STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge
Appellate Case No. 2014-002623

Richard Patterson,

Petitioner,

vs.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRITT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Counsel was not ineffective for failing to argue the Mirandized statement should have been suppressed as the fruit of the poisonous tree because at the time of trial, the fruit of the poisonous tree doctrine would not apply to Mirandized statements, and the prior oral, unwarned statement was not the product of custodial interrogation. Counsel was not ineffective for failing to hire an expert on post-traumatic stress syndrome because counsel stated a valid strategic reason for declining to hire such an expert, and Patterson failed to provide testimony that evaluation by such an expert would have been beneficial. Counsel was not ineffective for failing to bring Petitioner to law enforcement to give a third statement.

II.

Counsel pursued reasonable strategy in pursuing suicide as a defense because that was Petitioner's story in his trial testimony and his exculpatory statements to law enforcement. Evidence does not support a charge on accident and trial counsel's strategy was reasonable. Petitioner was not prejudiced by the alleged deficiency in light of the overwhelming evidence of guilt. No matter what, the jury would not have convicted Petitioner if the jury believed Patterson's story, and they never would have believed his story.

III.

Because it is not a criminal act to try and stop someone who you think is trying to commit suicide, trial counsel was not ineffective for failing to request an instruction on involuntary manslaughter. Petitioner was not prejudiced by the alleged deficiency since

evidence did not support an instruction on involuntary manslaughter.

IV.

Counsel was not ineffective regarding his mistrial motion where the trial court's curative instruction to the jury was sufficient and where the Court of Appeals opinion indicated that even if the mistrial issue was preserved for review, the trial court did not abuse its discretion.

V.

Petitioner did not meet his burden of proving prejudice from counsel's alleged deficiency in regards to the alleged Rule 5, SCRCrimP, violation because Petitioner failed to show that additional testing of the hair sample would have provided any beneficial results.

VI.

Counsel was not ineffective for failing to object to unobjectionable portions of the prosecution's closing argument, and counsel's own closing argument did not fall below professional norms.

VII.

Counsel's performance was not deficient for declining to retain an expert on post-traumatic stress disorder (PTSD) and because Petitioner chose to not be evaluated to determine if he suffered PTSD, Petitioner failed to prove prejudice.

STATEMENT OF THE CASE

Petitioner Patterson was indicted by the Anderson County Grand Jury for murder and possession of a firearm. Patterson was convicted as charged following a jury trial on October 9-13, 2000. Patterson was represented by James Brehm, Esquire. The Honorable J.C. Nicholson, Jr., sentenced Patterson to life imprisonment for murder and a concurrent sentence of five years imprisonment for the weapons charge.

Patterson filed an appeal and was represented by opposing counsel, Tara Dawn Shurling, Esquire. The South Carolina Court of Appeals affirmed Patterson's conviction and sentence. State v. Patterson, 2003-UP-143 (S.C. Ct. App. filed Feb. 19, 2003). This Court denied the subsequent petition for writ of certiorari by order dated May 13, 2004.

Patterson then filed an application for post-conviction relief. A hearing was first convened on June 18, 2009, and reconvened on February 26, 2013, before the Honorable J. Cordell Maddox, Jr. Opposing counsel represented Patterson. Assistant Attorney General West Lee, Esquire represented the State at the first hearing, while undersigned counsel represented the State at the second hearing. By order dated June 13, 2014, Judge Maddox denied relief. Patterson's subsequent motion pursuant to Rule 59(e), SCRCP, was denied on November 26, 2014.

STATEMENT OF FACTS

Patterson was convicted for murdering his girlfriend, Leanne Pearson (Victim). She was found dead from a gunshot wound after Patterson called 911 and claimed he found her dead after he returned home from the store.

The first witness for the State was Shannon Jordan, Victim's niece. Jordan testified she and Victim grew up together and were like sisters. Victim lived with Jordan and Jordan's family. She testified that Patterson and Victim had an on/off relationship. In January 2000, Patterson moved into the house with Victim and Jordan. Patterson lived at the house for about three months before Victim's death. App. pp. 129-31. Jordan described Patterson as being very protective and smothered Victim. Victim tired of being smothered and intended to end the relationship. She was also planning to move in with her father who was dying of cancer. App. p. 131. Jordan denied Victim was depressed or suicidal in the months before her death or the morning Victim died. App. p. 132.

Jordan testified that on March 9, 2000, Victim discovered she was missing some photographs and a tape from her purse. At Victim's request, Jordan paid a locksmith to open the door to Patterson's truck and found the photographs and tape in the truck. When Victim confronted Patterson about it, Patterson admitted that he took the items. The photographs were of Victim and her husband and children. Victim was angry. App. pp. 132-33; p. 135.

The next day, Jordan, her husband, and her children were headed to the store. Victim was sitting on the couch and took her bank card out so Jordan could get Victim some money from the ATM. That was when Victim realized the photographs were missing from her pocketbook again. Victim planned to confront Patterson despite Jordan's advice not to.

Jordan and her family left the house; Patterson and Victim were alone together. When Jordan returned approximately two to two and half hours later, law enforcement and the rescue squad were parked in her yard. App. pp. 136-37.

Tammy Alewine was friends with Victim. She was aware of Victim's plans to end the relationship with Patterson and move in with her father. On March 3, 2000, Victim called her looking for a queen-size bed so Victim could stay with her father. Victim decided she would end the relationship with Patterson when she moved. App. pp. 193-95.

Alewine testified that on the morning of March 10th, Victim called Alewine. Alewine testified it was apparent that Patterson was near Victim while Victim was speaking on the phone. Victim asked Patterson to get something and then whispered to Alewine that she had a locksmith open the door of the truck to retrieve some photographs and a tape that were missing. Victim was angry. She told Alewine she was going to end the relationship. Alewine never talked to Victim again. App. pp. 195-96.

Deputy Timothy Smith testified he received a call at 10:25 a.m. on March 10, and arrived at the house at 10:42 a.m. Patterson was sitting on the porch steps next to a corporal from Deputy Smith's Office. Deputy Smith testified that he asked Patterson to come with him to the side of the house. Deputy Smith asked what happened. Patterson claimed Patterson and Victim were "sitting around the house just reading, enjoying the day, when she asked him to go up to the local corner store" and buy Victim a drink and a pack of cigarettes. App. pp. 167-69.

Patterson claimed he went to the store and bought cigarettes and a drink. When he returned to the house, his girlfriend was sitting on the sofa with a gunshot wound to her head,

and she had a gun in her hand. Patterson said he called 911. Patterson claimed Victim had been depressed about her father who was sick, but that Patterson and Victim were getting along fine with no problems. App. p. 169, lines 7-24. Patterson never mentioned the argument over photographs. App. p. 171. Notably, Patterson claimed he was at the store when the gun discharged. App. p. 170, line 23 – p. 171, line 5.

Deputy Smith was instructed by the investigator to take Patterson to the police station, but Patterson was not in custody. Deputy Smith explained to Patterson that it was hot outside and the department would be more comfortable. Deputy Smith was also concerned about the fifteen to twenty family members that assembled and were making insults and threats to Patterson. App. pp. 172-73.

Crime Scene Investigator Mark Coyle testified that when he responded to the crime scene, he found Victim with a wound to the head and lots of blood. Investigator Coyle performed a gunshot residue test (GSR) on Victim. Investigator Coyle also performed a GSR test on Patterson. The gun was found on the floor beside the coffee table. There was an entrance wound on the right side of Victim's head and an exit wound on the left. Investigator Coyle used a trajectory rod. Investigator Coyle also noted that he found cold soda and packs of cigarettes. App. pp. 209-17.

