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MAY 23 2016

S.C. SUPREME COURT

May 20, 2016

Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: Eugene D. Patterson vs. State of South Carolina
C/A No: 2014-CP-40-01202

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Patterson in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-708-6767.

Sincerely,

Jonathan D. Waller

Cc: J. Clayton Mitchell, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

2014-CP-40-01202

Eugene D. Patterson, #331525,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Eugene D. Patterson, #321525, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed December 23, 2015, issued by the Honorable G. Thomas Cooper, Jr., Presiding Judge, Fifth Judicial Circuit.

Jonathan D. Waller

Giese Law Firm
SC Bar No.: 76290
1315 Blanding Street
Columbia, SC 29201
803-708-6767 (phone)
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jwaller@thegieselawfirm.com
ATTORNEY FOR PETITIONER

This 20 day of May, 2016.

Other Counsel of Record:
J. Clayton Mitchell, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
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S.C. SUPREME COURT

2014-CP-40-01202

Eugene D. Patterson, #321525,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, J. Clayton Mitchell, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 20th day of May 2016.

Kelly Giese

Kelly Giese

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2014CP4001202

Eugene D #321525 Patterson Jr
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court.

JEANETTE W. McBRIDE, C.C.P. & G.
RICHLAND COUNTY
FILED
2015 DEC 29 PM 4:12

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 30 day of Dec, 20 15 to attorneys of record or to parties (when appearing pro se) as follows:

Eugene D #321525 Patterson Jr Jonathan D Waller Megan Harrigan Jameson

Eugene D #321525 Patterson Jr
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Eugene D. Patterson, #321525, Applicant, v. State of South Carolina, Respondent.	**2014-CP-40-01202** **ORDER OF DISMISSAL**

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed February 25, 2014. Respondent filed a Return and Motion for a More Definite Statement on July 7, 2014, requesting an evidentiary hearing be convened. Jonathan D. Waller, Esquire, was appointed by the Richland County Clerk of Court. An evidentiary hearing was held on July 15, 2015, at the Richland County Courthouse. Applicant was present and represented by Counsel Waller. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's trial counsel, Tivis C. Sutherland, Esquire. The Court had before it the Richland County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, the trial transcript, and the appellate records.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted during April 2007 term of the Richland County Grand Jury for Murder (2007-GS-40-2137). He was represented by Tivis C. Sutherland, IV, Esquire. On May 5-13, 2008, Applicant proceeded to a

jury trial before the Honorable William P. Keesley, where he was convicted as indicted. Judge Keesley sentenced Applicant to forty-five (45) years' imprisonment.

Applicant filed a notice of appeal. Following briefing and oral arguments, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence by unpublished opinion. State v. Eugene D. Patterson, 2013-UP-154 (Ct. App. filed April 17, 2013). Thereafter, Applicant petitioned the South Carolina Supreme Court for certiorari. The South Carolina Supreme Court denied Applicant's petition by Order dated January 23, 2014. The Remittitur was sent on January 31, 2014.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Trial counsel was ineffective in:
    a. Failing to move for a severance;
    b. Failing to object to the jury instructions on mutual combat, transferred intent and proximate cause;
    c. Failing to request suppression or complete redaction of co-defendant, Tayson Boone's statement pursuant to Bruton[1]
    d. Failing to contemporaneously object to the victim's family being pointed out during testimony of Investigator Matt Ellis;
    e. Failing to object to State's Exhibit 14 being published to the jury after previously having been excluded;
    f. Failing to request a curative instruction after sustained objection to reference of a witness being murdered in an unrelated incident;
    g. Failing to object to testimony outside the scope of expertise for
        i. Zane Padgett and
        ii. Dr. Clay Nichols.
    h. Failing to object and move for a mistrial where witness pointed a weapon while testifying;
    i. Failing to object to leading questioning of Oliver Feldman;
2. Appellate counsel was ineffective in:
    a. Failing to raise the issue of whether Judge Keesley erred in allowing Robert Portee's testimony regarding threats made to him because he was cooperating with law enforcement.

[1] Bruton v. United States, 391 U.S. 123 (1968).

II. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order 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. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 386 S.E.2d at 625.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject

convictions, the transcripts, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the appellate records, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible.

