2014-001191

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable J. Michelle Childs, Circuit Court Judge

Case No. 2003-CP-40-5973

Israel Wilds, ... RESPONDENT-APPELLANT,

v.

State of South Carolina, ... APPELLANT-RESPONDENT.

SUPPLEMENTAL APPENDIX

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[1] The APPELLANT-RESPONDENT submitted the Proposed Order of Dismissal, per PCR Court's request, via email on April 23, 2008, copied to RESPONDENT-APPELLANT. [Rule 5(b)(3), SCRCP]. The version included in this Supplemental Appendix is a copy from the Richland County Clerk of Court's file, including the handwritten notes.

PLAINTIFFS
EXHIBIT 3

1

INTERROGATION; ADVICE OF RIGHTS

YOUR RIGHTS

2001 JUN 14
BARBARA SCOTT
C.C. & G.S.

Place 1409 Lincoln Street

Date 04-07-99

Time 2:30 pm

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask u any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you fore any questioning if you wish.

If you decide to answer questions now without a lawyer present, u will still have the right to stop answering at any time. You also have e right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my ghts are. I am willing to make a statement and answer questions. I do t want a lawyer at this time. I understand and know what I am doing. No omises or threats have been made to me and no pressure or coercion of any nd has been used against me.

Signed

ness:

ness:

e: 23 M

COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT FORM

Date: 04-07-99 Time: 245 Place: 1409 Lindsay ST

I am Isom Simmons My birthday is 12-07-83 15 grade 9 Eau Cla

My address and phone number are: 1315 Clarendon Cola SC. 29203

I am giving this statement concerning ABIL

to Inv. Burns who has identified himself as Police

Me and Antuan was walking Rhett street from Appley Apartments and we saw the man walking and he was drunk. Antuan said I bet this man got some money. We walked up to this man and the man said what yall got for me and Antuan said let me holla at you. So they steped behind me and was talking and then I saw Antuan pull out the pistol and told the dude to give me your money. The dude put his hand over his back pocket holding his wallet. I reached into his other back packet and pulled out his cigarettes and the dude pulled out his wallet and was holding it near his chest. Antuan hit the man in the head with the gun. The dude still wouldnt give up the wallet and Antuan said you go make me Shoot you. Then Antuan shot the dude, the gun has the red light on it. Antuan grabbed the wallet and we

Sworn and subscribed to me this
day of April 1999.
[signature]
NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 2002

/S/ Isom Simmons

/S/

Isom Simmons received a copy of this statement consisting of 3 pages
from Inv. B[signature]

/S/ Isom Simmons

Form 34-91

COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT CONTINUATION

took off running. Antuan took the money out the wallet and threw it down near the Shell station. Me and Antuan ran across the street and I told Antuan that he need to get rid of the gun and he said it was already gone.

Q. Was anyone else with you during the incident?

A. Yes, it was me Domtae Dungee (his first name is Joseph) and Antuan.

Q. What did Domtae do

A. He hit the man with his hands, and took the man keys and pocket knife.

Q. What did you do with the money?

A. I got ten dollars, Antuan got two dollars and Domtae got ten.

Q. Who shot the victim?

A. Antuan shot the man

Q. What was Antuan wearing?

A. Beige jacket, Air force one shoes grey suede 507-508, 130-140 Dark complexion

Q. What did you tell Jim Myers?

A. That we rob the dude and my cousin shot him

Q What was Dantae wearing

Sworn and subscribed to me this ___ day of April 19 99.

[signature]

NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 2002

/S/ Kelsan Simmons

/S/ ______

Kelsan Simmons ______ received a copy of this statement consisting of ____ pages

from [signature] /S/ Kelsan Simmons

COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT CONTINUATION

A. White Nike sweater, Black Timberland boots, Blue jeans
Q. When Antuan said I let this man get some money what did you say?
A. I said I let him do.
Q. How much money did you all get?
A. 30.00
Q. What did you do with your money?
A. Spent it at school.
Q. Have you seen Antuan and Dontae since this happen?
A. Yes, we talked about the robbery and I told them I heard he was in Critical Condition.
Q. Did you hit the victim?
A. Yes, I hit him one time in the back of the head with my fist. Dontae hit him in the face and Antuan hit him in the back of the head with the pistol.
Q. What did the man say when you all asked for his money?
A. He said I don't have any money
Q. Is Antuan your Cousin?
A. No, but I call him my cousin

Sworn and subscribed to me this 1 day of April 19 99.
[signature]
NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 2002

/S/ [signature] Simmons
/S/

[signature] received a copy of this statement consisting of 3 pages
from [signature]. /S/ [signature] Simmons

PLAINTIFFS
EXHIBIT 4

to read writes ! Terre
Grade 9th

Joseph D. Dunegel 5
06-21-83
1006 Harve Street
Mother ⇒ 22-H Latimar Manor

INTERROGATION; ADVICE OF RIGHTS

YOUR RIGHTS

Place 1409 Lincoln
Date 04.08.99
Time 9:50

2007 JUN 14 PM 2:45
BARBARA A. SCOTT
C.C. & Q.S.

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you ore any questioning if you wish.

If you decide to answer questions now without a lawyer present, will still have the right to stop answering at any time. You also have right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my nts are. I am willing to make a statement and answer questions. I do want a lawyer at this time. I understand and know what I am doing. No nises or threats have been made to me and no pressure or coercion of any has been used against me.

Signed Joseph Dunegel

ess: [signature]

ess: ______

: 9:55

COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT FORM

Page 1 **6**

Date: 04-08-98 Time: 10:15 Place: 1409 LINCOLN ST

I am JOSEPH O. DUNGEE My birthday is 06-21-83

My address and phone number are: 1006 HOUSE Street (786-4458) 256-2269

I am giving this statement concerning ARM- ARM ROBBERY

to INV. BURNS who has identified himself as police

We were walking down the street and we saw the dude. Anthony walk up to the dude and they was talking. Then Isom walk up to them and I saw them fighting and I went up to help Isom because he is my best friend. So I hit the dude in the face and then Anthony hit the man on the back of the head with the gun, I didn't know he had a gun and then I got a Cigarettes that was in the man pocket and Isom got the cigarettes. Then the man started holding on to his wallet and Anthony shot him. We all started running. Then me and Isom ran together and Isom told Jim what happen. Then Isom came over to me and said that he told Jim what happen and I told him don't tell nobody else about what happen.

