

Response in Opposition to Motion for a Stay of Execution

September 5, 2024

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S.C. SUPREME COURT

Attachment 1

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

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Freddie Eugene Owens, #5065,

Applicant,

C/A No. 2009-CP-23-0741

v;

State of South Carolina,

ORDER OF DISMISSAL

Respondent.

This is a capital post-conviction relief (PCR) case. The South Carolina Supreme Court assigned jurisdiction over this matter to this Court. For the reasons stated herein, and after careful consideration of the evidence, testimony, record, arguments, and briefs, this Court denies the relief which is sought and dismisses this application with prejudice.

I.

FACTS

On November 1, 1997, Freddie Owens murdered Irene Graves at the Speedway convenience store, formerly located at I-85 and Laurens Road in Greenville South Carolina. At the time of her death, Graves was a single mother of one adult and two minor children. She worked three jobs to support her family, including her position at the Speedway.

On Halloween afternoon, Owens and his three co-defendants prepared for a crime spree, casing several stores. Eventually, the group robbed the Prestige Cleaners on Laurens Road and the Conoco Hot Spot on Augusta Road before turning their efforts to the Speedway. After midnight on November 1, Owens and one of his co-defendants, Stephen Andre Golden, entered the Speedway with disguises over their faces.

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Graves and another employee were the only individuals working at the Safeway that night. At the time that Owens and Golden entered the store, however, the other employee had left the store to get ice for the drink machine, leaving Graves alone in the store. Owens and Golden accosted Graves and removed cash from one of the registers. They then took Graves at gunpoint to the store's safe, demanding that she open the safe. When Graves told them that she was unable to do so because cashiers were not given the safe's combination, Owens shot Graves in the right side of the head with a .32 caliber pistol. The bullet went through Graves' brain and ricocheted back off of the inside of her skull to the other side of her head.

After shooting Graves, Owens and Golden left the store with \$37.29. When they got back into the car, Owens told co-defendant Nikko Vance that he shot Graves because she would not open the safe. He then repeated that explanation to his girlfriend, Aisha Austin, the next morning. Eventually, Owens admitted to police that he had shot Graves.

The Greenville County Grand Jury indicted Owens during the October 20, 1998 term of the Court of General Sessions for the crimes of murder, armed robbery, conspiracy to commit armed robbery, and possession of a weapon during a violent crime. The State, through Solicitor Robert M. Ariail, served Owens with a Notice of Intent to Seek the Death Penalty. John M. Rollins and Karl B. Allen were appointed to represent Owens on these charges. The State presented its case through Solicitor Ariail and Deputy Solicitor Betty Strom.

The Trial and First Sentencing Proceeding

A jury tried Owens for the indicted charges from February 11, 1999 to February 15, 2009 before the Honorable Alexander Macaulay, Circuit Court Judge. The jury found Owens guilty of all charges.

During the statutorily-required 24-hour waiting period between the penalty and guilt

phases of his trial, Owens murdered his cell-mate, Christopher Lee, at the Greenville County Detention Center. When SLED agents questioned him, Owens confessed to killing Lee by beating, strangling, slamming, and kicking Lee, stabbing him with a ballpoint pen, stuffing the pen up his nose, and burning him with a cigarette lighter after beating him unconscious.

The sentencing phase began and ended the following day, February 17, 1999. The jury found that the State had proved the following aggravating circumstances beyond a reasonable doubt: (1) the murder was committed during the commission of an armed robbery; and, (2) the murder was committed during the commission of an armed larceny. In light of these aggravating factors, the jury recommended a sentence of death. Judge Macaulay followed that recommendation, sentencing Owens to death for Graves' murder, as well as 30 years for armed robbery, five years for conspiracy to commit armed robbery, and five years for possession of a weapon during a violent crime.

The First Appeal

Following his trial, Owens appealed his convictions and sentences to the South Carolina Supreme Court. Joseph Savitz, Chief Appellate Defender, and Katherine Carruth Link, Assistant Appellate Defender, represented Owens on his appeal. Assistant Attorney General Tracey Colton Green represented the State. On appeal, Owens raised eight grounds. The South Carolina Supreme Court affirmed Owens' convictions, but reversed his death sentence on the basis of one of those grounds – that defense counsel did not have sufficient time to investigate Owens' confession to Lee's murder. The Court remanded the case to the circuit court for resentencing.

The Second Sentencing Hearing

On remand, Owens was represented by Steve Sumner and Alex Kinlaw in a proceeding

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presided over by the Honorable John Kittredge, Circuit Court Judge. In this proceeding, Owens waived his right to have a jury determine his sentence, instead opting for Kittredge to sentence him himself. Following a proceeding that lasted from February 10, 2003 to February 14, 2003, Kittredge found beyond a reasonable doubt that Owens murdered Graves during the commission of an armed robbery and sentenced Owens to death.

The Second Appeal

After his resentencing hearing, Owens again appealed his death sentence to the South Carolina Supreme Court. Savtiz represented Owens again, while Assistant Attorney General Derrick McFarland represented the State. In this appeal, Owens raised only one ground for relief: that the judge erred during the jury waiver colloquy by informing Owens that his best chance for a life sentence may be in the form of jurors who claim to support the death penalty in order to be selected as part of a capital jury but who actually are opposed to the death penalty and will refuse to impose the penalty during sentencing. The South Carolina Supreme Court found that this constituted reversible error, again vacated Owens' death sentence and remanded the case to the circuit court for another resentencing proceeding.

The Third Sentencing Proceeding

Represented by E.P. "Bill" Godfrey and Kenneth Gibson on remand, Owens chose to have the jury determine his sentence. During this proceeding, the State introduced evidence of Lee's murder, as well as a sampling of Owens' lengthy record of violent prison disciplinary infractions.

At this proceeding, the jury recommended death after finding proof of two aggravating factors beyond a reasonable doubt: (1) murder during the commission of armed robbery; and, (2) murder during the commission of an armed larceny. The Honorable Larry Patterson, Circuit

Court Judge, followed the jury's recommendation, sentencing Owens to death.

