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REPLY TO THE CHARLESTON OFFICE
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August 7, 2018

VIA U.S. MAIL

The Honorable Daniel E. Shearhouse
Clerk of South Carolina Supreme Court
Supreme Court Building
Post Office Box 11330
Columbia, SC 29211

RECEIVED

AUG 10 2018

S.C. SUPREME COURT

Re: *Ryan Deleston, #307106 v. State of South Carolina*
Civil Action No.: 2017-CP-10-4561

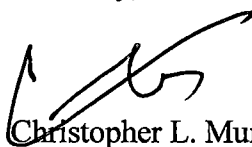
Dear Mr. Shearhouse:

Enclosed for filing, please find an original and two copies of Appellant's Notice of Appeal of the denial of his application for Post-Conviction Relief, and a Proof of Service regarding same. If you find everything in order, please file the original and return the clocked-in copies in the enclosed self-addressed envelope.

Please note, I was appointed to this and case and have copied the Office of Appellate Defense on this who will handle the appeal. Please call if you have any questions.

With kindest regards, I am

Sincerely,



Christopher L. Murphy, Esq.
For the Firm

CLM/jh

Enclosures

cc (w/ encls.): Mr. Ryan Deleston
Megan Harrigan Jameson, Sr. Asst. Deputy AG
Office of Appellate Defense
The Honorable Roger M. Young, Sr.
The Honorable Julie J. Armstrong, Clerk, 9th Jud. Cir.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

AUG 10 2018

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Roger M. Young, Sr., Circuit Court Judge

Case No.: 2017-CP-104561

Ryan Deleston, #307106 Appellant
v.
State of South Carolina Respondent

NOTICE OF APPEAL

Appellant appeals the Court's denial of his application for post-conviction relief.
Attached is the order from the court dated July 18, 2018, filed July 25, 2018 and received July 30, 2018.

August 7, 2018



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STATE OF SOUTH CAROLINA,
Respondent.

ORDER OF DISMISSAL

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attempted armed robbery, and possession of a weapon during the commission of a violent crime. Thereafter, during its December 2012 term, the Charleston County Grand Jury also indicted Applicant for possession of a handgun with an obliterated serial number. The charges stem from the shooting death of Marley Lion, a recent high school graduate, during an attempted armed robbery while he was asleep in his vehicle.

Applicant was represented by Ninth Circuit Public Defender D. Ashley Pennington and Assistant Public Defender John J. Kozelski. The prosecution was represented by Ninth Circuit Solicitor Scarlett A. Wilson and Deputy Solicitor Bruce DuRant. On October 7, 2013, the case was called before the Honorable Kristi Lea Harrington and a jury. On October 11, 2013, the jury found the Applicant guilty of all the charges. Judge Harrington sentenced Applicant to life without parole for murder, twenty years concurrent for attempted armed robbery, and five years concurrent for possession of a handgun with an obliterated serial number. The trial court did not impose a sentence for possession of a weapon during the commission of a violent crime pursuant to S.C. Code Ann. § 16-23-490(A) since Applicant was sentenced to life without parole.

Applicant filed a timely notice of appeal on October 14, 2013. He was represented on appeal by Chief Appellate Defender Robert M. Dudek and Appellate Defender Lara M. Caudy, both of the South Carolina Commission on Indigent Defense - Office of Appellate Defense. The State was represented by Deputy Attorney General Donald J. Zelenka. On appeal, Applicant argued the trial court erred in refusing to allow Applicant to cross-examine two witnesses regarding an armed robbery that occurred two weeks prior to the instant murder and the trial court erred in instructing the jury that the trial was “a search for the truth in an effort to make sure that justice is done.” Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant’s convictions and sentences in an unpublished opinion. State v.

Ryan P. Deleston, 2016-UP-055 (Ct. App. Filed February 10, 2016). Applicant petitioned for rehearing on February 25, 2016. The petition for rehearing was denied by the Court of Appeals on April 21, 2016.

Thereafter, Applicant petitioned for certiorari to the South Carolina Supreme Court, which granted certiorari on December 1, 2016. Following briefing and oral argument, the Supreme Court dismissed certiorari as improvidently granted. State v. Ryan M. Deleston, 217-MO-013 (filed July 19, 2017). The Remittitur was returned to the circuit court on July 19, 2017.

SUMMARY OF THE STATE'S TRIAL VERSION

This case involves a murder stemming from an attempted robbery. On the night of June 15, 2012, Marley Lion, a recent high school graduate, attended a house party with a friend. [R.p. 78, l. 7- p. 79, l. 1; p. 80, ll. 13-18, Tr. 274, l. 7- p. 275, l. 1; p. 276, ll. 13-18.] Marley had been drinking that night. He drove his friend Katherine Ridgeway home around 3:00 a.m. and then "said he was heading home." [R. p. 81, l. 7- p. 82, l. 7, Tr. 277, l. 7- p. 278, l. 7.] Before making it to his destination Marley decided he was too intoxicated to drive and pulled into the parking lot of Famous Joe's to get some sleep. [R. p. 101, ll. 12-18; see R. p. 108, ll. 3-14, Tr. 298, ll. 12-18; see Tr. 305, ll. 3-14.] While parked in the parking lot of Famous Joes, Marley was shot five times and killed.¹ The state's version was that Applicant shot Marley during an attempted robbery with Bryan Rivers and Julius Brown. The jury was instructed and the State argued his guilt under accomplice liability, although it also asserted that Deleston was the trigger person.

¹ Marley Lion's death was ruled a homicide by the forensic pathologist and the cause of death was determined to be a gunshot wound to the chest with perforations or injuries of the abdominal aorta, the spleen, and the liver. [R. p. 683, ll. 3-6, Tr. 934, ll. 3-6.] Marley also suffered several gunshot wounds to the left thigh and groin region, and a gunshot wound to the right arm. [See R. p. 683, l. 11 – p. 696, l. 21, See Tr. 934, l. 11 – p. 947, l. 21.]

ALLEGATIONS BEFORE THE COURT

In his *pro se* application for post-conviction relief, Applicant alleged:

In the *pro se* application Deleston raises the following grounds :

A. Ineffective Assistance of Trial Counsel :

1. Counsel was ineffective in failing to object to the following jury instruction on expressed malice:

“Expressed malice is shown when a person speaks words or which -- words which express hatred or ill-will of another person or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the Defendant's mind would be expressed malice.”

Tr. 1132 lines 14-21. Counsel failed to take issue with the “lying in wait” example which was an improper comment on the facts.

2. Counsel was ineffective for failing to object to the trial court’s instruction on voluntary intoxication:

“ Insanity caused by the use of drugs or alcohol may be a defense if the insanity is permanent and destroys the Defendant's ability to know right from wrong. However, when voluntary intoxication has not produced permanent insanity, it is not a defense to a crime. A person who voluntarily becomes intoxicated is just as responsible for the facts committed while intoxicated as when the person is not intoxicated.

Tr. P. 1131 lines 13-20.

In correspondence with his current PCR counsel Christopher Murphy, Applicant asserted the following additional grounds:

3. Counsel was ineffective in failing to request a lesser included offense or relay any deals or plea offers for lesser included offenses.
4. Counsel did not advise the Applicant on not taking the witness stand. (Court inquiry of Deleston on decision to not to testify) (Tr.p. 771- 776, p. 1040-1042, ROA 541 -544, 771-772).
5. Counsel did not cross-examine witnesses;

6. Counsel did not recall Bryan Rivers and cross-examine him on the Chopper shooting” when the State opened the door by presenting the Deleston statement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges counsel was ineffective for failing to object to two different jury instructions given by the trial court.

1. Express Malice and Lying in Wait.

Applicant initially contends counsel was ineffective for failing to object to the following jury instruction on express malice:

Expressed malice is shown when a person speaks words or which - words which express hatred or ill-will of another person **or when the person prepared beforehand to do the act which was later accomplished.** For example, **lying in wait for a person or any other acts of preparation going to show that the deed was within the Defendant's mind would be expressed malice.**

Tr. 1132 lines 14-21. A review of the trial record reveals that there was a charge conference on October 11, 2013. Tr. p. 1025-1031. The record shows that no initial objection to the expressed malice charge. After the instructions were given, no objection was raised concerning the expressed malice instruction. Tr.p. 1140.

The Applicant presently asserts that the “lying in wait” instruction within the expressed malice instruction was a “charge on the facts.” He asserts that the charge on express malice which includes: “[F]or example, lying in wait for a person or any other acts of preparation going to show that the deed was within the Defendant's mind would be expressed malice” is improper under the South Carolina Constitution. S.C. Const. art. V, § 21 (“Judges shall not charge juries in respect to matters of fact, but shall declare the law.”). However, the law of malice is that “lying in wait” is expressed malice as the charge stated.

Standards for Review of Ineffective Assistance of Counsel Claims

To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, at 688 (1984). A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.*, at 689. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*, at 687.

Strickland does not guarantee perfect representation, only a " 'reasonably competent attorney.' " 466 U. S., at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); see also Gentry, *supra*, at 7. Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. Strickland, *supra*, at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.

Although courts may not indulge "post hoc rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (*per curiam*). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not

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counsel's subjective state of mind. 466 U. S., at 688. Harrington v. Richter, __ U.S. __ (Jan. 19, 2011).

With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.*, at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, at 687. See Harrington v. Richter, __ U.S. __ (Jan. 19, 2011).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." United States v. Timmreck, 441 U.S. 780, 784, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U. S., at 689–690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms,"

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not whether it deviated from best practices or most common custom. Strickland, 466 U. S., at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. See Wong v. Belmontes, 558 U. S. ___, ___ (2009) (per curiam) (slip op., at 13); Strickland, 466 U. S., at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. *Id.*, at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." *Id.*, at 693, 697. The likelihood of a different result must be substantial, not just conceivable. *Id.*, at 693. Harrington, *supra*.

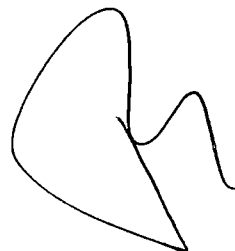
Conclusion

The record reveals reasonable performance on the part of counsel Pennington. This Court has not been presented with any opinion by the South Carolina appellate court or South Carolina Supreme Court which concluded that the instruction on expressed malice or lying in wait violated the State Constitution. During the PCR proceeding the Applicant failed to show that counsel was deficient in failing to object to the instruction. Counsel Pennington testified that he recalled the Judge Harrington discussed the charges with counsel. He did not object after review, listening to the charge and paying attention.

This Court must conclude that counsel was not deficient under the standards required of criminal defense counsel in 2013 when the matter was tried. Then and now, there is no binding caselaw that suggest that the lying in wait instruction was improper. To the contrary, the Supreme Court implicitly has approved a similar instruction of lying in wait and malice.

See State v. Kelsey, 331 S.C. 50, 78, 502 S.E.2d 63, 77 (1998) (“Proof of malice may be express or direct, such as, where there is evidence of previous threats or evidence of lying in wait. In other words, circumstances which show directly that an intent to kill existed). Cf. State v. Hardin, 114 S.C. 280, 103 S.E. 557, 558 (1920), overruled by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) (“Express malice is manifested by some outward act--lying in wait, making threat to take his life, or something of that kind”).

