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December 19, 2014

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S.C. SUPREME COURT

Honorable Daniel E. Shearouse
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211
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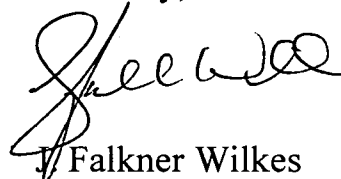
Re: Rishawn Reeder, 00316370 v. State of South Carolina
Case No.: 2012-CP-42-0509

Dear Mr. Shearouse,

I am enclosing a copy of the Notice of Appeal in the above captioned case. Also enclosed is a copy of the Order of Dismissal from which appeal is taken. Mr. Reeder is currently incarcerated and so I believe that he will qualify for the services of SCCID. I am therefore notifying Appellate Defense of the filing of this appeal and requesting that they conduct an evaluation as to Mr. Reeder's eligibility for services. As I anticipate SCCID's involvement, I am not requesting a transcript in this case.

I have notified Mr. Reeder of all of the above. I have provided Mr. Reeder with the Affidavit of Indigent Status for him to complete and forward to SCCID/AD. I will take no further action in this case pending SCCID's evaluation unless directed to do so by SCCID or your office.

Sincerely,



J. Falkner Wilkes

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Rishawn Reeder, 316370
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Pelzer, SC 29669

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
COMMON PLEAS COURT
R. Keith Kelly, Circuit Court Judge


Case No. 2012-CP-42-0509

Rishawn Lamar Reeder, #316370, Appellant,
v.
State of South Carolina, Respondent.

NOTICE OF APPEAL

Appellant, Rishawn Lamar Reeder, hereby appeals from the Judgment in a Civil Case (Order of Dismiss in a Post Conviction Relief action) signed by the Hon. R. Keith Kelly, Circuit Judge on the 5th day of December, 2014, entered on the 9th day of December 2014, for which written notice of entry was received on December 13, 2014.

A copy of the Judgment and Order of Dismissal from which appeal is taken is provided herewith and incorporated as if attached hereto.



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Counsel for Appellant

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S.C. SUPREME COURT

Other counsel of record:

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Attorney for Respondent

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
COMMON PLEAS COURT
Hon. R. Keith Kelly, Circuit Court Judge

Case No. 2012-CP-42-0509

Rishawn Lamar Reeder, #316370, Appellant,
v.
State of South Carolina, Respondent.

CERTIFICATE

I certify that on December 19, 2014, I served the Appellant's Notice of Appeal on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record and others as indicated below, and by facsimile:


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Respectfully submitted,



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December 19, 2014.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Rishawn Lamar Reeder, #316370,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2012-CP-42-0509

ORDER OF DISMISSAL

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This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 21, 2012, and amended application filed January 6, 2014. The Respondent made its Return on or about February 27, 2013. An evidentiary hearing into the matter was convened on November 4, 2014, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by J. Falkner Wilkes, Esquire. This Court notes that Mr. Wilkes was substituted in as counsel. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Kelly Glenn, Abel O. Gray, Esquire, and Michael D. Brown, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, the trial transcript, and Applicant's Exhibits.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted by the Spartanburg County Grand Jury at the May 2010 term for assault with intent to

kill (10-GS-42-2926), murder (10-GS-42-2927), and assault and battery with intent to kill (10-GS-42-2928). Applicant was represented by Michael D. Brown, Esquire. On May 12, 2011, the Applicant proceeded to trial, where he was convicted of the charges by a jury. Applicant was sentenced by the Honorable Roger L. Couch to confinement for life for murder, and concurrent terms of twenty years for assault and battery with intent to kill, and ten years for assault with intent to kill.

A timely Notice of Appeal was filed; however, The South Carolina Court of Appeals dismissed the appeal for failure to timely order the transcript and for failure to serve and file the Initial Brief of Appellant. The Order of Dismissal was filed August 30, 2011. The Remittitur was returned on September 14, 2011.

