

1 MR. GRIMES: Your Honor, I think it was May of last, last year in
2 Charleston, we had an evidentiary hearing in this matter. At the beginning –
3 At the beginning of the hearing, I believe I informed The Court that Mr.
4 Bowman has concerns of the quality of my representation and The Court
5 asked him several questions about it. It went through the evidentiary hearing
6 and after the end of it —

7 THE COURT: Did you – Was it decided that you would represent him
8 or he would represent himself?

9 MR. GRIMES: That I would represent him.

10 THE COURT: Okay.

11 MR. GRIMES: And then I think at the end of the hearing The Court
12 again asked if I'd covered everything and Mr. Bowman said yes and then
13 about a week later I got a letter from him where he – which I construed as,
14 basically, he wanted to withdraw the amended complaint that I had brought
15 forward. And, somehow, the material I have, I believe contained some
16 attorney/client material that I didn't want anyone to look at. I ask The Court
17 not to open that portion of the letter. I think I forwarded it, the unprivileged
18 matters, to The Court.

19 As I said, we've kind of been waiting. We had a hearing before Judge
20 Dennis. He – and then Judge Dennis, I believe he didn't have jurisdiction over
21 this case. I think that was September, and then we set it for this date. It's
22 suppose to be in grand jury in Charleston but that canceled out, we came
23 down here.

24 I believe Mr. Bowman, basically it his motion. I'll let he argue it. If he
25 doesn't —

1 THE COURT: Okay, well, first off, I'm gone ask Mr. McFarland if he'll
2 just give me the background of the case.

3 And I presume I – Did I sign an order on this case?

4 MR. MCFARLAND: Your Honor, an order has not been signed yet.
5 We had the hearing, which is —

6 THE COURT: Uh-huh.

7 MR. MCFARLAND: You've denied all issues except one. There was
8 a Jackson versus Deno hearing issue and you initially asked both parties to
9 brief that particular issue. But before we had an opportunity to do that, Mr.
10 Grimes got his letter from Mr. Bowman stating whatever it states. And then,
11 so we kind of put that – put that briefing on hold.

12 THE COURT: Because we couldn't go forward. Mr. Grimes couldn't
13 do anything because he wasn't clear about the representation.

14 MR. MCFARLAND: Correct, and that's where we are.

15 THE COURT: Okay, Mr. Bowman, I'll be glad to hear from you, sir.
16 What are your wishes?

17 PLAINTIFF MARCUS BOWMAN: Judge Gregory, I would like to not
18 go forward with the issues that, that he's raised. Because most of the issues
19 that he raise, he ought to and they amount to ineffective assistance of
20 counsel.

21 THE COURT: Most of the issues do what, now? I didn't —

22 PLAINTIFF MARCUS BOWMAN: The issues that he raise . . .

23 THE COURT: Uh-huh.

24 PLAINTIFF MARCUS BOWMAN: . . . they not amount to a
25 constitutional violation of ineffective assistance of trial counsel.

1 THE COURT: Okay.

2 PLAINTIFF MARCUS BOWMAN: And I would like that I be granted a
3 new hearing because the issues don't -- I can't even go forward, Your Honor,
4 because if it took them to --

5 THE COURT: Well, let me ask you this. Of course, the lawyer can't
6 make the facts. He has to take the facts as they come to him and there was a
7 record and you obviously have studied up on this. You know a lot about the,
8 the criminal procedure. What, what issues do you -- did you want to make
9 that he didn't make?

10 I think I probably asked you this before.

11 PLAINTIFF MARCUS BOWMAN: Well, Judge Gregory, there was
12 some -- I had my paper work prepared up at Kirkland, already prepared to
13 raised and the amendment that he amended, Your Honor, I didn't amend. He
14 amended -- All he has to -- All he has to -- He receive my questionnaire to Mr.
15 Jim Smiley.

16 And as -- I believe I sent you some copies of quite a few of the -- some
17 paperwork that I sent you making complaints about my -- his representation
18 toward me.

19 As far as him, you know, altering it to where it didn't amount to
20 ineffective assistance of counsel, I would request that The Court at least grant
21 me a new pcr hearing and new counsel to represent me because Land versus
22 State (phon.), okay, I'll read as far as counsel -- counsel change and alter all
23 my -- counsel changed and altered. Altering amounted to a violation of the
24 Code of Conduct and violates 17.27 90, causing the unsuccessful petition,
25 causing counsel -- because counsel failed to properly raise the issues

1 pursuant to Land versus State.

2 THE COURT: Okay.

3 What was the issue with the Jackson v Deno hearing?

4 MR. GRIMES: Question was, I think the law enforcement had
5 threatened him with a death penalty and some other notes were introduced as
6 an exhibit. And trial counsel had done a Jackson v Deno hearing but it was
7 very cursory and wasn't a full-fledged hearing.

