

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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POST CONVICTION RELIEF APPEAL FROM PICKENS COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Alex Kinlaw, Jr., Circuit Court Judge

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PCR Case Number: 2018-CP-39-0318

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Lester Davaria Mosley, Applicant

v.

The State of South Carolina, Respondent.

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**NOTICE OF APPEAL**

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Counsel of Record:

Alan Wilson, South Carolina Attorney General

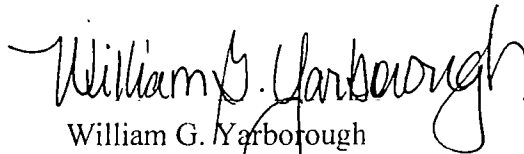
Janell H. Gregory, Assistant Attorney General  
Assistant Attorney General  
PO Box 11549  
Columbia, SC 29211-1549

Applicant Lester D. Mosley, by and through his undersigned counsel, William G. Yarborough, III, does appeal the decision of the Thirteenth Judicial Circuit's Court of Common Pleas, taken from the attached Order (*See Order*), and respectfully requests that this Honorable Court allow him the opportunity to file an appeal.

Applicant's counsel has requested a copy of the transcript from the Court Reporter and is currently awaiting the delivery. A copy of this Notice has been served upon Attorney General Alan Wilson and Assistant Attorney General Janell H. Gregory by U.S. Mail.

THEREFORE, the Applicant, Lester D. Mosley, respectfully moves this Honorable Court to grant the appeal.

Respectfully submitted,



William G. Yarborough  
Attorney for the Applicant  
308 W. Stone Avenue  
Greenville, SC 29609  
(864) 331-1612  
SC Bar No.: 10271

Greenville, SC  
December 5, 2019

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

RECEIVED

DEC 09 2019

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APPEAL FROM PICKENS COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Honorable Alex Kinlaw, Jr., Thirteenth Circuit Court Judge

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PCR Case; 2018-CP-39-0318

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Lester Devaria Mosley, Jr.,

Appellant

v.

The State of South Carolina,

Respondent

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AFFIDAVIT OF SERVICE

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I, Traci Trouton-Burr, certify on this date, December 5, 2019, I served a Notice of Appeal in this action, dated December 5, 2019, on South Carolina Attorney General Alan Wilson, and South Carolina Assistant Attorney General Janell H. Gregory by mailing it to him/her at his/her work address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Alan Wilson, South Carolina Attorney General

Janell H. Gregory, Assistant Attorney General  
Assistant Attorney General  
PO Box 11549  
Columbia, SC 29211-1549

Respectfully submitted,



Traci Trouton Burr

Paralegal to William G. Yarborough, Esquire

SWORN TO before this 5<sup>th</sup>  
Day of December, 2019



Notary Public for South Carolina

My Commission expires: 10/21/2029

STATE OF SOUTH CAROLINA )  
COUNTY OF PICKENS )

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

Lester D. Mosley, #361397 )

Case No. 2018-CP-39-0318

2019 NOV -4 P 3 37

Applicant, )

v. )

CLERK OF COURT )  
PICKENS COUNTY )  
SOUTH CAROLINA )

ORDER OF DISMISSAL

State of South Carolina, )

Respondent. )

This matter comes before this Court by way of an Application for Post-Conviction filed on March 2, 2018, by Lester D. Mosley (Applicant). The State (Respondent) filed its Return on August 3, 2018. On November 29, 2018, Applicant filed a Motion to Amend Application for Post-Conviction Relief, which this Courts accepts and will refer to herein as the amended application. An evidentiary hearing in the matter was held before the undersigned on August 29, 2019, at the Greenville County Courthouse. Applicant was present and was represented by William G. Yarborough, III, Esquire, and Lauren Carole Hobbis, Esquire, (both are PCR Counsel). Respondent was represented by Assistant Attorney General Taylor Z. Smith of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf and called Scott David Robinson, Esquire, (Trial Counsel) as a witness. Trial Counsel was called by a witness by Respondent, as was Katherine Haggard Hudgins, Esquire, (Appellate Counsel). Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds that Applicant has failed to meet his requisite burden of proof and denies this application.

**PROCEDURAL HISTORY**

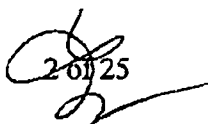
Applicant is presently confined in the South Carolina Department of Corrections pursuant

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to orders of commitment of the Greenville County Clerk In July of 2014, the Pickens County Grand Jury indicted Applicant for murder (2014-GS-39-1548), two counts of attempted armed robbery (2014-GS-39-1545; 2014-GS-39-1547;,, possession of a weapon during the commission of a violent crime (2014-GS-39-1546), and first-degree burglary (2014-GS-39-1597). Thirteenth Circuit Solicitor William Walter Wilkins, III, and Assistant Solicitor William Richardson Timmons, IV, prosecuted the case on behalf of the State. Applicant was represented by Trial Counsel. On September 15-17, 2014, Applicant proceeded to a jury trial with the Honorable Edward W. Miller presiding. At the conclusion of trial, Applicant was convicted as indicted on all counts. Judge Miller sentenced Applicant to imprisonment for fifty years for murder, fifty years for first-degree burglary, twenty years for each count of armed robbery, and five years for possession of a weapon during the commission of a violent crime, with all sentences running concurrently, and with credit to Applicant for his time served.