SLED Agent Kimberly Black testified that she examined the results of the GSR testing and determined that neither Victim nor Patterson had GSR on them when tested. App. pp. 450-50A (Tr. pp. 344-45).

Paramedic David Ellis arrived at the crime scene before law enforcement. He testified that Patterson was on the front porch when Ellis arrived. Ellis testified the gun was

in the deceased Victim's right hand on her lap, almost between her legs. Her finger was on the trigger. Ellis removed the gun from Victim and placed it on the floor. App. pp. 253-55.

When Investigator Matt Smith arrived at the crime scene, Patterson was talking with Deputy Tim Smith. Investigator Smith and Patterson sat down in front of another Detective's patrol car. App. pp. 256-57. Investigator Smith took a written statement from Patterson. Patterson was not in custody at the time and Patterson freely and voluntarily agreed to talk with Investigator Smith. App. pp. 258-59. Investigator Smith published Patterson's written statement, in relevant part, as follows:

> We were both sitting on the couch, Leanne asked me if I would go to the store to get her a drink and some cigarettes. I got dressed and asked her if she wanted anything else, and she said, no. I said I'll be back in a few minutes, Leanne said, I love you, I said, I love you too, I'll be back in a minute. I was gone about 15 or 20 minutes, I went to the new Texaco station, Hwy. 252 and Hwy. 413, I bought a Mountain Dew and a pack of cigarettes for me and a diet Mountain Dew and a pack of cigarettes for her. I came home and walked inside the house through the front door, I saw Leanne sitting on the couch with blood on her and a gun in her right hand. The gun is her's, I think her dad gave it to her. I called 911, and the lady at 911 wanted me to touch her neck to try to get a pulse. I touched her on the left side of the neck and I didn't feel a pulse. The lady on 911 told me to go outside. . . .

App. p. 260, lines 10-24.

Investigator Smith obtained a surveillance video from the store. The store was about seven miles, round trip, from the house. App. p. 262. On his way back to the office, Investigator Smith, accompanying Investigator Black, stopped for lunch. Investigator Smith also bought Patterson a hamburger to eat before Investigator Black interviewed Patterson at the Sheriff's department. In response to the prosecutor's question, Investigator Smith

affirmed that Patterson was not under arrest or in custody. However, after the conversation progressed, Patterson was provided Miranda warnings and placed under arrest. App. pp. 263-265.

Following the warnings, Investigator Smith took another written statement from Patterson. In the statement, Patterson claims the following occurred after Victim's niece and family left:

> Shannon and Keith [Jordan] left, Leanne got up and sat beside me on the couch, she got up and I asked her if she was going to bed and Leanne said, yeah. I told Leanne that I would be there in a minute, Leanne came back and sat down with a book, I looked at Leanne and asked, what was wrong, and she asked me why I took some pictures out of her purse, I told her that I put the pictures in a night stand and told her that no one would be able to see them there. Leanne did not like the way she looked in the pictures, Leanne told me that she had gotten the pictures back now, I told her that I did not understand why she was so upset. . . . I went into the bedroom and put my clothes on, when I came back out, she was walking out of Keith and Shannon's bedroom with a silver gun, a[n] automatic, I think it was a .380, the gun was at Leanne's side and she sat down on the couch and put the gun between her legs. It hurt my feelings that she needed a gun. . . . I asked her, what was wrong with you, I asked her, what has happened to you. . . . Leanne said, maybe things would be better if we would go back to the way things were before we met. . . . Leanne reached down between her legs and pulled the gun up, I grabbed her hand and took the gun away from her, as I was standing up I started walking back towards the bedroom, I turned back and shot Leanne in the back of the head. I stood there for a few seconds and Leanne's head just leaned back. I just heard one breath, I walked to the kitchen with the gun in my right hand, I walked [back] over to Leanne and put the gun in Leanne's right hand, she was not moving when I put the gun in her hand. . . . [O]n the way to the store I was thinking about getting two drinks and my brand of cigarettes and her brand of cigarettes . . . I came back home and walked inside and saw Leanne and she had blood all over

> her shirt. . . . I couldn't believe I had shot her. I called 911 and told the lady on 911 that I had gone to a store and returned home and found Leanne had shot herself. . . .

App. p. 271, line 17 – p. 273, line 13. Investigator Smith testified that while giving this statement, Patterson did not say there was a struggle and did not say it was suicide. App. p. 273, lines 17-22.

Dr. Brett Woodard, the pathologist who examined Victim, testified he found a single gunshot wound, explaining:

> It was behind and above the right rear in the general area where I'm placing my finger, an inch and three-eighths behind the ear, and an inch and a quarter above the right ear in the back portion of the skull and it was an entrance wound. There was an exit wound that was in front of the hole where the ear is on the left side, was in front of it and slightly above it where a bullet had passed from her head from the right back to the left front.

App. p. 312, line 19 – p. 313, line 1.

Dr. Woodward testified he did not find gunpowder on the skin or in the hair, indicating to Dr. Woodward that the gun was more than three to six inches away at the time it was discharged. App. pp. 316-17. There was no singeing of the hair, also indicating the gun was more than three inches away when it discharged. App. pp. 317-18.

Dr. Woodward testified about the autopsy results, which were inconsistent with suicide. Dr. Woodward noted that in a suicide, "[g]uns are usually in tight connect or near connect, meaning the gun may not be tightly placed against the skin, but it is very near the skin." App. p. 322, lines 21-23. Dr. Woodward further explained that in "the vast majority of suicides the gun is held tight to the skin, or very close to the skin with just a small amount

of air space in between. This leads to the powder being in the wounds, singeing and sometimes . . . we actually get bruises produced by that impact of the end of the barrel against the skin." App. p. 323, lines 4-14.

The location of the entrance wound was also inconsistent with a suicide, as Dr. Woodward explained:

> The angle indicated that the weapon was behind the head at the time it was discharge[d], and while that would be possible again using my marker like it was the end of the gun barrel, if the trigger finger was in the trigger at the time that it was discharged, would require extreme motion of bringing this elbow out and this wrist back which would be quite uncomfortable to accomplish though physically possible. That's not a usual behavior in a suicidal gunshot wound, so it's another unusual finding if this was a suicide.

App. p. 325, lines 8-16.

Another anomaly inconsistent with suicide was the placement of Victim's arm and the gun. Dr. Woodward explained that the arm would fall from where Victim was holding it at the time of discharge and fall to Victim's side and not to her lap. The gun itself would recoil away from the head and fall down on the floor or at lap level on the couch. App. pp. 326-27. Dr. Woodward testified he did not find any signs of a struggle on Victim. App. p. 328. Dr. Woodward testified that in his expert opinion the wound was more consistent with homicide than suicide. App. p. 329.

The 911 tape was played for the jury. App. p. 395.

SLED Agent Frank DeFreese testified as an expert in ballistics. DeFreese tested the gun and determined that after the safety has been released, the gun required 8 ¾ to 9 pounds of pressure to pull the trigger. App. pp. 417-19. Agent DeFreese determined that the weapon

would have been discharged more than 24 inches from the wound based on his testing. App. pp. 422-32.