Ineffective Assistance of Trial Counsel

Failure to Move for a Severance

Applicant alleges Counsel was ineffective for failing to make a motion to sever his case from co-defendant, Andre Tayson Boone's trial. This Court finds Applicant failed to meet his burden of proving trial counsel ineffective. Counsel testified he did not move for a severance because he believed the evidence against Boone was much stronger. He believed Boone was much more culpable and that Applicant would likely be acquitted when tried with Boone.

"Criminal defendants who are jointly tried [...] are not entitled to separate trials as a matter of right." State v. Dennis 337 S.C. 275, 281, 523 SE2d 173, 176 (1999) (citing State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Holland, 261 S.C. 488, 201 S.E.2d 118 (1973); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972)). "Charges can be joined in the same indictment and tried together where they 1) arise out of a single chain of circumstances; 2) are proved by the same evidence, 3) are of the same general nature; and 4) no real right of the defendant has been prejudiced." State v. Beekman 405 S.C. 225, 229, 746 S.E.2d 483, 486 (2013). A court should only grant a severance "when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent a jury from making a reliable judgment about a co-defendant's guilt." Id. at 282, 523 S.E.2d at 176.

This Court finds Counsel was not deficient in his decision to not move for severance. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). This Court finds that the legal and strategic decision to not move for a severance was reasonable in this situation. Counsel hoped to highlight that Boone was very likely the one who shot the fatal round that killed the victim. He emphasized in closing that it was impossible for Applicant to have fired the fatal round and that he was not responsible for the murder. This Court further finds no specific trial right was violated by trying Applicant and co-defendant Boone together. The confrontation issue regarding Boone's statement did not become an issue because Boone testified in his defense. Furthermore, the incident clearly arose out of the same circumstances, the charges were proved by the same evidence, and the charges are of the exact same nature.

Regardless, Applicant was not prejudiced by the joint trial with Boone. A cautionary instruction as to multiple defendants is sufficient to protect each co-defendant from prejudice that might result from a joint trial. See State v. Holland, 261 S.C. 488, 494, 201 S.E.2d 118, 121 (1973). Here, the trial court gave an instruction on the jury's duties regarding multiple defendants. (Trial Tr. p. 1603, line 21 – p. 1604, line 18; p. 1617, line 20 – p. 1618, line 6). These instructions negated any prejudice that may have resulted from the joint trial. Furthermore, Applicant has failed to show that a motion for severance would have been successful. Accordingly, Applicant has failed to prove prejudice from Counsel's decision not to move for a severance.

Failing to object to the jury instructions on mutual combat, transferred intent and proximate cause

Applicant alleges Counsel was ineffective in failing to object to the jury charges on mutual combat, transferred intent, and proximate cause. Counsel testified he did take issue with the State's theory of the case. Counsel testified that the State, in its opening statement, alleged that they would prove the case as an accomplice liability case under the hand of one, hand of all theory. Counsel testified he jumped all over that in his opening statement because he did not believe there to be any proof of the two defendants acting in concert. Counsel also testified that he objected to Judge Keesley's instructions on mutual combat.

This Court agrees with Counsel and finds that he did properly object and preserve for appeal the issue of whether the jury should have been charged with mutual combat. Counsel objected to the mutual combat charge, and Judge Keesley ruled there was ample evidence supporting the charge. (Trial Tr. p. 1469, line 13 – p. 1472, line 10). See Jackson v. State, 355 S.C. 568, 571, 586 S.E.2d 562,562 (2003) (quoting State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495 (1973)) ("Mutual combat exists when there is 'mutual intent and willingness to fight.'"). Codefendant's counsel objected to the transferred intent charge. (Trial Tr. p. 1472, lines 15-22). Judge Keesley charged transferred intent because there was a specific intent to kill a person but another person was killed. (Trial Tr. p. 1468, line 9 – p. 1469, line 1). This Court finds that although Counsel did not seem to join this objection to transferred intent, it would have been overruled. The charge was clearly applicable as a bystander to the fighting was shot and killed. Finally, as to the proximate cause charge, Applicant has similarly failed to meet his burden. Applicant cannot show that if he had made a challenge to the charge that it would have been successful. In any event, this Court finds the three challenged jury instructions were properly charged to the jury. This allegation is denied and dismissed with prejudice.