Trial Counsel filed a timely notice of appeal. Appellate Counsel submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967), on September 10, 2015, and moved therein to be relieved as Applicant's appellate counsel. The South Carolina Court of Appeals denied Appellate Counsel's motion to be relieved and directed the parties to brief specifically the following issue: "[w]hether the trial court erred by instructing the jury on accomplice liability in response to the jury's questions during deliberations." State v. Mosley, S.C. Ct. App. Order dated December 2, 2016. After the briefing had been completed in the case, the Court granted Applicant's motion to substitute Mr. Yarborough as his appellate counsel in place of Appellate Counsel. State v. Mosley, S.C. Ct. App. dated July 18, 2017. Thereafter, the Court of Appeals affirmed the convictions, and cited the following authorities:

State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant

  
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must object at his first opportunity to preserve an issue for appellate review.”); State v. Williams, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976) (“The rule in this state is firmly established that failure to object to a charge, when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge.”); State v. Hill, 268 S.C. 390, 395, 234 S.E.2d 219, 221 (1977) (“By failing to object or request additional instructions to the main charge, the appellant waived any objection to similar subsequent instructions.”).

State v. Mosley, 2017-UP-353 (S.C. Ct. App. filed September 6, 2017). The Remittitur was issued on September 27, 2017.

#### CURRENT PROCEEDING

On March 2, 2018, Applicant, filed an Application for Post-Conviction Relief, in which he alleged that he was being held in custody unlawfully based on his claim that Appellate Counsel failed “to preserve any other arguable issues of merit as directed within the ordered briefing by the South Carolina Court of Appeals.” He further explained therein that he “believes after consideration that there were other issues that should have been preserved for appeal.” In his amended return, Applicant alleged that he was entitled to relief on the following grounds:

1. “Trial counsel was ineffective pursuant to Strickland v. Washington for failing to contemporaneously and properly object, and thus preserve for appeal, to improper jury instructions on the inference of malice and felony murder. The improper instructions diluted the State’s burden of proof to prove Applicant’s guilt beyond a reasonable doubt and shifted the burden to Applicant.”;
2. “Trial counsel was ineffective for failing to contemporaneously and properly object, and thus preserve for appeal, to improper jury instructions on the ‘hand of one hand all’ accomplice liability jury charge. The improper instruction, both in and of itself and together with the aforementioned jury charges on felony murder and inferred malice was prejudicial to Applicant because it was confusing to the jury because Appellant was not tried with his codefendants, diluted the State’s burden of proof to the guilty of Appellant without improper spillover evidence

from the guilt of his codefendants, as well as improperly shifted the burden to Applicant, whom raised an alibi defense.”;

3. “Trial counsel was ineffective for failing to subpoena cellphone records which would have supported his alibi defense by showing that Applicant was not at the victim’s home the night the charged offenses occurred.”;
4. “Trial counsel was ineffective for failing to sufficiently cross-examine Applicant’s codefendants on their inherent bias in testifying for the State pursuant to a plea agreement.”;
5. “Trial counsel was ineffective for failing to request an adequate jury instruction on the credibility and weight of codefendants’ testimony in light of their inherent bias.”;
6. “Trial counsel was ineffective for failing to object to the admission of evidence of flight and corresponding jury charges.”; and
7. “Trial counsel was ineffective for failing to request an adequate jury instruction on accident, voluntary manslaughter, and involuntary manslaughter.”

At the evidentiary hearing before the undersigned on August 29, 2019, in response to Respondent’s request at the start of the hearing that Applicant specify for the record the grounds upon which he would move forward, Applicant stated that he would move forward solely upon the grounds alleged in the amended application. All other allegations are considered by this Court to have been waived by Applicant and they will not be addressed in this Order.

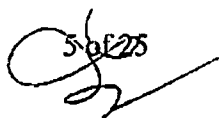
Applicant retained Yarborough to represent him during the late stage of his direct appeal, and Applicant testified at the evidentiary hearing that he does not have any allegations of ineffective assistance of counsel toward his PCR Counsel. The record from Applicant’s direct appeal that shows that Yarborough was retained only after briefing had been completed, and his control over the course of Applicant’s appeal would have been quite limited at that point. This Court finds that Applicant waived at the evidentiary hearing any allegations of the ineffective assistance of counsel as to Yarborough.

