WALLER
LAW GROUP

November 24, 2018

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

Re: Troy Darnell Hunter vs. State of South Carolina
C/A No: 2015-CP-21-0056

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Hunter in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,

Jonathan D. Waller

Cc: Lindsey A. McCallister, South Carolina Office of Attorney General

Enclosures

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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Thomas A. Russo, Circuit Court Judge

2015-CP-21-00056

Troy Darnell Hunter, #226094,

Appellant,

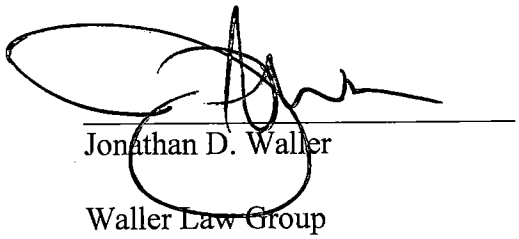
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Troy Darnell Hunter, #226094, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed October 29, 2018, issued by the Honorable Thomas A. Russo, Presiding Judge, Twelfth Judicial Circuit.



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ATTORNEY FOR PETITIONER

November 27, 2018

Other Counsel of Record:

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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Thomas A. Russo, Circuit Court Judge

2015-CP-21-00056

Troy Darnell Hunter, #226094,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Lindsey A. McCallister, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to her office located at P.O. Box 11549, Columbia, SC 29211.

M. David Scott

November 27, 2018

FORM 4

FILED

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP2100056

Troy Darnell Hunter	2018 OCT 29 AM 10:18 DORIS POULOS O'HARA CCCP & GS FLORENCE COUNTY, SC	South Carolina State Of	
PLAINTIFF(S)		DEFENDANT(S)	
Submitted by:		Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	Judge Code	10/29/2018 Date

For Clerk of Court Office Use Only

This judgment was entered on **October 29, 2018**, and a copy mailed first class or placed in the appropriate attorney's box on **October 29, 2018**, to attorneys of record or to parties (when appearing pro se) as follows:

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

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 2/17)

Jonathan D Waller 1116 Blanding Street Suite 2B
Columbia, SC 29201

Samuel Leonard Key Rembert C. Dennis Building 1000
Assembly St. Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Doris P. O'Hara

Court Reporter

Doris Poulos O'Hara - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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

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

STATE OF SOUTH CAROLINA COUNTY OF FLORENCE	IN THE COURT OF COMMON PLEAS OF THE TWELFTH JUDICIAL CIRCUIT
Troy Darnell Hunter, #226094, Applicant, v. State of South Carolina, Respondent.	Case No.: 2015-CP-21-0056 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed January 8, 2015, by Troy D. Hunter (Applicant). Respondent made its Return on November 21, 2016. An evidentiary hearing into the matter was convened on August 31, 2017, at the Florence County Courthouse. Jonathan Waller, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Charles Hunter also testified for Applicant. H. Steven DeBerry, IV, Esquire, testified for the State. After hearing testimony and the arguments of counsel, the Court now denies and dismisses the application.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment from the Florence County Clerk of Court. Applicant was indicted at the June 2012 term of the Florence County Grand Jury for armed robbery, attempted murder, assault and battery – second degree, and possession of a firearm (2012-GS-21-692). H. Steven DeBerry, IV, Esquire (Counsel), represented Applicant. On January 14-16, 2013, Applicant proceeded to a jury trial before the Honorable D. Craig Brown on the counts of armed robbery and assault and battery – second degree. The remaining charges were dismissed. The jury convicted Applicant

as indicted, and Judge Brown sentenced him to confinement for thirty years for armed robbery concurrent with three years for assault and battery – second degree.

A notice of appeal was filed on Applicant's behalf, and an appeal was perfected by Lara M. Caudy, Esquire, of the South Carolina Commission on Indigent Defense – Appellate Defense Division. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Hunter, Op. No. 2014-UP-437 (December 3, 2014). The Remittitur was issued on December 22, 2014.