8 THE COURT: Was it as statement?

9 MR. GRIMES: Yes, sir. It was – To refresh The Court's memory, this
10 was murder case where he did give a statement saying he was at the scene,
11 witnessed three people shoot the victim and made a dying declaration was
12 there to shoot him. And that statement – It was an informant who gave some
13 testimony saying that he saw him running away from the scene and wasn't —

14 THE COURT: Was this when they was robbing a juck-joint or
15 something? Or that's not it?

16 MR. GRIMES: It was an elderly man. I think it was – As I recall from
17 The State's side of the case, he was walking down the street; someone came
18 up and asked —

19 THE COURT: And he was picked up about a block away?

20 MR. GRIMES: Yes, sir.

21 THE COURT: I remember the case, yeah.

22 MR. GRIMES: No, it wasn't – I don't think he was picked up a block
23 away. I think he – they picked up some days later, after the crime occurred.

24 PLAINTIFF MARCUS BOWMAN: They picked me up four days later,
25 after the —

1 THE COURT: Oh, okay. Okay.

2 PLAINTIFF MARCUS BOWMAN: And I was tried to get all my issues
3 and claims in and they was altered and I couldn't. He only – The one that he
4 did raise, Your Honor, he altered them where they did not amount to
5 ineffective assistance of counsel.

6 THE COURT: Well, weren't you given the opportunity to put in
7 anything you wanted to at that hearing?

8 PLAINTIFF MARCUS BOWMAN: Your Honor, my – due to m you
9 negligence and my ignorance, I did object to it once but an ongoing,
10 continuous objection, I didn't know that I should've —

11 THE COURT: Now, my point's this, not – did you – did you not have
12 the opportunity to testify and tell me, as the hearing officer, the judge,
13 anything you wanted to about what you thought Mr. Smiley, thank you trial
14 counsel, did wrong? Didn't you have every opportunity to do that?

15 PLAINTIFF MARCUS BOWMAN: Yes, sir, but you also asked me
16 whether I wanted my counsel to represent me.

17 THE COURT: Uh-huh.

18 PLAINTIFF MARCUS BOWMAN: And I said yes, if he would raise my
19 claims properly. But being that I objected to the amendment that he raised, I
20 assumed that the amendment was not gonna continue to go forward.

21 THE COURT: Okay.

22 Well, I believe that the claims were – that – that – In other words, the
23 way thank you system works, basically, you tell him what happened, the
24 factual basis, just the common sense way of explaining it, and then he tries to
25 figure out a way to – a peg to hang that on with respect to the law or the

1 criminal procedures. That protect your constitutional rights and so forth. If
2 you don't give him the facts or the names of witnesses for him to talk to
3 that – where he can find out these facts, what – I don't know what the lawyer
4 can do.

5 PLAINTIFF MARCUS BOWMAN: Well, Your Honor, it wasn't a
6 question of the witnesses. It's a question to have my claims raised properly
7 and he didn't.

8 THE COURT: And which claim was that?

9 PLAINTIFF MARCUS BOWMAN: Okay, whereas I had the
10 perjury – the witness perjuring on the stand, he altered to booster saying that
11 the attorney only helped to booster the attorney's – attorney's – I mean the
12 witness testimony; whereas I prepared my case in Strickland as the booster
13 he raised. And it was perjury. And he altered all this.

14 And, also, he raised other claims, and also he raised other claims that
15 whereas I've already been denied at my – at the supreme court, that I could
16 not offer evidence of another person's guilt inconsistent with my own.

17 And . . .

18 THE COURT: Okay. Well, let me ask you this. Do you wish Mr.
19 Grimes to present to The Court anything on the Jackson v Deno hearing, the
20 lawfulness – whether your admissible or confession should be admissible in
21 The Court as to whether Mr. Smiley improperly handled that Jackson v Deno
22 hearing? Or do you wish to – him not to?

23 PLAINTIFF MARCUS BOWMAN: I would not like to go forward with
24 that issue, Your Honor.

25 THE COURT: Okay.

1 PLAINTIFF MARCUS BOWMAN: I would just like to try to get my
2 claims raised properly as they were presented before.

3 THE COURT: Okay. Well, that's good, then. I understand that.
4 Is there anything else?

5 MR. GRIMES: I'm not sure if my client realizes it but that's the one
6 issue that The Court took under advisement, which obviously shows that's
7 some merit. If he withdraws that, then he's —

8 THE COURT: I think you understand that, don't you?

9 PLAINTIFF MARCUS BOWMAN: I understand that.

10 MR. GRIMES: Okay.

11 PLAINTIFF MARCUS BOWMAN: That's why I wanted my other
12 issues and claims raised and I would ask The Court that you grant me a new
13 PCR hearing and new counsel whereas I can have them properly raised.