## Testimony at PCR Hearing

Applicant first called Trial Counsel as a witness at the evidentiary hearing.<sup>1</sup> Trial Counsel testified that he was appointed to represent Applicant in the underlying criminal case. Trial Counsel had a full-time investigator working with him on the case, and testified that he believes that the investigator's name was Joe Raven. He testified that Applicant's defense was an alibi defense, and that he and the investigator looked into alibi leads in preparation for trial. He testified that Applicant consistently maintained that he had an alibi at the time of the robbery, and that Trial Counsel would have called any alibi witness at trial that Applicant wanted, even though he does not know have an independent recollection of what names Applicant gave to him as potential witnesses. Trial Counsel testified that his usual practice when alibi witnesses are needed is to look into all potential alibi witnesses suggested by a defendant, or else have an investigator look into them, and that he then lets the defendant make the final decision about whether to use the available witnesses at trial based upon Trial Counsel's or an investigator's interviews with the potential witnesses. He testified that he and his investigator pursued every alibi witness named by Applicant. He testified that, if he did not call a particular alibi witness at trial, it was due to the fact that he was unable to locate that witness or else that witness's testimony would not have been helpful to Applicant's defense. He testified that he used the best alibi witnesses that he had at Applicant's trial. When asked by PCR Counsel to explain why he called some witnesses at trial when those witnesses testified that Applicant had been smoking marijuana with them, Trial Counsel testified that he does not coach witnesses and does not have an independent memory as to whether it was he or his investigator who met each with specific witness before trial.

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<sup>1</sup> Trial Counsel was also called as a witness by Respondent, so the summary of his testimony here includes the testimony he provided during Applicant's case-in-chief and in Respondent's case-in-chief.

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Trial Counsel testified that he attempted to get a security camera recording from Crock's, a bar at which Applicant and some witnesses testified that they had been on the night of the robbery. Trial Counsel testified that he was unable to acquire the tape because it was unavailable.

Trial Counsel did not remember if Applicant had a cell phone at the time of the robbery. He testified that he looked into the possibility of getting a phone expert to testify on Applicant's behalf at trial, but that he was eventually unable to use the phone records to support Applicant's alibi defense because Applicant was either using Applicant's girlfriend's phone, because Applicant's phone was broken at the time, or because Applicant did not have a cell phone at the time of the robbery. He could not remember which of these reasons undermined his attempt to use a phone expert's testimony as to the phone records in the alibi defense, but did testify that he pursued the issue until it became clear that neither the phone records of an expert's testimony would benefit Applicant at trial.

Trial Counsel testified that Judge Miller did not instruct the jury on flight and that there was not testimony at trial about flight on the part of Applicant. He testified that he moved to suppress any testimony on flight before trial, but that his motion was denied by Judge Miller. He testified that he cross-examined Deputy United States Marshal Douglas Leslie at trial concerning Applicant's alleged flight, and then questioned Applicant about it in an attempt to mitigate any evidence of flight.

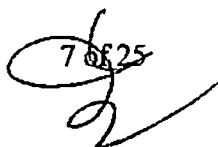
Trial Counsel testified that Judge Miller gave the jury a permissive malice instruction, and that Judge Miller did not instruct the jury that it had to infer malice from felony murder. He testified that the case law at the time indicated that permissive malice inferences were acceptable, and that State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), concerned solely an

inference of malice from the use of a deadly weapon, making it inapplicable to the malice instruction given in Applicant's trial.

He testified that he did not rely on accident as Applicant's primary defense. He testified that he did not start the trial intending to use a defense of accident, but he wanted Judge Miller to instruct the jury on accident by the end of trial because he felt that the testimony of the codefendants did not indicate that the shooting of the victim had been intentional, thereby naturally raising the issue of an accidental shooting.

He testified that he was aware that Appellate Counsel briefed on appeal the issue of Judge Miller's accomplice liability instruction. He testified that the multiple jury instructions given in Applicant's case could have been inconsistent and may have confused the jury, but added that a defense attorney never knows how a jury will evaluate a case. He explained that he wanted the jury instructed on alibi and accident because he wanted to keep all possible options and defenses open to Applicant.

Appellate Counsel testified at the evidentiary hearing. She testified that she was appointed to represent Applicant on appeal from his trial conviction in the underlying criminal case. She testified that she initially filed an Anders brief because she did not identify any preserved issues of merit, but then briefed on the issue of the trial court's instruction of accomplice liability once the South Carolina Court of Appeals instructed her to do so. She testified that she included a footnote in her brief, in which she noted that Applicant could likely raise as an issue in a post-conviction relief proceeding Trial Counsel's failure to preserve for appeal his objection to the trial court's jury instruction on accomplice liability since she believed that the objection had not been preserved for appellate review. She testified that, in her opinion, the trial court's instructing the jury on both accomplice liability and alibi could have confused

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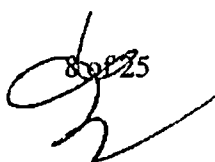
the jury and caused Applicant to suffer prejudice. She testified that the State argued on appeal that Trial Court's objection had not been preserved for review by the Court of Appeals and that Applicant was not entitled to relief thereon. She testified that the State did address the merits of the issue in its brief.

Applicant testified on his own behalf at the evidentiary hearing. He testified that Trial Counsel represented him at trial. He testified that he met with Trial Counsel on approximately three occasions over the course of the representation. He testified that they discussed the upcoming trial a few times, but that Trial Counsel did not review discovery with him. He testified that Trial Counsel was not as prepared for trial as he should have been and that he feels like he should get a "do over."