SUMMARY OF FACTS ADDUCED AT TRIAL

At approximately 2:00 p.m. on November 30, 2011, Demetrius Holloman (Victim) and Roderick Titus returned to Titus's home after attending a funeral. Tr. pp. 63-64, 130. At trial, Roderick Titus testified that he, Victim, and Applicant were all friends. Tr. pp. 60-61. He testified that on November 30, 2011, he and Victim attended a funeral together and then returned to his residence. Tr. pp. 63-64. Titus went inside the home to change clothes, while Victim walked to the side of the house. Tr. p. 65. Titus testified he heard a "loud bang noise" that could have been gunshots, at which time his sisters ran inside screaming and upset. Tr. pp. 66, 69-70.

Nate Orgbon testified he was also at Titus's house on November 30, 2011, and saw Applicant there later in the day, after lunch. Tr. pp. 84-85. He testified Applicant was looking for Victim, and someone told Applicant where to find Victim. Tr. p. 86. Orgbon explained Applicant walked up to Victim and "clean clocked" him with his fist. Tr. p. 87. Orgbon testified, "He just punched the man, you know what I mean, so they (sic) fighting." Tr. p. 87. Orgbon stated he left after he saw Victim "go back" after Applicant hit him. Tr. p. 87.

The State also called Idena Titus Simmons, Roderick Titus's mother, who lived at the address where the incident occurred. Tr. p. 109. She testified when she returned from the

funeral after lunch, she heard a loud boom. Tr. p. 112. She recalled telling her husband it sounded like a truck hitting a transmitter, and her husband said it sounded like a gun. Tr. p. 112.

Deloris Titus Johnson, Simmons' sister, testified she was also at the Simmons' residence on November 30, 2011. Tr. p. 119. Johnson testified she was parked in the front yard talking on her cell phone when she saw Applicant arrive with a man she did not know. Tr. pp. 119-21. Next, she recalled hearing gunshots and saw the people in the backyard begin to scatter. Tr. p. 121. She testified she saw Applicant and the man walk back to their car and leave. Tr. p. 122.

Victim testified regarding the details of the assault and robbery. When he arrived at the home, Victim walked to the side of the house, where he had his cell phone charger plugged in, and kneeled down to unplug it. Tr. 131. While Victim was kneeling down, Applicant came up behind him and hit him in the mouth with a .357 Magnum. Tr. pp. 131-32. Victim fell to the ground, and Applicant hit him on the top of the head with the gun, stood over him, and asked where "it" was. Tr. pp. 132-33. Applicant shot the gun right by Victim's head and then reached into Victim's pants pocket, taking $1,000. Tr. p. 133-34. Applicant threatened to kill Victim if he said anything, and then left the scene. Tr. p. 133.

Immediately after he saw Applicant drive away, Victim got up and walked straight to his mother's house and told her what happened and who did it. Tr. pp. 135-36. Initially, Victim told police he did not know who did it, but he eventually gave Applicant's name. Tr. pp. 137-39. Victim testified he went to the hospital and spoke to police there, but he did not give Applicant's name at first because he was afraid. Tr. p. 139. Victim testified he told the police what really happened a couple days later once he realized the full extent of his injuries and the money it would cost to repair them. Tr. pp. 138-39. He testified he was so scared after telling police Applicant did it that he stayed inside for two weeks, fearing for his life. Tr. p. 140.

On cross-examination, Counsel thoroughly questioned Victim regarding the timing of when he named Applicant to police as the person who assaulted and robbed him. Tr. pp. 147-48. Counsel asked several times whether Victim realized he could not get his teeth fixed unless he gave a statement and cooperated with the investigation. Tr. p. 147, 154-56. Specifically, Counsel asked, "Because of your recorded statement, you said to Sergeant Davis that it was only when you realize[d] that you couldn't get your mouth fix[ed] without giving a statement, that you decided to tell that it might have been Troy Hunter?" Tr. pp. 154-55.

Victim's mother, Debra Singleton, also testified. Singleton testified Victim came into her house, calling out to her. Tr. p. 170. She said she saw blood everywhere, "just pouring," and asked him what happened. Tr. p. 170. She testified, "He say [Applicant] hit me in my mouth with a gun." Tr. p. 170. Singleton accompanied Victim to the emergency room and told Victim he needed to tell the police what happened. Tr. p. 172. She recalled Victim was kind of scared to say anything because he knew Applicant carried a gun and was afraid Applicant could kill him. Tr. p. 173. She testified she sensed he might still have been scared even after he told police because he stayed at her house for several weeks and did not return to his own place until after Applicant was arrested. Tr. pp. 173-74.

