STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THIRD JUDICIAL CIRCUIT
) CASE NUMBER: 2008-CP-43-00905

RECORDED
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JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Bobby Wayne Stone, # 5051,

Applicant,

vs.

State of South Carolina,

Respondent.

AMENDED ORDER

INTRODUCTION

Applicant, Bobby Wayne Stone, was convicted and sentenced to death on January 28, 1997, for the shooting death of a sheriff's deputy in Sumter, South Carolina. On direct appeal, the South Carolina Supreme Court reversed the death sentence and remanded for a new sentencing proceeding. State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (S.C. 2002). On February 27, 2005, a second jury also imposed a death sentence. Cameron B. Littlejohn, Jr., and James H. Babb were appointed to represent Stone at his original trial in 1997 and for the resentencing proceeding in 2005. The South Carolina Supreme Court affirmed Stone's second death sentence on direct appeal. State v. Stone, 376 S.C. 32, 655 S.E.2d 487 (2007). Stone timely filed an application for post-conviction relief ("PCR"), and subsequently amended the application on two occasions prior to the evidentiary hearing. This Court held a PCR hearing on April 23-25, 2012, in Sumter, South Carolina, and on August 10, 2012, in Florence, South Carolina. At the hearings, Applicant was present and was represented by John Blume, Esquire, and Robert Lominack, Esquire. The Respondent was represented by Senior Assistant Deputy Attorney General Donald Zelenka and Assistant Attorney General Alphonso Simon Jr. At the conclusion of the evidentiary hearing, and with the consent of

Applicant, Emily Paavola, Esquire, was substituted as counsel for Robert Lominack, Esquire.

RELEVANT FACTS

On February 26th, 1996 applicant shot and killed Sumter County Deputy Charlie Kubala. The events that led to this tragic death are as follows. During the evening hours, May Ruth McLeod was visiting her mother, Ruth Griffith, at her Sumter home. During this visit, they heard Bobby Stone knocking at the back door. McLeod went outside and told Stone to go home. Applicant ultimately left the premises entering the woods behind the home. As Stone entered the woods, McLeod noticed that applicant had something under the back of his jacket. Shortly thereafter, McLeod noticed that Stone had stopped, was facing the house and was holding a shotgun across his arms. McLeod once again demanded that applicant go home and that she was going to call law enforcement. McLeod noted that Stone appeared to be intoxicated and was holding a beer can. In response to her call, Sergeant Charlie Kubala responded to Griffith's home at approximately 6:06 p.m. Kubala received the details of the incident, ensured that Stone was not on the premises, and directed that McLeod and Griffith call him if there was any more trouble.

McLeod left the home to go visit her daughter. At 6:47 p.m. Griffith heard gunshots and called her neighbor Landrow Taylor. Taylor came to Griffith's home and called 911 at 7:00 p.m. They then heard someone jiggle the door handle to Griffith's car and made a subsequent call to 911 at 7:02 p.m. Moments later, they heard someone banging on the rarely used side door, which led from the washroom onto a small screened-in porch used to store wood. The light on the porch was off. Taylor hollered "what are you trying to do back there?" There was a moment of silence but the knocking resumed.

Meanwhile, Sergeant Kubala returned to the home. Taylor met Kubala on the front porch directing him to Stone who was at the side door.

Suddenly, Taylor and Griffith heard someone shout, "Halt!" or Hold!" followed by three or

four gunshots. As Taylor ran back out onto the front porch, Deputy John Prince arrived in his patrol car. Taylor saw a flashlight and radio on the ground and yelled at Prince informing him that Kubala was around the side of the house. Deputy Prince shined a flashlight, saw Kubala and ran to his aide. Kubala was lying face up and bleeding profusely from his mouth and neck. His gun and radio lay near the fingertips of his right hand. His flashlight lay between his body and his right hand. As Deputy Prince rolled Kubala over to clear an airway, he heard another gunshot prompting him to take cover by the corner of the home.

Other officers and EMS arrived shortly thereafter. The officers cleared the nearby shed and surrounding area. EMS found Kubala not breathing and without a pulse. Although Kubala was wearing a protective vest he died at the scene as a result of a gunshot wound that entered his right ear and another that entered his neck.

Officers then began to set up a perimeter to snare the assailant. SLED bloodhounds and SWAT teams were called, and off-duty officers from various jurisdictions volunteered to assist. A SLED helicopter equipped with forward-looking infrared radar and an extremely powerful spotlight called "midnight sun" began searching the woods nearby Griffith's house. After searching for a while, the SLED helicopter located a subject lying prone underneath two fallen trees. The helicopter used the midnight sun to light up the spot.

Meanwhile, police ground teams directed by the helicopter moved in on the suspect. As officers approached, Stone laid perfectly still on his back. The officers repeatedly ordered the suspect to raise his hands, but he would not comply. Finally, one of the agents put his foot on the suspect's chest while the other officers attempted to take control of the suspect's hands. A .22 pistol was found near suspects left hip. Stone resisted being handcuffed, and officers had to carry him out of the dense woods.

Applicant was taken to the law enforcement center where he gave a statement. In his

statement, Applicant said that he woke up the morning of February 26th and smoked some marijuana. He went to the store and bought some beer, and met a man named David who offered to sell Applicant three guns. Thereafter, they agreed to meet on a nearby dirt road.

According to Applicant, David arrived at the meeting place with a .22 pistol and a .410 shotgun. The two men walked around in the woods, drinking beer and target shooting. They agreed on a price of $100 for both guns. As they walked around, Applicant decided to stop by and say hi to Griffith, whom he described as "an old drinking buddy." David stayed in the woods with the guns.

Applicant claimed that as soon as he entered Griffith's backyard, a woman he did not know came of the house "raising cane" at him and telling him to get off the property. Applicant returned to the woods, and found and paid David $100 for the weapons. David then left. Applicant then walked around the woods shooting the guns and finishing off the beer. Around dark, he decided to return to Griffith's home.

Applicant walked up the steps to the little screen porch, set down the shotgun, but kept the .22 in his right hand. He admitted he started beating on the inside door, which broke because he hit it too hard. Applicant then heard a man's voice yelling outside the house, and as he turned, the gun went off. Applicant ran into the woods. In his statement, Applicant claimed the gun only went off once, and he never saw the deputy or his patrol car.

Applicant denied ever firing the gun again after he ran off the porch. He also claimed he did not know what was going on even though he hid in the woods for hours surrounded by police officers with a helicopter overhead.

