

The Supreme Court of South Carolina

Andre King,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Edgar W. Dickson
Orangeburg County
Trial Court Case No. 2010-CP-38-01137

ORDER

For good cause shown, the request for an extension until May 2, 2012 to serve and file the Petition for Writ of Certiorari and Appendix in this matter is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what measures are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

April 2, 2012

cc: Appellate Defender Kathrine Hudgins
Assistant Attorney General Mary S. Williams

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Appeal from Orangeburg County
Edgar W. Dickson, Circuit Court Judge

RECEIVED

'APR 02 2012

S.C. Supreme Court

ANDRE KING,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

(3)

PETITION FOR EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR WRIT OF CERTIORARI
AND ACCOMPANYING APPENDIX

Counsel for Andre King, petitions the Court for a **final thirty day extension, until May 2, 2012** in which to file the petition for writ of certiorari and accompanying appendix in this case. In support of this petition, counsel shows:

1. The petition for writ of certiorari and accompanying appendix in this case are due to be filed with the Court today.
2. Counsel for Mr. King respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required.
3. Counsel had an oral argument in the South Carolina Court of Appeals in Antonio Bordeaux v. State on March 27, 2012. Counsel filed the brief of petitioner in State v. Mark Baker on March


26, 2012. Counsel had an oral argument before the Supreme Court in Wendell Williams v. State on March 13, 2012. Counsel filed petitions for rehearing in Joseph Walker v. State and State v. Mike Salley on March 8, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Marion Stewart on March 5, 2012.

4. Counsel has not had time to complete the petition for writ of certiorari and accompanying appendix in this case. As a result, counsel respectfully asks this Court for **a final thirty day extension, until May 2, 2012**, in which to file the petition for writ of certiorari and accompanying appendix. Counsel is striving to limit the number of extensions requested. Counsel is attempting to complete the cases with the most number of extensions first.

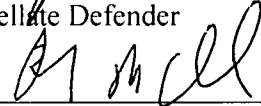
6. Counsel makes this request in good faith and not for purposes of delay.

Counsel respectfully requests **a final thirty day extension, until May 2, 2012**, in which to file the petition for writ of certiorari and accompanying appendix in this case based upon the above circumstances.

Respectfully submitted,

 For

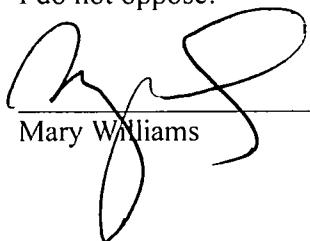
Kathrine H. Hudgins
Appellate Defender



Robert M. Dudek
Chief Appellate Defender

April 2, 2012

I do not oppose:



Mary Williams

The Supreme Court of South Carolina

Andre King,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Edgar W. Dickson
Orangeburg County
Trial Court Case No. 2010-CP-38-01137

ORDER

For good cause shown, the request for an extension until April 2, 2012 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Shonda J. Shealy
Chief Deputy Clerk

Columbia, South Carolina

March 2, 2012

cc: Appellate Defender Kathrine Hudgins
Assistant Attorney General Mary S. Williams

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Appeal from Orangeburg County

Edgar W. Dickson, Circuit Court Judge

RECEIVED

MAR 01 2012

ANDRE KING,

S.C. Supreme Court
PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

(2)

PETITION FOR EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR WRIT OF CERTIORARI
AND ACCOMPANYING APPENDIX

Counsel for Andre King, petitions the Court for a thirty day extension in which to file the petition for writ of certiorari and accompanying appendix in this case. In support of this petition, counsel shows:

1. The petition for writ of certiorari and accompanying appendix in this case are due to be filed with the Court today.
2. Counsel for Mr. King respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required.
3. Counsel filed the return to petition for writ of certiorari in Michael Witcher v. State on
Counsel filed the initial brief of appellant and designation of matter in State v. David Chavez on


January 20, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Lorenzo Inman and the return to petition for writ of certiorari for Shanna Kranchick v. State on January 17, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Craig Keeling on January 9, 2012. Counsel filed the petition for rehearing in Lorenzo R. Nicholson v. State on January 5, 2011. Counsel filed the petition for rehearing in State v. Tawanda Williams on December 22, 2011. The initial brief of appellant and designation of matter in State v. Jeffrey Herrmann was filed on December 21, 2011.

