

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Honorable Edgar Dickson, Circuit Judge

Case No.: 2018-CP-10-4365

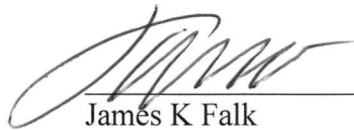
Timothy James Wright 354842.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Scott Welch appeals the Honorable Edgar Dickson’s June 30, 2022 Order of Dismissal. Undersigned counsel received notice of entry of the order on July 11, 2022. A copy of the order on appeal is attached hereto.



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July 11, 2022

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**RECEIVED**

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S.C. SUPREME COURT

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STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )  
 )  
Timothy James Wright, #354842, )  
 )  
Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

No.:2018-CP-10-4365

**ORDER OF DISMISSAL**

FILED  
2022 JUL -7 PM 4:1  
JULIE J. ARMSTRONG  
CLERK OF COURT

This matter comes before the Court by way of an application of post-conviction relief filed by Timothy James Wright (Applicant) September 4, 2018. The State (Respondent) made its Return and Motion for More Definite Statement of the Respondent on January 10, 2019. An evidentiary hearing convened on January 21, 2020, at the Charleston County Courthouse before the Honorable Edgar W. Dickson, circuit court judge.

Applicant was present at the hearing and was represented by James K. Falk, Esquire. Assistant Attorney General Sara Elyssa Gunton of South Carolina Attorney General's Office represented the State. Applicant testified on his own behalf and presented testimony from trial counsel, William Smith.

This Court had before it a copy of the Charleston County Clerk of Court's records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the post-conviction relief application, Respondent's return, the trial transcript and appellate records. After a review of the record and all evidence presented, for the reasons set forth below, this Court finds Applicant has failed to meet his requisite burden of proof to all allegations except his allegation of an illegal sentence. Therefore, Applicant's application for relief is denied and dismissed with prejudice in part, and granted in part.

I. PROCEDURAL HISTORY

Timothy James Wright (Applicant) is presently confined pursuant to orders of the Charleston County Clerk of Court. In June 2013, the Charleston County Grand Jury indicted Applicant for Murder and Possession of a Firearm During the Commission of a Violent Crime (2013-GS-10-03170,2).

Ted Smith, Esquire, and Martha Kent Runey, Esquire represented Applicant. Assistant Solicitor Jennifer Shealy and Ted Corvey prosecuted the case. On February 2, 2015, Applicant proceeded to trial before the Honorable J.C. Buddy Nicholson Jr. and a jury. Judge Nicholson sentenced Applicant to life on indictment murder and a concurrent five year sentence for possession of a weapon during the commission of a violent crime.

*Direct Appeal*

Applicant filed a timely notice of appeal. Robert M. Dudek, Esquire, of the Office of Appellate Defense perfected the appeal. The sole issue on appeal was whether the judge abused its discretion and violated the Appellant's due process rights by considering information presented in sentencing obtained from past incident reports that did not result in convictions when the defendant had no notice that these prior incidents would be addressed and no opportunity to rebut the information. The South Carolina Court of Appeals affirmed Applicant's conviction in an unpublished opinion filed December 6, 2017. *State v. Timothy James Wright*, Op. No. 2017-UP-448 (Ct. App. 2017). The remittitur was returned to the circuit court on March 21, 2018

I. Current Application

In his *pro se* application for post-conviction relief, Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> Amendment Violations
2. Fraud upon the Court
3. Due Process Violations
4. Subject Matter Jurisdiction
5. Ineffective Assistance of Counsel

On May 6, 2020 Applicant submitted through counsel an Amended PCR Application, wherein Applicant made three additional allegations regarding the ineffectiveness of trial counsel:

1. "Prior to sentencing, the state advised the court that defendant had a prior conviction for 3rd degree Assault and Battery. The State then summarized the facts from the incident report leading to that arrest. (Transcript page 530 lines 12-15). Additionally, the State advised the court that there were two prior incident reports which did not lead to an arrest but which alleged criminal domestic violence. The state then summarized the facts from those incident reports. (Transcript page 531 lines 9-15). The issue of whether or not the trial court abused its discretion in considering this information for sentencing purposes was raised on appeal. In a per curiam decision, the Court of Appeals held that the issue was not properly preserved for review. Applicant therefore respectfully contends that trial counsel was ineffective for:
  - a. Not objecting to the State's disclosure of the alleged facts underlying the June 2, 2012 conviction for 3rd degree assault and battery; and the July 2001 and September 2003 - criminal domestic violence allegations for which no arrest warrant was issued.
  - b. Not requesting a continuance of the sentencing hearing in order to allow counsel time to prepare to rebut the allegations from these three incidents.
2. Counsel was ineffective for failing to object to the admission of State's exhibit 173 which was referred to as the "Concerned Citizen Letter". The letter was unsigned and the State acknowledged that it did not know who authored the letter. The content of the letter was hearsay and trial counsel should have objected to the introduction of the letter. The parties later agreed to withdraw the introduction of exhibit 1 73. The exhibit was withdrawn and later marked as Court's Exhibit 4. The trial court reviewed the content of Court's exhibit 4 prior to sentencing. Even though the jury did not review the contents of the Concerned Citizen Letter, trial counsel was ineffective for: 1) not objecting to the letter being marked as a Court's exhibit; 2) not objecting to the State summarizing the content of the letter for the Court; and, 3) not objecting the Court reviewing the content of the letter prior to sentencing. (Transcript 537 1. 17 through 538 line 4).
3. Trial counsel was ineffective for not objecting to the State's improper pitting of witnesses. (Transcript p 435 lines 7-13)."