Police processed the scene and collected various items of evidence confirming facts set forth above. The pistol recovered from under Applicant at the time of his arrest was a target pistol which fired .22 "long rifle" ammunition. The weapon was found with five rounds in its clip and a shell

casing lodged in the ejection port. SLED conclusively matched this gun to two bullet fragments and one bullet taken from Sgt. Kubala's body. The .22 pistol also matched the three spent .22 cartridge cases found on the side porch as well as other casings found in the nearby woods. Kubala's 9mm service pistol, on the other hand, was found fully loaded and had not been fired.

A .410 shotgun was found leaning up against the wall of the side porch with a live shell inside and its hammer cocked back in firing position. This shotgun was conclusively matched to a spent .410 shell casing found in the woods near Griffith's house.

The screen door to that side porch had three holes which appeared to be from bullets. The screen around these holes not only tested positive for lead, but also was microscopically consistent with holes made from bullets SLED test fired through the screen door with Applicant's .22 pistol. Ruth had nailed a board to cover a broken window pane on the door inside the screen porch that leads into the main house itself. After the incident, this board was knocked out and was hanging loosely from only one nail.

A knife was found in Applicant's coat pocket. Tests taken shortly after arrest indicated gunshot residue on the palm and back of Applicant's right hand, as well as, the presence of lead on Applicant's left palm and sleeve. The victim had lead on his right palm which is consistent with the handling of a weapon. The victim's shirt did not have any gunshot residue, which indicates Kubala was not hit by a close range shot.

10(A): INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE

Applicant asserts five claims of ineffective assistance of counsel during the guilt phase of Applicant's first trial.

10(A)(1): FAILURE TO OBJECT TO CLOSING ARGUMENT

Applicant contends his counsel should have objected to argument that Applicant did not dispose of his gun so he could kill more officers. Applicant is not entitled to relief upon this claim.

Trial counsel's testimony at the PCR evidentiary hearing established that counsel made a reasoned decision in not objecting to the solicitor's closing argument. Also, the argument made by the solicitor was proper response to the anticipated argument that Applicant accidentally fired the shots at the victim. Thus, Petitioner failed to establish that counsel was deficient in this regard. Further, Applicant cannot establish that he was prejudiced by counsels' decision not to object to the solicitor's closing argument.

During the solicitor's closing argument, he noted that Applicant's actions after the crime were inconsistent with those claims in his statement, inasmuch as Applicant fled the scene, ran through bushes and briars in the dark of night, and hid under a log for four hours. The solicitor also responded to the defense questioning of witnesses on the fact that Applicant never tried to get rid of the gun in all that time, which the defense asserted was supportive of his claim that he did not know he shot a deputy. The solicitor suggested an alternate proposition, that Applicant knew he had already killed on officer, and he kept the gun because he was trying to escape the perimeter and might need to use it again. The solicitor further noted that once Applicant realized that he was caught, his actions belied any argument that he thought he did not shoot anybody; he tried to hide the gun and hoped no one would find it. No objection was raised to his argument at trial.

At the PCR evidentiary hearing, trial counsel indicated that he made a strategic decision in not objecting. Mr. Littlejohn noted that during the trial, the solicitor overplayed his hand at several points during the trial. Littlejohn believed this argument by the solicitor was just another example of the solicitor doing so.

> I really thought what he was trying to do was kind of be a little overbearing. And so when he came through with some of these things, not only did they kind of surprise me, but I -- I didn't feel like there was any evidence to support them. But from the standpoint of -- of letting him go with it because it was closing argument, I didn't know exactly what Judge Dennis would allow or not allow. He had been pretty lenient in that regard. So I didn't object, thinking that actually it might be to our benefit to -- to -- because it was just a further reflection of how overreaching and how hard the State was going at this thing and how they would do anything to get a

conviction against -- against Bobby Wayne.

(2nd Tr. 17, II 4-14).

Trial counsel was not deficient in his handling of the solicitor's closing argument in the guilt phase. First, as indicated above, counsel's decision not to object to the statement in question now was based upon a valid, strategic decision. Furthermore, the argument made by Solicitor Kolb in his closing was clearly permissible as a matter of law.

Here, the solicitor's argument was proper, as he was clearly arguing the State's version of events and arguing against the claim of accident in Applicant's statement. During the trial, the State introduced a statement given by Applicant after he was arrested. In that statement, Applicant asserted the gun went off accidently when he heard a man's voice behind him, and he never saw he had shot a deputy. It was clear from the cross-examination of the State's witnesses that Applicant's counsel was relying upon Applicant's version given in the statement. Further, the defense had implied through cross examination that Applicant did not attempt to grab the pistol to fire on the search party that arrested him. Meanwhile, several witnesses who were present when Applicant was arrested in the woods indicated that Applicant was not compliant when he was being arrested, and he was within reach of the pistol.

The solicitor was also responding to an obvious defense contention raised in their questioning as to the significance of the fact that Applicant retained the gun. Since the argument was permissible, counsel could not have been deficient for failing to object nor could Applicant have been prejudiced.

Applicant also fails to show that he was prejudiced. First, as already noted, this solicitor's argument was not improper, especially when viewed in the context of the record. Second, the trial judge charged the jury that the statements by the attorneys were not evidence. Moreover, even if the solicitor's argument was improper, it cannot be said that the comments "so infected the trial with

unfairness as to make the resulting conviction a denial of due process." Given the overwhelming evidence, this one comment cannot meet that standard. Since Applicant would not have been entitled to relief upon a claim that the closing argument deprived him of a fair trial, Applicant cannot show that he was prejudiced by the fact counsel did not object to the statements made in closing argument. As a result, this claim for relief is denied and dismissed.

10(A)(2): FAILURE TO UTILIZE CRIME SCENE AND OTHER EXPERTS TO REBUT STATE'S THEORY

Applicant next contends his counsel was ineffective in the guilt phase for failing to hire "crime scene and other experts" who would have opined the evidence supported Applicant's statement in which he asserted the gun went off accidently when he heard a man's voice behind him, and he never knew or saw that he had shot a deputy.

Applicant is not entitled to relief upon this claim. First, Applicant fails to show that counsel was deficient in this regard. At the PCR evidentiary hearing, Applicant presented the testimony of Wayne Hill, who was qualified as an expert in homicide events reconstruction and firearms. Mr. Hill testified that he reviewed prior trial transcripts (including Applicant's testimony, Agent Parnell's testimony, and other law enforcement officers' testimony regarding their actions at the scene), crime lab reports, crime scene photographs, autopsy photographs, and autopsy reports. Hill also testified that he went to the shooting scene. Hill indicated that he also examined the weapon used in the shooting.