Failing to request suppression or complete redaction of co-defendant, Tayson Boone's statement pursuant to Bruton

Applicant alleges Counsel was ineffective for failing to request Boone's statement be completely redacted or suppressed. Counsel did move to have Boone's statement substantially redacted. (Trial tr. p. 250, lines 8-20). Counsel and the prosecuting solicitor then came to an agreement to redact Boone's references to Applicant. (Trial Tr. p. 256, line 14 – p. 255, line 7). Applicant argues the redaction was not proper and that the statement should have been completely suppressed. Counsel testified that he believed the redaction to be proper and actually helpful to Applicant. Counsel recalled that Boone's statement incriminated him noting that Boone admitted to firing a gun. Counsel testified that this statement helped show that the evidence against Boone was much greater than the evidence against Applicant. This trial strategy was reasonable and effective. This Court further finds that Applicant cannot show any prejudice or any Confrontation Clause Violation because Boone testified in his defense thus making the matter moot. See State v. McDonald, 412 S.C. 133, 139, 771 S.E.2d 840, 843 (2015) (recognizing that Bruton only applies when a *nontestifying* codefendant's confession implicating the defendant is admitted). This allegation is denied and dismissed with prejudice.

Failing to contemporaneously object to the victim's family being pointed out during testimony of Investigator Matt Ellis

Next, Applicant alleges Counsel was ineffective in failing to contemporaneously object to the victim's family being identified during the testimony of Investigator Matt Ellis. Specifically, Applicant argues Counsel should have promptly raised a Rule 403, SCRE, objection. The challenge exchange went as follows:

> **Q:** And is Mr. Wright [victim's father] here in the courtroom today?
> **A:** He is.
> **Q:** And where is he seated?
> **A:** He's seated, I believe, that's the third row on the end, green shirt on.

Q: And he actually had to identify his son there at the scene?
A: He did have to identify the son on the scene so we could have a positive I.D.
Mr. Sutherland [Counsel]: Your Honor, I'm sorry, it's just exceedingly prejudicial to point out the victim. I'm sorry.
Court: Say again.
Mr. Sutherland: I think it's exceedingly prejudicial to point out the family of the victim to the jury, sir.
Ms. Payne [Boone's Counsel]: We would join in as well.
Court: Well, the objection's not contemporaneous. And I don't want y'all to go into this any further.

(Trial Tr. p. 1149, line 24 – p. 1150, line 18) (parentheticals added). Counsel testified that while Judge Keesley stated that the objection was not contemporaneously made, he thought it was fairly close.

This Court finds Applicant failed to meet his burden. Applicant only argues that Counsel should have objected earlier in the questioning. This Court finds Counsel was not ineffective because he made the proper objection which Judge Keesley seemed to sustain because he scolded the solicitor for raising this line of questioning.

Failing to object to State's Exhibit 14 being published to the jury after previously having been excluded

Applicant further argues Counsel was ineffective for failing to object to State's Exhibit 14 being shown to the jury after it was excluded. Boone's counsel objected to a number of photographs of the victim that the State intended to introduce through forensic pathologist Dr. Clay Nichols. Judge Keesley previously ruled would Exhibit 14 be excluded under a Rule 403, SCRE, analysis. (Trial Tr. p. 344, lines 5-13). Applicant argues Exhibit 14 was shown to the jury during Dr. Nichols's testimony. (Trial Tr. p. 1029, lines 11-16). Solicitor Campbell brought it to Judge Keeley's attention that she referenced Exhibit 14 during her examination of Dr. Nichols. (Trial Tr. p. 1067, line 23 – p. 1071, line 7). Counsel made a motion for a mistrial which was joined by Boone's counsel. (Trial Tr. p. 1068, lines 15-23). Judge Keesley then ruled: "All right.

