STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2016 – 001067
Lower Court Case No. 2014-CP-40-01202

Eugene D. Patterson, #321525,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

1. Did appellate counsel render ineffective assistance of counsel when he failed to raise the issue that the trial court judge erroneously presented the jury with the mutual combat jury instruction?
2. Did the PCR judge err when he found trial counsel did not render ineffective assistance of counsel when he failed to object to the trial court judge's jury instruction on transferred intent?
3. Did the PCR judge err when he found trial counsel did not render ineffective assistance of counsel when he failed to object to the trial court judge's jury instruction on proximate cause?
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5. Did trial counsel render ineffective assistance of counsel when he failed to contemporaneously object to the victim's family being pointed out by an investigator to the jury during the trial?
6. Did the PCR judge err when he found that appellate counsel did not render ineffective assistance of counsel when he failed to raise the issue of the trial judge's improperly allowing hearsay evidence form State's witness, Robert Portee, that he was threatened when other learned he was coopering with law enforcement?

STATEMENT OF THE CASE

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

Petitioner 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briefing and oral arguments, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence by unpublished opinion.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 issued on January 31, 2014.

Petitioner subsequently filed an application for post-conviction relief on February 25, 2014. An amended application was filed on July 9, 2015. On July 15, 2015, an evidentiary hearing was held before the Honorable G. Thomas Cooper, Jr. Petitioner testified on his own behalf. Counsel Sutherland also testified. On December 23, 2015, Judge Cooper issued an Order of Dismissal, denying relief. A Motion to Amend Judgment was filed on February 10, 2016, which was denied by Order issued on April 22, 2016.[1] Petitioner served and filed a notice of appeal to the South Carolina Supreme Court. A Petition for Writ of Certiorari was filed on January 30, 2017. This Return follows.

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[1] Respondent incorrectly states that Petitioner did not file an amended application or a Rule 59(e) motion. See PWC p. 1.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. The PCR court did not consider whether appellate counsel was ineffective for failing to raise the issue regarding the propriety of the mutual combat jury instruction. Regardless, the jury instruction was proper.

Petitioner first argues appellate counsel was ineffective on direct appeal in failing to raise the issue of whether the mutual combat jury instruction was proper. While conceding the issue was not raised to the PCR court, Petitioner urges the Court to disregard the procedural bars and review the issue on the merits. First, this Court cannot review an issue that was not raised to or ruled upon by the PCR court. Second, the mutual combat jury instruction was properly given to the jury.

How the Issue was Raised at Trial

Defendant was tried along with codefendant Tayson Boone for murder under a theory of mutual combat. On February 18, 2007, a shootout occurred in the parking lot of a Waffle House in Richland County, where a young bystander was fatally shot in the head. Shell casings from two weapons, a .38 caliber and a 9mm, were recovered. (App. p. 395-96). The bullet that struck the victim was not recovered and the firearms expert concluded that either of the two weapons fired by the defendants had the range to strike the victim if fired from the location of the shell casings. (App. p. 457-59). The pathologist testified that the gunshot wound to the back of the victim's head was a "through and through" wound. (App. p. 1061-67).

Numerous witnesses testified that a fight was planned at the Waffle House between two rival gang members, Corey Sanders and Chad Robinson. (App. p. 536-37; 544-47). Corey Sanders, a member of the bloods gang, testified that he along with Charles Williams and Byron Morant drove to the Waffle House so he could fight Robinson. (App. p. 656). Sanders knew

Robinson was a member of the Folk Nation gang. (App. p. 657). Sanders explained that he and Robinson had an "ongoing beef" and that they set up a fight to resolve those issues. (App. p. 660). Sanders saw Petitioner in the back of a vehicle make a "gun signal" which Sanders described as Petitioner pointing an actual, high caliber, gun as if he was going to shoot directly at him. (App. p. 658). Sanders testified that when going outside of the Waffle House to begin the fight, he noted "the light-skinned guy was already standing outside with a gun in his hand. He wasn't trying to hide it or anything." (App. p. 672-73).