14 THE COURT: Okay. Is there anything else?

15 PLAINTIFF MARCUS BOWMAN: No, sir.

16 THE COURT: Okay. Well, your request to grant you a – appoint you
17 another attorney or to grant you another PCR hearing are denied. I find that
18 you are knowingly, freely, intelligently waiving the issue of the, the validity of
19 the Jackson v Deno hearing. And, so therefore, I am requesting – and so
20 therefore the – since that's the only issue that I have not ruled on, I am – your
21 PCR application is denied and – under the Strickland test and the other
22 authorities and I would ask that Mr. McFarland, if you'll please prepare an
23 order as to that.

24 And this hearing is concluded.

25 MR. GRIMES: I have one final matter. I think at the original hearing I

1 had argued some matter from the state constitution. And I'm not sure I've
2 made exact argument. I'd just like to clarify one, if The Court'll allow me to do
3 that.

4 THE COURT: Okay.

5 MR. GRIMES: On the right to counsel argument we made where — I'd
6 argue that Mr. Bowman had requested counsel when he ask the police to call
7 his mom for her to get a lawyer. I believe The Court denied that under the
8 federal constitution and said that was an unequivocal claim — or equivocal
9 claim.

10 And under Justice Ginsberg's concurrent opinion in Davis, he said a
11 previous rule is an ambagious claim for an attorney. The officers had
12 stopped to clarify. In this case, we believe understand South Carolina State
13 Constitution, which seems to be read a little bit broader in the Kennedy case,
14 that officers here should at least stopped him and clarified; by refusing to stop
15 and clarify they violated his right to counseled

16 THE COURT: Thank you.

17 Okay, this matter's concluded.

18 MR. MCFARLAND: Thank you, Your Honor.

19 THE COURT: And if you will, please prepare an order and send a
20 copy directly to the applicant.

21 MR. MCFARLAND: I will, Your Honor.

22 — END OF REQUESTED TRANSCRIPT OF RECORD —
23
24
25

1 I the undersigned Donna Hartley, Official Court Reporter for the
2 Fourteenth Judicial Circuit of the State of South Carolina, do hereby certify
3 that the foregoing is a true, accurate and complete transcript of record of all
4 the proceedings had and evidence introduced in the trial of the captioned
5 case, relative to appeal, in the circuit court for Beaufort County, South
6 Carolina on the twentieth day of January, 2002.

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

9 June 25, 2002

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11 Court Reporter

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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Marcus Bowman, Jr., 235986,)

99-CP-10-2936

Applicant,)

v.)

ORDER OF WITHDRAWAL

State of South Carolina,)

Respondent.)

This matter comes before this Court by an Application for Post-Conviction Relief filed August 9, 1999. The Respondent made a Return on February 8, 2000. In the Application, the Applicant, Marcus Bowman, Jr., is challenging a December 4-6, 1996 trial in which a jury found him guilty of murder. The Applicant was sentenced by the Honorable Larry R. Patterson, to confinement for life.

Applicant timely filed notice of intent to appeal and an appeal was perfected on his behalf by the South Carolina Office of Appellate Defense. Following the filing of briefs by both sides, the South Carolina Supreme Court affirmed Applicant's conviction. State v. Bowman, 98-MO-093 (S.C. Sup. Ct. filed November 20, 1998).

In his Application, the Applicant alleges the following:

A. Applicant was denied and deprived of effective assistance of appeal & trial counsel,s (sic) and a fair trial in violations of Article one section three, and Fourteen of the South Carolina Constitution, and the Sixth and Fourteenth Amendments of the United States Constitution, when counsel failed to:

- 1. Properly prepare for malice murder trial, to investigate case law, failing to obtain closing argument transcripts, for appeal. And failed to provide Applicant (sic) with such.

gmb

2. Properly advise Applicant of all his Constitutional Rights, that he could act as co-counsel, participate in his own defense, and give closing statement to juror,
3. ~~Motion Court for proper voir dire~~ of jurors during trial, especially to determine if jurors has been tampered with, and influenced in any manner, by anyone, due to the popularity of the victim, or the un-usual character of State's witnesses,
4. Failure of Counsel to secure Applicant's rights to a fair trial, to receive an arraignment and be advised of pre-trial elements, and proceedings.
5. Object to gross-multiple burden-shifting, erroneous, and prejudicial statements during closing statements as to Applicant's lack of testimony and evidence,
6. Object to trial judge's erroneous jury instructions of reasonable doubt, and charges as "a whole" that were burden shifting, and un-constitutional,
7. Object to trial judge's erroneous burden-shifting jury instruction on malice, presumptions, that were burden-shifting, and un-constitutional,
8. Move for Court to give jury instructions on the lesser offenses of voluntary and involuntary manslaughter, as mandated by Constitutional Amendments, & State law.
9. Object and move for mistrial, and dismissal of indictment, upon defected (sic) indictment, Court lack of grand jury presentation of indictment, and amended indictment,
10. Object to and challenge Trial Court's jurisdiction to prosecute Applicant upon defected (sic) structural errors, substituting elements of malice, with "unlawful act."