The motion for a mistrial is respectfully denied. If you've got these photographs a foot from you, I can tell a difference. If you've got them more than a couple of feet, you can barely tell the difference between them." (Trial Tr. p. 1070, line 22 – p. 1071, line 7). He also stated that he would tell the jury to disregard any reference to the Exhibit because it was not in evidence. This Court finds Applicant failed to meet his burden. Counsel made the proper motion for a mistrial which was ruled upon by Judge Keesley. This Court finds persuasive Judge Keesley's finding that the jury did not see the exhibit up close and therefore no grounds for a mistrial existed.

Failing to request a curative instruction after sustained objection to reference of a witness being murdered in an unrelated incident

Applicant alleges Counsel was ineffective for failing to request a curative instruction after a sustained objection to the reference of a witness being murdered in an unrelated incident. On cross-examination Boone's counsel Everhart questioned Investigator Matt Ellis on whether he interviewed or spoke to a number of people who were presumed to have been at the scene of the murder. Solicitor Campbell asked Investigator Matt Ellis on redirect specifically about some of these individuals. The challenged portion is as follows:

> **Q:** And Ms. Brabham testified to what she knew?
> **A:** That's correct.
> **Q:** And she was the one that was able to provide you information about anyone's identity?
> **A:** She was.
> **Q:** What about Doneisha Smallwod?
> **A:** Doneisha Smallwood was interviewed. She can't be here, she was murdered.
> **Mr. Sutherland:** Objection, Your Honor, it's inflammatory.
> **Ms. Everhart:** We would join in, Your Honor.
> **The Court:** Sustained. Disregard the last portion of the witness' statement.

Applicant argues Counsel was ineffective for failing to request a proper curative instruction. This Court finds Judge Keesley did issue a curative instruction when he told the jury to disregard that portion of the testimony. Counsel properly objected to Investigator Ellis's answer, Judge Keesley

sustained it, and then issued a *sua sponte* curative instruction. Counsel also did not want to bring attention to the statement by arguing for any further instructions. Applicant cannot prove deficiency or prejudice. This allegation must be denied and dismissed with prejudice.

Failing to object to testimony outside the scope of expertise

Applicant alleges Counsel was ineffective for failing to object to two experts testifying outside the scope of their expertise and qualifications. Applicant argues that both Lieutenant Zane Padgett and Dr. Clay Nichols testified outside the bounds of their qualifications. The Court will address each in turn.

Lieutenant Zane Padgett

Padgett was qualified as an expert in crime scene investigations. Padgett testified during voir dire as to his training which included fingerprint comparison, arson investigation, trajectory analysis, blood pattern analysis, crime scene reconstruction. (Trial Tr. p. 376, line 22 – p. 377, line 10). He testified he had been in forensics for nearly twenty-four (24) years and that he has been qualified in several other areas as an expert as well. (Trial Tr. p. 377, lines 5-10). Applicant argues Padgett testified outside of the scope of those qualifications on redirect by Solicitor Campbell when asked about the speed of a projectile.

> **Q:** Is there any way that the same bullet that went into the wall could have been the same one that killed him [victim]?
> **A:** I don't think so. The problem is that the bullet would have to be traveling at such a rate of speeds to penetrate that steel wall and once it did, it didn't come out because there's no evidence that the bullet came out of that wall anywhere. There's no way that that bullet could have been the one that actually killed Mr. Wright. As to where that projectile is, my best answer is that it did fragment. It hit something hard behind the wall and it completely fragmented away. I went back at a later date and removed several panels from the Mobil State with tools in order to locate the projectile behind the wall, it was never found.

(Trial Tr. p. 407, lines 7-23).

GE 10

This Court finds that Padgett was qualified to testify as to the ballistics evidence collected at the scene. He noted his training and education regarding ballistic trajectory analysis and testified as to his opinion on the angle the 9mm projectile hit the wall. (Trial Tr. p. 400, line 12 – p. 401, line 18). This testimony was within the scope of his expertise as an expert in crime scene investigations.

As to prejudice, Applicant failed to meet his burden of proof. Counsel testified that Padgett may very well have been qualified as an expert specifically in firearms if he challenged his testimony. Furthermore, this Court finds Applicant has not proven that the State could not have further qualified Padgett through voir dire in order to elicit the testimony.

