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June 19, 2018

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Re: Manuel A. Marin, #00343371 v. State of South Carolina
Case No.: 2016-CP-42-2795

Dear Judge Shearouse:

Enclosed you will find the following in connection with the above referenced matter:

1. Notice of Appeal; and

2. Certificate of Service.

As always, I remain,

Yours very truly,

James H. Price, III

JHP/sac
Enclosures

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Court of Common Pleas, Oconee County
Honorable Grace Gilchrist Knie

Circuit Court Case No. 2016-CP-42-2795
Appellate Case No. _____

Manuel Antonio Marin, #343371, ... Appellant/Petitioner,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL
(PCR CASE)

Appellant hereby appeals the judgment of the Court of Common Pleas dismissing his action for post-conviction relief, **ORDER OF DISMISSAL**, signed by the Honorable Grace Gilchrist Knie, entered of record on June 5, 2016, and received by Appellant's counsel James H. Price, III, on June 5, 2018. A copy of said order is attached hereto and made a part hereof.

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

Court of Common Pleas, Oconee County
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Circuit Court Case No. 2016-CP-42-2795
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Manuel Antonio Marin, #343371, ... Appellant,

v.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I certify that on June 19, 2018, I served Appellant's notice of appeal and attached orders on the Respondent, and others if indicated, by placing a copy in the U.S. Mail, first class, postage prepaid, addressed as follows, and by electronic means if indicated:

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Respectfully submitted,

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
Manuel Antonio Marin, #343371, Applicant, v. State of South Carolina, Respondent.	2016-CP-42-2795 **ORDER OF DISMISSAL**

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Manuel Antonio Marin (Applicant) on July 28, 2016. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on February 1, 2018 at the Spartanburg County Courthouse. Applicant was present and represented by James H. Price, III, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant also presented testimony from Detective Dale Arterburn of the Greer City Police Department and Don Girdnt, a forensic consultant. Respondent presented the testimony of Tanya R. Jones ("Counsel") and Assistant Solicitor Russell D. Ghent ("Solicitor"). This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the trial transcript, the direct appeal records, the PCR application, Respondent's return, Applicant's supplemental application, and all exhibits admitted during the hearing.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted

by the August 2008 term of the Grand Jury for Spartanburg County for murder and possession of a firearm during the commission of a violent crime (2008-GS-42-5308). Applicant was represented by Tanya R. Jones, Esquire, at trial. Susan B. Reese, Esquire, and Jennifer A. J. Jordan, Esquire, represented the State. On October 27, 2010, Applicant proceeded to a jury trial.

Applicant was found guilty as indicted of both counts and then sentenced by the Honorable J. Derham Cole to life imprisonment for murder. No sentence was imposed for count two because a life sentence was imposed for count one.

Applicant filed a timely notice of appeal. Applicant was represented throughout the appellate process by Robert M. Dudek, Esquire, and David Alexander, Esquire. The issues argued to the Court of Appeals were whether the TC erred in refusing to charge the jury with "continue to shoot" instruction – that if Applicant was acting in self-defense, he was entitled continue shooting until it was apparent that the danger of death or serious bodily injury had ended. Applicant also raised the issue of whether the trial court erred in failing to charge part of the Protections of Persons and Property ("PPP") Act, where the trial court instructed the jury on the portion of the PPP Act that says there is no duty to retreat in one's vehicle and one can stand their ground, but not the portion that said one justified in using deadly force under the castle doctrine is immune from prosecution. The Court of Appeals heard oral arguments and then affirmed Applicant's conviction on July 3, 2013. State v. Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013). Applicant petitioned the Court of Appeals for a rehearing, but was denied in an order filed August 22, 2013.

Applicant then petitioned the Supreme Court of South Carolina for writ of certiorari, only arguing the first issue – the failure to give a "continuing to shoot" charge. Certiorari was granted and briefs were submitted by both parties. Another oral argument was held before the Supreme

Court. Ultimately, the Court affirmed the decision of the Court of Appeals as modified. State v. Marin, 415 S.C. 475, 783 S.E.2d 808 (2016). The Remittitur was returned on April 8, 2016.

In his *pro se* application, Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel, in that;
   a. "Failing to object to witness Diane Tabares's statement, 'He was a cancer survivor.'"
   b. "Failing to object to witness Diane Tabares's statement that she was pregnant and was due to deliver on the day of the incident."
   c. "Failing to recall the witness Larry Rodriguez to the stand and impeach the witness for lying on the stand."
   d. "Failing to object to and allowing the autopsy photographs to be entered into evidence."
   e. "Failing to have an evidentiary hearing to have defendant's camera excluded from the evidence, since the camera was tampered with prior to a warrant being secured for the contents inside defendant's truck."
   f. "Failing to have an evidentiary hearing to have the weapon excluded from the evidence since it was tampered with by Officer Jerry Powell."
   g. "Trial counsel was ineffective for not being prepared for trial by citing the wrong cases on point for a proposition."
   h. "Failing to object to prosecutor's highly inflammatory and prejudicial argument that the jury could infer malice because two shots were fired."
   i. "Failing to raise the King defense after the jury came back from the deliberations, and asked the trial judge to reinstruct or repeat the instructions on murder and manslaughter."
   j. "Failing to claim immunity under the Protection of Persons and Property Act as a pretrial motion instead of claiming it as a jury instruction."
   k. "Failing to claim as a pretrial motion that Spartanburg Superior Court lacked jurisdiction to try the case since the incident occurred before Walmart in Greenville County."