B. Applicant was deprived of a fair trial by the prosecution, trial court, and State of South Carolina, in violations (sic) of Article One, Section Three, Fourteen, and Article Five, Section 21 of the South Carolina Constitution, and in violations (sic) of the 4th, 5th, 6th, and the 14th Amendments of the United States Constitution, when:

1. Court deprived Applicant of effective assistance of trial counsel, in violations (sic) of 6th & 14th Amendments USCA.
2. Court/Prosecutor deprived Applicant of a fair trial, before and during trial, with-holding pre trial arraignment, with-holding evidence of Court's lack of grand jury presentation of indictment,
3. State/Court allowed Applicant to be prosecuted upon erroneous reasonable doubt, and malice murder instructions to jurors, to which deprived Applicant of a fair trial,
4. State/Trial Court, allowed Applicant to be prosecuted upon defected (sic) indictment, amended, substituted elements of indictment, verdict of guilt was void pursuant Court's lack of jurisdiction to receive such upon defected indictment, and trial counsel was totally ineffective failing to protect, Applicant's Constitutional rights to a fair trial.
5. Court failed to charge jurors on law of manslaughter, that was supported by evidence in violation of 6th & 14th. USCA.
6. The indictment being void, and there being no indictment by Grand Jury, Court had no jurisdiction to receive verdict and sentence Applicant for any crime, and State does not have jurisdiction to retain Applicant in prison.
7. The Trial Court submitted murder-felony doctrine as to jury, that was mandated presumption of malice and intent as charged by Court was unconstitutional, intent being presumed was mandatorily (sic) from the act, simply because homicide occurred during armed-felony, such totally relieved prosecution of all burden of proof of intent/malice, & substituted "unlawful act".
8. Trial Court gave erroneous reasonable doubt instructions that could have mislead jury into finding no reasonable doubt, when in fact there were some. Court failed to properly, clearly correctly instruct the jury, that if they had a reasonable doubt as to Applicant's guilt of murder or voluntary manslaughter, of involuntary manslaughter, it was there (sic) duty to resolve that doubt in Applicant's favor, and find him

guilty of the lesser offense, Court's erroneous burden-shifting reasonable doubt and malice instructions, were unconstitutional, and deprived Applicant of due process of law, equal protection of law, and a fair trial, effective assistance of trial counsel. In violations of guaranteed rights of Article one, Sections 3 & 14, S.C. Const. and Fifth, Sixth, and Fourteenth Amendments of United States Constitution.

On May 8, 2001, PCR counsel for Applicant, filed a Motion to Amend alleging:

- A. upon information and belief, trial counsel's performance fell below the threshold required by the Sixth Amendment and the South Carolina Constitution for the following reasons
- i. trial counsel failed to move to suppress the statement of Marcus Bowman on the ground that the police violated Marcus Bowman's Fifth and Sixth Amendment rights to counsel and his right to counsel under the South Carolina Constitution when the record will show that Marcus told the police that he wanted to speak with an attorney and that he wanted to call his mother for her to get an attorney;
 - ii. trial counsel failed to call Marcus Bowman in the *Jackson v. Denno* hearing to testify that the police obtained his statement by threatening him with, *inter alia*, the death penalty;
 - iii. trial counsel's cross-examination of James Nelson helped to bolster the testimony of James Nelson;
 - iv. trial counsel failed to investigate whether Kelvin Shine could have committed the murder despite having information that Kelvin Shine shot the victim;
 - v. trial counsel's cross-examination of Sergeant Gordon was inadequate because trial counsel failed to lay the proper foundation and to make the proper arguments to show that the police knew of other suspects in this case;
 - vi. trial counsel failed to accept the continuance offered by the court which would have allowed him the opportunity to lay the proper foundation for admitting evidence of other possible suspects;

- vii. trial counsel failed to object to the state's closing argument where the assistant solicitor commented upon Mr. Bowman's lack of remorse, Mr. Bowman's failure to testify, and Mr. Bowman's failure to accept responsibility;
- viii. trial counsel failed to object to the state's closing argument where the assistant solicitor's referring to Mr. Bowman as a "Rat" where there was no evidence that Mr. Bowman used "Rat" as a nickname, where the term "Rat" was not used to prove any matter in controversy, and where the use of "Rat" was designed to appeal to the passion of the jury;
- ix. trial counsel failed to object to the trial judge's charge to the jury on reasonable doubt where the trial court shifted the burden of proof to Mr. Bowman by instructing the jury to be "in search of the truth";

On May 17, 2001, a hearing was convened in the matter. The Applicant was present and represented by Andrew Grimes, Esquire. Respondent was represented by Derrick K. McFarland of the Attorney General's Office. Applicant testified on his own behalf at the hearing. Also testifying on behalf of the Applicant was James Smiley, Esq. The Court also had before it a copy of the transcript of Applicant's trial, the Charleston County Clerk of Court's records and Applicant's records from the South Carolina Department of Corrections.