ALLEGATIONS

In his application and amended applications, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to use exculpatory evidence,
 - b. Counsel failed to object to alleged non-testifying codefendant's out of court statements through investigators' testimonies,
 - c. Counsel failed to confront and cross-examine Officer Heather Forrester,
 - d. Counsel requested a self-defense charge,
 - e. Counsel failed to conduct an independent investigation,
 - f. Counsel failed to interview alibi witnesses,
 - g. Counsel failed to present the Spartanburg Regional Hospital video,
 - h. Counsel failed to prevent alleged codefendant with identification of shooter,
 - i. Counsel failed to make a motion for severance,
 - j. Counsel failed to object to jury charge instructing that malice could be inferred from the use of a deadly weapon,

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- k. Counsel failed to present the gunshot residue analysis information forms for Applicant and alleged codefendant,
 - l. Counsel failed to call Loren Williams as a witness,
 - m. Counsel failed to object to the admission of Applicant's gunshot residue test,
 - n. Counsel failed to move to suppress gunshot residue test pursuant to SCRE 403,
 - o. Counsel failed to move to quash the indictments before the jury was sworn,
 - p. Counsel failed to investigate alleged deal between State and alleged codefendant.
- 2. Due process violations, in that;
 - a. Violation of Sixth Amendment Confrontation Clause,
 - 3. Prosecutorial misconduct, in that;
 - a. Brady violation.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State,

286 S.C. 441, 334 S.E.2d 813 (1985).

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

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Michael D. Brown ("Counsel") testified that he was retained by Rishawn Reeder's family and represented Applicant during the entire pendency of his charges. Counsel testified that the Applicant had provided Counsel with two conflicting theories of defense: 1st theory, Applicant was in Spartan Terrace selling drugs and was robbed and shot and just coincidentally bumped into Cathcart at Spartanburg Regional; 2nd theory, Applicant acknowledged being in the car with Cathcart, but stated he had not been involved in the earlier fight and was just riding with Cathcart. Counsel testified that the 2nd theory was the more recent theory and what Counsel based the defense strategy at trial. Counsel testified that he requested a self-defense jury charge

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based upon the fact that the jury might believe Applicant had gotten into the car with Cathcart after the fight and shot back at the victim in self-defense.

Applicant testified that he had only claimed that he was in Spartan Terrace on the night of the shooting and was never at a club, gas station, or in a car with Cathcart. Applicant testified that Counsel lied because Applicant never told Counsel that he was in the car with Cathcart on the night of the shooting. Applicant testified that he met with Counsel approximately three or four times prior to trial.

Failure to Present Exculpatory Evidence

Applicant testified that Counsel should have used the video from Spartanburg Regional to support a defense of alibi. Applicant testified that the timestamp on the Regional video places Applicant in the hospital at or near the time the victim was shot as reflected on the video from Southeastern Converters. Further, Applicant testified that although he appears to be in the hospital with Cathcart, there is no video that shows Applicant getting out of the same car with Cathcart. Instead, Applicant testified that he drove himself to the hospital in a "little white Buick."

Counsel testified that he was aware of the videos from Spartanburg Regional Hospital and the video from Southeastern Converters. Applicant introduced a DVD containing two videos from inside Spartanburg Regional and the Southeastern Converter video as Exhibit #1. First, Counsel testified that the Applicant never raised the possibility that the Spartanburg Regional videos could or should be used in support of an alibi defense. Second, Counsel testified that he did not believe that the Spartanburg Regional videos would provide support for an alibi defense. Although the time stamp appears to show the Applicant and co-defendant Cathcart in the hospital around the same time of the shooting shown on the Southeastern video,

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Counsel believed that the times could easily be explained away if the State had brought in anyone to discuss the videos. Third, Counsel testified that he wanted to stay away from having the jury see the Spartanburg Regional videos because they show the Applicant walking into and around the hospital with the co-defendant. The video places the Applicant with the co-defendant after both have been shot. Additionally, there was another video from Spartanburg Regional, which purported to show the co-defendant's car that was later found burned, driving from the hospital.

Applicant also testified that Counsel should have introduced the Coroner's report, which recorded the victim's time of death as 4:00 am. Applicant introduced the report as Applicant's Exhibit #9. Applicant testified that the report, in association with the Regional video, supported the alibi defense.

The Applicant argued that Counsel failed to present evidence to support possible third-party guilt. Applicant introduced Exhibit #2, a packet containing the statements of Darius Cathcart, the co-defendant, and Edward Robinson, as well as copies of two photo identifications of each witness identifying Antwan Mack as the person who drove Cathcart's car, burned the car, and shot the murder victim. Counsel testified that he did not believe that the statement of Edward Robinson given in November 2009 was ever turned over to him through discovery. However, Counsel testified that he was aware of the statement of Cathcart from August 2009. Counsel testified that Robinson's statement could have been important since the State filed a motion in limine to prevent the defense from arguing third-party guilt.

