VOLUME III OF III

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Oct 30 2020

S.C. SUPREME COURT

Certiorari to Horry County

Honorable Kristi F. Curtis, Circuit Court Judge

ARMANDO K. CHESTNUT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-000412

APPENDIX

LARA M. CAUDY
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

CHELSEY MARTO
Assistant Attorney General
1000 Assembly St.
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

PAGES 1001-1121

INDEX

Statutes

APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to grant a new trial where it erroneously gave a Belcher instruction that the jury could infer malice from the use of a deadly weapon where self-defense was a verdict option, and the judge's later instruction that "if there's self-defense, there's no inference that can be associated with the use of a deadly weapon", was hopelessly confusing, and exacerbated rather than cured the prejudice?

RESPONDENT'S COUNTER-STATEMENT OF ISSUE ON APPEAL

I. Whether a new trial is warranted based upon an initial inadvertent instruction on the inference of malice through use of a deadly weapon where the trial judge granted defense counsel's request for a curative instruction which stated in "murder and attempted murder there can be no inference of malice by the use of a deadly weapon. If there's self-defense, there's no inference that can be associated with the use of a deadly weapon.... That's not proper in self-defense if it's established" which any reasonable juror would have understood withdrew the inadvertent instruction?

   a. The issue is not preserved for appeal since the only relief timely requested at trial was the curative instruction.

   b. The issue is not preserved for appeal since the defense counsel found acceptable the curative instruction and did not ask for a mistrial at that time.

   c. The issue is not preserved for appeal since the first complaint about the curative instruction was made after the verdict in a motion for new trial.

   d. Any challenge to the instructions on the inadvertent inference of malice is harmless error on the manslaughter conviction since the jury did not find the existence of malice concerning the death of Jamal McFadden.

   e. Any challenge to the effect of the inadvertent inference of malice charge concerning the attempted murder conviction concerning the assault on Damien Canty's life is harmless error where the attempt to kill Canty involved overwhelming evidence of malice, not limited to the use of a deadly weapon.

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Armando K. Chestnut, was indicted at the August 2012 term of the Court of General Sessions for Horry County for murder (2012-GS-26-3115), attempted murder (2012-GS-26-3116), pointing and presenting a firearm (2012-GS-26-3117), and assault and battery by mob-second degree-serious bodily injury (2012-GS-26-3118). R.p. 845-852. The State had sought by written notice life without parole pursuant to S.C. Code § 17-25-45 on December 7, 2012 and April 2013. Supp R. 32-33, Tr. p. 961-62.

The matter was called to trial on July 15, 2013 before the Honorable Steven H. John and a jury. The Appellant was represented by Barbara Pratt, Esquire of the Horry County Bar. The prosecution was handled by Brad C. Richardson, Senior Assistant Solicitor of the Fifteenth Circuit Solicitor's Office.

On July 19, 2013, the jury found the Appellant guilty of the lesser included offense of voluntary manslaughter on murder indictment concerning the death of Jamal McFadden. Supp. R. 23-30, Tr. p. 948-955. The Appellant was found guilty of attempted murder regarding victim Damien Canty, assault and battery in the second degree and pointing and presenting a firearm. Id. However, the jury found the Appellant not guilty on indictment 2012-GS-26-3118 on assault and battery by a mob second degree serious bodily injury of Damien Canty and assault and battery by a mob third degree bodily injury on Damien Canty and assault and battery first degree on Damien Canty. R.p. 809, Tr. p. 950, ll. 1-15.

The trial judge concluded that under S.C. Code § 17-25-45 he sentenced the Appellant to life imprisonment without parole on voluntary manslaughter and attempted murder. Supp. R. 31-33, R. 818-20, Tr. p. 960-62, 972-74. Judge John sentenced Appellant to concurrent sentences of

five (5) years concurrent for pointing and presenting a firearm and three (3) years concurrent on assault and battery with intent to kill. R. 820-21, Tr. 974-75.

The Appellant made a motion for new trial. A hearing on the motion was held on September 4, 2013 and the motion for new trial and motion to reconsider the sentence September 4, 2013. R. 822-843, Tr. p. 1-22. On September 26, 2013, Judge John entered a written order denying the motion to reconsider the denial of the motion for new trial and sentence. Order Denying Motion for New Trial, Amended, September 27, 2013. Supp.R.p. 1.

The notice of appeal was served October 4, 2013. This appeal and briefing follows.

RESPONDENT'S STATEMENTS OF THE FACTS

This case involves a series of assaults on March 6, 2012 at the 3rd Avenue Sports Bar in Myrtle Beach, South Carolina. On that date there was an altercation inside the bar arising from a dispute during a pool game. The altercation led to a fight between a group from Myrtle Beach and a group from Hemingway/Kingstree/Williamsburg County. The bar owner kicks them out of the bar where beginning fighting anew in the parking lot. Evidence is presented that the Appellant is seen going to his car prior to the shooting is then seen with something silver in his hand. During the altercations, Damien Canty was involved in a fight with Thoro and Corey Myers. At some point during the fight in the parking lot of the bar, a shot was fired and Canty was struck on the elbow. Appellant admits he fired that shot. He fires a couple more times. The altercation continued inside the bar where Canty was knocked to the floor by Mike Spivey and at some point during the beating became unconscious while he continued to be kicked and stomped on by the appellant and others. Chestnut continued to kick him until the owner of the bar pushed him off the victim, and then attempted to strike the victim some more. At some point Jamal McFadden was struck with a bullet during the scuffles. A bullet entered his left lower chest area

through the liver and exited the body. R. 411-12, Tr. 481-482. This resulted in Mr. McFadden death. R. 418, Tr. 488.

Videos of the crime scene were used at trial to identify the various incidents. The Appellant's weapon was recovered at the time of his arrest after it was dropped from the vehicle. R. 233-241, Tr. 294-302.

ARGUMENT

II. A new trial is not warranted based upon an initial inadvertent instruction on the inference of malice through use of a deadly weapon where the trial judge granted defense counsel's request for a curative instruction which stated in "murder and attempted murder there can be no inference of malice by the use of a deadly weapon. If there's self-defense, there's no inference that can be associated with the use of a deadly weapon.... That's not proper in self-defense if it's established" which any reasonable juror would have understood withdrew the inadvertent instruction.

a. The issue is not preserved for appeal since the only relief timely requested at trial was the curative instruction.
b. The issue is not preserved for appeal since the defense counsel found acceptable the curative instruction and did not ask for a mistrial at that time.
c. The issue is not preserved for appeal since the first complaint about the curative instruction was made after the verdict in a motion for new trial.
d. Any challenge to the instructions on the inadvertent inference of malice is harmless error on the manslaughter conviction since the jury did not find the existence of malice concerning the death of Jamal McFadden.
e. Any challenge to the effect of the inadvertent inference of malice charge concerning the attempted murder conviction concerning the assault on Damien Canty's life is harmless error where the attempt to kill Canty involved overwhelming evidence of malice, not limited to the use of a deadly weapon.

The Appellant contends that Judge John erred in refusing to grant a new trial based upon an inadvertent initial jury instruction concerning the inference of malice through the use of a deadly weapon and an assertion that the curative instruction given upon defense counsel's request was confusing and exacerbated the prejudice of the inadvertent instruction. Respondent submits that the trial judge recognized immediately that the inference of malice instruction that he gave was improper under State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) and corrected the instruction with the assistance of the language defense counsel propounded. As set forth fully below, this issue concerning the propriety and effect of the curative instruction as being confusing because it was never timely presented at the time of the trial. Rather, the defendant's counsel requested the language used, specifically accepted the language used and did not object

to the curative instruction or request a mistrial until after the guilty verdict. Respondent submits that the appeal is without merit due to this lacking preservation.

Further, at the outset, his challenge to the inferred malice and subsequent curative instruction can have no effect on the conviction for voluntary manslaughter since the jury expressly could not be deemed to have found the existence of malice in reliance upon any inference instruction. Further, for reasons set forth below Respondent additionally submit that any error concerning the instructions must be deemed harmless error as it relates to the attempted murder conviction.

STANDARD OF REVIEW

When an incorrect charge is given, the court must withdraw it; "[m]erely superimposing a correct statement of law over an erroneous charge only fosters confusion and prejudice." State v. Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986); State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985); State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981). **When an incorrect charge is given, the court must withdraw it;** "[m]erely superimposing a correct statement of law over an erroneous charge only fosters confusion and prejudice." State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991)[1], State v. Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986); State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985)[2]; State v. Adams, supra.[3]

---

[1] In Robinson, the Supreme Court found error where the judge gave an incorrect "mere presence" instruction although in the remainder of the charge he gave correct instructions. The Court found error because of repeated requests by counsel, the trial judge never retracted the incorrect statement. Here, the incorrect statement was immediately corrected in the curative instruction which declared, contrary to the initial that declaring "in particular, murder and attempted murder, there is no inference of malice by the use of a deadly weapon..." R. 800, Tr.p. 941. Any reasonable juror would have considered the improper language withdrawn.

[2] In Peterson, the Court was faced with a situation where the trial court gave an erroneous burden shifting presumption charged that had been abandoned by the court in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). In State v. Elmore, *supra,* the Supreme Court set forth a then exemplary malice charge (now abrogated after Belcher In Peterson, the trial judge followed the erroneous instructions with the *Elmore* charge. Instead of replacing the unconstitutional malice charge, the *Elmore* charge was simply added to the end of the charge. Merely superimposing

In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011). A jury charge is correct if, when read as a whole, the charge adequately covers the law. *Id.* "A jury charge that is substantially correct and covers the law does not require reversal." State v. Logan, 405 S.C. 83, 90-91, 747 S.E.2d 444, 448 (2013). The purpose of a jury instruction is "to enlighten the jury and to aid it in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987).

Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. *State v. Smith,* 315 S.C. 547, 446 S.E.2d 411 (1994). The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. State v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000); Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

HOW THE ISSUE WAS PRESENTED AT TRIAL

As noted previously, this case involves the effect of a curative instruction being given by the trial judge after an unintended charge concerning the inference of malice through the use of a deadly weapon being given. Respondent respectfully submits that the issue presented in the

---

correct instructions over erroneous ones serves only to foster prejudice and confusion, citing State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981).. See State v. Peterson, 287 S.C. 244, 247-48, 335 S.E.2d 800, 802 (1985) overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

[3] In Adams, the Court held that " a full curative instruction should immediately have been given to the jury". Id. In the Appellant's case, the instruction was immediately given declaring " in particular, murder and attempted murder, there is no inference of malice by the use of a deadly weapon..." R. 800, Tr.p. 941.

Appellant's brief is barred from appellate consideration due to a lack of the timely objection to the requested curative instruction and failure to request a mistrial.

THE INITIAL CHARGE CONFERENCE

At the outset of the jury charge conference, defense counsel Pratt stated that "obviously if we were using self-defense, there's no inference of malice with a deadly weapon." Supp. R. 4, Tr. 832, ll. 16-25. There was no other request concerning or discussing the inference of malice prior to closing arguments. Supp. R. 5-22, Tr. 833-850.

THE CLOSING ARGUMENT

During the prosecution closing argument, Deputy Solicitor Richardson stated :

> . . . On March 6th, 2012, the Defendant got the last word in and he spoke loudly, once, twice, three times. Did he go out that night and say I'm gonna go and kill Jamal McFadden? No, But when he went to that car and armed himself, not for self-defense but to get the last word in, that's malice, folks. From where he's sitting in the car, he can't even see the fight that's going on. And you see his reaction, he's not worried about a fight going on until he's already armed. He got the last word in that night, but not today.

R. 761, Tr.p. 902, ll. 5-14.

THE SECOND CHARGE CONFERENCE

After the argument, defense counsel Pratt made the following request:

MS. PRATT:	Okay. I do want to ask - and I would - sir, just a second. I want to ask for an additional charge because the Solicitors made an inference in the statement that he made that the fact that Armando armed himself and that that was malice. I would ask that the Court charge that if he is acting in self-defense, there is no inference of malice by the use of a deadly weapon and I believe that that case - - -
The COURT:	I don't think him gonna charge that at all that there's an inference.
MR. RICHARDSON:	I think that's been stricken from the charge, hasn't it, Your Honor?
The COURT:	I'm sorry.
MR. RICHARDSON:	I think that inference is been stricken from the charges.
The COURT:	I'm not going to say that.
MR. RICHARDSON:	Yes, sir.

MS. PRATT: I believe, I understand that, but I believe that Court should charge that, that the arming of himself is not malice because he said in closing that it was.

The COURT: That's a that's a comment on the facts. I can't do that. That's making a direct comment on the facts. I cannot do that.

MR. RICHARDSON: Your Honor.

THE COURT: Once again, I'd be saying he armed himself. It may be very well be that he said he did; that's for the jury. I – I'm not gonna talk about the facts of the case. So I'm not gonna do that. . . .

R. 763-64, Tr. 904, l. 21- p. 905, l. 22.

THE INITIAL INSTRUCTIONS

During the jury instructions, Judge John defined malice as follows:

Malice, that's hatred, ill-will, hostility towards another person. It's the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an injury or under circumstances the law would infer some evil intent.

Malice aforethought does not require that malice exist for any particular time before it's committed but malice must exist. It must exist in the mind of the Defendant just before and at the time the act is committed. There has to be this combination of the evil intent and the act.

Now, malice aforethought can be expressed or inferred. What that means is you look at whether it's been established to you by direct evidence or circumstantial evidence which was been proved, again, beyond a reasonable doubt.

Expressed malice, that could be, as an example, a person speaking words which expressed hatred or ill-will or when another person or a person prepares beforehand to do the act which was later accomplished. Malice can be inferred from conduct that shows a total disregard for human life. **Inferred malice can also arise when the deed is done with a deadly weapon. A deadly weapon is any kind of article, instrument or substance which is likely the cause of death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case.**

R. 776-77, Tr. p. 917-918. (emphasis added). Similar language was given during the instruction on "attempted murder" and malice. R. 780, Tr. p. 921, ll. 14-19. ("and inferred malice can also arise when that deed is done with a deadly weapon"). The charge was completed at 11:49 am and the jury was advised to not start its deliberations yet. R. 794, Tr. 935, ll. 14-24.

THE OBJECTION AND REQUEST FOR CURATIVE INSTRUCTION

After the charge was completed, defense counsel Pratt made an exception to this portion of the charge. R. 797, Tr. 938. She cited State v. Frazier, 410 S.C. 224, 736 S.E.2d 301 ( ) which stated in a situation of self-defense "it is not inferred malice in regard – juries shall [not] be charged that malice may be inferred from the use of a deadly weapon where evidence if presented that would reduce mitigate, excuse, or justify a homicide caused by the use of a deadly weapon." R. 797, Tr. p. 938, ll. 1-12. When asked by the trial judge what she wanted to be done, counsel Pratt requested a curative instruction and stated:

> I think a charge that states that if they find — if they believe the Defendant to have acted in self-defense then there is no inference of malice in the use of deadly weapon because it is a complete defense. Does that make sense? Am I thinking correctly?

R. 797, Tr. p. 938, ll. 20-24. She also had sought an instruction that self-defense was applicable to each charge. R. 797-99, Tr. 938-940.

Judge John then went through his corrective instructions upon which defense counsel confirmed acceptance:

> THE COURT: All right. Very good. To every crime charged. All right. And then if self-defense has been established, I probably ought to say again it's the State's burden to - the State's burden to disprove self-defense beyond a reasonable doubt. **It is a complete defense and in murder and attempted murder, there can be no inference of malice by the use of a deadly weapon. Would that be acceptable?**
>
> MS. PRATT: **Yes, Your Honor.**

R. 798, Tr. p. 939, ll. 12-20. Solicitor Richardson sought clarification on the re-instructions as it related to pointing and presenting a firearm. Judge John clarified:

> THE COURT : Okay. Well, the first thing I'm gonna say is self-defense is applicable to every crime charged. That's the very first thing I'm gonna say. All right. I'm not gonna pick a crime because I think that give undue influence to them. So, I'll just say it's applicable to

every crime. Then I'm gonna say, if self-defense has been established and I remind you, it's the State's burden to disprove beyond a reasonable doubt self-defense. It is a complete defense and in murder or attempted murder, there can be no inference of malice by use of a deadly weapon. Or if you want me to say, Ms. Pratt, in any crime there can be no inference of malice by the use of a deadly weapon. I don't — if you want me to say that.

MS. PRATT: I would rather you say the murder and attempted murder since the other one is specifically –

THE COURT: All right, fine, I will. That's great, I will say that then, that's fine, murder and attempted — so, anything else from the State that you - - -

MR. RICHARDSON: No, sir. Your Honor.

THE COURT: All right. From the Defense, anything else. Ms. Pratt?

MS. PRATT: No, your Honor.