4. Counsel has not had time to complete the petition for writ of certiorari and accompanying appendix in this case. As a result, counsel respectfully asks this Court for a thirty day extension, in which to file the petition for writ of certiorari and accompanying appendix. Counsel is striving to limit the number of extensions requested. Counsel is attempting to complete the cases with the most number of extensions first.

6. Counsel makes this request in good faith and not for purposes of delay.

Counsel respectfully requests a thirty day extension, in which to file the petition for writ of certiorari and accompanying appendix in this case based upon the above circumstances.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

March 1, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Orangeburg County
Edgar W. Dickson, Circuit Court Judge

ANDRE KING,

PETITIONER,

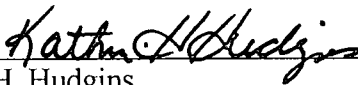
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

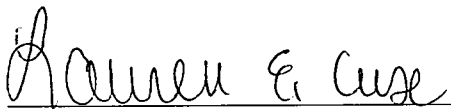
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the petition for extension of time in which to file the petition for writ of certiorari and accompanying appendix in the above referenced case has been served upon David M. Pascoe, Jr., Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 1st day of March, 2012.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 1st day of March, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

The Supreme Court of South Carolina

Andre King,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Edgar W. Dickson
Orangeburg County
Trial Court Case No. 2010-CP-38-01137

ORDER

The request for an extension until March 1, 2012 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda A. Shealy
Clerk

Columbia, South Carolina *Chief Deputy*

January 27, 2012

cc: Appellate Defender Kathrine Hudgins
Assistant Attorney General Mary S. Williams



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL 

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

January 26, 2012

RECEIVED

JAN 26 2012

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

S.C. Supreme Court

Re: Andre King v. The State

Dear Mr. Shearouse:

The Petition for Writ of Certiorari and accompanying appendix are due to be served and filed with the Court **Tuesday, January 31, 2012**. However, because of my heavy workload at this time, I am requesting a thirty day extension, **until March 1, 2012** in which to serve and file the petition.

By copy of this letter, I am informing Mary S. Williams, Esquire, of the Attorney General's Office, of my request.

Sincerely,



Kathrine H. Hudgins
Appellate Defender

KHH/lec

cc: Mary S. Williams, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

RECEIVED

DEC 5 2011

December 5, 2011

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

Andre King v. State of South Carolina

12/2/2011

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Sharon A. Graham
Administrative Coordinator



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

September 12, 2011

SEP 12 2011
S.C. Supreme Court

Ms. Harry A. Walker
Circuit Court Reporter
P O Box 127
Rowesville, SC 29133-9133

Dear Ms. Walker:

Please provide us with the following transcript:

Andre King v. State of South Carolina Case #: 10-CP-38-01137

County: Orangeburg Date of Trial: March 8, 2011

Presiding Judge: Edgar W. Dickson

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

Sharon A. Graham
Administrative Coordinator

cc: S.C. Supreme Court
Attorney General's Office

pck

The Brooks Law Offices, LLC

Charles T. Brooks, III
Attorney

309 Broad Street
Sumter, South Carolina 29150
Post Office Box 3512, Sumter, SC 29151
Post Office Box 291226, Columbia, SC 29229
OFFICE: (803) 418-5708
FAX: (803) 934-9618 TOLL FREE: (877) 770-8792
Email: cbrooks@ctbrooks.com

Irma R. Brooks
Attorney

July 26, 2011

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RECEIVED

JUL 29 2011

S.C. SUPREME COURT

RE: Andre King v State of South Carolina
Case No. 2010-CP-38-1137

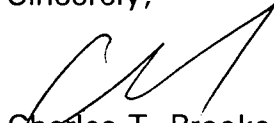
Dear Sir or Madam:

Enclosed herewith you will find the **Notice of Appeal, Order of Dismissal**, along with a **Proof of Service** in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,



Charles T. Brooks, III
CTB/jlb

Enclosed as stated

Cc: Robert Corney (for Mary Williams), Office of Attorney's General
South Carolina Office of Appellate Defense
Andre King, 258599

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Honorable Edgar W. Dickson Circuit Court Judge

Case No: 2010-CP-38-1137

Andre King, Appellant
S.C.D.C. No.:258599

v.

