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RECEIVED
MAY 21 2019
S.C. SUPREME COURT

May 17, 2019

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

Re: **Chris A. Liverman v. State of South Carolina**
NOTICE OF APPEAL
Case No.: **2012-CP-40-04870**

Dear Mr. Shearouse:

I have enclosed two copies of the Notice of Appeal and Proof of Service in the above-referenced case. I have also enclosed a copy of the Orders denying post-conviction relief.

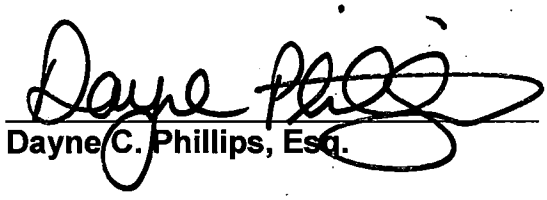
Please file one copy and return the clocked-in copy to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance in this matter. If you have any questions or concerns, please do not hesitate to contact me.

[Signature page to follow]

With best regards, I am,

Yours Sincerely,



Dayne C. Phillips, Esq.

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Enclosures (noted)

cc: Lindsey A. McCallister, Esq.
Jeanette W. McBride, Richland County Clerk of Court
Chris A. Liverman
Charles Grose

RECEIVED
MAY 21 2019
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Case No. 2012-CP-40-04870

Chris A. Liverman,

Petitioner,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Chris A. Liverman appeals the Honorable R. Scott Sprouse's Order Denying Application for Post-Conviction relief filed on April 23, 2019 and the Court's Order Denying Applicant's Motion for Reconsideration (Rule 59(e), SCRCP) filed on **May 10, 2019**.

Dayne C. Phillips, Esq.
1614 Taylor Street, Suite D.
Columbia, SC 29201

May 17, 2019

ATTORNEY FOR PETITIONER

Other Counsel of Record:
Lindsey A. McCallister, Assistant Attorney General
South Carolina Attorney General's Office
1000 Assembly Street, Room 519
Columbia, SC 29201

cc:
Jeanette W. McBride, Richland County Clerk of Court
Chris A. Liverman (SCDC)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAY 21 2019
S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Case No. 2012-CP-40-04870

Chris A. Liverman,

Petitioner,

v.

State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Lindsey A. McCallister, Esq., the Honorable Jeanette W. McBride, and Chris A. Liverman, by depositing a copy in the United States Mail, postage prepaid, on May 17, 2019, addressed to the following parties:

Lindsey A. McCallister, Esquire, South Carolina Attorney General's Office
1000 Assembly Street, Room 519
Columbia, SC 29201

The Honorable Jeanette W. McBride, Richland County Clerk of Court
P.O. Box 2766, Columbia, SC 29202

Chris A. Liverman, Lee Correctional Institution,
990 Wisacky Highway, Bishopville, SC 29010

Courtney Powers
Paralegal for Dayne Phillips, Esq.
1614 Taylor Street, Suite D.
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May 17, 2019

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Chris A. Liverman, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2012-CP-40-04870 ORDER DENYING APPLICANT'S MOTION FOR RECONSIDERATION

RICHLAND COUNTY
FILED
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JEANETTE W. [illegible]

After careful consideration of the able argument and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Plaintiff's Motion, pursuant to Rule 59, SCRCP, [1] is DENIED.

AND, IT IS SO ORDERED.

R. SCOTT SPROUSE
Judge, Tenth Judicial Circuit

Walhalla, South Carolina
May 8, 2019

[1] The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRCP.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	
Chris A. Liverman, #308393,	)	Case No.: 2012-CP-40-04870
Applicant,	)	
	)	**ORDER DENYING APPLICATION**
v.	)	**FOR POST-CONVICTION RELIEF**
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

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This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 17, 2012. Respondent made its Return on October 15, 2012. Applicant amended the application on March 6, 2013, August 7, 2018, and December 11, 2018.[1] An evidentiary hearing into the matter was convened on December 17, 2018, at the Richland County Courthouse before the Honorable R. Scott Sprouse, Jr. E. Charles Grose, Jr., and Dayne C. Phillips, Esquires, represented Applicant. Lindsey A. McCallister and W. Edgar Salter, III, Esquires, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant also presented testimony from Dr. Dawn McQuiston, and trial counsel Elizabeth Anne Franklin-Best, Esquire. At the close of all the evidence, the Court indicated it would take this matter under advisement, and the parties requested the opportunity to submit post-trial briefs. This Court now denies and dismisses the application with prejudice.

[1] In what appears to be a scrivener's error, the amendments filed August 7, 2018, and December 11, 2018, are both entitled "Second Amended Application for Post-Conviction Relief," although the two documents contain slightly different allegations.

Emailed SCANNED

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted at the April 2005 term of the Richland Grand Jury for two counts of murder. He was represented by Elizabeth Anne Franklin-Best (Franklin-Best), Esquire; Maxwell Schardt, Esquire; and Carolyn Gripp, Esquire, on the charges. On October 30, 2006, Applicant proceeded to a jury trial before the Honorable James W. Johnson, Jr. On November 9, 2006, the jury convicted Applicant of both charges as indicted and sentenced to life imprisonment without parole on each count, to run consecutively.