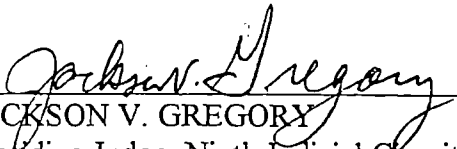
After the hearing, this Court orally denied and dismissed all issues except one: whether trial counsel erred while conducting the *Jackson v. Demmo* hearing. This Court took the issue under advisement and ordered both counsel to prepare a memorandum addressing the issue. Shortly after the hearing, counsel Grimes informed the Court that apparently Applicant no longer desired to proceed with the issues presented at the PCR hearing.

On January 28, 2002, a hearing was conducted at the Beaufort County Courthouse. The Applicant advised the Court that he no longer wished to pursue this state post-conviction relief

action. The Applicant indicated he understood that a withdrawal with prejudice would bar him from ever challenging the convictions on any claim that he raised or could have raised at this time. He stated that he no longer sought to pursue this matter.

WHEREFORE, IT IS ORDERED that this Application for Post-Conviction Relief is dismissed with prejudice.

AND IT IS SO ORDERED this 4th day of April, 2002.


JACKSON V. GREGORY
Presiding Judge, Ninth Judicial Circuit

Beaufort, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

666
SENTENCE

DoI: 10/30/95
GENERAL SESSIONS COURT

Murder
16-3-10 (116)

CASE NO. 96-GS-10-2282

TICKET/WARRANT NO. E724340

TICKET WARRANT NO. _____

The defendant, Marcus Bowman, is committed to the State Dept. of Corrections / County Detention Center / under Youthful Offender Act for a term of Natural Life days/months/(life imprisonment) years and/or to pay a fine of \$ _____; provided the sentence be suspended upon the service of _____ days/months/years and/or payment of \$ _____ plus pay/waive costs and assessment as applicable*, the balance suspended with probation for _____ months/years.

Special conditions: _____

Restitution (YES/NO)\$ 13% Total \$ _____
Weekly/Monthly \$ _____

to Clerk for _____

Public Defender Funds \$ _____

Date: December 6, 1996

[Signature]
Resident Presiding Judge, Ninth Judicial Circuit

Upon being advised that I do not have to consent to be sentenced as a youthful offender, I have however consented to be sentenced to an indeterminate sentence under the youthful offender act.

Signature: _____ Date: _____

INFORMATION ON DEFENDANT

Age: 38 S.S. No. [REDACTED]
M F Married Single
Date of Birth: [REDACTED] 57
Attorney: J. Smiley

ALL PAYMENTS MUST BE MADE BY CASH, MONEY ORDER OR CASHIER CHECK. WE CANNOT ACCEPT PERSONAL CHECKS.

Fine	\$	
Cost & Assessment (62%)	\$	
Total	\$	
3% County	\$	
Grand Total	\$	

Clerk of County/Deputy Clerk
White copyto Clerk
Canaryto Detention Center
Pinkto Probation
Goldenrod.....to Defendant
Green.....to Solicitor

CLERK OF COURT
2144 MELBOURNE AVE.
CHARLESTON, SC 29405
740-5700

CF.
AG
SDL
GS

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

03-CP-10-5082

Marcus Bowman, Jr., No. 235986,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

FILED
2005 JAN 20 PM 12:39
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 3, 2003. The Respondent made its Return on August 12, 2004. An evidentiary hearing into the matter was convened on January 20, 2005 at the Charleston County Courthouse. The Applicant was present at the hearing and was represented by Stanley Feldman, Esquire. The Respondent was represented by Arie Bax of the South Carolina Attorney General's Office.

This Court had before it a copy of the transcript of the proceedings against the Applicant, the records of the Charleston County Clerk of Court, the Applicant's appellate records, and the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. The Applicant was indicted at the April 1996 term of the grand jury for Charleston County for murder (96-GS-10-2282). He was represented by ^{SA James W.} Jimmy Smiley, Esquire.

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On December 4-6, 1996, the Applicant underwent trial by jury pursuant to which he was found guilty of murder. He was sentenced to confinement for his natural life.

Applicant timely filed notice of intent to appeal and an appeal was perfected on his behalf by the South Carolina Office of Appellate Defense. Following the filing of briefs by both sides, the South Carolina Supreme Court affirmed Applicant's conviction. State v. Bowman, 98-MO-093 (S.C. Sup. Ct. filed November 20, 1998).

