EST. 1905
SOUTH CAROLINA DEPARTMENT OF
ARCHIVES & HISTORY

22 October 2018

Mr. Eugene Thomas #222351
McCormick Correctional Institution F1-A-271
386 Redemption Way
McCormick, SC 29899

Dear Mr. Thomas:

I checked the following acts that you requested and but could not locate a visible impression of the Great Seal: 1993 Act No. 184 and 1998 Act No. 402.

I checked the following acts that you requested and found that they have a visible impression of the Great Seal: 1982 Act No. 358; 1986 Act No. 462; 1995 Act No. 83; 1997 Act No. 113; and 1997 Act No. 136.

Sincerely,

Steven D. Tuttle
Deputy Director
Archives & Records Management

EXAMPLE OF PETITIONER'S TRAVERSE (continued)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

ZACHARY SMITH	§	
	§	
Petitioner	§	
	§	
v.	§	No. 07-06068-CV-SJ-ODS
	§	
MIKE KEMNA	§	
	§	
Respondent	§	

PETITIONER'S TRAVERSE TO RESPONSE TO ORDER TO SHOW CAUSE

Petitioner Zachary Smith makes his traverse to the response of respondent in this matter.

Standard for granting relief.

As noted by the respondent, 28 U.S.C. §2254(d) provides a standard for when relief can be granted for claims adjudicated on the merits in state court: Relief should be granted when the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The United States Supreme Court interpreted that language in *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000).

The Court held that §2254(d)(1)'s "contrary to" clause required the rejection of state court decisions which were "substantially different from the relevant precedent of this Court." The court gave an example of a misinterpretation of *Strickland v. Washington*, 466 U.S. 668, 694 (1984):

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different, "opposite in

EXAMPLE OF PETITIONER'S TRAVERSE (continued)

> character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different."

Williams (Terry) v. Taylor, 529 U.S. 362, 405-406 (2000).

The Court then considered the situation in which a state court correctly identifies the applicable Supreme Court precedent and the standards contained in that precedent, but applies them unreasonably to the facts of the case. The Court held that this situation requires relief under §2254(d)(1): "A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision 'involving an unreasonable application of . . . clearly established Federal law.'" *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-408 (2000). The court declined to decide how the "unreasonable application" clause applies when a state court decision either extends a legal principle from Supreme Court precedent to a new context or declines to do so.

The Court held in *Williams (Terry)* that an *incorrect* application of law is not the same as an *unreasonable* application of law. But the reasonableness of the state court decision is evaluated objectively by the reviewing court, not by any sort of "majority rule" analysis. The Court specifically rejected the standard of the Fourth Circuit, which had focused on whether "reasonable jurists" would find the state court determination to be reasonable. *)Williams (Terry) v. Taylor*, 529 U.S. 362, 409-410 (2000).

While *Williams (Terry)* did not enunciate standards for the reasonableness determination, it did provide an illustration of the proper analysis when it applied the standard to the decision of the Virginia Supreme Court in Mr. Williams' case, and found that court's decision to be an unreasonable application of clearly established federal

Exhibit (3)

EXAMPLE OF PETITIONER'S TRAVERSE (continued)

law. In reaching this conclusion, the Court examined the reasoning of the Virginia Supreme Court both as to the legal standard which it applied and as to the application of that standard to the facts of the case. The court found two aspects of the Virginia Court decision to be unreasonable: First, the Virginia Supreme Court applied the wrong legal standard when it held that the prejudice standard of *Strickland v. Washington*, 466 U.S. 668, 688 (1984) had been modified by *Lockhart v. Fretwell*, 506 U.S. 364 (1993). Second, it failed to evaluate the evidence in the case properly in accordance with the correct standard when it found that the failure of Mr. Williams' counsel to present penalty phase evidence did not prejudice him. *Williams (Terry) v. Taylor*, 529 U.S. 362, 413-414 (2000). Accordingly, the United States Supreme Court reversed Mr. Williams' sentence of death.

The United States Supreme Court recently expanded on its analysis of 28 U.S.C. §2254(d):

> AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Carey v. Musladin*, . . .127 S.Ct. 649, 656. . . (2006) (KENNEDY, J., concurring in judgment). Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. 63, 76. . .(2003). The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner. See, e.g., *Williams v. Taylor*, 529 U.S. 362, . . . (finding a state-court decision both contrary to and involving an unreasonable application of the standard set forth in *Strickland v. Washington*, 466 U.S. 668. . . (1984)).