Hill made a number of conclusions:

1. The shooting could have occurred in the way outlined by Applicant in his statement to law enforcement.
2. The trigger pull was 1.5 pounds which he deemed to be unsafe under certain conditions.

3. A light trigger pull increased the likelihood of an unintentional discharge.
4. The gun could fire if rested upon three fingers the wrong way.
5. The patterns in the screen door were consistent with an unintentional firing of the gun.
6. If the firing were intentional, the bullet holes would have been higher on the screen.
7. The discrepancy between the number of shots fired and the number of shots recalled could be explained by Stones' state of intoxication.

To the contrary, Hill also made the following inculpatory conclusions:

1. It was within the realm of possibility that Stone intentionally aimed and fired the gun.
2. It would take three trigger pulls to discharge three bullets from the weapon.

It is important to note that without an eyewitness or video, it is impossible for a firearms expert to re-create all the events of the night of the shooting. There are so many variables such as: the posture and position of Stone; the posture and position of the victim; and, the position of the weapon. Additionally, it is beyond the scope of the expertise of a firearms examiner to testify as to the volition of the Applicant. No expert can render an opinion as to the intent of the defendant. With or without expert testimony, it is ultimately a question of fact for the jury. Also, it is beyond the expertise of a firearms examiner to testify as to the effects of alcohol on human behavior.

If Hill would have testified at trial, the very same factual issues would have been submitted to the jury.

The legitimate factual disputes were established by the State's witness, agent Ira Parnell. SLED agent Ira Parnell did testify at trial and concluded as follows:

1. The trigger pull was fairly light.
2. One would have to pull the trigger three times to discharge three bullets.

Defense counsel did retain Donald Girndt (a former SLED agent) who had expertise in gunshots, blood splatter, and fingerprints. Girndt made the conclusion that based on the evidence in this case, it is impossible to state that the shooting was accidental or intentional. All of the facts favorable to the defense were established through the testimony of agent Ira Parnell.

Clearly, trial counsels' testimony establishes they consulted with a crime scene expert. Counsel also made a well-reasoned, strategic determination to not call their expert as a witness at the first trial. Counsel repeatedly elicited that it was dark, and that the murder weapon was a target pistol with an extremely light trigger pull. Counsel also elicited that the victim was only 5'8" and the wooden partition of the walls of the screened porch would be over his head. Counsel argued the issue in closing. Further, based upon counsel's testimony, it appears that Mr. Girndt could not state that he had concluded that the shooting was accidental based on his review of the evidence. Respondent submits that counsel cannot be found deficient for not presenting their expert at trial when the defense team's expert reached different conclusions from the expert presented at the PCR evidentiary hearing. Overall, trial counsel was not ineffective.

Applicant also fails to show that he was prejudiced. There is no reasonable probability a jury would have accepted Applicant's version of events, even with a crime scene expert and other experts, when Applicant asserted in his statement: 1) that he unintentionally only fired once, when in fact there were three casings on the porch, two bullets in the victim, and three holes in the screened porch; 2) that he did not know he shot a deputy and did not know what was going on for the four hours he was at large, even though he spent that time hiding under a log in a thick brush.

Moreover, Applicant was not entitled to a jury charge on involuntary manslaughter or accident anyway. Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either: 1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or 2) a lawful act with reckless disregard for

the safety of others. Applicant, a felon on probation and not entitled to have a weapon, admitted he was banging on the side door of a house from which he had already been sent away once, while holding a loaded pistol in his hand. Such conduct hardly can meet either test for involuntary manslaughter as it involves a felon with no good reason to be in possession of a weapon, such that the possession is the proximate cause of the homicide. It also involves trespass after notice and burglary.

Similarly, Applicant cannot show entitlement to accident as he must not only have been acting lawfully, but must also show that he used due care in the handling of the weapon. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999). Not only was Applicant behaving unlawfully many times over but, by no stretch, can invading an enclosed porch and banging on the back door with a loaded pistol in one's hand be considered due care. Since Applicant was not entitled to either an involuntary manslaughter or accident charge under any view of the evidence, then counsel could not have been deficient nor Applicant prejudiced from the failure to get an expert to support his statement.

10(A)(3): FAILURE TO CHALLENGE BATSON VIOLATION

Applicant next contends counsel was ineffective during the guilt phase by failing to make a Batson motion challenging the prosecution's alleged racially discriminatory use of its strikes.

Applicant is not entitled to relief upon this claim. First, counsel was not deficient in not moving for a review of the State's use of peremptory challenges under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Trial counsel's testimony indicated they made a reasonable strategic decision in not making such an objection.

The record reflects that the solicitor used three strikes on black females (Jurors # 189, 6, and 109); one strike on a black male (Juror # 25); one strike on a white female (Juror # 90) during the selection of the alternate jurors. The jury consisted of one black male, three black females, five

white males, and three white females.

This claim is denied and dismissed. First, the record and the testimony at the evidentiary hearing clearly reflect that counsel made a strategic decision not to pursue a Batson motion after much deliberation. Counsel testified, and I find, that they did not make a Batson motion because they were pleased with the jury that was selected. In light of this reasonable strategic decision, Applicant is not entitled to relief.

Second, Applicant has failed to establish that he was prejudiced by counsels' decision not to challenge the prosecution's use of peremptory strikes under Batson v. Kentucky. As established by the testimony by both Solicitor Kolb and Mr. Littlejohn, such a motion would not have been successful.

Altogether, Applicant is not entitled to post-conviction relief upon this claim. It is, therefore, dismissed and denied.

10(A)(4): FAILURE TO OBJECT TO PRESENCE OF OFFICERS

Applicant next contends counsel was ineffective for failing to object to the presence of uniformed officers in the courtroom during trial.

This claim fails as a matter of law. In order to prevail on such a claim, Applicant must show that measures taken in the courtroom created either an actual or inherent prejudicial effect on the jury. "Inherent prejudice occurs when 'an unacceptable risk is presented of impermissible factors coming into play.'" State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (1998) (quoting Flynn). See also State v. Paige, 375 S.C. 643, 654 S.E.2d 300 Ct. App. 2007). (finding no actual or inherent prejudice, where there was no evidence that jurors were exposed to spectators wearing button of victim, and no evidence that if they did see it they could tell the picture was of the victim).

I find that the presence of uniformed law enforcement officers was not much different from other criminal trials. This finding is based upon the testimony of Wade Kolb, Jim Babb, and

Cameron B. Littlejohn, Jr.