At the evidentiary hearing, counsel for Applicant restated Applicant's contention that there were several incidents in this matter that he believed evidenced Ineffective assistance of counsel and added a number of additional claims as follows:

1. Applicant added to his allegation that Counsel was ineffective failing to object to the jury charge when the charge delivered by the Court did not include a jury charge on accident and involuntary manslaughter.
2. Applicant also added to his allegations that counsel was failing to object to the five year sentence for the possession for weapon during the commission of crime, as it was an illegal sentence pursuant to *State v. Palmer*
3. Applicant through counsel further asserted that counsel was ineffective for failing to move strike a juror for cause. Applicant through counsel alleged that during voir dire in this case, a question was asked about: 1) its classification as a domestic violence case, and 2) whether or not anybody was a victim of domestic violence or knew anybody through close family relation who was a victim of domestic violence. In response to these questions several people came forward to speak, one of which being Robin Elsmore. During jury selection trial counsel was out of strikes by the time Ms. Elsmore was to be decided on and he had to accept her as the 12<sup>th</sup> juror on this case.
4. Applicant had concerns regarding differences between the testimony that was in the warrant affidavits and the actual testimony from the daughter of the witness. In a reading of the affidavits supporting the arrest warrants and the indictments it appeared as though the daughter of the victim witnessed the shooting, however in actual testimony it was discovered that she did not witness the shooting but arrived on the scene immediately afterwards. Applicant claims there is a significant difference between the facts as alleged and the facts that were brought forward.
5. Applicant alleges trial counsel was ineffective failing to address a juror who Applicant asserted had a fear of hostility towards him. Applicant claims that through the duration of the trial one of the jurors seemed to give him "the evil eye". Applicant brought these suspicions to the attention of trial counsel and feels as though their failure to address that matter was inappropriate.

Counsel for Applicant represented to the Court that he intended to go forward on the issues in the allegations in the Amended Allegations as well those introduced at the hearing, and that he no longer wished to go forward on any allegations from the original Application outside of Ineffective Assistance of Counsel.

In relief sought, Applicant is seeking: "Conviction and sentence vacated; my name and

DNA removed from any derogatory files; an order issued expunging my record; all monies paid out returned.”

This court has before it the records of the Charleston County Clerk of Court regarding the subject convictions, the trial transcript, the appellate records, and the application and amendments.

## **II. FACTS GIVING RISE TO CHARGES**

On February 16, 2013, Appellant Timothy Wright shot his soon to be ex-girlfriend, Melinda Ford, with a shotgun. The shot was fired within three to four feet of Ford. (R. p. 103). The pathologist noted that the shotgun blast essentially destroyed Ford's right lung, bruised her left lung, and the blast damaged her liver as well. (R. p. 100). Ford died as a result of right lung and liver maceration due to a close-range shotgun wound to the back. (R. pp. 105-6).

### ***Background***

Wright and Ford had been dating for approximately seven to eight months before the shooting. (R. p. 107). Wright had been living with Ford and her three children for approximately five months. (R. p. 7). Ford had three children. Chrisson Hayward, Ford's oldest daughter, was nineteen at the time of the shooting; Kadasha J., Ford's youngest daughter, was fifteen; and Davon M., Ford's son, was six. (R. pp. 24; 45). Ford's mother, Kate Ford ("Kate"), also lived nearby. (R. p. 51).

Wright was a hunter. (R. pp. 7, 112). He testified that he kept a 12-gauge Remington pump gun in a cabinet in Ford's bedroom. (R. p. 112).

Kadasha testified that she, Ford, and Kate went shopping on the day of the shooting.<sup>1</sup> (R. pp. 3, 5, 7-8). During the trip, Ford's mother picked up some Chinese food. (R. p. 8). Ford and

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<sup>1</sup> They were shopping for a cousin's birthday party that was scheduled for the next day. (R. pp. 7-8).

Kadasha took Kate to her house on their way home, and they then returned to their home. (R. pp. 9-10). When the two got home, they unpacked the car, and they went to their separate bedrooms. (R. p. 10). While unpacking the car, the two found Kate left her Chinese takeout. (R. p. 10). Kadasha noted Wright was home when they arrived. (R. p. 10). She also indicated that Ford stopped in the kitchen and poured wine into a jar. (R. pp. 10-11).

Kadasha testified that she washed her clothes that afternoon. (R. p. 16). While Kadasha was in the kitchen, she heard Wright screaming in Ford's bedroom, but she did not hear Ford's voice. (R. p. 16). She later saw him open up the bedroom door, and he came out to the kitchen. (R. p. 16). Kadasha noted that she heard Wright say he was done; he got some black trash bags from a cabinet and started packing up his belongings that were in Ford's bedroom. (R. pp. 16-17). Ford was inside the bedroom at that time. (R. p. 18).

