a lot

of leeway” in closing argument, which trial counsel believed could be attributed to the applicable abuse of discretion standard of appellate review. (PCR Tr. p. 50).

This Court finds no error or prejudice within trial counsel’s representation of Applicant during the prosecution’s closing. Regarding the alleged failure to object, there remains in this action the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment in his representation of Applicant at all stages of Applicant’s trial. *Ard v. Catoe*, 372 S.C. at 331, 642 S.E.2d at 596 (citing *Strickland, supra*). “[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel’s strategy is viewed under an ‘objective standard of reasonableness.’” *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis in original). Here, trial counsel accurately cited the standard of appellate review pertaining to objections lodged during closing argument. *E.g., State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). Citing both knowledge and experience, counsel reasoned that any objection to the State’s closing argument in this case was likely to fail because he himself did not consider any portion of the argument too excessive, flamboyant, or otherwise outside the bounds of the record presented at trial. Counsel again cited knowledge and experience when he testified that he consciously elected not to object to any portion of the closing argument because he wanted to avoid amplifying the jury’s attention to any particular portion of it. This Court finds that trial counsel exercised objectively reasonable, informed trial strategy in this regard and declines to make a finding of deficient performance.

Also, because Applicant must establish prejudice from counsel’s failure to object in order to garner relief, the underlying question before this Court is “whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.”

Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166–67 (1998). “Solicitors are bound to rules of fairness in their closing arguments.” *State v. Northcutt*, 372 S.C. at 222, 641 S.E.2d at 881. “[I]ts content should stay with the record and reasonable inferences to it.” *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). “The solicitor’s closing argument must, of course, be based upon this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.” *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). However, “[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony.” *Humphries v. State*, 351 S.C. at 373, 570 S.E.2d at 166. Further, any excerpt of the State’s closing exists as “one moment in an extended trial.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872 (1974). Accordingly, a court must conduct an “examination of the entire proceedings” in context. *Donnelly* at 643, 94 S.Ct. at 1871; *Northcutt, supra* (“We must review the [closing] argument in the context of the entire record.”); *State v. Bell*, 302 S.C. 18, 35, 393 S.E.2d 364, 374 (1990).

The undersigned finds the portions of the prosecution’s closing argument drawn to this Court’s attention at the evidentiary hearing neither inflammatory nor improper based on the remainder of the record. The entirety of the closing argument closely pertained to evidence properly received at trial and later corroborated through Applicant’s own testimony. (R. pp. 668-98). Insofar as Applicant alleges the State prejudicially referred to the condition of the victims, (e.g. R. pp. 670, 678, 680, 683), this Court finds each reference closely contained to and reasonably inferred from the record of the injuries sustained. (R. pp. 502-03, 509-10, 513-18). As to any other portion of the closing cited by Applicant, this undersigned agrees with trial counsel’s assessment that the Solicitor permissibly argued his version of the facts, and further

notes that the State permissibly asked the jury to return a verdict on a number of possible outcomes favorable to the State. (R. pp. 670-98). This Court finds that the State's closing argument was permissibly offered in furtherance of the State's requesting the jury to find malice in the acts charged and to render a verdict in favor of the State based upon specific facts presented in the testimony received at trial.

This Court **DENIES and DISMISSES** Applicant's ineffective assistance of trial counsel allegation regarding the failure to object to the prosecution's closing argument, finding Applicant has failed to meet his burden of proving either prong of *Strickland*.

iv. Counsel's Alleged Failure to Object to an Impermissible *Belcher* Charge

Applicant asserts trial counsel was ineffective for not objecting to the trial court's instruction to the jury regarding the inference of malice from the use of a deadly weapon. (PCR Tr. pp. 17-24; R. p. 716, 732). This Court finds Applicant's claim without merit.

Applicant's case went to trial in September 2009, which was approximately one month prior to the South Carolina Supreme Court's decision in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (published Oct. 12, 2009). That opinion announced a wholly new rule of law concerning jury instructions on implied malice in trials for murder and ABWIK. It held "that where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) 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." *Belcher* at 612, 685 S.E.2d at 810. The court instructed retroactive application to "all cases which were pending on direct review or not yet final where the issue was preserved" at trial. *Id.* The *Belcher* court finally stated that the ruling "will not apply to convictions challenged on post-conviction relief." *Id.* (citing *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989)).

Applicant argues that trial counsel was put on notice of the pendency of the *Belcher* issue through various CLEs and listervs but omitted any objection to the implied malice instruction until Applicant's sentencing hearing, which was after the issuance of *Belcher* and obviously after the conclusion of the jury trial. (PCR Tr. pp. 17-24, 40). Trial counsel, however, addressed *Belcher's* interim issuance at Applicant's sentencing hearing. At that time, trial counsel moved for a new trial, arguing that the jury instruction on implied malice had been improperly charged under the new *Belcher* opinion and that Applicant's case was not yet final. (R. pp. 748-51). In denying the motion, the trial court noted that the objection "would have been specious because [the pre-*Belcher* implied malice instruction] was well settled South Carolina law" at the time of Applicant's jury deliberations. (R. pp. 751-52). Appellate counsel testified at PCR that she raised the *Belcher* issue in Applicant's direct appeal because trial counsel argued its applicability at the sentencing hearing—and that she felt as though trial counsel's argument preserved the *Belcher* issue because the case was "alive pending direct appeal or direct review." (PCR Tr. pp. 81, 88). In affirming Applicant's convictions and sentence, the South Carolina Court of Appeals found that the *Belcher* objection was not made until after the jury retired from deliberations and was thus not preserved for review. *State v. Parker*, 2013-UP-403, 2013 WL 8541548 at *1 (S.C. Ct. App. filed Oct. 30, 2013).