He testified that he provided the names of multiple people to Trial Counsel as potential witnesses. At the evidentiary hearing, Applicant identified these potential witnesses as: Kellan Goodine, Julien Anderson, Cosha Benson, William Wingard, and Phillip Bruce. He testified that his alibi defense had merit, but that it was not a fruitful defense at his trial because he did not have the right witnesses in order to pull it off. He testified that there was no forensic evidence or fingerprints used against him at trial.

Applicant testified that he was in Georgia with his girlfriend at the time of his arrest for the robbery. He explained at the hearing that he testified at his trial because he did not want the jury to think that he was in Georgia because he was running away from the crime.

When PCR Counsel questioned Applicant about the jury instructions that Judge Miller gave at trial, Applicant testified that he did not know what accomplice liability was at the time and that he was not aware of the theory of hand of one, hand of all. He testified that he wishes that Trial Counsel had done more to help him at trial.

  
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Applicant testified that he wants this Court to know that he is an innocent man, that he was not involved in the armed robbery or the killing of the victim, and that the extent of his involvement in the crime was in telling the codefendants that they would be able to buy marijuana at the victims' home. He testified that, of his codefendants, he knew only Ramsey.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to scrutinize their credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he 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, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; 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 v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “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). 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 Petitioner 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 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. 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. 668. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 697. Therefore, the function of the post-conviction relief court is to determine if “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney. Id. at 690.

Based on this standard set forth above, and the reasoning below, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel. The allegations are addressed fully below:

***Trial Counsel was constitutionally ineffective for failing to object to Judge Miller's improper jury instructions on the inference of malice and felony murder.***

Applicant argues that Judge Miller's jury instructions on malice and felony murder were improper because they shifted the burden onto Applicant, that Trial Counsel's performance was deficient because he did not object to the instructions, and that Applicant suffered prejudice thereby.

The Supreme Court of South Carolina has held that a defense attorney was constitutionally ineffective for failing to object a trial court's instruction on felony murder. Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008). In Lowry, the trial court neglected to instruct the jury on the felony murder doctrine in its initial charge to the jury, so it gave the following supplemental instruction to the jury:

[Y]ou will recall I went over and talked with you about accomplice liability, I meant to conclude that by telling you this in regard to what is called the felony murder doctrine. That is, if a person kills another in the doing or attempting to do an act which is considered a felony, the fact that this occurs while one is doing or attempting to commit a felony makes the killing murder. And, therefore, the killing by one of another in the commission or attempted commission of a felony makes that killing, by virtue of it occurring in that context, a murder.

Id. at 503, 657 S.E.2d at 762.

The Supreme Court found that the defense attorney should have objected to the supplemental instruction because it shifted the burden of proof for the malice element or murder onto Lowry. Id. at 506, 657 S.E.2d at 794. The burden shifted because the supplemental instruction did not contain permissive language that indicated to the jury that it could infer malice from Lowry's participation in the armed robbery, thereby creating "a mandatory presumption of the malice element in the crime of murder instead of permitting the jury" to find that malice existed as proven by the State beyond a reasonable doubt. Id.

During Applicant's trial, Judge Miller gave the following instruction with regard to felony murder:

[I]f one intentionally kills another during the commission of a felony, the inference of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, I, again, tell you this inference would simply be an evidentiary fact to be taken into consideration by you along with all the other evidence in the case and you give it the weight you think it should receive. I would tell you that burglary first and attempted armed robbery are felonies.

Trial Tran. at 385-86.

Unlike the trial court in Lowry, Judge Miller's instruction did not mandate that the jury presume malice on the part of Applicant. Unlike Lowry, Judge Miller's instruction informed the jury that it was permitted to find that malice existed. Judge Miller's instruction afforded to Applicant the sort of permissive safeguards that were absent from the instructions in Lowry. For this reason, Judge Miller's instructions did not run afoul of the Supreme Court's holding in Lowry. Trial Counsel testified at the evidentiary hearing that he believed Judge Miller's felony murder instruction was proper because its language as permissive, unlike the instruction given in Lowry. This Court finds that Trial Counsel's performance with respect to the instructions on felony murder and malice was not deficient. This Court finds that Applicant has failed to demonstrate that any supposed error by Trial Counsel with respect to the instruction prejudiced Applicant. This Court finds that Trial Counsel was not constitutionally ineffective with respect to his not objecting to the instruction on felony murder, and this allegation is denied and dismissed with prejudice.

At the evidentiary hearing, PCR Counsel questioned Trial Counsel as to whether Trial Counsel believed that he should have objected to Judge Miller's instruction about implied malice in light of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), but that case is not relevant here. The holding in Belcher was that:

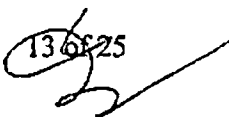
[A] jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide.

Belcher at 600, 685 S.E.2d at 803-04.

Judge Miller did not instruct the jury in Applicant's case that malice may be inferred from the use of a deadly weapon. Trial Counsel testified at the evidentiary hearing that, since Judge Miller did not give such an instruction, there would have been no need for him to object to the jury instructions pursuant to Belcher. Trial Counsel's assessment was correct. Applicant has wholly failed to show that Belcher is applicable to Applicant's case. There was simply no basis upon which Trial Counsel should have objected to Judge Miller's jury instructions in reliance upon Belcher. This Court finds that Trial Counsel's performance as to his not making an objection in reliance upon Belcher to Judge Miller's instructions was not deficient. As such, this Court finds that Applicant was not afforded ineffective assistance by Trial Counsel with respect to the allegation that Trial Counsel should have raised a Belcher objection, and this allegation is denied and dismissed with prejudice.