#### *Wriaht Shoots Ford*

Kadasha went back to her bedroom. (R. p. 18). Ford stopped by her room and told Kadasha that she was going to take Kate her Chinese food.<sup>2</sup> (R. p. 18). The next thing Kadasha heard was Ford scream very loud. (R. p. 18). She next heard a gunshot. (R. p. 19). After hearing the gunshot, Kadasha ran to the door and saw Wright standing over Ford with a gun in his hands. (R. pp. 19-21, see R. p. 36).

Wright was wearing a white shirt, Nike slacks, and a camouflage jacket. (R. p. 20). Kadasha was able to identify the gun he was holding. (R. pp. 21-22). She noted that Wright was standing in front of the porch around Ford, who was on the ground at that time. (R. pp. 21-22). Kadasha testified Wright said he would shoot Kadasha. (R. p. 21). Kadasha noted that at some point, he

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<sup>2</sup> Kate Ford, Melinda's mother and Kadasha's grandmother, testified that Kadasha called to inform her that Melinda would be bringing her Chinese food. (R. p. 51)

said "huh, huh, huh" and pointed the gun at Ford.<sup>3</sup> (R. p. 22). Kadasha attempted to find a phone at her house, and when she could not find one, she ran to the next door neighbor's house to call for help. (R. pp. 23, 37). The neighbors were already on the phone with a 911 operator. (R. pp. 23-24).

Kadasha looked back towards her house and saw Wright on the ground next to Ford. (R. p. 24). She heard a second gunshot. (R. p. 24). After the second shot, she saw Wright lying on the ground next to Ford. (R. p. 37). She assumed he shot himself. (R. p. 37). She then ran back over to her house. (R. p. 24).

Wright then got up, ran to his truck, and drove off. (R. pp. 25, 28). Kadasha moved the gun he had been holding back from where they were. (R. p. 25). She ran over to Ford, found Ford's cell phone, and called 911. (R. p. 26). Kadasha noted that her mother was not able to speak, and it appeared she had been shot in the chest. (R. p. 27). The 911 dispatcher gave instructions on how to stop the bleeding. (R. p. 27). Chrisson arrived at the home while Kadasha was attempting to help stop the bleeding. (R. pp. 29-31, 4748). After being advised by a neighbor of what was going on, she assisted Kadasha in aiding their mother. (R. pp. 47-48).

Leonard Maxwell, one of Ford's neighbors, testified he heard gunshots that afternoon. (R. pp. 38-39). After he heard the first shot, he ran out to the porch and saw Ford lying on the ground. (R. p. 39). He thought he saw Wright shoot the gun again. (R. p. 39). Maxwell saw Wright standing over Ford, and then saw him lying next to her on the ground. (R. p. 39).

After the first shot, Maxwell looked out over the porch and saw Ford on the ground. (R. p. 40). That's when he heard a second shot. (R. p. 40). He saw Wright point the gun at himself. (R. p.

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3. During cross-examination, Kadasha testified that at some point after the initial shooting, Wright attempted to give the gun to Kadasha and requested that she shoot him. (Tr. 172). She declined to do so. (Tr. 172).

40). Wright put the gun in his mouth and said he was going to kill himself. (R. p. 40). Maxwell told him no, but then Wright shot himself twice. (R. pp. 40, 44). After that, Wright got in his truck and drove away. (R. p. 41). Maxwell noted that Ford's daughter came over after the first shot. (R. p. 41). At that time, Maxwell's roommate had already called 911. (R. p. 41). Maxwell also testified he was outside when Kadasha was attempting to help Ford. (R. p. 42). He was telling her to apply pressure. (R. p. 43). He also saw her move the gun out of the way. (R. p. 43). Ford was dead when EMS arrived. (R. p. 54).

### *Wright Was Apprehended*

Wright led law enforcement in a vehicle pursuit around John's Island. (See R. pp. 59-69, 73-76). The chase ended after Wright drove his truck through a fence and onto a baseball diamond in a local park. (R. pp. 57, 69, 74-77). Wright, however, eluded arrest at the scene. He instead hid in a local residence that was under construction. (R. pp. 70-72, 92-95, 120-21). After midnight the next morning, Wright surrendered to law enforcement, who had maintained a perimeter near the site of the truck crash. (R. pp. 78-80, 81-82). He was treated at the scene by EMS and was transported to MUSC for treatment of his gunshot wounds. (R. pp. 80, 82-89).

### *Wright Asserts the Shooting Was an Accident*

Wright testified that on the day of the shooting, he purchased a cell phone for Kadasha. (R. p. 108). He was at home when Kadasha and Ford came home from shopping. (R. p. 109). He noted that Ford was frustrated about comments people had made to her regarding their relationship. (R. pp. 109-10). The two had a discussion in Ford's bedroom about that issue for three to four minutes. (R. p. 110). Wright decided that based on that discussion, it was best that he leave the home. (R.

p. 110). He went to the kitchen, got some trash bags, and went back into the room to pack his clothing. (R. pp. 110-11).

Wright testified that all of his clothes were on hangers. (R. p. 111). After he packed some of his belongings, and while Ford was in the bathroom, Wright grabbed the shotgun he kept in the room, along with two bags he had packed, and he headed outside to his truck. (R. pp. 113-14).