This Court finds that trial counsel was not ineffective for failing to object to the implied malice instruction at any time prior to Applicant's sentencing hearing because, in the context of a PCR action, our courts have "never required an attorney to be clairvoyant or anticipate changes in the law." *Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016). Trial counsel's presence at a CLE where another criminal defense attorney presented the *Belcher* issue as a basis for a potentially meritorious objection does not bind trial counsel to act in that manner at trial,

nor does it render his performance deficient when the theory was not established as law in our State at the time of Applicant's jury trial. *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995) (declining to find trial counsel's performance deficient when "he followed a long-standing and well-settled rule of South Carolina criminal law—even when that rule was under attack in the United States Supreme Court at the time of trial"); *Honeycutt v. Mahoney*, 698 F.2d 213, 216–17 (4th Cir. 1983) (deciding that trial counsel was not ineffective for failing to object to subsequently-overruled, but then long-standing, North Carolina law where such objection would have been based on a recent, non-binding First Circuit decision); *Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir. 1991) (ruling that trial counsel was not ineffective by failing to raise *Batson* challenge two days before *Batson* was decided), *cert. denied*, 504 U.S. 920, 112 S.Ct. 1967 (1992). Trial counsel acknowledged as much, recognizing at PCR that he could not have, at that time, anticipated the change in the law. (PCR Tr. p. 38). Counsel otherwise acted to bring the *Belcher* holding to the trial court's attention at the first relevant point in time. There can be no finding of deficient performance on this allegation, as counsel did not act "outside the wide range of professionally competent performance." *Strickland*, 466 U.S. at 687-89, 104 S.Ct. at 2064-65. This Court accordingly finds that absent any showing of deficient performance, Applicant cannot meet the *Strickland* standard, and **DENIES and DISMISSES** this final claim for relief.

IV. CONCLUSION AND NOTICE OF APPLICANT'S RIGHT TO APPEAL

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violation or deprivation that would require this court to grant his application. "[T]he proper measure of counsel's performance is whether he has provided representation within the range of competence required by attorneys in criminal cases." *Rutland*


v. State, 415 S.C. at 577, 785 S.E.2d at 353; *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). As to each of these allegations, Applicant has failed to demonstrate that he was burdened by deficient performance in any way. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (“Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.”). Applicant also cannot prove on this record “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. at 117-18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694). With Applicant failing to meet the burden established in *Strickland v. Washington*, *supra*, there exists no basis in the record for a grant of post-conviction relief, and the allegations pertaining to trial counsel’s representation at various stages of Applicant’s trial are **DENIED AND DISMISSED WITH PREJUDICE**.

This Court finally notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel’s assistance in seeking review of the denial of post-conviction relief. Applicant is directed to South Carolina Appellate Court Rule 243 and South Carolina Rule of Civil Procedure 71.1(g) for appropriate procedures for service and filing any notice of appeal.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent for completion of his sentence within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 3d day of July, 2019.


R. KEITH KELLY
Presiding Judge
Eleventh Judicial Circuit

Spartanburg, South Carolina

Aimee Jendrzewski Zmroczek PO Box 11961 Columbia,
SC 29211

Caroline M. Scrantom PO Box 11549 Columbia, SC
29211-1549

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), SCRPC.

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.

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2014CP3203172

Kerwin S Parker #337544	The State of South Carolina	
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PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> 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: _____

ISAM. JOMER
 CLERK OF COURT
 LEXINGTON, SC
 AUG 19 PM 12:35
 FILED

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

RELIEF DENIED

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.

Kerwin S Parker
 Circuit Court Judge

2165
 Judge Code

8/15/2019
 Date

For Clerk of Court Office Use Only

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

Aimee Jendrzewski Zmroczek PO Box 11961 Columbia, SC 29211

Caroline M. Scramton PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

LISA COMER/jp

Court Reporter

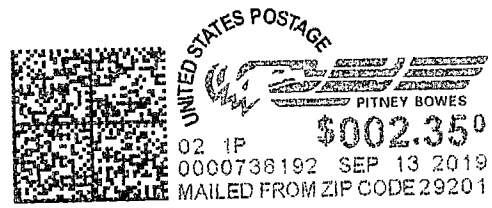
Lisa M. Comer - Clerk of Court

Court Reporter:

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



The Supreme Court of South Carolina
ATTN: Daniel Shearouse, Clerk of Court
PO Box 11330
Columbia, SC 29211