The Third Appeal and Subsequent Petitions for a Stay of Execution

Represented by Savitz and Assistant Appellate Defender LaNelle DuRant, Owens appealed this third death sentence. Assistant Attorney General Anthony Mabry represented the State. Owens raised three grounds for relief, all of which were denied. The South Carolina Supreme Court affirmed Owens' third death sentence on July 14, 2008 and denied his petition for rehearing on August 8, 2008.

Owens, through John Blume and Keir Weyble, made a Motion for a Stay of Execution on August 12, 2008, seeking time to appeal to the United States Supreme Court. The South Carolina Supreme Court denied this motion after finding that the issues that Owens wished to raise on appeal to the United States Supreme Court had not been preserved for review. Owens then petitioned the United States Supreme Court for a stay of execution. Chief Justice John Roberts granted that stay on September 20, 2008, pending the timely filing and disposition of a petition for certiorari. Owens filed a Petition for Writ of Certiorari, which the United States Supreme Court denied on January 21, 2009.

Owens next filed a Petition for a Stay of Execution to pursue potential post-conviction relief remedies, which the South Carolina Supreme Court granted on March 5, 2009. Through counsel Emily Paavola and Keir Weyble, Owens filed his final amended application for post-conviction relief on June 15, 2010. It is that application which currently is before this Court.

II.

THE PCR HEARING

In his final amended application, Owens alleged numerous instances of ineffective assistance of counsel and due process violations. This Court conducted an evidentiary merits

hearing on July 19 and July 20, 2010 to address the issues raised by Owens. At that hearing, Emily Paavola and Keir Weyble represented Owens, while Assistant Attorney Generals Anthony Mabry and Brendan MacDonald represented the State.

At the beginning of the hearing, Owens requested to waive and abandon Grounds 10(b), 11(b)7, 10(c), and 11(c), which alleged ineffective assistance of counsel for trial counsel's failure to object to Owens being seen by the jury in restraints during his trial. The Court granted that request, dismissing those grounds with prejudice. Owens then presented testimony from witnesses Joseph Savitz, Bill Godfrey, Kenneth Gibson, Jill Rider, James Garbarino, and Drucy Glass. Owens himself did not testify. The State presented testimony from witnesses John Rollins, Steve Sumner, Robert Ariail, Donna Schwartz-Watts, and Tora Brawley. In addition to the above-referenced testimony, this Court also has before it for consideration the Record on Appeal of Owens' trial and sentencing proceedings, the records of Owens' convictions and sentences, the evidence introduced in Owens' trial and sentencing proceedings, the appellate briefs and decisions of the South Carolina Supreme Court regarding Owens' trial and sentencing, the briefs and orders of the United States Supreme Court regarding Owens' Petition for Writ of Certiorari, the PCR applications, the PCR transcript, and the evidence and exhibits introduced at the PCR merits hearing.

After reviewing the entirety of the materials listed above, this Court finds that the application for post-conviction relief is without merit and dismisses the application with prejudice.

III

STANDARD OF REVIEW – INEFFECTIVE ASSISTANCE OF COUNSEL

In a PCR proceeding, the applicant bears the burden of proving that he is entitled to

relief. *Brown v. State*, 383 S.C. 506, 680 S.E.2d 909 (2009); *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). In order to establish ineffective assistance of counsel, the applicant must prove that: (1) counsel's performance was deficient; and, (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Id* citing *Strickland v. Washington*, 466 U.S. 668 (1984). This test requires that the applicant prove that the representation that he received fell below an objective standard of reasonableness and that he was prejudiced by this ineffective representation. *Id*; *Simpson v. Moore*, 367 S.C. 587, 595-96, 627 S.E.2d 700, 706 (2006).

In order to satisfy the first prong of this test – deficient performance – an applicant may not generally aver ineffective assistance but must identify specific acts or omissions that are unreasonable under prevailing professional norms. *Strickland v. Washington*, 466 U.S. at 690 (1984). This is a difficult burden for an applicant to satisfy, as there is a strong presumption that counsel provided effective assistance and used “reasonable professional judgment.” *Id*. It is made more difficult still by the latitude which courts must give to attorneys when evaluating the strategies that they used to try their cases: “Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Watson v. State*, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) citing *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Thus, in order to establish that the quality of his representation was so poor as to be ineffective, an applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 696.

Satisfying the second prong of the *Strickland* test is equally challenging. Even after establishing that the quality of his representation failed to meet an objective standard of

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reasonable professional judgment, an applicant must prove that he was prejudiced by that ineffective assistance. In capital cases, the standard for proving prejudice differs in the guilt and penalty phases of the trial. In the guilt phase, an applicant is prejudiced if, absent counsel's errors, there is a reasonable probability that the defendant would have been found not guilty. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). In the penalty phase, prejudice occurs if "there is a reasonable probability that the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. As it applies to both phases, a "reasonable probability" is a probability that is sufficient to undermine confidence in the outcome of the proceeding. *Jones v. State*, 332 S.C. 329, 344-45, 504 S.E.2d 822, 829-30 (1998).

In order for an applicant to prevail on a claim of ineffective assistance of counsel, he must satisfy both prongs of the *Strickland* analysis: "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Pelzer v. State*, 381 S.C. 217, 672 S.E.2d 790 (2009).

IV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ground 10(a)/11(a)(1)

In his PCR motion, Owens alleges in Ground 10(a) – supported by facts in Ground 11(a) – that his trial counsel was ineffective during jury selection for his 2006 resentencing proceeding for failing to object to statements by the solicitor and the trial court that the State may only seek the death penalty if aggravating circumstances are present. Such statements, according to Owens, improperly suggested to potential jurors that aggravating circumstances had already been

found. Because these challenged statements were not improper, Owens is unable to prove that his trial counsel was ineffective for failing to object to them.

While both the solicitor and the trial judge commented upon the necessity of proving aggravating circumstances in order to impose a death verdict, neither the solicitor nor the trial judge made any improper suggestions that aggravating circumstances had already been proved. The challenged comments were explanatory in nature, designed to instruct the jury of the differences between capital and non-capital cases, specifically that a jury may not impose a sentence of death unless the State has proved at least one aggravating factor beyond a reasonable doubt. As counsel testified at the PCR hearing, these remarks were not objectionable because they did not suggest to the jury that aggravating circumstances had already been proved. Because these comments were not objectionable, Owens cannot show that his trial counsel was deficient for failing to object to them at trial.