“I walked outside and. I went to go open the truck door. Because my — the way my vehicle was sitting I had the two bags in my hand, the shotgun in my hand. And I went to go use one hand and kick the handle open to release the door. And when I released the door I used the other hand to kind of swing the door open.” (R. p. 114, ll 7-12). The shotgun fired. (R. p. 114). Wright claimed he did not know Ford was outside. (R. p. 114). After the shotgun fired, Wright dropped the bags that were in his hands, and he started walking away back towards the step. (R. p. 115). He then heard Ford call his name. (R. p. 115). According to Wright, Ford then told him she had been shot. (R. p. 115). Wright testified that he tried to pick her up off the ground, but she told him to stop because of the pain. (R. p. 115).

Wright asserted that he called for Kadasha, but she did not come outside immediately. (R. p. 115). He also stated that he told Kadasha to go call for help. (R. p. 115). She ran back into the house, but when she returned, he attempted to hand Kadasha the shotgun and asked her to shoot him. (R. p. 116). Wright noted that Kadasha never touched the shotgun. (R. p. 116). Instead, he went off to the side and shot himself with the shotgun. (R. p. 117). Wright said that he heard Ford yell out, so he walked over to her and explained what he did to himself. (R. p. 117). He then shot himself again. (R. p. 117). Wright testified that he then went back over to Ford, held her leg, and talked to her. (R. p. 117).

Wright testified that he observed Kadasha and a neighbor calling for help on the phone. (R. p. 118). At that point, Wright became concerned about his personal safety if members of Ford's family came to the scene. (R. p. 118). He promptly got into his truck, left the scene, and drove in the direction of his aunt's house. (R. pp. 118-19). Wright acknowledged that he saw a police car pull behind him with lights on, and that he did not stop. (R. pp. 119-20). He also admitted that he crashed his truck into a couple of fences, and that he got out of the truck and ran into a house under construction nearby. (R. p. 120). From the house, Wright could see police officers in the softball field where he left his truck. (R. pp. 120-21). Wright recalled that at some time after many of the officers left the scene, he walked out to the remaining officers. (R. p. 121). He recalled being treated by EMS, and that he was transported to MUSC. (R. pp. 121-22).

### **III. SUMMARY OF FACTS ADDUCED AT THE EVIDENTIARY HEARING**

Applicant called trial counsel, William Smith. Counsel testified that he has been practicing law for seventeen years, and the entirety of that time has been spent specializing in criminal cases. Counsel further testified that he was appointed to Applicant's case as a public defender at the Ninth Circuit Public Defender's Office. When asked what the overall theory of defense was for Applicant's case, Counsel testified that this was a fact-driven case, and that there was little investigation to do because "they knew all the players." Counsel further testified that he tried to reach out to the family members of the victim to no avail, and largely relied on Applicant's version of events.

Trial counsel testified further about possible defenses. He stated that they did not look into any self-defense claims because there was no indication of any type of fights between Applicant and victim. Counsel stated that after reviewing the facts he did not think this would be a case where a jury would find Applicant not guilty by accident alone. However, he still requested that Judge

Nicholson charge accident, and Judge Nicholson chose not to do so. After he could not get the charge on accident, trial counsel Counsel hoped to turn the jury in favor of the lesser charge of involuntary manslaughter.

Furthermore, Counsel contended that his strategy for this case was based upon Mr. Wright's version of events wherein the gun firing was the result of a coat hanger catching the trigger and causing the gun to go off and that he was not intentionally attempting to shoot the victim. However, based upon the fact that the judge did not issue a charge on accident, that issue was not preserved for appellate review. In this matter the jury still convicted Applicant with murder over the lesser charge presented, a fact that trial counsel testified to as "quelling his fears" of a problematic charge being issued in this matter. When testifying about trial counsel's failure to object to the additional weapons charge for which Applicant was sentenced to five years imprisonment, trial counsel asserted that he assumed it would be subsumed by the life sentence on the murder conviction. Therefore, trial counsel did not feel the need to object to this charge.

Counsel testified that the State failed to provide investigative reports that were used at sentencing. He contended he was provided a RAP sheet for his client. When asked why he did not raise a Brady argument for the state's failure to supply the investigative reports, counsel testified that he did not anticipate that the solicitor would assert facts from which allegations had arose against Applicant. This assumption was based on his experience where he stated that Applicant's case would not normally be a scenario that called for such action by the State. In accordance with these facts, trial counsel contends that he was sufficiently caught off guard by the reports of uncharged allegations toward applicant and was not properly prepared to refute those claims. Trial counsel then asked the Judge to temper his consideration in regards to that information, and that

request was denied by the trial court due to the fact that it is common for the court to see domestic violence cases wherein the victim refuses to cooperate with the prosecution.

Trial counsel further explained that in his extensive legal career dealing with criminal proceedings, he has known the trial judge and sentencing judge to have very broad discretion in what they chose to look at in terms of sentencing. Therefore, trial counsel did not feel that it was inappropriate of the judge to look into the incident reports in this matter.

When asked whether he had any memory of any juror giving Applicant the visual impression of contempt, trial counsel testified that he had no memory of that incident. However, had he been aware of it, he asserts that he would have brought it to the court's attention.

Counsel further testified that when speaking about the testimony of the victim's daughter, that her testimony within the initial reports gave the impression that she had witnessed the shooting firsthand. Counsel testified that the testimony at trial that she had arrived at the crime scene shortly after the shooting took place was different, but he was aware of that being the witness' testimony. Trial counsel testified that he did not consider challenging the indictment on these grounds, due to the fact that identification was not a critical issue in the case. Therefore, the juxtaposition of the testimony to the incident report did not appear particularly prejudicial or harmful to this case.