***Trial Counsel was constitutionally ineffective for failing to preserve his objection to Judge Miller's jury instruction on accomplice liability.***

Judge Miller instructed the jury on accomplice liability during his charge to the jury. Trial Tran. 383. After doing so, Trial Counsel informed the court that he did not take any exception or have any objection to the jury instructions. Id. at 392. After beginning deliberations, the jury asked Judge Miller if Applicant could be guilty of murder if he did not pull the trigger. Id. at 393. The solicitor suggested that Judge Miller charge the jury on murder and "hand of one, hand of all . . . ." Id. Trial Counsel objected to charging the jury on accomplice liability, and requested that Judge Miller give the jury only the definition of murder. Id. Judge Miller overruled Trial Counsel's objection and charged the jury on murder and accomplice liability. Id.

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The Court of Appeals concluded that Trial Counsel did not preserve his objection to Judge Miller's accomplice liability instruction since he did not object to it after the jury charges were first given, but objected only when it was recharged after the jury asked for clarification. State v. Mosley, 2017-UP-353 (S.C. Ct. App. filed September 6, 2017). Applicant argues that Trial Counsel's performance was deficient because, although Trial Counsel did object when Judge Miller gave a supplemental instruction on accomplice liability, his failure to object after the initial instructions to the jury did not preserve the object and Judge Miller's ruling for appellate review, and that Applicant was prejudiced thereby.

This Court finds that, to the extent that the allegation by Applicant includes any contention that Trial Counsel's performance was deficient because he did not object to Judge Miller's instructing the jury on accomplice liability, that allegation is without merit. An issue that was found to be unpreserved on direct appeal may be raised as an allegation in a post-conviction relief action that defense counsel was ineffective for preserving the objection. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Trial Counsel did object to Judge Miller's instructing the jury; the fact that the objection did not come until the parties were discussing the formulation of a supplemental instruction is irrelevant because, at the moment the objection was made, it was within Judge Miller's authority to not charge the jury afresh with accomplice liability or even to amend his previous instruction to as to excise an instruction on accomplice liability. Any contention that Trial Counsel failed to object at all is obviously contradicted by the record. In accordance with McHam, however, Applicant argued that Trial Counsel was deficient for not preserving the objection.

The theory of "hand of one, hand of all" provides that:

[O]ne who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.

Barber v. State, 393 S.C. 232, 236-37, 712 S.E.2d 436, 439 (2011) (citing State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010)).

When one is determining whether an accomplice liability charge is warranted, “the question is whether there is any evidence that another co-conspirator was the shooter and [Applicant] was acting with him when the robbery took place.” Id. at 237, 712 S.E.2d at 439 (citing State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000)).

At trial, Trial Counsel elicited testimony from the victims that they were not able to positively identify Applicant as the shooter. One victim testified that he never saw the face of the robber who pulled the trigger, and was unable to give an accurate estimation of the shooter’s height. Trial Tr. 114. Another victim testified that he was unable to see which of the robbers fired the fatal shot. Id. at 124-25. A third victim testified that his recent smoking or marijuana and position on the floor prevented him from seeing the shooter. Id. at 131-32. A fourth victim could not identify the shooter because the shooter’s mask concealed his identity. Id. at 159-61. This inability of the victims to positively point to one of the robbers as the shooter was evidence that one of the codefendants other than Applicant may have pulled the trigger. Compounding the problem of the identity of the shooter, Applicant and his codefendant Ramsey are both African-Americans, a fact that is relevant in light of the victims’ testimony as to one of the codefendant’s being black. The evidence of the victims and Applicant’s three codefendants indicated that the robbers were all acting in concert in carrying out the crimes. Since the evidence was clear that the robbers acted together but not clear as to which of the robbers killed the victim, Judge Miller’s charge on accomplice liability was therefore warranted. See State v. Rivera, 389 S.C. 399, 699 S.E.2d 157 (2010) (holding that the law charged to the jury “must be determined from

the evidence presented at trial.”). This Court finds that Trial Counsel’s performance with respect to his late objection to Judge Miller’s instruction on accomplice liability was not deficient because the jury instruction was warranted based upon the evidence at trial.