A timely notice of appeal was filed, and an appeal was perfected on Applicant's behalf by Joseph L. Savitz, III, Esquire; A. Mattison Bogan, Esquire; and Robert M. Dudek, Esquire, of the South Carolina Commission on Indigent Defense - Appellate Defense Division. Applicant raised two issues before the Court of Appeals: (1) whether the trial judge erred in refusing to hold a Neil v. Biggers hearing on the reliability of the identification of Applicant as the shooter where the witness making the identification was familiar with Applicant before the identification took place, and (2) whether the trial court erred in admitting the State's gang expert testimony. By order filed December 4, 2009 the Court of Appeals affirmed Applicant's conviction finding a Biggers hearing was not necessary under controlling case law and finding the admission of the gang expert testimony was not preserved for appellate review, but was nonetheless harmless error. State v. Liverman, 386 S.C. 223, 687 S.E.2d 70 (Ct. App. 2009). Applicant's petition for rehearing was denied January 20, 2010.

Applicant then petitioned the South Carolina Supreme Court for a writ of certiorari, raising only the issue of the Neil v. Biggers hearing. After briefing, the matter proceeded to oral

argument before the South Carolina Supreme Court on February 23, 2012. On June 6, 2012, the Supreme Court issued an opinion affirming the convictions in result. State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012). The remittitur was issued June 26, 2012.

SUMMARY OF TESTIMONY ADDUCED AT TRIAL

On the night of August 26, 2004, twelve-year-old Courtney Dixon and sixteen-year-old Terrance Merchant were killed in a hail of gunfire aimed at Courtney's house on T.S. Martin Drive. The murders resulted from a vendetta by members of the Folk Nation gang against a rival gang, the Bloods. Tr. pp.109-15; 121-58, 588-93. Three projectiles were recovered from the home, and ten fired cartridge casings were found a short distance from Courtney's home. Tr. pp. 676-77, 683-86. Each victim died from injuries caused by a single gunshot wound to the head. Tr. pp. 979-87.

The events leading up to the murders unequivocally demonstrated a gang-related motive. Carl Duane Smith, aka Pooh, testified he and several friends had driven from the Bayberry Apartments complex over to T.S. Martin Drive earlier that evening. They were looking for a person named Delshawn, who was a member of the Bloods and had been involved in a confrontation with Pooh's friends earlier that day. Pooh and his friends were wearing black, the color of Folk Nation. They were unable to locate Delshawn, and they left after a girl called Pooh by name. Pooh later saw Applicant[2] at Bayberry Apartments and told him about what had occurred earlier. Applicant was accompanied at the time by his friend and fellow gang member, Reginald Joyner, aka Goo,[3] as well as several other people. Tr. pp. 205-08, 212.

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[2] Applicant goes by the nickname Baby Jesus. Tr. pp. 200, 415, 751.
[3] Goo is deaf and communicates through sign language. Tr. p. 214.

Applicant then told Pooh that someone "from T.S. Martin had run him out from there" several days earlier. Applicant also showed Pooh three or four bullets Applicant claimed he had just obtained, and he told Pooh he had a .22 caliber gun. However, Pooh did not see the gun at that point. Applicant told Pooh he was going to T.S. Martin, and he said that he might "go on a lick." Pooh tried to stop Applicant from going to T.S. Martin because Pooh was afraid the girl who had recognized him earlier that day would blame him for any trouble. However, Applicant refused to ~~head~~ heed RSS Pooh's warning. Tr. pp. 212-21.

Applicant's friend and codefendant, Diego Thompson testified he knew Applicant from school and from seeing Applicant at the Bethel Bishop Apartments, where Applicant's grandmother lived. Although Thompson denied being in a gang, he admitted he knew a number of gang members. Thompson testified Applicant was a member of the Folk Nation gang. Close to dark on the night of the murders, while Thompson was on his way home, he ran into Applicant at Bethel Bishop. Applicant told Thompson he had to "handle something" on T.S. Martin. Tr. pp. 258-63. Unaware Applicant had a gun, Thompson agreed to go with Applicant to the neighborhood. Applicant, Goo, and Thompson met up with two other associates, known as Ty and Little Chris, as they were walking. These two also agreed to go to T.S. Martin with Applicant. While the group was still in Bethel Bishop Apartments, Pooh once again warned Applicant to be careful "because they had pulled some guns on some Bloods." Along the way to T.S. Martin, Thompson saw Applicant put a black bandanna, or "flag," around his neck. According to Thompson, this indicated Applicant was "repping his set," or representing the gang, Insane Gangster Disciples, which is part of Folk Nation. Tr. pp. 263-69.

Once they reached T.S. Martin Drive, Little Chris asked a "little boy" who was sitting on the porch of a nearby house if the boy was a "Slob," which is a disrespectful term for Bloods. The boy replied there was not any gangbanging around there, and he went to a telephone. Thompson told Applicant they should go because the boy was either calling the police or other boys to come over. Applicant said that was what he wanted [the boy] to do. At this point, according to Thompson, Applicant pulled a .22 caliber rifle from his pants leg. Goo, who was standing next to Applicant, was armed with a shotgun. Thompson and the others were a slight distance away from the two with the guns. Tr. pp. 269-72.