In regard to Applicant's claim that counsel was ineffective for failure to file a motion remove to Robin Elsmore as the twelfth juror for cause. Trial Counsel testified that this decision was based upon the fact that Ms. Elsmore's relationship was too attenuated to the domestic violence in this situation. Ms. Elsmore was not the victim in the situation, she described to the court nor did she appear to have many of the facts surrounding it.

Furthermore, Applicant testified briefly on his behalf. He testified to his version of the events that occurred on the night of the shooting as an accidental event triggered by a clothes

This court finds that Applicant was not constitutionally ineffective for failing to strike a juror for cause for her relationship with a person who has committed domestic violence or for not moving to strike a juror for giving Applicant “the evil eye.” First, this court finds counsel was not deficient for failing to move to strike Robin Elsmore because he credibly testified he did not consider striking this juror because he felt that her connection to the domestic violence was too attenuated, as she was not the victim or had a personal relationship with domestic violence and did not seem to appear to know much about the situation that she informed the court about. Furthermore, as there was no constitutional deficiency, this Court finds that Applicant was not prejudiced by having this juror seated.

Additionally, this Court finds that trial counsel was not constitutionally ineffective for failing to bring to the Court’s attention that a juror allegedly gave Applicant the “evil eye” during the trial. This Court finds trial counsel’s testimony credible in that he had no independent recollection of a juror giving Applicant any look, but he could have presented that information to the Court had he been made aware. This court finds that counsel was not deficient for failing to inform the court of a juror who gave Applicant “the evil eye.” Furthermore, this Court finds Applicant has failed to show any resulting prejudice.

Accordingly, this Court finds that trial was not constitutionally ineffective for failing to move to strike Juror Elsmore for cause or for moving to strike a juror from the jury who allegedly gave Applicant “the evil eye.” Therefore, these allegations are denied and dismissed with prejudice.

#### **F. Failing to Challenge the Indictment**

Applicant contends Counsel was ineffective for failing to challenge the sufficiency of the indictment. This Court disagrees and denies relief.

hanger catching the trigger of the gun causing a misfire which struck the victim. Applicant further testified that one of the jurors throughout the trial was giving him menacing looks, and that upon him alerting trial counsel to this fact he requested that his assistant monitor the situation. Applicant asserts that this assistant affirmed his suspicions and made a note of the situation, but he did not testify if she let Mr. Smith know.

Applicant asserted that a former girlfriend (Timia Davis), who may have been responsible for the "letter from a concerned citizen" which sparked the debate regarding Applicant's uncharged allegations, caused a car accident which left him hospitalized. He did not press charges for this car accident citing that she needed to be able to take care of the two children they shared while he was in the hospital. Applicant claims that this information was shared with trial counsel prior to trial.

In response to this allegation trial counsel contents that he remembered the discussion about the accident to which applicant referred. However, this information did not lie at the heart of the matter for which Applicant stood trial and therefore trial counsel did not further investigate this incident or call Ms. Davis to testify in his trial.

#### IV. STANDARD OF REVIEW

An applicant may seek PCR upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

The reviewing court applies the two-part test outlined in *Strickland v. Washington* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687-88; *accord. Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The applicant has the burden of establishing both deficiency and prejudice in order to be entitled to relief. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e),

SCRC. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of “were outside the wide range of competence” demanded of attorneys in criminal cases. *Strickland*, 466 U.S. at 688. To prove prejudice, the applicant must establish “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Id.* Significantly, “the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Id.* at 696.

**V. FINDING OF FACT AND CONCLUSIONS OF LAW**

This Court has heard the testimony and evidence presented at the evidentiary hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After the testimony presented and considering the legal arguments by counsels, as well as the record in this action incorporated by way of the State’s return, this Court proceeds to the claim raised the evidentiary hearing.

Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

**Ineffective Assistance of Counsel**

This Court finds Applicant has failed to his burden of proving he is entitled post-conviction relief on any of the allegations of ineffective. Applicant has failed to prove deficiency and any prejudice there from.

- A. Ineffective assistance of counsel for 1) not objecting to the State’s disclosure of alleged facts underlying the June 2, 2012 conviction for 3<sup>rd</sup> degree assault and battery, and the July 2001 and September 2003- criminal domestic violence allegations where no arrest was issued. 2) Not requesting a continuance of the sentencing hearing in order to allow counsel time to prepare to rebut the allegation from these three incidents.**



Applicant alleges that trial counsel was ineffective for failing to object to the use and disclosure of incident reports where no arrest was issued in consideration for sentencing, and ineffective failing to request a continuance rebut the allegation. This court finds the issues are without merit and dismisses them without prejudice.

At the evidentiary hearing, Applicant called Ted Smith, Esquire. When asked why he did not object to this information being discussed during sentencing, he agreed with the State that in his extensive legal career, it was his understanding that sentencing judges have broad discretion in what they are able to consider during sentencing. He further testified that he has seen on a couple of occasions that judges have the opportunity to look at incident reports. He testified that while he would have like to have an opportunity to respond to the incident reports, he felt that it was ultimately in the Court's discretion.

