THE

GIESE

LAW FIRM, LLC

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JAN 20 2017

S.C. SUPREME COURT

January 16, 2017

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

Re: Thomas E. Davis vs. State of South Carolina
C/A No: 2013-CP-21-0846

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. Davis 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: Lindsey McCallister, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JAN 20 2017
S.C. SUPREME COURT

APPEAL FROM FLORENCE COUNTY
Edgar W. Dickson, Circuit Court Judge

2013-CP-21-0846

Thomas E. Davis, #351299,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Thomas E. Davis, #351299, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed December 29, 2016, issued by the Honorable Edgar W. Dickson, Presiding Judge, Twelfth Judicial Circuit.

Jonathan D. Waller

Giese Law Firm
SC Bar No.: 76290
1315 Blanding Street
Columbia, SC 29201
803-708-6767 (phone)
803-708-6769 (fax)
jwaller@thegieselawfirm.com
ATTORNEY FOR PETITIONER

This 17 day of January, 2017.

Other Counsel of Record:

Lindsey McAllister, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

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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, Lindsey McAllister, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 18th day of January 2017, to her office located at P.O. Box 11549, Columbia, SC 29211.

Kelly Giese

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP- 21-846

Thomas E Davis #351299

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. ☐ See Page 2 for additional information.

☐ **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:

ORDER INFORMATION

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

2016 DEC 30 AM 9:

FILED

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 (List amount(s) below)
		$
		$
		$

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**

CERTIFIED: A TRUE COPY
Connie Rae-Spearin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

For Clerk of Court Office Use Only

This judgment was entered on the 29 day of Dec, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 30 day of Dec 2016 to attorneys of record or to parties (when appearing pro se) as follows:

J. Waller
1315 Blanding St.
Columbia, SC 29201
ATTORNEY(S) FOR THE PLAINTIFF(S)

L. McAlister
P.O. Box 11549
Columbia, SC 29211
ATTORNEY(S) FOR THE DEFENDANT(S)

Connie Reel-Dhearin
CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA COUNTY OF FLORENCE	)	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT
Thomas E. Davis, #351299, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2013-CP-21-0846 AMENDED **ORDER OF DISMISSAL GRANTING WHITE V. STATE APPEAL**

FILED
2016 DEC 29 AM 11:04
CONNIE REEL-SHEARIN
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed March 27, 2013. Respondent made its Return on March 18, 2013. The Court convened an evidentiary hearing into the matter on October 9, 2014, at the Florence County Courthouse. Applicant was present at the hearing and represented by Jonathan Waller, Esquire. J. Croom Hunter, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the evidentiary hearing, Applicant testified on his own behalf. Respondent also presented testimony from trial counsel, Richard W. Strobel, Esquire (Counsel). The Court also had before it a copy of the trial transcript, the Florence County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

I. PROCEDURAL HISTORY

The Applicant is presently confined in SCDC pursuant to orders of commitment from the Florence County Clerk of Court. Applicant was indicted at the September 2011 term of the Florence County Grand Jury for attempted murder, armed robbery, and possession of a weapon

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Connie Reel-Shearin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

during the commission of a violent crime (2011-GS-21-1371). Richard W. Strobel, Esquire represented the Applicant.

The State proceeded to trial on June 18, 2012, and the jury found the Applicant guilty as indicted on the armed robbery and weapon possession charges. As to the attempted murder charge, the jury found the Applicant guilty of the lesser-included offense of assault and battery of a high and aggravated nature. The Honorable Thomas A. Russo sentenced the Applicant to concurrent terms of thirty (30) years imprisonment for armed robbery and twenty (20) years imprisonment for assault and battery of a high and aggravated nature. Judge Russo also sentenced the Applicant to a consecutive five (5) year prison term for possession of a weapon during a violent crime. The Applicant did not appeal.