Investigator Lee Davis of the Florence Police Department testified he got involved in the case when Victim contacted the police department's Victim's Services division and was told he had to cooperate with the investigation in order to receive services. Tr. pp. 181-82. Davis testified Victim then reported Applicant assaulted him. Tr. p. 182. Davis took a recorded statement from Victim, and Victim's Services took photographs of his injuries, which were admitted without objection. Tr. p. 182-83. Davis also testified he went out to the incident

location but could find no evidence at the scene to indicate a gun was used in the commission of the crime. Tr. p. 205.

Next, the State called Dr. James M. Lawhan, an oral and maxillofacial surgeon, to testify regarding Victim's injuries. Tr. p. 220, 223-24. The trial court qualified him as an expert in the field of dentistry and facial trauma without objection. Tr. p. 222-23. Dr. Lawhan testified he saw Victim on December 1, 2011, for an evaluation of trauma to his face. Tr. p. 224. He found one bottom tooth that was fractured, two adjacent missing teeth to the right of that, and two fractured teeth on the top. Tr. p. 231. Dr. Lawhan testified that between the swelling, the fresh blood clots he observed where the teeth had been knocked out, and the clean edges of the fractured teeth, he could tell the injuries were recent. Tr. p. 233. Further, Dr. Lawhan testified Victim's injuries were "consistent" with being hit with a gun butt, and he felt the mechanism of injury was something more condensed than a fist. Tr. pp. 235-36. However, on cross-examination, Lawhan conceded Victim's injuries could also be consistent with being hit by a knuckle. Tr. p. 240.

After the State rested, the parties had a charge conference, and Counsel objected to the inclusion of a charge on strong-arm robbery as a lesser-included offense of armed robbery. Tr. p. 249. The Court agreed the evidence presented was that there was a robbery and a firearm was used, and, therefore, decided not to include the strong-arm robbery charge. Tr. p. 249. During the Court's reading of the charge, the trial judge called the attorneys to the bench and informed them he intended to charge that fists could be a deadly weapon, depending on the circumstances. Tr. p. 284-85. Ultimately the Court charged as follows:

> [A] fist can be considered a deadly weapon. A hand or a fist. . . is not normally considered a deadly weapon. However, under some circumstances depending on the manner and means of its use, the wounds inflicted, and other relevant facts, a hand or fist may be considered a

deadly weapon. It is for you to decide in this case beyond a reasonable doubt whether or not a hand or fist is a deadly weapon.

Tr. pp. 284-85.

Ultimately, the jury found Applicant guilty of both charges, and Judge Brown sentenced him to three years' imprisonment for second-degree assault and battery and thirty years' imprisonment for armed robbery, to be served concurrently. Tr. pp. 303, 311-12.

ALLEGATIONS

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

1. Ineffective Assistance of Counsel
   a. Failure "to object to the trial court's erroneous jury instruction that shifted the burden of proof."

On August 16, 2017, counsel for Applicant provided Respondent with an updated and amended list of allegations via email. The amendment to the application includes the following allegations:

1. Failure to call witness Charles Hunter;
2. Failure to object to impermissible comments in the State's opening statement;
3. Failure to object to object to portions of Dr. Mark Lawhorn's testimony as outside the scope of his expertise;
4. Failure to object to portion of jury charge charging "fists as deadly weapons";
5. Failure to object to impermissible comments during State's closing argument;
6. Failure to make any post-trial motions.

At the start of the evidentiary hearing, Counsel for Applicant withdrew amendment #2 regarding impermissible comments in the State's opening. Therefore, this Court find Applicant has abandoned that allegation. Additionally, because Applicant failed to present any evidence

regarding the allegation that Counsel failed to make any post-trial motions, this Court finds Applicant also abandoned that allegation. This Court finds both allegations were waived, and they are dismissed with prejudice.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, an applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, an applicant must prove counsel's

performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

A. Ineffective Assistance of Trial Counsel

Regarding Applicant's claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet his burden of proof. "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that trial counsel's decisions are based on tactical strategy rather than neglect, and "[t]hat presumption has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court 'may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive.'" Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy).

Counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

1. Failure to call Charles Hunter as defense witness

Applicant testified he and Counsel discussed Applicant's version of events, and Applicant told Counsel he did not have a gun, and "there was a witness to everything," Charles Hunter. Applicant testified Counsel told him he met with Charles Hunter and had subpoenaed him for trial, and Charles was only a phone call away. Applicant further testified Counsel ended up not calling any witnesses on behalf of the defense, and Counsel told him it was because the State "did not have anything, and he did not want to give them anything."

Charles Hunter testified at the evidentiary hearing. Mr. Hunter testified he was in the neighborhood were the incident took place when he happened to see Applicant on the street. Mr. Hunter testified Applicant got in his car, and they went over to the house on Dixie Street, where the incident took place. Mr. Hunter testified there were lots of people at the house, including Victim, who he knows as "Tad" or "Tadpole." Mr. Hunter stated Applicant and Victim got into an argument, and he saw Victim swing at Applicant, then saw Applicant hit Victim with his fist. Mr. Hunter testified he then heard what he thought was a gunshot behind him, and when he turned back around, everyone was gone except Victim and Applicant, who were still fighting. Mr. Hunter stated he broke up the fight, and he and Applicant got back in his car and left. Mr. Hunter testified he did not see Applicant with a gun, but he acknowledged on cross-examination he had not been with Applicant all day, so he did not know what Applicant had in his pockets or under his clothes. Mr. Hunter stated neither law enforcement nor Counsel contacted him about what he had seen, but he did speak with Mr. McKenzie, from the public defender's office, and he told McKenzie what he knew.

Counsel testified he was aware of Charles Hunter as a potential witness, and Counsel spoke to him and included him on the witness list for trial. Counsel testified he was not certain whether he issued a subpoena for Mr. Hunter as the only copy in the defense file was unsigned. However, Counsel testified his notes indicated he communicated with Mr. Hunter, obtained the information to which Mr. Hunter would testify, and asked Mr. Hunter to be available by telephone in case Counsel called him to testify. Counsel also testified he went out to the scene of the incident himself, and met with Applicant five to six times prior to trial to discuss the case.

Counsel further testified he spoke with Applicant about the decision as to whether to call witnesses after the State rested, and they ultimately decided not to put up any testimony. Counsel testified he explained to Applicant the two main issues he saw with the State's case. First, Counsel explained he felt the State had not proved beyond a reasonable doubt the incident had occurred at this specific time and place, as the witnesses who claimed to have seen Applicant only testified to a fight, not a robbery, and there was no evidence recovered from the scene suggesting a gun was fired or someone had been injured there. Counsel testified calling Mr. Hunter would require Applicant to admit he was there and fought with Victim, just not with a gun. Second, Counsel testified Applicant had already decided not to testify, so he also explained to Applicant he would lose the last argument to the jury if they introduced any evidence.

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged

action might be considered sound trial strategy." Strickland, 466 U.S. at 689. This Court finds Counsel provided effective assistance in this case. Specifically, this Court finds Counsel visited the scene, met with Applicant, and investigated Applicant's witness, Mr. Charles Hunter, as Applicant requested. This Court finds Counsel's investigation into the facts and circumstances of the case was reasonable. Further, this Court finds credible Counsel's testimony he discussed with Applicant the issues Counsel saw with the State's case after the evidence had been presented, and Counsel and Applicant made a strategic decision not to call Mr. Hunter as a witness.

Additionally, the Court finds Applicant has not met his burden of proving he was prejudiced by Counsel's conduct. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691, 104. To establish prejudice, Applicant is required to show "there is 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. In this instance, the testimony offered by Mr. Hunter at the evidentiary hearing is not exculpatory, and in fact places Applicant at the scene, engaging in a physical altercation with Victim. Although Mr. Hunter testified he did not see Applicant with a gun, neither did any of the State's witnesses at trial, a fact which Counsel highlighted in his closing argument. Tr. pp. 266-68. This Court therefore finds Applicant has not proven Mr. Hunter's testimony would have changed the result at trial, and the allegation is therefore denied and dismissed.