Counsel Pennington was not deficient in failing to object to the instruction as it related to express malice and lying in wait and assert that it was a charge on the facts under the South Carolina Constitution. This Court noted that in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) the Court expressly did not address the implied malice by use of a deadly weapon instruction as a violation of the state constitution “charge on the facts,” but limited its holding to a common law determination based upon its original jurisprudence. Here, the Applicant, in a collateral setting seeks for the first time for this court to declare the instruction defining express malice is a charge on the facts and that counsel was deficient in 2013 in failing to challenge it. Counsel cannot be deficient in failing to object to an instruction which has been used and no opinion of a court has concluded it was a violation of the State Constitution. See Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (observing “We have never required an attorney to be clairvoyant or anticipate changes in the law”). See United States v. McNamara, 74 F.3d 514, 516-17 (4th Cir. 1996) (holding trial counsel cannot be found deficient under Strickland where counsel failed to anticipate a subsequent change in the law) (collecting cases); see also Honeycutt v. Mahoney, 698 F.3d 213, 217 (4th Cir. 1983) (finding trial counsel was not deficient for not objecting to a malice charge that was correct

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under state law at the time it was given, despite persuasive authority from other jurisdictions calling the validity of the charge into question). This ground is dismissed.

2. Voluntary Intoxication Instruction

Applicant similarly asserts trial counsel was ineffective for failing to object to the trial court's instruction on voluntary intoxication:

Insanity caused by the use of drugs or alcohol may be a defense if the insanity is permanent and destroys the Defendant's ability to know right from wrong. However, when voluntary intoxication has not produced permanent insanity, it is not a defense to a crime. A person who voluntarily becomes intoxicated is just as responsible for the facts committed while intoxicated as when the person is not intoxicated.

Tr. P. 1131 lines 13-20. As above, no objection was made to this instruction. Tr.p. 1140.

This Court must conclude for similar reasons as ground one that counsel was not deficient in failing to object. At the outset, this Court must conclude that the instruction was a correct statement of law and properly supported by the testimony and evidence presented during trial. The general rule in South Carolina is that voluntary intoxication or use of drugs does not constitute a defense to a crime. It has been recognized, however, that insanity caused by the use of drugs or intoxication may be a defense where the insanity is permanent and destroys the defendant's ability to know right from wrong. 22 C.J.S. Criminal Law §§ 112 and 113 (1989). In State v. Vaughn, 268 S.C. 119, 232 S.E.2d 328, 330 (1977), the Supreme Court adopted the rule that "voluntary intoxication, *where it has not produced permanent insanity*, is never an excuse for or a defense to crime...." (*emphasis added*). Accord State v. Hartfield, 300 S.C. 469, 473, 388 S.E.2d 802, 804 (1990).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where

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the application alleges ineffective assistance of counsel as a ground for relief, 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 (1984); Butler, 334 S.E.2d 813. Here, like in ground one, he has failed to prove that counsel was under a duty to object to the intoxication charge based upon existing precedent. Since counsel cannot be deemed deficient in failing to object to a valid charge and create a change in the law, the Applicant failed in his burden of proof. See Teamer v. State, supra. (observing "We have never required an attorney to be clairvoyant or anticipate changes in the law").

3. Assertions that counsel should have sought a lesser offense or negotiated a lesser plea deal.

In his third ground, the Applicant contends that trial counsel failed to pursue a lesser offense. If this allegation concerns a failure to reveal a plea offer for a lesser included offense, the Applicant has not shown in his allegation the existence of any plea offer that was not revealed to the Applicant. If the allegation is that counsel should have vigorously sought a plea offer, the Applicant has failed to show that the Applicant's counsel failed to seek or negotiate a plea offer with the approval of the Applicant.

During the PCR hearing, counsel Pennington testified that they had negotiations with the Solicitor's office but that they were unsuccessful with having the Solicitor offer any sentence less than "life without parole." Counsel stated that he sought this after meeting with his client and evaluated their case. Counsel stated that he attempted discussions on a number of occasions with the Solicitor's Office through telephone calls and even arranged a meeting with a judge to try to get a favorable negotiation without success. The only agreement offered

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was a straight up plea, Pennington stated that a trial was the only option in this case. He stated that this case involved the shooting of an innocent victim and had high public concern. Pennington recognized that any negotiations had to be within the range for murder, because any manslaughter suggestion would be a "bridge too far." He offered to the State a plea to murder straight up and a range of 30 to 45 years that was rejected by the State. Pennington, who had an extensive history of handling several hundred murder cases in his practice considered their offer the best he could do and based it on the Applicant's age and life expectancy which he suggested would be in reality a life without parole sentence. He used this same argument in the sentencing proceeding after the jury verdict.

Solicitor Wilson at the PCR hearing confirmed the extent of counsel Pennington's vigorous attempts at negotiating a lesser sentence. She stated that it was her intent after counsel approached her about a plea that it would have to be a straight up plea and that she would seek a life (without parole) sentence whether it was a guilty plea or trial. She stated that the negotiations began months before trial and the State consistently was not willing to suggest a sentencing range of a term of years. Solicitor Wilson confirmed that there was joint meeting with a judge trying to get the State to offer a plea and recommendation less than a life sentence. Solicitor Wilson confirmed that this was unsuccessful for the Applicant.

At the PCR hearing, the Applicant testified and acknowledged that his counsel attempted to get a lesser sentence, but that the State was unwilling to accept any offer.

This Court must find that counsel Pennington was not deficient. As his testimony credibly shows, counsel approached the State numerous times seeking to lessen the sentencing culpability of his client. However, the State was unwilling to accept anything less than a life sentence in its discussions.

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It is clear that “a defendant has no right to be offered a plea[.]” Missouri v. Frye, 566 U.S. 134, 148 (2012) (citing Weatherford v. Bursey, 429 U.S. 545, 561 (1977)); see also Lafler v. Cooper, 566 U.S. 156, 168 (2012). It is axiomatic that criminal defendants have “no constitutional right to plea bargain , the prosecutor need not do so if he prefers to go to trial.” so Petitioner cannot possibly establish that he was entitled to a plea agreement on his own terms or that his counsel was ineffective for not requesting same. See Weatherford v. Bursey, 429 U.S. 545, 561 (1977). State another way, a prosecutor is under no legal obligation to consider or negotiate a plea with a defendant; the decision to offer a plea bargain is a matter of prosecutorial discretion. “It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty.” Id.

Counsel Pennington took the next available step on behave of his client by seeking to bring a judge into the matter of negotiations to break what he perceived to be a logjam. This is authorized under South Carolina procedures. “A trial judge may participate in the plea bargaining process if he follows guidelines to minimize the fear of coercion.” Medlin v. State, 280 S.E.2d 648, 648 (S.C. 1981). See also Harden v. State, 276 S.C. 249, 277 S.E.2d 692 (S.C.1981). However, despite the effort of his counsel this did not result in a favorable bargain. Counsel did all that he was authorized to do on behalf of his client related to negotiating for a lesser sentence.

Accordingly, counsel cannot be deemed deficient for not having obtained a plea bargain when there is no evidence the government was amenable to negotiate or that a plea deal ever was offered. To the contrary, the government has indicated that the Solicitor never proffered a plea agreement.

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If this ground concerns that the counsel should have sought an instruction for a lesser included offense, he has failed to show any evidence that would support any instruction for a lesser offense. This alternative ground must be dismissed.

4. Advice of Right to Testify. Counsel did not advise the Applicant on not taking the witness stand. (Court inquiry of Deleston on decision to not to testify (Tr.p. 771- 776, p. 1040-1042, ROA 541 -544, 771-772).

This Court must find that that ground 4 is conclusively refuted by the record which reveals when the critical decision was made on whether the Applicant would waive his right to testify, Deleston was fully advised by his counsel concerning that matter. The Applicant contends that trial counsel did not adequately advise the Applicant of his right to testify. Respondent submits that the record of the trial conclusively disputes this allegation. Pertinent to this ground, the trial court made two specific inquiries of the Applicant relevant to this assertion.

Prior to the state's case, Judge Harrington made the preliminary inquiry of the Applicant:

THE COURT: Mr. Deleston, at this time I'm going to explain to you certain of your rights. We typically do this at the close of the State's case, but there's been a lot of testimony over the past two days, and I anticipate that there may be a point tomorrow that the State will rest. And so I wanted you to have as much time to go over these rights with your attorney. Do you understand?

THE DEFENDANT: Yes, ma'am.

THE COURT: If at any time you do not understand anything that I explain to you or you need me to explain anything in further detail, please let me know. Do you understand?

THE DEFENDANT: Yes, ma'am.

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THE COURT: At some -- when I ask you these questions, and it will not be tonight, but we will have reached the stage in the trial where you're going to need to make the decision what type of defense you're going to present. You have a right to claim the protections given to you by the Fifth Amendment to the Constitution of the United States. This Amendment states, in part, that no person shall be compelled in any criminal case to be a witness against himself. That means that you cannot be required to testify in this case. You have the right to testify on your own behalf; however, no one can make your testify. This is a personal right, and no one can waive this right except for you. If you decide to testify, you will be subject to the same rules that govern the other witnesses and you may be examined and cross-examined on any relevant issue in this case. In addition, if you have convictions involving dishonesty or false statements or for crimes punishable by imprisonment for more than one year, and I determine that the probative value of admitting that evidence outweighs its prejudicial affect to you, the Solicitor will be able to introduce your record to attack your credibility.

Mr. Pennington, we've already addressed which convictions would be appropriate for impeachment; is that correct?

MR. PENNINGTON: Yes, ma'am.

THE COURT: And, Solicitor Wilson, you agree with that?

MS. WILSON: Yes, ma'am.

THE COURT: If you decide to testify, this decision on your part must be freely, voluntarily, and intelligently made, with the knowledge of the protections given to you by the Fifth Amendment and the consequences of your decision to testify. If you decide not to testify, I will instruct the jurors that they cannot give the fact that you did not testify any consideration whatsoever, and I will instruct them there's to be absolutely no prejudice to you because you did not testify. As a matter of fact, I instruct the jurors that they are not to discuss the fact that you did not testify in the jury room whatsoever. It is left entirely up to you whether or not you testify. You have the opportunity over this evening hour and throughout tomorrow to discuss with your attorney, either together or separately, your family, your friends, or anyone else, but the final decision is left entirely up to you.

Do you understand what I have explained to you?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you need for me to explain any of these issues in further detail to you?

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THE DEFENDANT: No, ma'am.

THE COURT: Do you understand what convictions could be used against you if you decide to testify?

THE DEFENDANT: Yes, ma'am.

THE COURT: You understand the instructions that I will give to the jurors if you decide not to testify?

THE DEFENDANT: Yes, ma'am.

THE COURT: Have you had discussions with your attorney regarding these issues?

THE DEFENDANT: Not yet.

THE COURT: Not yet? All right. Thank you.

Mr. Pennington, do you need for me to explain anything further to your client regarding his right to testify?

MR. PENNINGTON: I don't believe so, your Honor. I believe that was a great -- a very thorough explanation. Obviously, in the run up to trial, there's been discussions about the subject. Because he's in custody, because we've been working very long hours, I would ask for an opportunity to have -- we can start at 9:30 tomorrow. That way I'll have -- he will get here at 8:30. They'll bring him up here, and I would have a chance to talk with him before we commence in the morning, if that's all right.

THE COURT: Counsel, I could have him here earlier than that if I instruct them to have him here; correct?

MR. PENNINGTON: I think it would only be like a 15-minute conversation. So I think we could work it in by 9:30 easily.

THE COURT: So if he is here no later than 8:30, you will have sufficient time in the morning; is that correct?

MR. PENNINGTON: Yes, ma'am.

Trial Tr. (Vol. 3) p. 772, l. 3- p. 777, l. 5.

Later in the trial prior to the close of the case, Judge Harrington made the following additional inquiry of the Applicant and defense counsel.

COURT : All right. Mr. Pennington, do you have witnesses besides your client that will testify?

MR. PENNINGTON: The Defense will rest.

THE COURT: All right. Just out of an abundance of caution, I want to inquire of your client.