II. ALLEGATIONS

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

1. Ineffective assistance of counsel

III. SUMMARY OF TESTIMONY

During the evidentiary hearing, Applicant testified he was charged with attempted murder, armed robbery, and weapons possession. Applicant testified he was arrested with both codefendants, and they were charged with the same crimes, except the weapons possession. Applicant testified he was represented by Richard Strobel (Counsel). Applicant testified he retained Strobel after other inmates recommended his services. Applicant testified he first met with Counsel on April 12. Applicant testified Counsel had him sign a representation agreement

and told Applicant he would come back again. Applicant testified he never met with Counsel again, and no one from Counsel's office ever came to see him. Applicant testified he spoke with Counsel on the phone four or five times, and Counsel charged $1500 more. Applicant testified he was denied bond, but his codefendants were able to get bonded out. Applicant testified he did have a bond hearing. Applicant testified Counsel told him the State of Connecticut had a hold on him for unrelated charges, and he would not get bond.

Applicant testified Counsel never discussed any of the evidence or possible defenses with Applicant. Applicant testified he was never made aware that SLED was involved in the case until the day of the trial, and he never saw any SLED reports. Applicant testified he wrote to SLED to get the reports from the GSR test. However, Applicant testified he never asked Counsel for copies of the test results. Applicant testified he and Counsel never discussed retaining an expert, and they never discussed any of the witnesses. Applicant testified he provided Counsel with a number of witnesses to call on his behalf, but they did not testify, and Counsel never discussed those witnesses with Applicant.

Applicant testified he and Counsel never discussed his trial. Applicant testified the State claimed he was the shooter, but he claimed innocence. Applicant testified his hands tested positive for gunshot residue, but he did not know how the residue got on his hands. Applicant testified the gun did not have his fingerprints on it. Applicant testified he was aware none of his codefendants tested positive for gunshot residue. Applicant testified he and Counsel never discussed any of his codefendants, and that he and Counsel got into an argument at trial. Applicant testified he did not believe Counsel was prepared for trial. Applicant testified Counsel never discussed his right to testify with him, but Applicant testified it was his decision to testify.

Applicant testified that he was unaware, and that Counsel had not advised him, that his testimony would potentially change the order that closing arguments would be presented to the jury.

Applicant testified he believed Counsel was ineffective for failing to object to a "hand of one, hand of all" jury charge, but Applicant testified he brought up the hand of one charge during his own trial testimony. Applicant testified he did contact Counsel following his conviction and requested that Counsel file an appeal of his conviction, and that the response he received from Counsel was that "I don't do appeals." Applicant testified Counsel never discussed Applicant's right to an appeal of his conviction. Applicant then testified that he attempted to file an appeal on his own but was unable to do so because he was in the Reception and Evaluation Institution of the Department of Corrections. Applicant testified he told Counsel he wanted to go to trial, but Counsel advised him to plead guilty.

On cross-examination, Applicant again claimed he and Counsel never discussed the evidence against him. Applicant testified he was sitting in the back seat of the car when the crime occurred. Applicant admitted that Arenthus Garrett testified that he witnessed the shooter get in the back seat of the car. Applicant testified he had dreadlocks when he went to trial, but his hair was cut after he went to SCDC. Applicant conceded that some witness testimony claimed the shooter had dreadlocks. Applicant conceded he was the only codefendant who tested positive for gunshot residue on his hands. Applicant testified he had been shooting guns in Darlington County earlier in the day. Applicant testified he did not understand why the gun did not have his fingerprints on it, but upon further questioning, he did admit the gun had rubber grips which were difficult to pull fingerprints from. Applicant testified he did not have any experts or other witnesses at the PCR hearing to testify on his behalf.

Applicant claimed he testified at trial to get the truth out for the jury. Applicant testified it was his decision to testify. Applicant again claimed that Counsel never discussed anything with him. Applicant testified he brought up the "hand of one, hand of all" at trial to explain why he ran from the police. Applicant admitted he is guilty of the lesser offenses, but he denied he was the shooter. Applicant admitted that he did apologize after he was convicted, but he testified his apology was for not stopping the crime, rather than committing it.

After the conclusion of Applicant's testimony, the State presented testimony from Trial Counsel. Counsel testified he recalled representing Applicant and reviewed his file prior to the PCR hearing. Counsel testified he was retained to represent Applicant. Counsel testified he met with Applicant "too many times." Upon further questioning, Counsel testified he met with Applicant at least a dozen times prior to trial at the detention center. Counsel testified he and Applicant also spoke on the phone multiple times. Counsel testified he did not need to meet with Applicant any more than he did in order to prepare for trial. Counsel testified he went over the elements of the charges against Applicant. Counsel also testified he filed Rule 5 and Brady motions and went over the discovery materials with Applicant. Counsel testified Applicant never asked for a copy of his discovery materials.