Thompson said, "it's time for us to go," and he started to back away. Applicant then pointed the gun at the house where the boy had been. Applicant told Goo in sign language to shoot at the house. As Thompson and the others began running away, Thompson heard "six or seven gunshots." When Thompson briefly turned around, he saw Applicant throw the rifle down and pick up the shotgun. However, no other shots were fired. Thompson continued running from the scene, as did everyone else in the group who had gone to T.S. Martin, with the exception of Applicant. Thompson testified Applicant eventually followed and disposed of his weapon near the gate to the Colony Apartments. Tr. pp. 273-78.

Shante Bethel testified she was also a member of Folk Nation. On the night of August 26, 2004, she saw Applicant and Pooh at the Bethel Bishop Apartments. According to her, Applicant said he was going to T.S. Martin "to go ride with some Slobs." She thereafter saw Applicant leave Bethel Bishop Apartments with Goo, Diego Thompson, and another man she identified as "Mirage." Tr. pp. 415-19. A little later, she saw Applicant return to the Bethel Bishop at "full speed." She overheard Applicant tell a man there that he and the others had just left a shooting at T.S. Martin, "that they were spraying" the gunfire, and two little kids were shot. Applicant

also said they had done it because "they had gotten in something with some Bloods" earlier in the evening. After this conversation, Applicant ran to the Bayberry Apartments, taking a "cut" near the apartment complex. Tr. pp. 420-23.

Tyrone Smith testified he had known Applicant for about seven years at the time of the shooting. Smith was living on T.S. Martin Drive with his aunt and cousins at the time. Smith saw Applicant talking to Smith's friend Delshawn at the Bayberry Apartments, on the afternoon of August 26, 2004. According to Smith, Delshawn was a member of the Bloods. Smith and Delshawn eventually went to Smith's residence.[4] Smith testified Delshawn left shortly after 9:00 p.m. to go home. Tr. pp. 751-57.

Smith testified the trouble began after Delshawn left. Smith received a call from Courtney, who told him "some boys had come to her and asked where the Slobs stayed." Smith later saw two males get out of a white car. One went to a house two doors away from him. However, the other male, whose face was partially covered by a black bandanna, approached Smith on his aunt's porch. This man pointed a gun at him and said, "I'll kill you." When this person turned around after realizing Smith was not Delshawn, Smith ran into the house and called the police. Tr. pp. 757-59.

Smith testified the white car was gone by the time the police arrived. After the police were informed of the incident and left to speak with Delshawn, Smith went back out onto the porch of his home with his two female cousins and another girl. He then saw Applicant and four other males walking up the street. Applicant's face was not obscured by a bandanna, although the other males were wearing bandannas. Smith and the girls immediately ran into the house and turned off the lights. Smith ran upstairs and looked out of "the left-hand window." Tr. pp. 759-62.

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[4] Both of Delshawn's sisters lived on the same block of T.S Martin as Smith. Tr. p. 756.

From there, Smith saw Applicant get a long, dark rifle from someone and hand another person a revolver. One gun was pointed at Courtney's house. Applicant kneeled, aimed at the same house, and opened fire. He continued shooting after he stood up again. Smith testified that he heard multiple gunshots.[5] The people who were with Applicant ran back the same direction from which they had come as soon as Applicant began shooting. Smith testified Applicant tried to re-cock his weapon but a bullet did not "come up," so he turned and ran away from the scene. In all, Smith looked out the window for four or five minutes. Tr. pp. 762-65, 770-74.

The police returned to Smith's house, and Smith gave a statement concerning the shooting to Investigator Joe Gray of the City of Columbia Police Department. Smith's statement identified Applicant as the shooter by his nickname, Baby Jesus. Minutes later, Investigator Gray told Smith the police had caught someone going through a "cut" nearby. Investigator Gray then drove Smith to the location. Smith remained in Gray's car while another officer brought Applicant to the front of Gray's vehicle. Although it was dark outside, both police vehicles at the show-up had their lights on, and Investigator Gray testified his high beams were on. Also, the other officer shined alight on Applicant's face. Smith immediately identified Applicant as the shooter. Tr. pp. 498-99, 507-08, 512-15, 766-68.

Applicant gave two statements to Investigator Gray following his arrest. The waiver of rights for his first statement was signed at 12:17 a.m. on August 27, 2004. Applicant initially denied being at T.S. Martin. When Investigator Gray told him the police had witness information putting him there at the time of the shooting, however, Applicant admitted he had been there with "Ty and Chris from Belvedere" and two of their friends. Still, Applicant

[5] One of Smith's cousins dialed 911 during the incident. Tr. p. 764.

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claimed one of the other men in the groups had done the shooting. According to Applicant, this person used a sawed-off gun with a scope on it. Applicant also told Gray a person named O.B. had a dispute with Delshawn. Tr. pp. 528-40.

Roughly twelve hours later, following the victims' deaths, Investigator Gray again spoke to Applicant. After serving arrest warrants for murder on Applicant and obtaining a waiver of rights, Gray told Applicant he had some questions about the shooting that needed to be cleared up. Applicant again waived his rights and gave another statement. Tr. pp. 543-45.