Furthermore, when asked what he may have done if he requested a continuance in this case, trial counsel testified that he may have tried to get a copy of the records and discussed what those incident reports with Applicant. He further agreed with the State that Applicant was sentenced within the sentencing range for murder, and that he discussed with Applicant he would likely get a life without parole due from his experience with Judge Nicholson as well as the seriousness of domestic violence in the State. Additionally, he agreed with the State in that the victim's daughter's testimony and victim impact statements weighed heavily on the trial judge in sentencing.

In *State v. Gullede*, the South Carolina Supreme Court held that in a sentencing proceeding, that the trial court may consider information which may be inadmissible under evidentiary rules.

This Court has reviewed the records, to include the transcript of the trial, and this Court has heard and reviewed the evidentiary hearing testimony summarized above. This Court finds no deficiency in counsel's handling of the incident reports and not requesting a continuance due to their introduction during sentencing. As stated in *State v. Gullede*, when sentencing a convicted a defendant, a trial court exercises a wide discretion regarding the sources and types of evidence it may use to assist it in determining the kind and extent of punishment to be imposed. This Court finds Trial Counsel's testimony credible in that he understood that the law allowed for judges to use broad discretion in their consideration of items for sentencing, and because of that, he did not object to the incident reports and did not request a continuance because of that. Additionally, trial counsel asked the court to "temper its consideration" of the incident reports, in which the trial court denied, as Judge Nicholson stated that a no conviction was common occurrence in domestic violence cases. Furthermore, this Court finds Applicant has failed to show any resulting prejudice from Counsel's alleged deficiency. Notably, trial counsel testified that he spoke with Applicant about his increased ~~changes~~<sup>chances</sup> of getting a life without parole sentence due to the seriousness of domestic violence in South Carolina, as well as his prior experience in front of the trial judge. Furthermore, trial counsel agreed with the State that the testimony and victim statements from the Victim's daughter weighed heavily in sentencing.

Furthermore, Applicant claims Counsel was ineffective for failing to seek a continuance. Trial counsel testified that he would have been able to look further into the reports and shared what those reports meant to Applicant, but agreed that the trial judge had the broad discretion to consider anything during sentencing and that he explained to Applicant that he would likely get a life without parole sentence if convicted. This court finds that Counsel was not deficient for failing to request a continuance. Additionally, Applicant failed to show how the continuance request would

not only be granted, but would have changed the results of the proceedings. Therefore, the record does not support a finding of deficiency nor a finding of prejudice for either of these issues. Accordingly, these allegations are denied and dismissed with prejudice.

**B. Ineffective Assistance of counsel for 1) not objecting to the “Concerned Citizen’s Letter” being marked as a Court’s exhibit; 2) not objecting to the State summarizing the content of the letter for the Court; and, 3) not objecting the Court reviewing the content of the letter prior to sentencing.**

Applicant asserts that Counsel was ineffective for not objecting to the Concerned Citizen’s letter being marked as a Court’s exhibit, not objecting to the state summarizing the content of the letter for the court and not objecting to the Court reviewing the content of the letter prior to court. The Court finds these allegations are without merit.

Leaving an issue unpreserved does not automatically constitute ineffective assistance of counsel. *See Millidge v. State*, 422 S.C. 366, 374, 811 S.E.2d 769, 800–01 (2018) (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue); *see also id.* at 380, 811 S.E.2d at 804 (“[T]he proper inquiry for determining prejudice . . . is whether there is evidence in the record to support the trial court’s finding . . . . If so, an appellate court would necessarily have affirmed the trial court’s [ruling] . . .”).

Similarly, “[a]n ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence.” *Hough v. Anderson*, 272 F.3d 878, 898 (7th Cir. 2001). “If evidence admitted without objection was admissible, then the complained of action fails both prongs of the *Strickland* test: failing to object to admissible evidence cannot be a professionally ‘unreasonable’ action, nor can it prejudice the defendant against whom the evidence was admitted.” *Id.*; *see Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner



challenges a futile objection, he fails both *Strickland* prongs); *U.S. ex rel. Link v. Lane*, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from failure to object unless there is a legally supportable argument for exclusion of the evidence).

Trial counsel testified that he did not object to the introduction of the "Concerned Citizen's Letter." He further testified that the letter never was in front of the jury, and only became relevant during the sentencing stages of trial. He further testified that he believed that the concerned citizen's letter could be relevant, but he admits that he should have been concerned about its admissibility to begin with. However, trial counsel did agree with the State in that Applicant was sentenced within the statutory range of life without parole. When asked whether or not he felt that this letter solely tainted the trial judge's decision to sentence Applicant to life without parole, he stated that he had discussions with Applicant regarding the likelihood of getting life without parole prior to trial, based on the seriousness of domestic violence in South Carolina and as well as his experiences in front of the trial judge. He continued to agree that the victim's testimony and impact statements likely had a large impact on sentencing as well. Trial Counsel further agreed with the State that hearsay is inapplicable at sentencing due to broad discretion in sentencing afforded to trial judges.

This Court finds Applicant failed to meet his burden of proving that Counsel's failure to object to the Concerned Citizen's letter was deficient. Counsel demonstrated through his testimony that the letter was never put forth in front of the jury, and credibly testified that he felt the letter was not the sole issue considered at sentencing, that he counseled Applicant on his exposure to a life sentence before trial and the letter was relevant in sentencing.