Counsel testified he "supposed" the evidence against Applicant was strong. Counsel testified he discussed Applicant's version of events and prepared the case with the intention of going to trial. Counsel testified Applicant never gave him the names of any witnesses to interview. Counsel testified he would have attempted to contact them if Applicant had given him any names. Counsel testified the State never conferred any plea offers. Counsel testified he orally went over the SLED reports with Applicant. Counsel testified that he argued to the jury that

Applicant's DNA was not found anywhere. Counsel testified he moved for a directed verdict after the State's case and renewed his motion at the close of testimony.

Counsel testified he never likes for his clients to testify but Applicant was adamant that he take the stand, even over Counsel's advice. Counsel testified he and Applicant did go over his prior record before he took the stand. Counsel testified he and the judge both reviewed Applicant's constitutional rights prior to his testimony. Counsel testified Applicant brought up the "hand of one, hand of all" during his testimony, but Counsel did not have a problem with the charge when the solicitor asked for it because he believed the charge would be more beneficial than detrimental to Applicant's case during jury deliberations because it could help persuade the jury Applicant was not the shooter. Counsel recalled the judge saying on page 315 of the trial transcript that he believed the charge would help Applicant as well. Counsel testified Applicant was convicted of the lesser-included offense of ABHAN. Counsel testified he told Applicant before the trial that he had the right to appeal if he was found guilty. Counsel testified Applicant did not ask him to appeal the verdict. Counsel testified he did not believe Applicant had any likelihood of success on appeal.

On cross-examination, Counsel testified he kept notes of his meetings in his file, but he did not have the dates of the meetings he had with Applicant. Counsel testified his notes contain what he and Applicant spoke about at the meetings. Upon further questioning, Counsel testified that he had reviewed his file in preparation for the evidentiary hearing, however, Counsel did not have his file with him at the hearing and could not produce notes or even dates of any times that he testified that he met with Applicant. Counsel testified he does not discuss the evidence until he gets all of the Rule 5 and Brady materials. Counsel testified that SLED did perform a GSR

test on Applicant, and Applicant tested positive. Counsel testified he told the jury about a movie where a suspect got gunshot residue on his hands from being put in the back of a police car and rubbing his hands on the bench as one possible way Applicant could have tested positive. Counsel testified Applicant brought the movie to his attention. Counsel testified he told Applicant the GSR test was positive but did not explain the mechanics of the test itself. Counsel testified he did not see a need to talk to the SLED forensics analysts. Counsel testified he did not talk to the Florence County crime scene investigator. Counsel testified Applicant's fingerprints were not found. Counsel testified he did not have an independent fingerprint analysis done because he was afraid Applicant's fingerprints would be found on the weapon or the ammunition. Counsel testified there was no benefit to having fingerprint testing done. Counsel testified he did not consult any experts. When asked whether the defense strategy would have changed prior to trial had Applicant's fingerprints, or some other person's fingerprints, been found on the weapon, Counsel was unable to provide an answer.

Counsel testified he did not bring up the witnesses' prior criminal record as part of his trial strategy. He testified that a hearing was held to determine the admissibility of some Rule 609, SCRCP, impeachable conviction evidence regarding several of the witnesses. One witness in particular, Arenthus Garrett, had several prior convictions that he would have been subject to questioning about. When asked about Counsel's trial strategy regarding failing to question Mr. Garrett regarding those prior convictions when Mr. Garrett later testified for the State, Counsel responded, "to win."

Counsel testified he did not object to exhibits being entered without a thorough foundation because he and the solicitor marked the exhibits before the trial to save time. Counsel

testified he would have objected to the exhibits based on lack of foundation if he thought it was needed. When asked specifically what the trial strategy behind State's exhibits 1-37, 39, and 40 being admitted into evidence, pre-trial, without objection or foundation, Counsel responded by asking Applicant's PCR Counsel, in a believed sarcastic manner, "I don't know, what are they?" When Counsel ultimately answered the original question, his response to the question of trial strategy was "to win."