2. Ineffective Assistance of Appellate Counsel
   a. "Appellate counsel Robert M. Dudek was ineffective in failing to claim the directed verdict of self-defense since it was dispositive issue in this case."

b. "Appellate counsel Robert M. Dudek or appellate court was ineffective in failing to give Marin the same treatment as in State v. Curry."

3. Various allegations of Judicial Error
   a. "The Court of Appeals wrongfully ruled on the continuing to shoot proposition since the directive went to the heart of Marin's case."
   b. "The South Carolina Supreme Court erred by citing law against Marin which was enacted after Marin's indictment (July 21, 2008)."
   c. Trial judge abused his discretion by not citing State v. Hendrix, after trial counsel cited such case for the continuing to shoot proposition.

On October 4, 2017 and December 2, 2017, Applicant, through counsel, filed amended applications[1] adding the following allegations::

1. Ineffective Assistance of Counsel, in that
   a. "Failing to request the court produce expert witness for the defense."
   b. "Failing to clearly explain to the jury on opening statements from the start that this was a self-defense case."
   c. "Failing to object to prosecutor's statements that 'defendant would not stop.'"
   d. "Failing to disclose important Brady discovery material to defendant until well after trial."
   e. "Failing to request complete charge on Article 6, instead of only § 16-11-450(a)."
   f. "Failure to argue why the second shot was necessary in order for the court to instruct the charge requested."
   g. "Failing to cite State v. Hendrix in a timely manner for the continuing to shoot proposition."
   h. "Failing to argue the lack of fingerprints from the steering wheel as exculpatory evidence since other fingerprint evidence was presented."
   i. "Failing to request jury instruction that the defendant had a right to judge the conduct of the deceased more harshly than otherwise because of his intoxication."
   j. "Failing to request instruction to the jury that victim's violent behavior was an unreasonable reaction to defendant having passed his road."

[1] During the pendency of this action, Applicant attempted to file various *pro se* amendments, despite being represented by counsel. This Court only considers those amendments filed by counsel part of this action.

k. "Failing to request jury instruction that the standard for evaluating whether a defendant accused of murder had reasonable belief that deadly force was necessary to prevent great bodily harm to himself, as element of self-defense is objective rather than subjective."
l. "Failing to request jury instruction that the jury could consider the first attack by the victim on the defendant after passing his road when weighing self-defense on the second attack by trying to run the vehicle off the road."
m. "Trial counsel was ineffective in failing to object to or allowing falsified direct physical evidence to be introduced by Det. Dale Arterburn."
n. "Trial Counsel was ineffective in failing to object to hearsay testimony by Det. Dale Arterburn about the scene or location of the shooting since it was falsified testimony by Det. Dale Arterburn."

2. Ineffective Assistance of Appellate Counsel, in that:
   a. "Appellate counsel Robert M. Dudek was ineffective in failing to claim the issue on the directed verdict on venue."
   b. "Appellate counsel Robert M. Dudek was ineffective in skipping a crucial step in the appellate process."
   c. "Appellate counsel Robert M. Dudek was ineffective in failing to raise the issue that evidence was insufficient that the defendant acted with malice."
   d. "Appellate counsel Robert M. Dudek was ineffective in failing to be present at the most critical part of the appeal; Oral Argument."
   e. "Appellate Counsel Robert M. Dudek was ineffective in failing to cite State v. Day along with Fuller for the trial judge's refusal to give the requested charge to the jury."
   f. "Appellate counsel Robert M. Dudek was ineffective in failing to raise State v. Belcher to the Court of Appeals for the prosecutor's charge to the jury that they could infer malice because two shots were fired instead of one."

3. Subject matter jurisdiction
   a. "Subject matter jurisdiction lacked by Spartanburg Superior Court to try indictments 2008-GS-42-5308 and 2008-GS-42-5308(a)."

4. Prosecutorial Misconduct and Malicious Prosecution
   a. "Ass.Att.Gen Donald J. Zelenka lied on his brief to the Appellate Courts about the evidence and facts of the case."
   b. "Prosecutor Susan Reese lied to the jury about evidence and facts of the case."

c. "Det. Dale Arterburn lied on the stand about physical (direct) evidence and lied about the location of the alleged incident, or where the actual shooting took place by introducing falsified evidence."
d. "Suppression of evidence by prosecutor Susan Reese. Prosecutor Susan Reese maliciously suppressed the steering wheel cover, which was collected as evidence and sent to SLED for DNA testing. Prosecutor Susan Reese suppressed the evidence because it was exculpatory evidence and would have had the decedent's DNA and proven that decedent was trying to run the vehicle off the road and kill everyone in the vehicle."

5. Abuse of Discretion by Trial Court:
   a. "Trial court violated Due Process by refusing to give defendant a preliminary hearing as timely requested."
   b. "Trial court abused its discretion by refusing to direct a verdict on self-defense since defendant proved self-defense as a matter of law."
   c. "Trial court abused its discretion by refusing to direct a verdict on venue since the evidence proved the incident occurred before Wal-Mart in Greer, which is located in Greenville County."
   d. "Trial court abused its discretion by refusing to acknowledge State v. Hendrix for the continuing to shoot proposition."
   e. "Trial court abused its discretion by failing to protect defendant's Constitutional Rights and Due Process of Law."