Owens is also unable to prove prejudice. As the record makes clear, the trial judge explained to the jury several times that the State is required to prove aggravating factors alleged beyond a reasonable doubt. He explained further that, absent such proof, a jury cannot impose a sentence of death. As trial counsel testified at the PCR hearing, it is common in a capital case for the court to explain the difference between capital and non-capital murder to the jury. Trial counsel also testified at the PCR hearing that the court instructed the jury numerous times that the State must prove aggravating circumstances beyond a reasonable doubt. These instructions, taken together with the jury's unanimous finding of aggravating factors and unanimous recommendation of a death sentence, illustrate that the jury determined independently that the State proved its case beyond a reasonable doubt. As a result, Owens is unable to establish prejudice and cannot obtain relief on the basis of this ground.

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Ground 10(a)/11(a)(2)

In Ground 10(a) – as supported by Ground 11(a)(2) – Owens alleges that his trial counsel was ineffective during jury selection for his 2006 sentencing proceeding for failing to object when the trial judge disqualified a potential juror, Sonya Ables, solely because she approached her pastor and spoke with him about the death penalty. Because the trial court properly disqualified Ables, Owens is unable to prove that his trial counsel was ineffective for failing to object to her disqualification.

In a capital case, it is the trial judge's duty to ensure that an unbiased, fair, and impartial jury is impaneled. *State v. Matthews*, 291 S.C. 339, 353 S.E.2d 444 (1986). The trial judge has sole discretion to determine whether a juror is qualified to serve, and his decision will be overturned on appeal only if wholly unsupported by the evidence. *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2009) *citing* *State v. Green*, 301 S.C. 347, 392 S.E.2d 157 (1990); *State v. Plemmons*, 286 S.C. 78, 332 S.E.2d 765 (1985). If a defendant appeals a prospective juror's disqualification, then the appellate court must review the voir dire examination of that juror in its entirety and may overturn the verdict only if there is no reasonable basis for which the trial court could have disqualified the juror. *State v. Evins*, 373 S.C. 404, 645 S.E.2d 904 (2007).

In this case, the trial judge properly disqualified Ables. Under South Carolina law, a trial judge may disqualify a prospective juror who, despite the court's instructions to the contrary, seeks advice about implementing the death penalty from a religious advisor. *State v. Gilbert*, 277 S.C. 53, 283 S.E.2d 179 (1982) (trial judge properly excused prospective juror who, despite the court's contrary instructions, met with her priest, told him that she might serve on a capital jury, and asked him about the church's stance on capital punishment). When the trial judge removed Ables, he was acting in accordance with South Carolina law. As a result, Ables'

disqualification was proper and trial counsel was not deficient for failing to object to it. Because Owens can prove neither deficient performance nor prejudice, he is unable to prevail upon this ground of his ineffective assistance of counsel claim.

Ground 10(b)/11(b)(1)

In Ground 10(a) – as supported by Ground 11(a)(2) – Owens alleges that his trial counsel was ineffective during his 2006 sentencing proceeding for failing to object when the State instructed the jury that Owens had been found guilty of murder, played the surveillance video that displayed Graves' murder, and did not tell the jury which of the two men captured in the video was the triggerman. Owens argues that by playing the video without offering Golden's testimony from previous proceedings – that he was the man visible behind the counter and that Owens, standing off camera, shot Graves – the State misled the jury into believing that Owens was the man visible behind the counter and that he was the triggerman. This, according to Owens, falsely led the jury to consider the video as conclusive video footage of Owens as the triggerman, foreclosing the possibility of Owens presenting a minor participant theory in his mitigation case. After a careful review of the evidence and Owens' allegations, it is clear that Owens is not entitled to relief on this ground.

Owens cannot establish that his trial counsel was deficient for failing to object to the State's playing of the video or for failing to request a jury instruction explaining the contents of the video. First, there was nothing improper about the State's publication of the crime scene video to the jury. *See State v. Powers*, 331 S.C. 37, 501 S.E.2d 116 (1998) (videotape of crime scene admissible to prove circumstances of crime and character of accused); *State v. Jones*, 343 S.C.562, 541 S.E.2d 813 (2001) (videotape of crime scene admissible in sentencing phase of capital trial). The video was relevant to the aggravating factors alleged by the State, the

circumstances of the crime, and the character of the defendant, all of which are proper factors for a sentencing jury in a capital trial to consider. *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001). The authenticity of the video was not in question, there was no evidence that the video had been tampered with or manufactured, and there were no issues regarding the video's chain of custody. Because there was no reasonable basis for an objection to the publication of the video to the jury, trial counsel was not deficient for failing to object.

Second, any jury instruction that the court could have given regarding the contents of the video would have required the court to comment upon the facts of the case, which would have been improper. Under South Carolina law, judges are precluded from commenting upon the facts of a case and from charging juries as to matters of fact. S.C. Const. Art. V, Section 21; *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009); *State v. Smalls*, 98 S.C. 297, 82 S.E. 421 (1914). Any instruction that the trial judge could have given as to the crime scene video would have required him to comment upon the facts of the case, in violation of Article V, Section 21 of the South Carolina Constitution. At the PCR hearing, trial counsel testified that they knew that an instruction clarifying the content of the crime scene video would have violated South Carolina law and that a request for any such instruction would be denied.

Owens also is unable to prove that he was prejudiced by his trial counsel's failure to object to the State's playing of the crime scene video to the jury and failure to request a jury instruction as to what the video depicted. As the sole decider of the facts of the case, the jury had to determine whether Owens was involved in Graves' murder and what role he played in that crime. Throughout the course of the sentencing proceeding, the third sentencing jury heard testimony that Owens was the triggerman, that he shot Graves while standing behind the counter and near the safe, and that he shot Graves because she would not open the safe. It was the jury's

role to determine if any or all of the State's evidence – including the testimony and the video – was credible and how much weight, if any, to afford to that evidence. In light of all of the evidence presented at the third resentencing hearing, Owens is unable to prove that there is a reasonable probability that the jury would have returned a life sentence if the State had not played the crime scene video or if the judge had instructed the jury as to its contents. Because Owens can prove neither deficient performance nor prejudice, he is unable to prevail on his ineffective assistance of counsel claim as it relates to the crime scene video.