Applicant also introduced Exhibit #5, copy of a Crime Stopper tip alleging Rodney Hutchen's involvement in the shooting. Attached to Exhibit #5 and also introduced, over Respondent's objection regarding relevance, were print outs from the judicial index showing

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numerous arrests and convictions for a Rodney Hutchens in Spartanburg. Counsel testified that he did not specifically recall that name and could not recall if he had a copy of the tip.

This Court finds that Counsel was not ineffective for failing to further interview witnesses, investigate or pursue a defense of third-party guilt because as Counsel testified, the evidence was insufficient to present a legal defense of third-party guilt. As clarified in Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), "a defendant [can] introduce evidence of third-party guilt regardless of the strength of the State's case if the evidence offered by the accused as to the commission of the crime by another person is limited to such facts as are inconsistent with his own guilt and that raise a reasonable inference or presumption as to his own innocence." Miller v. State, 379 S.C. 108, 114 n.2 (2008).

This Court finds that the evidence offered, in the way of statements from Cathcart and Robinson and an unsubstantiated tip regarding Rodney Hutchens, was not inconsistent with Applicant's guilt. Testimony was presented to indicate that there were at least three guns shot that night, which could mean that there were two shooters in the car with Cathcart and Applicant, leading to the conclusion that there were three people in the car. Additionally, Cathcart gave a statement to police that once he and Applicant were dropped off at Spartanburg Regional, "Black" took the car. Further, the jury was presented with and the State proceeded with the theory of the "hand of one, hand of all." Therefore, Applicant could still have been found guilty of murder, even if it was determined that he was not the shooter, simply by being with the others and knowing that they intended to shoot at the victims. However, the gunshot residue tests support the theory that the Applicant was the shooter.

This Court also finds that Counsel was not ineffective for failing to investigate and introduce other alleged exculpatory evidence. Our courts are understandably wary of second-

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guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Counsel articulated valid strategic reasons for not offering the videos from Spartanburg Regional as evidence.

Further, a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. State v. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985), citing Strickland v. Washington, 104 S.Ct. 2052, 890 L.E.2d 674(1984). Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. Id. This Court finds that the Applicant has failed to meet his burden of proof as to this claim.

*Failure to Object to Jury Charge Regarding Inference of Malice &
Requesting Self-Defense Jury Charge*

Applicant argued that Counsel was ineffective for failing to object to the jury charge regarding inference of malice and for requesting a self-defense jury charge. Counsel testified that he did not believe that the jury charge regarding inference of malice was improper and he did not believe the inferred malice charge was inconsistent with his request for a self-defense charge. Counsel for the co-defendant requested a charge for mutual combat and self-defense, but chose mutual combat when informed by the trial judge that he would not charge both. (Tr. p. 393-4). Applicant's Counsel requested a self-defense jury charge, arguing that because

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Applicant had not been identified as participating in the fight at the club, Applicant had no control over the vehicle and was not engaged in any prior difficulties. (Tr. p. 394-6). The trial judge ruled that because there was no evidence Applicant was involved in the initial altercation, he would have no duty to retreat and might not have brought on any of the difficulties. (Tr. p. 398-9).

“A jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse, or justify the homicide.” State v. Stanko, 402 S.C. 252, 260, 741 S.E.2d 708, 712, reh'g denied (Apr. 3, 2013), cert. denied (Oct. 7, 2013), cert. denied, 134 S. Ct. 247, 187 L. Ed. 2d 183 (U.S.S.C. 2013). In regards to the inference of malice with a deadly weapon, the trial court charged the jury with the following:

Inferred malice may arise when a deed is done by a person using a deadly weapon. A deadly weapon is any article or instruments or substance which is likely to cause death or great bodily harm. Now, whether an instrument is used as a deadly weapon is a question of fact for a jury to decide.

(Tr. p. 449).

This Court finds that, had there been evidence presented to “reduce, mitigate, excuse, or justify the homicide,” the jury charges regarding an inference of malice would have been incorrect. However, this Court can find no evidence in the record which would fall in any of those four categories. Neither defendant presented testimony to indicate that they shot the victims in self-defense and as was clear in the Applicant’s testimony, he denied shooting a gun at all that day.