6. Abuse of Discretion by Appellate and Supreme Court
   a. "Appellate court abused its discretion by refusing to grant the continuing to shoot proposition since it went to the heart of appellant's case, and because of prosecutor's highly prejudicial closing arguments."
   b. "Supreme Court abused its discretion by citing law against Marin that contradicts itself with other law."
   c. "Supreme court abused its discretion by citing law against appellant that was enacted after appellant's case entered the appellate courts. (Four years after)"
   d. "Supreme and Appellate court abused its discretion by not giving Marin the same equivalence as Belcher for the prosecutor's charge to the jury, that they could infer malice from two shots. The prosecutor said to the jury: "Ladies and gentlemen, I submit this is malice! Not one, two shots!"

SUMMARY OF FACTS ADDUCED AT TRIAL

The underlying facts were that the victim was heavily intoxicated at a Latin nightclub. Both the victim and Applicant had been celebrating at the Colombian Independence festival in Greenville which led them to the after party at Bongo's in Greenville. Towards the end of the night, the Bongo's staff was trying to find the victim a ride home because he was too intoxicated to drive. Applicant offered to take the victim home, claiming he knew where the victim lived. However, when the bouncer carried the victim to Applicant's car, Applicant had to retrieve the victim's license to get his address and then put the address into his navigation system.

The victim was placed in the back of Applicant's Durango SUV while Applicant's ex-brother-in-law, Jiminez, rode in the passenger seat. At trial, Jiminez could not be found and it was believed he returned to his home country of Mexico. However, some of his statements were admitted at trial as excited utterances. He was heard saying Applicant shot the victim because they had passed the victim's house and the victim continually asked Applicant to stop the car, but that Applicant refused to stop.

There was evidence presented that the shooting occurred on highway 29 headed toward Spartanburg near the intersection of Tacupau Road where the US Lumber Company is located. After Applicant shot the victim in the back of the head twice, he continued driving another 10 miles until Jiminez jumped out of the car at an intersection in downtown Spartanburg. The two were seen arguing outside the car and the cops were called. When the cops arrived, Jiminez was visibly upset while Applicant sat calmly on the side of the road. The victim's body was found dead in the vehicle with two gunshot wounds to the back of the head. Applicant was covered in blood. Witnesses saw Jiminez struggle for the gun and eventually take the gun from Applicant and throw it to the side of the road. When police arrived, Jiminez showed them where the gun

was. The gun was retrieved by law enforcement. Applicant testified at trial that he shot the victim in self-defense because the victim was trying to run the vehicle off the road by grabbing at the steering wheel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency. A Post-Conviction Relief application is not a venue for questioning each and every decision of trial counsel in hindsight. Rather, Applicant must demonstrate by a preponderance of the evidence that trial counsel was deficient and that the deficiency prejudiced the outcome of his trial. Applicant has failed to do so.

This Court will note Applicant has attempted to pick apart every minute detail of Counsel's performance and make ample recommendations of what should have or could have been done differently, in hindsight. But, the purpose of PCR is to highlight errors significant enough to carry with them constitutional implications, such that would cause this Court to question the fairness of the trial and undermine this Court's confidence in the outcome. For the Sixth Amendment does not exist for its own sake. The fundamental purpose of the Sixth Amendment is *not* to assess overall attorney performance, but to ensure the adversarial process functions fairly and reliably and that an accused receives a fair trial.

I. Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18.

A. Diane Tabares

Applicant alleged Counsel was ineffective for failing to object to testimony from Diane Tabares. Tabares was the State's first witness at trial. Tabares was the victim's sister. It is apparent from her testimony, that the State called her to give some background information

about the victim and to set the scene on the events that unfolded that day and into the night. The testimony Applicant insists was objectionable was Tabares's testimony that the victim was a cancer survivor and that Tabares was pregnant and due to deliver the day of the incident. (Tr. pp. 64-65). This Court does not find the testimony, in the context it was given, to be objectionable. Counsel did not find it objectionable either. The testimony was simply background information elicited to show where Applicant was the day of the incident and why as well as why Tabares herself was not there accompanying him. It is not improper for the jury to learn a little bit about the victim, since his death was the whole reason for Applicant's trial. This Court further finds this testimony did not influence or affect the jury's verdict in any manner whatsoever. Therefore, even if Counsel had objected, there is not reasonable probability the outcome would have changed.

Counsel's failure to make any conceivable objection is not deficient *per se*. Objections are calculated to achieve a tactical end in keeping with a party's theory of the case. Counsel, on the whole, reasonably calculated her objections to achieve the stated end. In any trial, decisions of Counsel can be, and will be, questioned. However, tactical trial decisions that do not serve to acquit the defendant do not, by definition, prove deficiency. In this matter, Counsel's performance was more than adequate and clearly within the standards of professional conduct.

B. Larry Rodriguez

Applicant alleged Counsel was ineffective for failing to recall Larry Rodriguez to stand and impeach him for lying on the stand. Again, this Court finds no merit in this allegation. Larry Rodriguez was called as a witness during the State's case-in-chief. Rodriguez was the owner of the nightclub, Bongo's, in Greenville. Applicant and the victim had been at Bongo's that evening into the early morning hours celebrating the Colombian Independence Day.