Counsel was asked several times in regards to several different specific questions regarding what his trial strategy was for making certain decision. Numerous times in response to those specific questions of trial strategy, Counsel testified that his strategy was "to win." Counsel testified that he waived his opening statement because he did not want to put certain things in front of the jury prematurely. Counsel testified that once the trial commenced, he elected to not give an opening statement, but to address the jury at a later time, but that ultimately he never did address the jury until closing arguments. Counsel testified that if Tyon Evans had testified based upon a statement that was not disclosed in the Rule 5 and Brady materials, Counsel would have "raised Hell." Counsel testified he would have asked for a mistrial if any statements came in that were not included in the discovery materials. Counsel testified Applicant was going to attempt to refute Evans' testimony when he took the stand himself. Counsel testified Applicant was "overbearing in his desire" to testify. Counsel testified he did not recall if he advised Applicant that he would waive the last closing argument by testifying. Counsel testified he did not object to the solicitor's cross examination of Applicant because Applicant claimed he was not the shooter, and objecting would have made it appear to the jury that Applicant was attempting to hide something. Counsel testified he did not object to solicitor's statement in closing that he was

"sorry" for Applicant's ignorance because it was the solicitor's opinion, and he did not think it would have been good trial strategy to object during closing and that he thought it was "rude" to object during a closing argument. Finally, Counsel testified that he did not file an appeal following the conviction of Applicant because he didn't feel that there were issues to appeal, despite the fact that he had been overruled on several objections during the course of the trial.

On redirect, Counsel testified it was trial strategy not to hire a fingerprint expert because finding Applicant's fingerprints would only have hurt him. Counsel testified he did object to the admission of Exhibit number 38. Counsel testified he did not believe making an opening statement would have helped his client because it would have locked him into what Applicant was going to say on the stand, and he was not confident Applicant would not change his story when he took the stand. Counsel testified he did not attempt to impeach the victim because it would make his client look bad. Counsel testified he only objects to closing arguments when it is absolutely necessary because he thinks it is rude. He testified he did not believe there was anything in the solicitor's closing worth objecting to. Finally, Counsel testified he did not know if his trial strategy would have changed if someone else's fingerprints were found on the gun, but it would not have changed his trial strategy if Applicant's prints were found on it.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. As an initial matter, this Court finds Counsel's testimony credible and Applicant's testimony not credible.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003):

A. Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (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.

Applicant alleges Counsel was ineffective for failing to thoroughly challenge the State's case at trial. This Court finds Applicant's argument fails because he has not shown Counsel was deficient in any way, and he has not shown any prejudice resulting from Counsel's alleged ineffectiveness.

A. Alleged Deficiency

Despite Applicant's testimony to the contrary, Counsel's testimony at the PCR hearing clearly showed that Counsel received, reviewed, and considered all of the State's evidence in the case, and Counsel met with Applicant at least a dozen times to discuss the case and prepare Applicant's defense. As such, Counsel had plenty of time to devise his overall strategy in the case. If Applicant's testimony that he only saw Counsel one time prior to trial is to be believed over Counsel's testimony, the Court's inquiry need not proceed any further. However, this Court finds that Applicant's testimony was wholly not credible, just as the jury found Applicant's testimony at trial to be unbelievable. After all, the jury considered Applicant's testimony and decided he was not telling the truth when they convicted him. In fact, Counsel pointed out on the stand that Applicant was lying about the number of times they met, because Counsel appeared with Applicant at his bond hearing, which would have accounted for at least one meeting after their initial consultation.

Counsel was not ineffective for failing to thoroughly challenge the State's case at trial because Counsel's decisions were shaped by his trial strategy. "[T]he court should recognize that

counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. When counsel articulates a strategy, it is measured under an objective standard of reasonableness. Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 691. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Id. at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

While Counsel's basic response to Applicant's questions of his trial strategy was "to win," when pressed, Counsel gave clear and unambiguous reasons why he chose to make various decisions throughout the trial.