Mr. Deleston, would you please stand? And let's go ahead and re-swear Mr. Deleston at this time.

THE DEPUTY CLERK OF COURT: Please raise your right hand. (The oath is administered by the Deputy Clerk of Court, and the Defendant answers as follows:)

THE DEFENDANT: Yes.

THE DEPUTY CLERK OF COURT: Thank you, sir.

THE COURT: Mr. Deleston, please remain standing. Do you remember when I advised you of your right to -- that you could testify?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you need me to go over any of those things with you?

THE DEFENDANT: No, ma'am.

THE COURT: Have you had an opportunity to meet with your attorneys, either separately or together, to discuss the benefits and the consequence of your right to testify?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you need any additional time to meet with your attorneys?

THE DEFENDANT: No, ma'am.

THE COURT: Have you made a decision whether or not you will testify?

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THE DEFENDANT: I will not testify.

THE COURT: All right. And thank you, Mr. Deleston. You may have a seat.

Mr. Pennington, do you need, based upon what has been presented today, to meet with your client is there as well -- we haven't had a break -- but to meet your client concerning that decision?

MR. PENNINGTON: I will, during the lunch hour, touch base with him just to confirm. But everything that I have -- all communications and understandings we've had up to this point would lead me to believe that that is a firm decision, and it's based on a thorough understanding of his circumstances.

THE COURT: I just wanted to make sure that you've had adequate opportunity to meet with him and to go over all of those consequences of his decision. So with that, the Defense rests. All right. So then that leaves us just charging and closing; is that correct?

Trial Tr . (Vol. 5), p. 1041-1041.

This Court finds that the Applicant's sworn statements in open court that he had consulted with counsel carry a presumption of verity. "[s]olemn declarations in open court carry a strong presumption of verity". forming a "formidable barrier in any subsequent collateral proceedings." Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). A criminal defendant has a fundamental constitutional right to testify on his own behalf at trial, a right that cannot be waived by defense counsel. United States v. Teague, 953 F.2d 1525, 1532 (11th Cir. 1992) (en banc). "A claim that a defendant's right to testify was violated by defense counsel is analyzed as a claim of ineffective assistance of counsel." Teague, 953 F.2d at 1534). "Defense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, the



strategic implications of each choice, and that it is ultimately for the defendant himself to decide....Counsel may advise the client in the strongest possible terms not to testify, but the choice whether to testify lies with the defendant....Counsel has the responsibility of ensuring that any waiver of the right to testify is knowing and voluntary.” Id. (internal citations omitted).

The Applicant has not presented a cogent reason as to why he should not be held to the truth of his statements at trial. The Applicant confirmed that he discussed testifying with Pennington. He stated that counsel told the Applicant that he was going to get hammered because at the time of the incident, he had just come off a YOA (Youthful Offender) sentence. However, the Applicant stated that he thought he was not prepared to testify at that time.

Counsel Pennington credibly testified that he advised Deleston that it was his recommendation that he not testify at this trial because Applicant’s testimony would not carry much weight. Counsel based this upon the fact that the Applicant’s statement was already in evidence by the State after the change in the State’s strategy and that he was then able to argue his denial within the statement. Pennington did not consider that Applicant would be a good witness. Counsel stated that if the Applicant would have testified after the intent to testify had been abandoned, Pennington would have rehearsed the matter with the Applicant. However, Pennington opined that the Applicant did not have a lot to add to the version of the crime. He recalled that the Applicant did not want to take on testifying, particularly where the evidence at trial already revealed that the gun at the incident was being passed between Applicant and Rivers. This Court adopts this portion of Pennington testimony as a finding of fact.

Even more interesting and probative at the PCR hearing, the Applicant acknowledged that he was aware of Rivers use of the weapon at the Chopper shooting which would have

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negated any suggestion in an accomplice liability case that he would have been unaware of Rivers use of lethal force previously. In fact, Deleston admitted during the hearing that he was a participant in the Chopper robbery although he stayed in the vehicle knowing that the intended robbery was taking place. While the Applicant may have testified that Bryan Rivers did the fatal shooting under his theory at the PCR proceeding, he would have also testified that he knew that he was involved and agreed to commit a robbery that night, aware that Rivers had used the weapon to rob previously. His testimony would have supported a charge of murder under "accomplice liability" if it was consistent with the testimony he gave at the PCR proceeding.

The Applicant has failed to show deficient performance on the part of his counsel concerning his advice concerning the Applicant's right to testify at trial. It is disingenuous for Applicant to claim that counsel deprived him of his right to testify. Counsel made the Applicant aware of his rights and recommended a course to take to improve their chances at this difficult trial which the Applicant accepted. As the trial transcript shows, Deleston declared under oath that he understood his right to testify, that he discussed the decision whether or not to testify with counsel, that it was his own decision not to testify, and that his decision in this regard was of his own free will. "Solemn declarations in open court carry a strong presumption of verity." Blackledge v. Allison, 431 U.S. 63, 74 (1977) "[I]f an accused desires to exercise [his] constitutional right to testify the accused must act affirmatively and express to the court [his] desire to do so at the appropriate time or a knowing and voluntary waiver of the right is deemed to have occurred." United States v. Kamerud, 326 F.3d 1008, 1017 (8th Cir.2003) (citation omitted).

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Further, he fails to demonstrate prejudice by showing a reasonable possibility that the results of the proceeding would have been different had he testified. See Fishbone v. Sec'y for Dep't. of Corrs., 165 Fed.Appx. 800, 801-02 (11th Cir.2006) (defendant not prejudiced by trial counsel's alleged ineffective assistance in failing to inform him he had the right to testify when, even in light of defendant's proposed testimony, there was no reasonable possibility that result of proceedings would have differed had defendant testified). To the contrary, he has shown that had he testified, it is more likely he would have been convicted because his testimony supported the State's alternative theory of guilt. For this additional reason, he has failed in his burden of proof.

5. Counsel Failed to Cross-examine witnesses.

In his allegation, Applicant makes a conclusory allegation that counsel failed to cross-examine witnesses. The record reflects that the Applicant did not cross-examine the following state witnesses at trial:

1. Elizabeth Page - Tr. 256 (Marley lived with them and she was unable to get in touch with him after midnight when he failed to return home.)
2. Katherine Ridgway - Tr. 272 (Friend of Marley and went to party that night after he picked her up and dropped her off that night at her apartment after 3 am and told her he was going home).
3. Lauren Mulkey - Tr. 279 (Investigator with Charleston Police Department and reviewed the surveillance video of d.d. Packers which revealed the victim's vehicle at 4:08 lights blinking after seeing a black male in a white shirt going towards the direction of victim's vehicle at 3:55).

4. Christopher Singleton - Tr. 789 ("Little Chris" was Bobby Warthaw's cousin and assisted in purchasing the gun from Applicant which he turned over to the police in return for reward money)
5. Jeffrey Robertson - Tr. 816 (Charleston Police investigator conducted surveillance on the controlled purchase of the weapon from the Applicant)
6. George Bradley - Tr. 830 (Charleston Police sergeant also conducted surveillance on the controlled purchase of the weapon from the Applicant)
7. Mary Phillips - Tr. 838 (Crime scene investigator described contact with six shell casings and did not recover fingerprints, collected a gun out of vehicle and introduced photos).
8. Michael J. Kaplan - MD - Tr. 927 (pathologist who performed autopsy)
9. S. Lamart Williams - Tr. p 997 (described man named Gee who gave him the gun to sell and asserted in the picture shown he was making a transaction for weed and not the gun).

At the PCR hearing, the Applicant has failed to allege any particular deficiency as to any of these witnesses. He has failed to allege any line of inquiry that was constitutionally necessary under the Sixth Amendment. Counsel Pennington generally testified he did not cross-examine the witnesses, but in hindsight has no recollection that he missed anything. During the hearing, the Applicant did not assert that the defense failed to bring out any particular evidence from any of these witnesses by failing to further question them.

Cross-examination must be objectively unreasonable and not flawless; an attorney's decision about the extent of cross-examination and refraining from certain lines of inquiry is entitled to great deference. Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000). But see



Berryman v. Morton, 100 F.3d 1089, 1097-1099 (3rd Cir. 1996). The Second Circuit expands by stating that whether to engage in cross-examination, its extent and its manner, is a strategic decision of counsel. (U.S. v. Nersesian, 824 F.2d 1294, 1321 (2d Cir. 1987). See also U.S. v. Corcoran, 855 F.Supp. 1359, 1369 (E.D.N.Y. 1994).) The Ninth Circuit has also said that allegedly inadequate cross-examination was not shown by the record and the petitioner failed to show prejudice from the alleged deficiency. Tinsley v. Borg, 895 F.2d 520, 532 (9th Cir. 1990). The Ninth Circuit also said that the defendant had failed to show that the result would be different with further cross-examination (U.S. v. Claiborne, 870 F.2d 1463, 1469 (9th Cir. 1989).) Hunt v. Smith, 856 F.Supp. 251, 258 (D. Md. 1994) found no defective cross or prejudice even if the cross had been more to the liking of defense attorney experts on habeas. See also Routly v. Singletary, 33 F.3d 1279, 1288-1289 (11th Cir. 1994); U.S. v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995) (failure to show what further cross-examination would produce and how it would affect the result); Pickens v. Gibson, 206 F.3d 988, 1002 (10th Cir. 2000) (no prejudice where failed to show how cross-examination could have been better); Carroll v. Schriro, 243 F.3d 1079, 1099-1100 (8th Cir. 2001) (state disposition of ineffective cross-examination claim was reasonable application of Strickland under the AEDPA).

Other circuits have also recognized the strategic and tactical nature of cross-examination. Phoenix v. Matesanz, 233 F.3d 77, 83 (1st Cir. 2000) (choice of emphasis in cross-examination is prototypical example of strategy); Henderson v. Norris, 118 F.3d 1283 (8th Cir. 1997) (a delicate task entrusted to the professional discretion of counsel); Battle v. Delo, 19 F.3d 1547, 1556 (8th Cir. 1994) (limited cross of state serology expert to avoid highlighting); U.S. v. Garcia-Rosa, 876 F.2d 209, 232 (1st Cir. 1989); Barnes v. U.S., 859 F.2d 607, 608 (8th Cir. 1988); Williams-Bey v. Trickey, 894 F.2d 314, 316 (8th Cir. 1990) (tactical decision not to

cross-examine assault victim about prior incident so as not to create greater sympathy). To the same effect is Bergman v. McCaughtry, 65 F.3d 1372, 1379-1380 (7th Cir. 1995) (decision not to cross-examine sympathetic prosecution witness). So-called "dainty" cross-examination was not found wanting in U.S. v. Reveron-Martinez, 836 F.2d 684, 688 (1st Cir. 1988). More extensive cross may have been perceived by the jury as unfair badgering said Hogue v. Scott, 874 F.Supp. 1486, 1541 (N.D. Tex. 1994).

Although cross-examination may not have been as effective as hoped, flawless cross-examination is rare, said the court in Sherron v. Norris, 69 F.3d 285, 290-291 (8th Cir. 1995). The question is not whether the prosecution witness was attacked on every conceivable point but whether the testimony was subjected to adversarial testing. Johnson v. Nagle, 58 F.Supp.2d 1303, 1355, n. 42 (N.D. Ala. 1999). Failure of defense counsel to cross-examine a prosecution expert about a subject was not prejudicial in Middleton v. Evatt, 855 F.Supp. 837 (S.C. 1994) where the subject had been raised by the prosecution cross-examination of defendant's expert. No ineffectiveness in cross was found in Gomez v. Ahitow, 29 F.3d 1128, 1136 (7th Cir. 1994) and U.S. v. Fish, 34 F.3d 488, 494 (7th Cir. 1994). The latter noted a possible strategic reason and the lack of prejudice in any event considering the cross-examination that was conducted. Defense experts who criticized cross-examination gave only "a grading of the quality of counsel's cross-examination" which was not of the magnitude to place counsel's cross outside prevailing professional norms. Hunt v. Nuth, 57 F.3d 1327, 1333 (4th Cir. 1995). An attorney does not have to ask every cross-examination question suggested by the client. U.S. v. Smith, 62 F.3d 1073, 1078 (8th Cir. 1995).

