

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Honorable R. Scott Sprouse Circuit Judge

Case No.: 2015-CP-07-01939

Jaquwn Brewer 347482.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Jaquwn Brewer appeals the Honorable R. Scott Sprouse's October 30, 2017 Order of Dismissal. Undersigned counsel received notice of entry of the order on November 27, 2017. A copy of the order on appeal is attached hereto.



James K Falk  
Falk Law Firm  
PO Box 1058  
Charleston, SC 29402

November 29, 2017

Ruston Neely, Esq.  
Office of S.C. Attorney General  
PO Box 11549  
Columbia, SC 29211-1549

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Honorable R. Scott Sprouse., Circuit Judge

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DEC 07 2017

Court of Appeals

Case No.: 2015-CP-07-1939

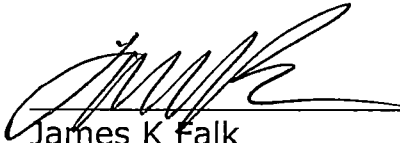
Jaquwn Brewer 347482 .....PETITIONER

V.

State of South Carolina.....RESPONDENT

PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Ruston Neely, Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this November 29, 2017.

  
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S.C. SUPREME COURT

# FALK LAW FIRM, LLC.

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November 29, 2017

Clerk of Court  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

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SC Court of Appeals

Re: Jaquwn Brewer 2015-CP-07-1939

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Horry County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

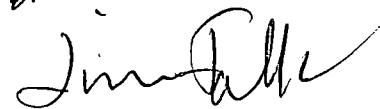
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S.C. SUPREME COURT

Thank you for your assistance.

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Cc: Ruston Neely, Jaquwn Brewer 347482.

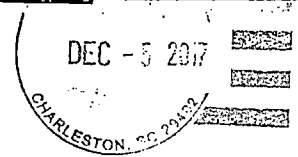
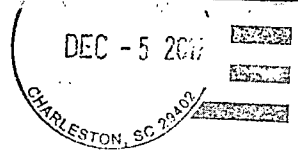


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SC Court of Appeals

STATE OF SOUTH CAROLINA  
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS  
THE FOURTEENTH JUDICIAL CIRCUIT

Jaquwn Brewer, #347482

Case no: 2015-CP-07-1939

Applicant,

v.

**RECEIVED ORDER OF DISMISSAL**

State of South Carolina,

DEC 07 2017

Respondent.

SC Court of Appeals

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SOUTH CAROLINA

The above-captioned matter comes before the court via an application for post-conviction relief (PCR) filed by Jaquwn Brewer on August 10, 2015. This Court convened an evidentiary hearing into the matter on February 13, 2017, at the Beaufort County Courthouse. Applicant was present at the hearing and represented by Jim Brown, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant's trial counsel, Jared S. Newman, Esquire, (Counsel) and Applicant were both present and testified. This Court had the opportunity to listen to their testimony and rule on their credibility. This Court also had before it a copy of the trial transcript, the record on appeal, the audio tape of the Applicant's interview with law enforcement, the records of the Beaufort County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the direct appeal records, and the pleadings in this matter.

**I. PROCEDURAL HISTORY**

Applicant was indicted by the June 2009 term of the Beaufort County Grand Jury for one (1) count of assault and battery with intent to kill (AWBIK), one (1) count of possession of a weapon during the commission of a violent crime, and one (1) count of murder (2009-GS-07-1279, -1296, -1293). On August 26, 2011, Applicant proceeded to a jury trial pursuant to which

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he was found guilty as indicted. The Honorable William H. Seals, Jr. sentenced Applicant to confinement for twenty years for the count of ABWIK, five years for the count of possession of a weapon during the commission of a violent crime, and life without parole for murder. The sentences were ordered to be run concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to Anders v. California, 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals sent a certified question to the South Carolina Supreme Court. The South Carolina Supreme Court affirmed in part, reversed in part, and remanded. State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015). The Remittitur was issued on March 5, 2015.

## II. ALLEGATIONS

Applicant alleged the following grounds at the PCR hearing:

- I. Ineffective Assistance of Counsel
  - a. Failed to object to the interview tape on 5<sup>th</sup> amendment grounds.
- II. Ineffective Assistance of Appellate Counsel
  - a. Failed to brief the burden shifting issue.

## III. SUMMARY OF FACTS

On May 23, 2009, a large group of people gathered at the Semper Fi Club (the Club) in Beaufort County, South Carolina, for a party. After midnight, as the party continued, law enforcement officers responded to a shooting at the Club. Two individuals were shot, one fatally. The investigation revealed that the first shooting occurred inside the Club and the second shooting occurred moments later in the Club parking lot.