Applicant takes issue with Rodriguez's testimony that he closed the nightclub at 2:00 AM. Applicant claims that because photos from his camera showed the victim was put into Applicant's vehicle at 2:54 AM, that Rodriguez lied.[2]

It is apparent from the record, Applicant made this request to Counsel during the trial and Counsel addressed it on the record. (Tr. p. 267). Counsel also testified that she did not believe recalling Rodriguez on that minor point would serve any legitimate purpose because the timing was never an issue at trial. This Court agrees. Whether Applicant left at 1:54 AM (as the original date stamps on the photos taken from his camera indicated) or at 2:54 AM is of no consequence to the issue of whether Applicant shot the victim in the back of his head twice in self-defense. Regardless, there was little, if any, impeachment value in recalling Rodriguez to question him on what time he closed his nightclub. The jury had the evidence presented and could decide if Rodriguez was credible based on any alleged time discrepancy. Applicant has failed to meet his burden of proving this allegation.

C. Failure to suppress or object to evidence

Applicant has alleged Counsel was ineffective for failing to suppress or object to various items in evidence. This Court finds the allegations lack merit and Applicant has failed to prove them.

[2] It is worth noting that Applicant also alleged Counsel was ineffective for failing to exclude his camera that was found at the crime scene. (See 1st PCR application, allegation 11:e; and 2nd amended application, allegation 1:e). The camera, to which Applicant refers had these photos of the victim being loaded into his vehicle, is also the same camera collected by law enforcement during the investigation. Officer Lindsey McGraw testified as an expert in computer forensics that after adjusting the time stamps on the photos extracted from Applicant's camera, the photos appear to have been taken at 2:54 AM (Tr. p. 213). Although Applicant alleged the camera evidence should have been objected to because it was "tampered with," he also uses that "tampered with" evidence to support his argument that Rodriguez lied.

Autopsy Photos

Applicant claimed "gruesome autopsy" photos should have been excluded. However, the record reveals that no such autopsy photos were ever admitted at trial nor did Applicant provide this Court with evidence that such photos were in any way presented to the jury.

Applicant's Camera

Applicant claimed his camera was "tampered with" prior to a warrant being secured to search his vehicle and therefore should have been inadmissible. First, Applicant is mistaken that a warrant was needed to investigate and process the crime scene. The victim's lifeless body was found in Applicant's vehicle at an intersection in downtown Spartanburg. When law enforcement arrived, Applicant was sitting on the side of the road covered in blood. Applicant's passenger claimed Applicant had shot the victim. Applicant's vehicle was the crime scene. A warrant was not required to investigate and process the crime scene.

Secondly, the testimony from Officer David Hogsed revealed Applicant's camera was found hanging from the driver's seat headrest. (Tr. p. 170 and photos admitted at trial 168). Hogsed also testified that the camera was moved in order for crime scene investigators to examine the body more closely without damaging the camera in the confined space. The camera was taken into evidence. (Tr. pp. 170-171). The removal of the camera from the vehicle and into evidence does not constitute "tampering." Applicant has offered no actual evidence that the camera was in fact tampered with. Therefore, Counsel was not deficient for not objecting to its admission into evidence at trial.

Murder Weapon

Applicant claimed the murder weapon was inadmissible at trial because it had been "tampered with" prior to the crime scene photographer arriving to take photos of it. This

allegation is meritless. Officer Jeffery Powell testified that after Jiminez showed him where the gun was, he took the weapon, removed the round in the chamber to make it safe, and collected the weapon as evidence. (Tr. pp. 114-115). This does not constitute tampering that would render the gun inadmissible at trial. Applicant has failed to prove the gun was tampered with and therefore Counsel was not deficient in not objecting to its admission into evidence.

D. Continuing to shoot charge and two shots equaling malice

Applicant made various allegations surrounding the fact that he shot the victim twice and the request for the trial court to instruct the jury on continuing to shoot. This Court is not persuaded by any of Applicant's arguments on the issue. The evidence presented at trial showed Applicant shot the victim in the back of the head twice. Based on this evidence, the prosecutor argued that the two shots were evidence of malice, a requisite element of murder. In response to her argument, Counsel requested a "continue to shoot charge." In requesting the charge, Counsel originally cited to State v. Rye, 375 S.C. 119, 651S.E.2d 321 (2007). (Tr. p. 395). Later, Counsel also cited State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978). Although Applicant complains Counsel failed to first cite Hendrix, the issue is moot. Counsel did bring the Hendrix opinion to the trial court's attention and the issue was thereafter exhaustively litigated through both of our state appellate courts. Ultimately, the Supreme Court found the failure to give the continuing to shoot charge was not error. The Court stated,

> While the "continuing to shoot" charge may have been appropriate, its absence does not mandate reversal. The essence of the charge was encompassed in the jury instructions, particularly the instruction that "a person may use such force as is reasonably necessary even to the point of taking human life where such is reasonable."

Marin, 415 S.C. at 483, 783 S.E.2d at 813. Counsel was not deficient. And even if she had cited Hendrix first, the outcome would not have changed.