First, Applicant contends Counsel was ineffective for failing to retain or consult a fingerprint expert. However, failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported by mere speculation as to the result. Rollinson v. State, 346 S.C. 506, 552 S.E.2d 290 (2001). A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence. Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995); Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005). Regardless, Counsel's explanation for this strategic decision was more than adequate. Because Applicant's fingerprints were not found on the gun, Counsel reasoned there was no benefit to having any further testing done on the weapon. If, Counsel explained, Applicant's fingerprints were found on the weapon, it would only hurt Applicant's case. If Applicant's fingerprints were not found on the weapon, there was also nothing to be gained because the State already conceded Applicant's fingerprints were not found. Applicant claims that some mystery shooter's prints would have been found on the weapon; however, Applicant was the only codefendant who tested positive for gunshot residue. Clearly Counsel's reasoning was that if anyone's prints were to be found on the gun, they would most likely belong to Applicant.

Additionally, Counsel cannot be held deficient for failing to retain an expert where he undertakes a vigorous cross-examination of the State's expert. See Frasier v. State, 306 S.C. 158,

410 S.E.2d 572 (1991). Applicant argues Counsel was deficient for not even consulting with an expert because Counsel essentially did not know what he did not know. However, Counsel has been trying criminal cases for decades and is fully capable of determining whether he needs to consult an expert or not. Applicant claims Counsel did not adequately rebut the evidence presented by the State's crime scene expert (Paul Bird); however, the record reflects Counsel did thoroughly cross-examine Bird for five (5) pages in the transcript. Record, 237-242. As such, Counsel's performance with regards to the weapon and any expert fingerprint testimony was not deficient.

Applicant next contends Counsel was ineffective for not objecting when the solicitor requested the judge give the jury a "hand of one" charge. However, Counsel testified at the PCR hearing that he did not object to the charge because he felt it could be beneficial to his client. Applicant cites numerous cases to support his position; however, they are distinguished from this case because here Applicant brought up the theory of accomplice liability on his own when he testified before the jury, and Counsel reasoned the charge could benefit Applicant. Applicant, a layman, was giving an unresponsive legal argument during his testimony and not testifying to the facts surrounding the incident, and such argument should not have normally been construed as sufficient to substantiate a jury charge of accomplice liability. However, "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, at 691. When the solicitor asked the judge to charge "hand of one, hand of all" the following took place:

> The Court: Mr. Strobel, do you have any position on that?
> Mr. Strobel: I'm not gonna object.

> The Court: I don't blame you. I think you're [the solicitor] instilling in this case an issue that's not here, but I'll need to look at the charge I've got unless you have something you want me to consider.

Record, at 315. Clearly, even the trial judge agreed with Counsel's strategy in not objecting to the charge. Counsel obviously believed the charge would only serve to further confuse the jury about the State's case and show the solicitor was unsure which theory of the case was correct. Counsel's reasoning was obviously correct to a certain degree because the jury found Applicant guilty of the lesser included ABHAN. As such, Counsel's performance cannot be deemed ineffective, and Applicant has failed to show any resulting prejudice.

Applicant next contends Counsel was ineffective for failing to object to the State's exhibits being admitted into evidence without any foundation. However, Counsel described his reasoning at the PCR hearing, explaining that he and the solicitor went through the exhibits prior to trial, so he was already aware of what the solicitor was planning to admit. Counsel explained that if he had a problem with the admission of any exhibits, he would object. Indeed, Counsel did object to the admission of State's Exhibit #38. Counsel may be found ineffective for failing to object to inadmissible evidence. See Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001). However, Applicant has failed to show that any of the State's exhibits would have been otherwise inadmissible. Counsel's strategy behind not objecting to the admission of the exhibits was obviously to attempt to keep the jury from developing an unfavorable opinion of his client from constant interruptions and objections based on minor procedural issues. Accordingly, Applicant has not shown any prejudice from Counsel's decision not to object.

Applicant next contends Counsel was ineffective for waiving his opening statement. However, Counsel's testimony at the PCR hearing showed Counsel was concerned by

Applicant's insistence that he take the stand in his own defense. Counsel's decision not to present an opening statement was reasonable because he was unsure what story Applicant was going to tell on the stand based on his previous conversations with Applicant. As such, Counsel's concern over presenting conflicting theories of the case to the jury was well-founded, and his strategy made sense. Furthermore, Applicant has not shown any prejudice from Counsel's decision to waive his opening statement.