Boone went to where Sanders was fighting, near the front of the Waffle House and stated that if others were to "jump in" on the fight then "he was going to shoot them." (App. p. 563). Robert Portee, a member of the bloods gang, testified that Boone told him that he "was going to chunk at these niggers," meaning he intended to shoot at them, and Robert heard the "racking of a gun." (App. p. 616-617). Boone asked Jerome Christopher Thompson for his 9mm pistol and fired it into the air. (App. p. 550-51; 566). Derrick Guilyard testified he went to the Waffle House with Boone. (App. p. 781). Guilyard testified that Boone approached the fight and then returned to his car and retrieved Thompson's gun and fired it into the air. (App. p. 805-06). William Kee, also a member of the bloods gang, corroborated this testimony that Boone fired the first shots into the air. (App. p. 647-48). Kee testified he heard multiple other shots from both the front and the back of the area. (App. p. 649). Thompson testified that two people, one light-skinned man wearing blue colors and one dark-skinned man also opened fire. (App. p. 568). Boone returned fire. (App. p. 576). Boone, Thompson and the rest of their group then drove away, and Thompson disposed of the gun because he "thought it had a body on it." (App. p. 579-80).

Karmindae Legget testified that he went to the Waffle House with friends Petitioner and Oliver Feldman to watch the fight. (App. p. 725-27: 743). After the fight began, Legget heard gun shots fired from near the back of the parking lot. (App. p. 732). Petitioner and Feldman then went and retrieved their guns from the vehicle. (App. p. 733-35). Petitioner had a .38 caliber pistol and Feldman had a .32 caliber. (App p. 733-35). Legget testified that both Petitioner and Felder fired several shots toward the back of the lot. (App. p. 733-35). Shot were then fired back at them. (App. p. 733-35). These events were further corroborated by Samuel Clemons, who was with Boone at the Waffle House. Clemons saw Petitioner and Feldman arrive with Feldman holding a revolver. (App. p. 761-62). He testified that Boone shot in the air and then Petitioner returned fire. (App. p. 765).

Feldman, a member of the Crips gang, testified that he knew Petitioner through a mutual friend and knew him to be a member of the Folk Nation gang. (App. p. 815-16). Feldman was wearing a blue bandana to represent the Crips, and Petitioner was wearing black to represent the Folks. (App. p. 818). Feldman explained that Petitioner received a call to go to the Waffle House because there was a fight planned. (App. p. 818). Petitioner had a .38 caliber pistol and Feldman had a .32 caliber. (App. p. 820). He testified that at first only two people were fighting but then another party intervened to help Corey Sanders. (App. p. 823-25). The fight then escalated to a broader fight between gang members. (App. p. 824-25). Feldman testified that he saw someone from the back of the parking lot shoot into the air. (App. p. 825). Then, the shooter began to fire directly at Feldman and Petitioner. (App. p. 826-27). Petitioner and Feldman then went back to the vehicle and retrieved their guns and returned fire. (App. p. 826-27).

Boone gave a statement to law enforcement that he was a member of the Bloods gang and went to the Waffle House to fight a Folk named Dameon Dowling. (App. p. 665). Boone stated

that the people who they were supposed to fight were "leading us around just so they could get enough people to outnumber us. We figured out that they were wasting time so that they could get their group up." (App. p. 1295-96). According to Boone, he approached the fight between Sanders and Robinson and a light-skinned man he believed was a Crip told him to back up or he would be shot. (App. p. 1296; 1429). Boone then went to the vehicle and retrieved a 9mm pistol from Thompson. (App. 1296-97). Boone stated that he fired twice into the air and then directly at the man he believed to be a Crip. (App. p. 1297-98). Boone did not believe he could have shot the victim because he fired directly at the Crip, in fact, over his head, and no one was in the line of fire. (App. p. 1298).

Discussion

A. The issue of whether appellate counsel was ineffective for failing to raise the issue of whether the mutual combat jury instruction was properly charged to the jury was not raised below to the PCR court and is therefore not preserved.

This argument is not preserved for this Court's review. It is well settled that an issue that has not been presented to or passed upon by the trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). If an issue is raised but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. Gee, 262 S.C. 373, 204 S.E.2d 727. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 20 (2011) ("Our law is clear that an issue may not be raised for the first time on appeal."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an

appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting issues and arguments on appeal). Issue preservation rules are meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. Herron v. Century BMW, 395 S.C 461, 719 S.E.2d 640 (2011).

