



L. Sherril Alford, Esquire

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December 3, 2019

RECEIVED

DEC 09 2019

S.C. SUPREME COURT

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

**RE: Thomas Jeffrey Stewart #353430 v. State of South Carolina**  
**2017-CP-13-0776**

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal along with the accompanying Order for the above-referenced matter. By way of this letter I am copying the Office of Appellate of Defense, as I was appointed to represent Mr. Stewart.

Best regards,

L. Sherril Alford, Esquire

cc: Thomas Jeffrey Stewart  
Jacob A. Isenberg, Assistant Attorney General  
Chesterfield County Clerk of Court  
Della White, Office of Appellate Offense

STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

DEC 09 2019

APPEAL FROM CHESTERFIELD COUNTY  
Court of Common Pleas

The Honorable Brooks P. Goldsmith, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2017-CP-13-0776

Thomas Jeffrey Stewart, #353430, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

NOTICE OF APPEAL

Applicant, Thomas Jeffrey Stewart, appeals the order of the Honorable Brooks P. Goldsmith, dated September 19, 2019, and filed September 30, 2019.

December 3, 2019



L. SHERRIL ALFORD, ESQUIRE  
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ATTORNEY FOR APPLICANT

Opposing Counsel:  
Jacob A. Isenberg, Assistant Attorney General  
S.C. Attorney General's Office  
PO Box 11549  
Columbia, SC 29211-1549

STATE OF SOUTH CAROLINA  
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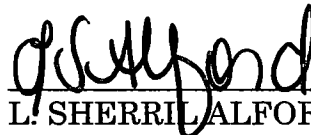
**PROOF OF SERVICE**

I, L. Sherril Alford, certify that I have served the within Notice of Appeal on Respondent on December 4, 2019 by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Jacob A. Isenberg, Assistant Attorney General  
S.C. Attorney General's Office  
PO Box 11549  
Columbia, SC 29211-1549

I further certify that all parties required by Rule to be served have been served.

December 3, 2019



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SC Bar No. 102490

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS	
	)	FOR THE FOURTH JUDICIAL CIRCUIT	
COUNTY OF CHESTERFIELD	)		
Thomas Jeffrey Stewart,	)	Case No.: 2017-CP-13-00776	
S.C.D.C. No. 353430,	)		
	)		
Applicant,	)	<b>ORDER OF DISMISSAL</b>	
v.	)		
	)		
State of South Carolina,	)		
	)		
Respondent.	)		
_____	)		

2019 SEP 30 PM 12:06  
 Wanda C. Hiles  
 CLERK OF COURT  
 CHESTERFIELD COUNTY, S.C.

This matter comes before the Court by way of an application for post-conviction relief filed by Thomas Jeffrey Stewart (“Applicant”) on December 7, 2017. Respondent made its return on July 6, 2018. The Court convened an evidentiary hearing into the matter on August 21, 2019, at the Chesterfield County Courthouse. Applicant was present at the hearing and represented by Sherril Alford, Esquire. Jacob A. Isenberg, of the South Carolina Attorney General’s Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant’s plea counsel, James Rivers, Esquire (“Counsel”) also testified. The Court had before it Applicant’s records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Chesterfield County Clerk of Court regarding the subject convictions, Applicant’s direct appeal records, and the pleadings. After a thorough review of the evidence and testimony, this Court finds Applicant’s application should be dismissed with prejudice.

**I. PROCEDURAL HISTORY**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chesterfield County Clerk of Court. Applicant was indicted at the March

2010 term of the Chesterfield County Grand Jury for murder (2010-GS-13-00192), and possession of a weapon during the commission of a violent crime (2010-GS-13-00263).