Panetti v. Quarterman, 127 S.Ct. 2842, 2858 (2007).

In addition to the situation where a state court decision is "contrary to" or "an unreasonable application of clearly established federal constitutional law, 28 U.S.C.

EXAMPLE OF PETITIONER'S TRAVERSE (continued)

§2254(d)(2) provides that a state court decision must be reversed, and relief must be granted if the state court proceeding "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." The application of this standard was discussed in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (*Miller-El I*):

> Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, §2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding [citations omitted.] Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

Citing *Miller-El I*, the court in *Collins v. Rice*, 365 F.3d 667, 685 (9th Cir. 2004), found the appellate court's determination that the trial judge properly accepted proffered "neutral" bases for peremptory challenges was not supported by the record, commenting,

> Contrary to the assertion in the dissent, we have not substituted our own judgment for that of the state court. "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Mille-El*, 123 S.Ct. at 1041; see also *Hall v. Dir. of Corrs*, 343 F.3d 976, 984 n. 8 (9th Cir.2003) ("AEDPA, although emphasizing proper and due deference to the state court's findings, did not eliminate federal habeas review. Where there are real, credible doubts about the veracity of essential evidence and

EXAMPLE OF PETITIONER'S TRAVERSE (continued)

> the person who created it, AEDPA does not require us to turn a blind eye.").

Also applying *Miller-El I*, the court in *Parsad v. Greiner*, 337 F.3d 175, 180-181 (2nd Cir. 2003), found that the state court's determination that a petitioner was not "in custody" for Miranda purposes was an unreasonable determination of the facts presented to the state court.

Explaining its ruling that the state court decision that the petitioner's plea agreement had not been breached was an unreasonable determination of the facts, the court in *Gunn v. Ignacio*, 263 F.3d 965, 970 (9th Cir. 2001), stated the standard as follows: "We read the 'unreasonable determination of the facts' criterion to require 'more than mere incorrectness,' such that the state court's fact finding is so 'clearly erroneous' as to leave us with a 'firm conviction' that its determination was mistaken on the evidence before it." (Citing *Torres v. Prunty*, 223 F.3d 1103, 1107-1108 (9th Cir.2000). See also *McClain v. Prunty*, 217 F.3d 1209, 1223 (9th Cir. 2000) (Finding state court decision that prosecutor's "race-neutral" reasons justified peremptory strike was unreasonable determination of the facts).

When it revisited Mr. Miller-El's case, the Supreme Court found that the Texas court's determination of the facts was unreasonable under 28 U.S.C. §2254(d)(2): "The state court's conclusion that the prosecutors' strikes of Fields and Warren were not racially determined is shown up as wrong to a clear and convincing degree; the state court's conclusion was unreasonable as well as erroneous." *Miller-El v. Dretke*, 525 U.S. 231, 266 (2005) (*Miller-El II*).

Finally, if a legal issue has not been considered by the state court, this court must review it de novo. *Wiggins v. Smith*, 539 U.S. 510, 531 (2003).

EXAMPLE OF PETITIONER'S TRAVERSE (continued)

Merits of Grounds for Relief.

The State has presented its views on the preservation of the issues in a separate section. Believing that this issue is intertwined with the merits, Mr. Smith will consider the state's contentions regarding preservation in connection with each separate issue.

Ground One: Denial of due process of law when prosecutor was permitted to testify

The state first contends that this Court's review of this ground is limited because the Missouri Court of Appeals reviewed it only for plain error. However, ineffective assistance of counsel provides legal cause for a failure to preserve error, provided that the instance of ineffective assistance of counsel is raised before the state court. *Coleman v. Thompson*, 501 U.S. 722, 754 (1991); *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Edwards v. Carpenter*, 529 U.S. 446, 450-454 (2000). Mr. Smith raised counsel's ineffectiveness for failing to preserve this error fully in his state post-conviction motion, as conceded by the state in its response to Ground Four, which concerns this instance of ineffective assistance of counsel. Thus, this Court may conduct plenary review of this ground.