2. Failure to object to object to portions of Dr. Mark Lawhan testimony as outside the scope of his expertise

Counsel testified while preparing this case, he expected the State to call a nurse who had treated Victim at the hospital, but the nurse became unavailable, so the State called Dr. Lawhan instead. Counsel testified he understood Lawhan, as an oral surgeon, to deal with injuries to the teeth and jaw. Counsel further testified he objected to Lawhan testifying because he was not aware he would be a witness, and Lawhan showed up with some notes Counsel had not seen. Counsel testified he reviewed the notes, which were only approximately two pages, and at that point he felt he had made his objection, and it was settled that Lawhan's testimony was going to come in.

This Court finds the record reflects Lawhan's testimony about the mechanism of injury was appropriately within the fields of expertise for which he was qualified – "dentistry and facial trauma." Tr. pp. 222-23. Lawhan testified he is a board-certified oral and maxillofacial surgeon, and he deals with treatment of trauma to the head and face due to a variety of issues such as "facial fractures, gunshot wounds, cancer, car wrecks, wisdom teeth, [and]. . . skin grafts." Tr. pp. 221-22. Dr. Lawhan also testified he had treated thousands of trauma cases over the course of his career, including "many impacts of the mouth." Tr. p. 222, 235. Lawhan testified he reviewed x-rays of Victim's mouth, conducted a physical examination, and spoke to Victim about the cause of the damage. Tr. p. 231.

Therefore, this Court finds there was a sufficient factual basis for Lawhan's opinion, and, since whether or not a gun was used was a contested issue, Lawhan's opinion could logically assist the jury in determining a fact in dispute. See, e.g., Creed v. City of Columbia, 310 S.C. 342, 426 S.E.2d 785 (1993) (finding trial court correctly overruled City's objection to testimony of general practitioner regarding plaintiff's mental and emotional injuries as outside the scope of

his expertise); Gazes v. Dillard's Dept. Store, 341 S.C. 507, 534 S.E.2d 306 (Ct. App. 2000) ("[I]t is exactly this type of situation, where direct evidence of an accident's cause is scant and in dispute, that testimony from an accident reconstructionist can assist the trier of fact in 'determining a fact in issue.'"). Because Lawhan's opinion testimony as to the mechanism of injury was appropriate to assist the jury with determining a fact in issue and was within the scope of his expertise, this Court finds Counsel's lack of objection was not deficient performance. This allegation is hereby denied and dismissed.

3. Failure to object to "fists as deadly weapon" jury charge

Counsel testified he objected to the State's proposed jury instruction on strong-arm robbery because he felt it was possible the jury would conclude no robbery had taken place at all, and, likely that if they did conclude it had taken place, it did not involve a gun. Therefore, Counsel testified, he didn't want to give them the option of finding Applicant guilty of the lesser-included offense in lieu of armed robbery. Further, Counsel testified when the trial judge called them to the bench during the recitation of the jury charge, the judge explained the "fists as deadly weapon" charge was in the bench book, so the judge was going to add it. Counsel testified he knew that was an appropriate charge in a murder case, and since the judge said it was in the bench book, he assumed it was a proper charge in this situation as well. Counsel also testified he did not want to object anymore because it had been a long trial, the jury was visibly aggravated, and he wasn't sure what effect an objection would have.

This Court finds Counsel was not deficient for failing to object to "fists as deadly weapon" jury charge because the charge was appropriate under South Carolina law. "The question of whether an instrument used in the commission of a robbery qualifies as a deadly weapon, thereby qualifying the incident as armed robbery, is a factual determination for

the jury. Although we have not specifically addressed whether a hand or fist may be considered a deadly weapon for purposes of armed robbery, we have held, in the context of murder, that a hand or fist may be considered a deadly weapon a depending on the factual circumstances." State v. Bennett, 328 S.C. 251, 262, 493 S.E.2d 845, 850–51 (1997) (citing State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992)). "Although Davis was a murder case, nothing in [that] opinion limits its application to murder.'" Bennett, 328 S.C. at 262, 493 S.E.2d at 851.