This Court must find that although it concludes that there was no cross-examination of the identified witnesses, the Applicant has failed to prove either deficient performance or

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prejudice. He has not identified one item of evidence that counsel should have presented through any of the witnesses. He has failed to identify one item that could be used to impeach any of the identified witnesses. Simply put, he has wholly failed in his burden of proof that rest upon him in these proceedings.

6. Failure to Recall Bryan Rivers concerning the “Chopper Shooting” after door opened by admission of the statement.

In his final amended allegation by PCR counsel, Applicant contends that counsel erred in failing to seek to recall Bryan Rivers after the State opened the door in presenting Deleston’s statement. This issue derives from the presentation of the similar issue in the direct appeal. However, in the direct appeal, the issue raised was whether the Applicant was initially entitled to present the issue on cross-examination at an earlier point of the trial.

An understanding of the course of the direct appeal is useful in resolving this ground. In the appeal, Applicant contended he was allegedly deprived of his constitutional right to present a defense. He asserted the trial court precluded the presentation of evidence during the cross-examination of accomplices Bryan Rivers and Julius Brown that two weeks prior to the murder of Marley Lion, Rivers and not Petitioner was the actual triggerperson in a separate shooting of Leroy “Chopper” Townsend with the same weapon that shot Lion. Deleston contended that the evidence was admissible under S.C. Rule of Evidence 404(b), as evidence of “third party guilt” under the precedent of State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), and as his constitutional right to present a meaningful defense under Holmes v. South Carolina, 547 U.S. 319 (2006). The Petitioner contended that this evidence of the other crime was relevant to his defense because he claimed that Rivers was the triggerperson in Lion’s death and that the excluded evidence would support that he was merely present at Lion’s death, even



though he was also present at the Chopper Townsend shooting.²

In denying relief, the trial judge initially rejected the proffer under Rule 404(b), South Carolina Rules of Evidence, concluding that there was not a close degree of similarity between the crimes and therefore did not demonstrate a common scheme or plan to establish Rivers as the shooter of Lion. The trial court further rejected the claim that there was a due process violation.

However, the record subsequently revealed after the testimony of Rivers and Brown, Solicitor Wilson revised her prosecution strategy³ prior to the conclusion of the state's case and introduced similar of Thompson shooting to the jury through the introduction of a partially self-serving statement of Ryan Deleston, without objection. This statement included information about Rivers shooting Townsend earlier with the same murder weapon. A new trial therefore was

² As noted above, the Applicant's PCR testimony eviscerates this "merely present" concept because he was an accomplice in the Chopper shooting by his presence with knowledge in the vehicle awaiting and aware of the robbery and shooting by Rivers prior to the Lion killing at as an accessory before the fact and a principal where he shared the proceeds.

³ At the outset of the opening argument, Solicitor Wilson stated, although the State would show "that it was Deleston that pulled that trigger" that night (R.p. 42, ll. 1-4, Tr.p. 238, ll. 1-4), it was relying on the principle of the hand of one is the hand of all" liability and that "when we prove to you that Julius, 'Little B' [Rivers] and Ryan Deleston were acting together, who pulled the trigger will not be of importance to you." R.p. 42-43, Tr.p. 238-239. Importantly, throughout the opening statement by Solicitor Wilson, no mention is made of her intent to introduce the taped statements of Deleston of July 30, 2012. R.p. 41-51, Tr.p. 237-247. No mention is made of the Petitioner's statement.

However, counsel Pennington does present his defense theory that Bryan Rivers "used the weapon at 2:45 am, one hour before this murder downtown on Rutledge Avenue, to rob that couple that you heard about downtown. And at 4:07 am, he used it again to murder Marley Lion." R.p. 57, ll. 16-20. Also R.p. 59. Tr.p. 253, ll. 16-20. Also Tr.p. 255. ("It is whether or not the State has truly removed all reasonable doubt to show that ---in this instance, that Ryan Deleston would have seen the crazy, irrational act of Bryan Rivers coming."). Counsel Pennington made no mention of Deleston's statement in his opening either. During the testimony of Detective Williams of the Charleston Police Department, the State introduced evidence that Deleston in the evening statement had indicated, among other things that Bryan Rivers had the firearm and went up to the vehicle and shot into the (Lion's) vehicle. R.p. 758, ll. 7-15, Tr.p. 1012, ll. 7-15.

inappropriate where no reversible error occurred.

The summary order by the Court of Appeals suggested in its citations that the Court of Appeals opined that the evidence of the other criminal act by Rivers was not relevant because it was not sufficiently similar to be admissible and lacked a sufficient degree of similarity, citing State v. Cope, 405 S.C. 317, 748 S.E.2d 194 (2013). Respondent submitted that the conclusion is correct, but there are also additional reasons why a new trial would not have been warranted in the appeal.⁴

⁴ In its opinion, the Court of Appeals concluded as follows:

1. As to whether the trial court erred in limiting cross-examination: Rule 404(b), SCRE (“Evidence of other crimes, wrongs, or acts ... may ... be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.”); State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013), cert. denied, 135 S.Ct. 400 (2014) (“Where there is a close degree of similarity between the crime charged and the prior bad act, the prior bad act is admissible to demonstrate a common scheme or plan.”); *id.* (“When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity.” (quoting State v. Clasby, 385 S.C. 148, 155, 682 S.E.2d 892, 896 (2009))); *id.* at 338 n. 4, 748 S.E.2d at 205 n. 4 (noting we must look at the commonality of the entire crimes when determining admissibility if the purpose of the evidence is to show that the allegedly guilty third party acted pursuant to a common scheme); *id.* at 341, 748 S.E.2d at 206 (“The admissibility of evidence of third-party guilt is governed by State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941).”); Gregory, 198 S.C. at 104–05, 16 S.E.2d at 534 (“[T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.” (emphasis added)); Cope, 405 S.C. at 339, 748 S.E.2d at 205–06 (addressing a similar due process argument in which the appellant relied on Holmes v. South Carolina, 547 U.S. 319, 323 (2006), and finding the facts were distinguishable from Holmes; holding “[i]t was not the strength of the State’s case that led to exclusion of evidence of [the alleged guilty third party’s] other crimes. Instead, it was because the other crimes were not sufficiently similar to the crime charged so as to be admissible”).

A. The Admission of Separate Evidence of the Earlier Shooting of Chopper Townsend by Rivers with the Murder Weapon through the Petitioner's Own Statement (State Exhibit 30) and the Solicitor's Subsequent Comment Concerning the Evidence of the Shooting in Closing Argument Renders the Prior Limitation on Cross-examination Harmless Error and Failure to Present Rivers after As Non-prejudicial under Strickland.

Any exclusion of the proffered evidence through cross-examination of Rivers and Brown that Rivers was the triggerperson in the shooting and attempted armed robbery of "Chopper" Townsend was not prejudicial under the Sixth Amendment because similar evidence was actually admitted within the admitted statement of the Petitioner in the State's case. This evidence from the Deleston statement (State Exhibit 30) was directly commented upon by the Solicitor in her closing statement to the jury.

At the conclusion of the case, Defense counsel Pennington did not make this specific request at trial after the evidence was introduced through their client's statement based upon the state opening the door under Rule 611, instead merely restating the motion. R.p. 769-770. In n the State's Return in this proceeding , the Respondent theorized that the evolving defense strategy in not recalling Rivers or Brown may be evident because it would have only further emphasized Deleston's involvement and knowledge of the earlier violent crime and the foreseeability of the Lion shooting potential, where Rivers's earlier weapon possession was now before the jury based upon Deleston's own interpretation of that incident through his statement.]. Respondent speculated that it may be suggested that the defense abandoned the request to cross-examine Rivers and Brown about the Chopper incident after the evidence was presented which opened the door to the glaring evidence within the statement. No specific defense objection or request was made concerning the earlier denial throughout the remainder of

the trial.

However, before this Court, counsel Pennington testified that he did not think of recalling Rivers or Brown at the time after the Applicant's statement was introduced including information about the Chopper shooting. However, even if this Court were to find this action in failing to recall Rivers deficient, which the Court does not, for the reasons below Sixth Amendment prejudice is not shown because there is no reasonable probability that the result of the proceeding would have been different because the sought for information was presented without necessitating Rivers testifying as well as the evident risk that he would have brought additional evidence about Deleston's earlier knowledge and involvement in the armed robbery.

Counsel Pennington stated that it was his initial intent if he could have presented the Chopper evidence to cross-examine Rivers about it that he had made a deal with the State and to suggest that he had a propensity to commit violent crimes. He claimed that because Rivers had admitted in a statement his involvement in the Chopper shooting, that fact would have been uncontested. He admitted that in hindsight he could have forced another ruling by the trial court after he opened the door and pointed that out to the court, but he did not think of it at the time.

1. Deleston's Admitted Statement About the "Chopper" Shooting by Rivers

Prior to the conclusion of the state's case in chief, the State introduced **State Exhibit 30**, a videotape of the July 30, 2012 evening session of the interrogation of Ryan Deleston. At the **9:33:40** portion of Exhibit 30, Deleston brings up about another robbery they did, but he claimed he did not participate in where they shot a drug dealer named Chopper. At the 9:45 PM portion of the tape, it reflects that Detective Osborne asks Deleston what he knows about the Chopper shooting. Deleston then tells Detective Osborne that Chopper was a big drug dealer and that he

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had stopped selling to them so they got someone else to call him. According to Deleston, Julius Brown, Bryan Rivers, George Brown and Valentino "Tino" Heyward jumped in the truck to go do the "lick." Deleston stated that they returned with money, dope and Chopper's cell phone. Deleston stated he heard that Rivers (Lil B) had shot Chopper. He said they had two guns with them that they put out beside the house. Deleston says that Tino and Lil B actually did lick while Julius and George stayed in car. Deleston says one of the guns was the murder weapon and other was a 45. Deleston stated that they got about 5 grand and 2 cookies in robbery. R.p. 766- p. 767, Tr.p. 1036- p. 1037. State Exhibit 30 (9:30 – 9:50).

2. Solicitor Wilson's Closing Comments Concerning Rivers Shooting of Chopper.

Solicitor Wilson commented upon the "Chopper" shooting in her closing argument. In particular, Solicitor Wilson stated:

Foreseeability? Y'all might not have caught this, or -- or thought about why it was so important to this case when you were watching those three and four hours of the Defendant's statement. Towards the end, just this morning, when Detective Osborne comes in, he tells Deleston, I want to talk to you about some other things, some other crimes. And he starts going through and asking him about other instances. **And some of them Deleston said, I don't know anything about. You might remember the one he did know something about or he claimed to. The shooting of a guy named Chopper. Remember that? He says Bryan Rivers shot a guy named Chopper with the murder weapon. Okay.**

So Bryan Rivers is now alleged to have shot someone with a murder weapon. He knows about it, and he goes to an armed robbery with it? He buys into robbing Joe's, he helps out in attempting to rob Marley, and he's going to say it's an accident, it wasn't foreseeable?

R.p. 781, l. 3-21, Tr.p. 1064, l. 3-21. (emphasis added). See State Exhibits 29 and 30. (Statements of Deleston); R.p. 766-767, Tr.p. 1036-1037.