Patterson presented five witnesses for the defense, including pathologist Dr. Michael Ward. Patterson also testified on his own behalf.

Patterson testified that on March 9, Patterson and Victim returned to the house at 10:30 p.m. and played cards and watched television, they made love and fell asleep around 3:30 a.m. Patterson described the night of the ninth as perfect and the best night they had in the last two years. App. pp. 591-92. Patterson testified Victim was on the phone with the insurance company and never whispered. App. pp. 592-93. When Jordan and her husband left the house, Victim was still happy. She asked Patterson to go to the store and get a diet Mountain Dew. Patterson said he needed to wake up first. They talked about some photographs Patterson took, but according to Patterson, not the ones that sparked the controversy Jordan discussed. App. pp. 595-96. Instead the photographs were of Patterson and Victim in a photo booth. Patterson testified he took them out of her purse and put them in the drawer to keep after she moved out. App. pp. 597-600.

Patterson testified he changed to go outside to see if there were cigarettes in his truck and then, if necessary, go to the store. He put on his clothes and a jacket and came out to find Victim walking to the sofa with a gun in her hand. She sat down where she had been sitting. App. pp. 606-08.

Patterson testified about a sudden change in Victim's demeanor: She was crying; her face was obscured by her fallen hair. App. p. 611. Patterson claimed the following:

> I asked her what was wrong and she said that she was just

> upset and I asked her what she was upset about and she shook her head, you know, like no, and I asked her, I said you don't want to talk about it, and she said, no. Then she said that she didn't feel like she was a good mother, she felt like her kids were mad at her because they weren't all together.

App. p. 614, lines 5-10. She was also upset about her father. Patterson's attempts to calm her down were ineffectual. App. pp. 614-15. She apologized to Patterson for screwing up his life and causing him to split from his wife. She said everyone would be better off if she wasn't around. App. pp. 616-17.

Victim started to raise the gun. Patterson, who was kneeling next to her, stood up to try and pull the gun away from Victim. App. pp. 616-618. Patterson testified that he had his hands around Victim's hands. Blood came down the left side of her neck. Patterson went outside. App. pp. 618-19. Patterson claimed he did not remember going to the store. App. p. 619.[1]

Patterson testified that after the gun discharged, Vicitm's arm fell and the gun fell into his hands. When the shot went off, Patterson's hand was not on the trigger. Victim's finger was though. App. pp. 620-21. Patterson put the gun on the floor and checked Victim for a pulse. She did not have one. App. p. 621, lines 21-24.

Patterson recalled returning to the house and seeing Victim still on the couch. He also recalled putting the drinks on the floor. App. p. 622. He called 911. App. p. 623. Patterson claimed that when he gave his statement at the law enforcement center, he told the

[1] This contradicts his claim in the 911 call that he went to the store and returned to find Victim. He told Detective Smith in his first written statement, the location of the store that he does not remember going to, which undermines the credibility of his memory loss claim. App. p. 260, lines 15-16.

investigators the whole time that it was a suicide. App. p. 625, line 25 – p. 626, line 1. He claimed the investigators typed out the statement without his input, and he did not see it until a couple days later. App. pp. 626-630.

According to Patterson, he was visited by his father and a co-worker two days later, and they told him the news was reporting that he confessed, which was a shock to him because, Patterson contends, he never confessed. App. p. 632. Patterson testified he was upset when he read the statement because "this isn't my statement." App. p. 633, lines 1-4. Patterson denied he shot Victim and claimed again that his hand was not on the trigger. App. p. 635.

Cross-examination was difficult for Patterson. He still could not explain why he went to the store instead of calling 911. App. p. 640. Patterson admitted he picked out Victim's drink and brand of cigarettes at the store after Victim allegedly shot herself. He was at a loss to explain why. App. pp. 640-43. Another glaring inconsistency Patterson had trouble explaining is why he did not remember going to the store, but then when he spoke to the police, he gave them the address of the store. 643-44.

The prosecutor went through the statement line by line with Patterson, and Patterson admitted that various details in the statement were correct, and some of these details could only have come from him. App. pp. 649-655. He admitted to details being things only he would have known and agreed it reflected a good memory despite his claims of being zoned out. This even included the discussion of how Patterson spent the previous night with Victim – first watching television, then retiring to the bedroom at 12:20 a.m. and having intercourse before drifting off to sleep around 3:00 a.m. Patterson admitted law enforcement

would not know that unless he told them. App. p. 652, line 9 - p. 653, line 2. However, once the statement reached the point of conflict, Patterson began to challenge the accuracy of it. App. p. 653 – 59. The story becomes more problematic when Patterson admitted kneeling next to Victim while she had the gun between her legs. Asked to explain why he did not take the gun from her, he claimed he did not know it was loaded. App. p. 659, lines 4-25.

Patterson did not consider his first story – that Victim shot herself while he was at the store – to be a lie. App. p. 660, lines 12-20. Patterson claimed he fell over with the gun in his hand after the gun went off. He admitted he checked her pulse and saw blood, then he went outside. App. p. 671.

Patterson reiterated the startling admission that he put the gun in Victim's hand. He admitted he put it back in her hand when he came back from the store. App. p. 647. This point was revisited again later in cross examination, and Patterson gave the following explanation:

> I got back, I walked up over to her, then I realized that I'm going to look responsible. I didn't get the gun, I didn't load the gun, I didn't put the gun to her head, so the best I could recollect what was going to happen, I put the gun back in her hand . . .

App. p. 671, lines 19-23.

On reply, Cathy Robinson, Victim's co-worker, testified that two days before Victim's death, Victim told her Patterson was following her around everywhere, even to the store, and she was scared. App. p. 697. The second reply witness, Shawn Burns, was engaged to Victim's daughter. App. p. 708. Burns testified that a week to a week and a half before Victim died, Patterson called him to ask if Victim's daughter had said anything about

Victim wanting to leave Patterson or not marry Patterson. App. p. 711, lines 18-22.

STRICKLAND AND THE STANDARD OF REVIEW

In order to prove counsel was ineffective, a PCR applicant must show counsel's performance was deficient and the applicant was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. 668, 687 (1984). The court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) citing Strickland. Counsel's performance will be deemed deficient if it falls "outside the wide range of professionally competent assistance." Strickland, at 687. The applicant is prejudiced by the deficient performance if "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695.

A review of counsel's performance "must be highly deferential" and "every effort must 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." Id. at 689. "[T]he existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." Id. at 689. "Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance of the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial." Id. Mere speculation will be insufficient to establish

prejudice. See State v. Bannister, 333 S.C. 298, 303-04, 509 S.E.2d 807, 809-10 (1998).

In a post-conviction relief (PCR) action, the PCR applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The findings of the PCR court will be upheld if supported by probative evidence. Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

ARGUMENT

I.

Counsel was not ineffective for failing to argue the Mirandized statement should have been suppressed as the fruit of the poisonous tree because at the time of trial, the fruit of the poisonous tree doctrine would not apply to Mirandized statements, and the prior oral, unwarned statement was not the product of custodial interrogation. Counsel was not ineffective for failing to hire an expert on post-traumatic stress syndrome because counsel stated a valid strategic reason for declining to hire such an expert, and Patterson failed to provide testimony that evaluation by such an expert would have been beneficial. Counsel was not ineffective for failing to bring Petitioner to law enforcement to give a third statement.