Here, the PCR court found that Counsel properly objected and preserved for appellate review the issue of whether the jury should have been charged with the mutual combat instruction. This is supported by the record where Counsel argued that the mutual combat charge was burden shifting and unsupported by the evidence and where Judge Keesley overruled the objection. (App. p. 1469-72). Counsel testified at the PCR hearing that he believed he had preserved the mutual combat issue for direct appeal (App. p. 1837). It was then incumbent on appellate counsel to raise the issue. No evidence was presented at the PCR hearing to support the allegation that appellate counsel was ineffective for failing to raise the issue.[2] The Order of Dismissal also does not address this specific issue. Petitioner seems to advocate this Court adopting a plain error analysis. South Carolina does not recognize the plain error rule. "The appellants have the responsibility to identify errors on appeal, not the Court." Kennedy v. South Carolina Ret. Sys., 349 S.C. 531, 532-33, 564 S.E.2d 322, 322-23 (2001). "This Court has consistently refused to apply the plain error rule." Jackson v. Speed, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997). This issue is not preserved, but even if it was it not meritorious.

B. The mutual combat jury instruction was appropriately charged.

Petitioner argues that if raised on direct appeal, the mutual combat issue would have been successful because it was not supported by the evidence. Nonetheless, the evidence that

[2] Petitioner seems to insinuate that PCR counsel's failure to present evidence on this claim was somehow driven by his employment with the former Fifth Circuit Solicitor's law firm. (PWC p. 9). This is a baseless and inappropriate allegation meant to distract from the issues.

Petitioner and other came to the Waffle House to fight rival gang members and fired shots was sufficient to allow for the charging of mutual combat.

The doctrine of mutual combat has existed in South Carolina law since 1843. State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003). In Taylor, the supreme court acknowledged the doctrine had "fallen out of common use in recent years" but still found it to be binding law. Id. The escalating urban warfare in present-day society has resurrected the need for a doctrine of mutual combat. Here, the State took the long-standing and viable theory of mutual combat and applied it to modern day facts.

In order for the doctrine of mutual combat to be asserted and an instruction on the law given to the jury, multiple factors must be shown. In determining whether mutual combat exists, there must be evidence of a "mutual intent and willingness to fight." Jackson v. State, 355 S.C. 568, 571, 586 S.E.2d 562, 563 (2003), quoting State v. Graham, 260 S.C. 49, 196 S.E.2d 495 (1973). One looks to the "acts and conduct of the parties and circumstances attending and leading up to the combat" to determine mutual intent. Id. Also, there must be an antecedent agreement to fight. Taylor, 356 S.C. at 234, 589 S.E.2d at 4. This agreement can be shown by evidence of "ill-will between the parties", threats, and an "apparent willingness of each to engage in an armed encounter with the other" Id. The parties must also be armed and know the other to be armed. Id.

Here, the State presented evidence of all the factors for mutual combat and thus the theory was appropriately applied to this case. Numerous witnesses testified that rival gang members decided to meet up at the Waffle House to engage in a fight. Feldman specifically testified that Petitioner received a call regarding the planned fight and they then drove to the Waffle House. (App. p. 818). There was ill-will between the rival gang members, and they

congregated at the Waffle House to fight each other. Petitioner had a willingness to join the fight as evidenced by when he retrieved a gun from a vehicle and fired into the crowd of people. (App. p. 826-27). In conclusion, the deep-rooted doctrine of mutual combat is a valid theory on which to base a murder charge. Petitioner and Boone mutually engaged each other in an armed conflict in which it was reasonably foreseeable that someone could be killed. Furthermore, Boone's appellate counsel raised this *precise* issue on appeal, and the court of appeals affirmed Judge Keesley's decision to instruct on mutual combat. See State v. Boone, No. 2013-UP-155 (filed April 17, 2013). Therefore, when reaching the merits of the issue, Judge Keesley properly instructed the jury on mutual combat and certiorari should be denied.

II. Counsel was not deficient because the transferred intent jury instruction was appropriately charged. Also, any objection would have been futile.