3. Sixth Amendment Prejudice not shown when similar evidence is admitted.

The Court finds that Sixth Amendment has not been proven. In order for this Court to



grant post-conviction relief, prejudice must be shown. Strickland v. Washington, *supra*. The Court finds that had counsel Pennington introduced further cross-examined Rivers that there is no reasonable probability that the result of the proceeding would have been different. Because the admitted State Exhibit 30 (Petitioner's statement) included his sought after assertion that Rivers shot Chopper with the murder weapon - the information he sought to develop through the cross-examination of Rivers and Brown - any exclusion or limitation on the cross-examination is harmless and without Sixth Amendment prejudice. Its earlier exclusion was not prejudicial because it would be cumulative to other evidence that was ultimately admitted. The earlier limitation on cross-examination does not warrant a new trial.⁵

HOW THE ISSUE WAS INITIALLY RAISED AT TRIAL

Prior to the trial, on October 7, 2013, the State made a written motion *in limine* regarding excluding from the record evidence that Bryan Rivers shot Leroy 'Chopper' Townsend two weeks earlier the same weapon used in the Marley Lion killing as inadmissible under Rule 404(b) and third party guilt. R.p. 3, Tr.p. 124. See *Motion In Limine Re: Reverse 404(B) Evidence by State*. R. p. 866-873. The defense had made a companion "Motion to Reveal" Rule 404(b) Evidence to determine what information about Applicant's past criminal acts the state intended to use on October 1, 2013. R. p. 3, Tr. p. 124. *Motion to Reveal*. R. p. 874-876. On October 7, 2013, the defense filed a "*Defense's Response to the State's Motion in Limine Re: Reverse 404(B), SCRE Evidence*." R. p. 877-890.

⁵ Rather than seek to re-open the state's case based upon the statement, immediately after State Exhibit 30 is played and the state closes its case, counsel Pennington merely renewed his motion about the inability to cross-examine witnesses in relation to the prior shooting by Bryan Rivers of Chopper without even mentioning or arguing that the similar evidence was presented in Petitioner's statement. R.p. 768, l. 24- p. 769, l. 6, Tr.p. 1038, l. 24- p. 1039, l. 6. Judge Harrington denied the motion. R.p. 770, l. 1-25, Tr.p. 1040, l. 1-25. At that point the defense rested its case without further presentation of any witnesses.

In the state's motion in *limine*, the State initially sought to prohibit the Appellant from offering remote and irrelevant testimony regarding Bryan Rivers's use of a murder weapon during an armed robbery two weeks before the murder of Marley Lion. The motion urged that Applicant would not be prejudiced by the exclusion because it anticipated that Bryan Rivers would admit that he used and possessed the weapon within hours of the shooting of Lion's.⁶

In the pretrial motion, the State declared that the anticipated facts of the case as follow:

During the early morning hours of July 16, 2012, Bryan Rivers, Julius Brown, Appellant Ryan Deleston and others left Defendant's house in the Ardmore area to find someone to rob. They made their way downtown where George Brown's gun was used by Rivers and Defendant to rob a couple walking near Rutledge Avenue. The two stole the woman's purse but did not get any cash. The crew left downtown and discussed robbing the Famous Joe's bar in the West Ashley area of Charleston County. As they approached Ardmore, they pulled through the Famous Joe's and continued to discuss the Famous Joe's robbery.

Shortly before 4 AM, Defendant, Rivers and Julius Brown walked down the street with plans to rob Famous Joe's employees as they left the bar with money. They were staking-out the area as Marley Lion pulled into the parking lot of Famous Joe's. Lion was concerned that he had too much to drink so he parked his white Nissan Pathfinder and climbed into the backseat to "sleep it off."

Within 10 minutes of Marley's climbing in the backseat, a surveillance video shows Julius Brown walking at a fast pace by Marley's car in the parking lot. The video shows that approximately 12 minutes later, Defendant approached the car and appeared to attempt to open the door to the backseat. When Marley's car alarm sounded, Defendant backed out of camera view for several seconds then re-approached the car and began shooting. In all, he struck Marley 5 of the 6 times he shot at Marley.

An investigation ensued and Defendant, Rivers and Julius Brown were developed as suspects. An undercover operation secured the purchase of the murder weapon from the Defendant. As a result of the undercover operation, George Brown gave information that Julius Brown, Rivers and Appellant were involved in Marley's murder. Upon his arrest, Defendant gave a statement implicating Julius Brown, Rivers and himself-- though he claimed Rivers was the trigger man. Since their own guilty pleas, Julius Brown and Rivers have confirmed their own involvement in the attempted armed robbery of Marley Lion after the Joe's plan fell through. They confirm that the Defendant shot Marley Lion using George Brown's firearm. Julius Brown and Rivers also admitted their

⁶ At trial, Rivers did in fact testify and he confirmed that he had the murder weapon earlier that night when they robbed the couple. R.p. 259, l. 6- p. 262, l. 18, Tr.p. 479, l. 6- p. 482, l. 18. ("I had the gun").

involvement in the robbery of the couple downtown. According to both of them, Rivers used the same George Brown firearm that later was used to kill Lion.

State's Motion in Limine Re Reverse 404(B) Evidence, p. 1-3. R. p. 866-868.

Pertinent to this question, the prosecution pointed to the "Chopper" shooting evidence that they initially sought to exclude:

Julius Brown, George Brown and Rivers also revealed that the Marley Lion murder weapon was used on June 1, 2012, by Rivers and another man (Valentino Heyward) when they robbed and shot Leroy "Chopper" Townsend. Chopper survived. According to all of them, Chopper is a drug dealer who they knew would have cash. Furthermore, Rivers had disliked Chopper for years. They rode with George Brown in his SUV to an area where they had created a ruse in which Chopper believed he was meeting someone to buy drugs at an apartment. When Chopper came out of the apartment, Rivers and Heyward robbed him of \$1300 and Rivers shot Chopper with George Brown's gun.

State's Motion in Limine Re Reverse 404(B) Evidence, p. 1-3. R. p. 866-868.

In the motion, the prosecution relied up the recent decision in *State v. Cope*, 405 S.C. 317, 343, 748 S.E.2d 194, 208 (2013) in which the defense attempted to put in evidence other crimes committed by James Sanders to support an assertion the Sanders had acted alone in the instant case without Cope. The Court concluded the trial judge was correct in excluding the evidence because they were not similar enough to the charged crime. As noted in *Cope*, "a close degree of similarity is required."

In their initial analysis as to why the "Chopper" shooting should be excluded, the prosecution's motion asserted that the Chopper robbery did not fall within the *State v. Lyle* exceptions of motive, identity, common scheme, the absence of mistake or accident or intent. The state asserted that the defense had no need to show these items because "[P]roving that Bryan Rivers used the murder weapon a full two-weeks prior does not prove his identity as the shooter, and the facts of the two cases are so wildly different that there is no common scheme or plan and it does not establish identity (it is not a "signature" crime)." *State's Motion in Limine*

Re Reverse 404(B) Evidence, p. 5. R. p. 870. Although it conceded that the evidence of the Chopper shooting was clear and convincing, its probative value was outweighed by the prejudicial effect. As the State asserted (and showed), the defense was able to show that Bryan Rivers used the murder weapon in an armed robbery downtown Charleston within hours of Lion's murder which was part of the *res gestae* of the Lion killing. In their motion the State asserted that the temporal proximity of the various crimes was critical:

The State's and Defendant's evidence will also show that the murder weapon actually belonged to George Brown. Others' access to the murder weapon will be obvious throughout the trial. The real and obvious reason that the Defendant seeks to introduce the robbery and shooting of Chopper is an attempt to prove that Rivers' acted in "conformity therewith" and, therefore, must have killed Marley Lion. This use of other bad acts is strictly prohibited by the Rule, even if offered in exculpation by a Defendant. The admission of this evidence is highly prejudicial to the state and the victim in this case and under Rule 403, SCRE, the evidence should be excluded.

State's Motion in Limine Re Reverse 404(B) Evidence, p. 6. R. p. 871. The prosecution asserted that the evidence was remote in time and would only cast clumsy aspersions that Rivers was the triggerperson. As stated therein, Deleston was not prejudiced by the exclusion of the Chopper shooting because there will be ample testimony that the gun did not belong to Applicant and others had ample access to the gun, including by Rivers during the robbery hours earlier.

In the motion, consistent with Cope, the State attached a summary of the similarities and differences between the crimes. *State's Motion in Limine Re Reverse 404(B) Evidence*, p. 8. R. p. 873.

DATE: June 1	Chopper Shooting	Marley Lion's murder
Targeted victim	X	
Victim Known to Assailants	X	
"Bad Blood" with victim	X	
Victim b/m 30 yoa	X	
Victim shot once creating minor injury	X	
Victim forced to strip	X	

Victim robbed of \$1300	X	
Assailants Driven to Crime scene	X	
Partner in Robbery. Valentino Heyward	X	
Shooting at Apartment complex	X	
Shooting not in Ardmore	X	
Shooting early-midevening approx. 9:30 pm	X	
George Brown's gun used	X	X
DATE : JUNE 16		X
Victim of Circumstance		X
Victim unknown to assailants		X
No bad blood with victim		X
Victim W/M 17 yoa		X
Victim shot 5 times fatally		X
Victim not actually robbed		X
Assailants walked to Crime Scene		X
Partners in Att. Robbery : Deleston and Julius Brown		X
Shooting in Parking lot businesses		X
Shooting in Ardmore		X
Shooting in early morning hours		X

State's Motion in Limine Re Reverse 404(B) Evidence, p. 8. R.p. 873.⁷

⁷ The defense responded to the motion on October 7, 2013. He contended that the evidence was admissible as "third party guilt" as well as Rule 404(b). He contends that the admission of the Chopper shooting showed facts "inconsistent with [the defendant's] own guilt . . . and raises a reasonable inference or presumption as to . . . a defendant's own innocence", citing *State v. Gregory, supra. Defense Response to State Motion*, p. 3. R.p. 879. He contends that other crime standard for third party guilt should be a lower standard for admissibility. *Defense Response to State Motion*, p. 3. R.p. 879. The defense asserted that it must be reversible error to exclude evidence that Bryan Rivers was serially committing similar crimes at the time of the offense at issue in participated in the offense. *Defense Response to State Motion*, p. 6-7. R. p. 882-883. The defense further asserted that there was a sufficient similarity between the Chopper shooting and the liens shooting where he contends that the crimes were plan by the same individuals that

The Motion Hearing

During the preliminary motions before Judge Harrington, the State made its argument as to why the potential evidence should be excluded consistent with their motion. R.p. 3– 6, Tr.p. 124-127. Solicitor Wilson noted the argument was undercut by the fact that Rivers used the gun an hour before the Lions shooting. R.p. 4, Tr.p. 125. The solicitor argued that if there is a need to show that someone else had used the murder weapon other than Deleston, the Defense has an armed robbery that occurred about one hour prior to the shooting using the same weapon. The solicitor claimed the two shootings were nothing alike. She stated that Chopper was someone who was known by Bryan Rivers and the other codefendants. She asserted that they had set out to rob Chopper whereas “Marley Lion just happened to be in the wrong place and the wrong time” and were not the “intended target.” She contend that George Brown drove the men to the Chopper shooting while the men walked to Famous Joe’s the night of the Marley Lion shooting. [R.p. 5, ll 1-20, Tr. 126, ll. 1-20.]. Additionally, the solicitor claims that the evidence is more prejudicial than it is probative. She opined that was not probative because it was nothing like the shooting of Marley Lion. [R.p. 5, l. 21 – p. 6, l. 1., Tr. 126, l. 21 – p. 127, l. 1.].