Patterson lumps three allegations under this first issue: (1) counsel was ineffective for failing to argue that the second written statement should have been suppressed as the fruit of the poisonous tree; (2) counsel should have hired an expert in post-traumatic stress syndrome to try and prove that the statement was not voluntarily made; and (3) counsel should have brought Patterson to the law enforcement center to give yet another statement.

Fruit of the poisonous tree

Under the case law in effect at the time of trial, the fruit of the poisonous tree doctrine would not apply to where a defendant gives a confession after Miranda warnings are given, even though there was a previous un-Mirandized custodial statement. Oregon v. Elstad, 470 U.S. 298 (1985). Accordingly, trial counsel was not ineffective as counsel is not required to be clairvoyant and anticipate changes in the law.

Further, the record reflects that Patterson was not a suspect and was free to leave until he admitted shooting the victim, at which point he was given Miranda warnings.

Accordingly, the written statement was admissible.

Jackson v Denno hearing

The first witness at the Jackson v. Denno hearing[2] was Deputy Tim Smith. Deputy Smith testified he received a call about a shooting and responded to the crime scene. Patterson had called 911. When he arrived, Patterson was sitting on the front porch. Deputy Smith asked Patterson about the reason he called 911. Patterson told Deputy Smith that he and his girlfriend were sitting around the house and she asked Patterson to get a drink and cigarettes. Patterson told Deputy Smith he went to the store and when he returned, Patterson found Victim who shot herself in the head. App. pp. 6-8. Patterson claimed he found the gun in Victim's hand. App. p. 8.

Deputy Smith spoke to Patterson without going into the house. The investigators arrived and went inside the house. One of the investigators asked Deputy Smith to take Patterson to the Law Enforcement Center. Deputy Smith explained the following:

> [H]e asked me to offer the defendant a ride back to the LEC and he told me to make sure that I understood that it was an offer, that he was not in custody, he was not being arrested. I remember specifically asking was it just a ride or was it custody. He said he was not in any custody. Make sure he understands the difference.

App. p. 10, lines 2-8.

There were two reasons why law enforcement wanted to take Patterson to the law enforcement center. First, it was an extremely hot day. The second reason was the scene was chaotic. The Victim's family showed up and was unruly. App. pp. 10-11.

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[2] See Jackson v. Denno, 378 U.S. 368 (1964).

Deputy Smith told Patterson he was not in custody. He explained that Patterson could stay at the scene if he wanted to but there was air-conditioning at the office and it would be less loud. App. p. 11, lines 12-18. Patterson agreed to go to the law enforcement center. App. p. 11, lines 19-21. Once there, Deputy Smith led Patterson to the interview room. Deputy Smith explained that Patterson "could have left at any time behind me." App. p. 14, lines 14-22.

Deputy Smith offered Patterson a bottle of water. He did not restrain Patterson at the station and Patterson was not under arrest. Deputy Smith opined that Patterson freely and voluntarily spoke with him and freely and voluntarily accompanied Deputy Smith to the law enforcement center. App. p. 13. Deputy Smith led Patterson to the bathroom. Deputy Smith explained he needed to use the bathroom also. Deputy Smith was the first person in the bathroom and the first person to leave. App. pp. 15-16.

Investigator Matt Smith testified he arrived at the scene to find Patterson speaking with Deputy Smith. Investigator Smith testified that he was not in custody and was free to leave. App. p. 27. Investigator Smith discovered Patterson placed the 911 call. App. p. 28. Investigator Smith took a written statement from Patteson at the crime scene. App. p. 29.

Investigator Smith and Investigator Black decided to interview Patterson back at the law enforcement center. Investigator Black and Investigator Smith rode together and stopped for something to eat. They bought Patterson a hamburger that they brought to the station for him. App. pp. 29-30.

Investigator Smith testified that Patterson was not restrained, threatened, or coerced. Patterson was not promised anything and voluntarily agreed to speak with Investigator Smith.

App. p. 31.

Investigator Smith explained the following:

> We just kind of talked to him about what happened. So, we took his statement on the scene and he started to get hostile with the victim's family which kind of, you know, upset him and they were kind of loud and everybody was out in the yard, there wasn't nowhere else to go. So, we talked to him at the office and kind of just conversation more than anything and we kind of got into what happened. He was telling us what happened and he finally broke down and said that he had shot the victim.

App. p. 31, line 20 – p. 32, line 4.

Investigator Smith testified they stopped the conversation at that point and gave Patterson his Miranda[3] warnings. App. p. 32, lines 5-8. Patterson signed the Miranda waiver form indicating he understood his rights. Patterson appeared to understand what he was doing. Investigator Smith testified he was not coerced or promised anything. Patterson freely and voluntarily agreed to give a statement. App. pp. 32-35.

Investigator Smith testified that Investigator Black was talking with Patterson and Investigator Smith was taking down notes of the conversation. App. pp. 34-35. Investigator Smith testified that he let Patterson read the statement. Investigator scratched through any errors he made and Patterson initialed the changes. App. p. 36.

Investigator Black also testified during the Denno hearing. His testimony corroborated the testimony from the first two witnesses. App. pp. 51-53. Patterson confessed within twenty-five minutes of the investigators reaching the office. App. p. 53.

Investigator Black described the conversation taking place that led to Patterson's

confession:

> The conversation started off initially where we were just kind of discussing his relationship with [Victim], how long they had been dating, just how it was going and that kind of thing. If he had any kids, if she had any kids. And we gradually progressed into the fact that things really didn't look right on the scene. I felt like that Kevin knew what had happened inside the house and I wanted to get him to tell me. I didn't know maybe if it was an accident or what it was. And wanted him to just relate to me what had happened. I felt like maybe that he was trying to maybe not tell us that if it was an accident, afraid that he would get in trouble or something of that nature. So, I had him to kind of tell me what happened.

App. p. 53, line 23 – p. 54, line 12. Investigator Black testified that Patterson "got real quiet and then he just spontaneously just said, well, I shot her." App. p. 54, lines 13-16. Investigator Black confirmed that until Patterson blurted out he killed Victim, Patterson was not in custody. Patterson was Mirandized at that point. App. p. 56. Investigator Black testified that Patterson read the statement, initialed it, agreed to it, and signed it. App. p. 56.

Post-warning statement is admissible

Under Miranda v. Arizona, 384 U.S. 436, 444 (1966), prior to custodial interrogation, a suspect must be warned he has a right to remain silent, any of his statements may be used against him, and he has a right to an attorney. However, these requirements only apply to situations involving custodial interrogation and were not intended to interfere with the traditional function of law enforcement officers in investigating crimes. Id. at 477. "Miranda warnings are required for official interrogations only when a suspect 'has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" State v.

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[3] See Miranda v. Arizona, 384 U.S. 436 (1966).

Easler, 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997) (quoting Miranda, 384 U.S. at 444). Thus, custodial interrogations are made up of two key components- custody and interrogation. State v. Whitner, 380 S.C. 513, 518, 670 S.E.2d 655, 658 (Ct. App. 2008).