R. 799-800, Tr. p. 940, l. 6- p. 941, l. 1. No request for mistrial was made by the defense.

THE CURATIVE INSTRUCTION WITHOUT OBJECTION

The jury then returned before deliberations began 10 minutes after the initial instructions at 11:59 a.m. R. 800, Tr. 941. Judge John then instructed:

> THE COURT: All right. Ladies and gentlemen, it's been called to my attention that I should bring something to your attention and I believe it's proper to do so and it's in regards to self-defense. Self-defense is applicable to every crime charged, just to be clear about that. It's applicable to every single crime charged in this matter. Now, if self-defense has been established - and I remind you now, it's the State's burden to disprove self-defense beyond a reasonable doubt. Again, the State has that burden on everything. **It is a complete defense. And in particular, murder and attempted murder, there can be no inference of malice by the use of a deadly weapon. If there's self-defense, there is no inference that can be associated with the use of a deadly weapon. It's not — that's not proper in self-defense if it's established**. And again, the State has the burden of disproving it beyond a reasonable doubt.

R. 800, Tr.p. 941, ll. 7-22. After the instruction, defense counsel Pratt confirmed that she had no further additions to the charge. R. 801, Tr. p. 942, ll. 12-17. No request for mistrial was made.

INSTRUCTION AFTER JURY REQUEST

The jury returned and made a further charge request for murder and manslaughter. R. 802-04, Tr. 943-945. The defense requested re-instruction on self-defense. Id. The trial judge agreed to reinstruct on self-defense if the jury asked for it. R. 803, Tr. 944. At that point, Judge John re-instructed on murder and voluntary manslaughter. In the re-instruction, he limited his discussion of malice as follows:

> A Defendant being charged with the crime of murder, the State has to prove to you beyond a reasonable doubt that the Defendant killed another person with malice aforethought. Malice is hatred, ill-will, hostility, hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or it's under circumstances that the law will infer an evil intent. Malice aforethought does not require that malice exist in the mind of the Defendant for any particular time before the act is committed but malice must and has to exist in the mind of the Defendant just before and at the time the act is committed, the murder. Therefore, there has to be this combination of evil intent and the act.
>
> Now malice aforethought can be shown to you by the State beyond a reasonable doubt either expressed or inferred. Example of - -it's either like direct evidence or by circumstantial evidence. Expressed malice can be shown when a person speaks words which express hatred or ill-will for another person or when the person prepares beforehand to do the act, the murder which was later accomplished. An example of that could be lying in wait for a person to commit a murder or any other acts of preparation going to show that the deed was within the Defendant's mind. **And now malice can be inferred from a showing by the State beyond a reasonable doubt of conduct that shows a total disregard for human life. Now, that's the definition of murder.**

R. 804-05, Tr. p. 945, l. 10- p. 946, l. 10. (emphasis added). [As revealed in the instruction, it did not include the inference of malice through the use of a deadly weapon].

At the conclusion of the instructions, he inquired of the jury whether they wanted instruction on any other aspect of the law. R. 804-06, Tr.p. 945-47. ***No further requests were made. Again, no objection was made by the defense concerning additions or deletions from the charge. R. 807, Tr.p. 948, ll. 1-6.***

VERDICT

The jury returned an hour and ten minutes later with its convictions on voluntary manslaughter and attempted murder. R. 807-810, Tr. 948-951.

POST-VERDICT MOTIONS

After the jury retired, counsel Pratt made a motion in arrest of judgment. She stated that she renewed all previous motions and objections and exceptions. R. 811, Tr. 955. In addition, she asserted the following related to the inference of malice:

> MS. PRATT: . . .I would also respectfully state that the statement regarding the inference of malice in regards to a deadly weapon in the first jury charge, while the Court gave a curative instruction, was not enough to remove the taint and therefore, even there though was a second jury charge, which did not include that inference, that there is a danger that that affected the due process in regards to that charge. So therefore, respectfully. Your Honor, I would ask that this Court grant my motion in arrest of judgment and set aside and direct a verdict of not guilty.

R. 812, Tr. p. 956, ll. 6-15. Judge John denied the request, treating it as a motion for new trial stating:

> THE COURT: Regarding the matter of malice, the Court did give what I believed to be a proper curative instruction and in fact the jury came back again and asked for the definitions of murder and voluntary manslaughter and the Court gave an instruction that was clear and without that issue so there's no question that they understood and knew exactly what it was that they were considering.
>
> On all those issues, I do not find there's any reason presented that a new trial should be granted in this matter. I do find that it was properly conducted, proper evidence was presented to the jury, they considered the evidence, had sufficient time to do so, there was more than sufficient evidence in the record to convict the Defendant of all of the crimes of which he was convicted beyond a reasonable doubt. Therefore, I respectfully decline to grant your motion for a new trial.

R. 814-15, Tr. p. 958, l. 12- p. 959, l. 2.

MOTION FOR NEW TRIAL AND HEARING

Subsequent to the trial, the Appellant made a notice of Notice and Motion to Reconsider the Sentence. A hearing on the motion was held on September 4, 2013. R. 822-843, Sept. 4, 2013 Tr. 1-22. One of the assertions in the motion for reconsideration of the denial of the motion for new trial was that the judge's inferred malice instruction in the initial instruction coupled with the read charge to the jury was hopelessly confusing. See Notice of Motion and Motion to Reconsider Sentence.

At the hearing defense counsel urged that the judge's instructions that malice was most troubling. Counsel cited to State v. Belcher, 385 S.C. 397, 685 S.E.2d 802 (2009). Defense counsel referred to the portion of the judge's jury instruction which stated that "inferred malice may also arise from the deed is done with a deadly weapon." R. 827, Sept. 4, 2013 Tr.p. 6, ll. 9-19, citing to R. 777, Trial Tr.p. 918, ll. 10-16. The appellant to urge that under the decision in Belcher, when self-defense is being raised the inference of malice with regard to a deadly weapon should not be charged to the jury. R. 827, September 4, 2013 Tr. p. 6, ll. 20-25. She pointed out that it was instructed initially with both murder and attempted murder. R. 827-28, Sept. 4, 2013 Tr. 6-7.

Defense counsel complained that she did not think that the matter could be cured in the manner the trial judge did. She stated that if there was self-defense, then there is no "presumption" and contended that that was the way the trial court couched it in the curative instruction. R. 828, Sept. 4, 2013 Tr. 7. She complained – for the first time – that "I'm not sure that Belcher talks about an 'if – then' statement", because Belcher talks about an absolute prohibition. She contended that since the inference was stated twice in the initial instructions, it was difficult to un-ring the bell. She contended that this was revealed by the inconsistent

verdicts, although she acknowledged that the crimes involved two different people. R. 829, Sept. 4, 2013 Tr. 8, ll. 1-11. She acknowledged that the voluntary manslaughter verdict on McFadden's death showed no malice even though there was a deadly weapon, but that on the attempted murder of Canty they found malice which she contends is the problem. R. 829, Sept. 4, 2013 Tr. p. 8, ll. 15-23.

Judge John declared that he had told her that he had that language deleted, but when he was reading it from the screen it came up and he read it. R. 830, September 4, 2013 Tr. 9. Judge John confirmed that in the curative instruction he stated "and in particular murder and attempted murder, there can be no inference of malice by use of a deadly weapon." Judge John found that "that statement is clear" and he stressed that "if there's self-defense or is no inference that can be associated with the use of a deadly weapon." R. 830, September 4, 2003 Tr. p. 9, ll. 1-16.

Counsel asserted that part of the problem in Belcher was if the court found that the self-defense instructions and inferred malice instructions were confusing and contended that when you use the "if, then" statement it is still confusing and prejudicial to the jury. She restated that she believed that the inconsistent verdicts revealed that confusion based upon the same behavior.

However the Court rejected the "same behavior" or "same act" assertion. He stated that he had different actions as to each of the two [victims]. Counsel Pratt contended that it was clear that self-defense was the issue in regards to Canty because he was the one that started by attacking Thoro, but also is in the process of attacking and fighting with Corey when the gunfire started. The defense contended this was more likely with respect to the Canty incident and its self-defense was not necessarily involved in the McFadden death. She stated her client absolutely denied the bullet from his gun was the one that hit McFadden in was concerned because the bullet that may have gone through McFadden was never tested for DNA. R. 831-32, September

4, 2013 Tr. 10-11. She stated that this pointed out the problem with the jury charge because if the jury believed that there was malice in regards to Canty then there was no reason for them to not find malice in regards to McFadden and lesser just confused about what they could do was self-defense and malice. Id.

In response, the prosecution asserted that they understood that since 2009 under Belcher in self-defense cases the inference of malice by use of a deadly weapon cannot be charged. R. 834-35, September 4, 2013 Tr. 13-14. However he noted that court went further by noting that an error can be corrected and deemed cured if the curative instruction is given. The State cited State v. Greene, 330 S.C. 551, 499 S.E.2d 817 (Ct. App. 1997), which held that an instruction to disregard competent evidence make here and error in a mistrial may yet be required depending upon the facts of a particular case of the defendant notwithstanding the curative instruction, suffered some prejudice. The State urged that in this case there was no prejudice, citing State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996), holding the determination of prejudice must be based on the entire record and the result would generally turn on the facts of each case. Counsel further at for erred to State v. Douglas, 367 S.C. 498, 523 S.E.2d 59 (2006) and State v. Harris, 340 S.C. 63, 530 S.E.2d 628 (2000).

The prosecution urged that the curative instruction compensated for any error in the initial instruction that included the inference by mistake after the defense properly raised an objection. R. 835, September 3, 2013 Tr.p. 14. The prosecution noted that the curative instruction plainly stated that there was no inference by the use of a deadly weapon in self-defense cases. R. 836, Sept. 4, 2013 Tr. 15. [This is actually stronger than Belcher requires which allows the state to still argue in self-defense cases that the particular use of a deadly weapon may create an inference of malice]. The state noted that after that curative instruction the

jury retired and then was recharged on murder and manslaughter and those charges did not include any reference to an inference of malice through the use of a deadly weapon. R. 836, Sept. 4, 2013 Tr. 15. The State urged that the defendant has failed to show prejudice by the instructions because the jury did not return a verdict of murder which required malice but returned a verdict of voluntary manslaughter which requires a showing of no malice. The State further urged that a mistrial should only be granted when absolutely necessary and that here the defense did not meet their burden.

Deputy Solicitor Richardson urged that the argument concerning inconsistent verdicts was faulty because they were two separate victims. He stated that the shot that kills Jamel McFadden as the defendant rushed in, no doubt inflamed at that moment and he pops him when time. The State urged the court to reconsider the video which showed the appellant running back out into the parking lot, firing multiple times and then chasing Mr. Canty the victim of the attempted murder into a club where he beats on him. The State urged that that action shows "malice." R. 837, Sept. 4, 2013 Tr. 16. He states that the appellant keeps going after a when there's no more threat to Thoro in only the threat to Canty. Id. The State urged that the curative instruction was exhaustive and sufficiently cured any potential prejudice. R. 837-38, Sept. 4, 2013 Tr. p. 16-17.

At the hearing, Judge John orally denied the motion related to the jury instruction. He stated:

> As to the jury charge, again, I said that at the time of the trial when the matter was raised to the Court's attention after the charge. **I had deleted it, it came back on the screen, I read it, I shouldn't have, I acknowledged that at the time.** I called the jury back in. **I was very clear telling them it was not part of the case. I think it was a proper curative instruction immediately after the charge.** Thereafter the jury, on its own, several hours later, came back and asked for a recharging of murder and voluntary manslaughter, and I indicated at the time

> we weren't going to go back and make the same error that I had made previously, and I charged them properly on murder and voluntary manslaughter.
>
> They did not hear anything that they should not have. I specifically asked the jury if they wanted any other things charged to them. I asked them, you know, including but not limited to self-defense, did they want to hear that again. The jury foreman clearly indicated to the Court at that point in time that what I instructed them was what they wanted to hear; they didn't want to hear anything else, even though I had specifically asked them, do you want to hear anything else, including, but not limited to self-defense, and the forelady, on behalf of the jury, indicated no, they heard what they wanted to hear.
>
> I had responded to their request, and properly charged them. The matter was raised to the Court, I gave a curative instruction, again, the jury, on its own, asked for instructions, proper instructions were given to them. I just cannot see any prejudice to the Defendant in this particular matter. On the facts of this particular case I just don't see any prejudice to the Defendant. Based on the facts -- and there are different facts for -- as I explained to the jury. They were trying a number of trials in one, and I specifically talked to them about that, and the facts on each one of them, and what the State had to prove to them beyond a reasonable doubt was different on each one of them, and I just don't see the prejudice to the Defendant in this particular matter.

R. 840-42, September 4, 2013 Tr. p. 19, l. 16–p. 21, l. 1.

On September 23, 2013, Judge John issued a written order denying the motion with similar findings and conclusions. *State v. Chestnut, Order, September 26, 2013.* Supp.R 1. In the written order on this issue, he concluded:

> 3. Regarding the jury instruction concerning the inference of Malice: while the Court should not have given this instruction, when objected to by that Defendant, the Court gave the proper curative instruction; further, upon request by the jury to be recharged on "Murder" and "Voluntary Manslaughter," the Court properly omitted any reference to the inference of Malice by Use of a Deadly Weapon and offered to give a further charge of Self-Defense, which offer was rejected by the former to the jury;"

State v. Chestnut, Order, September 26, 2013, p.2. Supp.R. 2.

ANALYSIS

The Supreme Court in State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803-04 (2009), held 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." Judge John initially included the inference of malice by use of a deadly weapon charge in his instructions by mistake because self-defense was being presented, as well as lesser included offenses.[4] After objection and aware of his mistake, he immediately corrected the mistake with the curative instruction. The Supreme Court had held "when an incorrect charge is given, the court must withdraw it; "[m]erely superimposing a correct statement of law over an erroneous charge only fosters confusion and prejudice." State v. Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986); State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985); State v. Adams, supra. Here, the instruction was withdrawn, not superimposed over an erroneous charge. A new trial is not warranted.

THE POWERFUL CORRECTIVE CURATIVE INSTRUCTION REMOVED ANY ERROR BY REMOVING THE INFERENCE OF MALICE FROM THE USE OF A DEADLY WEAPON FROM THE JURY'S CONSIDERATION.

Here, Judge John conceded that he mistakenly gave the instruction on inference of malice by the use of a deadly weapon. However, he immediately corrected the mistake and gave a corrective and curative instruction directing the jury that there was no inference of malice in the murder and attempted murder case. Specifically he stated:

> **And in particular, murder and attempted murder, there can be no inference of malice by the use of a deadly weapon. If there's self-defense, there is no inference that can be associated with the use of a deadly weapon. It's not — that's not proper in self-defense if it's established.** And again, the State has the burden of disproving it beyond a reasonable doubt.

R. 800, Tr.p. 941, ll. 7-22.

Respondent submits that no reasonable juror listened to the instructions would have thought otherwise. The court's recantation of the initial charge was quick and unambiguous

[4] Both parties were of the opinion that the inference of malice was not going to be charged. Supp.R. 4, Rp. 763, Tr.p. 832, 904. The trial court had agreed that it would not be charged. R. 763-64, Tr.p. 904-905. Judge John later blamed a computer glitch on it being included in the initial instruction. R. 830, 840-41, September 4, 2013 Tr.p. 9, 19-21.

"there can be no inference of malice by the use of a deadly weapon." This curative instruction was more powerful that Belcher required and more favorable to a defendant by precluding the inference of malice by the use of a deadly weapon. **Belcher allowed the State to still argue the inference. This firm curative instruction would have been interpreted to have removed that inferred malice through the use of a deadly weapon basis!** Simply put, the curative instruction benefitted the defendant beyond what Belcher would have required. It was not confusing. See U.S. v. Olano, 507 U.S. 725, 740, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (noting "the almost invariable assumption of the law that jurors follow their instructions") (quoting Richardson v. Marsh, 481 U.S. 200, 206, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)).

Contrary to the claims within the brief of appellant, Judge John did withdraw the inadvertent instruction by the strong curative instruction. It was not superimposed over a bad instruction. To the contrary, it rejected the prior language of the inference with clear directives to the jury. More importantly, it was done immediately after the initial instructions and prior to the beginning of deliberations. In addition, when the jury asked for re-instruction on murder and manslaughter, the language did not include the "inference of malice through use of a deadly weapon" and only referred to any inference of malice as "malice can be inferred from a showing by the State beyond a reasonable doubt of conduct that shows a total disregard for human life." R. 804-05, Tr. p. 945, l. 10- p. 946, l. 10. (emphasis added). A new trial is not warranted.

DEFENSE RECEIVED THE ONLY REQUESTED RELIEF OF THE CURATIVE INSTRUCTION AND DID NOT REQUEST A MISTRIAL

As reflected in the summary of how the issue was presented, it is clear that no request for mistrial was made at the time of the initial instructions and the sole remedy sought was a curative instruction. This instruction included the language that the defense counsel requested:

> I think a charge that states that if they find — **if they believe the Defendant to have acted in self-defense then there is no inference of malice in the use of deadly weapon because it is a complete defense.**

R. 797, Tr. p. 938, ll. 20-24.

Here, the trial judge sustained the objection concerning his mistaken inclusion of the inference language. The matter was later discussed at length among trial counsel and the trial judge. The defense sought no further relief below beyond the curative instruction that she partially drafted.[5]

> **It is a complete defense. And in particular, murder and attempted murder, there can be no inference of malice by the use of a deadly weapon. If there's self-defense, there is no inference that can be associated with the use of a deadly weapon. It's not — that's not proper in self-defense if it's established.** And again, the State has the burden of disproving it beyond a reasonable doubt.