Moreover, while there is contrary Eighth Circuit authority, the majority of circuits hold that there is no procedural bar where plain error review is conducted by the state court. See, e.g., *Sanders v. Cotton*, 398 F.3d 572, 579-580 (7th Cir. 2005) (State court's reliance on procedural bar was not sufficiently explicit to bar review because reference to the procedural issue was immediately followed by consideration of the merits of the ground for relief); *Harding v. Stemes*, 380 F.3d 1034, 1043-1044 (7th Cir. 2004), *cert. denied*, 543 U.S. 1174 (2005). *Clinkscale v. Carter*, 375 F.3d 430, 442 (6th Cir. 2004); *Riley v. Taylor*, 277 F.3d 261, 273-275 (3rd Cir. 2001).

ATTACHMENT (3)

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Eugene Thomas, S.C.D.C. No. 222351, Applicant, vs. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT C.A. No.: 2015-CP-23-2998 ORDER ENTERED COMPUTER

Applicant filed this post-conviction relief application on May, 2015. The matter was heard October 24, 2016. Applicant was represented by Brian P. Johnson, Esq. The State was represented by Patrick Schmeckpeper, Esq.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the May 2010 term of General Sessions for third-degree burglary (2009-GS-23-9349), armed robbery (2009-GS-23-9350, count 1), and possession of a weapon during commission of a violent crime (2009-GS-23-93580, count 2). Scott D. Robinson, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On September 11, 2012, the Honorable Markley Dennis, Jr. sentenced the Applicant to concurrent terms of 5 years for third-degree burglary, life imprisonment without parole for armed robbery, and 5 years for possession of a weapon during commission of a violent crime.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. *State v. Thomas*, Op. No. 2014-UP-360 (S.C. Ct. App. filed October 15, 2014). The Remittitur was sent on November 3, 2014.

In his application for post-conviction relief, Applicant alleges nine grounds for relief. At his hearing, these were compressed to four. Each will be addressed separately herein below.

First, Applicant alleges trial counsel was ineffective for failing to present his defense of alibi at trial. The first time Applicant's case was called for court, the testimony is that trial counsel had not complied with Rule 5(e)(1), South Carolina Rules of Criminal Procedure, which trial counsel acknowledged. At the first call, trial counsel had available two alibi witnesses and the State indicated it would waive notice if only one testified. This proposal was refused and the case continued.

At the second call of Applicant's case, trial counsel had alibi witnesses available and notice was not an issue. At his post-conviction relief hearing, Applicant called two witnesses, Demeco Romero Thomason and Yvonne Dee McBee. Both testified that Applicant was with them during the day of the robbery from early until around 3:00 a.m. the following day. However, trial counsel, with Applicant's approval, utilized acceptable trial strategy to not present a defense to preserve his right to make the final closing argument. Trial counsel testified he advised Applicant as to the pros and cons of preserving final argument and Applicant agreed with trial counsel's strategy to not call witnesses. The record reflects Applicant's satisfaction with this strategy (Trial Record p. 283, l. 20 through p. 284, l. 3).

judge made it clear to the jury that counsels' "remarks" were not evidence. (Trial Record p. 299, ll. 6-8).

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on has having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. *See Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by "its reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

Applicant argues that had trial counsel done proper research, he would have discovered the 1981 conviction was a qualifier. This is a convoluted argument that seems to have no logic. Applicant was repeatedly advised he was facing life without parole if convicted of armed robbery. Applicant seems to claim that if he was absolutely sure he was facing life without parole he would not have gone to trial. The record is clear that he was, in fact, absolutely sure that, if convicted of either armed robbery or attempted armed robbery, he was facing life without parole.

Third, Applicant alleges trial counsel should have moved to suppress the gun that was ultimately entered into evidence. This is based on a search and the ultimate seizure of the gun when applicant was being arrested on a warrant at a motel. Applicant argues at the time the bag, the dice game, and gun were found inside another bag, he was handcuffed and there was no necessity for a search of the room without law enforcement obtaining a search warrant. The testimony of one of the officers on the scene was that the bag containing the items was within Applicant's arms-reach while he was dressing. (See Trial Record p. 261, ll. 1-11). A search does not violate the Fourth Amendment to the Constitution of the United States when it is incident to an arrest and confined to the immediate vicinity of the arrest. *State v. Brown*, 289 S.C. 581, 347 S.E.2d 882 (1986); *Shipley v. California*, 395 U.S. 818, 89 S. Ct. 2053, 23 L. Ed. 732 (1969); *Stoner v. California*, 376 U.S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964). Trial counsel did object to admission of the gun on the grounds of relevance. This objection was overruled (See Trial Record p. 266, ll. 13-19).