Patterson asserts that trial counsel should have moved to suppress the statement as the fruit of the poisonous tree because Patterson's initial admission during the interview with the investigators. At the time of trial, this was not a valid argument for suppression. Oregon v. Elstad, 470 U.S. 298 (1985).[4] Counsel is not required to be clairvoyant and anticipate changes in the law not in existence at the time of trial. Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

In Elstad, law enforcement came to Elstad's residence with an arrest warrant for burglary. They asked Elstad if he knew the burglary victim and he indicated he did and that he heard there was a burglary at the victim's residence. The officer told Elstad that he felt Elstad was involved in the burglary and Elstad responded he was there. Id. at 302. Subsequently, Elstad was transported to the police station where he was given Miranda warnings for the first time. Elstad then gave a detailed confession. Id. The Supreme Court reversed the Oregon Supreme Court's decision finding the confession at the police station inadmissible because of the prior unwarned admission and rejected the application of the fruit of the poisonous tree argument, finding: "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and

[4] In Missouri v. Seibert, 542 U.S. 600 (2004), the United States Supreme Court found that Miranda warnings given mid-interrogation after a confession was given were ineffective and

confessing after he has been given the requisite Miranda warnings." Id. at 318; see State v. Register, 323 S.C. 471, 478, 476 S.E.2d 153, 157 (1996) (citing Elstad and finding that "[a] suspect who makes an inadmissible confession may subsequently waive the Fifth Amendment to remain silent and his later, validly obtained confession will be admissible at trial.").

Even post-Seibert, the confession is admissible. "To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning." State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003). The appropriate inquiry involves objectively viewing the circumstances to determine whether a reasonable person in the suspect's position would have understood himself to be in custody. Easler, 327 S.C. at 128. In the instant case, Patterson was always free to leave. Deputy Smith noted that Patterson was led to the interview room and could have left at any time. Deputy Smith left Patterson in the bathroom. Investigator Smith testified that when questioning Patterson, he was still trying to understand what happened and trying to determine if Victim's death was perhaps an accident. Patterson's initial admission that he shot the Victim was not the result of custodial interrogation. Therefore, Miranda does not apply to Patterson's oral admission.

Expert

Patterson claims trial counsel was ineffective for not retaining an expert to testify that Patterson's confession was not reliable or involuntary because he was suffering from post-

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therefore, the post-Miranda statement should be suppressed as well.

traumatic stress syndrome at the time he gave the incriminating statement to law enforcement due to the stressful event of watching his girlfriend kill herself. Of course Patterson shot Victim, Victim did not kill herself as evidenced by the entrance and exit wounds, which show a downward trajectory through Victim's head. App. p. 1050.

Further, Patterson's expert failed to offer anything beneficial for Patterson. The expert testified he never met with Patterson and was never asked to. App. p. 1102, lines 8-14. The expert confirmed that he was not asked to meet and conduct an actual psychiatric evaluation of Patterson. App. p. 1102, lines 15-17.

The expert testified it was not unusual for an individual to go into "shock" after seeing a violent traumatic event. App. p. 1103. The expert testified to various components of shock such as denial, misunderstanding, and confusion. It depends on the kind of shock and **the person who's exposed to this trauma**. App. p. 1103, lines 20-25. The expert testified that there could be memory loss or psychic denial. App. pp. 1104-05. The expert agreed that extreme guilt or maybe unfounded guilt can be an emotional component of shock, but qualified his agreement with Patterson's leading question by noting the individual "would need to be evaluated to ascertain whether that applies in their case." App. p. 1105, lines 23-25.[5] The expert agreed that the person could **possibly** take on an unfounded sense of responsibility. While indicating that it would be more difficult to determine the trauma or shock suffered ten years after the fact, the expert testified that he "wouldn't give up on an individual simply because a trauma occurred ten years ago." App pp. 1111-13 (quote p.

[5] It is unclear from the testimony whether the sense of guilty responsibility refers to criminal guilt or regret over not having intervened or taken other protective measures.

1113, lines 1-5). He noted that he has dealt with cases of Vietnam War veterans whose manifestations have been more clearly understood twenty years later. App. p. 1113. The expert agreed that it would have been helpful to meet with Patterson if he had been asked to render an opinion about Patterson in the instant case. App. p. 1114.

In the instant case, Patterson has made the same strategic decision his counsel did, which is avoid having him evaluated by an expert and having that evaluation used during his evidentiary hearing. For trial counsel, it is valid trial strategy. See App. pp. 1037-1043; p. 1131. For Patterson, it is fatal to the requirement that he show prejudice from the alleged deficiency of counsel. But the claim of post-traumatic stress was absurd anyway. Patterson had the presence of mind to create an alibi by going to the store, buy Victim's preferred drink and cigarettes, come back to the house, put the murder weapon in Victim's hand, and call 911 to claim he went to the store while Victim shot herself. There is no reasonable probability the jury would accept that Patterson confessed to shooting Victim out of a false sense of guilt over her alleged suicide. Accordingly, counsel engaged in reasonable trial strategy and Patterson was not prejudiced by the alleged deficiency.

Counsel should have brought Patterson to law enforcement for yet another statement.

Patterson alleges counsel was deficient for failing to have Patterson give another statement to law enforcement once the shock cleared. Of course, Patterson's expert testimony reveals that the effects of PTSD could last as much as twenty years. Further, there is not the least bit of evidence to show Patterson was ever in shock absent his selective memory about going to the store.

Counsel was retained ten days after the murder. Counsel testified he never heard of anyone trying to bring their client in to give a new statement after they have confessed. This is probably because it is not a good idea. It likely only would have created more inconsistencies than already existing between Patterson's two written statements and the 911 call. At trial, Patterson wanted the jury to believe that Victim killed herself, which is reflected in the first written statement and the 911 call. Patterson was better off explaining the inconsistencies from his previous exculpatory explanations than creating a new set of facts to explain at trial. Notably, Patterson failed to offer any authority to suggest the failure to bring your client to the police to waive his right to silence falls below professional norms.

Of course, Patterson testified on his own behalf at trial, so he was given a chance to provide the jury with his new and improved story. Patterson argues the prosecution would not have been able to say he had months to come up with this new version of events. However, if Patterson, with the aid of counsel, gave yet another statement more than ten days after he initially confessed, the jury would understand that he had plenty of time, with assistance of counsel, to fabricate a better version of events. So Patterson has failed to offer a plausible and realistic explanation about how counsel's alleged deficiency prejudiced Patterson, especially given the overwhelming evidence of guilt.

Counsel was not deficient nor was Patterson prejudiced by the alleged deficiency.

II.

Counsel pursued reasonable strategy in pursuing suicide as a defense because that was Petitioner's story in his trial testimony and his exculpatory statements to law enforcement. Evidence does not support a charge on accident and trial counsel's strategy was reasonable. Petitioner was not prejudiced by the alleged deficiency in light of the overwhelming evidence of guilt. No matter what, the jury would not have convicted Petitioner if the jury believed Patterson's story, and they never would have believed his story.

Patterson engages in a hindsight analysis to argue that accident would have been a better defense than suicide. However, Patterson chose suicide as the defense when he called 911 and said that Victim committed suicide. Patterson stuck to this story even at trial. At trial, Patterson denied there was a struggle. App. p. 684, lines 3-4. Counsel testified, "We didn't know anything about a struggle until [the prosecutor] brought it up, yes." App. p. 1049, lines 14-15. Counsel testified that his theory of the case was neither accident nor involuntary manslaughter because Patterson did not pull the trigger. App. pp. 983-84. Counsel testified as follows:

> He claimed she had the gun, put it to her head, and he tried to prevent it from happening. I mean, did he try to impede her from doing it? Yes. But his story was that she was going to commit suicide, and that was our theory of that is that that's ultimately what happened. She did.

App. p. 983, lines 3-8.[6] Counsel testified Patterson never told counsel it was an accident.