Ground 10(b)/11(b)(2)

In Ground 10(b) – as supported by Ground 11(b)(2) – Owens alleges that his trial counsel was ineffective during his 2006 sentencing proceeding for failing to object to Officer Wood's testimony that Owens gave him "cold chills" and the State's reliance upon that testimony in its closing argument. Because Owens is unable to prove deficient performance and prejudice, he is unable to obtain relief upon the basis of this ground.

During the penalty phase of a capital trial, a jury must weigh evidence of mitigation and evidence of aggravation. Because the character of the defendant and the circumstances of the crime are important factors in the jury's sentencing determination, a trial judge may allow the admission of evidence that bears on either of those issues to aid the jury in its deliberations. *State v. Kornahrens*, 290 S.C. 281, 350 S.E.2d 180 (1986); *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979), *overruled on other grounds*, 305 S.C. 45, 406 S.E. 315 (1991).

In this proceeding, the State offered Woods' testimony as evidence of character and of future dangerousness. Woods testified as to several statements that Owens made to him, including Owens' remarks that he wants "to be remembered as the one who killed the most people in Greenville" and that he considers himself to be "a real menace." Woods also testified

that Owens had a "cocky" demeanor and a "don't care attitude" during their meetings. In response to the State's question of how Owens made him feel, Woods testified that Owens was one of only two people who ever had given Woods "cold chills" during his 25 years of experience as a law enforcement officer.

As character evidence introduced during the penalty phase of the trial to prove the aggravating character of future dangerousness, Investigator Woods' testimony was admissible in its entirety. *See State v. Howard*, 295 S.C. 462, 369 S.E.2d 132 (1988); *State v. Torrence*, 305 S.E. 45, 406 S.E.2d 315 (1991). Additionally, the State's reliance upon that testimony during closing arguments was proper. *Randall v. State*, 356 S.C. 639, 591 S.E.2d 608 (2004) *citing State v. Cooper*, 334 S.C. 540, 514 S.E.2d 584 (1999); *Edwards v. Lawton*, 244 S.C. 276, 136 S.E.2d 708 (1964) (counsel has wide latitude in closing arguments to juries so long as the arguments are based upon facts properly within evidence or inferences drawn from those facts). In this case, the Solicitor's closing argument focused upon Owens' character and background as well as the circumstances of the crime. All references made to Woods' testimony were based upon statements properly within evidence and reasonable inferences drawn therefrom. *See Vaughn v. Staet*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004). Because both Woods testimony and the State's reliance upon that testimony in closing arguments were proper, trial counsel was not deficient for failing to object to their admission.

Even if Owens were able to prove deficiency, he is unable to prove prejudice. *See Von Dohlen v. State*, 313-14, 602 S.W.2d 738, 746 (2004) (holding that failure to object to improper closing argument in the penalty phase was not prejudicial to applicant) and *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). Based upon the entirety of the aggravating evidence presented by the State at this third sentencing proceeding -- including Graves' and Lee's

murders and Owens' lengthy prison record – Owens is unable to prove that, had his counsel objected to the admission of Woods' testimony or the State's argument from that testimony, the jury would have recommended a sentence of life. As a result, he is unable to obtain relief on this ground.

Ground 10(b)/11(b)(3)

In Ground 10(b) – as supported by Ground 11(b)(3) – Owens alleges that his trial counsel was ineffective during his 2006 sentencing proceeding for failing to object to victim impact testimony concerning the effect that the victim's death had upon the victim outreach coordinator and the statements made by the victim's children to the victim outreach coordinator after the victim's death. Because this testimony was admitted properly into evidence, Owens cannot prove that his counsel was ineffective for failing to object to it.

The State may introduce victim impact testimony if it shows the specific harm committed by the defendant in murdering the victim and is relevant to the jury's determination of the defendant's moral culpability and blameworthiness. *Payne v. Tennessee*, 111 S.Ct. 259 (1991); *State v. Bixby*, 388 S.C. 528, 698 S.E.2d 572 (2010). In this case, the State chose to call as a victim impact witness Juliana Christy, the Sheriff's Office's victim/witness coordinator, rather than Graves' two minor children. Because Christy's testimony was offered to prove the specific harm committed by Owens in murdering Graves and was relevant to the jury's determination of Owens' moral culpability in Graves' death, her testimony was admissible.

At trial, Christy testified as to the Graves' children's reactions to hearing of their mother's death as well as to her own feelings concerning their emotional responses. Christy testified that she went to the Graves' house on November 1 to inform Insley and James of their mother's death. When she arrived and knocked on the door Insley – who was waiting for a ride

from her friend's mother to go to cheerleading camp – opened the door and immediately asked “where is my mommy,” a phrase that she continued to repeat throughout Christy's visit. Christy testified that, upon hearing of her mother's injuries and death, Insley began to scream and to cry, ran into her mother's room, put on her mother's coat, and wrapped it around her so that she could smell her mother's scent on the coat. Jeremy sat very still and was silent for several minutes before beginning to cry and running into Christy's arms. When the children's grandparents came to pick them up, Jeremy packed a family photograph to take with them.

After describing that day's events, Christy was asked how she would describe that day. In response to that question, Christy testified that this was the most difficult case that she had worked on in her fifteen years of experience and out of thousands of cases. She further explained that this was the only death notification that she had ever done and that this case had affected her deeply. Because Christy's descriptions of the events constituted proper victim impact evidence, her testimony was admissible in its entirety. As a result, Owens' trial counsel was not deficient for failing to object to its admission into evidence.