The Applicant subsequently filed an application for PCR on August 9, 1999. The State filed its Return on or about February 8, 2000. In his Application, the Applicant alleges the following:

- A. Applicant was denied and deprived of effective assistance of appeal & trial counsel,s (sic) and a fair trial in violations of Article one section three, and Fourteen of the South Carolina Constitution, and the Sixth and Fourteenth Amendments of the United States Constitution, when counsel failed to:
 1. Properly prepare for malice murder trial, to investigate case law, failing to obtain closing argument transcripts, for appeal. And failed to provide Applicant (sic) with such.
 2. Properly advise Applicant of all his Constitutional Rights, that he could act as co-counsel, participate in his own defense, and give closing statement to jury,
 3. Motion Court for proper voir dire of jurors during trial, especially to determine if jurors has been tampered with, and influenced in any manner, by anyone, due to the popularity of the victim, or the un-usual character of State's witnesses,
 4. Failure of Counsel to secure Applicant's rights to a fair trial, to receive an arraignment and be advised of pre-trial elements, and proceedings.
 5. Object to gross-multiple burden-shifting, erroneous, and prejudicial statements during closing statements as to Applicant's lack of testimony and evidence,

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6. Object to trial judge's erroneous jury instructions of reasonable doubt, and charges as "a whole" that were burden shifting, and un-constitutional,
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- B. Applicant was deprived of a fair trial by the prosecution, trial court, and State of South Carolina, in violations (sic) of Article One, Section Three, Fourteen, and Article Five, Section 21 of the South Carolina Constitution, and in violations (sic) of the 4th, 5th, 6th, and the 14th Amendments of the United States Constitution, when:
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 3. State/Court allowed Applicant to be prosecuted upon erroneous reasonable doubt, and malice murder instructions to jurors, to which deprived Applicant of a fair trial,
 4. State/Trial Court, allowed Applicant to be prosecuted upon defected (sic) indictment, amended, substituted elements of indictment, verdict of guilt was void pursuant Court's lack of jurisdiction to receive such upon defected indictment, and

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 [Signature]

trial counsel was totally ineffective failing to protect, Applicant's Constitutional rights to a fair trial.

- 5. Court failed to charge jurors on law of manslaughter, that was supported by evidence in violation of 6th & 14th. USCA.
- 6. The indictment being void, and there being no indictment by Grand Jury, Court had no jurisdiction to receive verdict and sentence Applicant for any crime, and State does not have jurisdiction to retain Applicant in prison.
- 7. The Trial Court submitted murder-felony doctrine as to jury, that was mandated presumption of malice and intent as charged by Court was unconstitutional, intent being presumed was mandatorily (sic) from the act, simply because homicide occurred during armed-felony, such totally relieved prosecution of all burden of proof of intent/malice, & substituted "unlawful act".
- 8. Trial Court gave erroneous reasonable doubt instructions that could have mislead jury into finding no reasonable doubt, when in fact there were some. Court failed to properly, clearly correctly instruct the jury, that if they had a reasonable doubt as to Applicant's guilt of murder or voluntary manslaughter, of involuntary manslaughter, it was there (sic) duty to resolve that doubt in Applicant's favor, and find him guilty of the lesser offense, Court's erroneous burden-shifting reasonable doubt and malice instructions, were unconstitutional, and deprived Applicant of due process of law, equal protection of law, and a fair trial, effective assistance of trial counsel. In violations of guaranteed rights of Article one, Sections 3 & 14, S.C. Const. and Fifth, Sixth, and Fourteenth Amendments of United States Constitution.

On May 8, 2001, PCR counsel for Applicant, filed a Motion to Amend alleging:

- A. upon information and belief, trial counsel's performance fell below the threshold required by the Sixth Amendment and the South Carolina Constitution for the following reasons
 - i. trial counsel failed to move to suppress the statement of Marcus Bowman on the ground that the police violated Marcus Bowman's Fifth and Sixth Amendment rights to counsel and his right to counsel under the South Carolina

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Constitution when the record will show that Marcus told the police that he wanted to speak with an attorney and that he wanted to call his mother for her to get an attorney;

- ii. trial counsel failed to call Marcus Bowman in the *Jackson v. Denno* hearing to testify that the police obtained his statement by threatening him with, *inter alia*, the death penalty;
- iii. trial counsel's cross-examination of James Nelson helped to bolster the testimony of James Nelson;
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- vi. trial counsel failed to accept the continuance offered by the court which would have allowed him the opportunity to lay the proper foundation for admitting evidence of other possible suspects;
- vii. trial counsel failed to object to the state's closing argument where the assistant solicitor commented upon Mr. Bowman's lack of remorse, Mr. Bowman's failure to testify, and Mr. Bowman's failure to accept responsibility;
- viii. trial counsel failed to object to the state's closing argument where the assistant solicitor's referring to Mr. Bowman as a "Rat" where there was no evidence that Mr. Bowman used "Rat" as a nickname, where the term "Rat" was not used to prove any matter in controversy, and where the use of "Rat" was designed to appeal to the passion of the jury;
- ix. trial counsel failed to object to the trial judge's charge to the jury on reasonable doubt where the trial court shifted the burden of proof to Mr. Bowman by instructing the jury to be "in search of the truth";

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On May 17, 2001, a hearing was convened in the matter. The Applicant was represented by Andrew Grimes, Esquire. Respondent was represented by Dennis B. [redacted] of the Attorney General's Office. Applicant testified on his own behalf at the hearing. Also present on behalf of the Applicant was James Smiley, Esq. The Court also had before it a copy of the transcript of Applicant's trial, the Charleston County Clerk of Court's records and Applicant's records from the South Carolina Department of Corrections.