[6] An instruction on suicide was provided to the jury. App. p. 774, lines 10-20. Notably, the trial court instructed the jury that "[s]uicide, like accidental death, is not an affirmative defense and as I told you there is no burden on the defendant on this issue." App. p. 774, lines 18-20.

App. p. 1049, lines 32-24. Counsel articulated valid trial strategy[7] based on his conversations with Patterson. Patterson was the one set on suicide as a defense starting with his 911 call: Counsel's performance was not deficient and he engaged in reasonable trial strategy by trying to utilize Patterson's story instead of deviate from it.

Additionally, Patterson was not prejudiced. Certainly no part of his testimony is supported by the autopsy report that indicated the bullet entered Victim's skull above the right ear and went in a downward trajectory through Victim's left jawbone. App. p. 1050, lines 2-15. Moreover, it is simply absurd to believe that the jury would decide that Patterson should be convicted of murder for trying to stop Victim from shooting herself. The jury simply did not believe Patterson and it is hard to believe they ever would.

[7] Opposing counsel disrespectfully refers to this as a "so-called" strategy (Pet. p. 27), although it is consistent with Patterson's own version of events. Notably, Patterson refrained from testifying at the PCR hearing.

III.

Because it is not a criminal act to try and stop someone who you think is trying to commit suicide, trial counsel was not ineffective for failing to request an instruction on involuntary manslaughter. Petitioner was not prejudiced by the alleged deficiency since evidence did not support an instruction on involuntary manslaughter.

Patterson claims trial counsel was ineffective for withdrawing his earlier request for a jury instruction on involuntary manslaughter. However, the evidence does not support the instruction. The evidence indicated that either Patterson murdered Victim, which the jury found, or Patterson unsuccessfully attempted to stop Victim from killing herself, which is not a criminal act.

Involuntary manslaughter is defined as follows:

> (1) The unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others. Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating. . . . The negligent handling of a loaded gun will support a charge of involuntary manslaughter.

State v. Gibson, 390 S.C. 347, 356, 701 S.E.2d 766, 771 (Ct. App. 2010) (citation omitted).

The law to be charged must necessarily be determined from the evidence presented at trial. State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989). A request to charge the lesser included offense only if the evidence supports a reasonable inference that the accused committed the lesser **rather than** the greater offense. State v. Fuchess, 267 S.C. 427, 229

S.E.2d 331 (1976); State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999); State v. Morris, 307 S.C. 480, 415 S.E.2d 819, 821 (Ct. App. 1992) (emphasis added). Merely that "the jury might accept the State's evidence in part and reject it in part will not support a request for the lesser charge." Morris; see State v. Gadsden, 314 S.C. 229, 232, 442 S.E.2d 594, 596-97 (1994) (finding "where there is no evidence to support a finding that the defendant was guilty of the lesser offense, there can be no error in the failure to charge the lesser offense.").

Patterson claims in his petition: "Given the fact that the deceased was not alleged to have expressly stated that she was about to kill herself, the jury in this case could have concluded that Petitioner while acting lawfully, nevertheless acted with 'reckless disregard for the safety of others' when he attempted to take control of the weapon from her. Thus he was entitled to a charge on involuntary manslaughter." Pet. p. 31. This argument strains credulity.

Under Patterson's version of events, Victim carried the gun with her to the couch. She was crying. She said she was not a good mother. She was upset about her father. She could not be calmed down. She apologized to Patterson for messing up his life. She said everyone would be better off if she was not around. She then started raising the gun. App. pp. 611-17. If believed, this testimony does not support that Patterson acted with reckless disregard for Victim's safety when he intervened.

Trial counsel indicated reasonable trial strategy when he testified that he did not believe the evidence supported involuntary manslaughter. App. pp. 976-77; p. 1046. Accordingly, counsel was not ineffective.

IV.

Counsel was not ineffective regarding his mistrial motion where the trial court's curative instruction to the jury was sufficient and where the Court of Appeals opinion indicated that even if the mistrial issue was preserved for review, the trial court did not abuse its discretion.

Patterson alleges trial counsel was ineffective regarding trial counsel's objections and motion for mistrial in response to an emotional outburst by members of the victim's family when autopsy photographs were presented on a projector screen in the courtroom. The following is transcribed as to what occurred at trial:

> Q [by solicitor]: I'm showing you State's Exhibit 21[autopsy photo] ---
>
> (Interruption from audience.)
>
> Court: Bailiff, would you ask her to please leave and if anyone else would like to leave please take advantage of it at this time to leave.
>
> Okay, Solicitor, please proceed.
>
> [Solicitor]: Yes, Your Honor.

App. p. 226, lines 17-22.

Counsel subsequently argued for a mistrial as follows:

> Your Honor, I'm renewing my objection, the reason I'm objecting is I'm asking for a mistrial. And my reason is Judge I made the objection based on the grounds that these photos are prejudicial. The solicitor placed these on camera, showed them in front of the jury, showed them in front of the victim's family, the victim's family as you know, it's on the record, I'm not sure exactly who it was but there were several friends and family members that blurted out, stared crying, screaming and created a disturbance ---

* * *

> There was an outburst from family and friends and had to be escorted out, and again I would ask for a mistrial, that that was highly prejudicial, that impacted the jurors, and was extremely prejudicial to show in front of the family members. Under duress, I don't think it had any purpose and I think it did prejudice the jury.

App. p. 231, lines 2 – 21. Note that counsel objected to Exhibit 21 initially before it was presented to the jury. App. p. 226.

The Solicitor disagreed with counsel's recollection of events, arguing there was no screaming, although "some of them started crying and left the courtroom." App. pp. 231-32.

The trial court agreed with the solicitor's recollection, observing the following:

> I think some young lady started crying when she saw the picture and I asked them to escort her out, and he escorted her out, and I'll deny your motion.
>
> I will give the jury a curative charge as to not take any sympathy or passion as to what happens from the audience when they come back from lunch.

App. p. 232, lines 3-8. Then the trial court gave the following curative instruction:

> Mr. Foreman and ladies and gentlemen of the jury, prior to lunch there was a crying spell from someone in the audience, and I'd just like to instruct you, your job, as jurors, is not to find anyone innocent or guilty based upon your prejudice, compassion or sympathy. Your job is to find the facts as you see them from the witness stand, and not to base that on any compassion, prejudice, or sympathy, and I would so instruct you to ignore any outbreaks from the audience and I'll try to keep it to a minimum.

App. p. 232, line 23 – p. 233, line 6.

Counsel testified at the PCR hearing that he felt he should have put more on the record. However, the transcript reveals counsel explicitly stated what he perceived to occur

in the court room. The trial court simply did not agree with counsel's recollection of events and found the outburst was more limited than what counsel proposed. Counsel's performance was not deficient in making his objection simply because the trial court viewed the extent of the outburst differently.

Counsel never objected to the sufficiency of the curative instruction. However, Patterson was not prejudiced as a curative instruction is held to generally cure error, and the decision whether or not to grant a mistrial is in the sound discretion of the trial court. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989).

The Court of Appeals addressed this issue as follows in its unpublished opinion:

> Issue II: State v. Rosemond, 335 S.C. 593, 596-597, 518 S.E.2d 588, 589-90 (1999) ("The relevance, materiality and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion. . . . If the photograph serves to corroborate testimony, it is not an abuse of discretion to admit it."); State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000) ("A mistrial should only be granted when absolutely necessary. In order to receive a mistrial, the defendant must show error and resulting prejudice.") (internal citation omitted); State v. Kelsey, 502 S.E.2d 63, 69, 331 S.C. 50, 73 (1998) ("The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion."); State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998) (stating a defendant cannot acquiesce in an issue at trial and then complain about it on appeal).