R. 800, Tr.p. 941, ll. 7-22. Inasmuch as the Appellant obtained the only relief he sought, this Court has no issue to decide. State v. Brown, 274 S.C. 48, 260 S.E.2d 719 (1979); State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981).[6] Relief must be denied.

ISSUE NOT PRESERVED BY TIMELY OBJECTION TO THE CURATIVE INSTRUCTION

Appellant made no objections to the form of the curative charge when given. R. 797, 800, 807, Tr.p. 938-94, 948. An error is deemed to be cured if a curative instruction is given. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996), cert. denied, 520 U.S. 1123, 117 S.Ct. 1261, 137 L.Ed.2d 340 (1997). A contemporaneous objection to the sufficiency of a curative charge must be made to preserve the issue for appellate review. Id. Since Appellant made no objection to the

---

[5] Concerning the curative instruction which she proposed, a party cannot complain of error his own conduct has induced. State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998)(appellant may not on appeal object to use of substituted phrase in jury charge because he asked for change and judge agreed); State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984).

[6] A party cannot seek and receive a particular result at trial and then challenge it on appeal. Bowman v. Bowman, 357 S.C. 146, 591 S.E.2d 654 (Ct. App. 2004).

curative charge as given, this issue is not preserved for our review. See State v. Greene, 330 S.C. 551, 561, 499 S.E.2d 817, 822 (Ct. App. 1997).[7] To the contrary, the defense endorsed the curative instruction and advised the trial court that it was acceptable. R. 798, Tr. p. 939, ll. 12-10. See State v Moyd, 321 S.C. 256, 468 S.E.2d 7 (Ct. App. 1996)(if the objecting party accepts the ruling of the trial judge and does not contemporaneously object to the sufficiency of the curative instruction or move for a mistrial, error deemed cured and issue not preserved for appellate review); Kalchthaler v. Workman, 316 S.C. 499, 450 S.E.2d 621 (Ct. App. 1994); State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1991)(no issue preserved for appellate review if objecting party accepts judge's ruling on evidence and does not make an additional objection to the sufficiency of the curative charge or move for a mistrial).

Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient *or* move for a mistrial to preserve an issue for review. State v George, 323 S.C. at 510, 476 S.E.2d at 912; State v Patterson, 337 S.C. at 226, 522 S.E.2d at 850. Therefore, this issue may not be preserved for review because the trial court sustained defense counsel's objections and gave a thorough curative instruction without objection or request for a mistrial. See State v. Walker, 366 S.C. 643, 658-59, 623 S.E.2d 122, 130 (Ct. App. 2005).

Here, it appears that the mistrial request based upon the curative instruction and second instruction was first made after the verdict. R. 812, Tr.p. 956. Until the verdict against him had

[7] In Greene, the defense asserted for the first time in the appeal that a second curative instruction failed to properly correct an error of the first curative instruction. Like Appellant in this case, Greene made no objection to the forms of the curative charge, in fact giving the language to the trial judge. See R. 797, Tr. p. 938, ll. 20-24. In particular, defense counsel found the language of the curative instruction to be acceptable when asked. R. 798, Tr.p. 939, ll. 12-120. See also, R. 799-800, Tr.p. 940-941 (no addition or objection); R. 801, p. 942 (no addition or objection after the curative charge); R. 804-05, p. 945-946 (no additions or requests after the jury requested re-instruction on murder and manslaughter which did not include the inference of malice through the use of a deadly weapon instruction).

resulted in a guilty verdict on attempted murder, Chestnut had not asserted the curative instruction was confusing in combination with the inadvertent inference instruction.[8] One may not take his chance of a favorable verdict and, after an unfavorable one, raise an objection that should have been made before the verdict was rendered. State v. Mayfield, 235 S.C. 11, 23-24, 109 S.E.2d 716, 724 (1959). When an instruction as given is allegedly inadequate, a party must request further instructions or object at the completion of the instructions in order to preserve the issue for review. State v. Avery, 333 S.C. 284, 509 S.E.2d 476 (1999); State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998)(appellant argued for first time on appeal that trial judge's instructions to "assume" life imprisonment and death sentence should be understood in their ordinary and plain meanings was error); State v. Hornsby, 326 S.C. 121, 484 S.E.2d 869 (1997)(appellant did not request trial judge instruct jury that the sentencing consequences for a guilty or guilty but mentally ill verdict are the same; therefore, could not complain that the jury was misled because they thought guilty but mentally ill was a lesser verdict).

The Appellant parses the curative instruction and contends that it was unworkable and confusing because he contends that if the jury were to determine that he was not guilty of self-defense then it could not apply the inference of malice. This is not confusing, but correct under Belcher. However, defense counsel ignores the more powerful ameliorating language in the instruction that "in particular, murder and attempted murder, there can be no inference of malice by the use of a deadly weapon." However, the Appellant then challenges the language that the defense counsel propounded to the trial judge in a self-defense case there can be no inference of

[8] The reason why the defense did not object is self-evident since the curative instruction could be read to remove the possibility of the inference of malice through the use of a deadly weapon, something that Belcher authorized a prosecutor to argue. To the extent the prosecution argument could be construed to have argued this, the curative instruction underline a basis for the state's case! The defense had been given a windfall in the curative instruction due to Judge John's inadvertent error.

malice. He misreads the instruction as a whole. The trial judge's self-defense component supports the previous sentence that there can be no inference of malice by a deadly weapon in a murder or attempted robbery case which includes cases of self-defense, not limited to cases of self-defense as he now suggests. Again, his argument before this court is the opposite of what she argued in requesting the similar instruction when Judge John made it. This instruction included the language that the defense counsel requested:

> I think a charge that states that if they find — **if they believe the Defendant to have acted in self-defense then there is no inference of malice in the use of deadly weapon because it is a complete defense.**

R. 797, Tr. p. 938, ll. 20-24. A party cannot seek and receive a particular result at trial and then challenge it on appeal. Bowman v. Bowman, 357 S.C. 146, 591 S.E.2d 654 (Ct. App. 2004).

This issue is also further not preserved because it was raised for the first time in the post-verdict oral motion for new trial. See R. 812, Tr.p. 956, See State v. Robinson, 238 S.C. 140, 150, 119 S.E.2d 671, 676 (1961)(stating South Carolina does not permit a party disappointed by a verdict to employ a motion for a new trial to raise, for the first time, an error committed at trial). Failure to contemporaneously object to the question now advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial. State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981)[9]; State v. Groome, 274 S.C. 189, 262 S.E.2d 31 (1980); State v. Atchison, 268 S.C. 588, 235 S.E.2d 294 (1977), cert. denied 434 U.S. 894, 98 S.Ct. 273, 54 L.Ed.2d 181 (1977).

ANY ERROR WAS HARMLESS ERROR

[9] In Lynn, the Court found an objection to evidence was waived when first presented in a later motion for a mistrial. Lynn alleged that the trial court erred in refusing to grant a mistrial when evidence of appellant's bad moral character was introduced by two of the State's witnesses. The first witness volunteered testimony concerning appellant's involvement with the law in Florida. No objection was made to the introduction of the testimony, but appellant's counsel moved for a mistrial after the State completed its case. State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981). Like Lynn, here no motion for mistrial was made until after the verdict.

Respondent submits that any error in the instructions was harmless error. Erroneous jury instructions are subject to a harmless error analysis. State v. Belcher, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009).[10] Jury instructions should be considered as a whole, and if as a whole, they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Burkhart, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002); State v. Logan, 405 S.C. 83, 94, 747 S.E.2d 444, 449 (2013).

Error in charging a proposition of law is not necessarily reversible. In order to constitute reversible error, the court must be satisfied that there are reasonable grounds for supposing that the jury might have been misled to the prejudice of the appellant. State v. Martin, 122 S.C. 286, 115 S.E. 252; State v. Washington, 80 S.C. 376, 61 S.E. 896; State v. Johnson, 159 S.C. 165, 156 S.E. 353; State v. Woods, 189 S.C. 281, 1 S.E.2d 190, 194-95 (1939).

As to the manslaughter verdict, it is incontestable that any inference of malice instruction would necessarily be harmless error. Since the jury did not find the necessary element of malice with a manslaughter verdict, the inadvertent malice instruction could not have contributed to the verdict. Since the jury did not find malice, they did not infer malice from the use of a deadly weapon. Here, the jury found that Appellant acted without malice by convicting Appellant of voluntary manslaughter. *See* State v. Pilgrim, 320 S.C. 409, 414, 465 S.E.2d 108, 111 (Ct.App.1995), *overruled on other grounds,* State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996)

[10] In Belcher, the Supreme Court observed that often in murder cases there will be overwhelming evidence of malice, apart from the use of a deadly weapon. *Id.* at n. 8 ("In many, if not most, murder cases the [inferred malice from the use of a deadly weapon] charge will be harmless, even if couched in terms of a presumption. Here, the evidence of malice in the attempted murder case is not limited to the use of a deadly weapon. *See Belcher,* 385 S.C. at 612, 685 S.E.2d at 810 ("It is entirely conceivable that the only evidence of malice was Belcher's use of a handgun."). See State v. Stanko, 402 S.C. 252, 264, 741 S.E.2d 708, 714, reh'g denied (Apr. 3, 2013), cert. denied (Oct. 7, 2013), cert. denied, 134 S. Ct. 247, 187 L. Ed. 2d 183 (U.S.S.C. 2013)

("The distinction between murder and manslaughter is the presence of malice in murder and the absence of malice in manslaughter."). The jury's ultimate verdict demonstrates that the trial court's inadvertent inference from the use of a deadly weapon instruction did not preclude the jury from seriously considering the evidence of self-defense, justification and excuse presented at trial. Accordingly, we find the trial court's instruction that the jury could infer malice from Appellant's use of a deadly weapon was harmless error. Accord State v. Spriggs, No. 2013-UP-435, 2013 WL 8541581, at *3 (S.C. Ct. App. Nov. 27, 2013) rev'd, No. 2015-MO-034, 2015 WL 3649565 (S.C. June 10, 2015).

As to the attempted murder conviction, Respondent submits that the instructions were harmless error. As noted above, the inference was removed by the timely curative instruction that stated : "in particular, murder and **attempted murder**, there can be no inference of malice by the use of a deadly weapon. If there's self-defense, there is no inference that can be associated with the use of a deadly weapon. It's not- that's not proper in self-defense if it's established." R. 800, Tr.p. 941. Further, even if the curative instruction was deemed inadequate, evidence of malice related to the Appellant's actions toward Canty to support the attempted murder conviction is overwhelming and not limited to the "use of a deadly weapon."

The evidence of malice in Appellant's actions against Canty as a victim were overwhelming. Section 16–3–29 of the South Carolina Code (Supp.2014) defines attempted murder: "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." State v. King, 412 S.C. 403, 408, 772 S.E.2d 189, 191 (Ct. App. 2015), reh'g denied (June 5, 2015).

At the outset of the opening statement to the jury, the prosecution declared that Appellant was guilty of attempted murder of Damien Canty "for stomping [Damien] Canty's head into the

ground on a cold concrete floor." R. 4, Tr.p. 54, ll. 3-5. The prosecution describes the evidence in the case from a video from inside the bar as "Damien Canty, big old fellow, comes in and get knocked down by one of the defendant's friends. And then we'll see the defendant, Armando Chestnut, come in that bar. You'll be able to tell it's him because of that very distinctive jacket he's got on, white and black striped and you see him run in, run over and hit Damien Canty and stomping him again and again into a hard concrete floor. So as I said, Wayne Feaster backs them off and then you'll see him calmly get up and walk out." R. 6-7, Tr.p. 56-57.

In the defense argument, defense counsel asserts that Damien Canty had continued to fight between his Hemingway/Kingstree/Williamsburg County group and the Myrtle Beach group by hitting Thoro from the Myrtle Beach group with a bottle in the parking lot after they were all sent out of the 3rd Avenue Sports Bar by the owner, Wayne Feaster after he claims the deceased Jamal McFadden (known as the man with dreadlocks) had initiated a fight over a pool game and money by grabbing a pool cue. The defense asserted that Canty had then viciously beat him. R. 11-12, Tr.p. 61-62. He claims that Canty stopped fighting with Thoro and then started fighting with Corey Myers. He asserts that McFadden then comes up looking at the fight and then Appellant fires a weapon in the air which stop the fight between Thoro and Canty. R. 12, Tr.p. 62. Counsel then attempted to tie self-defense into his opening. R. 13, Tr.p. 63. He claims the only thing that stopped the attack between Canty and Thoro was the Appellant's first shot. Id.

The bar's owner, Wayne Feaster, testified concerning some of the incident with Canty. He described that there was an argument March 6, 2012 between the "Myrtle Beach crowd against the Hemingway crowd." He testified it was about the pool game and money for bet during the game. R. 72-74, Tr.p. 129-131. He stated that there was an altercation inside. He stated that after he escorted Thoro (Dewayne) was hit in the head with a bottle. R. 78, Tr. 135. At

that point he described that everyone started fighting and then he saw a gun up in the air. He stated after the fight there were 2 people injured, one a skinny individual with dreadlocks who was killed and another who is around 5'10" and 220 pounds who he saw injured when he came back into the club. R. 80, Tr. 137. Feaster stated the individual had come into the club swinging and the boys got into an altercation again and he stopped it after that man (Canty) was down and unconscious. R. 81, Tr. 138. Feaster declared that he recognized the appellant by the name Barney. R. 88, Tr. 145. In reviewing the videos from his business, he described seeing the pool stick grabbed that night and at that time he put the pool stick back on the wall and ordered the people to get out. R. 90-91, Tr. 147-148. Feaster described viewing the video and seeing the appellant running toward the front door of the building. In a later video he sees the other victim fall on the floor and they were beating him. He stated that there was carpet underneath them and concrete underneath the carpet. R. 97, Tr. 154. He further describes a video where Feaster goes towards the appellant and pushes him off of the victim (Canty) because he was down and out. R. 99, Tr. 156. He stated he saw one of the Myrtle Beach people initially knocked the victim down. R. 99, Tr. 156. Feaster stated that he tried to assist the Hemingway fellow that a got knocked down. R. 104, Tr. 161.

On cross-examination, Feaster confirmed that he saw Canty hit Thoro with a bottle on his head after he initially kicked everyone out of his club after the first altercation. R. 112, 127-28, Tr. 169, 184-185. He stated that Thoro was then jumped on by a bunch of guys. R. 113, Tr. 170. He states that at some point outside he saw Corey Myers fighting and saw Corey with a weapon. R. 114, Tr. 171. He stated that when there was a gunshot, that people started to move in different directions. R. 117, Tr.p. 174.

He described seeing on the video Canty fighting with Thoro. Later he described that he sees on the video Canty initially advancing and then get knocked down by Mike Spivey. R. 130-31, Tr.p. 187-188. He confirmed that it appeared to be mutual combat. R. 135, Tr.p. 192.

Corey Myers testified that he was involved in the altercations that night and broke his thumb. R. 142-43, Tr.p. 199-200. He was arrested after he turned himself in after he left the hospital. R. 143, Tr. 200. Concerning the series of altercations after they were kicked outside the club, he described seeing the big guy hit Thoro first. R. 152, Tr. 209. Corey stated he tried to hit the guy with the gun that he had in his hand on Canty's head a number of times. R. 153, 169-70, Tr. 210, 226-27. After he heard a gunshot, everyone scattered. R. 154, Tr. 211. He described the scene as a brawl. Because he had dropped his gun, Corey looked to see if it was being fired at him but it was still on the ground. R. 155, Tr. 212. He stated that Feaster (Thoro) appeared to be picking the big guy up and leading him to leave because he was still fighting. R. 155, 171, Tr. 212, 228. Corey stated at that time he tried to hit the big guy again but he goes back into the bar any guess that the guy got into a fight in their again. R. 155, Tr. 212. He stated that after he heard gunshots he saw him again unconscious on the floor in the bar. R. 156, Tr. 213. Stated he drove his thumb during the fight. R. 157, Tr. 214. Myers testified that when he started fighting with the big guy that they ended up on the ground with Myers over the victim. R. 169, Tr. 226.

Testimony was presented that both victims, McFadden and Canty, for transported by ambulance to the hospital. R. 204, Tr. 262.

Officer Michelle McSpadden, a crime scene unit with the Myrtle Beach Police Department testified that she was sent to the hospital to collect evidence from the 2 victims who are transported there. Through her testimony photographs of victim Damien Canty were introduced. R. 266-69, Tr. 328–331. State Exhibits 88-91. These photographs were taken to

document the laceration on Canty's forehead and wound to his right elbow. R. 267, Tr. 329. A bullet from Canty's elbow was also introduced as evidence. R. 399-400, Tr.p. 467-468.