First, none of Christy's testimony – including her recollections of statements made by the children on that day – constituted hearsay. The statements were not offered to prove the truth of the matter asserted, but to show the children's state of mind after hearing that their mother had been killed. Rule 801(c), SCRE, *State v. Kelly*, 343 S.C. 350, 340 S.E.2d 851 (2001) (testimony by witness as to victim's child's statement was not hearsay because the statement was not offered for the truth of the matter asserted but to show the impact of the murder upon the child). Even if the children's statements constituted hearsay, they would fall under the excited utterance exception to the hearsay rule. The children's comments resulted directly from a startling event, were made while the children were still under the stress of the event, and were related to the

event. Collins, Danny R., *South Carolina Evidence, Second Edition, 577-582, S.C. Bar (2000)*.

Second, Christy's testimony, even if hearsay, did not violate the Confrontation Clause of either the United States or the South Carolina Constitution because the statements were non-testimonial in nature. *State v. Davis, 371 S.C. 170, 178, 638 S.E.2d 57, 61; Crawford v. Washington, 541 U.S. 36, 68 (2004)*. Christy went to the Graves' home in order to inform the children of their mother's death, not to gather evidence. The children's statements were made during the death notification process. As a result, the statements were non-testimonial in nature and did not violate the Confrontation Clause. *Davis v. Washington, 547 U.S. 813, 126 S.Ct. 266 (2006); Hammond v. Indiana, 547 U.S. 813, 126 S.Ct. 266 (2006)*.

Finally, the testimony was admissible under Rule 403, SCRE because the probative value of the evidence was not substantially outweighed by a danger of unfair prejudice. *State v. Bixby, 388 S.C. at 556-57, 698 S.E.2d at 572*. During a capital sentencing proceeding, victim impact testimony is probative of "the loss to the victim's family and to society which resulted from the homicide" and is relevant "to show the uniqueness of the victim, the harm committed by Appellant, and the impact of the victim's death." *Payne v. Tennessee, 501 U.S. 808, 822, 111 S.Ct. 2597, 2606 (1991)*. Christy's victim impact testimony was admissible for those reasons, and Owens cannot prove deficient performance for his trial counsel's failure to object to its admission.

Owens is also unable to prove prejudice from the admission of Christy's testimony into evidence. Even if Christy had not testified, the State would have been able to present evidence that Owens' murdered a mother with two small children who depended upon her for support, nurture, and love. *State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994)*. The State would have presented evidence of the effect of Graves' murder upon her children, including their

emotional reactions and physical actions after they were notified. Christy's testimony as to the children's reactions and statements was cumulative of other testimony already in evidence. *State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (1990) (admission of alleged improper hearsay in penalty phase of capital trial was harmless where the evidence was cumulative of other evidence); *State v. Blackburn*, 271 S.C. 324, 247 S.E.2d 334 (1978) (admission of improper evidence is harmless if it is merely cumulative of other evidence). Owens can neither establish prejudice nor prove ineffective assistance of counsel, and he is unable to obtain relief on the basis of this ground.

Ground 10(b)/11(b)(4)

In Ground 10(b) – as supported by Ground 11(b)(4) – Owens alleges that his trial counsel was ineffective during his 2006 sentencing proceeding for failing to preserve for review Confrontation Clause and due process objections to the admission of Owens' prison disciplinary infractions record. Of Owens' 56 disciplinary infractions, the State introduced at trial a summary of 28 of those incidents. Because Owens cannot establish deficient performance and prejudice, he is unable to obtain relief upon the basis this ground.

First, Owens is unable to establish deficient performance because the records were relevant and properly admissible under the business records exception to the hearsay rule. In the sentencing phase of a capital trial, a defendant's prison disciplinary infractions record is relevant and admissible as evidence of both the defendant's character and of the aggravating factor of future dangerousness. *State v. Shuler*, 353 S.C. 176, 577 S.E.2d 438 (2003); *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999) (evidence of a defendant's behavior in prison is admissible in capital sentencing because it bears on his character and future dangerousness). The records are not hearsay because they fall within both the business records exception to the hearsay rule. Under this exception, a report is admissible and does not constitute hearsay if the report was

prepared at or near the time of the event recorded, by or from information by a person with knowledge of the event, during the regular course of business, is identified on the record by a qualified witness, and is deemed trustworthy by the court. Rule 803(6)(c), SCRE.

In *State v. Owens*, 378 S.C. 636, 664 S.E.2d 80 (2008), the South Carolina Supreme Court unanimously rejected Owens' contention that the prison disciplinary records summary admitted in previous proceedings – and at issue here – was not admissible under the business records exception after finding that the summary satisfies each requirement of the business records exception. The underlying disciplinary reports were made at the time of the incident by correctional officers with knowledge of the incidents and were prepared during the regular course of business in accordance with South Carolina law requiring prison records to be maintained. The custodian of records at the South Carolina Department of Corrections, Major Theiry Nettles, presented and identified the records at trial. Finally, the trial court found these prison records admissible during an *in camera* hearing before allowing them into evidence at trial.

Owens' trial counsel was not deficient for failing to make a Confrontation Clause objection to the introduction of this summary into evidence because non-testimonial business records do not implicate the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004) (business records are not testimonial in nature and, therefore, do not implicate the Confrontation Clause); *State v. Holmes*, 361 S.C. 333, 605 S.E.2d 19 (2004) (“properly administered, the business and public records exceptions are among the safest against a Confrontation Clause challenge of the hearsay exception”). The business records in issue in this case are non-testimonial in nature because they were not prepared in anticipation of producing testimony at trial, but rather in accordance with South Carolina statutory law for the

administration of prison affairs. *See* S.C. Code Ann. §§ 24-1-130; 24-1-140; 24-21-60; 24-21-70; *Rayfield v. South Carolina Dep't. of Corrections*, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988) (state statute requires prison and parole officers to keep records of prisoners' habits and deportment and to prepare adequate reports). Owens' prison disciplinary infractions record was admitted properly and did not violate the Confrontation Clause, and Owens cannot prove that his trial counsel was deficient for failing to object to its admission.