How much money did Isom give you?
3.00, I bought something to eat
Did you shoot the man?

Sworn and subscribed to me this
day of April 19 99
[signature]
NOTARY PUBLIC OF SOUTH CAROLINA
COMMISSION EXPIRES: 2002

/S/ Joseph Dungee
/S/

Joseph Dungee received a copy of this statement consisting of 2 pages
[signature] /S/ Joseph Dungee

Form 34-01

COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT CONTINUATION

A. Antuan shot the man.
Q. Did you see Antuan shot the man?
A. Yes, Antuan said man you go make me blast you and the man wouldn't give him the wallet so Antuan shot the man.
Q. What did you do with the cigarette lighter?
A. I don't know, we play games with lighters and if somebody holds it for fifteen minutes and you forget to get it, its no longer yours.
Q. Did you know the victim?
A. No
Q. How long have you know Antuan?
A. I saw him two or three times, I met him with Isom. He was staying at Isom Aunt's house so Isom calls his cousin.
Q. Was anyone else involved in this incident
A. No
Q. Did you tell anyone about the assault and Robbery
A. No.
Q. How long have you known Isom?
A. Since seventh grade.
Q. What were you wearing? White Sweater, Blue jeans, Antuan had on a jacket, like Cream and Isom had Brown Sweater

[Sworn] and subscribed to me this
____ day of April ____ 19 99
[signature]
[NOTA]RY PUBLIC OF SOUTH CAROLINA
[C]OMMISSION EXPIRES: 2002

/S/ Joseph Dunzee
/S/ ____

____ received a copy of this statement consisting of ____ pages
____ /S/ Joseph Dunzee

01-156

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The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

V. CLAIRE ALLEN
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March 10, 2003

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The Honorable Barbara A. Scott
PO Box 2766
Columbia, SC 29202-2766

Re: The State v. Wilds, Israel
1999-GS-40-40142
1999-GS-40-45289

Dear Ms. Scott:

Enclosed is the Remittitur in the above entitled matter. A copy of this letter is being sent to all counsel.

Sincerely,

Frances Dickson
Frances Dickson
Administrative Specialist

KAR/fd

cc: Deputy Chief Attorney Joseph L. Savitz, III
Assistant Deputy Attorney General Donald J. Zelenka
Warren Blair Giese, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Israel Wilds, Appellant.

Appeal From Richland County
Marc H. Westbrook, Circuit Court Judge

Unpublished Opinion No. 03-UP-152
Submitted January 13, 2003 - Filed February 20, 2003

AFFIRMED

Deputy Chief Attorney Joseph L. Savitz, III, of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, of Columbia; Warren Blair Giese, of Columbia; for respondent.

PER CURIAM: Israel Wilds appeals his convictions for murder and armed robbery, arguing the trial court erred in limiting cross-examination of two of the State's witnesses.

We affirm pursuant to Rule 220(b)(2), SCACR, and the following authorities: State v. Sims, 348 S.C. 16, 26 n.2, 558 S.E.2d 518, 524 n.2 (2002) ("On appeal, appellant also argues the trial court's ruling violated the Sixth Amendment of the Constitution; however, this issue is not preserved for review because it was not raised at trial."); State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("In order to preserve for review an alleged error in admitting evidence an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge."); State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("The issue which is not properly preserved cannot be raised for the first time on appeal.").

AFFIRMED.

GOOLSBY, HUFF, and SHULER, JJ., concur.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Marc H. Westbrook, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ISRAEL WILDS,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The judge erred by preventing defense counsel from cross-examining appellant's two codefendants, who had turned state's evidence, about the possible punishment they faced before they agreed to testify for the state, because this ruling violated South Carolina Evidence Rule 608(c) and the Sixth Amendment.

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STATEMENT OF FACTS

On September 15, 1999, a Richland County grand jury indicted Israel Wilds for murder and armed robbery. Two juveniles, Isom Simmons and Joseph Dungee, were also charged as principals, but turned state's evidence and testified against appellant. Judge Marc H. Westbrook presided at that jury trial on March 26 – 29, 2001. Wilds' defense was alibi: witnesses testified that he was watching a basketball game on TV when the crimes occurred. ROA p. 217, lines 11–13; ROA p. 230, lines 14–23; ROA p. 246, lines 10–16. The jury found appellant guilty as charged and the judge sentenced him to life imprisonment for murder and thirty years for armed robbery.

ARGUMENT

The judge erred by preventing defense counsel from cross-examining appellant's two codefendants, who had turned state's evidence, about the possible punishment they faced before they agreed to testify for the state, because this ruling violated South Carolina Evidence Rule 608(c) and the Sixth Amendment.

Israel Wilds was nineteen at the time of the incident, so he stood trial in general sessions. His codefendants, Isom Simmons and Joseph Dungee, who were fifteen, were also charged as principals with murder and armed robbery, but in family court. Dungee's case was transferred to general sessions. Both turned state's evidence and testified that, while they had participated, Wilds was the instigator and shooter. ROA p. 55, line 3 – p. 60, line 25 (Simmons); SUP. ROA p. 36, line 2 – p. 46, line 25 (Dungee).

Although Simmons and Dungee were also charged with murder and armed robbery, the judge ruled that defense counsel could not "get into any details about the potential sentences and that sort of thing." ROA p. 44, line 21 – p. 45, line 8. Defense counsel responded:

> I should be able to question them not merely about the existence of the charges, but what they hope to get as a result of their testimony – their understanding of the penalties they're facing now, and specifics of the fact that they are looking at life in prison on the murder charge, and their hopes in regard to a reduction in sentencing.

ROA p. 45, lines 9–17. The judge concluded, "It's appropriate to ask if they think they're going to get their sentence reduced or if they think they're going to get the charges reduced, but I think you can do that without going into details." ROA p. 45, lines 18–21.

Thus, defense counsel's cross–examination of Simmons and Dungee was truncated as a result. ROA p. 90, line 2 – p. 92, line 4 (Simmons); SUP. ROA p. 53, line 16 – p. 55, line 17 (Dungee). In accordance with the judge's ruling, he did not question these two key witnesses about the specific sentences they were hoping to avoid by testifying against appellant.