Dr. Clay Nichols

Dr. Nichols was qualified and admitted as an expert in forensic pathology. During voir dire, he testified he had been qualified several hundred times to give testimony detailing his conclusions drawn from conducting autopsies. (Trial Tr. p. 1016, line 21 – p. 1018, line 10). Applicant alleges Counsel was ineffective for failing to object to his comments on the power of different caliber guns.

> **Q:** Doctor, during the course – as a forensic pathologist, you're somewhat familiar with types of guns?
> **A:** Yes.
> **Q:** And are you familiar with a nine millimeter?
> **A:** Yes, I am.
> **Q:** Are you familiar with a .380?
> **A:** Yes, I am.
> **Q:** Are you familiar with a .32 caliber revolver?
> **A:** Yes, I am.
> **Q:** Of those, do you have an opinion, as a forensic pathologist, which is the actual most powerful gun?
> **A:** I pick the nine millimeter. The .380's a very similar gun. The .32 is a less powerful weapon with less penetrating power.
> **Q:** With less penetrating power?
> **A:** Yes.

Q: Once the bullet entered the back of the head and exited out the front, can you say where it went?
A: No.
Q: Could it have continued to travel?
A: Yes. It will continue to travel until it runs out of energy and falls to the ground or is embedded in another object.

(Trial Tr. p. 1030, line 22 – p. 1031, line 20).

This Court finds Counsel was not ineffective in failing to object to the challenged testimony because Dr. Nichols was able to testify to the caliber of certain handguns because the penetrating power is a part of a pathologist's analysis in determining a likely murder weapon. Pathologists routinely give expert testimony on the type of gun they believe was used in a murder. Applicant has failed to meet his burden in proving Counsel was ineffective.

Furthermore, Applicant has not shown he was prejudiced by this testimony. Applicant has failed to show that if he had made that objection it would have been sustained or that its admission likely affected the trial. Investigator David Collins, the next witness called by the State, was qualified as an expert in firearms. He testified and explained how semiautomatic pistols and revolvers work. He also testified to their penetrating power. So even if Dr. Nichols's testimony was excluded, the testimony still gets before the jury through Investigator Collins. This allegation is denied and dismissed with prejudice.

Failing to object and move for a mistrial where witness pointed a weapon while testifying

Next, Applicant alleges Counsel was ineffective in failing to object and move for a mistrial when Investigator Collins was handling a weapon while testifying. Investigator Collins was qualified as an expert in firearms and explained to the jury how nine millimeters, .380, and .32 caliber handguns work and their differences. Counsel did make an objection that Investigator Collins should not be able to "waive these scary looking guns around up there, sir, I just don't see where it would be – where it would outweigh the prejudice." (Trial Tr. p. 1056, lines 18-19).

Counsel goes on to argue that Investigator Collins should not be able to demonstrate how the guns operate in that fashion. Judge Keesley ruled that the State would not be allowed to introduce any further demonstration through Investigator Collins. Judge Keesley relied on South Carolina Court Administration's *Guidelines for Safe Handling of Firearms as Evidence in the Courtroom.* (Trial Tr. p. 1061, line 14 – p. 1062, line 11). He noted the procedures set out in the manual were not followed.

This Court finds Applicant failed to meet his burden. Notably, Counsel did make an objection and received a favorable ruling. This allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal.

As to Applicant's argument that the objection was not made contemporaneously and that some demonstration had already taken place, this Court finds Applicant failed to meet his burden. In State v. McIver, 238 S.C. 401, 120 S.E.2d 393 (1961), the Supreme Court held that it did not find any impropriety on the part of the solicitor in doing a demonstration, noting that the pistol was in evidence and that the use of the gun to demonstrate it had a heavy trigger was relevant. Here, the guns were previously admitted into evidence and were relevant to prove which gun was the likely murder weapon, whether it be a revolver or a semiautomatic. Applicant has also failed to show how he was prejudiced.