Similarly, Owens' trial counsel was not deficient for failing to raise a due process objection because the admission of the records into evidence did not violate Owens' right to due process. From a review of Owens' PCR Application, it is not clear what due process violation Owens is alleging. However, to the extent that Owens is raising the same procedural due process claim that he raised on direct appeal from his third sentencing proceeding, this claim is without merit. Procedural due process requires notice, an opportunity to be heard, judicial review, and such procedural protections as demanded by the particular situation. *Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health and Envtl. Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991); *Kurschnew v. City of Camden Planning Comm'n*, 376 S.C. 135, 172, 656 S.E.2d 346, 350 (2008). Owens received all procedural protections required by due process. He was on notice that his prison misconduct would be introduced in this penalty phase resentencing hearing because the State provided trial counsel with the disciplinary records, a summary of the disciplinary violations, a Notice of Aggravating Circumstances, and a Notice of Evidence in Aggravation before trial. Owens also had an opportunity to be heard and judicial review by the trial court and the South Carolina Supreme Court. Finally, Owens' due process rights under *Gardner v. Florida*, 430 U.S., 349 (1977) were not violated because he was given an opportunity to deny and explain the prison disciplinary infractions but chose not to.

Just as Owens is unable to prove deficient performance, so is he unable to prove prejudice from trial counsel's failure to object to the introduction of his prison disciplinary infractions. The records were admitted properly into evidence, and any objection that Owens' trial counsel had made could have been properly overruled. Even if trial counsel should have objected to the evidence, their error in failing to object would have been harmless because this evidence was cumulative proof of aggravating factors. *See State v. Bell*, 302 S.C. 18, 393 S.E.2d 362 (1990). In this sentencing proceeding, the State introduced overwhelming evidence of Owens' future dangerousness, bad character, and inability to adapt to prison life. Many of the witnesses that testified to Owens' future dangerousness relied upon these prison records to testify to Owen's history of violent behavior and possession of illegal weapons while incarcerated. As a result, the evidence of Owens' prison infractions was before the jury through other witnesses, making the introduction of the summary of the records cumulative and any failure to object to its admission harmless error. Owens is unable to prove deficient performance and prejudice, and he is unable to obtain relief upon the basis of this ground.

Ground 10(b)/11(b)(5)

In Ground 10(b) – as supported by Ground 11(b)(5) – Owens alleges that his trial counsel was ineffective during his 2006 sentencing proceeding for failing to present mitigation evidence that previously had been presented at Owens' first two sentencing proceedings. Specifically, Owens objects to trial counsel's failure to present evidence in greater detail of his life history and background, brain dysfunction, and difficulties with attention and impulse control. Because he cannot establish deficient performance and prejudice, Owens is unable to prevail on this ground.

The South Carolina Supreme Court analyzes claims of failures to investigate, discover, and present mitigating evidence under the United States Supreme Court's holding in *Wiggins v.*

Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003), and its progeny. Under this line of cases, trial counsel in a capital case must conduct a reasonable and thorough investigation into mitigation evidence and present favorable mitigation evidence during the sentencing phase of trial. *Id.* In this case, Owens' trial counsel properly conducted a thorough investigation into potential mitigating evidence and chose to present evidence that it thought would favor Owens at trial. Owens' trial counsel complied with Wiggins' requirements, and, as a result, Owens is unable to establish ineffective assistance of counsel.

Owens claims that his trial counsel was deficient for failing to call Dr. Jim Evans to testify to Owens' brain dysfunction and difficulties with attention and impulse control and for failing to have Marjorie Hammock testify in extensive detail about Owens' life history. As to Dr. Evans, trial counsel made a strategic decision not to have him testify at the third sentencing hearing after reviewing the testimony that he gave at the second sentencing hearing. At Owens' second sentencing hearing, Dr. Evans, a neuro-psychologist, based his testimony, in part, on the results of a quantitative EEG (QEEG) – a controversial test that has been attacked successfully as invalid in some jurisdictions – that was analyzed in California. Trial counsel decided not to use Evans because they questioned his credibility, as well as the credibility of the QEEG upon which he based his analysis. Trial counsel also decided that it may be prudent to use different experts at Owens' third sentencing proceeding, as the experts used at Owens' first two sentencing proceedings did not obtain a life sentence for Owens. Trial counsel called several different experts – Dr. Schwartz-Watts, Dr. Thomas Cobb, and Dr. Tora Brawley – instead of Evans, and those experts offered substantively the same testimony.

As to Hammock, the main reason that her testimony in the third sentencing proceeding was less substantial than in previous proceedings was that the State decided not to cross-examine

Hammock as they had in the previous proceedings. Additionally, much of Hammock's testimony at the first two proceedings dealt with how Owens would adjust to incarceration, a topic that became irrelevant after Owens had been imprisoned for several years and had a lengthy prison disciplinary infraction record. Owens' trial counsel made the strategic decision not to elicit testimony from Hammock that was no longer relevant.

Owens was not prejudiced by trial counsel's decision not to have Evans testify. When determining whether an absence of certain mitigation evidence resulted in prejudice, the reviewing court must determine whether "the mitigation evidence, taken as a whole, 'might well have influenced the jury's appraisal' of the defendant's culpability." *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009) quoting *Wiggins v. Smith*, 539 U.S. 510, 538, 123 S.Ct. 2527 (2003). In reaching that determination, the reviewing court must consider whether "had the jury been able to place [the new mitigation evidence] on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Gray v. Branker*, 529 F.3d 220, 238 (4th Cir. 2008). Thus, a defendant seeking to establish prejudice "must show a reasonable probability that the jury would have rejected a capital sentence after it weighted the entire body of mitigating evidence (including the additional testimony applicant could have presented) against the entire body of aggravating evidence (including any additional aggravating evidence likely to have come in). *Wong v. Belmontes*, 558 U.S. 15, 130 S.Ct. 383 (2009) citing *Strickland* at 695-96, 700.

In this case, Owens cannot prove that he suffered prejudice from trial counsel's decision not to have Evans testify because the substance of Evans' testimony was presented to the sentencing jury through the testimony of expert Doctors Cobb, Brawley, and Schwartz-Watts. Through their testimony, the jury learned that Owens had an anxiety disorder; was on psychiatric

medications; had problems with attention and impulsivity; had a history of depression that could manifest itself as aggression, impulsivity, and resistance; had select areas of deficit in his brain; and suffered from difficulties in school because of learning disabilities and poor social skills.