Under South Carolina Evidence Rule 608(c), "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." "This subsection of Rule 608 preserves South Carolina precedent holding that generally, 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded to his testimony'." State v. Jones, 343 S.C. 562, 541 S.E.2d 813, 817 (2001), quoting State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976). The Sixth Amendment right of confrontation similarly recognizes that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross–examination." Davis v. Alaska, 415 U.S. 308, 315 (1974).

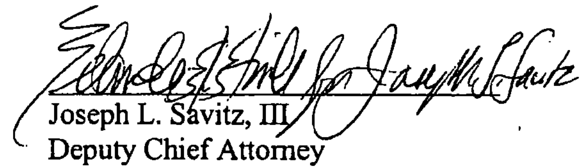
The credibility of Simmons and Dungee was the central issue in this case. They themselves were facing the same charges as appellant and, by their own admission, had participated in those crimes. Compare State v. Jones and State v. Aleksey, 243 S.C. 20, 538 S.E.2d 248 (2000).

The judge erred by preventing defense counsel from questioning Simmons and Dungee about the sentences they faced had they not decided to cooperate with the solicitor's office. See State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994), and State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991). The error could not have been harmless, given the

importance of their testimony to the state's case. State v. Jones. The balance of the state's evidence was not sufficient to neutralize this error.

For this reason, the Court should reverse Israel Wilds' convictions and remand for a new trial.

Respectfully submitted,



Joseph L. Savitz, III
Deputy Chief Attorney

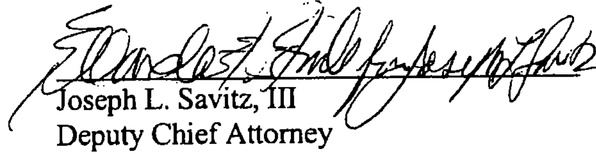
ATTORNEY FOR APPELLANT

This 17th day of May, 2002.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 210(b), SCACR.

May 17, 2002



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Marc H. Westbrook, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ISRAEL WILDS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, this 17th day of May, 2002.

Joseph L. Savitz, III
Deputy Chief Attorney

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of May, 2002.

____________________(L.S.)
Notary Public for South Carolina

My Commission Expires: March 13, 2007 .

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Richland County
The Honorable Marc H. Westbrook, Circuit Court Judge

THE STATE,

Respondent,

vs.

ISRAEL WILDS,

Appellant.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

The judge erred by preventing defense counsel from cross-examining appellant's two co-defendants, who had turned state's evidence, about the possible punishment they faced before they agreed to testify for the state, because this ruling violated South Carolina Evidence Rule 608(c) and the Sixth Amendment.

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Israel Wilds, was indicted at the September 1999 term of the Court of General Sessions for Richland County for murder and armed robbery. The charges were from the March 29, 1999, gunshot assault and armed robbery of Anthony Rumph that led to his death on July 8, 1999. He was represented by Doug Strickler, Esquire. The prosecution was handled by Luck Campbell and Knox McMahon, of the Fifth Circuit Solicitor's Office. On March 26, 1999, the matter was called to trial before the Honorable Marc H. Westbrook. The jury found the Appellant guilty as charged. Judge Westbrook sentenced the Appellant to life imprisonment for murder and thirty (30) years for armed robbery.

This appeal follows.

ARGUMENT

I. The trial judge properly limited defense cross-examination of two State witnesses to allow inquiry into pending charges for murder and armed robbery arising from the same incident but not allowing details of potential sentences. Further, any error would be harmless beyond a reasonable doubt.

Appellant Wilds contends that Judge Westbrook erred in refusing to allow specific cross-examination of co-defendants Isom Simmons and Joseph Dante Dungee during trial about possible punishment they faced on the pending charges of murder and armed robbery. The trial judge allowed inquiry into the specific charges and "if they think they are going to get their sentence reduced or if they're going to get the charges reduced," but apparently denied his request to develop the specifics of their understanding of the penalties they were facing for the same crimes. **R.p. 45, ll. 5-12, Tr. p. 206, ll. 5-22.** Respondents submit the trial judge did not abuse his discretion.

A. Standard Of Review.

The trial judge's decision to admit or exclude the evidence is reviewed on appeal under an abuse of discretion standard. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). Under South Carolina Rules of Evidence, Rule 608(c), "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." This subsection of Rule 608 preserves South Carolina precedent holding that generally, "anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony." State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001); State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976) (citing 98 C.J.S. Witnesses S 460).). "On cross-examination, any fact may be elicited which tends to show interest, bias,

or partiality of the witness." State v. Starnes, 340 S.C. 312, 325, 531 S.E.2d 907, 924-16 (2000) (emphasis added) (also quoting Brewington, 267 S.C. at 101, 226 S.E.2d at 250).

The Court recently addressed Rule 608(c) in State v (Mandel) Sims, 348 S.C. 16, 558 S.E.2d. 518, (2001). In Sims, the defendant sought to expose a state witness's possible bias and prejudice by asking the witness what the crimes were with which he was charged. Because of the number of charges pending against the witness and the severity of the potential sentences, the Supreme Court found the evidence was probative on the issue of bias and should have been admitted. "There was the substantial possibility Peterson would give biased testimony in an effort to have the solicitor highlight to his future trial judge how he had cooperated in the instant case. The excluded evidence had "a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity" of Peterson's testimony, citing State v. Jones, supra. Although the Court found error, they concluded that it was harmless , citing State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985) (trial errors are harmless where they could not reasonably have affected result of trial). [1]

In Jones, the Court found error where the defendant sought to explore past dealings between a witness and the office prosecuting the current charges, not to impeach the witness through those dismissed charges, but rather to expose Brown's bias and prejudice in the present case. The Court found that situation was unlike that presented in State v. Aleksey,

---

[1] In Sims, the basis for the harmless error conclusion was the following matters. The State's case against appellant was strong without resorting to Peterson's testimony. For example, appellant's fingerprints were found on the headboard of the victim's bed. Further, the victim's mother testified when she informed appellant the victim was out of town on the day of the attack, appellant responded that he had told her not to go out of town. Finally, appellant approached two officers, who were at his home for questioning, with his hands "out in front of him" and spontaneously confessed, "I did it, I assaulted [the victim]."