The Court of Appeals, while finding the issue was unpreserved, also found that the trial court did not abuse its discretion in denying the motion for mistrial as evidenced by the authority and parenthetical explanations found in the opinion. Accordingly, there was no prejudice because even if the issue was preserved for review, there was no trial court error in

denying the motion for mistrial.

"A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons." State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989) *cited in* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (noting trial judge should exhaust other methods to cure possible prejudice before aborting a trial). Counsel was not ineffective in making his motion for mistrial since the trial court simply took a different view of what occurred in the courtroom. The trial court did not abuse its discretion in denying the motion for mistrial. Further, the curative instruction cured any prejudice. Accordingly, Patterson did not meet his burden of proving prejudice from counsel's alleged deficiency.

Patterson makes related claims that counsel should have anticipated the prosecutor would display the photos with the projector. Counsel is not required to be clairvoyant and anticipate every possible event during trial. Reasonable efforts and performances are all that is required of trial counsel. See Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) (finding trial counsel was not ineffective for failure to interview the victim who already gave a damaging statement to the police because unless clairvoyant, counsel could not have reasonably anticipated any benefit would accrue from the interview).

Further, moving the analysis a step back in time does not alter the outcome. Assuming counsel's performance was deficient for failing to ascertain in advance the prosecutor's purpose for bringing the projector, the deficiency was cured by counsel's objection and mistrial motion followed by the trial court's curative instruction. The PCR court correctly denied relief.

V.

Petitioner did not meet his burden of proving prejudice from counsel's alleged deficiency in regards to the alleged Rule 5, SCRCrimP, violation because Petitioner failed to show that additional testing of the hair sample would have provided any beneficial results.

Patterson claims the PCR court erred in denying relief on the allegation that counsel was ineffective in regards to a hair sample that was not made available to counsel. Counsel was told the sample was missing when he sought to have a defense expert test the sample for gun powder residue. However, the sample apparently was found, which counsel testified he first discovered at trial. Counsel, in hindsight, indicated he should have moved for mistrial or sought a continuance to test the hair sample. Patterson failed to offer any evidence of prejudice and fails to address in the petition why the PCR court's ruling on this point is erroneous.

The PCR court found counsel's performance deficient, but that Patterson failed to prove prejudice, explaining:

> Counsel admitted he failed to put his motion for continuance on the record. Counsel's performance in this regard was deficient. However, Applicant has not proven prejudice. Applicant has not sought to test the hair and there is no evidence in the record that had the defense expert tested the hair, he would have found gun powder residue on the hair.
>
> Instead, the trial testimony suggests it was unlikely that had the hair been tested by the defense expert, gun powder residue would have been detected, which would be evidence that the gun was fired from a closer range. At trial, the State's pathologist testified he viewed the hair with magnifying lenses and did not see any gun powder residue in the victim's hair. Tr. pp. 210-211. This Court cannot speculate on the results of a test that never occurred and therefore finds Applicant has failed to meet his burden of

> proving prejudice. Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (finding one could only speculate whether counsel could have done a better cross-examination of a doctor, therefore, applicant did not meet his burden of proving prejudice).

App. pp. 1134-35.

Patterson fails to address why the PCR court's prejudice analysis is incorrect. It is not. Patterson failed to show a reasonable probability that analysis of the hair sample by his expert would have produced beneficial results. Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997). Further, in light of the overwhelming evidence of guilt, suppression of the hair sample would not have affected the outcome of trial. Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). Accordingly, the PCR court did not err.

VI.

Counsel was not ineffective for failing to object to unobjectionable portions of the prosecution's closing argument, and counsel's own closing argument did not fall below professional norms.

Patterson argues counsel should have objected to portions of the State's closing argument and further argues counsel should have argued that the shooting was an accident and not a suicide. The prosecution's arguments were based on the record and reasonable inferences from the record. Therefore, the prosecution's argument was proper. Further, counsel made an excellent closing argument that could not overcome the enormity of evidence pointing conclusively to Patterson's guilt.

First, Patterson argues that counsel should have objected to the prosecution's assertion in closing argument that the gun was unloaded and Patterson loaded the weapon. However, the State elicited testimony that the weapon was stored in a drawer and the clip was not loaded in the gun. App. p. 532. Counsel testified he did not object because the State was also presenting the theory, based on his confession, that he took the gun from Victim walked a few steps away and fired. App. p. 970, line 15 – p. 971, line 11. The prosecution "may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony." State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999). The solicitor's closing argument is permissible where it stays within the record and reasonable inferences to it. Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002). Patterson admitted buying two drinks from the store after Victim died and putting the weapon in her hand after she was dead. While a counterargument may be made that Victim

is the one who loaded the weapon, the State is allowed to state their theory of the case, which was Patterson murdered Victim and staged the scene in an attempt to make it appear to be suicide.

Since the argument is based on the record and a reasonable inference from the record, the prosecution's argument was proper and the argument was not objectionable. Additionally, counsel was reasonable in not objecting since it arguably inconsistent with other aspects of the State's theory of the case. Further, the argument was hardly prejudicial such as would warrant a new trial, particularly in light of the overwhelming evidence of guilt. Accordingly, counsel was not ineffective and the PCR court did not err. Further, this argument was not addressed in the PCR court's order. Plyler v. State, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992) (an issue must be raised by the PCR applicant and ruled upon by the PCR court to be preserved for review).

Patterson also argues that counsel was ineffective for failing to object to the prosecution's argument that Patterson wiped the gun clean in the kitchen as an explanation as to why no gunshot residue was found in her hand. A larger excerpt puts context to the prosecution's argument:

> The Defendant took the gun after he shot her and remember in his written statement he said, I went to the kitchen that was the next step in his plan before he could set up the alibi, he went to the kitchen he took the gun, why do you think he chose the kitchen, to wipe it off, put a little something moist to put on it to wipe off the fingerprints, now he doesn't know about gunshot residue. So he then comes back and he places the gun in his beloved's hand, including putting the finger through the trigger. The problem is if he hadn't wiped it clean she would have gunshot residue in her palm, but she didn't, there was nothing found in the palm of her hand,

where's the sudden heat of passion.

App. p. 763, line 18 – p. 764, line 5.

The prosecutor's argument is again based on the record and reasonable inferences. Patterson, in his statement, said he went to the kitchen. The State's theory was the reason for going to the kitchen was to wipe fingerprints off the gun, which would also mean any gunshot residue would have been wiped off. The argument was not objectionable. Further, the argument was not prejudicial in light of the overwhelming evidence of guilt.

Patterson also argues that counsel should have objected to the prosecution's arguments about the physical evidence being inconsistent with suicide because in Patterson's view, the evidence was more consistent with accident. The record is replete with claims that Victim committed suicide or was suicidal. Patterson chose this defense when he made his fraudulent 911 call, disavowed on redirect examination that there was a struggle, and **admitted** at trial to trying to manufacture evidence by putting the weapon in Victim's hands. App. p. 646, p. 671, lines 19-23. The prosecution was free to discuss why the evidence did not look like suicide, even if counsel chose to pursue accident as his strategy.