A video was reviewed which showed individuals involved in the assault on Canty inside the club. R. 431, Tr.p. 501. Officer Kitelinger testified that it lead to identifying Michael Spivey as the person who knocked Canty down. R. 431-32, Tr. 501-502.

The record reflects that Damien Canty at around 1:15 am was knocked down and unconscious and stomped according to the video of the scene. R. 97-99, 227, Supp.R. 3, Tr. 154-156, 288, 569. State Exhibit 1 at CH04-2012-03-06-00-55-12 @ 1:14 - 1:15:11. See also, State Exhibits 24-27. The Appellant's friend, Annaleise Testa testified that the photographs appeared to show the Appellant "stomping on something or someone." R. 227, Tr. 288.

The Appellant claimed (contrary to the state's theory) that he arrived at the bar already with the gun. R. 615-16, Tr. 734-735. He stated he heard a gunshot, so he then shot and claimed at that time that he hit Canty in the arm. R. 616, Tr. 735. However, he claimed that he did not intend to shoot Canty and was trying to scare him off. R. 640, Tr. 759. He claimed he did not realize anyone was hit because he did not hear anyone holler. R. 640, Tr. 759.

He described then going over to kick Canty after he was knocked on the ground by Spivey. R. 620-21, Tr. 739-740. He testified that he did not know that Canty was unconscious when he was kicking him. R. 621, Tr. 740. He claimed he only kicked him one time and missed the other two kicks. Id.

According to the Appellant's statement, he and several others were hitting Canty at the same time and stomping on his head. Appellant admitted to kicking him along with the others. State Exhibit 122 (CD – Interview of Defendant).

During the cross-examination of the Appellant, he admitted that in his interview, he admitted kicking Canty. R. 660-61, Tr. 780 -781. Despite what the video showed, Appellant denied that he stomped on his head, but admitted hitting his shoulder. R. 695, Tr. 815. He admitted that when Canty ran inside the club after the fight between Canty and Thoro, he went inside after him. R. 695, Tr. 815.

Q: And you stomped at him at least twice more, right?
A: I stomped down but never hit him the second — the last two times.
Q: Were you aiming at the floor or at his head?
A: I was aiming really anywhere I could hit him at but I didn't hit him in the head.

R. 695-96, Tr. 815-816. See R. 661-62, Tr. 781-782. He described after he got pushed back off the victim by Feaster, he probably went back over to Canty again. R. 662, 696, Tr. 782, 816.

Respondent submits that the combined evidence of malice from the continued assault upon Mr. Canty while he was unconscious combined with the earlier admitted shot to Canty while he was fighting Myers supports a conclusion that the instruction was harmless error as it related to attempted murder.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the judgment and conviction and sentences of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BY: _____
DONALD J. ZELENKA
S.C. Bar No. 5758

Office of the Attorney General
Post office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

ATTORNEYS FOR RESPONDENT

October 21, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Steven H. John, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

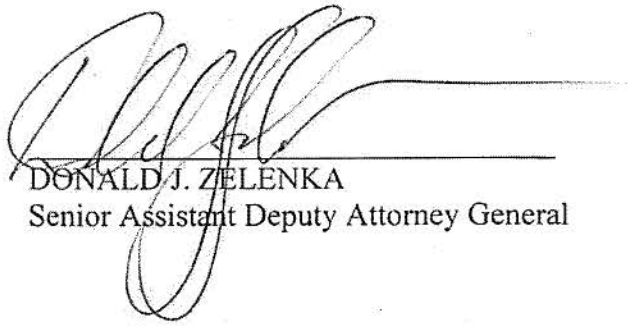
ARMANDO K. CHESTNUT,

Appellant

Appellate Case No. 2013-002123

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled " Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."



DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

October 21, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Steven H. John, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

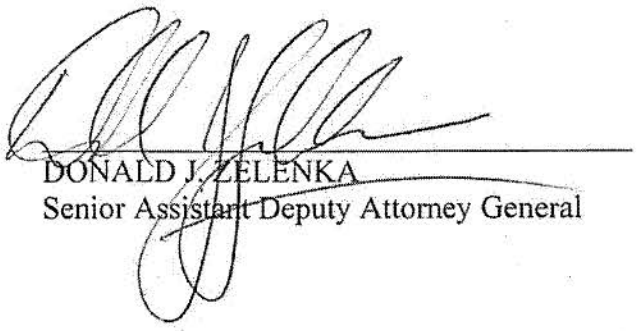
ARMANDO K. CHESTNUT,

Appellant

Appellate Case No. 2013-002123

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Final Brief of Respondent in the foregoing action by depositing two copies of same by InterAgency Mail to Robert M. Dudek, Chief Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201 this 21st day of October, 2015.



DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Armando K. Chestnut, Appellant.

Appellate Case No. 2013-002123

Appeal From Horry County
Steven H. John, Circuit Court Judge

Unpublished Opinion No. 2016-UP-227
Submitted April 1, 2016 – Filed June 1, 2016

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Jimmy A. Richardson, II, of Conway, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) ("No

issue is preserved for appellate review if the objecting party accepts the [trial court's] ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial."); *State v. Greene*, 330 S.C. 551, 561, 499 S.E.2d 817, 822 (Ct. App. 1997) ("A contemporaneous objection to the sufficiency of a curative charge must be made to preserve the issue for appellate review."); *State v. Moyd*, 321 S.C. 256, 263, 468 S.E.2d 7, 11 (Ct. App. 1996) ("[I]f the objecting party accepts the ruling of the trial [court] and does not contemporaneously object to the sufficiency of a curative instruction or move for mistrial, the error is deemed cured, and the issue is not preserved for appeal.").

AFFIRMED.[1]

SHORT and THOMAS, JJ., and CURETON, A.J., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

JBB

FORM 5

STATE OF SOUTH CAROLINA)
County of Horry)
Armando Knuckles Chestnut)
Full name and prison number (if any) of Applicant)
v.)
State of South Carolina)

IN THE COURT OF COMMON PLEAS

20 16 CP26 7859

APPLICATION FOR

POST-CONVICTION RELIEF

2016 Feb -7 PM 4:36

INSTRUCTIONS – READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Corr. Inst.

2. Name and location of Court which imposed sentence Horry County Court House, Conway SC

3. Name(s) of co-defendant(s) (if any) Markel Spivey, Corey Myers

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2012-GS-26-03117; 2012 GS-03115

(b) 2012-GS-26-03117; 2012 GS 03116

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) July 19 2013

(b) L.W.O.P

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) ✓ after a plea of not guilty _____

(c) after a plea of nolo contendere _____

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

yes

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

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeal

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. _____

ii. Appeal Denied

iii. _____

(c) the date of each such result:

i. June 22, 2016

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Unpublished Opinion

ii. _____

iii. _____

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

(a) N/A

(b) _____

(c) _____

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

(a) United States Constitutional Rights

(b) Amendment violations Etc...

(c) _____

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

(a) Ineffective Asst Counsel

(b) Due Process

(c) Etc...

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

(a) any petition in a State Court under South Carolina Law? N/A

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A

(d) any other petitions, motions or applications in this or any other Court? N/A

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

(a) the specific nature thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. N/A

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

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

i. N/A

ii. _____

iii. _____

iv. _____

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

_____

N/C

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

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

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

i. N/A

ii. _____

iii. _____

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

(a) Ineffective Ast Counsel

(b)

(c)

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

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

N/A

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

(a) the name and address of each attorney who represented you:

i. Ms Barbara Gail Pratt

ii. Ms Barbara Gail Pratt Attorney

iii. 408 E/N St Conway SC 29526

(b) the proceedings at which each such attorney represented you:

i. Ms Pratt

ii. Jury Trial

iii. Robert Duck Ohd Appl Defender Direct Appeal

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

VACATE CONVICTION AND SENTENCE AND RELEASE AND REMAND FOR A NEW TRIAL

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

N/A

2016 CP26 7859

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of _____)

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

Amanda L Chestnut

SWORN to and subscribed before me this 30th day of November, 2016.

Lucresia Bryant (L.S.)
Notary Public

My Commission Expires: May 7th, 2026

2016 DEC -7 PM 4:36

Revised 3/2003

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF 20 16 CP26 7859

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

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Armando Chojat
Applicant

SWORN or affirmed to and subscribed before me this 30th day of November, 2016.

Ludivina Bryant
Notary Public

My Commission Expires: May 26, 2020

2016 DEC -7 PM 4:36

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
Armando K. Chestnut, S.C.D.C. No. 228621,	)	Case No.: 2016-CP-26-07859
Applicant,	)	
v.	)	**RETURN, PARTIAL MOTION TO DISMISS, AND MOTION FOR MORE DEFINITE STATEMENT**
State of South Carolina,	)	
Respondent.	)	

In response to the application for post-conviction relief filed by Armando K. Chestnut (Applicant) on December 7, 2016, Respondent would show this Court:

I.

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the August 2012 term of the Horry County Grand Jury for murder (2012-GS-26-03115), attempted murder (2012-GS-26-03116), pointing / presenting a firearm (2012-GS-26-03117), and assault and battery by mob, second degree – serious bodily injury (2012-GS-26-03118). Barbara W. Pratt, Esq. represented Applicant. Brad C. Richardson and Travis Hyman, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. The underlying facts of the case were summarized by Respondent on appeal as follows:

> This case involves a series of assaults on March 6, 2012 at the 3rd Avenue Sports Bar in Myrtle Beach, South Carolina. On that date there was an altercation inside the bar arising from a dispute during a pool game. The altercation led to a fight between a group from Myrtle Beach and a group from Hemingway/Kingstree/Williamsburg County. The bar owner [kicked] them out of the bar, [at which time fighting began] anew in the parking lot. Evidence [was] presented that the [Applicant was] seen going to his car prior to the shooting[, and

> was then] seen with something silver in his hand. During the altercations, Damien Canty was involved in a fight with Thoro and Corey Myers. At some point during the fight in the parking lot of the bar, a shot was fired and Canty was struck on the elbow. [Applicant] admits he fired that shot. [Applicant] fired a couple more times. The altercation continued inside the bar where Canty was knocked to the floor by Mike Spivey and at some point during the beating became unconscious while he continued to be kicked and stomped on by [Applicant] and others. [Applicant] continued to kick him until the owner of the bar pushed him off of the victim, [after which Applicant] attempted to strike the victim some more. At some point Jamal McFadden was struck with a bullet during the scuffles. A bullet entered his left lower chest area through the liver and exited the body[, resulting] in Mr. McFadden's death.

Final Brief of Respondent at 2, State v. Chestnut, App. Case No. 2013-002123. Applicant proceeded to trial before the Honorable Steven H. John and a jury on July 15-19, 2013. The jury found Applicant guilty of the lesser-included charge of voluntary manslaughter (-03115), as indicted for attempted murder (-03116), as indicted for pointing and presenting (-03117), and of the lesser-included charge of assault and battery, second degree (-03118) on July 19, 2013. Pursuant to S.C. Code Ann. § 17-25-45,[1] Judge John sentenced Applicant to imprisonment for concurrent terms of life without the possibility of parole.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Robert M. Dudek, Esq. Raised to the South Carolina Court of Appeals was the question of:

> Whether a new trial is warranted based upon an initial inadvertent instruction on the inference of malice through [the] use of a deadly weapon where the trial judge granted defense counsel's request for a curative instruction which stated in "murder and attempted murder there can be no inference of malice by the use of a deadly weapon. If there's self-defense, there's no inference that can be associated with the use of a deadly weapon . . . . That's not proper in self-defense if it's established" which any reasonable juror would have understood withdrew the inadvertent instruction?

[1] Applicant pled guilty to voluntary manslaughter on or about October 13, 1995 (1995-GS-26-00172).

Final Brief of Respondent at vi, State v. Chestnut, App. Case No. 2013-002123. By opinion filed June 1, 2016, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Chestnut, 2016-UP-227 (S.C. Ct. App. filed June 1, 2016. The Remittitur was issued on June 17, 2016.

II.

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

1. "Ineffective Asst. [of] Counsel"
2. "Due Process"

Attached to and incorporated herein are the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the current application for relief. Respondent reserves the right to amend this Return upon receipt of relevant information.

III.

Applicant's allegation of ineffective assistance of counsel is 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 (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 v. Washington, 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, 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). 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.

Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant vaguely alleges his rights to due process of law were violated. This allegation should be summarily dismissed. An application for post-conviction relief does not serve as a substitute for direct appeal, and an issue that could have been raised at applicant's trial or on appeal is not cognizable in an application for PCR. S.C. Code Ann. § 17-27-20(b); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). Trial court error is not a cognizable claim for PCR. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Notwithstanding due process

issues that may arise in the context of an allegation of ineffective assistance of counsel or prosecutorial misconduct, Applicant's allegation his due process rights were violated could have been raised at trial and thereafter on appeal. Therefore, to whatever extent Applicant's vague allegation may fall outside the scope of ineffective assistance of counsel, it should be dismissed as not cognizable under the Uniform Post-Conviction Procedure Act.

V.

Respondent also hereby moves for a more definite statement. Applicant has failed to set forth any facts to "support each ground" or to explain with any specificity the facts upon which his claims are based. The Uniform Post-Conviction Procedure Act requires the Applicant to "*specifically set forth the grounds upon which the application is based.*" S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Respondent respectfully submits that it is incumbent upon Applicant, through counsel, to amend his application to set forth specific facts upon which his allegations are based so that Respondent may adequately prepare for an evidentiary hearing. Therefore, Respondent requests that Applicant be required to amend his application to set forth specifically the grounds on which his claims are based.

VI.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments *will be opposed by the State at an evidentiary hearing* pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP; Mangal v. State, Op. No. 27726 (S.C.Sup.Ct. refiled October 4, 2017) (Shearouse Adv.Sh. No. 38 at 12). All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only

individual authorized to file amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

VII.

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

[*Conclusion and signature on following page*]

VIII.

WHEREFORE, Respondent respectfully requests that this Court grant its motion for a more definite statement, dismiss Applicant's due process allegation to whatever extent it is distinguishable from his allegation of ineffective assistance of counsel, and thereafter convene an evidentiary hearing on the allegations of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

24 Oct., 2017

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
	)	
	)	2016-CP-26-7859
ARMANDO K. CHESTNUT, #228621,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return, Partial Motion to Dismiss and Motion for More Definite Statement** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Daniel A. Selwa, II, Esquire
516 29th Avenue North
Myrtle Beach, SC 29577

DATED this 24th day of October, 2017.

Mallory Morris, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS OF THE FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY	**2016-CP-26-7859**
Armando K. Chestnut, SCDC No. 228621	**SUPPLEMENT TO APPLICATION FOR POST-CONVICTION RELIEF**
v.	
State of South Carolina.	

Petitioner Armando K. Chestnut, by and through his counsel, respectfully requests that the court grant his petition for post-conviction relief, on the following grounds:

1) **Trial Counsel Waived Petitioner's Right to an Immunity Hearing**

Trial counsel's waiver of Petitioner's right to an immunity hearing pursuant to 16-11-440(c), Trial Transcript 42/12 – 43/10, was ineffective assistance of counsel that resulted in prejudice to Petitioner.

Trial counsel stated that this was "a matter of strategy" and stated, "we do not believe that it would add anything to this particular case that we would not be able to ask in a later motion." Id.

Trial counsel's advice to petitioner to waive his right to a "stand your ground" hearing was ineffective assistance of counsel. Trial counsel's statement that it would not add anything that "we would not be able to ask in a later motion" was incorrect and indefensible.

SC Code Section 16-11-440(c) states:

(C) 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.

If the provisions of 16-11-440(c) apply, then Petitioner is entitled to immunity from prosecution pursuant to SC Code Section 16-11-450:

(A) A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force...

Trial counsel was well aware that there would be multiple witnesses, including Petitioner, who would testify that Petitioner was attacked in a place where he had a right to be, had no duty to retreat, and had the right to stand his ground and meet force with deadly force.

Similarly, there was ample evidence at trial that Petitioner's friend, Thoros, was attacked in a place where he had a right to be, and that Petitioner had the right to defend his friend, had no duty to retreat, and had the right to stand his ground and meet force with deadly force.

By waiving petitioner's rights under 16-11-440(c), Petitioner lost his only opportunity to claim immunity under the statute – there was no valid strategy employed during trial that justified this decision and trial counsel's statement that Petitioner could ask for immunity "in a later motion" was an incorrect statement of the law.

DANIEL A. SELWA, II
Attorney at Law, L.L.C.

2) Trial Counsel Allowed Jurors to Believe Incorrectly that Petitioner had a Duty to Retreat

Trial counsel's waiver of Petitioner's rights under SC Code Section 16-11-440(c) was ineffective assistance of counsel that resulted in prejudice to Petitioner because the jurors were informed by the Court, and the prosecutor argued in his closing, *that Petitioner had a duty to retreat.*

Pursuant to the plain language of 16-11-440(c), if Petitioner: 1) was attacked in a place where he had a right to be, then 2) he had the right to stand his ground and meet force with force, including deadly force, if 3) he reasonably believed it was necessary to prevent death or great bodily injury to himself or another person.