Next, Petitioner argues the PCR court erred in failing to find Counsel was ineffective in failing to object to the jury instruction on transferred intent.

The law on mutual combat in South Carolina has yet to address the scenario where an innocent bystander is killed instead of a combatant. Nevertheless, it is only logical that transferred intent would apply in such a situation. Transferred intent applies to cases where an innocent bystander is killed, rather than the intended victim. South Carolina recognizes that "if there was malice in [defendant's] heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake." State v. Heyward, 197 S.C. 371, 377, 15 S.E.2d 669, 672 (1941). Thus, transferred intent holds the defendant liable for the harm caused to an innocent bystander. See, e.g., State v. Fennell, 340 S.C. 266, 272, 531 S.E.2d 512, 515 (2000) (A person who, acting with malice, unleashes a deadly force in an attempt to kill or

injure an intended victim should anticipate that the law will require him to answer fully for his deeds when that force kills or injures an unintended victim.).

The California Supreme Court upheld a murder conviction based on the theories of mutual combat and transferred intent in a similar setting. People v. Sanchez, 26 Cal. 4th 834, 29 P.3d 209 (2001). In referencing the concurring opinion's analysis of transferred intent, the majority opinion stated in a footnote:

> For purposes of applying the rule of transferred intent, it does not matter whether defendant himself fired the fatal shot or instead induced or provoked another to do so; in either situation, defendant's culpable mental state is determined as if the person harmed were the person defendant meant to harm.

26 Cal. 4th at 850, 29 P.3d at 220.

In concluding that each defendant was equally liable for the innocent bystander's death, the Court stated:

> Because defendant and co-defendant, rival gang members, had equally culpable mental states and engaged in precisely the same conduct at the same time and place in exchanging shots in a gun battle, it was not unfair to hold them equally responsible for an innocent bystander's death, without regard to which of them actually fired the bullet
>
> 26 Cal. 4th at 854, 29 P.3d at 144.

Here, the PCR court did not err in finding that Counsel was not ineffective for failing to object to the jury instruction on transferred intent. If both parties contributed to the mutual combat, then both parties are actors in the gunfire and both parties are culpable for the resulting injury. Much like accomplice liability[3], both parties should be held equally accountable for the consequences that result from creating a zone of danger. Mutual combatants' activities are

[3] "Under the 'hand of one is the hand of all' theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." State v. Gibson, 701 S.E.2d 766, 769 (S.C. App. 2010).

comparable to those of aiders and abettors because they encouraged each other to engage in an urban conflict. Reyes v. State, 783 So.2d 1129 (Fla.App. 3 Dist. 2001). Here, Petitioner, Boone, and others encouraged each other to fight and engaged in a lethal gun battle that resulted in the death of an innocent child. Since an innocent bystander was killed rather than one of the combatants, the doctrine of transferred intent was properly applied to transfer Petitioner's and Boone's criminal intent to the unintended victim. Therefore, the PCR court did not err.

Even if this objection was properly made, Judge Keesley would have overruled it. Counsel for codefendant Boone made a specific objection to the transferred intent charge. (App. p. 1510). Judge Keesley discusses the transferred intent instruction and how he wrestled with how best to include it. Judge Keesley stated:

> **The Court:** While I'm on that, I got into that transferred intent. I didn't really know that I was going to get into transferred intent because I thought, once again, that I was dealing with a situation where you were advancing a depraved heart, malignant heart theory, but there is evidence in this record of specific intent. And if there's specific intent to kill a person and the perpetrator mistakenly, or just because of whatever reason, misses that person that they intent to kill and kill somebody else, then the doctrine of transferred intent applies and the intent goes to hold the perpetrator responsible for the death of another person. I felt like I had to add that in there because there is some evidence of specific intent and I tried to do it in a way that's not confusing, but that's why that's in there. There were actually expressed – there's evidence of expressed malice, there's very reasonable constructions the jury could come to that when one or both of these defendants leveled guns, if they did, that they intended to kill.

(App. p. 1506-07). While Counsel did not seem to join Boone's counsel's objection, joining the objection would not have changed Judge Keesley's ruling or the result of the trial.

III. Counsel was not deficient in failing to object to the proximate charge jury instruction. Any such objection would have been overruled.