343 S.C. 20, 538 S.E.2d 248 (2000). In State v. Aleksey, supra, the defendant sought to impeach an eyewitness about specific charges which had been dismissed against her in New Jersey. That witness was neither the self-confessed accomplice to the murder for which the defendant was on trial, nor was there any evidence of her participation in the crime other than a retracted confession by the defendant. Obviously, there was no connection between the prosecutor's office in New Jersey which had dismissed the charges and the solicitor's office which was prosecuting the defendant. In Starnes, the Court held under both the Sixth Amendment and Rule 608(c), SCRE, appellant was entitled to inquire if one witness had a romantic relationship with a party where an intimate relationship between the witness and the party could affect the witness's credibility. The trial judge erred by prohibiting appellant from making this inquiry.

B. How the Issue Was Raised Below.

During the State's presentation, prior to the testimony of Isom Simmons, defense counsel Strickler set forth a clarification of his understanding of any limitation on cross-examination. In particular, the following occurred.

MR. STRICKLER: With regard to the pending charges as against Mr. Simmons and Mr. Dungee, they are currently, according to the Solicitor, both charged with murder and armed robbery.

We would submit to the Court that I should be able to question them not merely about the existence of the charges but what they hope to get as a result of their testimony.

Their understanding of the penalties they're facing now and specifics of the fact that they are looking at life in prison on the murder charge. and their hopes in regard to a reduction in sentencing.

I understand Your Honor's ruling that I cannot go into that.

THE COURT: Yes, sir. It's appropriate to ask if they think they're going to get their sentence reduced or if they think they're going to get the charges reduced, but I think you can do that without going into details.

MR. STRICKLER: I understand.

Tr. p. 206, ll. 5-22, R. 45, ll. 5-22.

Isom Simmons, the co-defendant of Appellant, testified that he was seventeen years old at the time and knew both Joseph Dante Dungee and Antwan Wilds, the Appellant. **Tr. p. 213-214**. He described the events of March 29, 1999. **R. p. 51-67**. Essentially, he described walking along Clarenden Street with Dante and the Appellant and seeing the victim, Anthony Rumph. **R.p. 54-55**. He stated the Appellant stopped and talked to him as Simmons and Dante kept walking. **R. p. 55**. He then saw the Appellant pull out a gun and point it at Rumph's chest area. **R. p. 56**. Rumph grabbed for his back pocket and then a struggle started. **R. p. 57**. The victim had pulled his wallet out of his back pocket. Then, the Appellant "ordered me and Dante to hit him." **R. p. 58, ll. 1-3**. They both hit him (Rumph) in the head. **R. p. 58, l. 11**. Simmons said he got cigarettes out of the victim's pocket. After Dante hit the victim, Dante took a key chain from the victim. The victim was still holding on to his wallet and the Appellant put the gun to the victim's chest and then shot him at point blank range. **R. p. 59, l. 1 - p. 60, l. 6**. Simmons said he ran off after that shooting. After they got to the Shell Station, the Appellant, who had gotten the wallet and thrown it down, handed money to Simmons and Dante and then left. **R.p. 60-61**. He said he got about $10.00. **R. p. 62, l. 16**.

On direct examination, the prosecution developed that Simmons had been charged initially with armed robbery and assault with intent to kill and it was changed to murder after the victim died. **R. p. 69, ll. 21-25.** He confirmed that the charges were still pending against him and that the State had not made any deals or offered any deals on his sentence in return for his testimony. **R. p. 70, ll. 1-6.**

On cross-examination, Simmons was questioned about his use of drugs, and his description of the incident. **R. p. 79-84.** He pointed out subtle differences in the statement and his testimony. **R.p. 84-89.** He also inquired about the fact that Simmons was charged as a juvenile and spoke to his lawyer about it. He developed that he was hoping that in return for his testimony he would not have to come to court and plead guilty to armed robbery and murder. **R.p. 90-91.** It was declared to be his hope that the solicitor would do something graciously for him in the future, but he admitted no one had promised him anything. **R. p. 91, ll. 8-18.** He stated his lawyer told him to do the right thing. **R. p. 91, ll. 21-25.** He stated again that he hoped he would get something in exchange for his testimony. **R. p. 92, ll. 1-4.**

Joseph Dante Dungee testified similarly about the incident. He stated he was currently housed as an adult. His description of the incident was similar to Simmons'. He stated that before the incident they talked about robbing somebody. **Supp ROA p. 30-31.** He described seeing the victim with a cup in his hand initially and the Appellant approaching him and discussing something. He saw Wilds pull out the gun and then he and Simmons grabbed the man. He said they both hit the victim and tried to go through his pockets and tried to get the wallet from him. **Supp ROA p. 40.** The Appellant then shot the victim. **Supp ROA p. 40-**

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44. They fled after the shooting, seeing the Appellant get money from the wallet. **Supp ROA p. 46**. He then got some of the money from Isom. **Supp ROA p. 48-49**.

Dungee denied that he had been offered any deal for his testimony and that he was testifying because it was the right thing to do. **Supp ROA p. 51-52**.

On cross-examination, Dungee admitted he was currently charged with murder and armed robbery as an adult. He stated he did not hope to gain anything. **Supp ROA p. 52-53**. However, he stated he was not going to trial and hoped that his charge would be changed to accessory to murder because he did not murder anyone. **Supp ROA p. 54-55**. He stated that he was testifying because it was the right thing and that he hoped his murder charge would be reduced, but did not know. He said he was going to plead guilty to murder. **Supp ROA p. 54-55**.

Like Simmons, Dungee was questioned about his statements. **Supp ROA p. 55-64**.

C. Analysis.

The Respondents submit the trial judge properly used his discretion in limiting the exact potential punishment the witnesses were facing on the pending charges. The prosecution allowed for the Appellant to fully cross-examine the witnesses about whether there were any deals and, more particularly, about their hopes to get the charges reduced as a result of their testimony. Clearly, his right to confrontation was not deprived by any limitation.