There was more than sufficient testimony and evidence presented at the trial from which the jurors could have concluded that Petitioner and Petitioner's friend Thoros were in a place where they had the right to be and that Petitioner stood his ground and met force with deadly force with the reasonable belief that it was necessary to prevent death or great bodily injury to himself or Thoros.

By waiving Petitioner's substantial rights under 16-11-440(c), trial counsel caused the jurors to believe that Petitioner had a duty to retreat pursuant to the older common law definition of self defense *that had been replaced by 16-11-440(c).*

There was no valid trial strategy employed by trial counsel that could possibly justify subjecting Petitioner to a duty to retreat, *when he did not have a duty to retreat pursuant to 16-11-440(c).* Although trial counsel could have corrected this "in a later motion," she did not.

Petitioner was prejudiced by trial counsel's waiver of his right to "no duty to retreat" pursuant to 16-11-440(c), because the jurors were instructed that he had a duty to retreat *and* trial counsel allowed the prosecutor to argue to the jurors that Petitioner had a duty to retreat in the prosecutor's closing argument.

The Court charged the jury with the elements of common-law self-defense and defense of others. As part of the Court's jury instructions, the Court charged the jury that Petitioner had a duty to retreat: "The final element of self-defense is that the Defendant had no other probable way to avoid the danger of death or serious bodily injury than to act as the Defendant did in this particular circumstances." Trial Transcript pp 927/9 – 931/24.

Although this was a correct statement of the common law elements of self-defense, Petitioner did not have a duty to retreat under 16-11-440(c) – a substantial difference in the Court's instructions that easily could have resulted in Petitioner's convictions for voluntary manslaughter, assault and battery, attempted murder, and pointing and presenting.

Furthermore, the prosecutor argued Petitioner's duty to retreat to the jurors at length:

Finally, the Defendant and the person defended had no way of avoiding the danger. Thoro actually goes to his car to get in and leave. The Defendant has keys to Annaliese' car; he can leave. He says, what, I'm gonna leave my girl there? No, no. She's at the bar. On your way out say, hey, there's trouble, let's get on out of here. Defendant runs to a fist fight with a gun in hand. Thoro goes to his car. Is he getting a gun; I don't know. Is he putting his phone and weed away cause he's getting ready to fight; I don't know. Thoro walks to Canty holding up two beers and Thoro throws Thoro's hands up and makes some move towards Canty. That provokes the attack. So there's ample ways they could have avoided this attack. So the Defendant just fail on the one element but them all. And the State only needs to knock out one element for the defense -- for self-defense to fall flat and for the defense of others to fall flat.

Trial Transcript, pp 891/12 – 892/2.

As the prosecutor stated in his closing argument, the jurors needed to disbelieve only one element of self-defense to find Petitioner guilty. There is a substantial likelihood that, if the jurors had been instructed that Petitioner did *not* have a duty to retreat, pursuant to 16-11-440(c), they would have returned a verdict of not guilty.

Trial counsel's waiver of Petitioner's substantial rights under SC Code Section 16-11-440(c) was ineffective assistance of counsel that was not justified by any possible trial strategy, was not corrected "in a later motion," and resulted in substantial prejudice to Petitioner's defense.

3) Trial Counsel Failed to Object to the Prosecutor's Argument that Petitioner had a Duty to Retreat

Trial counsel's failure to object to the prosecutor's argument that Petitioner had a duty to retreat, Trial Transcript, pp 891/12 – 892/2, was ineffective assistance of counsel that resulted in substantial prejudice to Petitioner's defense for the reasons outlined above.

4) Trial Counsel Failed to Object to the Court's Jury Instruction that Petitioner had a Duty to Retreat

Trial counsel's failure to object to the Court's instructions to the jurors that Petitioner had a duty to retreat, Trial Transcript pp 927/9 – 931/24, was ineffective assistance of counsel that resulted in substantial prejudice to Petitioner's defense for the reasons outlined above.

For the foregoing reasons, Petitioner requests that this Court vacate Petitioner's sentence and order a new trial.

Daniel A. Selwa, II
604 16th Ave. North
Myrtle Beach, SC 29577
843-492-5449
selwa@sclawyers.net
Attorney for the Defendant

October 15 2018.

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF HORRY	)	**2016-CP-26-07859**
STATE OF SOUTH CAROLINA, Applicant, vs. ARMANDO K. CHESTNUT, Respondent.	)	**Transcript of Record** (PCR Hearing) November 26, 2018

B E F O R E:

Honorable Kristi F. Curtis
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Daniel A. Selwa, II, Esquire
Attorney for Applicant

Johnny Ellis James, Jr., Esquire
Attorney for Respondent

TAKEN BY:

Dixie C. Eubank
Circuit Court Reporter

PREPARED BY:

Kay H. Richardson
Circuit Court Reporter

INDEX

NOVEMBER 26, 2018 Pg.

EXHIBITS

No. ID EV

(No exhibits were marked or admitted.)

NOVEMBER 26, 2018

BY THE COURT:

MR. JAMES: May it please the Court?

THE COURT: Yes, sir.

MR. JAMES: This is the matter of Armando K. Chestnut versus State of South Carolina, docket number 2016-CP-26-07859. Mr. Chestnut is present here in the courtroom today and is represented by Mr. Daniel Selwa, Esquire.

Mr. Chestnut was indicted at the August 2012 term of the Horry County Grand Jury for murder, attempted murder, pointing and presenting a firearm, and assault and battery by mob, second degree, resulting in serious bodily injury. Barbara Pratt, Esquire represented Mr. Chestnut at trial on those charges and it was prosecuted by Brad C. Richardson and Travis Hyman, both of the Fifteenth Circuit Solicitor's Office.

He was -- ultimately proceeded to trial which ran from July 15th to July 19th, 2013, before the Honorable Steven H. John. At the end of that trial, the jury convicted him or a lesser included charge of voluntary manslaughter, as indicted for attempted murder, as indicted for pointing and presenting, and of the lesser included charge of assault and battery, second degree, on July 19th, 2013.

Pursuant to Section 17-25-45, Judge John sentenced Mr. Chestnut to imprisonment for concurrent terms of life without the possibility of parole. The Office of Appellate Defense

perfected an appeal and the South Carolina Court of Appeals affirmed Mr. Chestnut's convictions on June 1, 2016, and the remittitur was thereafter issues on June 17th, 2016. Mr. Chestnut filed this Application for Relief on December 7th, 2016, so it was timely filed. Nonetheless, the state previously alongside of its return filed a Partial Motion to Dismiss and a Motion for a More Definite Statement. Both of those revolve around the broad allegations of ineffective assistance of counsel and due process violations.

Your Honor, subsequent to those motions and response thereto, opposing counsel has timely filed a Supplement to Application for Post-Conviction Relief, presenting in detail the allegations which we'll be proceeding forward on today. One, that Trial Counsel waived Petitioner's right to an immunity hearing. Two, that Trial Counsel allowed the jurors to believe incorrectly that Petitioner had a duty to retreat. Three, that Trial Counsel failed to object to the prosecutor's argument that the petitioner had a duty to retreat. And, four, that Trial Counsel failed to object to the Court's jury instruction that the petitioner had a duty to retreat.

With that set forth, Your Honor, I will give the floor over to Mr. Selwa.

MR. SELWA: May it please the Court?

THE COURT: Yes, sir.

MR. SELWA: Thank you, Your Honor.

MOTIONS:

MR. SELWA: I had not brought this up to Mr. James, but I just talked to my client. He informed me that he had been in touch or gotten in touch and actually spoken with the other codefendant. Obviously, the one codefendant did pass, but the codefendant that got shot in the elbow in this situation, spoke to him, and that is something that he wanted to address at the court today. He indicated that they could not find him or serve him a subpoena during the original trial, and has now been in contact with him and wants to present evidence from him to this Court. And understandably, he is indicating that Mr. -- I guess -- Thoros (spelled phonetically) is willing to do so. And, Your Honor, I have not had an opportunity to explore this. I didn't know about this until today. Mr. Chestnut indicated that he just spoke to Thoros. And so, I guess, Your Honor, I wasn't planning on asking for a continuance, but I'm asking at the request of my client for a continuance in this matter.

THE COURT: Mr. James?

MR. JAMES: The state respectfully opposes the request for a continuance. I don't think Mr. Selwa has done anything wrong, but Mr. Chestnut could've raised these issues to his PCR counsel at any point in time over the course of the last nearly two years that this PCR has been pending. The state is here, present, ready to proceed. The state has its witness

here present, ready to proceed. A considerable amount of time both on the clock and off the clock has been spent in preparation for this post-conviction relief hearing. And, so, bringing up new allegations at the last moment in order to try and secure a continuance is not the appropriate way to handle post-conviction relief matters and I would respectfully request the Court deny the motion to continue and proceed with the hearing today on the allegations as set forth in the Supplement to Application for Post-Conviction Relief filed October 17, 2018.

MR. SELWA: One more thing, Your Honor. He's indicated that he just was able to get in touch with him. He had put feelers out and spoken with his cousin trying to get in touch with him because he was unsuccessful at trial at getting him in the courthouse. And finally, that victim reached out to him. So, this just happened. And again, I just learned that.

THE COURT: Okay. So, when you say codefendants ---

MR. SELWA: I'm sorry. Victim. I'm sorry.

THE COURT: Yeah, we're very late in the game here, so I'm not inclined to continue this. This has been pending for many, many moons. We're gonna go forward on it today.

MR. SELWA: Thank you, Your Honor.

THE COURT: Thank you.

MR. SELWA: Your Honor, the argument that I will be proceeding on will follow and flow directly from the

supplemental petition. And, of course, I would reiterate and reassert that as the grounds from which we're going forward on. And there is some legal arguments in there. There was a -- just a plethora of testimony in this, including the defendant's here. And so, as a point of asking how you want me to proceed. A lot of the information is already in the transcript based off of the legal arguments that I've made in the supplemental application. So, I -- if you want me to elicit that testimony that has already been in the transcript, I certainly can, or I can just argue this motion per the supplemental petition as it's written.

THE COURT: Well, I haven't -- I mean, I just got the materials today. So, I would appreciate if you can give me a rundown of what the issues are. Whether you want to do that through the client taking the stand or however you want to do it is fine with me. But, since I am brand new to seeing these materials, I would appreciate if you could ---

MR. SELWA: Certainly, Your Honor.

THE COURT: --- give me a rundown.

MR. SELWA: Okay. I would call up Armando Chestnut to the stand.

Your Honor, he's indicating that he has some paperwork that he wishes to get that he didn't grab and present. We were talking and we came right in and so...

ARMANDO K. CHESTNUT, HAVING BEEN DULY

SWORN, TESTIFIED AS FOLLOWS:

CLERK: Please have a seat and state your name for the Court, and spell it, please.

MR. CHESTNUT: Armando Chestnut, A-R-M-A-N-D-O, C-H-E-S-T-N-U-T.

DIRECT EXAMINATION OF ARMANDO K. CHESTNUT BY MR. SELWA:

Q: Mr. Chestnut, can you tell the Court what you were charged with?

A: Attempted murder, murder, lynching, and pointing and presenting.

Q: And what did you ultimately get convicted of?

A: I got convicted of -- what was it -- involuntary man -- what was it -- voluntary manslaughter, attempted murder, and pointing and presenting, and the other charge was dropped to a lesser, I think.

Q: And who represented you at trial on those charges?

A: Ms. Barbara Pratt.

Q: Gotcha. And you had a full trial on that, correct?

A: Yes, sir.

Q: Did you take the stand at that trial?

A: Yes, sir.

Q: And you testified, I think, regarding all the facts concerning the case, correct?

A: Yes, sir.

Q: Okay. Now, you filed a post-conviction relief petition

claiming that there was ineffective assistance of counsel and then you filed a supplemental claim specifying certain aspects of that ineffective assistance, correct?

A: Yes, sir.

Q: Okay. And as part of that trial and your testimony, did you waive your right to an immunity hearing?

A: Yes, sir.

Q: Okay. And was that upon advice of counsel?

A: Yes, sir.

Q: Do you know why you waived the immunity hearing?

A: To be honest with you, I didn't -- I wasn't familiar what was it, what it was about or -- to be honest, I didn't know what it was, you know what I'm saying. I didn't know that it was concerned that I could've went in the hearing, and it's like a bench trial, I guess, something like that, so -- I didn't know that if I could've had that trial, and I could've -- I could've been not going for this. I couldn't even have been jail if I'd have had that trial, if I'd had that little hearing or not.

Q: Did Ms. Pratt go over the code section that applied regarding the immunity hearing?

A: And what that mean? What you trying ---

Q: Did she explain the law to you regarding that -- your immunity hearing, your rights to an immunity hearing, whether or not you should take it, and why you should not -- why you

should take it or why you should not? Did she explain the law to you?

A: I don't -- I don't recall. But, I do recall like her saying that that we didn't need to have the hearing, that she had a different strategy.

Q: Did she explain that strategy to you?

A: If I'm not mistaken, I think what it was about that -- I think it was that we didn't have -- I don't know -- if it were -- that we didn't have the witnesses at the time or they had witnesses at a time. I just think we wasn't prepared.

Q: Okay. Are you familiar with South Carolina Code Section 16-11-440(C)?

A: No, sir.

Q: Okay. That section states a person who is not engaged in an unlawful activity and who is attacked in another place where he has the 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, 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.

Now, does that in your opinion apply to the facts of your situation?

A: Yes, sir.

Q: And were you -- tell us about what happened.
A: What, that night?
Q: Yes.
A: I went out to a bar with a girlfriend of mine, co-worker of mine at work. And as I went in the bar, I see a couple of guys that I knew was playing pool with some other guys that I did not know, like six, seven other guys that I did not know. So, I went to the bar and I brought me something to drink, and I brought my friend something to drink, and I was just -- we just drinking and I was sitting up there watching the pool game. And then an argument started and then one of the guys grabbed a pool stick. And as he grabbed the pool stick, he was coming towards one of my friends with a pool stick.
Q: Who was that?
A: I'm trying to think of his name. I don't know his name but I just know it was the guy with the dreads, he had dreads -- the guy that got killed in my case. And he grab a pool stick and he went towards Thoro (spelled phonetically) with the pool stick and was trying to hit him with the pool stick, but security stopped him.
Q: Are you saying Thoro was his nickname?
A: Yeah. His real name is Dewayne Durant.
Q: Okay. He -- they was shooting pool and the guy come to him with the pool and -- I guess, security came and broke it up. They kicked the guys out. They did not kick us out. I

don't know why they say that they kicked us out, but they did not kick us out. And as they was kicking the guys out, I guess, my friend, Mr. Durant, went outside. And as he walked outside, I guess they follow him out the side, the guys that was in the club followed him out there. And I was still inside the club and I was drinking and I asked my friend, I was like, where did -- where did Thoro go, because I didn't see him inside the club anymore. And I didn't see anybody by the pool table no more. So, I asked him where did Thoro go. And I'm looking for Thoro and I don't see him. And she was like I don't know where he went at. So, I thought maybe he went to the restroom. So, I stood there for a minute and waited to see if he come out the restroom. He never came out the restroom. So, I was drinking, so you know, I was drinking and like if I get -- I got a habit, if I'm drinking, I got to smoke a cigarette. So, I didn't have my cigarettes on me at the time. And I went to the -- I asked my friend to give me her keys to her car, and I went to her car. As I was walking to her car, I see like six, seven guys beating Thoro up outside, hitting him with bottles and beating him, hitting him with guns, you know -- get beaten. So, when I saw that, I just ran over there because, all right, I had a gun on me at the time, I had a gun on me at the time. So, when I went over there, and I shot one of the guys in the elbow. And I -- basically, I was helping him. Basically, I was just -- he was

getting jumped by like six, seven different guys. They was beating him in the head with bottles. They had pistols. They was hitting him in the head with guns. And one of the guys got shot and one of the guys got -- one of the guys got killed. And they try to say that my bullet killed the guy, you know what I'm saying. When they tried to say that my bullet hit the other guy in the elbow, which I truly admit to my bullet hitting the guy in the elbow. But I told them that that I never shot the guy that got killed. And which my gun did come back from SLED not being the murder weapon from SLED. So, I mean, I don't know how that work or how that goes, but it did come back to the guy that shot in the elbow, because he was jumping my friend. It was like six or seven of them. So, they was jumping my friend and I just came over there to help. That's all it was about. We just -- that he could've got -- he could've got hurt out there that night. So, it was nothing about nothing else. I didn't know those guys. I never seen them before in my life. I just see my friend outside getting jumped by several guys, getting beat with bottles, getting hit in the head with pistols, and I just went out there to help him. That was the whole purpose of the whole thing. I just went out there to help him.

Q: You were there just shooting pool, correct?

A: I went there. I wasn't really shooting pool. They -- I was watching them shoot pool. I just went there to have a

couple of drinks.

Q: But in other words, you were there lawfully -- for lawful reasons, correct?