Moreover, Applicant has failed to show prejudice in that any objection to the Concerned Citizen's Letter would have changed the outcome of his trial. The letter was nor presented to the

jury as it was withdrawn by mutual agreement of counsel. Furthermore, in sentencing, Applicant was sentenced within statutory range, and was counseled on the possibility of receiving a life sentence before trial. Furthermore, due to the broad discretion in sentencing Therefore, this Court finds that Applicant has failed to produce any evidence that an objection to the Concerned Citizen's letter would have changed the outcome of his trial.

Applicant has produced no probative evidence towards meeting his burden as to either prong of *Strickland*, and accordingly his demand for relief by way of this allegation is denied.

**C. Ineffective for not objecting to the State's alleged improper pitting of witnesses.**

Applicant alleges trial counsel was ineffective for failing to object when the State impermissibly pitted witnesses. Specifically, Applicant argues the following portion of the State's cross-examination of him improperly pitted his testimony against the victim's daughter who witnesses the altercation and testified as State's witnesses:

Q. When she came out there, the 15-year-old at the time, you had this weapon; you had it down on Melinda going huh, isn't that true?

A. No, ma'am, that is not the truth.

Q. So [minor] is liar?

A. Well, she is a liar; because I did not have the gun pointed on Melinda saying huh, huh, huh.

(R.p. 435, line 7-13). Counsel did not object to this line of questioning.

"No matter how a question is worded, anytime a solicitor asks a defendant to comment on the truthfulness or explain the testimony of an adverse witness, the defendant is in effect being pitted

against the adverse witness. This kind of argumentative questioning is improper.” *Burgess v. State*, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (citing *State v. Bryant*, 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994); *State v. Sapps*, 295 S.C. 484, 486, 369 S.E.2d 145, 145-46 (1988)). “However, improper pitting constitutes reversible error only if the accused is unfairly prejudiced.” *Id.* “To establish his claim of ineffective assistance of counsel, petitioner had to show a reasonable probability that the result of his trial would have been different if counsel had objected to the solicitor’s improper questions.” *Id.* (citing *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997)). A reasonable probability is a probability sufficient to undermine confidence in the outcome of a trial. *Id.*

This Court finds that although the State’s questioning of Applicant was improper because it asked him to “comment on the truthfulness or explain the testimony of an adverse witness,” Applicant cannot establish any resulting prejudice, and thus, cannot meet his burden to show counsel was constitutionally ineffective. The uncontroverted testimony from both Applicant and the State’s witnesses all confirmed that Applicant was the person that shot the victim. Trial counsel for Applicant further testified that he may should have objected to this line of questioning, but he did not believe that the testimony was critical to the overall case. Therefore, the State’s attempt to bring up a discrepancy between Applicant’s version of events and that of the State’s witnesses had no real impact on the outcome of the trial. Therefore, Applicant cannot establish any constitutional ineffectiveness of counsel for failing to object. This allegation is denied and dismissed with prejudice.

#### D. Failure to object to the Jury Charge

Applicant alleges that trial counsel was ineffective for failing to object to the jury charge given by the Court because the charge did not include a jury charge on accident. This Court finds that Applicant has failed to prove that counsel was constitutionally ineffective.

At the evidentiary hearing, Trial Counsel testified that he considered accident as a defense based upon the way the Applicant represented the facts. Counsel admitted there was some testimony presented to the jury that ~~his~~<sup>this</sup> was an accident. However, trial counsel credibly testified that he requested a charge on accident during an off-record charge conferenced but the trial judge refused to charge Accident, but would charge voluntary manslaughter. Trial Counsel testified about the requirements to show accident, and testified that there was conflicting information presented to the jury on that specific issue. When asked whether or not he was happy with the results of the jury charge, trial counsel stated that he was in fact happy with Jury charge on involuntary manslaughter, because he did not think the jury would find Applicant guilty by reason of accident alone.

This Court finds Applicant cannot establish any constitutional ineffectiveness of counsel for failing to properly preserve the request an accident charge. Trial counsel was not deficient, as this Court finds his testimony credible that he in fact requested the jury charge but was told by the trial judge that he was not going to charge it. Furthermore, the Court finds failing to object to the jury charge did not prejudice this client, because the jury was able to hear Applicant's alleged testimony about the incident surrounding the shooting, but there was also conflicting information about whether or not the shooting was indeed an accident. This Court finds that trial counsel was not constitutionally ineffective in her request for such an instruction. This allegation is denied and dismissed with prejudice.

### E. Failure to Strike a Juror

Applicant claims Counsel was ineffective for failing to strike Robin Elsmore for cause after her disclosure about a family member's history with domestic violence, and failing to strike a juror for allegedly giving Applicant "the evil eye."

"[J]ury selection is a process that inherently falls within the expertise and experience of trial counsel." *Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). "[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." *Id.* Accordingly, "[i]n PCR proceedings, a defendant must provide credible evidence that the trial attorney's refusal to strike a juror prejudiced the defense." *Id.*

This Court finds that trial counsel was not constitutionally ineffective for failing to move to strike this juror for cause. During voir dire, the potential juror notified the court that her brother-in-law and his wife had been in a domestic violence situation for which they had to appear in family court. The juror went on to say that she personally did not feel that domestic violence happened but that it was a "long story." However, the juror represented to the Court that she could be impartial in this matter, but wanted to let the court know about the domestic violence situation to be transparent. At the evidentiary hearing, on direct examination, trial counsel testified that he did not find it necessary to strike this juror for cause, because the domestic violence situation that she spoke about was too attenuated from the domestic violence, and from her testimony, she did not appear to be knowledgeable about the situation between her brother-in-law and his wife.