1. This issue is procedurally barred because there was an inadequate objection at trial.

The record reveals that when defense counsel Strickler made his request to use the potential sentences for the co-defendant to impeach he failed to assert either Rule 608 or the

Sixth Amendment as a basis for his objection. **R. p. 45-46**. It appears that he is asserting these grounds for the first time in this appeal. **R.p. 45-46**. His failure to raise these same claims as a basis for the objection to the denial bars consideration of these claims on appeal because they are not preserved as a matter of South Carolina procedure. Accord, State v. Sims, 348 S.C. 16, 558 S.E.2d 518, n. 2 (S.C. S.Ct. Jan. 14, 2002); State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998) (to be preserved for appeal, an issue must be raised to and ruled upon by a judge); State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996) (Eighth Amendment challenge not preserved because no constitutional basis raised at trial); State v. Holliday, 333 S.C. 332, 509 S.E.2d 280 (S.C. Ct. App. 1998) (in order to preserve an error for appellate review, a defendant must make a contemporaneous objection on a specific ground). See also, SCRE, Rule 103(a)(1).

Respondent respectfully submits that both of his issues are not preserved.

2. Assuming the matters are preserved the trial judge did not abuse his discretion under Rule 608 or the Sixth Amendment.

The Appellant asserts that the potential range of punishment the witnesses faced should have been allowed because they had admitted participating in the offense and were facing the same charges as the Appellant. He asserts, without any factual support, that "the judge erred by preventing defense counsel from questioning Simmons and Dungee about the sentences they faced had they not decided to cooperate with the solicitor's office. **Initial Brief of Appellant, p. 6**.

The problem with this characterization is the fact that the witnesses were still facing the same punishment as the Appellant, even though they testified. It is undisputed that there

was no pre-existing plea agreement with either witness at the time of their testimony. Unlike the witness in State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991), there was no agreement like the Smith witness that in return for testifying she had pled guilty to a conspiracy charge with a cap sentence of seven and a half years, but he was prevented to show the witness had faced a twenty-five no parole sentence if she had not testified. Instead, there was no arrangement in this case. The witnesses here, unlike Smith, had been permitted to avoid a higher sentence in return for their testimony.[2]

The importance of this distinction should be recognized. Here, the witnesses still faced the risk of the penalty despite their testimony. In Smith, in return for the testimony, the witness was able to avoid a sentence three times the duration of the sentence she had agreed to. Here, there was nothing to support any revision other than the expressed hope by the witnesses that the charges would be lessened.

Similarly, the Appellant's reliance on State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994), is misplaced. In Smith, the defense was precluded from cross-examining a State witness about pending unrelated drug charges. The Court, however, found the record incomplete on the reasoning of the trial judge and completed a harmless error analysis where the jury only learned of the fact of pending charges, but lacked the specific charges. Unlike Smith, here the inquiry in the charges on each witness, as set forth above, was unrestrained concerning the particular charges and the witness's role. Only the potential punishment was precluded from the consideration.

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[2] We note the court in Smith rejected the fact that disclosure of the witness's potential sentence would also have disclosed potential sentences for the Appellant. However, it may be distinguishable here since there was no agreement to avoid the sentence which the witness may be exposed to.

The trial judge's decision on the use of his discretion cannot be viewed in isolation. The trial judge did allow full impeachment on numerous aspects of the pending charges including:

1. If they thought they would get their sentence reduced;
2. If they thought they would get their charges reduced;
3. What charges are pending;
4. Whether the State had made any deals in return for the testimony;
5. Whether the State had offered any deals in return for the testimony;
6. His expectations and hopes in return for his testimony.

Here, through impeachment questioning, the Appellant was able to develop, though no promises had been made, that witness Simmons had been charged with murder and armed robbery and hoped that in return for his testimony the solicitor would do something graciously for him in the future and that he would not have to plead guilty to armed robbery and murder. **R. p. 90-91, 92**. Similarly, the defense developed with witness Dungee that although no promises or offers had been made to him in return for his testimony, he hoped his murder charge would be reduced or changed to accessory to murder because he did not murder anyone. **Supp ROA p. 53-54**. Unlike Simmons, Dungee stated he did not hope to gain anything, but admitted that in return for testifying, he hoped to have his murder charge reduced and declared he would plead guilty to murder. **Supp ROA p. 53-55**.

Under Rule 608, the question is whether there was "anything that had a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness."

Since there was no "deal" or "promise" of the lesser offense or lesser sentence, unlike Smith, there was no quid pro quo for the testimony. The defense was able to show the witness's "hope," but the legitimate truth was each still faced the maximum penalty. The impeachment adequately revealed the desire to seek a reduction based upon their testimony. The trial judge did not violate Rule 608.

The Court in State v. Mitchell, 330 S.C. 189, 197, 498 S.E.2d 642, 648 (1998), declared that "a defendant may have a right to question a potentially biased witness on more than just whether there are pending charges against the witness," in a Sixth Amendment Confrontation Clause challenge. Here, as set forth above, the Appellant was able to question on more than just if there were "pending charges." The jury was fully aware of the nature and severity of the charges and the hopes each witness had as a result of his testimony. It must be recognized that jurors understand the nature of a murder charge.

Under each challenge, Rule 608 and the Confrontation Clause, the trial judge has wide latitude to impose "reasonable limits" on cross-examination, including the avoiding confusion and marginal relevance. Delaware v. Van Arsdall, 475 U.S. 673, 679 (1996); SCRE, Rule 611(a), (b); State v. Sierra, 337 S.C. 368, 523 S.E.2d 187 (S.C. Ct. App. 1999). Here, we submit the judge did not abuse his discretion. His assertion to the contrary must be denied.

3. Any error was harmless under either Rule 608 or the Confrontation Clause, if error.

In State v. Mitchell, supra, the Supreme Court adopted the following harmless error factors:

(1) the importance of the witness's testimony to the state's case;

(2) whether the testimony was cumulative;

(3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points;

(4) the extent of cross-examination otherwise permitted; and

(5) the overall strength of the prosecution's case.

Respondent submits that the limited examination on witness Simmons and witness Dungee was harmless error and does not require reversal.

Respondent acknowledges that the testimony of both witnesses was important to the State's case since each was involved in the crime. However, the testimony was cumulative to each other.