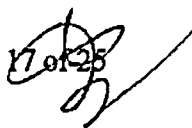
This Court finds that Applicant was not prejudiced by the lack of preservation because he has not shown that he would have been successful on appeal had this issue been preserved. Applicant has failed to introduce any evidence that the jury was confused by any one jury instruction or by any combination thereof. See Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) (concluding that an applicant who was seen in chains by the jury failed to establish prejudice when he did not offer testimony of affidavits from the jurors) (citing Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995)). Applicant’s offering of Appellate Counsel’s opinion that the issue was arguable because she believed the jury may have been confused by the charging of accomplice liability, alibi, and accident was unconvincing. Applicant merely speculates that Trial Counsel’s performance with respect to jury instructions prejudiced him. Though the jury did ask for clarification, it specifically inquired as to murder and whether Applicant could be guilty of murder if he did not pull the trigger. Rather than indicating that the jury was confused by the interplay between the defenses of alibi or accomplice liability, the jury’s question shows that the jury wanted to know about the nature of accomplice liability and how it would relate to one of the indicted offenses. This Court finds that Trial Counsel was not constitutionally ineffective for failing to preserve his objection to the instruction on accomplice liability because Applicant has failed to demonstrate that the instruction was inappropriate and has failed to demonstrate that the issue would have been successful on appeal. As such, this allegation is denied and dismissed with prejudice.

***Trial Counsel was constitutionally ineffective for failing to subpoena cellphone records that would have supported Applicant's alibi defense.***

Applicant argues that Trial Counsel's performance was deficient because he did not subpoena phone records that would have allegedly supported Applicant's alibi defense by showing that Applicant was not at the victims' home on the night of the armed robbery.

A defense attorney has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland, at 691. Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). A defense attorney's "[f]ailure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). An applicant alleging that his attorney failed to prepare for the case must show how additional preparation would have resulted in a different outcome. Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (Ct. App. 2014).

This Court finds that there was no deficiency in Trial Counsel's conduct with respect to his investigation into Applicant's phone records. Trial Counsel testified that he initially believed

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that Applicant's phone records could support Applicant's alibi defense, but that he was forced to abandon this approach when he discovered that the phone records would have been of no benefit to the defense. He testified that he could not remember specifically the reason that he concluded that the phone records were not helpful to Applicant's defense, but testified that it was either due to Applicant's not having an operational phone at the time of the armed robbery or to Applicant's use of his girlfriend's phone at the time. In either of these situations, the records would not have supported Applicant's alibi defense at his trial. This Court finds that Trial Counsel's testimony on his unsuccessful attempt to support Applicant's alibi defense with phone records is credible. Trial Counsel's testimony indicates that he conducted a reasonable and thorough investigation with respect to the phone records. Furthermore, Applicant has not put before this Court the phone records that supposedly support his alibi defense, but has merely speculated that the phone records supported his alibi. This Court finds that Trial Counsel was not constitutionally ineffective with respect to his failure to introduce Applicant's phone records at trial because Applicant has failed to demonstrate any deficiency in Trial Counsel's performance and any resulting prejudice. As such, this allegation is denied and dismissed with prejudice.

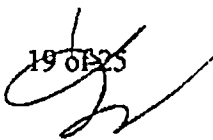
***Trial Counsel was constitutionally ineffective for failing to sufficiently cross-examine Applicant's codefendants on their bias in testifying for the State pursuant to a plea agreement.***

Applicant argued that Trial Counsel's performance was deficient because he did not adequately cross-examine Applicant's codefendants on their bias as witnesses for the State.

Trial Counsel testified at the evidentiary hearing that he had adequately cross-examined Applicant's codefendants at trial. Trial Counsel questioned codefendant Jaron Dalton about his pleading guilty to voluntary manslaughter rather than the indicted offense of murder because the codefendant had told law enforcement that he was not the one who killed the victim. Trial Tran. 202-03. Trial Counsel questioned codefendant Jordan Dalton at trial about the codefendant's

pleading guilty to the lesser-included offense of voluntary manslaughter instead of the indicted offense of murder. Id. at 237. Trial Counsel questioned codefendant Kadeem Ramsey about his pleading guilty to voluntary manslaughter rather than the indicted offense of murder. Id. at 223. Tavis Campbell was not one of Applicant's codefendants in the underlying criminal case, but he testified about an incriminating statement that he heard Applicant make, and testified about his being charged for hindering apprehension when he was arrested with Applicant in Georgia after the robbery. Id. at 256-66. Trial Counsel cross-examined Campbell about his faxing a letter to the prosecution in which he offered to testify against Applicant in exchange for the conferring upon him of some benefit. Id. at 267-70.

When cross-examining each of Applicant's three codefendants, Trial Counsel questioned their having plead guilty to a lesser-included offense of murder and made the jury aware of the fact. Trial Counsel argued in closing that Applicant's three codefendants testified that Applicant was the fourth armed robber at the victims' home on the night of the robbery, despite the fact that the victims testified that there were three robbers. Id. at 357. Trial Counsel explained the codefendants' identifying Applicant was one of the robbers by arguing that they are biased because they want to get a better deal by cooperating with the prosecution. Id. at 360. This Court finds that Trial Counsel adequately cross-examined Applicant's codefendants about their plea deals, and that his argument in closing that they were lying in order to take advantage of the State's offers to them shows that he was employing a strategy of challenging the credibility of Applicant's codefendants throughout the trial. This Court finds that Trial Counsel was not constitutionally ineffective with respect to his cross-examination of Applicant's codefendants because Applicant has failed to demonstrate any deficiency in Trial Counsel's performance and any resulting prejudice. As such, this allegation is denied and dismissed with prejudice.