Applicant also complains that Counsel did not object to the prosecutor's argument that the two shots was evidence of malice. This issue was also used to support Applicant in his arguments on appeal. However, this Court finds the argument was proper and not objectionable. Counsel did not find the argument objectionable, but, rather, in response to it, she argued for the "continue to shoot" charge. This Court finds her performance in this regard was reasonable and sound. Likewise, this Court finds Counsel's closing arguments were also reasonable, despite Applicant's allegation Counsel should have argued why the second shot was "necessary." Not only does this Court find the evidence did not support such an argument[3], but such an argument was not likely to change the outcome of the trial.

Lastly, this Court notes that the law from Hendrix states that "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." Hendrix, 270 S.C. at 661, 244 S.E.2d at 507. The more relevant issue for the jury to determine in this case, was if Applicant was even justified in shooting the heavily intoxicated victim in the back of the head two times after the victim had, on more than one occasion, pleaded for Applicant to stop or turn around after Applicant had passed his home at 3:00 AM and continued to drive farther and farther from the victim's home. The victim had even "attacked" Applicant from the backseat prior to the fatal attack and Applicant was able to push him off and into the backseat. At no point in time between that attack and the 10 miles Applicant continued to drive did he consider pulling over and kicking Applicant out of the car. Nor did Applicant consider simply slowing down and kicking Applicant out of his car during the second "attack," in which Applicant alleged the victim was trying to "kill them all" by running

[3] At trial, Applicant testified he shot twice, "real fast - - boom, boom" (Tr. p. 313-314) within seconds. Therefore, how could he have known if the second shot was "necessary"

the car off the road. Instead, Applicant chose to reach over to his glove compartment,[4] pull out a pouch containing a gun, put the pouch between his legs, unzip the pouch, pull out the gun, then press the gun firmly against the back of the victim's head/neck and fire two rapid shots, all while still driving the car while passenger Jiminez sat by idly offering no assistance in subduing the alleged "attacker" that was trying to "kill them all." In this Court's reading of the record, the most relevant issue was the credibility of Applicant's self-defense claim, rather than whether there was malice because he fired two shots. Counsel was not deficient. Had Counsel done any of the things Applicant insists she should have, the facts would not have changed, and therefore the outcome would not have changed.

E. Proposed Jury Instructions

Applicant has alleged Counsel was ineffective for failing to request various different jury instructions. However, there is no merit to any of the allegations. All of the proposed instructions are without basis in any authority in South Carolina law and are essentially an unconstitutional comment on the facts. "Judges shall not charge juries in respect to matters of fact, but shall declare the law. " S.C. Const. art. V, § 21; See also Marin, 415 S.C. at 486, 783 S.E.2d 808. Further, this Court is concerned that some of the proposed instructions are not even a correct statement of the law nor good law. This Court finds Counsel was not deficient in failing to request Applicant's proposed jury instructions.

F. Protections of Persons and Property Act ("PPP Act")

Applicant alleged Counsel was ineffective for both failing to request immunity under the PPP Act in a pre-trial motion, rather than as a jury instruction. This allegation lacks merit. This Court notes at the time of Applicant's trial, it was a common practice to request the PPP Act be

[4] The evidence seems to indicate that Applicant would have had to reach to his glove compartment for the secured gun while Applicant was not "attacking" him, but, rather, while he was subdued in the backseat.

read as a jury instruction. It was not until 2011 in State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011), that the proper procedure to hear PPP Act claims in a pre-trial hearing before the judge was laid out. The Supreme Court also held that the PPP Act should not be read as jury instructions, but that the reading of the PPP Act to the jury benefitted a criminal defendant.

Since Counsel's performance is analyzed based on a standard of reasonableness in light of *prevailing professional norms*, Counsel cannot have been deficient for not requesting a pre-trial immunity hearing under the PPP Act when doing so was not the prevailing professional norm. Additionally, even if Counsel had requested such a hearing, it would most likely not have benefited Applicant. Applicant's self-defense claim was not credible and he could neither convince a jury of twelve nor an experienced and excellent trial judge that he acted in self-defense. A pre-trial hearing would have been futile and would have served only to pre-try his case.

Applicant also alleged Counsel should have requested the entire PPP Act have been read to the jury, and not just the duty to retreat provision. However, the PPP Act is not an appropriate jury charge and Applicant got part of it read to the jury anyway. Importantly, Applicant received the most integral part of the PPP Act as a jury charge which was that he had no duty to retreat in his own vehicle. Therefore, Counsel was not deficient and Applicant was not prejudiced.

G. Venue/Jurisdiction

Applicant has made various allegations regarding questions about venue and/or jurisdiction, the first of which is an allegation that Counsel was ineffective for failing to have a pre-trial motion "that Spartanburg Superior Court lacked jurisdiction to try the case since the incident occurred before Walmart in Greenville County." Applicant also alleged the court lacked

subject matter jurisdiction to hear the case and that Detective Arterburn lied on the stand regarding evidence of where the shooting took place.

First, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Gentry, 363 S.C. 93; See also S.C. Const. Art. V, § 7. Thus, Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Applicant's conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction. This Court finds Applicant has failed to present any evidence to refute the record that the convictions he challenges in this application are in a class over which the circuit court does not have the authority to provide.