At trial, the State presented testimony from victim Bryant Miller that he first saw a car beside him when the car began shooting at Miller and his friends. (Tr. p. 90). Miller testified

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that once he heard gunshots, he shot back at the dark green Nissan using a .40 caliber pistol. (Tr. p. 91). Miller testified that all of the windows in the car he rode in were up and after they shattered from the initial gunshots, Miller knocked out the remainder of the window to shoot back. (Tr. p. 97-8). Miller testified that he was shot on the left side of his neck and the bullet exited from the right side of the neck. (Tr. p. 121). Miller also testified that he was sitting in the backseat on the driver's side of the vehicle. (Tr. p. 121-2).

Dwight Geter testified that a car "just pulled up beside us and started shooting." (Tr. p. 179). Geter testified that the car had its headlights off, pulled up on the left side of his car, and started shooting. (Tr. p. 180; p. 183). Geter testified that Miller did start shooting back, but only after the other car shot first. (Tr. p. 185). Geter identified Cathcart as involved in the altercation at the club. (Tr. p. 187-8; p. 195).

Testimony was presented to show that Cathcart had a grazing injury to his right side. (Tr. p. 151). Cathcart's statements to police were introduced, which placed him driving a gray Nissan with Applicant and a guy named "Black," when a car drove up beside them near I-85 Business and shot at them. (Tr. p. 153; 158-9). Later, testimony was presented that Cathcart's car was found in flames, but with no apparent damage from gunshots. (Tr. p. 159; p. 167; p. 170).

Testimony presented showed that the victim's car had ten impact marks from bullets, all on the driver's side of the car, including marks to the driver's side of the windshield, driver's door, and back door on the driver's side. (Tr. p. 239).

The only evidence presented by the Applicant at trial was testimony from Officer Talanges, specifically regarding a crime scene sketch of the location of the shooting and initial interaction at the hospital with Applicant and Cathcart. (Tr. p. 384-389). Counsel questioned

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Talanges as to the locations of shell casings, blood, and other unknown biological manner, and questioned as to whether those items were all tested. Counsel also questioned Talanges about locating Applicant and Cathcart at Spartanburg Regional and noting that Applicant had a gunshot wound to his left wrist area. (Tr. p. 389).

This Court finds that Counsel was not deficient for failing to object to the charge regarding the inference of malice by use of a deadly weapon or for requesting a self-defense charge. Erroneous jury instructions are subject to harmless error analysis. Lowry v. State, 376 S.C. 499, 510-11, 657 S.E.2d 760, 766 (2008). The Applicant has failed to demonstrate that Counsel was deficient or that if Counsel was deficient, that Applicant suffered any prejudice as a result. Therefore, this claim is denied.

Failure to Properly Address Gunshot Residue Evidence & Witness

Applicant introduced a number of documents relating to gunshot residue as Exhibit #3. Applicant testified that he was unaware of the specific levels of residue and metals prior to trial. Applicant testified that Counsel should have objected to the State's use of those specific levels when there was no evidence that those levels existed. Counsel testified that he recalled receiving the gunshot residue reports from SLED which showed the overall results, but did not specifically recall documents with the details. Counsel testified that he did not believe the detailed documents were attached to the overall report. However, Counsel testified that he did recall a conversation prior to trial with the Solicitor regarding the particulates and individual results, so he was aware of those results. Counsel testified that he did not object to Officer Simmons testifying as to the particulates because Counsel's trial strategy was to show that those numbers could be a result of the Applicant being shot in the hand.

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Applicant also introduced Exhibit #4, copies of the gunshot residue analysis forms completed at the time of collection. Applicant testified that the forms reference how each individual came to be at the hospital and Counsel should have used the form because the Officer wrote that Applicant and Cathcart each "drove to hospital." Counsel testified that he did not want to introduce the gunshot residue analysis forms for Cathcart and Applicant, even though it appears both forms indicate that each defendant drove themselves to the hospital, because the report also indicated that the Applicant was left-handed. Counsel testified that he objected to any conversation between Applicant and police coming into evidence because of issues with medication as a result of the gunshot wound and voluntariness of statements, including the statements made to police regarding Applicant being left-handed. Further, Counsel testified that it would be a "novel" theory that the Applicant had simply appeared at the hospital at the same time as Cathcart. Counsel also testified that the Applicant never informed Counsel that Applicant drove himself to the hospital.