Applicant failed to establish he was prejudiced in any way. Applicant presented no evidence to show that the presence of law enforcement in the courtroom had any effect on the jury. In fact, Applicant has not presented any evidence to support a finding of inherent prejudice. In light of that failure, Applicant failed to show that he was prejudiced by counsel not objecting to the law enforcement presence in the courtroom during the guilt phase of Applicant's trial. As a result, he has not shown that trial counsel was ineffective in this regard. This claim is, therefore, denied and dismissed.

10(A)(5): FAILURE TO OBJECT TO SHACKLING OF DEFENDANT

Applicant asserts trial counsel was ineffective for failing to object to the use of visible shackles during the guilt phase of Applicant's first trial. Applicant is not entitled to relief upon this claim. There is no evidence in the record to support this claim.

Based upon the testimony of Wade Kolb, James H. Babb, Cameron B. Littlejohn, Jr., and Director Simon Major of the Sumter Regional Detention Center, I find that:

1. Applicant was not shackled during the jury selection in Georgetown County or any of the trial procedures that transpired in Sumter County.
2. The kind of restraints that were used on Applicant were placed under his clothing. Applicant was dressed for court at the detention center and it would be impossible for the jurors or anyone in the courthouse to see the concealed restraints.
3. The trial judge was vigilant about not allowing Stone to move in the presence of the jury.

Since Applicant was not visibly restrained in the presence of the jury, trial counsel could not be deficient for not making an objection regarding the use of visible restraints because no such objection was necessary.

In light of the fact Applicant was not entitled to relief upon the motion, he fails to establish

that he was prejudiced. As a result, this claim for relief is, therefore, denied and dismissed.

10(B)(1): INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING OBJECTION TO VICTIM'S WIDOW'S TESTIMONY ABOUT SUICIDE ATTEMPT

Applicant contends trial counsel was ineffective for failing to preserve an issue as to the admissibility of the widow's victim impact testimony that she attempted suicide upon finding out the South Carolina Supreme Court reversed the first sentencing proceeding. This issue is without merit.

At resentencing, widow Teresa Kubala described her relationship with the victim, the pain of finding out about his death, and the difficulties of moving on in her life without the victim. She specifically noted the counseling and help she needed to even start dating again, as she thinks of Sgt. Kubala every day and felt like she was cheating on the man she had married at age 19.

Near the end of her testimony, the solicitor asked if there was "anything significant" in her life she would like to tell the jury. She stated that after she and her new husband returned from a family trip to celebrate their first anniversary, she found a message on her machine that "they were going to retry this case that the supreme court had overturned it. She went on to state that her new husband had gotten hurt working at UPS and was dealing with trying to get workers compensation, and they were trying to make two house payments until they could sell one. She said UPS would not take her husband back, so he lost his job and had to find another, "and everything just blew up."

At this point, the defense approached for an off the record conference, after which the solicitor asked Teresa to state what happened as a result of "the things you went through with Charlie and the things after." Teresa then described taking a bottle of Tylenol PMs before her husband woke, but then having second thoughts and telling him what she had done. She then described going to the hospital for treatment and then spending three days in a ward, which led her to realize she did not have as many problems as she thought. At this point, the solicitor stopped the questioning and moved on.

After the State rested, the defense put its objection on the record. The defense argued that

the causation factor for the suicide was not the crime, but because the legal proceeding was about to occur again, and asserted that the time that had passed from the original crime and this resentencing proceeding "lessens the direct effect that she would otherwise be allowed to testify about." Thus, the defense contended the suicide attempt was extremely prejudicial. The trial court responded that objection was timely, but Teresa's testimony was at least partially related to Sgt. Kubala's murder, even though that was not the only thing she mentioned. Applicant raised an issue related to this event on direct appeal, but the South Carolina Supreme Court found it was not preserved. The Supreme Court noted that counsel at trial argued the issue as one of causation – that the suicide attempt was related more to financial difficulties rather than the victim's murder – but on appeal Applicant was asserting that the reference to direct review invited the jury to speculate on the finality of their decision, and the reference to suicide invited the jury to speculate on the effect of their decision on the widow's health. On direct appeal, the Court found the latter issues distinct from that raised at trial and not preserved.

Applicant was not deficient in his objection to the testimony primarily because it was admissible, relevant and not unduly prejudicial. This testimony is proper victim impact evidence in that it demonstrates the uniqueness of the victim and the specific harm committed by defendant. It was made clear to the jury that Teresa Kubala's attempted suicide was precipitated by a multitude of factors, one of which was the murder of her husband. Additionally, the trial judge properly ruled that this suicide attempt was sufficiently tied to the impact of this crime on the victim's family.

The failure of trial counsel to object to this evidence on the grounds that it lessened the jury's responsibility for sentencing is without merit. There was neither argument nor implication the responsibility for determining the appropriateness of the sentence rested with someone other than the jury.

To the extent Applicant asserts trial counsel should have argued that the mention of prior

reversal impermissibly maximized the jury's sense of responsibility inasmuch as it implied a life sentence would trigger another attempt, his claim is also without merit. Such an argument would present a logical problem in that Applicant asserts in the same sentence that the mention of the reversal both minimized and maximized the jury's responsibility. Regardless, no one said that at all. There was no argument along those lines, simply a brief matter-of-fact mention of a predicate fact. Indeed, as noted before, suicides are generally admissible victim impact evidence, and any suicide attempt might carry the inference that any sort of subsequent victory for the defense might trigger another attempt. The same could be said for other psychological problems suffered by a survivor, but that concern does not mean the defendant gets to escape having the jury learn about the actual impact of what he has done on those who have suffered.

This evidence was admissible and, therefore, the complaint fails both prongs of the Strickland test. As a result, this claim for relief is denied and dismissed.

10(B)(2): INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING LACK OF OBJECTION TO VICTIM IMPACT TESTIMONY

Applicant contends trial counsel was ineffective for not objecting to certain victim impact testimony during his resentencing trial. Specifically, Applicant complains that testimony regarding the effect of Deputy Kubala's death on law enforcement in Sumter County generally and on individual officers in particular. Respondent submits Applicant's claim is without merit. Applicant fails to show that counsel was deficient in not objecting to the victim impact testimony that was presented at trial. Counsel articulated valid, strategic reasons for not objecting to the testimony. Further, Applicant fails to show that he was prejudiced, especially in light of the fact that victim impact testimony that was presented was admissible.

Victim impact evidence is admissible in the sentencing phase to demonstrate the uniqueness of the victim and the specific harm committed by the defendant.