Second, with regard to the allegation of ineffective assistance, Counsel never had a reason to challenge the venue based on the location of the shooting. Counsel testified credibly that Applicant could never explain to Counsel where the shooting took place. This is consistent with Applicant's testimony at trial. At trial, Applicant testified *twice* that he "did not know where [he] was at (sic)" after being specifically asked if he saw whether the 24-hour Wal-Mart was open. (Tr. p. 311). When asked if the Waffle House was opened, he again stated, "I did see anything." (Tr. p. 311). Conveniently, over seven years later, at his PCR hearing, he remembered that he shot the victim before the Walmart in Greer, which he claims is in Greenville County.[5] During the PCR hearing, when asked why he did not present that information to the jury, and instead testified he did not know where he was, he simply responded that he was not asked the question – again blaming his predicament on Counsel. This Court does not find Applicant's testimony credible. Applicant is merely trying to back door in a new argument in an effort to vacate his murder conviction and life sentence.

[5] This Court takes judicial notice, in addition to it having been testified to, that the Greer Wal-Mart referenced in this case is located in the city of Greer, but is also in Spartanburg County. Greer is situated in both Spartanburg and Greenville County.

With regard to Applicant's allegation that Detective Arterburn lied regarding the location of the shooting, Applicant's testimony is, again, not credible. Detective Arterburn testified that he took Jiminez and tried to re-route the path taken the night of the shooting. Based on what Jiminez told him as well as fresh skid marks and vehicle debris, Detective Arterburn established the shooting occurred at near the intersection of Tacupau Road and Highway 29 by the US Lumber Company. This was never refuted or disputed by the defense. In fact, Counsel went to the scene and took pictures of the area that she ultimately admitted at trial. The purpose of the pictures were to show the jury the landscape and show why Applicant could not simply "turn around" like the victim allegedly wanted and to show the danger Applicant faced with the victim grabbing at the wheel when "telephone polls" and "trees" littered the area. (Tr. p. 280; 296; 297; 303). Furthermore, this Court finds Detective Arterburn's testimony credible and Applicant's testimony not credible. Applicant's testimony regarding the front bumper found at the shooting location was not only lacking in credibility, it was also confusing. This Court finds Applicant failed to meet his burden to prove any of this allegations regarding venue and jurisdiction.

This Court also recognizes our state's law in cases where the exact location of a crime is not certain.

> A criminal defendant is entitled to a directed verdict when the State fails to present evidence that the offense was committed in the county alleged in the indictment. *State v. Evans,* 307 S.C. 477, 415 S.E.2d 816 (1992); *State v. McCoy,* 98 S.C. 133, 82 S.E. 280 (1914). For the purpose of establishing jurisdiction in a criminal prosecution, it is not necessary that the county in which the crime was committed be proved affirmatively if there is sufficient evidence from which it can be inferred. *State v. McLeod,* 303 S.C. 420, 401 S.E.2d 175 (1991); *334 *State v. Wharton,* 263 S.C. 437, 211 S.E.2d 237 (1975); *State v. Henderson,* 285 S.C. 320, 329 S.E.2d 448 (Ct.App.1985). Moreover, venue, like jurisdiction, in a criminal case need not be affirmatively proved, and circumstantial evidence of venue, though slight, is sufficient to establish jurisdiction. *State v. Owens,* 293

> S.C. 161, 359 S.E.2d 275 (1987); *Wray v. State,* 288 S.C. 474, 343 S.E.2d 617 (1986); *State v. Wharton, supra.* Generally, it can be inferred that the crime was committed in the state as well as county where the body is found. *United States v. Rees,* 193 F.Supp. 849 (D.Md.1961). Furthermore, where some acts material to the offense, and requisite to its consummation, occur in one county, and some in another, venue is proper in either county. *State v. McLeod, supra; State v. Gasque,* 241 S.C. 316, 128 S.E.2d 154 (1962).

State v. Williams, 321 S.C. 327, 333–34, 468 S.E.2d 626, 630 (1996). There was more than sufficient evidence that the actual shooting took place in Spartanburg County.

H. Expert Witness

Applicant alleged Counsel was ineffective because she failed to call an expert witness. Applicant failed to meet his burden to prove this claim. At the PCR hearing, Applicant offered Don Girdnt as an expert in crime scene reconstruction. Girdnt testified that upon his review of the case materials, the crime scene was consistent with Applicant's version of events that the victim had reached from the back seat to grab the steering wheel. This Court commends Applicant on presenting an expert on the issue. However, the fact that the victim was reaching from the backseat for the steering wheel was never in dispute or a material issue at trial. In fact, the State admitted photos of the crime scene showing the victim's body half in the back seat while his upper torso was over the console and into the front seat. Additionally, Jiminez told law enforcement that Applicant passed the victim's home and would not stop so the victim reached over the driver's side. Applicant fails to acknowledge that it was not the action of the victim that was at issue, but rather the reasonableness of his response to his actions by shooting him in the head twice. Therefore, this Court cannot find Counsel was deficient in failing to call Girdnt or any other expert in the area of crime scene reconstruction.

I. Opening Statements

Applicant alleged ineffective assistance because Counsel did not tell the jury in opening statements that the case was about self-defense. Applicant has failed to prove either deficiency or prejudice on this allegation. Counsel testified that she always would rather under-promise rather than over-promise the jury during her opening. In this case, Counsel was unsure if Applicant was going to testify and therefore unsure if she could present sufficient evidence to get a self-defense jury charge. In fact, Applicant had indicated to Counsel that he wished not to testify, even though she encouraged him to testify. Counsel's testimony on this issue is credible.