After the hearing, this Court orally denied and dismissed all issues except one: whether trial counsel erred while conducting the *Jackson v. Denno* hearing. This Court took the issue under advisement and ordered both counsel to prepare a memorandum addressing the issue. Shortly after the hearing, counsel Grimes informed the Court that apparently Applicant no longer desired to proceed with the issues presented at the PCR hearing.

On January 28, 2002, a hearing was conducted at the Beaufort County Courthouse. The Applicant advised the Court that he no longer wished to pursue the state post-conviction relief action. The Applicant indicated he understood that a withdrawal with prejudice would bar him from ever challenging the convictions on any claim that he raised or could have raised at this time. He stated that he no longer sought to pursue the matter. By order dated April 4, 2002, Judge Jackson V. Gregory dismissed the action with prejudice.

A timely Notice of Appeal was filed on the Applicant's behalf and a Petition for Writ of Certiorari was submitted by the South Carolina Office of Appellate Defense pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). On May 13, 2003, the South Carolina Supreme Court denied the Petition.

ALLEGATIONS

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In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reason:

1. Ineffective assistance of PCR counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the arguments of counsel at the post-conviction relief hearing. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

First, this Court finds that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10, et. seq. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgement of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offenses he challenges in this Application on December 6, 1996. This Application was filed on December 3, 2003, well after the one year statutory filing period had expired.

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Moreover, this Court finds that the Application must be dismissed because it is clearly successive to the previous applications for post-conviction relief. Successive applications for post-conviction relief are clearly disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." [Emphasis in original]. Id., 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, Id.

The Applicant could have raised the new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications.

This Court further finds that the Applicant has not established sufficient reason why he should be allowed to avoid the operation of the applicable statute of limitations or the general

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prohibition against successive applications for post conviction relief. The Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under § 17-27-90." Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The appellate courts of this State have recognized a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). However, application of the holding in Austin "is limited to its particular factual situation . . ." Aice, 305 S.C. at 452, 409 S.E.2d at 394. Here, an appeal from the Applicant's prior PCR was perfected. Moreover, pursuant to the Johnson brief filed on the Applicant's behalf, together with the Applicant's own pro se appellate brief, the Applicant's case received a full review on appeal. See Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). In particular, the Applicant's allegation that PCR counsel failed to properly raise and argue all relevant issues received full review and adjudication at the appellate level.

The Applicant has also failed to convince this Court that he should be allowed to raise his current allegations under the guise of newly discovered evidence. A defendant requesting a new trial based on after discovered evidence must show that the evidence:

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(1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

This Court finds that the Applicant has not presented evidence that meets the requirements for after-discovered evidence.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has failed to file his application within the time limits established in S.C. Code Ann. §17-27-45(a). This Court further finds the Application is successive in nature to the Applicant's prior PCR application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice. Finally, the Applicant has failed to establish entitlement to relief due to ineffective assistance of prior PCAR counsel.

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. His attention is also directed to South Carolina Appellate Court Rule 227 for appropriate procedures after notice has been timely filed.

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 Respondent.

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AND IT IS SO ORDERED this 23rd day of February, 2005.

D.L. Jefferson
Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

Charleston, South Carolina.

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P. & G.S.
[Signature]
BY _____
DEPUTY CLERK

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[Signature]

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 MARCUS BOWMAN, JR.,)
 No. 235986)
 Applicant,)
)
 vs.)
)
 STATE OF SOUTH CAROLINA,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 CASE NO. 2003-CP-10-5082

MOTION
 (Rule 59 SCRPC)

BY _____
 2005 APR -7 PM 4:26
 CLERK OF COURT

FILED

COMES NOW the Applicant, through counsel, who moves before this Honorable Court for an Order altering, amending and reconsidering the Order of Dismissal signed February 23, 2005 and filed in the office of the Charleston County Clerk of Court on March 4, 2005. The undersigned received written notice of the entry of the order on March 31, 2005. (retrieval from Charleston County Clerk of Court)

In support of his Motion, Applicant, through counsel, would respectfully assert the following:

ONE: The Order reflects that the proceeding on January 20, 2005 was an "Evidentiary" hearing. This is incorrect. Rather, it was a hearing only on the State's Motion to Dismiss the application on procedural grounds. (The Court held a docket meeting on Friday, January 7, 2005, The Honorable Daniel Pieper presiding. At that time, the Court set this case for a hearing on the state's motion to dismiss.)