Petitioner argues the PCR court erred in failing to find Counsel ineffective for failing to object to Judge Keesley's jury instruction on proximate cause. Petitioner argues that the evidence

did not support the charge and the circumstances presented here are too attenuated to prove that Petitioner caused the victim's death. Judge Keesley issued a proper jury charge on proximate cause. (App. p. 1659-60).

Defendants who engage in mutual combat can be the proximate cause of the injury or death of an innocent bystander. A number of states have directly addressed this issue. See State of Iowa v. Spates, 779 N.W.2d 770, 779 (Iowa 2010) ("Our cases support a conclusion that the acts of a defendant engaged in mutual combat can be the proximate cause of injury to an innocent bystander that directly results from the act of another combatant."); Roy v. United States, 871 A.2d 498, 509 (D.C. 2005), *cert. denied*, 547 U.S. 1162 (2006) ("While the evidence was unclear as to whether Roy's or Settles' bullet was responsible for the fatal shot, such a determination is unnecessary if both men prepared for and undertook to participate in the gun battle where it was clearly foreseeable that others would be endangered.").

In State v. Spates, 779 NW.2d at 772, the Supreme Court of Iowa reviewed a murder conviction where the victim had been a bystander killed "during a gun battles between rival groups . . ." The state court considered both theories of aiding and abetting and mutual combat. In light of the applicability of those theories, the court concluded:

> We agree with those courts that have concluded participants in mutual combat encourage each other to engage in the potentially lethal conduct that leads to the injury of innocent bystanders, thereby supporting liability as an aider and abettor.

779 N.W.2d at 780.

The Iowa courts had previously reached a similar conclusion in State v. Brown, 589 N.W.2d 69 (Iowa App. 1998), *reversed on other grounds,* State v. Reeves, 636 N.W. 2d 22 (Iowa 2001). In that case, the victim was killed when she unwittingly drove between rival gangs in the midst of a shootout. However, a rival gang member, not Brown, actually fired the fatal

bullet. Brown contested his second degree murder conviction as there was no evidence connecting him personally to the fatal bullet.[4] The appeals court, considering proximate cause, rejected Brown's assertion finding:

> Brown's engagement in conduct that created a very high risk of death or serious bodily injury to others was a proximate cause of Davis's death. See State v. Marti, 290 N.W.2d 570, 579 (Iowa 1980). This is true whether it was the defendant or another participant in the shoot-out who fired the shot that killed the innocent bystander. See id. ("It is not essential for conviction in all cases that the accused actively participated in the immediate physical impetus of death.").

589 N.W.2d 69, 74 -75.

Similarly, in a 2005 case, the appellate court in the District of Columbia, in reviewing a causation charge, reasoned that "while proximate causation as a theory of second-degree murder liability has been recognized in our case law for some time, the factual scenario of a 'gun battle' on city streets, as in this case, is relatively new." Roy v. United States, 871 A.2d 498, 507 (D.C. 2005), *cert. denied*, 547 U.S. 1162, 126 S. Ct. 2346 (2006). The court easily acknowledged the "the application of proximate cause liability to those participants who willfully choose to engage in these battles." Id. In upholding the application in that specific case as reflected in the contested charge on causation, the court reasoned: "While the evidence was unclear as to whether Roy's or Settles' bullet was responsible for the fatal shot, such a determination is unnecessary if both men prepared for and undertook to participate in the gun battle where it was clearly foreseeable that others would be endangered." 871 A.2d at 509.

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[4] Though "second degree murder," the malice requirement is substantially the same. In Iowa, "[m]alice is required for both degrees of murder. See Iowa Code § 707.1 (1997) ('A person who kills another person with malice aforethought either express or implied commits murder.'). However, first-degree murder requires proof of deliberation and premeditation in addition to malice aforethought. See Iowa Code §§ 707.1, 707.2(1). Second-degree murder, on the other hand, does not require deliberation and premeditation; it requires only proof of malice aforethought. *Compare* Iowa Code § 707.2(1) *with* § 707.3." Reeves, 636 N.W.2d at 25. Thus, it appears that the charge would be in definition, though not statutory structure, comparable to the murder charge in this State.