Applicant next argues Counsel was ineffective for not attempting to impeach the state's eyewitness Arenthus Garrett based on his prior criminal record. However, Counsel testified he felt there was little to be gained by attempting to impeach the witness. Garrett did not positively identify Applicant as the shooter; he only described the shooter's physical appearance and actions. Counsel reasonably thought that an attempt to demonize Garrett as a criminal would serve no beneficial purpose in helping his client, but could possibly leave the jury with a negative impression. As such, his strategy was reasonable. Furthermore, Applicant has not shown how Counsel's decision not to impeach Garrett has prejudiced Applicant. After all, Applicant was convicted of the lesser-included offense of ABHAN, to which he admitted his guilt at the PCR hearing.

Applicant's next ground is that Counsel should have objected during the solicitor's cross-examination of Applicant. The cross examination of Applicant by the Solicitor can only be described as "contentious." Record, at 300-307. Mr. Strobel did not make a single objection during the Solicitor's cross, despite several questions being objectionable. One question in particular was particularly objectionable with the Solicitor asking, "All right. And of course, you being a great, someone who doesn't like this type of thing, you immediately came to the aid of a

three year old while his father was getting pistol whipped and shot?" Record, at 306, L. 5. Applicant contends that this question impermissibly brings the defendant's character into question. When asked what the trial strategy behind not objecting to this or any other question during the Solicitor's cross examination, Counsel, yet again, replied, "to win." Applicant contends that this is not a valid trial strategy for failing to object to this type of question, however this Court finds that Counsel is presumed to have given competent representation and Applicant has not made overcome this presumption to show that Counsel failed to do so.

Applicant also contends Counsel was ineffective for not objecting to the solicitor's statement during closing arguments that he felt sorry for Applicant. Record, at 345. Additionally, Counsel explained that he generally only objects during closing arguments if there is something "major" to which he thinks he should object. Applicant contends Counsel's statement that objecting during closing arguments is rude is not a valid trial strategy; however, if Counsel believes it is rude, it is certainly possible such objections could have an adverse effect on the members of the jury as well. As such, Counsel's strategy for not objecting was reasonable. Furthermore, Applicant has not proven any prejudice resulting from the solicitor's comments.

B. Failure to Show Prejudice

Even assuming *arguendo* that Counsel's performance was deficient, Applicant has failed to show any prejudice resulting from Counsel's alleged ineffectiveness because Applicant was convicted based on overwhelming evidence. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), *cert. denied,* 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305

S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008).

The record before the Court combined with the testimony from the PCR hearing clearly highlight the overwhelming evidence of Applicant's guilt that was presented to the jury. Johnny Hendricks (victim) testified that someone matching Applicant's description (hair in a ponytail) walked up and shot him in the back of the head while he was holding a small child in his lap. Record, at 77. Arenthus Garrett then testified he looked out his window after hearing a shot and saw the shooter wearing a light colored shirt and dreadlocks pulled into a ponytail. Record, at 90. Garret testified the shooter got into the backseat of the Nissan Altima that was used as the getaway car. Record, at 92. Almost immediately after the Altima pulled away from the shooting, a vehicle driven by undercover Florence Police Department officers took up pursuit. Officer Rodney Fridley testified that after a high speed chase, the Altima eventually came to a stop, and three people jumped out. All three were apprehended. Record, 98-108. Officer Jessie Collins testified he observed Applicant hiding underneath a house shortly after the suspects bailed out of the car. Collins testified he was forced to taze Applicant after a struggle, and that Applicant was the only one of the three suspects who had dreadlocks. Record, 111-18. Officer Kendrick Spears of the Florence Police Department testified that he found the gun in a wood line in the direction Applicant ran from the car. Officer Spears identified Applicant as one of the suspects who ran from the car. Record, 146-154. Sergeant Nida of the Florence Police Department testified the victim's wallet was recovered at the scene where the suspects were apprehended. Record, at 160. Ira Parnell, the SLED firearms examiner, testified the bullet recovered from the victim matched