The State Respondent

NOTICE OF APPEAL

Andre King, appeals his Denial for Post Conviction Relief in this case. The Order of Dismissal was imposed and signed by the Honorable Edgar W. Dickson, on July 8, 2011, which I, Charles T. Brooks, III, received on July 26, 2011.

July 26, 2011



Charles T. Brooks, III
309 Broad Street
Post Office Box 3512
Sumter, South Carolina 29151
(803) 418-5708
Attorney for Appellant

Other Counsel on Record:
Robert Corney, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3970

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Honorable Edgar W. Dickson, Circuit Court Judge

Case No: 2010-CP-38-1137

Andre King.....Appellant
S.C.D.C. No.: 258599

v.

The State.....Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 26th day of July, 2011 I served the foregoing Notice of Appeal, Order of Dismissal, as well as Proof of Service in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on July 26, 2011 addressed to the following as indicated below:

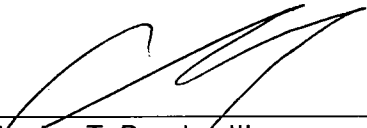
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

South Carolina Office of Appellate Defense
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29211-1589

Office of Attorney's General
Attn: Robert Corney, Esquire
Post Office Box 11549
Columbia, South Carolina 29211-1549

Andre King, 258599
Lieber Correctional Institution
Post Office Box 205
Ridgeville, South Carolina, 29472

Dated: July 26, 2011


Charles T. Brooks, III
Attorney for the Appellant
309 Broad Street
Sumter, South Carolina 29150
(803) 418-5708

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ORANGEBURG)
)
 Andre King, #258599,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

2010-CP-38-1137

2011 JUL 18 P 2:33
 FILED FOR RECORD
 WINNIE B. CLARK
 CLERK OF COURT
 ORANGEBURG COUNTY, SC


ORDER OF DISMISSAL

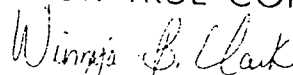
This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 9, 2010. An evidentiary hearing into the matter was convened on March 8, 2011, at the Orangeburg County Courthouse. The Applicant was present at the hearing and was represented by Charles T. Brooks, III, Esquire. The Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying was Michael Culler, Esquire ("Counsel"). This Court had before it the records of the Orangeburg County Clerk of Court, the trial transcript, and the Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

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 Orangeburg County Clerk of Court. The Applicant was indicted at for Murder (2005-GS-38-1395), Assault and Battery with Intent to Kill ("ABWIK") (2005-GS-38-1393), and Possession of a Weapon During Commission of a Violent Crime (2005-GS-38-1394). Michael Culler, Esquire, and Andrew Brown,

1 of 9


ATTEST: TRUE COPY

 CLERK OF COURT
 ORANGEBURG COUNTY, SC

Esquire, represented him. On September 10-13, 2007, Applicant proceeded to a jury trial before the Honorable Knox McMahon. Applicant was found guilty, and on September 13, 2007, Applicant was sentenced to life imprisonment for Murder, to twenty (20) years for ABWIK, and to five (5) years for Possession of a Weapon During Commission of a Violent Crime, sentences to be served concurrently.

A Notice of Appeal was filed and an appeal perfected. Applicant's conviction and sentence was affirmed. State v. King, Op. No. 2010-UP-254 (S.C. Ct. App. filed April 26, 2010).

In his application for post-conviction relief (PCR), Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. "Counsel failed to perform pre-trial investigation and object to numerous trial errors that denied Petitioner his right to a fair trial."
2. "Denial of 6th Amendment."
3. "Denial of 14th Amendment."

At hearing on March 8, 2011, Applicant also alleged that counsel was ineffective in regard to his closing argument, that counsel failed to object to the jury charge on malice, that counsel failed to request a jury charge, and that counsel failed to object to the jury charge on self-defense.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80.



Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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 upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland, supra). 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 trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735

(1997) (citing Strickland).