The testimony that Evans could have offered would have been cumulative of the above-described evidence testified to by the experts that replaced him.

Owens also was not prejudiced by his trial counsel's decision not to elicit more detailed testimony from Hammock. Although her testimony was more limited in the third sentencing proceeding than in the first two, Hammock nevertheless offered substantially the same testimony, including that Owens frequently was exposed to violence in his home and neighborhood; suffered from physical abuse; witnessed physical abuse, including one incident during which his step-father chased his mother around the house with a machete; had five family members who had been incarcerated; and, was in and out of foster care for portions of his childhood. Hammock further testified as to the strong correlation between the type of childhood that Owens had and a future history of violence. The topics that she failed to cover were addressed by the other mitigation witnesses at the third sentencing proceeding, specifically Schwartz-Watts, Cobb, Brawley, and Owens' teacher, Ms. Maag.

During his PCR hearing, Owens raised an additional basis for relief under this ground that he did not present in his PCR application, and it too is without merit. Owens argued that this ground extends to cover his trial counsel's failure to present mitigation evidence contained in mitigation investigator Drucy Glass' file. However, despite Owens' claims that his trial counsel did not have access to the information contained within Glass' file during this proceeding, there is no evidence that information was not available to counsel at the time of this proceeding. Glass testified that she turned the file over to Owens' counsel at each proceeding, and Owens' trial

counsel testified that they reviewed the evidence found in that file in advance of trial. If trial counsel made a strategic decision not to present the evidence present in that file, then such a decision does not constitute ineffective assistance of counsel. Trial counsel presented a cogent mitigation case through the testimony of Hammock, Schwartz-Watts, Cobb, Brawley, and Maag. As a result, the absence of some evidence present in Glass' file from the mitigation case presented at trial does not undermine confidence in the outcome of this penalty proceeding.

Ground 10(b)/11(b)(6)

In Ground 10(b) – as supported by Ground 11(b)(6) – Owens alleges that his trial counsel was ineffective during his 2006 sentencing proceeding for failing to present mitigation evidence of Owens' experiences while incarcerated in the Department of Juvenile Justice and the impact of those experiences upon his character, conduct, and psychological condition. Specifically, Owens argues that his trial counsel was ineffective for failing to introduce the testimony of Dr. James Garbarino that Owens experienced and witnessed physical and sexual abuse while incarcerated at DJJ. Because Owens is unable to prove deficient performance or prejudice, he is unable to obtain relief upon the basis of this ground.

Owens cannot prove that his trial counsel was deficient for failing to present the substance of Garbarino's testimony at Owens' third resentencing proceeding because trial counsel made a reasonable strategic decision not to present this evidence. First, Owens' claims of abuse were not corroborated. Although Owens met with six defense attorneys, two mitigation investigators, one private investigator, and a number of mental health experts before meeting with Garbarino in 2009, he failed to inform any of these individuals of this alleged abuse. He could not produce any records indicating reports of sexual assault or sexual abuse from DJJ during the time of his incarceration. Similarly, he failed to offer testimony from any guard or

former inmate of DJJ that witnessed any sexual or physical abuse or from any of his friends or family members to whom he had relayed accounts of this alleged abuse.

Second, it is clear from the record that Owens' trial counsel conducted an extensive and thorough investigation into potential mitigation evidence and made a conscious decision not to present Garbarino's testimony at trial. Trial counsel retained for investigative purposes a forensic social worker, a mitigation investigator, a private investigator, a forensic psychiatrist, a neuro-psychologist, and Owens' treating psychiatrist. Trial counsel also reviewed the mitigation evidence collected for Owens' first two sentencing proceedings and the transcripts of those proceedings. In none of these records were there any allegations of physical or sexual abuse during Owens incarceration at DJJ.

Third, trial counsel decided that it would be in Owens' best interest not to present this mitigation evidence because of the circumstances surrounding Owens' incarceration in DJJ as well as his behavior while there. Owens was incarcerated at DJJ for assault with the intent to kill. While there, he displayed a propensity for violence, frequently assaulted other inmates, threatened DJJ staff, refused to comply with disciplinary rules, and incited other inmates not to do their work. His poor behavior at DJJ caused Owens to be confined to a maximum security unit on several occasions. Because the State did not introduce Owens' behavior while at DJJ, trial counsel thought it best not to open the door to admitting potentially damaging information into evidence during its mitigation presentation. Specifically, trial counsel did not want the sentencing jury to focus upon the similarity of the assault for which Owens was incarcerated and his behavior while at DJJ and his murders of Graves and Lee. By allowing in evidence of Owens' behavior while at DJJ and leading up to his incarceration there, trial counsel would have risked letting in evidence regarding Owens' bad character, future dangerousness, and inability to

adapt to life in prison. *See Burger v. Kemp*, 483 U.S. 776, 793, 107 S.Ct. 3114 (1987) (when a defendant's background is "by no means uniformly helpful" and "suggest[s] violent tendencies," it is reasonable to choose not to present it).

Owens also is unable to prove prejudice for his trial counsel's failure to present Garbarino's testimony at his third resentencing proceeding. Even if the jury believed Garbarino's uncorroborated testimony that Owens was physically and sexually abused while incarcerated at DJJ, the defense's eliciting of that testimony would have come at the great cost of opening the door for the State to introduce evidence that would characterize Owens as a consistently violent criminal who would be a future danger to society and who would not adapt well to prison. As a result, it was a reasonable strategic decision for Owens' trial counsel to choose not to call Garbarino in an attempt to keep Owen's DJJ record out of his sentencing proceeding.

Ground 10(b)/11(b)(7)

In Ground 10(b) – as supported by Ground 11(b)(8) – Owens alleges that his trial counsel was ineffective during his 2006 sentencing proceeding for failing to object to statements that the solicitor made during closing arguments that the State chooses to seek the death penalty only rarely, that the jury should choose death because prison would give Owens an easy life, and that the solicitor himself wanted the death penalty imposed. Owens argues that, by not objecting, his trial counsel failed to preserve for review constitutional violations. Because Owens is unable to establish deficient performance and prejudice, he is unable to prevail on this ground.