Furthermore, at the evidentiary hearing, trial counsel testified that he had no independent recollection of a juror giving Applicant "an evil eye" and that he would have been able to bring it up to the Court if he felt that the juror had already made up her mind, but did not know about it.

This court finds that Applicant was not constitutionally ineffective for failing to strike a juror for cause for her relationship with a person who has committed domestic violence or for not moving to strike a juror for giving Applicant "the evil eye." First, this court finds counsel was not deficient for failing to move to strike Robin Elsmore because he credibly testified he did not consider striking this juror because he felt that her connection to the domestic violence was too attenuated, as she was not the victim or had a personal relationship with domestic violence and did not seem to appear to know much about the situation that she informed the court about. Furthermore, as there was no constitutional deficiency, this Court finds that Applicant was not prejudiced by having this juror seated.

Additionally, this Court finds that trial counsel was not constitutionally ineffective for failing to bring to the Court's attention that a juror allegedly gave Applicant the "evil eye" during the trial. This Court finds trial counsel's testimony credible in that he had no independent recollection of a juror giving Applicant any look, but he could have presented that information to the Court had he been made aware. This court finds that counsel was not deficient for failing to inform the court of a juror who gave Applicant "the evil eye," Furthermore, this Court finds Applicant has failed to show any resulting prejudice.

Accordingly, this Court finds that trial was not constitutionally ineffective for failing to move to strike Juror Elsmore for cause or for moving to strike a juror from the jury who allegedly gave Applicant "the evil eye." Therefore, these allegations are denied and dismissed with prejudice.

#### **F. Failing to Challenge the Indictment**

Applicant contends Counsel was ineffective for failing to challenge the sufficiency of the indictment. This Court disagrees and denies relief.

Applicant alleges that trial counsel was ineffective for failing to challenge the indictment because there is an alleged discrepancy in the facts presented in the indictment than the facts that were presented at trial. Applicant alleges that it appears in the indictment that the witness saw the first shot take place, but the witness testified at trial that she did not see the shot take place. Importantly, however, Applicant did not testify to ever bringing this to trial counsel's attention. When reviewing the indictment, Counsel testified that it appeared to be different, but that he anticipated and was made aware of that the witness' testimony at trial would be that she did not see the shot until afterward, and he did not think to challenge the indictment on that basis.

However, a motion to quash an indictment tests only the facial validity of the indictment. *See* S.C. Code Ann. § 17-19-90 (2014). "A motion to quash does not test the sufficiency of the State's evidence; the sufficiency of the evidence can properly be challenged only by a motion for a directed verdict following the State's presentation of its case at trial."<sup>4</sup> *State v. Massey*, 430 S.C. 349, 359, 844 S.E.2d 667, 671 (2020). Applicant's allegations at the evidentiary hearing did not raise an issue with the facial validity of the indictment, but rather appears to raise an issue with the sufficiency or type of proof offered by the State. Moreover, this Court has reviewed the indictment and finds it was indeed facially valid, and Counsel had no viable objection to make. The Court therefore finds Counsel was not deficient, nor was Applicant prejudiced by Counsel's failure to challenge the indictment.

This allegations is dismissed with prejudice, and relief is denied.

#### **E. Failure to Object to Sentencing**

Applicant contends that trial counsel was ineffective for failing to object to the Trial Judge sentencing Applicant to five years for the possession of a weapon during the commission

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<sup>4</sup> Counsel moved for a directed verdict at the close of the State's case. Trial Tr. pp. 406.

of violent crime when he was sentenced to life without parole for murder. This court agrees, and vacates this sentence.

Trial counsel testified at the PCR hearing that there was no strategic reason to not object to this sentence at the trial. He stated that he thought the five years would be overcome by the murder charge. However, that is an inaccurate characterization of the law. South Carolina Code § 16-23-490 states:

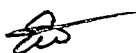
a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime

South Carolina Code Ann. §16-23-490.

Accordingly, the trial judge's sentence was improper as he sentenced Applicant to five years for the possession of a weapon during the commission of a violent crime. Therefore, this Court vacates Applicant's conviction for possession of weapon during the commission of a violent crime.

## VII. CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has established the sole constitutional violation in that he is serving an improper sentence for possession of a weapon during the commission of a violent crime. Therefore, this application for post-conviction relief is granted in part and denied in part. This Court finds Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation on all allegations outside the issue of



Applicant's improper sentence. Therefore, this Court denies relief on all allegations and dismisses this PCR action with prejudice as to every allegation outside of Applicant's improper sentence.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That the Applicant's sentence as to the possession of a weapon during the commission of violent crime is vacated.
2. That the other claims in this Application for Post-Conviction Relief must be denied and dismissed with prejudice.

AND IT IS SO ORDERED this 30<sup>th</sup> day of June, 2022.



THE HONORABLE EDGAR DICKSON  
Presiding Judge  
Ninth Judicial Circuit

Orangelung, South Carolina

RECEIVED

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S.C. SUPREME COURT