However, in addition to the testimony of Simmons and Dungee, the prosecution's case was otherwise strong.

1. The Appellant gave a statement to the police initially denying that he knew Simmons, but then admitted knowing him and admitted he owned several guns after first asserting he did not own any. **R. p. 24-27.**

2. Timothy Myers corroborated Simmons' statement that "my cousin" [Wilds] had shot somebody. **Supp ROA p. 12-13.**

3. Mitochondrial DNA testing revealed that the victim's blood was located on the Appellant's shoe. **R. p. 181-84.**

Further, as set forth above, the witnesses were both otherwise extensively cross-examined about the pending charges, the differences in their statements and testimony, and their hopes. This was similar to the harmless error inquiry into the witness in State v. Sims, supra; State v. Mitchell, supra; and State v. Smith, supra. Compared to those cases, the cross-examination

here more strongly supports harmless error. Moreover, the defense counsel here extensively argued credibility to the jury.[3]

Under either theory, Respondent submits that any error was harmless beyond a reasonable doubt under the Confrontation Clause or harmless under SCRE Rule 608(c) and Rule 103. State v. Sims, supra.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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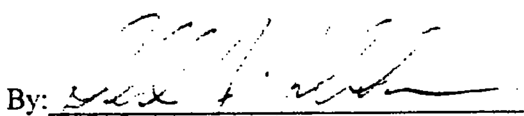


By: ____________________

ATTORNEYS FOR RESPONDENT

May 22, 2002

[3] Cf. State v. Graham, 314 S.C. 383, 444 S.E.2d 525 (1994) (error not harmless where court refused to allow cross-examination on co-defendant's light sentence to support inference he remained silent in exchange for sentence).

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County
The Honorable Marc H. Westbrook, Circuit Court Judge

THE STATE,

Respondent,

vs.

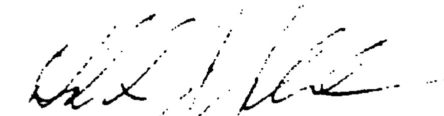
ISRAEL WILDS,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies with SCACR 210(b).

This 22nd day of May, 2002.



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ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County

The Honorable Marc H. Westbrook, Circuit Court Judge

THE STATE,

Respondent,

vs.

ISRAEL WILDS,

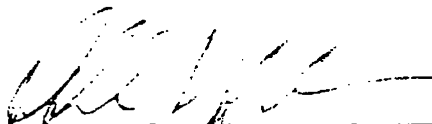
Appellant.

PROOF OF SERVICE

I, Donald J. Zelenka, counsel for the Respondent, certify that I have served the within **Final Brief of Respondent** by depositing three (3) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Joseph L. Savitz, III, Esquire, South Carolina Office of Appellate Defense, 1122 Lady Street, Suite 940, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 22nd day of May, 2002.



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ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

2003-CP-40-5973

Israel Wilds, 274010,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 15, 2003, and amended May 11, 2006. The Respondent made its Return on July 6, 2004. An evidentiary hearing into the matter was convened on June 8, 2007, at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Tara D. Shurling, Esquire. The Respondent was represented by Robert L. Brown of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. This Court also had before it the records of the Richland County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant was indicted at the September 1999 term of the Grand Jury for Richland County for murder (99-GS-40-45289) and armed robbery (99-GS-40-40142). He was represented by Douglas Strickler, Esquire. On March 29, 2001, the Applicant

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SOUTH CAROLINA

proceeded to trial after which he was found guilty of the stated charges. He was sentenced by the Honorable Marc H. Westbrook to confinement for life and thirty (30) years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Wilds, Op. No. 03-UP-152 (S.C. Ct. App. filed February 20, 2003).

In his current application filed May 11, 2006, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Applicant alleges that Trial Counsel was ineffective for failing to move to suppress all evidence seized following arrest where his arrest was unlawful.

2. Applicant alleges that Trial Counsel was ineffective for failing to move to suppress Applicant's alleged statement that he owned three guns.

3. Applicant alleges that Trial Counsel was ineffective for failing to object to the characterization of the Applicant's alleged statement about the guns as "bragging."

4. Applicant alleges that Trial Counsel was ineffective for failing to object when the Court limited the scope of cross examination of State's witness, Tim Myers, with respect to prior criminal conduct allegedly engaged in by the Applicant and one or more of his co-defendants.

5. Applicant alleges that Trial Counsel was ineffective for failing to object when the trial Judge erroneously advised the Applicant that the Solicitor would be able to cross examine him on his Juvenile criminal record if he took the stand, thereby causing the Applicant to refrain from testifying.

6. Applicant alleges that Trial Counsel was ineffective for failing to raise adequate objections to the lower Court's ruling improperly restricting the Applicant's cross-examination of his two co-defendants where said ruling was improper under Rule 608(c) and violated the Applicant's right to confront witnesses under the Sixth and Fourteenth Amendments of the U.S. Constitution.

7. Trial Counsel was ineffective for failing to request that the Judge respond in the affirmative to the jury's question, "If we say Antwan is guilty of murder, are we saying he, of the three, actually pulled the trigger?" since that was the language of the indictment and the sole theory of the State's case.

8. Applicant alleges that Trial Counsel was ineffective for failing to renew his motion for a mistrial after it became clear from the jury's question in Item No. 5 that one or

more members of the jury had concluded that the Defendant did not shoot the deceased.

9. Applicant alleges that Trial Counsel was ineffective for failing to move for a new trial on the ground that the Judge charged the jury with the legal premise "the hand of one is the hand of all," where accomplice liability was not suggested in the indictment, the evidence, the closing statements, or the original charge.

10. Applicant alleges that Trial Counsel was ineffective for failing to object to the Court giving an "Allen" charge after the jury indicated that it had a verdict on one count and could not reach a verdict on the other count after several hours of deliberation.

11. Applicant alleges that Trial Counsel was ineffective for failing to object when the Court gave an improper Allen charge and for failing to request that the Court give a corrected charge.

12. Applicant alleges that Trial Counsel was ineffective for failing to get the Judge to correct his more detailed re-definition of the elements of "the hand of one is the hand of all" theory to the jury.