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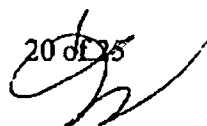
***Trial Counsel was constitutionally ineffective for failing to request an adequate jury instruction on the credibility and weight of the codefendants' testimony.***

Applicant argued that Trial Counsel's performance was deficient because he did not request a jury instruction on the bias of Applicant's codefendants in testifying as witnesses for the prosecution after accepting plea deals. As discussed earlier in this Order, Trial Counsel cross-examined Applicant's codefendants as to their plea deals and argued that they were biased and not credible during his closing argument. Judge Miller, in his jury instructions, charged the jury as follows:

[I]n determining the believability of the witnesses, you may believe one witness over several or several over one. You may believe a part of the testimony of a witness and reject the remaining part. You may believe the testimony of a witness in its entirety or you may reject that same testimony in its entirety. And you may consider whether the witness has an interest in the result of the trial of that the witness is prejudiced towards either the State or the Defendant . . . .

Trial Tran. 379-80.

This Court finds that there was no deficiency in Trial Counsel's conduct with respect to his not requesting a jury instruction from Judge Miller that specifically addressed any bias on the part of Applicant's codefendants. The jury instruction quoted above adequately covered the relevant biases, if any, of all witnesses at trial, not merely Applicant's codefendants. After the aforementioned cross-examination by Trial Counsel as to the codefendants' plea deals and his closing argument, the jury instruction addressed any biases that the codefendants may have had in testifying falsely against Applicant. This Court finds that Applicant has failed to demonstrate any prejudice he suffered in Trial Counsel's reliance upon instruction that Judge Miller gave to the jury about their weighing of witness credibility. This Court finds that Trial Counsel was not constitutionally ineffective with respect to Judge Miller's jury instruction on the jury's findings of witness credibility because Applicant has failed to demonstrate any deficiency in Trial

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Counsel's performance and any resulting prejudice. As such, this allegation is denied and dismissed with prejudice.

***Trial Counsel was constitutionally ineffective for failing to object to the admission of evidence of Applicant's flight to Georgia and corresponding jury charges.***

Applicant argues that Trial Counsel's performance was deficient because he did not object to the admission of evidence of Applicant's flight to Georgia after the robbery or request jury charges on flight.

Trial Counsel moved to suppress any evidence of Applicant's flight before the testimony began. Trial Tran. 33-36. Trial Counsel was unsuccessful in his motion because Judge Miller found that there was no evidence before him that should be suppressed, as long as the prosecution did not attempt to introduce speculation as to Applicant's state of mind upon going to Georgia after the robbery. Trial Counsel elicited testimony from the witness who discovered and arrested Applicant in Georgia that Applicant "did not try to leave the room" during the arrest. Id. at 294. Applicant testified at the evidentiary hearing that he wanted to testify at trial so that he could make it clear that he was not in Georgia because he was trying to avoid detection or flee South Carolina after committing the armed robbery. Trial Counsel questioned Applicant at trial about his reason for being in Georgia after the robbery. Id. at 308-11. Trial Counsel testified that he did this at trial in an attempt to mitigate any harm that could have been caused by the evidence of Applicant's flight.

A review of the trial transcript shows that Judge Miller did not specifically give any jury instruction relating to Applicant's apparent flight to Georgia after the armed robbery. Trial Counsel confirmed during the evidentiary hearing that no such jury instruction was given during Applicant's trial. Judge Miller did mention the flight of a defendant during his jury instructions, but only when explaining the elements of burglary, which provide that a defendant is guilty of

burglary if he commits some act while in another's dwelling or in immediate flight therefrom. Id. at 386-88; see also S.C. Code Ann. § 16-11-311.

This Court finds that Trial Counsel was not ineffective in his handling of the issue of Applicant's flight to Georgia. Applicant has failed to demonstrate any deficiency in Trial Counsel's performance. Trial Counsel moved to suppress any evidence and then attempted to mitigate it once it came in at trial. This Court finds that Applicant has failed to demonstrate that he has suffered prejudice due to the references of flight at trial. The prosecution had a single witness who could have been said to have discussed any flight on the part of Applicant. Trial Counsel mitigated this witness's testimony through cross-examination and by questioning Applicant about the reason for his presence in Georgia after the robbery, which was also tied to his alibi defense in that he was with his girlfriend. As such, this allegation is denied and dismissed with prejudice.

***Trial Counsel was constitutionally ineffective for failing to request adequate jury instructions on accident, voluntary manslaughter, and involuntary manslaughter.***

Applicant argues that Trial Counsel's performance was deficient because he did not request adequate jury instructions on accident, voluntary manslaughter, and involuntary manslaughter. A defendant is entitled to a jury instruction on a lesser-included offense if "there is evidence from which it could be inferred [that] a defendant committed a lesser rather than a greater offense." State v. Fields, 356 S.C. 517, 522-23, 589 S.E.2d 792, 795 (S.C. Ct. App. 2003) (citing State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986)). "Voluntary manslaughter is the unlawful killing of a human being in a sudden heat of passion upon sufficient legal provocation." State v. Locklair, 341 S.C. 352, 359, 535 S.E.2d 420, 424 (2000) (citing State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998)). Trial Counsel testified at the evidentiary hearing that there was no evidence admitted at trial that would have shown that there was any legal provocation in the

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shooter's killing of the victim, no matter which of the four defendants may have pulled the trigger, and that Applicant would not have been entitled to a voluntary manslaughter instruction. Trial Counsel did, however, ask for such a charge during the charge conference, without success. Trial Tran. 348-49. This Court finds that Trial Counsel was not with respect to requesting a jury instruction on the lesser-included offense of voluntary manslaughter. This Court finds that Applicant has failed to demonstrate that he was entitled to a jury instruction on voluntary manslaughter as the fatal was shot by a masked assailant during an armed robbery, which would not constitute sufficient legal provocation.