Fourth, Applicant argues that the State in its opening and closing talked about "facts and items not put into evidence." Since the Applicant did not call the Court's attention to the specifics of this argument, the Court must find this claim without merit. Additionally, the trial

2444

Where trial counsel articulates a valid reason for employing a certain strategy, such choice will not be deemed ineffective assistance of counsel. *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). In the instant case, the trial strategy exercised by trial counsel was well within the trial strategy which a reasonable competent attorney would have exercised under the same or similar circumstances.

Second, Applicant alleges trial counsel did not properly advise him that if he were convicted of armed robbery or attempted armed robbery, Applicant would be subject to a mandatory sentence of life without parole. The testimony at the hearing convinces the court that Applicant was well aware of his potential life without parole sentence. He received two notices that stated that the State would seek a life without parole sentence. One listed only armed robbery as a qualifying offense. The second listed both armed robbery and attempted armed robbery. Applicant acknowledged to the trial judge that he knew he would (not could) receive a sentence of life without parole (Trial Record p. 9, ll. 4-8).

As to this second allegation, Applicant testified that that trial counsel was ineffective for not "investigating" and "researching" whether or not Applicant's 1981 conviction for murder in Florida was a qualifying conviction. As to the latter point there can be no argument that murder is a qualifier for life without parole regardless of the state of conviction. *See* S.C. Code Ann. § 17-25-45 (1976 as amended).

Section 17-25-45 has no time parameters as to a time outside of which a qualifying conviction is too remote. In spite of this, trial counsel made a vigorous effort to get the trial judge to make a finding that the Florida conviction was too remote to be used as a qualifier (Trial Record p. 348, l. 10 through p. 349, l. 5).

Wherefore, I find Applicant has not proved by a preponderance of the evidence that trial counsel was ineffective on any of the grounds presented by Applicant at the post-conviction relief hearing. Therefore, Applicant's application for Post-Conviction Relief is denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. *See* Rules 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.

October 7th, 2016
Greenville, South Carolina

John C. Hayes, III #6
Presiding Judge

> houses may show as to the successive steps which may have been taken in the passage of the original bill."
>
> Reasons for the adoption of the rule become apparent. Public policy, certainty as to what the law is, convenience, and that respect due by the courts to the wisdom and integrity of the Legislature, a coordinate branch of the government, all require that the enrolled bill, when fair upon its face, should be accepted without question by the courts. [citations omitted.]

The Court in Wingfield then proceeded to state that:

> [t]he Chester case, supra, is conclusive of the questions raised by the petitioners in the present case under their first general objection. The enrolled bill appears regular upon its face: It was duly signed by the President of the Senate and the Speaker of the House of Representatives, approved by the Governor, and filed in the Office of the Secretary of State with the great seal affixed. Having been properly authenticated as required by the Constitution, it becomes the "sole expository of its own contents and the conclusive evidence of its existence and valid enactment," and this court cannot look to the journals of either house or to other extrinsic evidence, in order to ascertain its history or its provisions, or to inquire into the manner of its enactment.

144 S.E. at 850 (emphasis added). The "enrolled bill rule" continues to be the law in South Carolina in accordance with Art. III, § 18 of the Constitution. See Med. Soc. of S.C. v. Med. Univ. of S.C., 334 S.C. 270, 278, 553 S.E.2d 352, 356 (1999) ["The enrolled bill rule provides that an Act ratified by the presiding officers of the General Assembly, approved by the Governor and enrolled in the Office of Secretary of State is conclusively presumed to have been properly passed. Such an Act is not subject to impeachment by evidence outside the Act as enrolled to show it was not passed in compliance with law."] (discussing Wingfield and concluding it to be "dispositive in this case."). See also State v. Carr, 5 N.H. 367 (1831) ["The Seal of the State is of itself the highest test of authenticity" and serves without other proof to authenticate a copy of an act to be admitted into evidence].

Your questions pose the converse of cases involving the "enrolled bill rule." You are asking essentially what is the legal effect upon an Act's validity when Art. III, § 18 is not complied with. In this instance, you state that the Secretary of State has failed to affix the Great Seal of the State upon a number of Acts. Our courts have yet to address this question directly.

Of course, as with the potential unconstitutionality of any Act in question, this Office has consistently advised that

> . . . legislation passed by the General Assembly is presumed constitutional. Horry County School Dist. v. Horry County, 346 S.C. 621, 631, 552 S.E.2d 737, 742 (2001) ("All statutes are presumed constitutional and will, if possible, be construed as to render them valid."). "A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it