The challenged evidence in the present case was admissible as a matter of law; thus, counsel

could not have been deficient nor Applicant prejudiced. At issue here is part of the testimony of Captain Hobbs and Major Metts, both of the Sumter County Sheriff's Office. Captain Hobbs testified that he and Deputy Kubala started in law enforcement at the same time. As a result of their closeness in beginning their law enforcement careers, they became close friends. Hobbs testified that he loved Kubala like a brother, and the two and their families were close. Hobbs noted they stayed in contact after Kubala left law enforcement to pursue another job. Hobbs also described Kubala returning to duty at the Sheriff's Office a few years later, including how they lobbied to work together again once Kubala became a sergeant. Hobbs also testified about how he was the one who told Kubala's wife that he was killed on the night of the shooting. Hobbs also testified about the impact Kubala's murder had on the sheriff's office. He noted that during orientation, new trainees are taken to the scene of the shooting, and they are informed about the case. The trainees are then taken to Kubala's grave site, and they are advised that if they are not able to give that sacrifice, then it may not be the right job for them.

Major Metts testified that he met Deputy Kubala as both volunteered with the Explorer program. Metts stated that Kubala was like his brother, and Kubala was his best friend. Metts testified about the night of the shooting, and how he responded to the news. He discussed how he and others, like Hobbs, tried to help his widow in the weeks after the shooting. Metts indicated that she asked him to serve as a pallbearer in Kubala's funeral, and she further requested that he get his police uniform ready for the burial. Metts went on to describe how Kubala's death impacted him personally, and how he was unable to maintain the Explorer program because of the memories he had of working with Kubala on the program. Metts also discussed a golf tournament that was started in Kubala's memory, and described visiting the scene of the murder with Kubala's widow and children.

At the PCR evidentiary hearing, Mr. Littlejohn testified that he considered objecting to some

the testimony presented by Captain Hobbs, and he ultimately decided against it.

> I considered objecting to a lot of this, but Judge King was being very liberal in what he was allowing in from the standpoint of victim's testimony. I mean I felt if he allowed in what Ms. Kubala said about her reaction to the appeal that he was probably going to allow this in. I didn't want to be perceived by the jury as -- as jumping up and objecting to everything like I was trying to hide something.
>
> So yes, I did consider it. I didn't consider my chances of winning that objection very well -- to be very good and I mean there's a lot of leeway that the courts have allowed in -- in this kind of testimony. So I considered it; I didn't object to it obviously.

Similarly, Littlejohn testified that he made a similar strategic decision in not objecting to portions of Major Metts' testimony.

> Well, like I said earlier and I reviewed this yesterday, I considered objecting to a lot of this, but I did not feel that the objection would be sustained. I didn't want to be perceived as -- as trying to hide things and, you know, a lot of this is contemporaneously with that happened and, you know, I just think Judge King would have -- would have let it in.

Clearly, counsel expressed a valid strategic reason for not objecting to the testimony. First, counsel did not want to appear as if he was hiding something from the jury. Second, counsel reasoned that the objection likely would have been overruled by Judge King. In light of counsels' reasoning in not objecting to the disputed victim impact testimony, Applicant fails to show that counsel was ineffective in not raising an objection.

Counsels' determination that his objection likely would have been overruled was well founded. The testimony Applicant now challenges is admissible. First, as to the specific officers, they were not merely coworkers, but friends who ate together, spend off duty time together with each other and their families, and did community projects together. Moreover, the loss of the victim affected the way they perceived and went about their jobs. This evidence involved their specific personal relationships with the victim and was undoubtedly admissible.

The greater issue to Applicant is apparently the admissibility of the lasting effect of the killing on the Sumter County law enforcement community in general. However, this larger effect on

the community is admissible as well. As noted in Payne:

> [Defendant] Payne echoes the concern voiced in Booth's [Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440] case that the admission of victim impact evidence permits a jury to find that defendants whose victims are assets to their community are more deserving of punishment that those whose victims are perceived to be less worthy. (citation omitted). As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind-for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but the murderer of a reprobate does not. It is designed to show instead each victim's "uniqueness as an individual human being," whatever the jury might think the loss resulting to the community might be.

Payne, 501 U.S. at 823-824 (emphasis added) (quoted in Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002)). Other passages in Payne support the idea that evidence on the crime's impact of the larger community is admissible:

> In Justice O'Connor's concurrence, she explains her view that "[a] State may decide that the jury, before determining whether a convicted murderer should receive the death penalty, should know the full extent of the harm caused by the crime, including its impact on the victim's family and community." Payne, 501 U.S. at 829, 111 S.Ct. 2597 (O'Connor J., concurring) (emphasis added). Although obviously relevant to the Government's argument, this of course is not part of the holding of Payne, but rather dicta from the concurrence. Second, the Payne majority opinion cites a statement of Justice White from the dissenting opinion of Booth v. Maryland, one of the cases that Payne overruled: "'The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.'" Payne, 501 U.S. at 826, 111 S.Ct. 2597 (quoting Booth, 482 U.S. at 517, 107 S.Ct. 2529 (White J., dissenting) (citation in original omitted) (emphasis added)).

United States v. Wilson, 493 F. Supp. 2d 364 (E.D.N.Y. 2006).

And, a number of courts have upheld admission of the effect of a law enforcement officer's murder on the law enforcement community. See United States v. Battle, 173 F.3d 1373 (11th Cir. 1999) (permissible to show how murder of corrections officer emboldened inmates and made the prison more dangerous, but how a death sentence would send a message to those emboldened inmates); United States v. Wilson, 493 F. Supp. 2d 364 (E.D.N.Y. 2006) (permissible to show murder of undercover officer had chilling effect on other undercover officers); People v. Brown, 93

P.3d 244 (Cal. 2004) (permissible to show officer was a good police officer and to admit testimony brother saluted his grave because officer gave life for the community); United States v. Whitten, 610 F.3d 168, 189 (2d Cir. 2010)(noting that no prohibition of testimony regarding generalized community harm as victim impact evidence is generally recognized); State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010)(finding admission of law enforcement officer's funeral was proper victim impact evidence demonstrating the general loss suffered by society). Altogether, Applicant fails to show that counsel was deficient in not objecting to the victim impact testimony presented at trial.

Altogether, Applicant has failed to establish counsel was ineffective in not objecting to the victim impact testimony presented through Captain Hobbs and Major Metts. This claim for relief is, therefore, denied and dismissed.