A: Yes.

Q: And did you reasonably believe that Thoro was in danger of being killed or great bodily injury?

A: Yes, cause ---

Q: He was ---

A: Cause when I first -- okay, when I was -- when I walked outside to go get the cigarettes out her car, I heard a commotion like a little -- like 15 feet away from me, and I heard people just like, yeah, yeah, yeah, yeah, what's up, what's up, and I didn't know it was him. I remember he had a white hoodie on his head. So, when I looked and I turned around and I saw him, his whole hoodie was bloody like a -- his whole -- they was beating him with bottles, he was almost unconscious, they was just punishing him, beating him, fighting him, hitting him with bottles, and hitting him with guns. So, that what kind of trigger me when I seen it, it just -- I just like, oh, he bleeding, he was bleeding to death. He really was bleeding bad. Knowing that those facts may fit under that statute that I read to you, do you believe that deadly force was permitted in that situation?

A: Yes, sir. I feel like -- I feel like I was just -- I was there just helping him. I wasn't trying to cause any trouble

to no one. I was just there helping him, trying to help him, you know, this threat that was on him. And that's the only thing I was doing. I didn't mean to harm nobody else, I just wanted him -- you know, those guys to get off him; that's it.

Q: So, there was ample evidence that you were -- you were defending him, who was being attacked.

A: Yes, sir.

Q: You had a right to be there?

A: Yes, sir.

Q: You didn't have a duty to retreat because you were helping your friend, correct?

A: Yes, sir.

Q: And you met force with force, correct?

A: Yes, sir.

Q: All right. By waiving that, did you understand by waiving the immunity hearing, did you understand you did not have the opportunity to address those issues?

A: No, I didn't, because to be honest with you, I don't know too much about the law, and I never knew South Carolina had a self-defense law at all. So, I didn't know that. I didn't know what that hearing was really about. I just was basically -- cause I've known Barbara for years. I know her almost all my life, and I just know her judgment when she said, that's what I went by. So, I just know her like -- I know she's a good lawyer and I just know she -- I just go by what she say I

needed to do. So, she said she had something else to do, so I guess that's what we was gonna do.

Q: Did she explain that something else or that trial strategy which did not include the immunity hearing to you?

A: She didn't explain to me what was the strategy or anything. She just -- I guess she just went in the best way she could. I guess. I mean, she never really explained to me like the strategy-wise, but I knew -- I just felt real comfortable with her because I know her all my life, so I just, I just felt that she knew -- she would do right by me, so...

Q: Had you had that immunity hearing, do you feel you would've prevailed?

A: I feel like -- I feel I would've. I feel I would've -- now that I know how it work, I didn't know how it worked. I didn't even know if I would've had that hearing, the Judge had the discretion to decide what happen to me or -- and I felt that if he'd had saw the videos and all everything that went place -- took place, that I would've -- I would've got immunity for that, I really would've.

Q: And how much time were you sentenced to?

A: Life sentence.

Q: Two consecutive of concurrent?

A: Two -- I think they run together, if I'm not mistaken.

Q: And are you asking the PCR Court today to overturn your

conviction and asking for a new trial on this based on this issue among others?

A: Yes, sir.

Q: Now, according to that statute, 16-11-440(C), you had a right to be there.

A: Yes, sir.

Q: You had a right to stand your ground.

A: Yes, sir.

Q: Reasonably believed your friend was in trouble, correct?

A: Yes, sir.

Q: Do you believe that you had a duty to retreat in that situation?

A: I don't think I had a duty to retreat if I walked outside -- if I walk at a gas station and if I see four guys jumping on a guy, I have the right to help that guy. So, I don't think it's duty to retreat, to leave him for dead, or not do nothing, just call the police. I feel I have the right to stop it or help him out in any way possible that I can.

Q: Now, Ms. Pratt indicated to the Court that she would address this later in a motion, correct?

A: Yes, sir.

Q: And did she address that later in a motion?

A: She never addressed it.

Q: And in your opinion, did that lead to allowing the jury to believe incorrectly that you had a duty to retreat?

A: Yes, I believe that.
Q: And when the jury charged -- the elements of the common law self-defense and defense of other, the jury -- or the Court actually charged that the jury -- charged to the jury that you had the duty to retreat; is that correct?
A: Yes, sir.
Q: And the prosecutor argued that in his closing arguments, didn't he?
A: Yes, sir.
Q: Indicated that you had a duty to retreat there. And because of your waiver, you weren't able to really address that, correct?
A: Yes, sir.
Q: Now, Ms. Pratt also, she failed to object to both of those instances, correct?
A: Yes, sir.
Q: She did not lodge an objection to the prosecutor's argument that you had a duty to retreat, nor the jury instructions, correct?
A: Juror instructions, yeah. Well, ---
Q: To your knowledge ---
A: Yeah, to my knowledge, well, the jury instruction, the Judge -- the Judge basically, he gave me the self-defense charge to the jury. He charged the self-defense to the jury. He watched the video and he come to the conclusion that this

could be a self-defense case. So, he gave me the self-defense charge, he charged it to the jury, but he charged the jury the wrong law. He gave them the law that was -- I think is no longer the law since 1989, but he give them wrong statute, he gave the jury the wrong law. So, and I feel like that issue, give the jury the wrong instructions, the wrong law, and then you asked for corrective instruction, that doesn't cure it, though. That doesn't cure it because I feel like if the jury -- if you tell the jury -- if the Judge give the jury the wrong law, like, it's in their mind regardless. If you try to give them -- turn around and correct it, it still in their mind. And I just feel like that, that, that's one of the -- that's one of the main, main issues of my case that, that they got the wrong instruction, he gave the jury the wrong instructions. And I want to put it -- I want to say this, too, because I was -- I was brought back, I was sentenced on the 19th or the 23rd, and I was brought back to court, I think it was August the 4th, or August somewhere around that time, I was sent back for them to basically correct the jury instructions, you see what I'm saying. Like, why is they were gonna -- they offered me -- to take the life sentence back, they offered me 35 to 30 years, right?

Q: Who offered you that?

A: The solicitor or the judge or whatever, my lawyer, I had a letter that got -- came through when I was Kirkland that I

got to come back to court because my trial had been messed up. And that I ---

Q: Would that have been a motion to reconsider?

A: A reconsideration. And which my lawyer, and which Ms. Pratt told me that she doesn't do reconsiderations, you see what I'm saying. And so, obviously, the judge called her and told her to put that in because he wanted to straighten that out. But, at the same time, I didn't take the time -- he offered me 30 years, he wanted me to plea to it but I was telling him that I didn't want to take away my appeal rights, I didn't want to appeal -- I mean, I didn't want to plea to the charge and then they -- it kills my appeal rights. So, that's the one main reason I didn't plea to it. But I did come back, it's in the record somewhere that I came back and they try to on a reconsideration. But I didn't take the time, so I guess the Judge never granted me or whatever.

Q: They just offered you 30 years?

A: They offered me 30 years, 35 to 30 years. And then I think it was -- I think I might've got the courtroom one day, I think it down lower, I think it went to 20, but I never would took -- I never took the offers because I felt that I needed a new trial. I needed a whole new trial, I wanted a whole new trial. I didn't want to take no 20 to 30 years for helping nobody. I mean, that's just not right for me, if I'm sitting over here helping this guy and he's getting hurt,

bodily harm hurt, in danger, he could die, or lose his life, and all of a sudden he want to bring me back and try to give me 30 years because you gave me life because you messed up the trial. I feel like I should be able to get a new trial. I mean, in the statute it states that -- in *Belcher* it states that I should -- I should get a new trial. I mean, by law I should get a new trial. I don't know why I didn't get a new trial. When you give the jury the wrong instructions -- you just can't give a jury the wrong instructions, there's no way to correct that. But why is -- give me a mistrial. There's no way.

Q: According to you, your testimony, Ms. Pratt's conduct or advice to you regarding this stuff and her conduct in failing to object to these issues, to preserve them, put you in the place that you are now, correct?

A: Yes, sir.

Q: Do you feel like it would've been a different outcome on these issues?

A: I felt, I feel like it would've been a different outcome if, if I could've got my investigator on the stand, if I could got these guys clothes. They never tested clothes for gun residue.

MR. JAMES: Objection. These are allegations not specifically set forth in either the amendment or the original application, so this testimony is not relevant to the

allegations set forth.

MR. SELWA: Your Honor, as a general claim of ineffective assistance of counsel, per his petition, I'm allowing Mr. Chestnut to indicate what those are for the Court.

THE COURT: I mean, I think we have -- we require some specificity for a reason. So, I'm gonna sustain that objection.

BY MR. SELWA:

Q: Now, this is your last opportunity on this issue to bring forth any claims that you have and if you do not bring them up, you cannot readdress them later on.

A: Yes, sir.

Q: Is there anything else that you wish to address with the Court regarding these issues?

A: Yes, sir. I have a issue, again, that dealing with -- I feel like the victim in this case, Ms. Pratt had ordered -- we had got a investigator for this case. And the investigator thought, because they was looking for the victim at this time that was involved in my case, and we needed somebody to try to find him, to try to bring him into court. And the investigator he found Thoro, he found Mr. Durant, but he never subpoenaed him, he never subpoena him because he said Ms. Pratt never gave him the paperwork to subpoena him, so that stopped me from not having him in court. I think if I'd have had him in court as the victim ---

MR. JAMES: Objection, relevance, again. This issue is not alleged.

THE COURT: Sustained.

BY MR. SELWA:

Q: Anything else, Mr. Chestnut?

A: The issue about the solicitor bolstering witnesses. And the fact that the Judge -- hold on one second.

MR. JAMES: If he wishes to proffer this, that's within Your Honor's discretion, but I'm gonna make the same objection to -- the issue is not alleged.

A: I want to say something about the, the victims. The guys that had -- that had got shot that night, I was trying -- wonder why that they didn't take their clothes and get gun residue for their clothes. My -- the gun that I had, not being the murder weapon. Hold on one second. There's some more issues I had. And I just -- basically that's -- then the issues that I have like why is the victim's clothes, and my gun, and my witnesses that I could've had in court that wasn't here that should've been subpoenaed that wasn't subpoenaed. My investigator didn't get on the stand; I needed him on the stand. And the hearing, the hearing I had, and basically -- but basically it's the instructions to the jury.

Q: All right. No further questions. Please answer any questions Mr. James may have.

MR. JAMES: I have no questions for this witness.

THE COURT: Thank you, sir. You may step down.

MR. SELWA: Your Honor, I'd call Barbara Pratt to the stand.

BARBARA PRATT, HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

CLERK: Have a seat and state your name.

MS. PRATT: Barbara Pratt, P-R-A-T-T.

DIRECT EXAMINATION OF BARBARA PRATT BY MR. SELWA:

Q: Thank you, Ms. Pratt.

You represented Mr. Chestnut in his trial that we're here today for, correct?

A: Yes, I did.

Q: And did you have ample opportunity to meet with him and discuss and go over the case with him?

A: I believe so. I went through my trial notes. It looks like I met with him several times before trial.

Q: And you had an investigator working on the case as well?

A: Yes, we did. There was a video that he was particularly helpful with.

Q: Did he testify about that video?

A: No. The video got played many, many times during the trial, several times. And what the investigator did for me was to slow it down so that you could see the actual movement second-by-second in the video. To give a little bit of background on this, if I may, this incident happened in the

parking lot of a club. And so there were several cameras that actually showed the incident. You could see people walking up, you could see the fighting, you could see people afterwards, and there was a shot on the parking lot as well.

Q: Okay. Now, in regards to Mr. Chestnut's immunity hearing and the decision to waive that, what was the theory behind that?

A: And to be candid, I had not considered immunity before it was raised by Judge John that day. He wanted to know if we were going to have that hearing or whether we were going to waive it, and wanted to particularly call our attention to subparagraph (C), which speaks to the fact that if a person is in any place with the right to be there that that could create a situation of immunity. My concern -- which is -- or basically would have no duty to retreat. My concern was that that if we held that hearing and the Judge did not rule for us, that we would have already put out our witnesses, that Armando would've testified, he would've been subjected to cross examination. They could've gotten testimony that they then could've used later on. And so that was my biggest concern in that situation. It's not just a guarantee that, if you're someplace lawfully, that you don't have a duty to retreat. You also have to have a reasonable belief that, you know, that this is the -- the defense of the other person is necessary.

Q: And with then South Carolina Code Section 16-11-440(C), are you familiar with that section?
A: I am. I actually left the copy that AG had given me over on the stuff there. I apologize. I should've carried it up here.
MR. JAMES: If I may approach the witness, Your Honor?
THE COURT: Sure.
A: Thank you, Mr. James. All right. I have it in front of me now.
BY MR. SELWA:
Q: According to (C), do you feel that Mr. Chestnut's conduct are in line with the facts would apply to that statute?
A: Well, I think that was the argument in self-defense, certainly. And what we were presenting in self-defense was that he, you know, believed that his behavior was necessary and reasonable. And that was the big question that the jury was gonna have to determine. And if a judge had ruled against us on that, then he would've been in a situation where he had laid the whole -- all the testimony out.
Q: But he did end up, in fact, testifying and getting subsequently convicted, correct.
A: Yes, he did. It was a lesser included offense, and a couple of them were not guilty.
Q: Do you feel that he had a duty to retreat?
A: You know, that's a very difficult question, because

that's a comment on the facts as well. I mean, the way that the fight went, the fight began inside the bar, Armando was actually one of the later people coming out, following Canty. There was Thoro who was the victim that he was trying to protect. There was a fellow named McFadden, who I think is the one who died. But there was -- there was a point where Armando runs out to his car. The state believed that he went and got a gun. Armando testified that he had put some things into his car instead. And there's a question, you know, I'm not sure what the jury believed, whether they felt that he didn't need to come back, that, you know, there were other people there for Thoro, or whether he was the one that should come back.

Q: Was anybody ---

A: It's a difficult question.

Q: --- else charged? Sorry.

A: Go ahead.

Q: Was anybody else charged?

A: Not that I remember.

Q: Did anybody else jump in and aid Thoro?

A: We had an argument -- we made an argument that there was another fellow who'd the gun and that the gun had gone off. I can't remember -- there were four or five people, maybe from Williamsburg County. I think there might've been a couple. I don't remember exactly that we're on Thoro's side with

Armando.

Q: Given the gravity of the beating, do you believe that that represented either a potential for death of great bodily injury?

A: I think it could have. We went through -- I remember in jury charges, trying to decide what great bodily injury was, because we had to go through some other statutes in regards to ABHAN and others to determine what was going to be charged. And I remember we kind of got a little creative in regards to what needed to be charged in that way.

Q: So, there was -- there's no question that he had a right to be where he was, correct?

A: Yeah, I don't think he -- they never alleged that he was in an unlawful activity, like he was selling drugs or doing anything at the bar. He was there having drinks with friends and watching a pool game.

Q: And could I characterize your feelings on his duty to retreat as he felt compelled to help his friend who was getting beat down?

A: I think so.

Q: And obviously, if you felt like that that conduct was heading towards either death or great bodily injury, he had the right to meet that force with that same force, correct?

A: And that was going to be our argument, certainly, and it was our argument at trial through the whole self-defense part.

Q: And the person that he stepped in for actually was saved, essentially, correct?
A: He didn't die, yes. I don't mean that in a -- you know ---
Q: Of course.
A: --- in a light fashion, but...
Q: Now, regarding the issue on the duty to retreat and the Court's instructions as well as the prosecutor's argument in closing, you didn't object to either one of those, correct?
A: No, because it was an element of self-defense. And I don't think I had the right to object to that. I think in my closing I argued, you know, that it was self-defense what he had done.
Q: Do you feel like the Court's instructions and/or the prosecutor's argument incorrectly made the jury believe that there was a duty to retreat?
A: Well, considering that there wasn't immunity, there was a -- that is an element of the self-defense. I mean, they had the right to argue it. And, you know, a duty to retreat is, insofar as it's possible, it's not you have to turn around and run away. I mean, you -- so, it's kind of qualified. This was a difficult case. I felt that -- Armando is right, I mean, I've known him since he was a teenager. And I hated that he got caught up in this so that he was the one that they assumed did this murder.

Q: Now, he stated that you don't normally file motions to reconsider. Was that an accurate characterization of ---
A: I don't -- yeah, I don't normally file a motion to reconsider, because what you're asking a judge to do is to say, oh, yeah, that's right, I was wrong. And most people, not just judges, but most people don't ever want to admit that they're wrong. In this situation, there had been a couple of things that had happened in the trial that I didn't like. And I mean, there was an improper comment by the solicitor that Thoro wasn't there, which the Judge got pretty ticked off about and said that that would never be said in his courtroom. There was also an error that the Judge had made himself in that we had agreed during the charging conference that he would not charge that malice could be inferred by the use of a deadly weapon because when you're arguing self-defense that is not an inference that's allowed. And he did a curative instruction on it. But I -- and I don't think -- you could tell by the way Judge -- and I've known Judge John just as long as David Canty in the earlier hearing had been there. And I know that he doesn't normally say things that don't have a meaning. So, what he -- when he said in his sentencing that normally he would've given the 30 years but he had no choice but to give life without parole, I could tell it was bothering him that this was the outcome. And so I wanted to take a chance and file that motion to reconsider. And we did have a

discussion before it where there was a discussion of an offer, as Armando said.