Summary of Facts Adduced at Trial

On June 9, 2005, two individuals were shot at A Touch of Class nightclub in Eutawville. Applicant's ex-girlfriend, Monique Green ("Green") was airlifted and survived the bullet wound she sustained which entered her face and exited her neck. Green's cousin, Matthew Jenkins ("Jenkins") died at the scene from a gunshot wound to the head.

Applicant owned the nightclub, and Green had formerly been a bartender there. Applicant and Green had recently ended their lengthy relationship. Green went to the nightclub with friends, but the group was asked to leave. They complied but returned later. Upon returning to A Touch of Class, Green remained in the car until Jenkins approached her. Jenkins assured her that another owner of the club had consented to her coming in and escorted her in, holding her hand. Applicant attempted to prevent them from entering, but Jenkins and Green proceeded past him.

Applicant briefly exited the building, returning with a pistol. According to witnesses, Applicant pushed his way through the club, first firing upon Jenkins then turning the gun on Green. Green stated that she heard the gun "click" when Applicant attempted to fire at her a second time. Applicant then left the nightclub in his green Lexus. Upon arriving at his apartment, Applicant instructed his friend, LaQuyin Cason ("Cason"), to get her kids, ages three and four, and get into the car. Cason complied. Applicant had earlier told Cason that Green "played him and she [Green] had to die." (Tr. p. 225, line 1.)

As the car pulled away from the apartment complex, police attempted to stop the vehicle. Applicant pulled over then told Cason that he was not going to prison and that he would kill the

police officers. Cason implored him not to do so because her children were in the car. Applicant then sped away, leading police on a high speed chase, disregarding traffic laws and running one roadblock. Spikes and police ramming Applicant's vehicle eventually ended the chase. Applicant was arrested. He had attempted to dispose of the weapon beneath the car, and ammunition was found in Applicant's pocket. Ballistics matched the weapon recovered beneath Applicant's car to that used in the attack on Jenkins and Green.

In a statement to police given after a night's rest to overcome the effects of alcohol, Applicant admitted his animosity toward Green had prompted the shooting. Applicant claimed in the statement that he did not mean to shoot Jenkins. Approximately one year after the incident, Applicant wrote to Jenkins' family, apologizing for his actions and assuring them that Jenkins had been an innocent party in the incident. At trial, Applicant for the first time stated that he shot Jenkins in self-defense. Applicant claimed that Jenkins had moved his hands in a threatening manner as if he were about to hit Applicant; Applicant had not seen a weapon.

Closing Argument

Applicant asserts that Counsel was ineffective because he conceded Applicant's guilt in closing argument. In closing, Counsel made the following statement:

Ladies and gentlemen, it is our position – we apologize to Ms. [Monique] Green. Clearly we do not contest the assault and battery with intent to kill or the weapons charge. But look at the evidence, hold the State to their burden, which is to prove guilt beyond a reasonable doubt.

At the end of the day, what I said to you on Tuesday, is we ask you to find my client not guilty of murder. Thank you.

(Tr. p. 485, lines 17-25. See also Tr. p. 482, lines 15-18.) At PCR hearing, Counsel noted that in

Applicant's statement, he had admitted to shooting Green. Based on the overwhelming evidence involving the shooting of Green, Counsel had no viable defense to argue against the ABWIK charge. In his own testimony, Applicant did not deny shooting Green. Counsel felt that the only viable option was to seek acquittal or a lesser-included offense on the murder charge.¹

Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. See for example Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992); Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Given the evidence presented at trial, I find Counsel's strategy was reasonable. The Applicant has not shown that counsel was deficient in that choice of tactics. Therefore, I find no error by Counsel in his statement in closing argument. Moreover, in light of the overwhelming evidence of Applicant's guilt, Counsel's closing statement did not affect the outcome of the trial.

Inference of Malice

Applicant attributes error in Counsel's failure to object to the solicitor's arguments on malice and failure to object to the trial court's charge on malice. Applicant states that Counsel should have made objections based on the inference of malice from use of a deadly weapon.