Owens is unable to prove deficient performance because the Solicitor's comments during closing argument, even if improper, are not sufficient to have Owens' death sentence overturned on appeal. When considering whether a solicitor's arguments were improper, a reviewing court

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must examine the comments in light of the entire record, including whether there were curative instructions given or overwhelming evidence of the defendant's guilt. *Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010); *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). A solicitor's comments are only grounds for reversal if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). In this case, the solicitor's comments are not grounds for reversal.

Owens objects specifically to three comments made during the State's closing argument. The first of these comments – that the State chooses to pursue a death sentence only rarely – was not improper. Mere mention of the solicitor's involvement in the State's decision to seek the death penalty is not improper. *State v. Bell*, 302 S.C. 18, 34, 393 S.E.2d 364, 373 (1990). Here, the solicitor simply was explaining that the State does not choose to pursue the death penalty for every charge of capital murder. Such a comment, without more, is proper.

The second of these comments – that the jury should impose a death sentence because imposing a life sentence would give Owens too easy of a life – also was not improper. The solicitor argued in favor of a death sentence because of the atrocity of the crimes that Owens committed. These arguments were tailored to the specific crimes that Owens committed and to Owens himself. *Smart v. State*, 278 S.C. 515, 526, 299 S.E.2d 686, 692-93 (1982) (solicitor's comments in favor of death sentence must be case specific and defendant specific). While the solicitor requested the death penalty, he did not attempt "to minimize the jurors' own sense of responsibility for appellant's fate by stressing that he himself already made the same decision that he was asking them to make." *State v. Woomer*, 277 S.C. 170, 175, 284 S.E.2d 357, 359-60 (1981).

Additionally, given the evidence, it was appropriate for the solicitor to argue that life in prison would not be a significant punishment for Owens. The record shows that Owens was incarcerated during his teenage years and most of his adult life. During meeting with investigators following Graves' murder, Owens admitted that the idea of prison was not a threat to him and told investigators that he "was born to be in jail." He further explained to investigators, "If I go to jail, I go to jail, I don't give a shit."

Finally, the third of these comments – that the solicitor wanted the death penalty imposed himself – also was not improper when examined in the context in which it was made. Taken in context, the solicitor simply stated that he was seeking the death penalty because that punishment was appropriate under the facts of the case. A solicitor does not commit reversible error when stating that he is asking for the death penalty, seeking the death penalty, or even expecting the death penalty. See *Williams v. Ozmint*, 380 S.C. 473, 671 S.E.2d 600 (2008) (although the solicitor stated that he "expected the death penalty," he did not commit reversible error because he did not attempt to minimize the jurors' own sense of responsibility). Such comments do not insert the solicitor's personal opinion into the case but simply explain the state's position. *State v. Woomer*, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981).

Even if Owens were able to establish deficient performance, he would not be able to prove prejudice. The challenged comments made in the solicitor's argument comprised only a small portion of a lengthy closing argument. See *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996) (challenged comment was one isolated event in an entire lengthy argument); *State v. Chaffee*, 285 S.C. 21, 328 S.E.2d 464 (1984) ("momentary lapse of good taste will rarely constitute prejudicial error"). Additionally, the trial court instructed the jury that they were to decide what verdict to return and that they were not required to return a death sentence. Under

South Carolina law, jurors are presumed to follow a trial court's instructions. *See State v. Northcutt*, 372 S.C. 207, 228, 641 S.E.2d 873 (2007). Given the admitted evidence of guilt, the circumstances of the crime, the curative jury instruction, and the great amount of evidence in aggravation, Owens is unable to prove that there is reasonable probability that the jury would have returned a life verdict had the solicitor not made these comments.

Ground 10(c)/11(c)

In Ground 10(c) – as supported by Ground 11(c) – Owens alleges that his appellate counsel was ineffective during the appeal from his 2006 sentencing proceeding for failing to assert that his trial court erred by denying Owens' request to ask potential jurors if they were biased in favor of police officers because of their previous work in law enforcement. This ground is without merit.

A PCR applicant has the burden of proving that his appellate counsel was deficient. *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (2003). Appellate counsel is not required to raise every non-frivolous issue that is presented from a review of the record, but rather has the duty to choose among potential issues according to their merit. *Tisdale v. State*, 357 S.C. 474, 594 S.E.2d 166 (2004); *Jones v. Barnes*, 463 U.S. 745, 752 (1983). In order to prove that appellate counsel was ineffective, a PCR applicant must show that his appellate counsel was objectively unreasonable in failing to identify, argue, and present significant and obvious issues on appeal and that, but for appellate counsel's errors, the applicant would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000). This is a difficult burden for an applicant to meet, as it requires a showing that "the ignored issues are clearly stronger than those presented" during the appeal. *Id.*

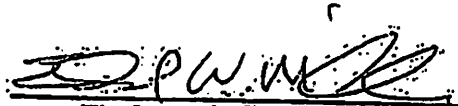
In this case, Owens is unable to meet that burden. Owens' appellate counsel was not

required to make every non-frivolous argument requested by Owens, but rather was free to make a reasonable strategic decision not to appeal certain issues. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). It was reasonable for Owens' appellate counsel to decide that it was in Owens' best interest not to raise this issue on appeal because it was meritless. During voir dire, any examination beyond the statutorily required questions is within the trial judge's discretion. *State v. Bethune*, 93 S.C. 195, 75 S.E. 282 (1912). This includes any proposed questions as to the prospective jurors' ability to remain impartial. *State v. Young*, 238 S.C. 115, 119 S.E.2d 504 (1961). Judge Patterson's decision not to question prospective jurors as to their potential bias in favor of law enforcement officials was well within his discretion. This issue is not clearly more meritorious than the issues that appellate counsel raised on appeal, and Owens is unable to prove that his appellate counsel was ineffective for failing to raise it.

CONCLUSION

As a result of all of the above, this Court finds the allegations raised by Owens in his Final Amended Application for Post-Conviction Relief to be without merit and dismisses this application with prejudice. Applicant is remanded to the custody of the South Carolina Department of Corrections for the purpose of carrying out his sentence.

2/13/13


The Honorable Edward W. Miller
Circuit Court Judge
13th Judicial Circuit