The defense contended that this does not reach the *Lyle* analysis because it is evidence of 3rd party guilt. They asserted that the evidence of the Chopper shooting was evidence that somebody else use this weapon in the very same manner as it was used in the lions shooting and that it showed that somebody else was the shooter in the Lion murder as third party guilt

there was a common plan to rob an individual which was executed under their theory by Bryan Rivers in the same manner to rob an individual at gunpoint and with the same weapon during the nighttime. The appellant further asserted in the motion that the two-week time difference does not preclude admission of other act evidence under *Lyle*. He contends that the admission of evidence of Rivers’ other crimes is relevant evidence of intent and the identity of the person who really shot Lion’s. He asserts that they passage of a mere 2 weeks did not make the June 1 shooting so remote to preclude them from being a common plan or scheme. Finally he contends that unlike *Cope*, the evidence was not being offered against a codefendant’s rights on trial were trying to be protected. *Defense Response to State Motion*, p. 6-7. R.p. 882-883.

evidence. Ignoring “the hand of one hand of all” theory of the State, the defense urged that he should be entitled to present a defense because he did not do this and that somebody else was the triggerman. R.p. 6, Tr.p. 127. The defense opined that the evidence was probative that somebody else committed the murder, did not prejudice anyone and was only probative of Deleston’s innocence. He additionally contended that due process should allow him to present a defense saying that he was not the shooter and that it is more likely than not that Bryan was the shooter due to the earlier incident.

Solicitor Wilson responded that you have to look at the relevance of their request and that just because another armed robbery took place 2 weeks before does not automatically make it probative in this particular case. She pointed out that in the June 1 shooting the evidence would be that Chopper was called on the telephone told to be at a certain place under the ruse of buying drugs and there he was ambushed, robbed, and shot. She noted this is nothing like the shooting of Marley. It was her contention that under the defense analysis every armed robbery would involve a plan to hold someone at gunpoint, which is what armed robbery is, and that is not a sufficient similarity to allow the admission. However, the defendant cannot be prejudiced when there will evidence that the crimes that night began with a gun in Bryan Rivers’ hand committing an armed robbery before Marley Lion attempted robbery. R.p. 11, Tr.p. 132. See also, R.p. 12-16, Tr.p. 133-137.

The Trial Court’s Rulings.

Judge Harrington ruled to exclude the admission of the Chopper shooting by the defense. In its pertinent part, she stated in denying the admission under Rule 404(b):

Rivers' armed robbery and the shooting of Leroy "Chopper" Townsend and the Marley Lion attempted armed robbery and shooting are not sufficiently



similar, based upon the testimony that has been presented, to prove a common scheme or plan. The Chopper shooting involved a victim that was known and targeted by the assailants. The assailants created a ruse to lure him out of his apartment.

The Marley Lion shooting involved a victim of circumstance who was unknown to the assailants. While there was bad blood, according to testimony, of the chart that was given, between the victim and the assailants, there was no bad blood between the victim and the assailants in the Marley Lion murder.

The victim in the Chopper shooting was a 30-year-old African male, while Marley Lion was a 17-year-old white male. In the Chopper shooting, the victim was shot once, was forced to strip and received a minor injury. Marley Lion was shot five times fatally. In the Chopper shooting, they were driven to the crime scene.

In the current case, the assailants walked to the crime scene. And Rivers' partner in Rodney Chopper was Valentino Hayward. Other partners in the attempted robbery of Marley Lion's were Rivers, Deleston, and Brown. Finally, the Chopper shooting occurred at 9:30 at an apartment complex. Marley Lion was killed at approximately 4:00 a.m. in the parking lot of a business.

The similarities between the two shootings and the fact that the gun used belonged to George Brown, and that Rivers was present at that crime scene, accordingly, Rivers' prior bad act of shooting Chopper is not sufficiently similar to the shooting of Marley Lion to qualify for the common scheme or plan under Rule 404(b).

R.p. 21, l. 15- p. 22, l. 24, Tr.p. 211, l. 15- p. 212, l. 24.⁸

Judge Harrington next addressed the issue concerning excluding the evidence under third party guilt.

⁸ Solicitor Wilson clarified that George Brown drove Deleston, Julius Brown and Rivers to the apartment complex where the Chopper shooting took place, along with Valentino Heyward. She stated that Tino and Rivers were the ones that actually did the robbery of Chopper and Rivers is actually the man who shot Chopper. R.p. 24, l. 1-10, Tr.p. 214, l. 1-10. Further, Solicitor Wilson clarified that in the Lion case, an hour before the (Lion) robbery, an attempted robbery, George Brown drove the perpetrators through a parking lot and they went home. Brown's truck stayed at the location. At some point after that the Appellant, Bryan Rivers, and Julius Brown discussed looking for people to rob and then walked the third of a mile down to Joe's where Marley interrupted the employees leaving. Solicitor Wilson clarifies that this meant George Brown did not drive anyone to the Lion robbery, unlike the Chopper case when he did drive them to the apartment. R.p. 24, l. 1-24, Tr.p. 214, l. 1-24.

As to the issue involving third-party guilt, the rule governing the admissibility of the evidence under third-party guilt doctrine provides that evidence offered by the accused as to the commission of the crime by another person must be limited to such facts that are inconsistent with his own guilt and to such facts as raise a reasonable inference of presumption as to his own innocence. Evidence that has no other fact other than to cast a suspicion upon another or to raise a conjectural inference as to the commission of the crime is not admissible. The evidence of third-party guilt may include facts that are inconsistent with the Defendant's guilt and evidence raising a reasonable inference as to the accused innocent.

The evidence, again, to be sought by the Defendant's Motion to -- to Include Third-Party Guilt Evidence does not pass the same for admissibility. The evidence in question exceeds the scope of the facts that are inconsistent with his own guilt. It does not pertain to the commission of the crime currently before this Court or the Defendants involved in it whatsoever.

Despite his contention that -- despite Deleston's contention that Bryan Rivers was the shooter and that Bryan Rivers used the same weapon used in the submission of the crime currently before this Court, I do not find that the Defendant states a sufficient factual basis to cast more than a mere suspicion upon a third party. I find that the introduction of this evidence would also amount to solely a conjectural inference as to commission of a crime by third party.

And I find that the evidence sought to be admitted is inadmissible as it pertains to the third-party guilt of Bryan Rivers. Again, noting your exception to my ruling.

R.p. 26, l. 7 -- p. 27, l. 16, Tr.p. 216, l. 7 -- p. 217, l. 16.

The next morning, the defense pursued a ruling on the exclusion of the Chopper evidence under their due process argument. Counsel Pennington noted that in their response to the State's motion, they had also included a chart purporting to show similarities in the two crimes. R.p. 28-29, Tr.p. 224-225. Counsel Pennington noted that Rivers would testify that he was the shooter in the June 1 incident and that it is the same gun that was used by him later on the night of this incident against two victims. He contended that this supports identity and intent and is consistent with targeting individuals in the nighttime at gunpoint.

Judge Harrington opined that the Applicant's due process arguments were addressed in her earlier orders. R.p. 30-31, Tr.p. 226-227.

The Trial Evidence Concerning "Chopper" Townsend's Shooting

During the trial, further discussion occurred about the Chopper incident prior to the testimony of Julius Brown. The State made a court exhibit the full incident report about the Chopper shooting. Court Exhibit 5. The State called Julius Brown in camera who testified concerning the Chopper shooting. R.p. 125-143, Tr.p. 329-347. In direct, he testified that Julius Brown, Rayshawn Milligan, Ryan Deleston, George Brown and Valentino went to where Chopper was. R.p. 125-126, Tr.p. 329-330. He stated that Chopper was a drug dealer known by Rivers and the witness and had bought drugs from him before. R.p. 126, Tr.p. 330. Julius recalled that George Brown drove them to Andrews Garden Apartments. He was aware that they decided they were going to rob Chopper that day. Valentino in Bryan Rivers was supposed to do the robbery. Julius Brown stated that George, Rayshawn **and Deleston** stayed in the truck and could not see the robbery take place. After they had let out Tino and Bryan Rivers, he next saw them running from the apartment and got in the car with them. Julius Brown testified that around \$1300 was taken from Chopper and the six of them split it up between them. R.p. 129-130, Tr.p. 333-334. Julius Brown testified that he did not see who shot Chopper. R.p. 130, Tr.p. 334.

During the *in camera* cross-examination, Julius Brown testified that he had not been charged with the robbery of LeRoy Townsend. He stated that it was something that was planned and agreed that Deleston actually knew there were going over the Saint Andrews Garden Apartments to commit a robbery. R.p. 138, l. 17-19, Tr.p. 342, l. 17-19. He stated that when Rivers and Tino got out they were carrying the same pistol that was later used to shoot Marley

Lion. R.p. 139, Tr.p. 343. He also stated that it was in the nighttime and that they had approached Mr. Townsend on foot with the plan to rob him at gunpoint. He described Bryan and Tino returning to the Shires where they had parked and initially ran past the truck because the police had come through. R.p. 141, Tr.p. 345. He stated the plan was always that they would provide the transportation, which they did. R.p. 143, Tr.p. 347.⁹

During Julius Brown's trial testimony before the jury, he confirmed that that they had agreed to "hit a lick" and drove in George's car with Bryan Rivers and Ryan Deleston in the backseat (on the night of Marley's shooting). R.p. 173, Tr. 378. He stated that they had George Brown's gun to use which they carried around often. R.p. 173, Tr.p. 378. He stated that they spotted a boy and girl who were walking. He stated that Rivers and Deleston got out and Bryan had the gun. R.p. 175, Tr.p. 380. He saw Bryan Rivers point the gun and get the pocketbook

⁹ Solicitor Wilson stated that she did not have anything further to add to the arguments other than if the court were to reconsider its position, this witness does not have enough facts about the shooting itself independently about who shot. R.p. 143, l. 17-23, Tr.p. 347, l. 17-23.

Counsel Pennington stated that he understood Bryan Rivers would be called that afternoon. He stated that he desired to cross-examine Rivers about an interview with Detective Osborne when Rivers was asked about his involvement in the robbery at St. Andrews Garden Apartments with Tino. Pennington stated that Rivers denied involvement, which was not truthful. Counsel Pennington stated he sought to use that to show when Rivers needed to rely he knew how to lie. He also stated that with regards to a follow-up conversation that Rivers had on July 30 and 31, he admitted that on June 1 he rode along with a preplanned robbery of Mr. Townsend, that he got \$1300 in cash and drugs, that he used the Marley Lion murder weapon to rob Townsend, that he shot Townsend in the leg, that it was George Brown's gun, that is not been charged with this arm robbery pursuant to his proffer agreement, and that he is also not been charged with attempted armed robbery pursuant to the agreement. R.p. 145, l. 1-11, Tr.p. 349, l. 1-11.