TWO: At page 7 of the Order of Dismissal, the court found that the only issue before the Court was the issue of ineffective assistance of PCR counsel. This finding or conclusion neither states nor reflects Applicant's position as presented and argued at the Motion hearing on January 20, 2005. It was Applicant's position that he has not received complete resolution on ALL issues previously raised. In the first PCR hearing, Judge Gregory took under advisement the *Jackson v. Denno* issue. The Court did not rule on the merits of this issue.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 MARCUS BOWMAN, JR.,)
 NO. 235986)
 Applicant,)
)
 VS.)
)
 STATE OF SOUTH CAROLINA,)
 Defendant.)

IN THE COURT OF GENERAL SESSIONS
 OF THE NINTH JUDICIAL CIRCUIT
 CASE NO.: 03-CP-10-5082

BY
 JUDGE
 CLERK OF COURT
 2005 JUN 28 AM 9:33
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ORDER

This matter is before the Court on the Applicant's Motion to Alter, Amend or Reconsider the Order of Dismissal signed on February 23, 2005 and filed on March 4, 2005 pursuant to a hearing on January 19, 2005.

Having considered the Applicant's motion and brief pursuant to SCRCP 59, the Respondent's Return and Motion to Dismiss, the timeliness of the filing of the motion, the record herein, as well as the various interests balanced by the Court at the time of the ruling, the Applicant's motion is hereby denied.

IT IS SO ORDERED.

D.L. Jefferson

 Deadra L. Jefferson
 Presiding Judge

June 27, 2005
 Charleston, South Carolina

2. Was trial counsel ineffective for failing to call Applicant as a witness in a hearing into the voluntariness of Applicant's statement to police, when the statement may have been involuntary?

Johnson Petition (Gregory), p. 2. On April 24, 2003, the South Carolina Supreme Court denied the Petition. The remittitur was issued on May 13, 2003. [Applicant had 193 days remaining to file his federal habeas petition up to November 12, 2003].

The Applicant filed a second state post-conviction relief action on December 10, 2003 alleging ineffective assistance of PCR counsel. *Jefferson App.p.* 1- 13. The respondent on August 12, 2004 made a Return and Motion to Dismiss as "successive" and alternately as time barred under S.C. Code Section 17-27-45. Further, the State asserted that the claim of ineffective PCR counsel was not a cognizable claim for state post-conviction relief. *Jefferson App.p.* 27-29.

On January 20, 2005, a hearing was held before the Honorable Deadra Jefferson, Presiding Judge. *Jefferson App.p.* 30-61. On March 4, 2005, Judge Jefferson issued a written order of dismissal. *App.p.* 63-73. In the order Judge Jefferson concluded the application must be procedurally dismissed as "untimely" under the statute of limitations mandates of S.C. Code Section 17-27-45. *App.p.* 69-70. Second, it alternately dismissed the matter under Section 17-27-90 as "successive" to the 1999 application. The court further determined that the allegations were not cognizable in an application for post-conviction relief and did not meet the demands of "newly discovered evidence."

On April 7, 2005, the Applicant's counsel, Stanley Feldman, made a Rule 59 motion, On June 27, 2005, Judge Jefferson denied the motion. *App.p.* 75.

The Applicant timely appealed the denial. In the appeal, he was represented by Robert M. Pachak of the South Carolina Office of Appellate Defense. On December 1, 2005, he made a

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Johnson Petition for a Writ of Certiorari. In the petition, he alleged as the sole arguable ground with his request to be relieved:

“Whether there was any evidence to support the PCR judge’s findings that Applicant’s current application was barred by the statute of limitations and that it was successive?”

Johnson Petition, p. 2. A pro se response was filed but not served on Respondents. The South Carolina Court of Appeals entered an order dated September 13, 2007 denying the petition and granting counsel’s request to be relieved after review pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). The remittitur was issued on October 1, 2007.

Applicant filed a *pro se* Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 dated July 23, 2009, Bowman makes the following allegations in a pro se document dated February 28, 2009, made prior to the first PCR hearing. This document is summarized with the following:

- I. Ineffective Assistance of Trial Counsel:
 - A. Counsel failed to present a defense theory, refused to accept offer for a continuance, had a plea agreement with the judge, failed to object to circumstantial evidence instruction.
 - B. Counsel failed to have a preliminary hearing.
 - C. Counsel failed to object to false testimony concerning a baseball cap when witness changed testimony on cross-examination and the state’s closing statements concerning the baseball cap evidence.
 - D. Counsel erred in submitting the baseball cap evidence when there was no evidence Applicant was wearing a cap.
 - E. Counsel failed to preserve issues for appellate review.
 - F. Counsel failures set out above showed a conflict of interest due to divided loyalties.
 - G. Counsel failed to investigate exculpatory witnesses who could have supported

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