Q: And was that accurate or was he -- his testimony accurate in the conveyance of that offer and how much -- how long it was?

A: He was close. It's been a lot a years. So, I know he doesn't remember exactly what went on. What had happened was that the solicitor was concerned, I'm sure about the potential on appeal of the issue of the curative instruction and about the comment about Thoro. So, he said that if Armando wanted to plead, even under *Alford*, that he would, you know, take a plea to the voluntary manslaughter, which was what he'd been convicted of. And the Judge -- we talked to him, Judge John was very clear that he wasn't promising anything but that, if that -- if Armando pled to what he'd been convicted of, that he would give him something in the range of 30 to 40 years. And so I wrote a letter to Armando, while he was in the department, and explained what that would mean and the would be giving up appeal rights, but also that the appeal simply meant that he went back to square one again and -- with a new trial, you know, except for the charges that were found not guilty on. And that taking this offer would mean that he would do 85 percent, somewhere between 27 years to, you know, 34, 36 years or something like that. And then when Armando got to J. Reuben Long, we sat down and talked about it again

and I wrote a second letter, because I really wanted him to consider this strongly. I knew that it was tough on him and he felt, like many young people do, that, you know, 30 years means you're gonna be dead anyway. But, I'm 63 now, so, you know, that's not that old.

Q: Do you feel Mr. Chestnut deserves a new trial?

MR. JAMES: Objection, relevance.

THE COURT: That's a difficult question to ask. I don't know that that's a -- particularly appropriate question to ask, but if you want to answer it, I'll let you, but I'm not gonna require you to answer it.

A: I would like him to have a new trial, if it's appropriate, because I feel -- I don't think he went in with the intent of murdering someone or even of killing someone in heat and passion like would be required with voluntary manslaughter. And maybe I gave him bad advice in regards to 16-11-440(C). I had a reason behind it but, you know, I don't know -- you never know whether the Judge would've granted the immunity or not.

MR. SELWA: Court's indulgence.

BY MR. SELWA:

Q: Ms. Pratt, did you subpoena Thoros to court or the investigator who found Thoros?

MR. JAMES: Objection, issue not alleged.

THE COURT: Your objection is noted, but I'm gonna allow

it.
A: I was looking through my file and I don't see a subpoena there. I think we had found him and we thought he was coming to trial, but -- and I don't really remember and couldn't find a piece of paper in there to show that I had subpoenaed him.
BY MR. SELWA:
Q: And ultimately, he did not come to trial, correct?
A: He did not come to trial, and the solicitor commented on that.
Q: No further questions.
THE COURT: Mr. James?
CROSS EXAMINATION OF BARBARA PRATT BY MR. JAMES:
Q: Good afternoon, Ms. Pratt.
A: Good afternoon.
Q: Just to be 100 percent clear, you had a strategic reason to waive the immunity hearing; is that correct?
A: Yes.
Q: And was it that you did not wish to put forth the defense case before you ever stepped foot in front of a jury; is that correct?
A: Yes.
Q: All right. And once you waived that hearing -- well, take a step back. What was your thoughts of the likelihood of prevailing in that immunity hearing?
A: I really wasn't sure that we would prevail. I've never

seen a case that talked about any place, another place where he has the right to be. He didn't have -- it wasn't his home, it wasn't his place of business, it wasn't his vehicle. So, the normal elements that we look at weren't part of that. And I really was not sure that we were going to win. Judge John is very, very strong on the law, and usually gives very well supported decisions. And I felt that we were probably going to lose on that one and it would make a record that we might not want. Plus, it was going to mean that my client would testify, that we might put up other witnesses, we'd be basically putting the whole defense into a pretrial motion.

Q: And the fact that the burden of securing that immunity does fall on the defendant, correct?

A: That's correct. We had the burden of proof. And y'all keep saying -- if I can say this -- that I waived it, but the Judge did question Armando about the waiver, and we did talk about it. I don't know -- it was a very stressful time. He may not have understood everything that I was explaining to him, but we certainly were given time over the lunch break with the, you know, to talk about it and to make that decision. And I thought I had explained it thoroughly enough to him that he understood so that when the Judge was asking us about waiver and actually asked him about it, that he had done that.

Q: And thank you, that was probably the next place I was

going to go. It was ultimately Armando's decision to waive that hearing?

A: It was, based on my advice.

Q: And there as a thorough colloquy on the record to that effect by Judge John?

A: Yes.

Q: All right. Ultimately, the jury was charged on common law defense of self and others; is that correct?

A: I think we used *State v. Dickey*, yes. I still have the poster board in my office that we used.

Q: And you argued defense of self and others under *State v. Dickey*?

A: Yes, I did.

Q: Is it your understanding that, where immunity is waived or denied, that that is the appropriate charge?

A: I believe it is.

Q: Okay. With reservation of my prior objections, did you ever manage to get in contact with Thoro?

A: I did not speak with him myself. I think my -- I was looking for notes there. I think that my investigator did locate him because he'd been in and out of jail. And we certainly had his records come in, I think. Thoro is Durant, correct? Yeah. So, we had his records come in. We had Captain Safford testify about some records and so on.

Q: Did he tell your PI anything of interest or value?

A: No.
Q: Okay. There was, as you indicated, an erroneous *Belcher* instruction -- well, it's not necessarily the nature of the instruction, but an inference of the use of -- an inference from the use of a deadly weapon that Judge John thereafter cured. Did you find that cure to be adequate?
A: Yes. The minute that that instruction came out of his mouth, he looked at me and I looked at him and he knew he had messed up, and I felt for him. And of course, I stood up and objected. I thought that we had crafted a good curative instruction, and I think I asked him a couple of times -- the jury had a question, I asked him to keep recharging that, but he didn't. But, I think that that was a problem because certainly when -- where we're arguing self-defense that there is no inference of malice.
Q: But you did feel very satisfied in that curative, that it was a good cure?
A: I did.
Q: Okay.
MR. JAMES: I have no further questions, Your Honor.
THE COURT: Anything further?
MR. SELWA: Yes, just one redirect question, Your Honor.

<u>REDIRECT EXAMINATION OF BARBARA PRATT BY MR. SELWA:</u>

Q: At what point, Ms. Pratt, did you decide that Mr. Chestnut would testify?

A: I think we had always thought that that would be something that would happen, because I don't know any other way that he could get his story out there. But it wasn't just my decision; it was Armando's. And I know he wanted to be able to tell them what he'd been doing and why. And we knew the danger of his record, but how else do you get the story out there? We had his girlfriend testify and I think we had Michael Spivey, who was in the bar at the time, testify.

Q: With that being said, that contradicts the concern of putting testimony on the record for the immunity, correct?

A: Well, not really, because if I put him up in the pretrial hearing and the state has the chance to cross examine him and he's locked into some testimony, then when he testifies in the case in chief, he's locked in and he's already said everything that he was going to say, and the solicitor, you know, would have all that information.

MR. SELWA: No further questions.

MR. JAMES: Nothing further from the state, Your Honor.

BY THE COURT:

THE COURT: Thank you, ma'am. You can step down.

MS. PRATT: Thank you.

MR. SELWA: No further witnesses, Your Honor.

MR. JAMES: No witnesses from the state, Your Honor. However, the state does have a small amount of case law to provide the Court, if the Court should wish to review it.

THE COURT: Sure.

MR. JAMES: Would you like full closings, or would you just like for me just to hand this up?

THE COURT: I'd love if you would just hand it up. But if you want to make a closing, I'm not gonna tell you no, sir.

MR. JAMES: Handing it up is just fine by me. I have provided copies already to opposing counsel.

THE COURT: Okay.

MR. JAMES: For the sake of the record, I'll indicate what it is I'm handing up.

THE COURT: Uh-huh, (affirmative response).

MR. JAMES: It is first a copy of the statute, South Carolina Code Annotated 16-11-440; it is a copy of *State v. Curry*, 406 S.C. 364; it is a copy of *State v. Marin*, that is 783 S.E.2d 808; another copy of *State v. Marin*, that's 745 S.E.2d 148; copy of *State v. Duncan*, 709 S.E.2d 662; and a copy of *State v. Davis*, 317 S.E.2d 452.

THE COURT: Thank you.

Again, I'm gonna read all this and take it under advisement. Thank you.

MR. SELWA: Thank you, Your Honor.

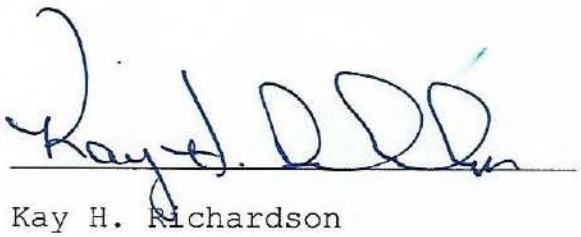
MR. JAMES: Thank you, Your Honor.

ADJOURNED.

C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Armando K. Chestnut v. State of South Carolina, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on November 26, 2018, as reported by Dixie C. Eubank.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Kay H. Richardson
Official Court Reporter

May 29, 2020.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
Armando K. Chestnut, S.C.D.C. No. 228621,	)	Case No.: 2016-CP-26-07859
Applicant,	)	
	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief filed by Armando K. Chestnut ("Applicant") on December 7, 2016. Respondent made its return on or about October 24, 2017. The Court convened an evidentiary hearing into the matter on Monday, November 26, 2018, at the Horry County Government & Justice Center in Conway, South Carolina. Applicant was present at the hearing and represented by Daniel A. Selwa, II, Esq. Johnny Ellis James Jr., Esq., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Barbara W. Pratt, Esq. ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, the pleadings and amendment, and the case law submitted by the parties at the hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the August 2012 term of the Horry County Grand Jury for murder (2012-GS-26-03115); attempted murder (2012-GS-26-03116); pointing and presenting a firearm (2012-GS-26-03117); and assault and battery by mob, second degree, serious bodily injury (2012-GS-26-03118). Barbara W. Pratt, Esq. represented Applicant at trial. Bradley C. Richardson and Michael Travis Hyman, Esqs., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On July 15, 2013, Applicant proceeded to trial before the Honorable Steven H. John and a jury. On July 19, 2013, the jury found Applicant guilty of the lesser-included offense of voluntary manslaughter (-03115); as indicted for attempted murder (-03116); as indicted for pointing and presenting (-03117); and of the lesser-included offense of assault and battery, second degree (-03118). Pursuant to S.C. Code Ann. § 17-25-45, Judge John sentenced Applicant to imprisonment for concurrent terms of life without the possibility of parole.

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

> Whether the court erred by refusing to grant a new trial where it erroneously gave a Belcher instruction that the jury could infer malice from the use of a deadly weapon where self-defense was a verdict option, and the judge's later instruction that 'if there's self-defense, there's no inference that can be associated with the use of a deadly weapon," was hopelessly confusing, and exacerbated rather than cured the prejudice?

By opinion filed June 1, 2016, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Chestnut, Op. No. 2016-UP-227 (S.C. Ct. App. filed June 1, 2016). The Remittitur was issued on June 17, 2016.

Present Application

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

1. "Ineffective Asst. [of] Counsel"
2. "Due Process"

By filing by and through PCR counsel on October 17, 2018, Applicant amended his application to raise the following grounds for relief (excerpted verbatim):

1. "Trial Counsel Waived Petitioner's Right to an Immunity Hearing"
   a. "Trial counsel's waiver of Petitioner's right to an immunity hearing pursuant to 16-11-440(c), Trial Transcript 42/12 – 43/10, was ineffective assistance of counsel that resulted in prejudice to Petitioner."
   b. "Trial counsel stated that this was a 'matter of strategy' and stated, 'we do not believe that it would add anything to this particular case that we would not be able to ask in a later motion.' Id."
   c. "Trial counsel's advice to petitioner to waive his right to a 'stand your ground' hearing was ineffective assistance of counsel. Trial counsel's statement that it would not add anything that 'we would not be able to ask in a later motion' was incorrect and indefensible."
2. "Trial Counsel Allowed Jurors to Believe Incorrectly that Petitioner had a Duty to Retreat"
   a. "Trial counsel's waiver of Petitioner's rights under S.C. Code Section 16-11-440(c) was ineffective assistance of counsel that resulted in prejudice to Petitioner because the jurors were informed by the Court, and the prosecutor argued in his closing, *that Petitioner had a duty to retreat.*" (emphasis original)
   b. "Pursuant to the plain language of 16-11-440(c), if Petitioner: 1) was attacked in a place where he had a right to be, then 2) he had the right to stand his ground and meet force with force, including deadly force, if 3) he reasonably believed it was necessary to prevent death or great bodily injury to himself or another person."
   c. "There was more than sufficient testimony and evidence presented at the trial from which the jurors could have concluded that Petitioner and Petitioner's friend Thoros were in a place where they had the right to be and that Petitioner stood his ground and met force with deadly force with the reasonable belief that it was necessary to prevent death or great bodily injury to himself or Thoros."
   d. "By waiving Petitioner's substantial rights under 16-11-440(c), trial counsel caused the jurors to believe that Petitioner had a duty to retreat pursuant to the older common law definition of self defense *that had been replaced by 16-11-440(c).*" (emphasis original)

e. "There was no valid trial strategy employed by trial counsel that could possibly justify subjecting Petitioner to a duty to retreat, *when he did not have a duty to retreat pursuant to 16-11-440(c).* Although trial counsel could have corrected this 'in a later motion,' she did not."

3. "Trial Counsel Failed to Object to the Prosecutor's Argument that Petitioner had a Duty to Retreat"
   a. Cites to Trial Transcript pp. 891-92.
4. "Trial Counsel Failed to Object to the Court's Jury Instruction that Petitioner had a Duty to Retreat"
   a. Cites to Trial Transcript pp. 927-31.

Applicant requests relief as follows:

- "Petitioner requests that this Court vacate Petitioner's sentence and order a new trial."

At the evidentiary hearing, Applicant proceeded forward on the allegations as set forth in the October 17, 2018, amendment.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. 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). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. 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, 540 U.S. 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. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" Harrington, 562 U.S. at 111-12 (quoting Strickland, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." Id. at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

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

Applicant presents his claims as four distinct allegations in the amendment. However, because of the closely related character of claims 2; 3, and 4, they are addressed together in Subsection 2, below.

1. Waiver of Right to Immunity Hearing

Applicant alleges Counsel was ineffective in waiving his right to an immunity hearing under S.C. Code Ann. §§ 16-11-440(C) and 16-11-450. The "Protection of Persons and Property Act" ("the Act") provides that "[a] person who uses deadly force as permitted by the provisions

of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force[.]" S.C. Code Ann. § 16-11-450. The Act further provides, in part, that:

> 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). "A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard[.]" State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) (citing State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011)).

Where a defendant seeks treatment under § 16-11-440(c), it is not enough for a defendant to establish that he was "not engaged in an unlawful activity" and was in a "place where he has a right to be." Rather, "[c]onsistent 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" save the duty to retreat. Id., 406 S.C. at 371, 752 S.E.2d at 266 (emphasis added). Notwithstanding the Act or other provisions of law, in order to establish self-defense, the defendant must show (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger. State v. Long, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997). "Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to

take the life of the assailant in self-defense." Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998) (citing State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997)).

After jury selection at trial, Counsel informed the trial court that she had discussed with Applicant whether to pursue a pre-trial hearing to invoke S.C. Code Ann. § 16-11-440(C), reviewed with him State v. Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013), and decided they would waive the pre-trial hearing. (Tr. 42-43). Counsel explained:

> The reasons for the wavier, first of all, we do not believe that it would add anything to this particular case that we would not be able to ask in a later motion. We also feel it's a matter of strategy, Your Honor, and my client understands that he is giving up the right to have the Court determine whether he's entitled to immunity. But as I've explained to him, he's not giving up his right to present the idea of self-defense and defense of others to the jury throughout the trial.

(Tr. 43, ll. 2-10). The trial court had Applicant sworn, and thereafter thoroughly explained the purpose of the pre-trial hearing in question, confirmed Applicant had discussed the subject with Counsel, and confirmed Applicant wished to waive the hearing. (Tr. 43-46).

An exhaustive five day trial followed, the facts of which are adequately summarized in the filings from the direct appeal, not again here restated.

At the PCR evidentiary hearing, Applicant testified he waived his right to an immunity hearing upon the advice of Counsel. Applicant claimed he did not know what it was, and expressed the hearing would have been "a bench trial I guess." Applicant could not recall Counsel explaining the Act to him, but did recall that she told him she had a different strategy. Applicant opined she was instead unprepared for an immunity hearing.