Solicitor Wilson stated that she took issue with the assertion that Rivers not being charged with the Chopper shooting was not pursuant to any agreement with the Solicitor's office. She stated that their agreement was only that they could not use Rivers words against him and that they could make a case from other folks against them and that he does not have immunity from that prosecution. R.p. 145, Tr.p. 349. See also, R.p. 243-244, Tr.p. 451-452. Solicitor Wilson reaffirmed that even the limited testimony of Julius Brown shows the stark difference between the Chopper shooting and the Lion shooting. R.p. 146, Tr.p. 350. Counsel Pennington renewed his objection concerning the Chopper shooting proffer. R.p. 146-147, Tr.p. 350-351.

from the couple. R.p. 175-176, Tr.p. 380-381. At that time he said while Bryan ran back to the car, Deleston walked the other way and they met Deleston at McDonalds after he called George to pick him up there. R.p. 176, Tr.p. 381.¹⁰

He stated that next plan was to rob Famous Joe's, which the Applicant had discussed robbing before. Julius testified that they drove through the parking area and then Julius told Ryan he did not think it was a good idea. R.p. 179, Tr.p. 384. Julius Brown said the gun was under the driver's side mat after Bryan gave it to George. Julius testified that when they got back to Cashew, Deleston wanted to go back and check out Famous Joe's again. Julius stated that he was to be the lookout in the wonder robbed them was going to be the Applicant. R.p.181, Tr. p. 386. Julius recalled the George gave the list and the gun before they left and he put it inside his pants on his hip. R.p. 181, l. 12-13, Tr.p. 386, l. 12-13. He stated that he walked down to Famous Joe's with Rivers and the Applicant. The plan was to wait for the people inside Joe's to come out with the moneybag. He stated that Rivers role was also to be a lookout. R.p.182, Tr.p. 387.

Julius testified there was a discussion and a decision was made to change the plan after Marley Lion pulled up into the area. He said Deleston was going to try to see what Marley had. R.p. 183-184, Tr.p. 388-389. He stated that he later then saw Deleston and Bryan discussing who was going to do what and passing the gun back and forth. R.p. 187-188, Tr.p. 392-393. Julius

¹⁰ Chris McLandish testified about the initial robbery on Rutledge Avenue. R.p. 700-712, Tr.p. 953-965. He described walking with his girlfriend on June 16 between 2:45 AM and 3:00 AM. He stated that they heard a man behind them and then the person came in front of them with a gun. He testified he pointed the gun at him and that they only saw one man. He stated that after his girlfriend gave the purse to him the man ran off to the right and he heard a car door but did not see anything. R.p.702-704, Tr. 955-957. See also R.p. 707, Tr. 960. He confirmed that he only saw one person attempting to rob him. R.p. 711, Tr. 964.

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testified that he then saw Deleston approach Marley's truck and tell him to open the door and Marley set off the alarm, which caused him to run back. At that time Julius testified he told the Applicant to "bust the window" and Deleston turned back around and started shooting. R.p. 188, Tr.p. 393. He stated after the Applicant shot five times he took off running. R.p. 189, Tr.p. 394. When they got back to Cashew Street, both Julius and Rivers cursed at Deleston for shooting for nothing. Deleston stated that he thought Julius had told him to shoot. R.p.192, Tr.p. 397. Julius confirmed that Exhibit 23 was the gun used to kill Marley Lion owned by George Brown and that Deleston had it and that it was used by Bryan Rivers that date to rob the couple. R.p. 212, Tr.p. 417. Julius confirms that on the video he is telling Deleston with the white shoes and striped shirt to bust the window. R.p. 213-214, Tr.p. 418-419.

On cross-examination, Julius confirms that Rivers got out with the gun to rob the couple and that Ryan had gone away from the robbery. R.p. 223, Tr.p. 440.

At the conclusion of the cross-examination, counsel Pennington renewed his request to go further, implicitly concerning the Chopper case. The court denied the motion. R.p. 240, Tr.p. 447. There was a further discussion about no further need to proffer Rivers testimony concerning the Chopper incident. R.p. 243-244, Tr.p. 451-452.

Bryan Rivers testified about his involvement in the couple's robbery and the Marley Lion incident. He stated he was involved in the shooting of Marley Lion with Julius Brown, George Brown and Ryan Deleston. R.p. 246-247, Tr.p. 466-467. He testified that he pled guilty to voluntary manslaughter for the killing of Marley Lion because the hand of one is a hand of all. R.p. 255, Tr.p. 475. He testifies on that night that he went downtown with Deleston, Julius, George, and Rayshawn looking for robberies to be done with George Brown's gun. He stated



that he had seen a couple that looked like they had been drinking which would be a good target. He thought George spotted them first and they pulled over in part. He stated that George gave him the gun and that he and Deleston got out. Although the Applicant was supposed to help him, Rivers thought he did not help him and that he walked the other way. Rivers stated that he approach the couple and held them at gunpoint and the female victim gave her purse to him. R.p. 260-261, Tr.p. 480-481.

He stated that he later picked up the Applicant when they ran into him at McDonalds. R.p. 263, Tr.p. 483. Then, they drove around and scoped out the scene at Famous Joe's parking lot. Rivers stated that everybody was planning to rob the people coming out of Joe's. R.p. 264, l. 9-11, Tr.p. 484, l. 9-11. He stated in on this planning was himself, Deleston, Julius and George. Because they did not see anybody in the parking lot, Rivers thought that gave them the idea to continue with the robbery. R.p. 265, Tr.p. 485. They returned to Cashew Street and then Rivers left with Deleston and Julius. R.p. 265, Tr.p. 485. Rivers stated that they walked and that Deleston had the gun he had gotten from George Brown. R.p. 266, Tr.p. 486. Rivers stated that after the earlier robbery, he had given the gun back to George Brown. He saw that Deleston had the gun before they left for Famous Joe's because he tucked it under waistline. R.p. 267, Tr.p. 487. Deleston had on a striped shirt. R.p. 267, l. 2-22, Tr.p. 487, l. 2-22.

Rivers stated he saw Marley Lion pull up while the employees were leaving. R.p. 269, Tr.p. 489. The big fish money was leaving according to Rivers. He stated that Julius check out the scene while Deleston had the gun. Rivers stated that Deleston tried to pass the gun to him, but he pushed it back. R.p. 270-271, Tr.p. 490-491. Also R.p. 309-310, Tr.p. 529-530. He said his attention was not to rob the boy, but to get the person with the bag coming out of Joe's. R.p. 270-271, Tr.p. 490-491. He told Deleston to go ahead. R.p. 271; R.p. 310, Tr.p. 491; Tr.p. 530.

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("to rob Marley Lion"). He described Deleston walking up to the window and knocking on it and the alarm went off. R.p. 271, Tr.p. 491. Deleston then initially ran back towards them and Rivers heard Julius say "get him" to continue with the robbery, but not as to shot the man. R.p. 272, Tr.p. 492. However, instead of robbing the man, the Applicant started shooting the man about 5 times. Rivers stated he knew that the Applicant hit him because the way the victim was yelling and screaming. At that point he turned and started running. He also thought the Applicant turned and start running also and caught up with them. On the way back Deleston hid the gun under a pool. R.p. 274, Tr.p. 494. Rivers confirmed to this on the video of the crime scene. R.p. 282-283, Tr. 502-503. Rivers admitted that he was wearing all black and testified that Applicant was wearing a striped shirt and white sneakers called Willie Dee's. [R.p. 261, ll. 9-12; Tr. 267, ll. 1-17, Tr. 481, ll. 9-12; Tr. 487, ll. 1-17.]

On cross-examination, Rivers confirmed he had the weapon earlier that night and robbed the woman of her purse. R.p. 293, Tr. 513. As to the second robbery, Rivers testified that he did not know the Applicant was going to do something like that. R.p. 297, Tr. 517.

At the conclusion of Rivers's examination, counsel Pennington renewed his motion pursuant to the motion *in limine*. R.p. 308-309, Tr. 528-529.¹¹

¹¹ George Brown, the gun owner, testified consistently with Julius and Rivers. He testified that during the first robbery that he had the gun in his vehicle and gave it to Rivers. R.p.457, Tr.p. 686. After the robbery of the couple, Rivers returned with the purse. He stated that Deleston had gotten out with Rivers, but they had split up. He said Deleston called him on his cellphone and they picked him up at the McDonald's. R.p.458-459, Tr.p. 687-688. After they returned to Cashew Street after casing out Famous Joe's, George stated he did not want to be part of robbing Joe's. However, he stated that Rivers had returned the gun to him after the first robbery, but gave it to Deleston who put it in his waistband when he left. R.p. 462-463, Tr.p. 691-692. He saw Deleston, Rivers and Julius leave. When they returned, they were made with Deleston. R.p.463-464, Tr.p. 692-693. George stated he did not know what happened but gleaned that Ryan had shot someone because he came back and washed his hands. R.p. 465,

The state subsequently introduced the video of the Applicant's statements the next day, reflecting a change in strategy.¹² On the day of his arrest, Applicant was interviewed twice. In the morning interview, he denied involvement in the crime. State Exhibit 29 (9:48-9:54, 10:59 - 11:03, 2:19-2:20, 2:49). In the evening interview, State Exhibit 30, he initially named "Tino" as the perpetrator. State Exhibit 30 (8:00:12). Subsequently, in the interview, he named Bryan Rivers as the person who shot Marley Lion. State Exhibit 30 (8:16:25). He admits being with Rivers and Julius and described how it occurred. State Exhibit 30 (8:16 - 8:30). He claimed that Julius and Rivers were the ones who went up to rob the employees of Famous Joe's but then decided to rob Marley. He "identified Julius Brown as the person walking across in front of . . . Marley Lion's vehicle, and said that Bryan Rivers had the firearm and went up to the vehicle and shot into the vehicle." R.p. 756, l. 23- p. 759, l. 1, Tr. 1010, l. 23 - p. 1013, l. 1. State Exhibit 30. Deleston also stated at some point during the event at Joe's, Rivers gave the gun to him and

Tr.p. 694. George learned the next day that someone had been killed from the news. R.p. 467, Tr.p. 696. When he viewed the footage, George Brown identifies Deleston as the shooter from the video he viewed. R.p. 467-468, Tr. p. 696-697. He described the person as wearing the clothes that appellant had on that day and he had the physical characteristics of Deleston, as opposed to Rivers (too skinny). R.p.468-469, Tr.p. 697-698. State Exhibit 1 (Video). R.p. 469, l. 9-10, Tr.p. 698, l. 9-10. Detective Osborne testifies that Deleston fit the description of the shooting on the video, not Julius or Rivers. R.p. 611-615, Tr.p. 857-861. State Exhibit 1 (Mantek Video).

¹² During the PCR hearing, Solicitor Wilson testified about this change in strategy. She noted, as did counsel Pennington earlier in his testimony, that strategy always evolves during any trial based upon the evaluation by the lawyers as to what is occurring and the needs with a particular case. Although she initially did not want the jury sidetracked about the Chopper shooting. She stated that she developed concerns about the statement based upon Pennington's motion to exclude. She felt that it was better to introduce the statement because it cut both ways. In particular it would add to the state's case about the foreseeability of the violent action by either Applicant or Rivers where it indicated that Rivers had shot someone and Applicant was aware of it prior to the Lion incident. However, she saw that it could cut the defense way in seeking jury nullification because it revealed that Applicant stated that River had shot the victim and that Rivers had shot Chopper. She relied upon the statement in her argument about foreseeability. .

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wanted him to go up to the car but he did not want any part of it and gave the gun back to Rivers. State Exhibit 30 (8:17 – 8:30).

At the conclusion of the state's case, counsel Pennington renewed his motion to thoroughly cross-examine witnesses in relation to the prior shooting of Chopper, although never mentioning similar evidence had been presented through the statement, nor rely upon SCRE Rule 611. R.p. 769, l. 4-6, Tr.p. 1039, l. 4-6. The Court denied the motion asserting that it had heard nothing to change its ruling. R.p. 770, Tr.p. 1040.

In his defense closing argument, counsel Pennington urges the jury to accept that Rivers was the shooter. The factors he points out are that Bryan had the gun that night, he had the gun earlier that day at Shawn Turner's video production and was waving it around,¹³ that Rivers was the gunman during the robbery on Rutledge Avenue when Deleston walked away. R.p. 808-809, Tr.p. 1091-1092. He also described the tip that the police had received from Leroy Townsend that Bryan was involved in the shooting. R.p. 812, Tr.p. 1095.¹⁴ In addition, counsel Pennington argued that Applicant was not wearing black or a striped shirt when he is stopped riding the bicycle shortly after the crime. R.p. 813, Tr.p. 1096.¹⁵ However, counsel stated that "we're not disputing that Ryan was out there as a part of a plan to do a robbery of Marley." R.p.