The record corroborates Counsel's testimony. At the end of the State's case, the trial judge engaged in a colloquy with Applicant regarding his right to testify. Applicant told the judge he wished to remain silent and not testify. Thereafter, the defense rested before the jury. The next day, Counsel had to request Applicant be allowed to testify since Applicant had a change of heart. The trial judge permitted him to testify. Therefore, because Counsel was not sure at the start of the trial if she would be entitled to a self-defense jury instruction, she did not want to over-promise the case to the jury. This was not only reasonable, but prudent. Regardless, Applicant did testify to self-defense, Counsel requested a self-defense charge, and the jury was given a charge on self-defense. Therefore, even if Counsel had mentioned self-defense in opening, there is no likelihood it would have affected the outcome of the trial.

J. Failing to object to prosecutor's comment

Applicant alleged Counsel should have objected when the prosecutor stated in closing that Applicant "would not stop." (Tr. p. 349). However, Applicant has failed to present any evidence as to why this comment was objectionable. The comment was in reference to evidence presented at trial. Jiminez's excited utterances were admitted. Jiminez said Applicant was

supposed to take the victim home, passed the victim's home, the victim got upset and tried to get Applicant to stop the car, and Applicant "just wouldn't stop." (Tr. p. 122). Applicant himself testified he never stopped even after the victim allegedly kept trying to reach for the wheel and Applicant pushed him back. (Tr. p. 303). Therefore, the prosecutor's comment was not objectionable and Counsel was not deficient.

K. Failure to disclose Brady material

Applicant alleged Counsel was ineffective for failing to disclose Brady material to him. Applicant failed to prove this allegation. Counsel testified, credibly, that she met with Applicant numerous times and reviewed his discovery and the entire case in depth. Applicant has presented no credible evidence to show Counsel failed to disclose any of the State's evidence to Applicant.

L. Steering wheel

Applicant made various allegations regarding the steering wheel of his car. The first allegation is that Counsel was ineffective for failing to argue that the lack of fingerprints on the steering wheel was exculpatory. This Court fails to see Applicant's reasoning behind this argument. Regardless, the testimony at trial revealed the vehicle was processed for fingerprints and only two prints were found. Applicant's fingerprint was found on the left-side rear door and Jiminez's fingerprint was found on the right-side front door. (Tr. p. 198) Officer Thomas Murphy also testified that fingerprints are more likely to be lifted from slick or shiny surfaces, as opposed to textured surfaces. (Tr. p. 197). The photos admitted at trial reveal Applicant had a textured steering wheel cover, which would tend to be why no prints could be found or lifted from the steering wheel. Therefore, this Court cannot find Counsel ineffective for failing to argue that no fingerprints were found on the steering wheel nor was Applicant prejudiced.

Applicant also alleged prosecutorial misconduct, in that the State failed to disclose DNA testing performed on the Applicant's steering wheel cover. This Court granted Applicant discovery to resolve whether such DNA testing had been done. SLED thereafter provided all documentation surrounding the testing of a sample collected from the steering wheel cover which revealed no testing had ever been done, because the requirements for routine analysis had not been met. Therefore, Applicant has failed to prove this allegation.

M. Failing to object to Detective Arterburn's testimony

Applicant alleged Counsel should have objected to evidence and testimony from Detective Arterburn because it was "falsified." As more thoroughly fleshed out in the prosecutorial misconduct section below, Applicant has failed to prove any evidence was falsified in this case. Therefore, Counsel was not deficient for not objecting to evidence on the basis it was falsified.

II. Ineffective Assistance of Appellate Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d (1985). A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476. 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) ("For judges to

second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . .")).

Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

In Applicant's direct appeal, Chief Appellate Defender, Robert M. Dudek, and Assistant Appellate Defender, David Alexander, raised the following issues to the South Carolina Court of Appeals:

I. The court erred by refusing to instruct the jury on self-defense that a defendant acting in self-defense had the right to continue shooting until it was apparent that the danger of death or serious bodily injury had ended since this was a widely accepted correct instruction on the law, and appellant had a right to have the instruction crafted to the facts of the case.
II. The court erred by refusing to charge South Carolina Code § 16-11-450(a) that a person protected by the Castle Doctrine who was acting lawfully was immune from criminal or civil prosecution, since the judge erred by refusing to give a full jury instruction on the Castle Doctrine where it was raised by the evidence in this case.

By opinion filed July 3, 2013. State v. Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013), the South Carolina Court of Appeals affirmed Applicant's convictions. Applicant appealed to the South Carolina Supreme Court, arguing only the "continuing to shoot" jury instruction issue, and the Court granted certiorari. By opinion filed March 23, 2016, the Supreme Court of South

Carolina affirmed as modified the Court of Appeals decision. The remittitur was returned to the circuit court on April 8, 2016.

Applicant alleged appellate counsel was ineffective for failing to raise various issues and case law on appeal. Applicant further alleged appellate counsel was ineffective for "skipping" oral argument.