Involuntary manslaughter is either:

(1) [T]he killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the killing of another without malice and unintentionally but while engaged in the doing of a lawful act with a reckless disregard of the safety of others.

State v. Tucker, 324 S.C. 155, 170, 478 S.E.2d 260, 268 (1996) (citations omitted).

Trial Counsel testified that he did not think that Applicant was entitled to a jury instruction in involuntary manslaughter since the shooting occurred during an armed robbery, which is a felony that tends to result in death or great bodily harm and is not a lawful act. This Court finds that Trial Counsel was not deficient in not requesting an instruction on involuntary manslaughter because Applicant would not have been entitled to the instruction. This Court finds that Trial Counsel was not ineffective in not requesting the charge.

The Supreme Court has provided that, "[f]or a homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, that the defendant was acting lawfully, and that due care was exercised in the handling of a weapon." State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994) (citing State v. Brown, 205 S.C. 514, 32 S.E.2d 825 (1945)). Judge Miller's jury instruction on accident was virtually identical to this definition. Trial

Tran. 384. Judge Miller also instructed the jury that the prosecution bore the burden of proving beyond a reasonable doubt that the killing of the victim was not an accident. *Id.* The jury was charged on accident at Trial Counsel's request. *Id.* at 350. Trial Counsel testified that he did not rely upon accident as Applicant's primary defense, but that he believed that some of the testimony at trial could have supported the defense. He also testified that he wanted every available defense to be charged to the jury so that the jury he could keep all of Applicant's options open. Jaron Dalton testified at trial that Applicant was standing up from his position over the victim and "the gun just fired about halfway up." *Id.* at 196. According to this codefendant, the perpetrators were "kind of shocked that the weapon had fired . . . ." *Id.* Jordan Dalton, another of Applicant's codefendants, testified that Applicant pistol-whipped the victim and that then "the gun went off." *Id.* at 233. This was similar to the testimony of one of the victims who survived the robbery, who testified that the "gun went off . . . ." *Id.* at 128.

This Court finds that Trial Counsel's performance was not deficient with respect to the jury instruction on accident. Trial Counsel requested that the jury be charged on accident as an alternative defense based on testimony given by multiple witnesses at trial. He made the strategic decision to have the jury charged on accident so that the jury could have multiple avenues of acquitting Applicant. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." Strickland, at 689. Additionally, this saddled the prosecution with the burden of proving that accident did not apply beyond a reasonable doubt. This Court finds that Applicant has not demonstrated any prejudice from the jury's being charged with accident. Applicant has argued that the instruction was inadequate, but has failed to identify any reason that the articulation of accident by Judge Miller was insufficient in any respect. This Court finds that Applicant was not afforded the ineffective

assistance of counsel with respect to the jury instruction on accident because Applicant has failed to show that there was any deficiency in Trial Counsel's performance and that Applicant suffered any resulting prejudice. As such, this allegation is denied and dismissed with prejudice.

**CONCLUSION**

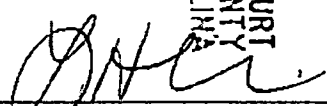
Based on all the foregoing, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his Application for Post-conviction Relief. Therefore, this application is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203 and 243, 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. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 16 day of Oct, 2019.

  
LETITIA H. VERDIN  
Presiding Judge

CLERK OF COURT  
PICKENS COUNTY  
SOUTH CAROLINA  
2019 NOV -4 P 3:38

Greenville, South Carolina



State of South Carolina  
The Circuit Court of the Thirteenth Judicial Circuit

Letitia H. Verdin  
Judge

CLERK OF COURT  
PICKENS COUNTY  
SOUTH CAROLINA

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Phone: (864) 467-8448  
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lverdinj@sccourts.org

October 16, 2019

Pickens County Clerk's Office  
214 E Main Street  
Pickens, SC 29671

RE: *State of South Carolina v. Respondent*  
Case No.: 2018-CP-39-0318

To whom it may concern:

Enclosed herewith please find the above referenced order signed by Judge Letitia Verdin. Please kindly file this order. If you need anything from me with regards to this matter please do not hesitate to contact our office.

With kindest regards,

A handwritten signature in cursive script that reads "Brittany Long".

Brittany Long  
Administrative Assistant to  
The Honorable Letitia H. Verdin

bpl  
Enclosures



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Clerk of Court  
Mr. Daniel E. Shearouse  
PO Box 11330  
Columbia, SC, 29211**