Counsel was not ineffective for failing to object to the proximate cause jury instruction because it was appropriately applied to the facts of this case. Petitioner and codefendant Boone both created a very high risk that someone would be killed in the shootout. Both came to the Waffle House preparing for a fight and participated in a gun battle where it was clearly foreseeable that people would be endangered. Therefore, similar to the analysis above, both parties contributed to the mutual combat and therefore are both culpable for the resulting injury.

IV. Counsel articulated a valid strategic reason for not moving to sever Petitioner's case from codefendant Boone's case.

Next, Petitioner argues the PCR court erred in not finding Counsel ineffective for failing to move to sever Petitioner's case from Boone's. Specifically, Petitioner argues he was prejudiced because the self-defense jury instruction was confusing and because the mutual combat required the jury to consider each defendant's actions in determining guilt.

First, Counsel testified that he considered the severance issue and articulated a strategic reason for not moving to sever the case. See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996) (holding that when counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective.). Counsel testified that the evidence presented against Boone was much stronger as Boone gave a statement and testified at trial that he fired multiple shots, even conceding that he shot directly at who he believed to be rival gang members. (App. p. 1771-75). Counsel believed the case against Petitioner was weaker. (App. p. 1771-75). He hoped that the jury would be able to distinguish the evidence between Petitioner and Boone and find that Petitioner was not guilty. (App. p. 1823-25). The PCR court correctly found Counsel's strategy was valid and reasonable under the prevailing professional norms.

Second, Petitioner was not prejudiced by the alleged deficiency. A cautionary instruction as to multiple defendants is sufficient to protect each codefendant 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). Counsel ensured that Judge Keesley gave an instruction on the jury's duties to consider each case separately. (App. p. 1657-58; 1671-72). Furthermore, Petitioner does not point to a specific right that was violated and cannot show that if a severance would have been granted that the result of the trial would have been different.

V. Counsel appropriately objected when an investigator was asked to identify the victim's family on examination by the solicitor.

Petitioner also argues that the PCR court erred in failing to grant relief based on an investigator identifying the victim's family during the trial. The 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.
> **The Court:** Well, the objection's not contemporaneous. And I don't want y'all to go into this any further.

(App. p. 1187-88). Respondent submits this objection was contemporaneous and preserved the issue for appeal. The objection was made one question after the solicitor asked where the victim's family was seated. Furthermore, Judge Keesley essentially sustained the objection by instructing the solicitor to move on and not go into his any further. The PCR court did not err in denying relief on this allegation.

VI. Appellate counsel was not deficient for failing to raise a hearsay issue as it would not have been meritorious.

Finally, Petitioner argues the PCR court erred in failing to grant relief by finding that appellate counsel was ineffective for failing to raise the issue of whether the trial court improperly allowed hearsay testimony from witness Robert Portee. The relevant testimony is as follows:

> 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.

(App. p. 627, lines 5-24).

The PCR court did not err in finding that Petitioner failed to meet his burden in proving that the proposed issue was strong than the one raised on direct appeal. "'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)). The PCR court explained that the testimony was admissible to explain the witness's mental state.

Petitioner argues that this issue would have been meritorious and that Petitioner's conviction would have been overturned. To the contrary, the appellate courts would likely have

deferred to Judge Keesley's judgment and not found that he abused his discretion in overruling the objection. In any event, the testimony at issue was not vital to the State's case and was not relied upon to convict the defendants. Respondent asks this Court to deny certiorari.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling as there is ample evidence of probative value to support the PCR Court's denial of Petitioner's application. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

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July 3, 2017

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2016 – 001067
Lower Court Case No. 2014-CP-40-01202

Eugene D. Patterson, #321525,

Petitioner,

v.

State of South Carolina,

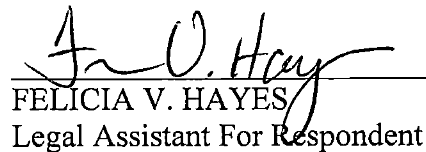
Respondent.

CERTIFICATE OF SERVICE

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

Elizabeth A. Franklin-Best, Esquire
Blume Norris & Franklin-best, LLC
900 Elmwood Ave Ste 200
Columbia, SC 29201-2058

This 3rd day of July, 2017



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