Casey Secor, Esq. and S. Boyd Young, Esq. represented Applicant at trial. Kernard E. Redmond and Adam Foard, of the Fourth Circuit Solicitor's Office, prosecuted the case. On December 3, 2012, Applicant proceeded to trial before the Honorable J. Michael Baxley and a jury. The jury found Applicant guilty as indicted on December 6, 2012. Judge Baxley sentenced Applicant to imprisonment for a term of life.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Jarrett Wanda C. Wilkes  
CLERK OF COURT  
CHESTERFIELD COUNTY, SOUTH CAROLINA  
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Coco, Esq., who raised the following three issues:

1. The trial court erred in finding no discrimination in the State's use of peremptory challenges because (a) the trial court failed to comply with the third step Batson analysis which requires a court to meaningfully evaluate the persuasiveness of the prosecutor's group neutral explanations and make a deliberate decision whether purposeful discrimination occurred; and (b) Appellant proved the State's proffered reasons were pretextual because they were not applied in a neutral manner.
2. Where the State announced to the jury that malice can be implied from use of a deadly weapon and where the jury was asked to consider a lesser included offense of murder and self-defense, the trial court erred in overruling Appellant's objection and failing to issue a correction to the jury.
3. The trial court erred in overruling Appellant's objection to unfairly prejudicial character evidence offered by the State.

The parties proceeded to oral arguments on April 14, 2015. Applicant was represented by Mr. Coco, Esq., and Donald J. Zelenka, of the South Carolina Attorney General's Office, represented the State. By opinion decided July 15, 2015, the South Carolina Court of Appeals reversed Applicant's convictions and remanded the case, finding the State committed a Batson violation and that the trial court erred in its review. State v. Stewart, 413 S.C. 308, 775 S.E.2d 416 (Ct.

App. 2015). Respondent petitioned the Supreme Court of South Carolina for a writ of certiorari, which was denied by order dated May 19, 2016. The Remittitur was issued on May 24, 2016.

After remand, Applicant was represented by James Matthew Rivers, Esq. On June 23, 2017, Applicant pled to murder pursuant to North Carolina v. Alford, 400 U.S. 25, (1970); the weapon charge was dismissed *nolle prosequi*. The Honorable Paul M. Burch sentenced Applicant to imprisonment for a term of 30 years.

Applicant filed a timely notice of appeal. By Order filed October 17, 2017, the South Carolina Court of Appeals dismissed Applicant's appeal for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. State v. Stewart, S.C. Ct. App. Order filed October 17, 2017. The remittitur issued November 2, 2017.

## II. CURRENT ALLEGATIONS

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

1. Ineffective Assistance of Counsel
  - a. Failure to investigate facts of the case
  - b. Provided erroneous advice about sentencing and never filed for reconsideration

Applicant requests relief as follows:

- Sentence vacated, conviction reversed, and remand for new trial

At the evidentiary hearing, Applicant proceeded forward on the above-mentioned allegations. Applicant also proceeded forward on a claim for ineffective assistance of counsel based upon a failure to preserve an issue for appeal.

## III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony

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Wanda C. Miles  
CLERK OF COURT  
CHESTERFIELD COUNTY, S.C.

accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, the Court makes the following findings based upon all of the probative evidence presented.

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Wanda C. Miles  
CLERK OF COURT  
CHRISTIAN COUNTY, S.C.

#### A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690).

The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). “[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” Yarborough at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

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

In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he/she would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant’s right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) (“Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.”). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he or she should be allowed to depart from the truth of his

statements. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97.

*1. Failure to Investigate Facts of Case*

Applicant contends Counsel failed have an expert inspect the confession video in preparation for trial. In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation "was itself reasonable." Taylor v. State, 404 S.C. 350, 364, 745 S.E.2d 97, 104 (2013). However, Counsel is not deficient in conducting a reasonable investigation as long as they interview potential witnesses "when it is reasonable to do so." Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011).

Here, Applicant testified Counsel agreed to have an expert review the confession tapes. Specifically, Applicant testified he wanted the tapes to be checked for doctoring. Finally, Applicant testified Counsel failed to have an expert review these tapes before the suppression hearing.

On the other hand, Counsel credibly testified he paid an expert to review the confession tapes. Thereafter, Counsel credibly testified the expert concluded there was nothing wrong with these tapes. Finally, Counsel credibly testified he relayed this information to Applicant before the suppression hearing.

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Wanda C. Miller  
CLERK OF COURT  
PRESTONFIELD COUNTY, S.C.