Failing to object to leading questioning of Oliver Feldman

Applicant further alleges Counsel was ineffective in failing to object to the leading questioning of witness Oliver Feldman. Applicant points specifically to a portion of Feldman's testimony where Feldman says that he "made a mistake [in his prior statement] and thought it was two people." (Trial. Tr. p. 807, lines 24-25). Applicant argues this response was elicited after a leading question. Counsel testified that it is a judgement call on whether to object to a leading question. He explained that he could not object to every leading question asked by the solicitor. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). This Court finds Counsel provided a reasonable strategy for not objecting. This Court also notes that Judge Keesley denied the motion for a mistrial and motion to disallow any further testimony which was made by codefendant's counsel. Applicant cannot show that if he had joined those motions that Judge Keesley would have ruled in his favor. Judge Keesley also ruled that the proper way to deal with Feldman allegedly changing his statement was by impeaching him with his prior inconsistent statement. Counsel does this effectively on cross examination. This allegation is denied and dismissed with prejudice.

Ineffective Assistance of Appellate Counsel

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial.

See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

"Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is 'difficult to demonstrate that counsel was incompetent.'" United States v. Mason, No. 3:06–607–CMC, 2012 WL 5845807 at *1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). While appellate counsel is required to provide effective assistance of counsel, "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, 526 (1990), citing Jones v. Barnes, 463 U.S. 745 (1983). "For judges to second-guess reasonable professional judgments and impose on . . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." Jones, 463 U.S. at 754. Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. 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 deficient performance. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

"To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal." United States v. Mason, 2012 WL 5845807 at *1 (citing Smith v. Robbins, 528 U.S. at 285-86, 120 S. Ct. at 764).

Here, appellate counsel argued the trial judge erred in denying Counsel's motion for a directed verdict of acquittal as the State's circumstantial evidence against him did not rise above mere suspicion. Appellate counsel argued that the State could not prove Applicant fired the fatal shot and that the evidence was clear that the codefendant was responsible for the murder.

As an initial matter, this Court notes that appellate counsel did not testify at the PCR hearing. This Court finds that a presumption of effectiveness applies and that it is Applicant's burden to prove that appellate counsel was ineffective in failing to raise stronger issues that would have resulted in a reversal of Applicant's conviction. This Court cannot speculate as to whether appellate counsel considered raising these issues or believed they would have any merit. See Bannister v. State, 333 S.C. at 303, 509 S.E.2d at 809. Applicant alleges appellate counsel was ineffective in failing to raise an issue regarding a hearsay objection.

Applicant argues Counsel was ineffective in failing to raise the issue of Judge Keesley allowing alleged hearsay testimony from witness Robert Portee that he was threatened when others learned he was cooperating with law enforcement.

> A: I mean, I didn't see anyone with a firearm. I told you why I said that. I was getting threatening phone calls before the police even came to my house. I don't want to put my family in jeopardy when I'm getting threatening phone calls saying, I know what your mom drive, I know where you live, I'm going to kill your parents, I'm going to kill your brother.

> Mr. Sutherland: This is hearsay, Your Honor, that was not solicited and I ask that it be stricken from the record.
> Ms. Campbell: Your Honor, he asked him why he didn't tell the truth. I think he has a right to explain it.
> Mr. Sutherland: I don't think I asked why. I said he wasn't telling the truth.
> Ms. Campbell: Okay. And he has a right to explain why he wasn't telling the truth.
> Mr. Sutherland: I didn't ask him why.
> The Court: This falls within the exception under Rule 803(3). Go ahead. It's overruled.

(Trial Tr. p. 603, lines 5-24).

This Court finds Applicant failed to meet his burden in proving appellate counsel was ineffective. Applicant has failed to prove that the proposed issue is stronger than the one raised. "The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." State v. Foster, 354 S.C. 614, 620, 582 S.E.2d 426 (2003). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." Id at 621, 582 S.E.2d at 429. To warrant reversal, an appellant must show not only an alleged error, but also resulting prejudice. State v. Fulton, 333 S.C. 359, 363-64, 509 S.E.2d 819, 821 (Ct. App. 1998). The trial court admitted Portee's testimony as to his mental state. See Rule 803(3), SCRE. Portee was attempting to explain why his statements were inconsistent after he was impeached by Counsel. It is not likely that an appellate court would find the trial court abused its discretion in admitting the statement. This allegation is denied and dismissed.

All Other Allegations

As to any and all allegations that were raised in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 22 day of December, 2015.

G. Thomas Cooper, Jr.

G. THOMAS COOPER, JR.
Presiding Judge

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