10(B)(3): LACK OF PRESENTATION OF EVIDENCE OF APPLICANT'S PRIOR COOPERATON WITH LAW ENFORCEMENT

Applicant asserts that trial counsel was ineffective for not presenting evidence that he had cooperated with law enforcement prior to the shooting. This claim is without merit. Trial counsel's testimony establishes that the decision not to present such evidence was the result of reasonable trial strategy.

At the evidentiary hearing, Mr. Littlejohn testified that he considered presenting evidence that Applicant cooperated with law enforcement.

> There were two aspects of that. Bobby had cooperated in helping them out with a few things that were -- were -- I mean they -- They were helpful to law enforcement, but they weren't really substantial things. I felt like it came out that he was cooperating working with law enforcement, then bam, turned around and shot a police officer, that that made him, you know, look in a much worse light.
>
> The other thing that I had to consider was a lot of the law enforcement officers could have helped him maybe watered down what they were going to say or didn't really, you know, want to support him because of the pressure they were feeling from the rest of the law enforcement community down there. So there wasn't any other way to bring it out other than to call Bobby and Bobby didn't want to testify,

which I don't -- I don't blame him with that decision, but that would have been the only way to bring it out.

(2nd Tr. 32, II 10-25).

Applicant fails to show that he is entitled to relief upon this claim. First, as reflected in Mr. Littlejohn's testimony, trial counsel did consider presenting evidence of Applicant's cooperation with law enforcement, and they made a strategic decision not to present such evidence. As a result, Applicant is not entitled to relief upon this claim.

Furthermore, Applicant cannot establish that he was prejudiced by any alleged deficiency of counsel in this regard. Applicant did not present any testimony or evidence establishing prior cooperation with law enforcement at the evidentiary hearing. Thus, it would be speculative to find that the presentation of any such cooperation would have led to a different result at Applicant's trial.

10(B)(4): REASONABLENESS OF INVESTIGATION IN MITIGATION EVIDENCE

Applicant next asserts that trial counsel was ineffective for not properly investigating several areas of possible mitigation evidence. Specifically, Applicant asserts that counsel should have investigated more into Applicant's impoverished background and family dysfunction resulting from the equivalent to a polygamous household; Applicant's low intellectual functioning; neurological damage that Applicant allegedly suffered from exposure to dangerous neurotoxins and other chemicals; and neurological damage that Applicant allegedly suffered from maternal ingestion of alcohol during his developmental period. Applicant further contends trial counsel failed to gather relevant records to corroborate mitigation evidence that was presented at trial. Finally, Applicant argues counsel failed to investigate, develop, and present evidence of Applicant's good character. All of these claims are without merit.

Based upon the testimony at the trial, I find that:

1. Applicant's background was adequately investigated and presented to the jury in an effective way.

2. The gathering of mitigating evidence was thorough and presented to the jury in an effective way.

3. The issue of Applicant's adaptability to prison was investigated and presented to the jury in an effective way.

Therefore, this claim is hereby denied and dismissed.

10(B)(4)(A): FAILURE TO INVESTIGATE POLYGAMOUS FAMILY BACKGROUND AND HOW IT LED TO IMPOVERISHED FAMILY BACKGROUND AND FAMILY DYSFUNCTION

The allegations that defense counsel did not investigate the Applicant's polygamous family background and how it led to impoverished family background and dysfunction is without merit.

A review of the record as a whole and particularly the testimony of Te Anne Oehler, Melinda Parrott and Arlene Anderson, I find that:

1) The issues of polygamy, poverty and family dysfunction were exhaustively investigated and effectively presented to the jury,

2) Applicant has failed to present any meaningful evidence that trial counsel was ineffective in investigating and presenting the issues of poverty, polygamy and family dysfunction

This claim is denied and dismissed.

10(B)(4)(B): EVIDENCE OF APPLICANT'S LOW INTELLECTUAL FUNCTIONING

Applicant next contends that trial counsel failed to adequately investigate Applicant's low intellectual functioning. Respondent submits that Applicant failed to show that he is entitled to relief upon this claim.

Based upon the view of the trial transcripts and the testimony of James Babb and Te Anne Oehler, I find that:

1) The issue of low intellectual functioning was investigated and presented to the jury,

2) Defense counsel had access to Applicant's school records,

3) Defense was aware of the low IQ, and the fact that Applicant's IQ dropped between the ages of 11 and 14.

4) Defense was aware that Applicant was diagnosed with a learning disability in the area of verbal expression and language comprehension.

Applicant fails in meeting its burden with regard to showing that counsel's investigation was not reasonable. Further Applicant has failed to show that he was prejudiced. As a result, this claim for relief is denied and dismissed.

10(B)(4)(C)(1): TRIAL COUNSEL INEFFECTIVE FOR NOT INVESTIGATING EVIDENCE OF APPLICANT SUFFERING NEUROLOGICAL DAMAGE FROM EXPOSURE TO DANGEROUS NEUROTOXINS AND OTHER CHEMICALS

Applicant further contends that trial counsel failed to investigate and present evidence that Applicant was exposed to dangerous neurotoxins and other chemicals as a child. Applicant's claim here is without merit. First, counsel was not deficient in not investigating whether Applicant was exposed to chemicals and neurotoxins from swimming in Turkey Creek. Second, Applicant fails to show that he was prejudiced.

Based upon the testimony at the PCR hearing, I find that:

1. Defense counsel hired mitigating experts who investigated Applicant's background in a thorough manner.
2. Defense experts did not report to trial counsel anything concerning exposure to contamination in and around Turkey Creek.
3. Applicant never informed mitigation experts as to any concerns about Turkey Creek.
4. Applicant relied upon the expert testimony of Dr. Merikangas who has an impressive educational background; however, this court does not find his testimony persuasive. Although he presented his uncontradicted expert opinion this court does not believe his opinion is supported by the facts and, therefore, not credible. The facts are lacking in

that:

a. There was insufficient testimony to support the allegation that Applicant had significant exposure to Turkey Creek;

b. There was insufficient evidence as to when and where Applicant was exposed to Turkey Creek; and,

c. It is impossible to know the levels of toxicity of the water at the particular time and place that Applicant was exposed to Turkey Creek.

Applicant has failed to prove that trial counsel was ineffective or that there is a reasonable probability that the results at trial would have been different. Therefore, this claim for relief is denied and dismissed.

10(B)(4)(C)(2): EVIDENCE OF APPLICANT SUFFERING NEUROLOGICAL DAMAGE FROM MATERNAL INGESTION OF ALCOHOL DURING THE DEVELOPMENTAL PERIOD

Applicant asserts trial counsel failed to investigate and present evidence that Applicant suffered neurological damage that resulted from his mother ingesting alcohol while she was pregnant. Applicant's claim here is without merit. Counsel did not investigate whether Applicant suffered from neurological damage as a result of his mother drinking because there was no credible evidence to support such an investigation.