Brewer and several of his companions were posing for photographs inside the Club. The photographer, Gary Bright, and several other attendees noticed Brewer was posing with a handgun. A photograph introduced at trial confirmed that Brewer had a handgun in the front waistband of his pants. One of the organizers of the party, Deon Stevenson, was alerted, and he

asked Brewer to take the gun out of the Club. Brewer responded by pulling out the handgun and pointing it at Stevenson's head, which others in the Club witnessed. Immediately thereafter, Brewer shot his gun inside the Club, hitting Donald Parker, who was standing near the photo booth. There were numerous witnesses to the shooting of Parker. Parker survived the shooting. Brewer was charged with assault and battery with intent to kill and possession of a weapon during the commission of a violent crime as a result of shooting Parker.

Patrons, including Brewer, fled the Club after the first shooting. Moments later, more shots were fired outside the Club in the parking lot by at least two individuals, including Brewer and Dominique Middleton. Henry Jones was standing in the entrance to the Club dialing 911 when a stray shot from the parking lot struck and killed him. Brewer was charged with murder for the killing of Jones.

Law enforcement recovered numerous shell casings. One was found on the floor inside the Club, one directly outside the exit, one near the road, and eight on the left side of the parking lot next to a red laser sight. The investigation revealed the laser sight was part of Middleton's gun. Trace metals and gunshot residue were found on the pants Brewer was wearing. The physical evidence showed the bullets recovered from the victims were likely fired from a .45 caliber, semi-automatic handgun. However, a comparison of the bullets was inconclusive, and the SLED firearms examiner could not determine whether the bullets were fired from the same handgun. Despite learning from many witnesses that there were at least two shooters in the Club parking lot, investigators pursued Brewer as the only suspect.

In an interview at the Beaufort County Sheriff's Office, Brewer waived his Miranda rights and agreed to speak with investigators. The recording of this interview, including the interrogators' hearsay-laden questions and comments, was played for the jury. The investigators

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informed Brewer that many witnesses observed him shoot both victims, which was true only with respect to the shooting of Parker inside the Club. Brewer denied involvement in either shooting. Brewer told investigators that he wanted to end the interrogation. Yet the interrogation continued. The investigators employed various tactics to extend the interrogation, including bringing Brewer's mother into the room and repeatedly telling Brewer that he should "prove himself innocent" by turning in his handgun, all of which was audiotaped and played to the jury, over Brewer's objection. Investigators claimed they attempted to locate Middleton but were unsuccessful and quickly abandoned their efforts. Middleton was never charged in connection with the shootings.

#### **IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court finds Applicant has failed to satisfy his burden to prove Counsel's actions were deficient. Applicant also failed to prove he was prejudiced by Counsel's alleged deficiencies. This Court finds Counsel's testimony was credible and Applicant's testimony lacked credibility. This Court finds Counsel properly prepared for Applicant's trial. This Court finds Counsel elucidated valid trial strategies in defending Applicant and preparing for trial. This Court finds Counsel rendered adequate assistance and exercised professional judgment in his decisions at trial. This Court also finds Appellate Counsel's arguments were proper and the strongest issue was briefed. This Court dismisses Applicant's application for the reasons set out below:

##### **A. Ineffective Assistance of Counsel**

In evaluating allegations of ineffective assistance of counsel, the court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668, 669 (1984). First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an

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attorney's performance by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). "The proper measure of counsel's performance remains whether he has provided representation within the range of competence required of attorneys in criminal cases." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsel's deficient performance must have prejudiced 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. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Failed to object to the interview tape on 5<sup>th</sup> amendment grounds.

The court has previously held an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. "Since the [issue] was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in [applicant's] PCR claim. When the defendant claims counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is meritorious and that the

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verdict would have been different absent the evidence that should have been excluded.” Id. at 465, 746 S.E.2d at 47. Therefore, this Court must determine whether the underlying claim was meritorious and there was a reasonable probability it would have resulted in reversal and a new trial.

Here, Counsel properly objected to the introduction of Applicant’s statement in a Jackson v. Denno hearing on four separate grounds:

1. The continuation of the interview after Applicant requested the interview stop.
2. The mother of Applicant was brought into the interview room to reopen the interview.
3. The hearsay testimony used by the interviewing officers.
4. Law enforcement’s insistence Applicant prove his innocence was burden shifting.

Tr. 72-77.