In this second statement, given at 1:25 p.m. on August 27, Applicant admitted he had been shooting a .32 caliber automatic rifle when the incident occurred at T.S. Martin, but he claimed he only had two bullets. Applicant also said he had shot at a "top window [of a house] with a round hole like an attic." The other person was shooting "down the street in the dark." Further, Applicant claimed he had returned the .32 weapon to the person who handed it to him, and he denied that Goo, Diego Thompson, or Pooh had been present at the time of the shooting. Officers returned to the scene but could not find damage to any house other than Courtney's, including a nearby house resembling the one Applicant described. Tr. pp. 547-52.

Finally, the State presented two experts in gang recognition who gave expert opinion testimony about the significance of the two teardrop tattoos Applicant put on his face after his arrest for the murders. Investigator Edward O'Cain, an expert in gang activity and gang recognition, testified he had viewed the two teardrop tattoos on Applicant face, "right [below] the right eye." One of these is an open teardrop. O'Cain opined this tattoo "can represent quite a few things depending on who you're talking to." Under gang rules, however, it is supposed to signify a "family member" – whether a fellow gang member, a relative, or an innocent person – has died. The other teardrop was filled in, and according to O'Cain, this means the

wearer has killed someone in retribution. It can, however, have some other meanings. Tr. pp. 902-53.

Officer Walter Mahoney, of the City of Columbia Police Department's gang task force, testified as an expert in gangs in the Columbia area. In his expert opinion, "[t]he open teardrop could represent a lost soldier, [or fellow gang member,] or... some innocent person that might have been killed by mistake. The closed teardrop is the body." According to Mahoney, Applicant's tattoos signify "[h]e is a gang member that took somebody out." (Sic) Tr. p. 954-75.

ALLEGATIONS

At the evidentiary hearing, Counsel for Applicant clarified that the December 11, 2018, amendments were meant to supersede the allegations contained in the original application and all other amendments. Applicant ultimately went forward only on the following allegations contained in the amended application filed December 11, 2018:

1. Ineffective Assistance of Trial Counsel, in that:
    a. Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible mitigating evidence in preparation for trial. . . . Specifically, Trial Counsel failed to consult with an expert witness for an independent review of the eye-witness identification evidence implicating Applicant as the murderer when it was reasonable and necessary;
    b. Trial Counsel improperly argued irrelevant and highly prejudicial character evidence during the Applicant's opening statement by telling the jurors that Applicant had been incarcerated for twenty-six months prior to his jury trial;
    c. Trial Counsel failed to move for suppression of objectively false evidence that Applicant stole the gun that was used in the murders, resulting in Trial Counsel having to introduce otherwise inadmissible, irrelevant, and highly prejudicial character evidence that Applicant was incarcerated when the gun used during the homicide was stolen;
    d. Trial Counsel failed to object to improper and highly prejudicial testimony by witness, Tyrone Smith, that he was scared to testify but was testifying for the victims and their family;
    e. Trial Counsel failed to object to the admissibility of any testimony, by either lay or expert witnesses, that Applicant was a member of a gang, when such evidence was not relevant to the State's case and was inadmissible, unduly prejudicial character evidence;

f. Trial Counsel failed to object to the admissibility of the State's gang expert witness testimony;
g. Trial Counsel failed to preserve for appellate review objects to highly prejudicial testimony of the State's gang expert witnesses, including by not limited to testimony about possible meanings of the teardrop tattoos and hash mark tattoos;
h. Trial Counsel improperly called an expert witness to testify about gangs, including the possible meaning of tattoos, when it only served to bolster the credibility of the State's gang expert witnesses and enhance the State's improper and highly prejudicial evidence;
i. Trial Counsel failed to object to the Solicitor's improper comments during closing argument and failed to move for a curative instruction and/or mistrial based on the undue prejudice created by those comments. Specifically, Trial Counsel failed to object when the Solicitor argued in closing, "There is not a single witness, or any evidence in this case, that points to anyone other than [Applicant] as being the shooter, the murderer." This unduly prejudicial argument was both burden shifting and an impermissible a comment on the Applicant's right not to testify;
j. Trial Counsel failed to call an expert witness to testify in rebuttal of the eye-witness identification evidence presented by the State at trial when it was reasonable and necessary to present this critical evidence;
k. Trial Counsel failed to object to and preserve for appellate review lay opinion and expert testimony regarding unduly prejudicial gang affiliation evidence and stigma in the minds of the jurors (sic). . . .;
l. Trial Counsel failed to object to improper and highly prejudicial testimony by a State's witness that he was scared to testify but was testifying for the victims and their family.

2. Ineffective Assistance of Appellate Counsel, in that:
   a. Appellate Counsel failed to argue on appeal before the S.C. Court of Appeals that the testimony of the State's gang expert witness was entirely inadmissible;
   b. Appellate Counsel failed to argue on appeal before the S.C. Court of Appeals that the State's gang experts' opinion about the possible meaning of the teardrop tattoos was inadmissible;
   c. Appellate Counsel failed to argue on appeal before the S.C. Court of Appeals that the State's gang experts' opinion about the possible meaning of the hash mark tattoos was preserved for appellate review;
   d. Appellate Counsel failed to appeal the portion of the S.C. Court of Appeals' Opinion regarding the admissibility of the State's gang expert witnesses' testimony to the S.C. Supreme Court.