Based upon the testimony at the PCR hearing, I find:

1. There was no credible evidence that Applicant's mother drinks alcohol. The overwhelming evidence is that she abstained from the use of alcohol.
2. More specifically there is no evidence that Applicant's mother drank alcohol while she was pregnant with Stone.
3. The methodology employed by Dr. Merikangas is questionable. The conclusions reached by Dr. Merikangas were not supported by the facts and, therefore, are not

believable.

Therefore, the relief requested is denied and dismissed.

10(B)(4)(D): EVIDENCE OF APPLICANT'S GOOD CHARACTER

The allegation that trial counsel was ineffective in failing to investigate and present evidence of Applicant's good character is without merit. Te Anne Oehler did a superlative job in investigating the mitigation phase of this case. I specifically find that all aspects of his life were adequately investigated and effectively presented to the jury. Applicant has further failed to show that there is a reasonable probability the results at the resentencing trial would have been different.

The relief requested is, therefore, denied and dismissed.

10(B)(5): INEFFECTIVE ASSISTANCE OF COUNSEL IN SENTENCING PHASE FOR NOT OBJECTING TO PRESENCE OF LAW ENFORCEMENT OFFICERS IN COURTROOM DURING RESENTENCING TRIAL

The allegation that trial counsel was ineffective for not objecting to the presence of law enforcement officers in courtroom during the resentencing trial is without merit.

Based upon the record I find that:

1. The presence of officers at the resentencing trial did not create either an actual or inherent prejudicial effect on the jury.
2. There was not an abundance of uniformed officers in the courtroom.
3. There were even fewer spectators at the second trial than the first trial.
4. Applicant failed to show that he was prejudiced in any way by the presence of law enforcement in the courtroom.

As a result, this claim is denied and dismissed.

10 B(6): Failure to Conduct Adequate Voire Dire

Based upon the review of the record, I find that:

1. Trial counsel conducted voire dire in such a fashion that far exceeded the minimum standard of competence.
2. The voire dire questions posed to potential jurors were appropriate and clearly calculated to aid them in selecting open-minded jurors, who were not predisposed to hand down the death penalty.
3. The application nor the PCR record set forth with any particularity how the voire dire could have been conducted in a better fashion.
4. Applicant has not set forth any substantial allegations of prejudice.

Therefore, this claim is denied and dismissed.

10(B)7: Failure to Secure Crime Scene Experts

Based upon the trial transcript and the PCR transcript, I find that:

1. Trial counsel hired an expert, Donald Girndt, but elected not to call him.
2. Trial counsel made a well-reasoned strategic decision not to call this witness.
3. Trial counsel were not ineffective in their investigation of this case. They were not ineffective in their decision not to hire additional experts.
4. Applicant also failed to show that he was prejudiced.
5. Applicant failed to show that the result of the resentencing would have been any different had additional experts been hired or, if they had elected to call Donald Girndt as a witness.

Therefore, this claim is denied and dismissed.

10(C): Ineffective Assistance of Appellant Counsel

1. On appeal, appellate counsel raised a single issue on appeal. Specifically, he asserted the trial judge committed reversible error by permitting the victim's widow to testify that she had attempted suicide when she learned from a message left on her answering machine

that the Supreme Court had reversed Stone's death sentence and "they were going to retry this case over again", as this testimony introduced an arbitrary factor into Stone's resentencing, in violation of S.C. Code Section 16-3-25(C)(1). In affirming Applicant's conviction on appeal, the South Carolina Supreme Court found the issue raised in the appeal was not preserved for appellant review.

> Appellant's argument is not preserved for review. At trial, Appellant objected as the victim's widow began to describe her suicide attempt. The record reveals that Appellant based his objection on causation grounds, arguing that the testimony implied that the cause of the suicide attempt was not the victim's murder, but the financial pressures the victim's widow was experiencing and the fact that Appellant would have another sentencing proceeding. In allowing the testimony, the trial court held that the victim's widow had attributed the facts relayed in the testimony to her relationship with the victim, and that the testimony was, therefore, relevant and admissible.
>
> Appellant's argument before this Court goes along quite different lines. Appellant now argues that the victim's widow's testimony improperly invited the jury to speculate about the finality of its decision on the appropriate punishment and improperly invited the jury to consider how its decision might impact the victim's widow's future health. Thus, while Appellant's argument below focused on what caused the victim's widow to attempt suicide-meaning, what caused the testimony to be relevant-Appellant's argument on appeal abandons the issue of relevance and addresses only the effect this testimony may have had on the jury. Because Appellant did not argue these grounds in support of his objection at trial, Appellant's argument is not preserved for review. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E. 2d 6912, 693 (2003) (providing that in order for an issue to be preserved for appellant review, it must have been raised to and ruled upon by the trial court.)
>
> Appellant alleges that his argument on appeal is simply an augmentation of his objection at trial. , but a thoughtful examination reveals that this is not so. Primarily, Appellant's objection at trial was based on relevance and that issue has been abandoned here. Second, whether the suicide attempt by the victim's spouse minimized the jury's sense of responsibility (by suggesting that the jury's ultimate decision would be subject to review by a higher court) or maximized the jury's sense of responsibility (by implying that imposing a life sentence might lead the victim's widow to attempt suicide again), these considerations are wholly independent of the relevance argument presented below. If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call.

2. Based upon the trial transcript, PCR transcript and the South Carolina Supreme Court opinion State v. Stone, 376 S.C. 32, 655 S.E.2d 487 (2007, I find that:

a. Applicant has not established that appellant counsel was ineffective in failing to raise the issue as it was raised at trial.

b. Applicant would not have prevailed in his appeal even if the issue was properly put before the Supreme Court.

c. The testimony in question was admissible in the sentencing phase to demonstrate the uniqueness of the victims and the specific harm committed by the defendant.

d. Applicant failed to show prejudice by any deficiency of counsel.

Therefore, this claim is denied and dismissed.

10(d)(1): Due Process Violation, Failure to Approve Funding for a Jury Selection Expert

Applicant next asserts a due process violation from the refusal to find a jury selection expert. This freestanding claim can only be raised on direct appeal and is inappropriate in PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993)(issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel); Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (an application for post-conviction relief is not a substitute for an appeal). This claim is one that could have been raised at trial, and further, could have been raised by Applicant in his direct appeal. Since the issue could have been raised then, it cannot be raised now in this application. As a result, this claim is denied and dismissed.