Counsel testified that the Applicant never requested Counsel move to suppress the gunshot residue and Counsel did not object to the gunshot residue test coming in as more prejudicial than probative, according to SCRE 403. Counsel testified that to his knowledge, gunshot residue swabs can be taken from someone without a search warrant based upon exigent circumstances and the fragility of the residue. Counsel testified that he attempted to use the particulates in his closing argument to draw attention to the fact that the Applicant was shot in the wrist/arm.

This Court finds the testimony of Counsel to be credible. This Court finds no merit in Applicant's arguments that Counsel was ineffective for failing to object to the gunshot residue evidence. Further, this Court finds the strategy articulated by Counsel reasonable for not

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introducing the analysis information forms. Therefore, the Applicant has failed to meet his burden of proof as to this claim.

Failure to Move for Severance of Trial

Applicant testified that at the time of trial, he was not aware of the term "severance," but did want to have a separate trial from his co-defendant Cathcart. Counsel testified that he did not file a motion for severance because he did not believe he had a legal argument for severance based upon the fact that there were no competing interests and the Spartanburg Regional videos and statements that placed Applicant and Cathcart together. Counsel also testified that he was concerned that if a separate trial was held, Cathcart could have potentially come to testify and place the blame predominantly on Applicant.

This Court finds that Counsel made an informed and strategic decision when he chose not to file for a severance. "Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right." State v. Halcomb, 382 S.C. 432, 439, 676 S.E.2d 149, 152 (Ct. App. 2009). Although there is not a clearly defined rule determining when a defendant should receive a separate trial, it is well established that "[s]everance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." Id. at 440, 153. This Court finds that Counsel was not deficient in his decision to not move for severance. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). This Court finds that the legal and strategic decision to not move for a severance was reasonable in this situation.

Failure to Object to Co-Defendant's Statements

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Applicant argued that Counsel was ineffective for failing to object to Cathcart's statements, testified to by officers, as a violation of his right to confront witnesses and a violation of Bruton v. United States, 391 U.S. 123, 136-37 (1968). Counsel testified that he did not object to Cathcart's statements to police at the hospital coming in, but did object to any statement made by Applicant. Counsel testified that he was not concerned with Cathcart's statements because they simply placed Cathcart and the Applicant together, but did not implicate Applicant in any criminal activity. Further, the statements were consistent with the Applicant's second theory that he was an innocent rider in Cathcart's car.

An accused's constitutional right to confront and cross-examine witnesses against him is essential to a fair trial in that it promotes reliability in criminal trials and ensures convictions will not result from testimony of individuals who cannot be challenged at trial. State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). Specifically, the introduction of a nontestifying co-defendant's statement which *implicates* a defendant violates that defendant's right to confrontation because no opportunity to cross-examine the co-defendant is presented. Bruton v. United States, 391 U.S. 123, 136-37 (1968)(emphasis added). However, Bruton applies only when the statement implicates the defendant "on its face," and the rule does not apply to statements that only become incriminating when linked to other evidence introduced at trial, such as the defendant's own testimony. State v. McDonald, 400 S.C. 272, 275, 734 S.E.2d 167, 168 (Ct. App. 2012), reh'g denied (Nov. 30, 2012).

This Court finds that Counsel was not ineffective for failing to object to Cathcart's statements being introduced through officer testimony. This Court finds that the statements, on their face, do not implicate the Applicant in the shooting. Therefore, this Court finds that Counsel was not deficient for failing to object to the statements.

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Failure to Conduct an Independent Investigation

Applicant introduced a copy of a field investigation card as Exhibit #6. The card referenced an interview with witness Glenn Kelly, who indicated he saw a Ford Crown Victoria and a Ford Mustang that evening at the time of the shooting. Applicant testified that he was unaware of Kelly as a potential witness, but had received a copy of the investigation card while he was located in the county detention center. Applicant testified that Counsel should have called Kelly as a witness because it would have caused doubt as to which car was involved in the shooting.

Glenn Kelly testified that on the night of the shooting, he had just returned from club around 4:30 am. Kelly testified that he heard shots and saw an older green Mustang or older green car. Kelly testified that he called 911, but never spoke with an officer. Kelly testified that he was about fifteen feet away from the intersection and can identify cars by their headlights. Kelly did acknowledge that he had been drinking that night at the club.

Counsel testified that he recalled having a discussion with the Applicant about the report of someone seeing a Mustang. However, Counsel testified that he never spoke with Glenn Kelly. Counsel testified that the discussion with Applicant about someone identifying a Mustang was at the same time that Applicant was presenting the first theory involving his being at Spartan Terrace and not in the car.