At the close of evidence, the defense moved for a directed verdict based on failure to show malice in the shooting of Jenkins. (Tr. p. 398-400.) Noting that evidence of both express malice (Applicant's statement that Green had to die) and implied malice (use of a gun) existed, the trial

¹ At PCR hearing, Counsel noted that he had strongly advised Applicant to accept a plea offer due to the overwhelming evidence against him. Counsel advised Applicant in discussing the plea that self-defense and/or conviction of voluntary manslaughter were not likely to be successful. Nonetheless, Applicant chose to proceed with his right to a jury trial.

court denied the motion. There was also discussion regarding the doctrine of transferred intent, applying evidence of Applicant's statement about Green and his statement that Jenkins was mistakenly shot. (Tr. pp. 450-453.)

In closing argument, the solicitor argued that both express malice and implied malice were present in this case. (Tr. p. 467, line 18 – p. 469, line 19; p. 472, lines 3 – 16; p. 490, lines 5-11; p. 493, line 21 – p. 494, line 1; p. 496, line 23 – p. 497, line 1.) The trial court charged the jury on the offenses of murder and ABWIK, noting the requirement of malice aforethought. (Tr. p. 511, line 13 – p. 512, line 2.) The trial court charged that malice may be express or inferred. (Tr. p. 512, line 3 – p. 513, line 4.) The trial court also gave a charge on transferred intent. (Tr. p. 513, lines 5-14.)

Applicant asserts Counsel erred in failing to object to the solicitor's arguments and the court's jury charge on inference of malice from use of a deadly weapon. On October 12, 2009, the South Carolina Supreme Court held "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." State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 804 (2009). Applicant was tried on September 10-13, 2007, more than two years before the ruling in Belcher on October 12, 2009. Belcher "represents a clear break from our modern precedent" approving of the jury charge on inference of malice from use of a deadly weapon, expressly overruling some twenty-six (26) cases decided over the course of more than 100 years, ranging in date from 1894 to 2006. 385 S.C. at 612, 685 S.E.2d at 810. The charge given in Applicant's case was, at the time of his trial, the sanctioned charge on the law, and the solicitor's arguments reflected the same. Because the Belcher decision posed a clear break from long-

established precedent some two years after Applicant's trial, Counsel was not unreasonable in failing to pose this objection. Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) (attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial) (overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999)).

This court further notes that evidence that would reduce, mitigate, excuse or justify the homicide was only presented as to Jenkins. There was evidence of both express and implied malice with regard to Jenkins. Applicant's statement and letter to Jenkins' family contrasted to his trial testimony, and no other evidence of self-defense was presented.² Therefore, even had the implied malice arguments and charge not been given, it is unlikely that the outcome of trial would have been different. For all these reasons, I find Applicant has failed to carry his burden in this regard.

Failure to Request King Charge

Applicant was charged with Murder, and the court gave an instruction on the lesser-included offense of Voluntary Manslaughter. Applicant argues that Counsel erred in failing to request a jury charge stating that if the jury had any doubt between the greater and lesser offense, they should resolve such doubts in favor of the defendant. In Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999), the South Carolina Supreme Court held that the King charge is unnecessary in light of the modern general reasonable doubt charge which instructs the jury to resolve doubts in favor of the defendant. Therefore, I find Counsel was not ineffective in this regard.

Self-Defense Charge

Applicant argues that Counsel was deficient in failing to object the trial court's charge on self-defense as burden-shifting. In its jury charge, the court noted that the State had the burden of

² At PCR hearing. Counsel testified that an investigator was retained and efforts were made to procure evidence of any

disproving self-defense by proof beyond a reasonable doubt. When read as a whole, the jury charge on self-defense was a proper statement on the law. Therefore, Counsel was not unreasonable in this regard.

Other Allegations

No other allegations were raised at the PCR hearing. Therefore, any additional allegations are deemed waived because no evidence was presented.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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 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 Rule 243, SCACR, 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.


AND IT IS SO ORDERED this 8th day of July, 2011.



EDGAR W. DICKSON
Presiding Judge
First Judicial Circuit

Orangeburg, South Carolina.

threat made by Jenkins or his reputation for violence. After extensive interviews, investigators were unsuccessful.



CHARLES T. BROOKS, III
THE BROOKS' LAW OFFICES, LLC
309 BROAD STREET
POST OFFICE BOX 3512
SUMTER, SOUTH CAROLINA, 29151

Andre King
Albert C. Smith II
Jamie M. Gilbert
William L. Hickman
Perry M. Scott

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211