Even if this claim could be raised in PCR, the issue should still be dismissed as a matter of law. As noted by the Fifth Circuit in Moore v. Johnson, 225 F.3d 495, 503 (5th Cir. 2000), which addressed an indigent defendant's asserted right to a jury selection expert pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985),

> [A] defendant cannot expect the state to provide him a most-sophisticated defense; rather, he is entitled to 'access the raw materials integral to the building of an effective defense....Most of those raw materials come to the defendant in the form of his court-appointed lawyer in his expert knowledge about how to negotiate the rules of court, how to

> mount an effective defense, and so forth.... [J]ury selection is not a mysterious process to be undertaken by those learned in the law only with the assistance of outside professionals. All competent lawyers are endowed with the 'raw materials' required to pick a jury fairly disposed toward doing substantive justice....[A] defendant does not lack 'an adequate opportunity to present [his] claims fairly' because he has been denied a jury consultant.

See also Ford v. Schofield, 488 F. Supp. 2d 1258 (N.D. Ga. 2007) (noting the constitution does not require an indigent defendant to get all the assistance his wealthier counterpart might buy, and finding no prejudice shown from the denial of a jury selection expert).

Here, at both proceedings Petitioner had the assistance of James Babb and Cameron Littlejohn, both who have extensive experience in jury trials in the midlands. Babb, in particular, has been trying major criminal cases in Sumter and Clarendon counties for years. Certainly, they had the "basic tools" to conduct jury selection such that no expert was needed. Since there was no constitutional violation or resulting prejudice from the denial of any such request, the claim is denied as a matter of law.

10(d)(2): Due Process Violation, Presence of Law Enforcement Personnel during both the Guilt and Sentencing Phases of Applicant's Trial

Applicant next contends he was denied due process based on the alleged presence of uniformed officers in the courtroom during both the trial and the resentencing proceeding.

First, as was the case with Applicant's claim in ground 10(d)(1), this freestanding claim can only be raised on direct appeal and is inappropriate in PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel); Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (an application for post-conviction relief is not a substitute for an appeal). These claims could have been asserted at trial. These are not claims that are cognizable for post-conviction relief. As a result, these claims are denied and dismissed with prejudice.

Moreover, this claim fails as a matter of law. In order to prevail on such a claim, Applicant must show that measures taken in the courtroom created either an actual or inherent prejudicial effect on the jury. "Inherent prejudice occurs when 'an unacceptable risk is presented of impermissible factors coming in to play." State v. Hill, 331 S.C. 94, 501 S.E2d 122 (1998) (quoting Flynn). See also State v. Paige, 375 S.C. 643, 654 S.E.2d 300 Ct. App. 2007). (finding no actual or inherent prejudice, where there was no evidence that jurors were exposed to spectators wearing buttons of victim, and no evidence that if they did see it they could tell the picture was of the victim).

As noted in response to grounds 10(a)(4) and 10(b)(5), there is no evidence in the record that there was an abundance of uniformed officers in the courtroom such that prejudice can be shown. At the evidentiary hearing, Applicant did not identify or present any such evidence that an intimidating atmosphere was created to the point where due process was violated. See, e.g. Holbrook v. Flynn, 475 U.S. 560 (1986) (finding no prejudice from presence of armed officers stationed as guards); Hill, 331 S.C. 94, 501 S.E.2d 122 (any prejudice from presence of officers is wholly speculative, and Hill failed to present any evidence the officers had an effect on the jury); Paige, 375 S.C. 643, 654 S.E.2d 300 (finding no actual or inherent prejudice, where there was no evidence that jurors were exposed to spectators wearing button of victim, and no evidence that if they did see it, they could tell the picture was of the victim). Altogether, Applicant failed to establish he was entitled to relief upon this claim. As a result, this claim is denied with prejudice.

10(c): Fifth and Sixth Amendment violations due to shackling during transport to courtroom and once inside courtroom

Applicant asserts his constitutional rights were violated by the alleged shackling of Applicant when he was transported to the courtroom and when he was inside the courtroom. Specifically, it

appears that Applicant is asserting that he was visibly restrained before the jury at some point in time, during either the jury selection process or guilt phase in his first trial.

First, this freestanding claim is one that can be raised on direct appeal and is inappropriate in PCR. Drayton v. Evatt 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal that cannot be raised in a PCR application absent a claim of ineffective assistance of counsel).

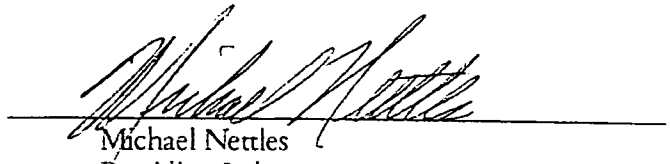
> Whether a defendant is restrained during trial is within the trial judge's discretion. The trial judge is to balance the prejudicial effect of shackling with the considerations of courtroom decorum and security. Illinois v. Allen, U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). The trial judge is the best equipped to decide the extent to which security measures should be adopted to present disruption of the trial, harm to those in the courtroom, escape of the accused, and prevention of other crimes. Brewster v. Bordenkircher, 745 F.2d 913 (4th Cir.1984).

State v. Tucker, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995). In Deck v. Missouri, 544 U.S. 622, 626-29, 125 S. Ct. 2007, 2010-12 (2005), the United States Supreme Court noted that it had been long established that the routine use of visible shackles was not permitted, and that a special need would have to be present for visible shackling to be used during the guilt phase of a trial. Thus, to the extent Applicant is asserting that he was improperly shackled during the guilt phase of the first trial, Applicant's claim was clearly available at trial and for his direct appeal. As a result, this claim for relief must be denied and dismissed with prejudice.

Second, as outlined in the response to Applicant's claim on ground 10(a)(5), the testimony and evidence presented at the evidentiary hearing clearly indicates that Applicant was not visibly restrained in the jury's presence. Instead, those involved in transporting Applicant and providing security during the first trial, utilized restraints that fit underneath Applicant's clothing. The testimony at the evidentiary hearing also established that efforts were made to ensure Applicant was not moved in the jury's presence. He was brought into the courthouse and courtroom before the jury arrived, and he would not leave the courtroom until after the jury left. Altogether, Applicant

did not establish a factual basis to support this claim. As a result, this claim for relief is denied and dismissed.

IT IS, THEREFORE, ORDERED that Applicant's Post-Conviction Relief is hereby **DENIED** as set forth hereinabove.



Michael Nettles
Presiding Judge

Florence, South Carolina

August 12, 2013