Applicant added two more allegations regarding trial counsel's performance prior to the start of the hearing:

1. Trial Counsel failed to object to improper vouching and bolstering of two witnesses, Shante Bethel and Diego Thompson, during the State's closing argument;
2. Trial Counsel failed to object when the State presented improper Golden Rule and burden-shifting arguments during closing arguments.

The Court therefore finds any other allegations other than those set forth by Applicant's counsel on the record at the start of the evidentiary hearing are waived and abandoned, including any allegations raised in the original application and previous amendments.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As to the remaining allegations of ineffective assistance of trial and appellate counsel, this Court finds they are without merit. This Court has had the opportunity to review the record in its entirety and has heard the testimony at the PCR hearing. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

In a PCR action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). 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. "Counsel is strongly presumed to have rendered adequate assistance and made all significant

decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Applicant also alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is **not** required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)) (emphasis added). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . . ." Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Jones, 463 U.S. at 754). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland, 337 S.C. at 616, 524 S.E.2d at 836 (1999). Thus, in this case, we ask first whether appellate counsel's performance was deficient, and two, whether Applicant was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, an applicant must show that, but for appellate

counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

I. Allegations 1(a), (j): Failure to consult with and call at trial an expert in eyewitness identification

Applicant alleges his trial counsels were deficient for failing to consult with an expert on eyewitness identification and for failing to call such an expert to rebut testimony presented by the State. In support of this claim, Applicant presented the testimony of Dr. Dawn McQuiston (McQuiston), Ph. D., who was qualified as an expert in memory and eyewitness identification.

McQuiston testified generally to issues that may be present regarding memory and eyewitness identifications. According to McQuiston, memory decays over time, and people's limited ability for attention can lead to errors in perception which contribute to misidentifications. McQuiston also testified there is scientific data to show misidentification occurs, although she could not say whether it was a "common" occurrence. McQuiston also testified familiarity between the subject and the person making the identification does not necessarily make an identification more accurate, nor does a person's confidence in the identification, although there is some relationship between confidence in the identification and its accuracy. Finally, McQuiston testified an identification from a lineup is more reliable than a show-up identification. Both McQuiston and Franklin-Best opined McQuiston's testimony may have been helpful at trial to help the jurors better understand all of the issues surrounding eyewitness identifications. Franklin-Best testified although she was aware of the ability to secure forensic experts for the defense, she did not consider hiring an expert on this particular issue.

However, McQuiston admitted she could not testify as to the reliability of the specific identification in this case, nor was she in any better position to say if this particular identification

was accurate than the jurors were at trial. In this case, the witness, Tyrone Smith, identified Applicant by his nickname, Baby Jesus, before officers even knew a suspect had been detained and before the show up occurred. Tr. p. 768. Further, although there were some issues with the identification, such as the suggestiveness of the show-up procedure, trial counsel pointed out these issues on cross-examination. Additionally, Thompson testified he was part of the group that traveled to T.S. Martin on the night of the shooting, identified Applicant as the shooter, and Applicant's own statement to law enforcement acknowledges he was at the scene and firing a gun. Tr. pp. 265-76.

"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. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. 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." Id. at 689. Further, "while the Constitution requires that a criminal defendant receive effective assistance of counsel, the presentation of expert testimony is not necessarily an essential ingredient of a reasonably competent defense." Bonin v. Calderon, 59 F.3d 815, 834 (9th Cir. 1995). Counsel's failure to procure expert witnesses does not render his or her representation deficient when counsel vigorously cross-examines the State's witnesses and attacks the accuracy of the evidence. Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008).

In this case, the Court finds Counsel vigorously cross-examined the witnesses Tyrone Smith and ~~Deigo~~ Diego RSS Thompson regarding their assertions Applicant was the shooter. Tr. pp. 287-358, 777-824. Applicant's trial counsel also argued the show up was suggestive, Smith's inconsistent statements regarding his prior familiarity with Applicant, and the distance from which Smith viewed the shooting all called the identification into question. Despite Franklin-Best's second-guessing of her own performance in hindsight, her decision not to consult with or call an expert on this issue did not render her representation of Applicant constitutionally deficient, as she was able to attack the credibility of the identification in various other ways. See Wright v. Hopper, 169 F.3d 695, 707 (11th Cir. 1999) ("The question of ineffectiveness is a question for the court to decide so admissions of defective performance by attorneys are not decisive.").

Finally, "[a]n 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. 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. The Court finds there was significant evidence in the case supporting the reliability of this particular identification of Applicant by Tyrone Smith, which could not be overcome by McQuiston's testimony since she was unable to comment on the reliability of this particular identification. Therefore, the Court finds Applicant has failed to meet his burden of proving he was prejudiced by Franklin-Best's alleged deficiency.

Accordingly, because Applicant cannot prove either deficiency or prejudice regard to the expert witness issue, these allegations shall be denied and dismissed.

II. Allegation 1(b): Introduction of irrelevant, improper, and highly prejudicial character evidence by trial counsel during Applicant's opening statement

Applicant argues trial counsel was ineffective by telling the jurors Applicant had been incarcerated for twenty-six months prior to his jury trial in the defense's opening statement. The attorney who gave the opening, Maxwell Shardt, was unavailable to testify at the evidentiary hearing, and Franklin-Best testified she was not aware he was going to make such an argument beforehand. However, the Court has reviewed the record and finds, in the context of the opening as a whole, as well as the defense's overall strategy of point the finger at Diego Thompson, there is sufficient basis to conclude Shardt's decision was a strategic one.