Accordingly, this Court finds Counsel provided credible testimony on the issue. Therefore, this Court finds Counsel reasonably investigated the tapes to ensure there was no improper tampering. As a result, this Court finds Applicant has failed to overcome the burden to prove Counsel was deficient in investigating the confession tapes.

Applicant contends an expert witness would conclude his confession tapes were improperly doctored. The prejudice prong is dependent upon whether counsel's deficiencies "affected the outcome of the plea process." Frierson v. State, 417 S.C. 287, 789 S.E.2d 762 (Ct. App. 2016), *aff'd as modified*, 423 S.C. 257, 815 S.E.2d 433 (2018). To establish it through witness corroboration an applicant "must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. SCRE 801. Mere "speculation" about the details of what a witness would testify about is insufficient to establish prejudice. Dalton v. State, 376 S.C. 130 at 143, 654 S.E.2d 877 at 877.

Here, Applicant testified law enforcement cut portions of the video out for his statements. Thereafter, Applicant testified an expert in video tapes would figure this out after reviewing them. On the other hand, Counsel credibly testified the individual he paid to review these tapes worked in videotaping news for several years. Counsel further credibly testified this expert affirmatively concluded nothing was wrong with the tape. Therefore, Counsel credibly testified he decided not to use this witness in preparing for trial because the testimony elicited would be unfavorable.

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Manda C. Gillies  
CLERK OF COURT  
REGISTERED SOCIETY, S.C.

Accordingly, Applicant has not presented a witness to corroborate his claims. Also, Counsel provided a credible explanation on what an expert thought of the video at issue. Therefore, this Court finds Applicant is insufficiently speculating as to what an expert witness would testify about the confession video. As a result, this Court finds Applicant has failed to overcome the burden to prove he was prejudiced by an alleged failure to investigate the confession video.

**2. Failure to Advise**

Applicant contends Counsel failed to advise him he was pleading to murder instead of manslaughter.

Here, Applicant testified he believed he was pleading to manslaughter based upon conversations with Counsel before the plea hearing. Applicant testified Counsel agreed this was not a murder case so they agreed only a manslaughter plea would be accepted. Finally, Applicant testified he did not realize he pled to murder until after incarceration.

On the other hand, Counsel credibly testified he believed this case presented a genuine jury question on whether manslaughter or murder occurred. Further, Counsel credibly testified he communicated his belief on the factual issue to Applicant. Counsel credibly testified he talked with Applicant about the importance of avoiding life without parole. Thereafter, Counsel negotiated a sentence of thirty years for murder. Counsel credibly testified he believed this was a favorable plea based upon thirty years being the minimum for murder as well as maximum for manslaughter. Counsel credibly testified he communicated this deal to Applicant, who did not want to plead guilty to murder. Counsel credibly testified he understood Applicant did not want to plead guilty to murder. Therefore, Counsel credibly testified he communicated to Applicant the existence of Alford guilty pleas. Counsel credibly testified Applicant understood all of the details

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Wanda C. Miles  
CLERK OF COURT  
WESTFIELD COUNTY, GA.

behind the negotiated sentence. Finally, Counsel credibly testified Applicant affirmatively agreed to the negotiated sentence.

Accordingly, this Court finds Counsel provided credible testimony on this issue. Specifically, it is hard to believe Applicant would have entered an Alford plea if he believed it was for voluntary manslaughter. Further, Counsel provided the same explanation on this matter at the plea hearing. (Tr. 94-5). Therefore, this Court finds Applicant has failed to overcome the burden to prove Counsel did not advise him the negotiated sentence was based upon murder.

Applicant contends he was prejudice by the bad advice based upon not being eligible for early release under community supervision.

Here, Counsel credibly testified he communicated that pleading guilty to murder included serving day for day. Counsel then credibly testified he believed Applicant understood this would be the consequence of pleading guilty to murder. Counsel credibly testified Applicant acknowledged it was important to avoid the possibility of receiving a sentence of life without parole again. Counsel then credibly testified they discussed the fact that his previous LWOP sentence was only reversed due to a procedural issue at trial. Therefore, Counsel credibly testified they agreed upon a goal of avoiding life in prison this time around.