This Court finds Counsel's testimony credible that he recalled discussing the fact that one of the cars had been identified as a Mustang with the Applicant. The Applicant failed to meet his burden of proof of establishing that Counsel was deficient for failing to interview or call Kelly as a witness. The Applicant's allegations that Counsel did not conduct an adequate pre-trial investigation are without merit. Following testimony and review of the transcript, it is clear

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that Counsel had prepared extensively for Applicant's trial. The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). The Applicant failed to show how that any additional investigation into this witness would have affected the outcome of the trial. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequate investigation.

Failure to Interview Alibi Witnesses

Applicant also testified that he provided the names of two potential alibi witnesses to Counsel in November or December 2009, prior to the trial in May 2011. Applicant testified that the witnesses would testify that they saw Applicant at Spartan Terrace the night of the shooting, but Applicant was not sure the witnesses could testify that they saw Applicant get shot.

Counsel testified that he was provided with names of several potential alibi witnesses that Applicant claimed saw him that evening at Spartan Terrace, including Shantae Geter and Tacoya Carpenter. However, Counsel testified that he was not able to get in touch with any of the witnesses prior to trial. PCR Attorney for the Applicant offered a copy of an affidavit of non-service for a subpoena for Ms. Carpenter the prior attorney had attempted to serve as Applicant's Exhibit #10. PCR Attorney for Applicant also offered a subpoena in an attempt to secure the testimony of Shantae Geter because of the recent discovery of a possible address. This Court

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sent an officer out in an attempt to serve the subpoena and he returned, stating that he was unable to locate her and the apartment complex manager stated that no one by that name leased an apartment there. The Court placed those records into evidence as Court's Exhibit #1.

This Court finds that the Applicant has failed to meet his burden of proof of establishing that Counsel was ineffective relating to the interviewing of alibi witnesses. This Court finds Counsel's testimony credible that he attempted to locate the witnesses, but was unable to. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). As evidenced by Applicant's own inability to locate the witnesses for the PCR hearing, this Court finds that Applicant has failed to meet his burden of proving that Counsel was ineffective for failing to interview the alibi witnesses.

Failure to Properly Cross-Examine Witnesses

Applicant introduced Exhibit #7, which included a portion of the cross-examination of State's witness Dwight Geter and an incident report, along with Exhibit #8, which was a copy of the photo identification of Cathcart by Geter. Applicant testified that Counsel was ineffective for failing to cross-examine Geter on the fact that Geter identified Cathcart as involved in the

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victim's shooting. Counsel testified that there was a limited cross of Geter because Geter had only identified Cathcart as the person involved in the fight at the club earlier that evening and Counsel wished to draw attention towards Cathcart. Further, Counsel testified that he objected to the introduction of the testimony and identification, in so far as it identified Cathcart as the one who was "involved with the fight and shooting my brother." Counsel testified that Geter had not originally identified Cathcart as involved with the shooting. Counsel testified that he objected to the evidence because he did not want to link the Applicant to the fight at the club and certainly not the shooting. Counsel testified that he believed that redacting the portion identifying a reference to the shooting would be in Applicant's best interest.

Counsel testified that he did not cross-examine Officer Forester about her investigative report indicating the victim/witness said an "unknown black male" shot at them because she stated in both her direct testimony and her cross-examination by Cathcart's counsel that the victim/witness stated that he did not know the black males involved in the altercation.

Counsel testified that he did not call Investigator Loren Williams as a witness, but instead argued during closing arguments that Williams not testifying for the State should be the basis for reasonable doubt to the jury and attempted to attack the integrity of the investigation (Tr. p. 412-3; p. 421).

This Court finds the testimony of Counsel to be credible in this matter. The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant

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did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing the witnesses' answers at trial would have been different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense.

Additionally, prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). The Applicant failed to show what testimony, if any, Investigator Williams would have provided that could have benefited the defense. Therefore, this Court finds that the Applicant failed to meet his burden of proof as to the allegation that Counsel was ineffective for failing to properly cross-examine witnesses.