These issues were preserved and reviewed by the South Carolina Supreme Court. Brewer, 411 S.C. 401, 768 S.E.2d 656. The Court found the admission of the objected to portions of the audio tape was error. Id. Accordingly, the Court reversed the murder conviction. However, the Court upheld the ABWIK and weapon convictions because the State’s evidence against Applicant, for those charges, was overwhelming. This Court agrees and also finds the evidence against Applicant was overwhelming regarding the ABWIK and possession of a weapon during commission of a violent crime. Therefore, Applicant cannot prove prejudice where the evidence against him is overwhelming. See Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008). A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

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Accordingly, this Court finds Applicant failed to prove Counsel's actions prejudiced Applicant such that there was a reasonable probability the result of the appeal would have been different had Counsel objected on constitutional grounds. Accordingly, this Court denies and dismisses this allegation.

**B. Ineffective Assistance of Appellate Counsel**

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

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

**Failed to brief burden shifting issue.**

Counsel objected to the audio tape on the basis that law enforcement's statements were burden shifting. Tr. 76-77; 614. This ground was not briefed by Appellate Counsel. However, Appellate Counsel argued the admission of the audio tape was improper on other grounds. The Supreme Court reviewed the introduction of the audio tape and found the admission of the audio

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tape was in error. Brewer, 411 S.C. 401, 768 S.E.2d 656. Appellate Counsel was not deficient for failing to raise a different ground, as to why the interview material was inadmissible, where the Court agreed with Appellate Counsel and found in their favor. Appellate Counsel's argument was successful. There can be no stronger argument than a winning argument.

The Court ruled the admission of the objected to portions of the audio tape was in error. Applicant argues Appellate Counsel should have briefed the burden shifting issue in order for the Court to rule the admission of the audio tape was in error. The Court ruled the admission was in error based on the issues Appellate Counsel chose. Therefore, Applicant has failed to prove he was prejudiced where the Supreme Court found the audio tape inadmissible based on the grounds raised.

Accordingly, this Court finds Applicant failed to prove Appellate Counsel's briefing decisions were deficient. Applicant also failed to prove he was prejudiced such that there was a reasonable probability the result of the appeal would have been different had Appellate Counsel had also briefed the burden shifting issue. Accordingly, this Court denies and dismisses this allegation.

#### V. CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

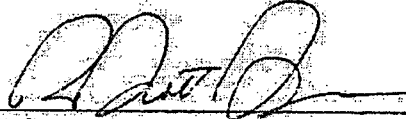
This Court notes Applicant must file and serve a notice of appeal within thirty 30 days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991),

Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1g, SCRPC, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. The Application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 30 day of October, 2017.

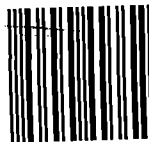
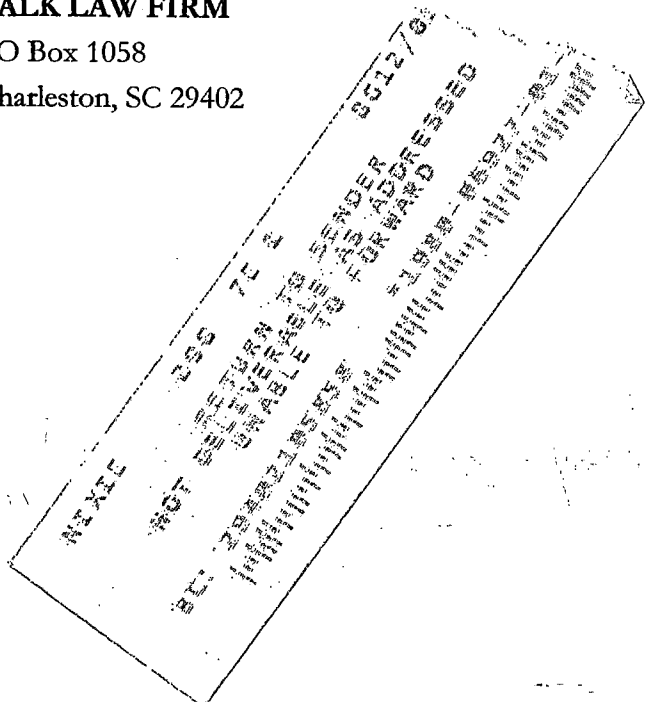
  
\_\_\_\_\_  
R. SCOTT SPROUSE  
Presiding Judge  
14<sup>th</sup> Judicial Circuit

Wallula, South Carolina

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Charleston, SC 29402



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