The full text of the charge stated that a fist would not normally be considered a deadly weapon, and it was up to the jury to determine beyond a reasonable doubt whether or not it was. Tr. pp. 284-85. Nate Orgbon testified at trial that Applicant punched Victim, and they began fighting, so the charge was appropriate based on that testimony. Counsel cannot be deficient for failing to object to a charge that is supported by evidence in the record. Further, Counsel's defense strategy, as evidenced by his closing argument, was to deny a robbery occurred at all, so Counsel's failure to object to the charge was not inconsistent with Applicant's defense. Tr. pp. 266-69. Finally, Applicant has presented no evidence the jury convicted him under the theory that a fist is a deadly weapon, and therefore, he has failed to show he was prejudiced by the inclusion of the instruction. There is myriad evidence in the record to support a finding that a gun was indeed used during the commission of the robbery, which is clearly a sufficient factual basis to support a conviction on the armed robbery charge.

4. Failure to object to impermissible comments in State's closing argument

Applicant alleges Counsel failed to object to impermissible comments in the solicitor's closing argument, specifically the solicitor's statement that Victim was telling the truth. See Tr. p. 259. Counsel testified regarding his strategy for objections during closing arguments. Counsel explained he feels it is risky to object during opening and closing arguments, and he has

seen it go badly in the past. Counsel testified he believed it is appropriate for an attorney to comment on the evidence in closing, and in any event, he did not feel that single statement was sufficiently objectionable. Counsel explained he watches the jury very closely, and he felt this jury was clearly ready for the case to conclude. Counsel testified he might have objected if the solicitor had continued to belabor the point.

This Court finds Counsel was not deficient in his handling of objections during the solicitor's closing arguments. Counsel is not required to object at every opportunity if Counsel has a valid explanation for not doing so. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy).

Further, "[i]mproper comments do not automatically require reversal if they are not prejudicial. . .," and Applicant "has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. This Court finds the challenged statement does not rise to that level, and Applicant has presented no evidence that the

jury was influenced by the statement. This Court finds "it [is] not reasonably likely" that the solicitor's comment in his closing argument caused the jury to act in a "manner inconsistent with the notion that the State has the burden of proof beyond a reasonable doubt." State v. Daniels, 401 S.C. 251, 260, 737 S.E.2d 473, 477 (2012). Therefore, Applicant has not met his burden of showing he was prejudiced by the allegedly improper comment, and this allegation is denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 18th day of October, 2018.

THOMAS A. RUSSO
Presiding Judge
Twelfth Judicial Circuit

Florence, South Carolina.

FILED
2018 OCT 29 AM 10:03
DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

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CLERK OF COURT C.P. & G.S.
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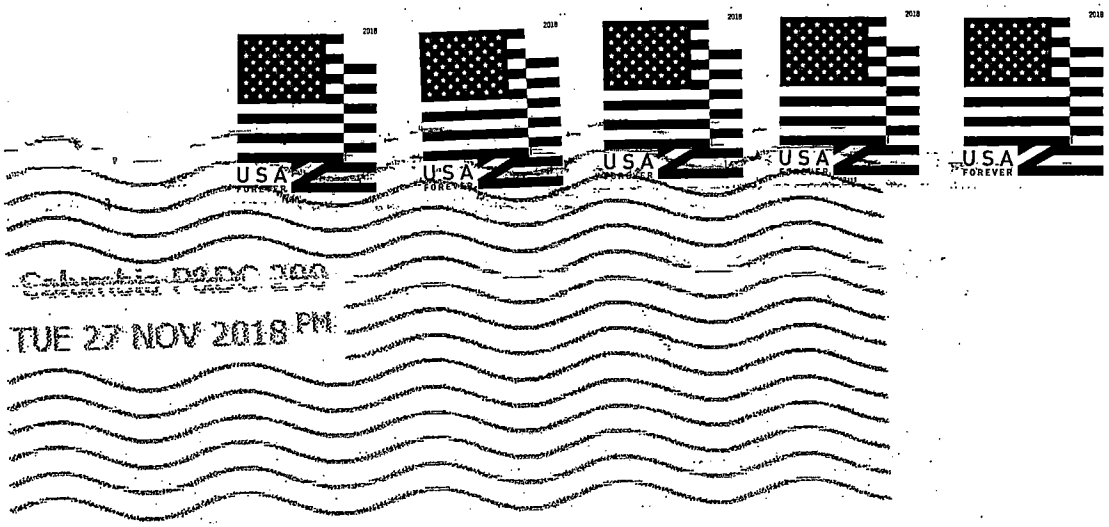
Columbia, SC 29201



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