Applicant has failed to meet his burden of proving either appellate counsel was deficient or that Applicant was prejudiced by such alleged deficiencies. Applicant proposed that appellate counsel should have briefed issues that are either without basis in any authority in South Carolina law, or were actually raised, or are clearly inferior to the issues which were raised. Applicant failed to present any evidence to convince this Court that the issues raised were not the most meritorious issues available on appeal. This is evident by the fact that the case was called to oral argument at the Court of Appeals, resulted in a published opinion from the Court of Appeals, the Supreme Court granted certiorari to review the case, the Supreme Court called the case for oral argument, and resulted in a published opinion from the Supreme Court. Further, this Court finds none of the case law Applicant insisted should have been used to be of any benefit to the arguments made on appeal.

With regard to the allegation that appellate counsel, Dudek, missed the oral argument, this Court finds the allegation without merit. First, Applicant fails to realize he was represented by two appellate defenders, Dudek and Alexander. The evidence presented to this Court shows Alexander argued in the Court of Appeals while Dudek was handling a death penalty case. Further, the oral argument in the Court of Appeals is essentially irrelevant since the Supreme Court reviewed the case and also heard oral arguments that resulted in a modified opinion from

the Supreme Court. Both Dudek and Alexander argued on Applicant's behalf before the Supreme Court. (Archived argument found at media.sccourts.org/videos/2013-002001.mp4).

III. Prosecutorial Misconduct/Malicious Prosecution

In his application, Applicant alleged prosecutorial misconduct and malicious prosecution. However, prosecutorial misconduct is not typically an issue for post-conviction relief. Rather, this allegation is a direct appeal issues that is procedurally barred by S.C. Code Ann. § 17-27-20(b). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised these issues during trial and on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794 (1989).

To the extent Applicant raises these allegations as being newly discovered, and therefore could not raise the issues at trial or on appeal, this Court finds the allegations without merit. Applicant essentially claims that every State actor "lied" in every step of his criminal case from the investigation through trial and even on appeal. Applicant has set forth no credible evidence to support his allegations of prosecutorial misconduct, other than his self-serving testimony. Furthermore, a reading of the record reveals neither Detective Arterburn, Assistant Solicitor Susan Reese, nor Assistant Solicitor Russel Ghent lied during any phase of Applicant's trial and appeal. Detective Arterburn was consistent in the testimony he provided at both trial and during the PCR hearing regarding how he established the location of the shooting. This Court finds nothing untruthful about either. Applicant did not present any credible evidence to support his contention that evidence was "falsified." Additionally, both Reese's and Ghent's arguments to

the jury in closing and in the briefs on appeal were based on the evidence presented at trial and reasonable inferences to be made therefrom. Therefore, Applicant has failed to meet his burden to prove prosecutorial misconduct by a preponderance of the evidence. This allegation is denied and dismissed with prejudice.

IV. Summary Dismissal

Although this Court allowed ample leeway and flexibility in allowing Applicant to present all of his allegations and complaints at his PCR hearing, this Court finds any and all allegations of trial and appellate court error improper for PCR. An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release was unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other write, motion, petition, proceeding or remedy...

S.C. Code Ann. § 17-27-20.

Applicant's allegations do not support a cognizable claim for post-conviction relief under any of the statutory grounds. Post-conviction relief is only proper when the application collaterally attacks the validity of the conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).

Allegations of trial court or appellate court error are direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. For these reasons, the allegations are denied and dismissed.

CONCLUSION

Applicant raised 50 separate grounds for relief. When a party raises a dozen or more grounds to vacate a conviction, that usually means there are none. See Fifth Third Mortgage Co. v. Chicago Title Ins. Co., 692 F.3d 507, 509 (6th Cir. 2012); Pierce v. Visteon Corp., 791 F.3d 782, 788 (7th Cir. 2015) (raising 13 issues on appeal violates principle that counsel must concentrate attention on the best issues). Taken together, it is apparent that the application may be effectively summarized as provided by Applicant's overall complaint: Applicant feels Counsel could have done better. However, Monday-morning quarterbacking and hindsight analysis do not provide for post-conviction relief. The relevant question is only whether or not Counsel's performance was so deficient as to deprive Applicant of a fair trial, and deprive the judiciary of confidence in the outcome. For all the reasons set forth above, Applicant has failed to meet his burden under Strickland as to any of the allegations, and the application for post-conviction relief should be denied.

This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's

assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 5 day of June, 2018.

GRACE GILCHRIST KNIE
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

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Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Manvel Antonio Mann #343371

Applicant

VS

State of S.C.

Respondent

IN THE COURT OF COMMON PLEAS

7TH JUDICIAL CIRCUIT

CASE # 2016 CP 42 2195

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Order of dismissal
In this action dated 06/05/2018, _____ on 06/05/2018

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

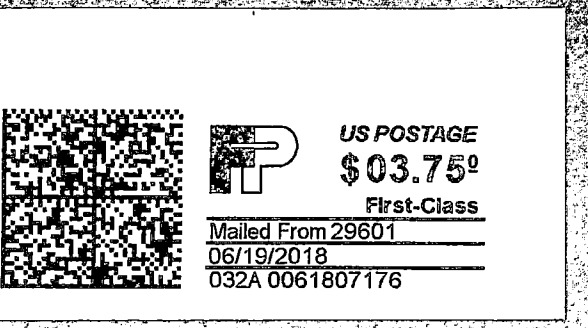
Megan Jameson

Susannah Ross

James Price III

06/05/2018
(Date)

Cecil Seay
(Signature)



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