"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 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)). When counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992); 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). However, courts should not "insist counsel confirm every aspect of the strategic basis for his or her actions." Harrington v. Richter, 562 U.S. 86, 109 (2011).

Here, Schardt stated during his opening Applicant had been in jail for twenty-six months, and it was public knowledge Applicant "was [the State's] guy," and law enforcement had been focused on him that entire time, rather than following the evidence. Tr. pp. 117-18. Schardt concluded by telling the jury Applicant had been waiting for twenty-six months for them to send

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him home. Tr. p. 130. It is clear from a full reading of the opening statement and from the record as a whole, Schardt was arguing the police investigation was deficient because they had jumped to the conclusion Applicant was the perpetrator and pursued that theory, rather than letting the evidence tell them what to do or what avenues to pursue. It is also clear Schardt was making this argument in order to point to Applicant's innocence, rather than his guilt.

Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. "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." Id. Where, as here, a strategic basis can be deduced from the record, trial counsel's performance should not be held deficient, and this Court so finds. Accordingly, this allegation shall be denied and dismissed.

III. Allegation 1(c): Failure to object to allegedly improper testimony regarding the gun used in the homicide

Applicant alleges trial counsel failed to object when the State presented evidence showing the gun used in the homicide had been stolen because Applicant was in jail during the timeframe of the theft, and refuting such evidence required the defense to present otherwise inadmissible evidence implicating Applicant's character. As an initial matter, this Court finds to the extent Applicant is arguing the introduction of this evidence constituted prosecutorial misconduct, that allegation was not properly plead, and relief should not be granted on that ground. Instead, Applicant has framed the issue as one of ineffective assistance of trial counsel for failing to object. For the reasons discussed below, the Court finds Applicant has not met his burden of proof as to either deficiency on this issue.

Applicant asserts this evidence was "highly prejudicial" because it required the defense to admit evidence showing Applicant was in jail at the time of the theft. However, contrary to Applicant's description of this evidence as harmful to his case, it was instead beneficial and consistent with the defense theory, as testified to by Franklin-Best, the shooter was not Applicant, but was actually Diego Thompson. The evidence showing Applicant was in jail at the time of the gun theft refuted Thompson's testimony Applicant stole the gun, putting Thompson's credibility in doubt. The State's lead investigator agreed the identity of the person who stole the gun was important to the murder investigation, and law enforcement knew it could not have been Applicant. Tr. p. 1338. The defense was then able to argue in closing the State had not tied the gun to Applicant, and that fact, along with the fact the gun was not found where Thompson said it was or anywhere near where Applicant was arrested, was evidence Thompson was the shooter rather than Applicant. Thus, because the introduction of this evidence was consistent with the defense theory, this Court finds Applicant's trial counsels were not deficient for introducing it, nor was it prejudicial to Applicant's defense. This allegation shall be denied and dismissed.

IV. Allegations 1(d), (l): Failure to object to testimony by the witness Tyrone Smith that he was scared to testify but was testifying for the victims and their family

Applicant alleges his counsels were ineffective for failing to object when Tyrone Smith testified he was "scared to be on TV," but was nevertheless testifying for the victims and their families. Tr. pp. 775-76. The Court finds Applicant has failed to meet his burden of proof as to this allegation.

In the exchange at issue, Smith stated he was comfortable with testifying because there were no cameras in the courtroom and his concern was being on television, because Applicant "is a brother." Tr. p. 775. Franklin-Best testified she should have objected because this testimony was bolstering and impermissible character evidence. However, Applicant's gang affiliation was

uncontested at trial. Further, Smith never testified he was afraid of Applicant himself or that Applicant or anyone affiliated with Applicant had threatened him. Smith's testimony implies he is afraid of *other* community members who might see him on television, not Applicant. Finally, this Court's review of the record reveals the reference to Smith being afraid was fleeting, comprising seventeen lines in a transcript of more than one-thousand pages.

This Court finds Applicant has failed to meet his burden as to deficiency because the comments were not objectionable. In any event, 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." Strickland, 466 U.S. at 694. Applicant did not present any evidence, other than mere speculation, regarding the impact of this testimony. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . ."). Further, as noted above, Applicant's gang affiliation was not a contested issue at trial. Accordingly, the Court finds Applicant's presentation on this issue was insufficient to meet his burden of proof as to the prejudice prong. Therefore, these allegations shall be denied and dismissed.

V. Allegations 1(e) -(h), (k): Failure to object to or otherwise preserve for appellate review testimony from the State's witnesses regarding to Applicant's gang affiliation and the possible meaning of Applicant's tattoos; failure to properly rebut the State's expert witness testimony regarding the meaning of the tattoos

First, Applicant contends evidence of his gang affiliation was "irrelevant" and "highly prejudicial." In fact, the entire theory of the State's case was based on this shooting being a gang-related retaliation; thus, the Court finds Applicant's membership in the Folk Nation gang

was clearly relevant. Additionally, this Court's review of the record reveals Applicant's counsel objected to the testimony of the State's expert witnesses on multiple bases, in both the pre-trial motion hearing and at trial. Therefore, for the reasons set forth below, this Court finds Applicant has failed to meet his burden of either deficiency or prejudice regarding these allegations.