¹³ Bobby Warthaw testified that on the day of the murder, he had been up in Ardmore earlier in the day. Shawn Turner was doing a music video shoot and Bryan Rivers was out there and had pulled the pistol out, waving it around. Rivers was intoxicated & acting a little crazy. R.p. 535-536, Tr.p. 765-766. Accord, R.p. 664, Tr.p. 915 (Det. Osborne testifies about the tip he had received from Warthaw about Rivers waving the gun around at the video shoot).

¹⁴ Two days after the murder, Leroy Townsend contacted police & named Bryan Rivers as a suspect. R.p. 654-655, Tr.p. 905-906.

¹⁵ Officer Vance testified that around 4:20 am., he stopped Deleston for not having a light on his bicycle with another person and that they were both wearing white shirts. R.p. 152, 155-157, Tr.p. 357, 360-362.

823, Tr.p. 1106, l. 2-4. Counsel also thought a moment of revelation during the examination of Rivers was when the question was asked about what set off the alarm and whether it was set off by Lion. R.p. 825, Tr.p. 1108.¹⁶ Counsel claimed that this proved that he was close enough to see the cell phone light. Id. Counsel further asserted that he indicated that his involvement in trying to hide the pistol. R.p. 826, Tr.p. 1109. Counsel described that the Applicant's statement was what really happened and that it was unforeseeable and did not fit the plan. R.p. 829, Tr.p. 1112. After the verdict, counsel renewed his motions, which were denied. Tr.p. 1148-49.

Evidence of the "Chopper Shooting" did not pertain to the commission of the crime involving the death of Marley Lion and thus was not admissible under a "third party guilt" theory.

The third party guilt claim is a "red herring" in this case. Contrary to the bare assertion by the Petitioner, the evidence of the Chopper shooting is not inconsistent with his guilt for the Marley Lion shooting. The additional evidence actually supports the culpability of Deleston in the Lion shooting as being involved in the violent incident with knowledge and foreseeability. A new trial on this claim is without merit. Deleston contends that he was entitled to present the evidence of the Chopper shooting by Rivers as evidence of third party guilt of Rivers in Lion's death.

The foundation of his claim is that the Townsend evidence only suggests that at the Lion crime, only Rivers possessed the weapon rather than Deleston. However, this assertion does not absolve Deleston of his criminal culpability in Lion's death. There was no dispute at the trial that Rivers was involved in the attempted robbery of Lion that led to his death. In fact, Rivers admitted his personal guilt to the jury under hand of one hand of all and that he had pled guilty to the Lion crime. R. 255, Also ROA pp. 246-247, 269-282, 297. Under the state's version,

¹⁶ See R.p. 271, l. 21-24, Tr.p. 491, l. 21-24.



although it could prove that Deleston was the triggerperson in Marley's death, under the theory of "hand of one hand of all," Deleston would have been guilty, even if Rivers shot the weapon because he had been a participant in the crime.¹⁷ **In fact, the defense acknowledged in their closing argument that "Ryan was out there as a part of the plan to do a robbery of Marley." R.p. 823, Tr.p. 1106.** "Third party guilt" therefore was not at issue in the case. To the contrary, the Petitioner also ignores that as to the Chopper Townsend shooting, Deleston would have been as guilty as Rivers of the Chopper crime even though he was not the triggerperson but was involved in the planning, went to the scene, and although he remained in the vehicle he shared in the proceeds.

As recognized in the Court of Appeals opinion, the rule for the admissibility of evidence of third party guilt comes from State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). In Gregory, our Supreme Court stated:

[T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have no other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

198 S.C. at 104-105, 16 S.E.2d at 534-535 (internal citations omitted). In Gregory, the Supreme Court held evidence of third-party guilt that only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime should be excluded. 198 S.C. at 105,

¹⁷ During the jury instructions, the jury was advised about "aider and abettor" (R.p. 844, l. 10-17, Tr.p. 1127, l. 10-17), mere presence (R.p. 844, l. 18-23, Tr.p. 1127, l. 18-23), and "the act of one is the act of all." R.p. 845, l. 8- p. 845, l. 2, Tr.p. 1128, l. 8 - p. 1130, l. 2.

A handwritten signature in black ink, appearing to be 'Ruth', is located in the bottom right corner of the page.

16 S.E.2d at 534. See 20 Am.Jur. Evidence § 265 (1939)); State v. Burgess, 391 S.C. 15, 23, 703 S.E.2d 512, 517 (Ct.App.2010) (accord).

The evidence of Bryan Rivers' involvement with the Chopper shooting coupled with the evidence that he robbed a couple at gunpoint hours before the Marley Lion shooting does not "tend[s] clearly to point" to Rivers as the individual who approached Marley Lion's car, attempted to rob him, and shot into his car. It ignores the fact that Petitioner was also involved. It ignores the fact that Petitioner conceded in his statement that he was present and aware of the intended robbery. It ignores that fact that proof of earlier possession by Rivers of the weapon is not inconsistent with Petitioner's guilt for the crime of murder. Petitioner failed to show that there was a clear "train of facts or circumstances" between all three known armed robberies – the Townsend shooting two weeks before, the admitted robbery of the couple by Rivers, and the Lion robbery and shooting on the same date.

Although the similar perpetrators were involved and the same gun used, the Chopper shooting differs greatly from the circumstances surrounding the Marley Lion shooting and the armed robbery of the couple downtown. The shooting of Leroy "Chopper" Townsend was one that was targeted and involved "bad blood." The armed robbery of the couple downtown and the attempted robbery and shooting of Marley Lion were both acts toward random victims who the codefendants did not know.

The trial court's holding that the "evidence in question exceeds the scope of the facts that are inconsistent with his [Petitioner's] own guilt [and] does not pertain to the commission of the crime currently before this Court" was not an abuse of discretion. The evidence of the Chopper would only cast "a mere suspicion upon a third party" and "the introduction of this evidence

would . . . amount to solely conjectural inference as to commission of a crime by [a] third party.” [R.p. 26, l. 7- p. 27, l. 16, Tr. 216, l. 7-p. 217, l. 16.]. Under the discrete circumstances of the case where the proffered evidence was not inconsistent with Petitioner’s guilt, a new trial is not warranted.

The Constitution guarantees “a meaningful opportunity to present a complete defense,” Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quotation marks omitted), but “not an unlimited right to ride roughshod over reasonable evidentiary restrictions,” Rockwell v. Yukins, 341 F.3d 507, 512 (6th Cir.2003) (en banc). The right to present a complete defense - including the purported third-party culpability defense raised here - thus does not mean that a defendant may introduce whatever evidence he wishes, only that any state-law evidentiary restrictions cannot be “arbitrary” or “disproportionate to the purposes they are designed to serve.” Holmes v. South Carolina, 547 U.S. 319, 325–26, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).

Here, the defense was allowed to explore the fact that Rivers had possessed the murder weapon prior to the Lion incident. R. p 293. The assertion that Rivers had possessed the murder weapon in an armed robbery immediately prior to the Lion killing was an uncontested fact. R. 260-261. The robbery of the couple just two hours before was documented throughout the trial by evidence from each of the perpetrators – Julius Brown, Bryan Rivers, George Brown, and the victim. R.175-176, 260-61, 457-458, 702-704, In addition, evidence was presented that during the day before the two robberies, Rivers was waving a gun at the video shoot. R. 535-536. Further, Rivers conceded that prior to Lion’s killing he had a discussion with Petitioner where they attempted to pass the gun between each, a discussion that was documented within the testimony of Rivers, Julius Brown and Petitioner’s own evening statement. R. 270-271. Simply

put, the exclusion of the Chopper evidence did not prevent Petitioner from articulating that Rivers had used the weapon in a robbery, a robbery that in fact had close temporal proximity to the Lion crime.

The evidence that Rivers had possessed George Brown's gun two weeks before during a robbery that Deleston was a participant was minimally relevant to prove that Rivers possessed the weapon at the Lion robbery, in light of the more temporally probative evidence supporting that defense theory. The exclusion did not undermine his Deleston's right to present a defense. There was extensive evidence presented about Rivers prior possession of weapons during a robbery before the jury. See United States v. Lucas, 357 F.3d 599, 606–07 (6th Cir.2004) (exclusion of third party's prior conviction did not violated defendant's right to present a defense where defendant "was able to explore her theory that [another individual] was in fact the culprit" through other evidence). The Court "may exclude marginally relevant evidence and evidence posing an undue risk of confusion of the issues without offending a defendant's constitutional rights." United States v. Alayeto, 628 F.3d 917, 922 (7th Cir.2010) (citing Holmes v. South Carolina, 547 U.S. 319, 326–27, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)).

Any deficiency in the alleged exclusion was not prejudicial under Strickland

Prejudice in the failure to recall Rivers was not proven. Evidence about the Chopper robbery and shooting by Rivers was developed in the admitted statement of Deleston the evening of July 30 and commented on by the Solicitor in her argument. Evidence that Rivers possessed the weapon within two hours of the Lion shooting was presented, as well as evidence that Petitioner and Rivers were conferencing with each other at the Lion crime on who would have the weapon. There was overwhelming evidence of Petitioner's criminal participation in the Lion incident through the testimony of Julius Brown, the surveillance videos which identified

similarities with Deleston as opposed to the other perpetrators, and portions of Petitioner's own statement where he acknowledged involvement in the Lion attempted robbery.

CONCLUSION

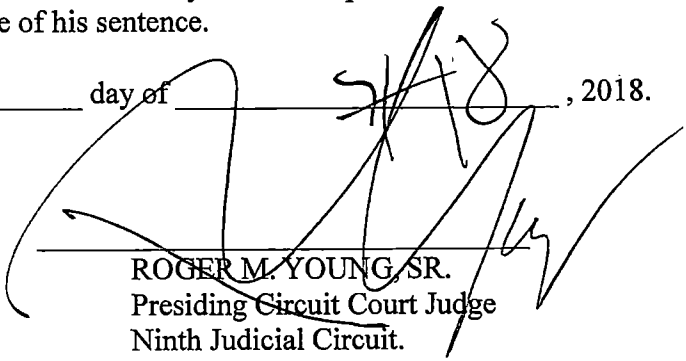
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR Application is denied and dismissed with prejudice.

The Court notes that Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on his behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

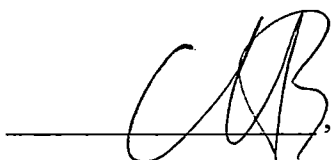
IT IS THEREFORE ORDERED THAT:

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

AND IT IS SO ORDERED this _____ day of _____, 2018.



ROGER M. YOUNG, SR.
Presiding Circuit Court Judge
Ninth Judicial Circuit.


_____, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No.: 2017-CP-104561

RECEIVED

AUG 10 2018

S.C. SUPREME COURT

Ryan Deleston, #307106 Appellant

v.

State of South Carolina Respondent

PROOF OF SERVICE

I certify that I have served APPELLANT'S NOTICE OF APPEAL by delivering a copy
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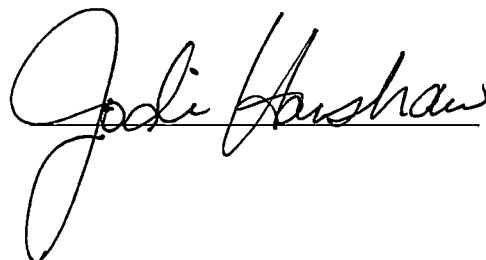
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