Accordingly, this Court finds Counsel provided credible testimony on the issue. Applicant had a sentence of life without parole overturned on a procedural issue. Thereafter, he communicated to his lawyer the importance of avoiding that sentence again. He would have been exposed to life without parole had he gone to trial. Therefore, this Court finds Applicant pled guilty with the motivation of receiving a sentence more favorable than what he would have been exposed to at trial.

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CLERK OF COURT  
HESPERIA COUNTY, S.C.

Alternatively, Counsel contends Applicant pled guilty because he lost the suppression hearing. Here, Counsel credibly testified Applicant signed a plea sheet to be enforced in the event he lost the suppression hearing. The record reflects Applicant signed a plea sheet agreeing to enter a negotiated sentence, under Alford, for murder. At the plea hearing, Counsel stated this agreement was contingent upon the outcome of the suppression hearing. (Tr. 92). Thereafter, Counsel stated the benefit of this negotiated sentence was avoiding the high likelihood of being found guilty of murder at trial based upon the admissible confession tapes. (Tr. 94). Therefore, this Court finds Applicant pled guilty based upon losing the suppression hearing.

Alternatively, Respondent contends the plea court remedied any alleged erroneous advice given by Counsel. An accurate plea colloquy can effectively cure erroneous advice or misunderstandings between counsel and their client. See Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997) (stating that plea counsel's deficient performance can be cured by the plea court's colloquy). At the plea hearing, the court notified Applicant he would serve every day of the thirty year sentence. (Tr. 107). Accordingly, this Court finds the plea colloquy correct any alleged erroneous advice about the eligibility of early release for a charge of murder.

### 3. Failure to Object

Applicant contends Counsel failed to preserve the confession tapes for suppression hearing on appeal.

Here, Counsel credibly testified he went through with a hearing to suppress the confession tapes. Furthermore, Counsel credibly testified he lost the suppression hearing. Finally, Counsel credibly testified he objected to the court's decision to not suppress these confession tapes. This is consistent with the record. Specifically, the record reflects the plea court acknowledged Counsel preserved this issue for review. (Tr. 91). Accordingly, this Court finds Counsel objected to the

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Wanda C. Hayes  
CLERK OF COURT  
CHESTERFIELD COUNTY, S.C.

court's decision to protect Applicant on appeal. Therefore, Applicant has failed to overcome the burden to prove Counsel was deficient based upon a failure to object.

Applicant contends he was prejudiced by Counsel's error because the suppression issue was not preserved for appeal. Here, the record reflects Counsel filed a notice of appeal based upon the plea court's ruling that videotaped statements were admissible. The record also reflects Counsel notified the Court of Appeals he specifically argued the evidence was inadmissible based upon tampering.<sup>1</sup> Thereafter, the record reflects the Court of Appeals issued an order of dismissal based upon the failure to provide a sufficient explanation in accordance with 203(d)(1)(B)(iv). Accordingly, Applicant has failed to explain how this order specifically pinpoints a failure to preserve in dismissal. Therefore, this Court finds Applicant has not provided sufficient evidence to conclude this dismissal resulted from a failure to preserve. Therefore, this Court finds he has failed to prove prejudice on an alleged failure to object.

### III. CONCLUSION

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

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

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<sup>1</sup> Counsel also cited Jackson v. Denno, 378 U.S. 368 (1964).

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Hande C. Niles  
CLERK OF COURT  
CHESAPEAKE COUNTY, VA

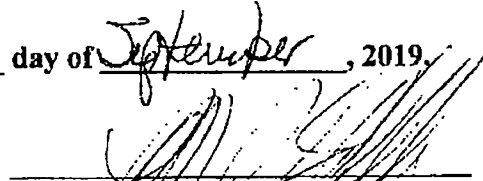


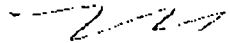
appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 19 day of September, 2019.

  
\_\_\_\_\_  
BROOKS GOLDSMITH  
Presiding Judge  
Fourth Judicial Circuit

  
\_\_\_\_\_, South Carolina

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Wanda C. Miles  
CLERK OF COURT  
CHESTERFIELD COUNTY, S.C.