13. Trial Counsel was ineffective for failing to sufficiently articulate the proper grounds for objecting to the trial judge interjecting accomplice liability as an issue in this case by issuing a supplemental charge on "the hand of one is the hand of all," where there had been no previous discussion of the applicability of accomplice liability to the facts of this case- which should have been grounds for a mistrial.

14. Counsel was ineffective in failing to object to a jury charge under the theory "hand of one, hand of all" on the ground that the State had not pursued the theory of accomplice liability in their case in chief.

15. The Applicant alleges that Trial Counsel was ineffective for failing to renew his motion for a mistrial and for failing to put forth adequate grounds for a mistrial after the lower court gave an improper supplemental charge on accomplice liability.

16. Appellate Counsel erred in failing to raise counsel's objection to the lower court's supplemental charge on the law of accomplice liability as an issue on direct appeal.

17. Appellate Counsel failed to brief the objection to the 2nd supplemental accomplice liability charge.

18. Appellate Counsel erred in failing to raise the issue that a mistrial should have been granted because of the misapplication of the accomplice liability charge.

19. Appellate Counsel erred in failing to brief the issue of the lower Court's refusal to issue a "mere presence" charge where such an instruction was appropriate on the facts of this case.

At the evidentiary hearing, Applicant affirmatively waived his right to proceed on allegation #5.

THE LAW OF POST-CONVICTION RELIEF

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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.

Ineffective Assistance of Appellate Counsel

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As to the allegation that trial counsel was ineffective for failing to move to suppress all evidence seized following arrest where the arrest was unlawful, this Court finds this claim is without merit. A review of the trial transcript indicates that counsel moved to dismiss this case based on a warrantless arrest and that motion was denied. Additionally, this Court finds that a motion to suppress would not have been fruitful because the arrest was lawful and predicated on probable cause stemming from statements made by Isom Simmons, Applicant's co-defendant. Section 17-13-10 of the South Carolina Code authorizes any person, including a private citizen, to make a warrantless arrest of a felon or thief under three specified circumstances: (1) upon view of a felony; (2) upon view of a larceny; and (3) upon "certain information" that the other has committed a felony. Here, the police had certain information that a felony, specifically assault and battery with intent to kill, had been committed and thus the arrest was justified. Accordingly, even if counsel should have moved to suppress the evidence, there is no warrant as the motion would have been denied. Accordingly, this allegation is denied and dismissed.

As to the allegation that trial counsel was ineffective for failing to move to suppress Applicant's alleged statement that he owned three guns, this Court finds this claim is without merit. It is clear that counsel moved, pre-trial to suppress Applicant's statement via a hearing pursuant to Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). A criminal defendant is deprived of due process if his conviction is founded, in whole or in part, upon an involuntary confession. Id. at 377. In determining whether a statement was given "voluntarily," a Court must consider the totality of the circumstances surrounding the defendant's giving of the statement. Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Here, there is no indication that the statement was anything but voluntary. Although counsel moved to suppress

the statement, it was an unsuccessful motion and no grounds existed to attack the voluntariness of the statement. Accordingly, this allegation is denied and dismissed.

As to the allegation that trial counsel was ineffective for failing to object to the characterization of the Applicant's alleged statement about the guns as "bragging", this Court finds this claim is without merit. The characterization in question goes to a full description of the statement given to police. The description helps paint a picture to the jury and becomes a question of credibility in whether the jury believes the witnesses testimony regarding the demeanor of the interviewee. Additionally, counsel for Applicant was given adequate opportunity to cross-examine the witness regarding the characterization of Applicant's statements and was able to call into question the reliability of Deputy Burns' characterization of Applicant's statement as "bragging." Additionally, this Court cannot find that but for this lack of objection there is a reasonable probability that the result of the proceeding would be different. Accordingly, this allegation is denied and dismissed.

As to the allegation that trial counsel was ineffective for failing to object when the Court limited the scope of cross examination of State's witness, Tim Myers, with respect to prior criminal conduct allegedly engaged in by the Applicant and one or more of his co-defendants, this Court finds this claim is without merit. A review of the transcript shows that counsel did object to this limitation of the cross-examination. As such, counsel cannot be held ineffective. Additionally, even if counsel had failed to object, the limitation was proper under Rule 403 of the South Carolina Rules of Evidence. As the presiding judge indicated, prior drug deals had no bearing on the current crime and were irrelevant. As such, neither counsel or appellate counsel was ineffective regarding this issue. Accordingly, this allegation is denied and dismissed.

As to the allegation that trial counsel was ineffective for failing to raise adequate objections to the lower Court's ruling improperly restricting the Applicant's cross-examination of his two co-defendants where said ruling was improper under Rule 608(c) and violated the Applicant's right to confront witnesses under the Sixth and Fourteenth Amendments of the U.S. Constitution, this Court finds this claim is without merit. [This issue was raised on appeal and was ruled to be not preserved. However, this Court finds that even if this issue were preserved, the appellate court would have found no error. The trial judge's decision on the use of his discretion cannot be viewed in isolation. The trial judge allowed full impeachment on several aspects of the Applicant's co-defendants' pending charges including: 1) whether they thought they would get their sentences reduced; 2) whether they thought they would get their charges reduced; 3) what charges are pending; 4) whether the State had made any deals in return for the testimony; 5) whether the State had offered any deals in return for the testimony; and 6) their expectations and hopes in return for the testimony. Under Rule 608 of the SCRE the question is whether there was "anything that had a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness." Here, there was no deal or promise of a lesser offense or lesser sentence. The defense was able to show the witness' hopes but the legitimate truth was that each still faced the maximum penalty. Additionally, this Court finds that even if counsel should have objected, the error was harmless. Whguilt was Accordingly, the Applicant's requested relief on this issue is denied.] -#4 in Cara's order, pg. 24

As to the allegation that trial counsel was ineffective for failing to request that the Judge respond in the affirmative to the jury's question, "If we say Antwan is guilty of murder, are we saying he, of the three, actually pulled the trigger?" since that was the language of the indictment

and the sole theory of the State's case, this Court finds this claim is without merit. Clearly counsel indicated that he believed Judge Westbrook should have instructed the jury that they were saying Applicant pulled the trigger because the hand of one, hand of all was not supported in fact. Additionally, Applicant amended this allegation to include ineffective assistance of appellate counsel. This Court does not find this issue to be more viable than the issues presented. There is no indication that had Judge Westbrook told the jury that by finding Applicant guilty of murder they were finding that he actually pulled the trigger the result would have been any different. Accordingly, this allegation is denied and dismissed.