Throughout his petition, Patterson has argued that counsel's strategy was all wrong: counsel should have been pursuing an accident defense. Consistent with this theme, Patterson argues that counsel's closing argument should have been focused on accident, not suicide.

Counsel pursued a valid trial strategy. Patterson chose suicide as his defense when he called 911 and when he first spoke to law enforcement. Patterson's rendition of events at trial, which Patterson is stuck with, focused on Victim's alleged suicidal state of mind: she

was upset about breaking up her family and Patterson's family, she was upset about her father, and she said everyone would be better off without her. She raised the gun to her head and although Patterson claims he put his hands over her in a belated attempt to stop her, her hand was on the trigger, not his. Patterson denied there was a struggle. App. 684-85. Counsel presented evidence that Victim was suicidal in the past. Counsel testified that the first time he heard about a struggle was when the prosecution brought it up. Most importantly, the defense was consistent with the facts that Patterson related to him.

Counsel's closing argument furthered the defense and did not fall below reasonable professional norms. One of the points counsel made was that the last statement, the one where he admits to killing Victim, could not be true because it would have been physically impossible for him to walk towards the bedroom from the couch and shoot – there was not enough room according to counsel (and Patterson): "[Y]ou cannot shoot someone in the back of the head through the wall." App. p. 741, lines 1-15. Counsel accused the prosecution of "shifting gears" by arguing that Patterson retrieved the gun. App. p. 741, line 11. Counsel claimed, "[t]hey don't believe the statement either." App. p. 741, line 22. Counsel criticizes the State for failing to test the hair sample and tells the jury, "[t]his hair, ladies and gentlemen, would prove beyond all doubt that my client is not guilty." App. p. 742, lines 21-23.

Then counsel emphasized evidence of Victim's mental state, arguing to the jury as follows:

> Who got the gun, Kevin or Leanne? Leanne is a woman, ladies and gentlemen, that is suffering from major depression. She is a woman that has gone to seek help. She is a woman

> that when she wrote on the intake form about suicide in the past, she admitted to trying, or attempting suicide two times prior. She is a woman that tried to get out of a car and throw herself into traffic. She is a woman, ladies and gentlemen, that at one time took her father's gun and tried to commit suicide. And guess what, Steve, her husband[,] had to take the gun away from her. That's eerie, that is eerie to me.

App. p. 743, lines 14-23.

Counsel came to the conclusion for the jury that Victim retrieved the gun. Counsel pointed out the conflicts in Victim's life and pointed out that Patterson and Victim were planning to get married. App. p. 745.

Counsel then emphasized Patterson's own testimony to the jury as follows:

> Kevin explained to you what happened. He says she goes and puts the gun up to her head, says he reaches up and stands up and says, no. Grabs her hands and pulls the gun away. She's – kind of like this, I believe is how he demonstrated it. Here's the entrance wound, here's the exit wound, and the bullet is found in the couch. . . . State's exhibit 22, look at it . . . [because] in terms of the trajectory, in terms of where the barrel of the gun was when it went off. Because it accurately depicts the trajectory of that bullet, and that, ladies and gentlemen, just happens to coincide with what Kevin is saying.

App. p. 748, lines 2-19.

Counsel argued that Patterson's testimony corresponded with the physical evidence: "And it's no different than what Kevin is telling you. Is he down the hall firing through the wall back at her head. No. He's pulling at the gun trying to [get] it away this way, and that's the situation." App. p. 746, line 25 – p. 747, line 3.

Counsel undertook the difficult task of explaining Patterson's actions afterwards. He told the jury Patterson went to the store and came back hoping Victim was still alive.

Counsel argued that Patterson was consistent because he told the 911 operator it was suicide and told law enforcement it was suicide. Counsel explained disarmingly that Patterson put the gun back in Victim's hand because she got the gun and she was the one with her finger on the trigger. Then counsel dismissed the "so-called" statement admitting guilt and chided law enforcement for not videotaping the interview, noting depositions are videotaped. App. p. 748.

Contrary to Patterson's assertions, counsel dealt with the unfavorable physical evidence and gave an explanation consistent with Patterson's testimony. It was a bit much for the jury to swallow, sure. But definitely no more than the tenuous, hindsight-induced assertions made in Petitioner's brief that are contradicted by Patterson's own words, especially his admission that there was no struggle. Counsel's strategy was superior to what has been offered in the petition, and more to the point, it did not fall below professional norms. The argument faithfully executed counsel's well-reasoned strategy that was the best possible in the face of the overwhelming evidence of Patterson's guilt.

VII.

Counsel's performance was not deficient for declining to retain an expert on post-traumatic stress disorder (PTSD) and because Petitioner chose to not be evaluated to determine if he suffered PTSD, Petitioner failed to prove prejudice.

Rehashing a sub-argument in Patterson's fist issue, Patterson argues the PCR court erred in denying relief on the grounds that counsel should have retained an expert in post-traumatic stress disorder (PTSD). Patterson claims that the PCR court did not consider the value of the expert's testimony. The expert's testimony had no value because while the expert established that someone watching a person they are close to commit suicide **could** cause trauma affecting their behavior, the expert's testimony did not relate to the facts of Patterson's case, and the expert was unable to say whether Patterson might have suffered such trauma because Patterson refrained from being examined by his own expert.

The PCR court noted the expert's testimony about the disorder generally, but also noted that the expert never interviewed Patterson and did not opine on whether Patterson suffered from the disorder. The PCR court found:

> While determining whether an applicant suffered from such a disorder at the time of the homicide may be difficult ten years after the fact, this Court notes that Dr. Martin testified that he "wouldn't give up on it" had he been asked to evaluate Applicant. Deposition transcript (Depo Tr.) p. 14, line 23 – p. 15, line 22. Dr. Martin further stated: "But I would not write off a case simply because the person is now ten years out." Depo Tr. p. 15, lines 24-25. Regardless, Applicant failed to present expert testimony that Applicant was actually suffering from post-traumatic syndrome at the time of the offense. Accordingly, this Court finds any benefit from retaining an expert at trial speculative. This Court finds that Applicant has failed to meet his burden of proving prejudice.

App. p. 1132.

Patterson fails to point out how the PCR court's determination is wrong. A claim of ineffectiveness should be denied where claims of prejudice are only supported by mere speculation. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (holding, where there was nothing in the record to indicate that interviewing the victims would have led to any different result, trial counsel's failure to conduct an independent investigation did not constitute ineffective assistance of counsel, as the allegation was supported only by mere speculation as to the result). In the instant case, it is speculative at best that an expert would have been able to provide helpful testimony.

Further, counsel's strategic decision was reasonable. Counsel was aware that Patterson carried a long history of misbehavior, and Patterson's self-protective behavior, such as placing the gun back in Victim's dead hand, putting her limp finger on the trigger, and fabricating an alibi, is difficult to reconcile with an allegation that PTSD caused Patterson to confess to a crime he did not commit. Counsel could readily discount the chances of a favorable diagnosis given the evidence and even if he could not articulate, in retrospect, all of the possible bad past that might be dredged up, he articulated a valid strategic reason for not employing the services of a PTSD expert. Accordingly, this petition for writ of certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court grant certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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July 31, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Anderson County
Court of Common Pleas

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge
Appellate Case No. 2014-002623

RICHARD KEVIN PATTERSON, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

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This 31st day of July, 2015

Ashley Haworth
ASHLEY HAWORTH
LEGAL ASSISTANT