Applicant testified to his version of what occurred on the night in question. Applicant recalled that he went to the bar with a co-worker, where they enjoyed drinks while watching a game of pool. An argument broke out and the "guy with dreads" attacked Applicant's friend with a poolstick. Security then removed the attackers from the bar. Applicant recalled he then

went to his car to get cigarettes when he saw the same individuals attacking Thoro. Applicant, armed with a gun, moved to rescue Thoro, and Applicant admitted he shot one person in the elbow. Applicant noted that investigators never matched the deadly shot to his own gun. Applicant testified he feared Thoro was in great danger, explaining that his "whole hoodie was bloody."

Applicant opined that the use of deadly force was justified, and that he felt he could have won an immunity hearing. Applicant explained he had known Counsel his entire life, trusted her, and that she was a good lawyer who would do right by him. However, Applicant claimed she never explained her strategy to him.

Counsel testified she did not consider pursuing immunity until the trial judge brought up the subject. Counsel recalled she was concerned that pursuing the hearing would have effectively forced her to present their defense case before ever drawing a jury, exposing Applicant and other witnesses to impeachment based upon any inconsistencies their trial testimony may have with the testimony during the immunity hearing. Counsel offered that it may have been bad advice to Applicant to waive his immunity hearing, but firmly asserted that she had a reason for giving the advice. On cross-examination, Counsel further noted that she was not sure whether Applicant would have prevailed upon an immunity hearing, and again emphasized that going forward with the hearing might have created a record neither she nor Applicant would have wanted. Counsel acknowledged that ultimately Applicant waived the immunity hearing on the record.

This Court finds Applicant has failed to meet his burden of showing any deficiency on the part of Counsel, or that but for the deficiency alleged, the outcome of trial would have been different. Counsel reasonably weighed the likelihood of prevailing upon the immunity hearing

against the strategic disadvantage of placing the defense case on the record prior to the prosecution presenting its case to the jury, and determined the more favorable course was to waive immunity, wait until after the State presented its case-in-chief, and only then seek to present the case for self-defense. Counsel articulated her strategic reasoning at the evidentiary hearing and, accordingly, this Court cannot find her to have performed deficiently.

Even if Counsel had requested a pre-trial determination of immunity under the "stand your ground" statute, the facts would not have established by a preponderance of the evidence that Applicant was entitled to immunity. The evidence presented at trial provided that Applicant was not an innocent bystander, but actively participated in the original instigation of the conflict at the pool table. Applicant took the time to prepare for further conflict by going to his car to stow away his phone and marijuana, and retrieve his gun.[1] Thoro, the person in whose defense Applicant now claims to have acted, initiated both the original conflict and the second engagement outside. No evidence was introduced at the trial or the evidentiary hearing to establish that Thoro was in fear for his life; to the contrary, that Thoro returned to the opposing group of combatants and reinitiated the confrontation reflects the absence of fear. Both Thoro and Applicant enjoyed ample opportunity to peaceably return to their vehicles and leave the premises. No evidence was ever recovered to show anybody fired a weapon other than Applicant, and the fight prior to the shooting was for the most part an unarmed fistfight.[2] Applicant fired upon a retreating individual and others, and proceeded to stomp an unconscious victim who was no longer a threat. This Court perceives no reasonable probability that Applicant could have established by a preponderance of the evidence that either he or Thoros, let

[1] Concurrently, this Court does not find credible Applicant's testimony at the evidentiary hearing that he was merely going back for cigarettes.
[2] Evidence did provide the original confrontation involved one person armed with a pool cue, and that Thoro was struck with a bottle during the second fight.

alone both, were without fault in bringing about the conflicts. Applicant has failed to meet his burden of showing he could have by a preponderance of the evidence established he or Thoro reasonably feared for either person's life. Applicant has failed to show prejudice under Strickland.

For all of these reasons, Applicant's request for relief by way of this allegation is **DENIED.**

2. Failure to Object to State's Closing, Jury Instruction regarding Duty to Retreat

Applicant additionally contends Counsel was ineffective in failing to object to the State's arguments in closing and the trial court's instructions to the jury that the final element of self-defense was that Applicant had no other probable way to avoid the danger of death or serious bodily injury than to act as Applicant did in the particular circumstances at issue.

The Act provides for true immunity, and conditions under which it may be asserted, but a claim for immunity must be decided prior to trial and is not an affirmative defense. State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). As such, it is error to charge a jury with section 16-11-440(C). State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013). Nor is S.C. Code Ann. § 16-11-450(A) is to be charged to a jury; "it is a procedural subsection under which the circuit court may grant immunity from prosecution before a trial begins if the court finds the defendant acted lawfully in self-defense." State v. Marin, 404 S.C. 615, 625, 745 S.E.2d 148, 153-54 (Ct. App. 2013), aff'd as modified, 415 S.C. 475, 783 S.E.2d 808 (2016).

The Court finds Curry dispositive as to this claim. The Act did not obviate the applicability of the fourth prong of self-defense, and instruction thereon, in all self-defense cases. The conditions and provisions of the Act are limited to claims for total immunity, not modifications upon the traditional analysis of common law self-defense. As such, the State was

within its rights to argue, and the trial court was correct to instruct the jury that Applicant was subject to a "duty to retreat," as phrased by Applicant. No meritorious basis for objection existed, and thus Applicant cannot show deficiency on the part of Counsel. Applicant's claim for relief by way of this allegation is **DENIED.**

[*Conclusion and signature on following page*]

III. CONCLUSION

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

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

IT IS THEREFORE ORDERED:

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

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

AND IT IS SO ORDERED this 4th **day of** February, **2019.** 2020

Kristi Curtis

KRISTI C. CURTIS
Presiding Judge
Fifteenth Judicial Circuit

Sumter, South Carolina

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

RECEIVED
MAR 06 2020
S.C. SUPREME COURT

ARMANDO K. CHESTNUT, #228621,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Daniel A. Selwa, II, Esquire
516 29th Avenue North
Myrtle Beach, SC 29577

This 13th Day of February, 2020.

EVA COOK
LEGAL ASSISTANT FOR RESPONDENT

SWORN to before me this 13th Day of February, 2020.

Notary Public for South Carolina.
My Commission Expires: 8/9/28

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT
MURDER

At a Court of General Sessions, convened on July 26, 2012, the Grand Jurors of Horry County present upon their oath:

MURDER

CDR: 0116 16-03-0010,0020

That Armando K Chestnut and/or Co-Defendants did in Horry County, on or about March 6, 2012, willfully, feloniously, and intentionally kill the victim, Mel McFadden, with malice aforethought, either express or implied, by means of a shooting, and the victim did die as a proximate result thereof on or about March 6, 2012 in Horry County, in violation of Section 16-03-0010, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

J. GREGORY HEMBREE
FIFTEENTH CIRCUIT SOLICITOR

WITNESSES

Everest Carrison Myrtle Beach Police Department

REST WARRANT NUMBER

M350858
CDR: 0116 16-03-0010, 0020
DOA: 3/7/2012

ACTION OF GRAND JURY

JUL 26 2012

Foreperson of Grand Jury
Date:

VERDICT

BILL

Foreperson of Petit Jury
Date:

DOCKET NO. 2012-GS-26- 03115

The State of South Carolina

County of Horry

Bradley C. Richardson
12H01112

COURT OF GENERAL SESSIONS

August, 2012 TERM

THE STATE

vs.

Armando K Chestnut **B/ M**

[redacted]

ATTORNEY: Pratt, Barbara Wilson

Indictment for

MURDER

J. Gregory Hembree, Solicitor

ORIGINAL

1111

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT
ATTEMPTED MURDER

At a Court of General Sessions, convened on July 26, 2012, the Grand Jurors of Horry County present upon their oath:

ATTEMPTED MURDER
CDR: 3410 16-03-0029

That Armando K Chestnut and/or Co-Defendants did in Horry County on or about March 6, 2012 with intent to kill Damien Canty, attempt to kill the victim with malice aforethought, either expressed or implied in violation of Section 16-3-29, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

J. GREGORY HEMBREE
FIFTEENTH CIRCUIT SOLICITOR

WITNESSES

Everest Carrison Myrtle Beach Police Department

ARREST WARRANT NUMBER

M350859
CDR: 3410 16-03-0029
DOA: 3/7/2012

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: JUL 26 2012

VERDICT

TRUE BILL

Foreperson of Petit Jury
Date:

DOCKET NO. 2012-GS-26- 03116

The State of South Carolina

County of Horry

Bradley C. Richardson
12H01112

COURT OF GENERAL SESSIONS

August, 2012 TERM

THE STATE

vs.

Armando K Chestnut **B/ M**

[redacted]

ATTORNEY: Pratt, Barbara Wilson

Indictment for

ATTEMPTED MURDER

J. Gregory Hembree, Solicitor

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT
POINTING / PRESENTING A FIREARM

At a Court of General Sessions, convened on July 26, 2012, the Grand Jurors of Horry County present upon their oath:

POINTING / PRESENTING A FIREARM

CDR: 0122 16-23-0410

That Armando K Chestnut and/or Co-Defendant(s) did in Horry County on or about March 6, 2012, point or present a loaded or unloaded firearm, to wit: a handgun, at Damien Canty and/or Mel McFadden, in violation of Section 16-23-0410, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

J. GREGORY HEMBREE
FIFTEENTH CIRCUIT SOLICITOR

WITNESSES

Everest Carrison Myrtle Beach Police Department

ARREST WARRANT NUMBER

M350860
CDR: 0122 16-23-0410
DOA: 3/7/2012

ACTION OF GRAND JURY

JUL 26 2012

Foreperson of Grand Jury
Date:

VERDICT

TRUE BILL

Foreperson of Petit Jury
Date:

DOCKET NO. 2012-GS-26- 03117

The State of South Carolina

County of Horry

Bradley C. Richardson
12H01112

COURT OF GENERAL SESSIONS

August, 2012 TERM

THE STATE

vs.

Armando K Chestnut **B/ M**

[redacted]

ATTORNEY: Pratt, Barbara Wilson

Indictment for

POINTING / PRESENTING A FIREARM

J. Gregory Hembree, Solicitor

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT
[redacted]/ASSAULT AND BATTERY BY MOB
SECOND DEGREE – SERIOUS BODILY INJURY

At a Court of General Sessions, convened on July 26, 2012, the Grand Jurors of Horry County present upon their oath:

1116

~~LYNCHING~~/ASSAULT AND BATTERY BY MOB
SECOND DEGREE – SERIOUS BODILY INJURY

CDR: 3432 16-03-0210(C)

That Armando K Chestnut, while joined with others and acting as a mob, did in Horry County, on or about March 6, 2012, commit an act of violence which resulted in serious bodily injury to [redacted] ~~McFadden~~ and/or Damien Canty, in violation of Section 16-3-0210(C), S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

J. GREGORY HEMBREE
FIFTEENTH CIRCUIT SOLICITOR

WITNESSES

Everest Carrison Myrtle Beach Police Department

DOCKET NO. 2012-GS-26- 03118

The State of South Carolina

County of Horry

Bradley C. Richardson
12H01112

COURT OF GENERAL SESSIONS

August, 2012 TERM

THE STATE

vs.

Armando K Chestnut **B/ M**

[redacted]

ATTORNEY: Pratt, Barbara Wilson

ARREST WARRANT NUMBER

M350861
CDR: 3432 16-03-0210(C)
DOA: 3/7/2012

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: JUL 26 2012

VERDICT

Indictment for

~~ENDANGERING~~/ASSAULT AND BATTERY BY MOB
SECOND DEGREE – SERIOUS BODILY INJURY

ORIGINAL

J. Gregory Hembree, Solicitor

Foreperson of Petit Jury
Date:

1117

STATE OF SOUTH CAROLINA)
COUNTY OF Horry) IN THE COURT OF GENERAL SESSIONS
STATE VS.)
Armando K Chestnut)
AKA:)
Race: BLACK Sex: M Age: 36)
[redacted])
Address: J. Reuben Long Detention Center)
City,State,Zip: Conway, SC 29526)
[redacted] SID#:)
*CDL Yes☐ Nc☐ CMV Yes☐ No☐ Hazmat Yes☐ Nc☐)

1118

INDICTMENT/CASE#: 2012GS2603115
A/W#: M350858
Date of Offense: 3/6/2012
S.C. Code § : 16-03-0010, 0020
CDR Code #: 0116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Voluntary Manslaughter

in violation of § 16-03-0050 of the S.C. Code of Laws, bearing CDR Code # 0217
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☒ §17-25-45

The charge is: ☐ As Indicted, ☒ Lesser Included Offense. ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation. ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Richardson, Bradley C.	SCB68305 SC Bar#	Defendant	Attorney for Defendant	SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 25 years without the possibility of parole pursuant to 17-25-45 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $ _____; plus costs and assessments as applicable*; the balance is suspended probation for 10 17-25-45. months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☑ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code§17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$ 3.90
TOTAL		$ 133.90 = 173.90

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel. § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Melanie Huggins-Ward
Court Reporter: Kay Richardson
Presiding Judge
Judge Code: 128
7/19/13

STATE OF SOUTH CAROLINA)
COUNTY OF Horry)
STATE VS.)
Armando K Chestnut)
AKA:)
Race: BLACK Sex: M Age: 36)
[redacted])
Address: J. Reuben Long Detention Center)
City,State,Zip: Conway, SC 29526)
[redacted] SID#:)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2012GS2603116
A/W#: M350859
Date of Offense: 3/6/2012
S.C. Code § : 16-03-0029
CDR Code #: 3410

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Murder / Attempted Murder

in violation of § 16-03-0029 of the S.C. Code of Laws, bearing CDR Code # 3410
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Richardson, Bradley C.	SCB68305			
SC Bar#		Defendant	Attorney for Defendant	SC Bar#

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections ☐ County Detention Center, for a determinate term of ~~days/months/years~~ or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $ _____; plus costs and assessments as applicable*; the balance is suspended probation for 17-25-45. months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

Life Imprisonment without the possibility of parole pursuant to

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☑ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code§17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$ 3.90
TOTAL		$133.90

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal. consecutive ~~weekly~~/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel. § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Melanie Higgins Ward
Court Reporter Kay Richardson

Presiding Judge
Judge Code: _____
7/19/13

STATE OF SOUTH CAROLINA)
COUNTY OF Horry)
STATE VS.)
Armando K Chestnut)
AKA:)
Race: BLACK Sex: M Age: 36)
DOB: [redacted])
Address: J. Reuben Long Detention Center)
City,State,Zip: Conway, SC 29526)
DL#: [redacted] SID#:)
*CDL Yes☐ Nc☐ CMV Yes☐ No☐ Hazmat Yes☐ Nc☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2012GS2603117
A/W#: M350860
Date of Offense: 3/6/2012
S.C. Code § : 16-23-0410
CDR Code #: 0122

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐PLEADS
TO: Weapons / Pointing and presenting firearms at a person (0-5)

in violation of § 16-23-0410 of the S.C. Code of Laws, bearing CDR Code # 0122
☒ NON-VIOLENT ☐ VIOLENT ☐SERIOUS ☐MOST SERIOUS ☐Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐§17-25-45

The charge is: ☒As Indicted, ☐Lesser Included Offense, ☐Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Richardson, Bradley C.	SCB68305 SC Bar#	Defendant	Attorney for Defendant	SC Bar#

WHEREFORE, the Defendant is commited to the ☒ **State Department of Corrections,** ☐ **County Detention Center,**
for a determinate term of 5 ~~days/months~~/years or ☐ under the **Youthful Offender Act** not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended **probation** for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2012-GS-26-3115 & 3116
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code§17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$ 3.90
TOTAL		$ 133.90

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel.
§ 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Melanie Huggins Howell
Court Reporter Kay Richardson
Presiding Judge
Judge Code: 129
Sentence Date: 7/19/13

STATE OF SOUTH CAROLINA ✓)
COUNTY OF Horry)
STATE VS.)
Armando K Chestnut)
AKA:)
Race: BLACK Sex: M Age: 36)
DOB: [redacted])
Address: J. Reuben Long Detention Center)
City, State Zip: Conway, SC 29526)
DL#: [redacted] SID#:)
*CDL Yes☐ Nc☐ CMV Yes☐ No☐ Hazmat Yes☐ Nc☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2012GS2603~~116~~ 3118
A/W#: ~~M350859~~ M350861
Date of Offense: 3/6/2012
S.C. Code § : ~~16-03-0029~~ 16-3-210(c)
CDR Code #: ~~3410~~ ~~3410~~ 3432

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Assault / Assault & Battery 2nd degree (0-3)
in violation of § 16-03-0600(D)(1) of the S.C. Code of Laws, bearing CDR Code # 3413
☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: SCB68305
Richardson, Bradley C. SC Bar# Defendant Attorney for Defendant SC Bar#

~~WHEREFORE~~, the Defendant is commited to the ☑ **State Department of Corrections,** ☐ **County Detention Center,**
for a determinate term of 3 ~~days~~/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended **probation** for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2012-GS-26-3115 & 3116
☑ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code§17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$ 3.90
TOTAL		$ 133.90

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal. consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel. § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Melanie Huggins-Ward
Court Reporter Kay Richardson
Presiding Judge
Judge Code:
Sentence Date: 7/19/13