As to the allegation that trial counsel was ineffective for failing to renew his motion for a mistrial after it became clear from the jury's question in Item No. 5 that one or more members of the jury had concluded that the Defendant did not shoot the deceased, this Court finds this claim is without merit. It is not clear that the jurors question indicates that one or members of the jury had concluded that the Defendant did not shoot the deceased. It is easy to speculate this from the note, but speculation is not enough to meet the burden of proof in a post-conviction relief case. Applicant has failed to present any evidence to support this position and asks this Court to rely on inferences and assumptions which this Court will not do. As such, the Applicant has failed to meet his burden of proof with regards to this claim and it is denied and dismissed.

As to the allegation that trial counsel was ineffective for failing to move for a new trial on the ground that the Judge charged the jury with the legal premise "the hand of one is the hand of all," where accomplice liability was not suggested in the indictment, the evidence, the closing statements, or the original charge, this Court finds this claim is without merit. Counsel moved for a mistrial prior to Judge Westbrook giving the charge and noted his motion was based on Judge

Westbrook's giving a hand of one, hand of all charge. See Tr. Vol. II, p. 146, line 25 – p. 147, line 16. Accordingly, this allegation is denied and dismissed.

As to the allegations that trial counsel was ineffective for failing to object to the Court giving an "Allen" charge after the jury indicated that it had a verdict on one count and could not reach a verdict on the other count after several hours of deliberation, this Court finds this claim is without merit and the allegation that trial counsel was ineffective for failing to object when the Court gave an improper Allen charge and for failing to request that the Court give a corrected charge, this Court finds this claim is without merit. Counsel noted his objection on the record both prior to the Allen charge and after the charge. Additionally, this Court finds no error in the charge as given. Accordingly, these allegations are denied and dismissed.

As to the allegation that trial counsel was ineffective for failing to get the Judge to correct his more detailed re-definition of the elements of "the hand of one is the hand of all" theory to the jury, this Court finds this claim is without merit. There is no indication that Judge Westbrook would have changed his charge and the charge was correct under the law of "hands of one, hands of all." Accordingly, this allegation is denied and dismissed.

As to the allegation that trial counsel was ineffective for failing to sufficiently articulate the proper grounds for objecting to the trial judge interjecting accomplice liability as an issue in this case by issuing a supplemental charge on "the hand of one is the hand of all," where there had been no previous discussion of the applicability of accomplice liability to the facts of this case- which should have been grounds for a mistrial, this Court finds this claim is without merit. It is clear from the record that counsel did object and preserved this issue for appeal. Counsel objected on the grounds that the facts did not support the charge and that it was not the State's theory of the case. There was a lengthy colloquy on the record regarding this issue and the issue was

adequately preserved. Accordingly, counsel was not ineffective and this issue is denied and dismissed.

As to the allegation that counsel was ineffective in failing to object to a jury charge under the theory "hand of one, hand of all" on the ground that the State had not pursued the theory of accomplice liability in their case in chief, this Court finds this claim is without merit. It is clear from the record that counsel did object and preserved this issue for appeal. Counsel objected on the grounds that the facts did not support the charge and that it was not the State's theory of the case. There was a lengthy colloquy on the record regarding this issue and the issue was adequately preserved. Accordingly, counsel was not ineffective and this issue is denied and dismissed.

As to the allegation that trial counsel was ineffective for failing to renew his motion for a mistrial and for failing to put forth adequate grounds for a mistrial after the lower court gave an improper supplemental charge on accomplice liability, this Court finds this claim is without merit. It is clear from the record that counsel did object and preserved this issue for appeal. Counsel objected on the grounds that the facts did not support the charge and that it was not the State's theory of the case. There was a lengthy colloquy on the record regarding this issue and the issue was adequately preserved. Accordingly, counsel was not ineffective and this issue is denied and dismissed.

As to the allegation that appellate counsel erred in failing to raise counsel's objection to the lower court's supplemental charge on the law of accomplice liability as an issue on direct appeal, this Court finds this claim is without merit. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." <u>Gray v.</u>

Greer, 800 F.2d 644, 646 (7th Cir. 1986). This Court does not find that this issue would have been more successful than the issue raised on appeal. To call into question the issues presented on appeal forces this Court to second-guess appellate counsel's professional judgment. Applicant presented no evidence regarding why counsel chose to present one issue over the other and therefore this allegation is denied and dismissed.

As to the allegation that appellate counsel failed to brief the objection to the 2nd supplemental accomplice liability charge, this Court finds this claim is without merit. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). This Court does not find that this issue would have been more successful than the issue raised on appeal. To call into question the issues presented on appeal forces this Court to second-guess appellate counsel's professional judgment. Applicant presented no evidence regarding why counsel chose to present one issue over the other and therefore this allegation is denied and dismissed.

As to the allegation that appellate counsel erred in failing to raise the issue that a mistrial should have been granted because of the misapplication of the accomplice liability charge, this Court finds this claim is without merit. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). This Court does not find that this issue would have been more successful than the issue raised on appeal. To call into question the issues presented on appeal forces this Court to second-guess appellate counsel's professional judgment.

Applicant presented no evidence regarding why counsel chose to present one issue over the other and therefore this allegation is denied and dismissed.

As to the allegation that appellate counsel erred in failing to brief the issue of the lower Court's refusal to issue a "mere presence" charge where such an instruction was appropriate on the facts of this case, this Court finds this claim is without merit. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). This Court does not find that this issue would have been more successful than the issue raised on appeal. To call into question the issues presented on appeal forces this Court to second-guess appellate counsel's professional judgment. Applicant presented no evidence regarding why counsel chose to present one issue over the other and therefore this allegation is denied and dismissed.

As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

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.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik

v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court advises 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 227 for appropriate procedures for appeal.

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 _____ day of ____________, 2007.

J. Michelle Childs
Presiding Judge
Fifth Judicial Circuit

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________________, South Carolina.

29 OCT 2008
CERTIFIED TRUE COPY
OF ORIGINAL FILED
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