Failure to Object to Solicitor's Closing Arguments

Applicant alleged that Counsel should have objected to two portions of the Solicitor's closing arguments. Counsel acknowledged that he did not object or request a curative instruction when the Solicitor stated that the defense also had the ability to issue a subpoena for Investigator Williams as well. (Tr. p. 425, lines 17-21). Counsel also acknowledged that he did not object or request a curative instruction when the Solicitor said that the jury should not give the defendant the benefit of the doubt. (Tr. p. 426, lines 21-2). Counsel testified that he did not believe that either of the statements made by the Solicitor was burden shifting. Further, Counsel testified that

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the jury had been instructed by the trial court that statements made by the attorneys were arguments and not law.

A solicitor has a right, during closing arguments, to state his version of the testimony and to comment on the weight to be given such testimony. Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002). Even constitutional prohibitions do not preclude a prosecutor from making “a fair response to a claim made by defendant or his counsel.” State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000) (citing United States v. Robinson, 485 U.S. 25, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988)). This Court finds that the Applicant has failed to meet his burden of proving that Counsel was ineffective for failing to object to the Solicitor’s closing arguments.

Failed to Move to Quash the Indictments

Although the Applicant raised the allegation in his application, Applicant failed to present any testimony or evidence in support of the allegation at this hearing. Therefore, this Court finds that the Applicant has voluntarily abandoned this allegation.

Failed to Investigate Deal between State and Cathcart

Although the Applicant raised the allegation in his application, Applicant failed to present any testimony or evidence in support of the allegation at this hearing. Therefore, this Court finds that the Applicant has voluntarily abandoned this allegation.

Due Process Violations – Confrontation Clause

This Court finds that the allegations of a due process violation are sufficiently addressed in the above allegation regarding ineffective assistance of counsel for failing to object to co-defendant’s statements. This Court finds that, in accordance with the ruling above, the Applicant has also failed to meet his burden of proof as to this claim.

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Prosecutorial Misconduct

Brady Violation

The Applicant argued that a Brady violation occurred. Applicant introduced Exhibit #2 in support of his claim, a packet containing the statements of Darius Cathcart, the co-defendant, and Edward Robinson, as well as copies of two photo identifications of each witness identifying Antwan Mack as the person who drove Cathcart's car, burned the car, and shot the murder victim. Counsel testified that he did not believe that the statement of Edward Robinson given in November 2009 was ever turned over to him through discovery. However, Counsel testified that he was aware of the statement of Cathcart from August 2009. Counsel testified that Robinson's statement could have been important since the State filed a motion in limine to prevent the defense from arguing third-party guilt.

Applicant also introduced Exhibit #5, copy of a Crime Stopper tip alleging Rodney Hutchen's involvement in the shooting. Attached to Exhibit #5 and also introduced, over Respondent's objection regarding relevance, were print outs from the judicial index showing numerous arrests and convictions for a Rodney Hutchens in Spartanburg. Counsel testified that he did not specifically recall that name and could not recall if he had a copy of the tip.

In evaluating post-trial Brady claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268.

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First, this Court finds that the Applicant failed to demonstrate that the prosecution suppressed this evidence. There was no definitive testimony as to whether or not the statement regarding Robinson and the tip regarding Hutchens were received by Counsel. Counsel testified that he either did not believe he had received the statement or could not recall the tip. Secondly, this Court finds that the evidence is not material. This Court finds that the evidence offered, in the way of statements from Cathcart and Robinson and the tip regarding Hutchens, was not inconsistent with Applicant's guilt. Testimony was presented to indicate that there were at least three guns shot that night, which could mean that there were two shooters in the car with Cathcart and Applicant, leading to the conclusion that there were three people in the car. Additionally, Cathcart gave a statement to police that once he and Applicant were dropped off at Spartanburg Regional, "Black" took the car. Further, the jury was presented with and the State proceeded with the theory of the "hand of one, hand of all." Therefore, Applicant could still have been found guilty of murder, even if it was determined that he was not the shooter, simply by being with the others and knowing that they intended to shoot at the victims. However, the gunshot residue tests support the theory that the Applicant was the shooter.

Therefore, this Court finds that the allegation of a Brady violation has no merit.

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, Counsel's testimony is most credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness. This Court also finds that the allegations of due process violations and a Brady violation have no merit.

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Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel’s performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Asier *supra*. Therefore, this allegation is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel’s assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant’s behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

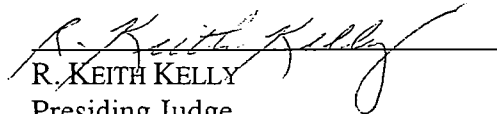
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IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 5th day of December, 2014.


R. KEITH KELLY
Presiding Judge

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