the gun that was recovered near Applicant. Record, 184-86. Next, Ila Simmons, of SLED, testified that both of Applicant's hands tested positive for traces of gunshot residue. Simmons further testified that none of the other codefendants tested positive for GSR. Record, 194-97. Next, Tyon Evans, Applicant's codefendant who admitted to driving the getaway car, testified that Applicant got out of the car at the victim's house, after which Evans heard a gunshot. Evans testified Applicant came running back to the car, jumped in, and said to go. Evans testified he saw the gun in the backseat with Applicant when he looked in the rearview mirror. Record, 255-57. Clearly, the testimony presented at trial created an almost insurmountable mountain of evidence against Applicant. The record reflects that an unusually large number of officers responded to the scene in Applicant's case, and he was essentially caught red-handed after shooting the victim (with a child in his lap) in the back of the head, and attempting to flee.

In contrast to the vast amount of credible testimony presented by the State, Applicant presented a much different tale when he took the stand in his own defense. Applicant claimed he went to the home of his codefendant Tyon Evans and smoked a blunt, after which point he became high, and Evans said "Come ride with me." Record, at 290. Applicant claimed he knew nothing about the gun. Applicant did admit he sat in the backseat of the car as they drove to the victim's house. Record, at 291. Applicant claimed the other codefendant (Rasheem Thomas) saw the victim, who had allegedly been in an altercation with Evans. Applicant claimed he was going to get out of the car, until Evans pulled the gun out, at which point Applicant decided to stay in the car. Record, 292-93. Applicant claimed he never got out of the car, never touched the gun, never robbed the victim, and never pulled the trigger. Record, at 299. However, Applicant's testimony completely ignores the fact that all of the witnesses gave descriptions of the shooter

matching Applicant's appearance, the gun was found in proximity to Applicant, Applicant was the only codefendant who was sitting in the backseat, and Applicant was the only codefendant who tested positive for gunshot residue.

Put simply, the evidence against Applicant was overwhelming, and the fact that Counsel was able to obtain a conviction for ABHAN rather than attempted murder, in light of the overwhelming evidence, is proof in and of itself that Counsel was not deficient. While Counsel may have provided some terse answers in response to Applicant's questions at the PCR hearing, the fact remains that Applicant was facing an almost insurmountable struggle by proceeding to trial, and Counsel did the best he could reasonably be expected to do with the facts and evidence with which he was presented. For the foregoing reasons, this Court finds Counsel was not deficient, and Applicant has been unable to prove any resulting prejudice. Accordingly, Applicant's PCR application is denied and dismissed with prejudice.

B. Appeal

This Court finds Applicant did not knowingly and intelligently waive his right to a direct appeal. Counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by Anders v. California, 386 U.S. 738 (1967). Id. Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive their appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State. See Rule 243(i)(1), SCACR; Davis v. State, 288 S.C. 290, 291 n.1,

342 S.E.2d 60, 60 n.1 (1986) ("Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a White v. State review.").

In the present case, Applicant testified that Counsel never informed him of the right to appeal his conviction. Counsel testified that he only files appeals if his clients ask him to do so and in this case Applicant did not ask him to file an appeal. Counsel further testified that he did not think that an appeal would have been successful. It does not appear that Applicant knowingly and intelligently waived his right to appeal; therefore, he is entitled to a belated appeal. As such, the Court finds Applicant did not knowingly and voluntarily waive his appellate rights and is entitled to an appeal from his conviction. Applicant's lack of an appeal can be remedied pursuant to White v. State.

C. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby deemed to have been abandoned.

V. CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations. Counsel was not deficient in any manner, nor was Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice. This Court, however, concludes Applicant is entitled to

review of direct appeal issues from the conviction pursuant to White v. State.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be denied and dismissed with prejudice;

2. Within thirty (30) days of service of this Order, counsel for Applicant must file a notice of appeal to secure the appropriate review of Applicant's conviction. Counsel and Applicant are directed to Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986), and Rule 243(i), SCACR, for the appropriate procedure for securing appellate review; and

3. That Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 21st day of December, 2016.

EDGAR W. DICKSON
Presiding Circuit Judge
Twelfth Judicial Circuit

Florence, South Carolina

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CCP&GS
FLORENCE COUNTY, SC

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