The defense's primary objection to the tattoo testimony was that the State was unable to establish what the tattoos meant to Applicant, specifically. Tr. p. 19. The defense also argued the testimony was improper "propensity" evidence, overly prejudicial, and based on inadmissible hearsay. Pre-Trial Tr. pp. 5-9, 112-17; Tr. pp. 12-24, 901. Although these initial objections were overruled, Franklin-Best made multiple motions for a mistrial based on the testimony actually elicited, arguing the portion of the experts' testimony attributing "bodies" to the tattoos was "inflammatory," irrelevant, based on hearsay which violated Applicant's rights under the Confrontation Clause, and was improper "propensity" evidence. Tr. pp. 919-24, 971-73. Thus, the Court finds it is clear from the record defense counsel did a capable job of fighting the admission of this testimony on multiple grounds.

However, Franklin-Best testified at the evidentiary hearing she should have objected based on character, and she should have argued the evidence did not meet the Council test for admissibility. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (holding when admitting scientific evidence, the trial judge must find the evidence will assist the trier of fact, the expert is qualified, and the evidence is reliable). However, Council applies to scientific evidence, and at the time of Applicant's trial, was not the standard for non-scientific expert testimony, which was governed instead by State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997). The Court finds the testimony at issue here was much like that at issue in Morgan, in that it was not based on rigorous scientific data and testing, but instead on the observations and experience of the

testifying experts. In those instances, Morgan instructed the reliability of the expert testimony went to the weight of the evidence, not its admissibility. 326 S.C. at 513, 485 S.E.2d at 118. Morgan was not overruled until 2009, thus it was the law at the time of Applicant's trial, and any argument for use of the Council standard would have been incorrect. Therefore, this Court finds Franklin-Best was not deficient for failing to object to on that ground.

Additionally, Applicant's appellate counsel raised the issue of the expert testimony regarding "bodies" being attributed to the tattoos on appeal. Although the Court of Appeals found it was not preserved as to the character evidence argument, it nevertheless addressed the issue on the merits, finding any error in the admission of such evidence harmless given the eyewitness identifications of Applicant as the shooter and Applicant's own incriminating statement. State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012).

An issue raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475-76, 746 S.E.2d at 47 ("Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim."). Therefore, before this Court can grant relief on a claim of ineffective assistance of trial counsel for failing to preserve a ground for appellate review, the Court must determine the underlying claim was meritorious and a reasonable probability that it would have resulted in reversal and a new trial. Here, the Court of Appeals

explicitly found the admission of the gang expert testimony was harmless, and therefore, this Court finds Applicant has not met his burden of proof as to the prejudice prong.

Finally, Applicant also argues Franklin-Best was deficient in calling a defense expert (Walker) regarding the tattoos when his testimony only served to reinforce the opinions of the State's experts. However, the Court finds this characterization of Walker's testimony is not supported by the record. Walker had extensive law enforcement credentials, and testified there were multiple possible meanings for the teardrop tattoos other than signifying "bodies," including that a friend or family member had died, serving time, or simply being a copycat. Tr. pp. 1164, 1169. He also pointed to multiple celebrities with teardrop tattoos including the rapper Lil Wayne and the basketball player Larry Hughes. Tr. p. 1196. Walker also testified the hash mark tattoos signified rank within the gang, not "bodies." Tr. p. 1173. Finally, Walker helped build the defense's argument that no expert could say definitively say what the tattoos meant, as only Applicant would know. Tr. pp. 1174-75.

"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 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). The Court finds calling Walker as a defense witness was a reasonable strategic decision to counter the presentation of the State's expert witnesses, and therefore, this Court finds Applicant's trial counsel were not deficient in doing so.

Because Applicant has shown neither deficiency nor prejudice regarding the defense's handling of the various expert witnesses' testimony, these allegations shall be denied and dismissed.

VI. Allegation 1(i): Failure to object to various improper comments during the State's closing argument; failure to move for a curative instruction and/or mistrial based on the undue prejudice created by those comments

Applicant alleges his trial counsel should have objected to the solicitor's argument in closing, "There is not a single witness, or any evidence in this case, that points to anyone other than [Applicant] as being the shooter, the murderer." Tr. p. 1319. Applicant contends this argument was both burden shifting and an impermissible comment on the Applicant's right not to testify. Applicant also alleges trial counsel should have objected to improper vouching and bolstering of two witnesses, Shante Bethel and Diego Thompson, and to improper Golden Rule and burden-shifting arguments during the State's closing. Tr. pp. 1319-20, 1392.

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609-10, 602 S.E.2d at 744. "If a solicitor's closing argument remains within the record

evidence and the reasonable inferences therefrom, no error occurs. Undoubtedly, a solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony." State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) (internal citations omitted). However, "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant, and the [defendant] 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 has reviewed the relevant portions of the trial record and finds the solicitor's statement that there were no witnesses or evidence pointing to anyone other than Applicant as the shooter is within the bounds of permissible argument. The solicitor did not argue "the defendant" or "the defense" had failed to present such evidence; she was merely commenting on her view of the all the evidence presented at trial. Tr. p. 1319. The Court finds this is a permissible comment for a solicitor to make, as the State has a right to argue its version of the facts and credibility of the evidence. Further, the defense called Diego Thompson and Shante Bethel "liars" during closing, which put their credibility in issue before the jury, as it always is, and the State had a right to respond to the defense's characterization of those witnesses. Tr. p. 1337. Accordingly, because the comments were not objectionable, the Court finds trial counsel were not deficient for failing to object.

Further, this Court finds none of the comments at issue in this case were so prejudicial as to amount to a denial of due process, particularly in the context of the whole trial. See State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003) (appellate courts will review the

alleged impropriety of an opening or closing argument in the context of the entire record). In Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), the Supreme Court concluded any impropriety in the solicitor's closing argument was not sufficient to grant post-conviction relief where the solicitor's improper use of the pronoun "I" was limited, did not recur throughout his argument, there was overwhelming evidence of the defendant's guilt, and the trial judge instructed the jury not to consider counsels' statements as evidence. Similarly, the trial court in Applicant's case instructed the jury the attorneys would recount their recollections of the testimony, but if what the attorneys said differed from the jurors' own recollections, they were to rely on their own memories. Tr. p. 1298. He also instructed jurors it was their duty to judge the credibility of witnesses, and in doing so, they could consider whether a witness had exhibited any interest, any motive, any bias, or any prejudice in the case." Tr. pp. 1403-05. In this context of the closing arguments and jury instructions taken as a whole, the Court finds the solicitor's comments were not so prejudicial as to deprive Applicant of due process.

Therefore, because Applicant has failed to prove either deficiency or prejudice, these allegations shall be denied and dismissed.

VII. Allegation 2(a)-(d): Appellate Counsel was ineffective in his handling of the gang expert testimony on appeal

Applicant alleges appellate counsel was ineffective because he failed to argue before the Court of Appeals that the testimony of the State's gang expert witnesses was entirely inadmissible, failed to argue the State's gang experts' opinion about the possible meaning of the teardrop tattoos was inadmissible, failed to argue the State's gang experts' opinion about the possible meaning of the hash mark tattoos was preserved for appellate review, and failed to

appeal the portion of the Court of Appeals' Opinion regarding the admissibility of the State's gang expert witnesses' testimony to the S.C. Supreme Court.

As an initial matter, the Court finds the State has correctly pointed out Applicant has alleged both trial counsel was ineffective in failing to preserve these issues and appellate counsel was ineffective in failing to raise them. It cannot be both ways, as appellate counsel cannot be deficient for failing to raise an unpreserved issue. Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002). Additionally, because Applicant did not present any testimony at the evidentiary hearing regarding appellate counsel's performance, this Court finds he is unable to overcome the presumption in favor of appellate counsel that appellate counsel's decisions regarding which issues to raise where based on strategy rather than neglect.

Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is **not** required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on. . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . . ." Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Jones, 463 U.S. at 754). Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland, 337 S.C. at 616, 524 S.E.2d at 836 (1999). Thus, in this case, we ask first whether appellate counsel's performance was deficient, and two, whether Applicant was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, an applicant must show that, but for appellate counsel's errors, there is a

reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

In this instance, appellate counsel raised two claims, including the propriety of the gang expert testimony, and although that issue was found to be unpreserved, the Court of Appeals still considered the merits, finding its admission was harmless error. Appellate counsel then selected the show-up issue for further appeal to the Supreme Court. Because Applicant failed to present any testimony from appellate counsel on this issue, this Court finds Applicant cannot overcome the presumption the decision was based on strategy rather than neglect. See, e.g., Jones v. Barnes, 463 U.S. 745, 751-52 (1983) ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues."). "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.

Additionally, the Court finds it is not reasonably likely Applicant would have prevailed on these issues. Indeed, the Court of Appeals found the admission of the gang expert testimony was harmless. Such an assessment is not likely to change no matter which argument appellate counsel made for its inadmissibility. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765, 145 L. Ed. 2d 756 (2000) (quoting Gray v. Greer, 800 F.2d 644, 646 (C.A.7 1986)). This Court finds Applicant has not met his burden of proving deficiency or prejudice. Therefore, this allegation shall be denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Counsel was not deficient in any manner, nor was Applicant prejudiced by his representation. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty 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 Applicant's 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 is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.

R. SCOTT SPROUSE
Presiding Circuit Court Judge
Fifth Judicial Circuit

4-15, 2019

ALAN WILSON
ATTORNEY GENERAL

April 9, 2019

The Honorable R. Scott Sprouse
South Carolina Circuit Court
Post Office Box 1277
Wahalla, South Carolina 29691

Re: **Chris A. Liverman, #308393 v. State of South Carolina**
2012-CP-40-04870

Dear Judge Sprouse:

Enclosed please find the original proposed **Order Denying Application for Post-Conviction Relief** in the above-captioned case for filing in your office.

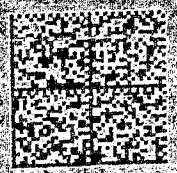
Sincerely,

Lindsey A. McCallister
Assistant Attorney General

LAM/can
Enclosure(s)

Cc: Dayne C. Phillips, Esquire
E. Charles Grose, Jr., Esquire

PRIORITY MAIL



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The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
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Columbia, SC 29211