

Don A. Thompson
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RECEIVED
JUN 06 2019
S.C. SUPREME COURT

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June 5, 2019

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

RE: Andre T. Boone, #328364, Appellant -vs- State of South Carolina, Respondent
2013-CP-40-6702

Dear Mr. Shearouse:

I was appointed to represent Mr. Boone in a post-conviction relief action. Judge Burch has denied him relief and dismissed the action. Mr. Taylor has instructed me to file an appeal.

Enclosed, for filing, please find the following relating to this matter:

- 1) A copy of Judge Burch's written Order of Dismissal;
- 2) A Notice of Appeal;
- 3) A Proof of Service; and
- 4) A Certificate of Filing (as to the filing of the Notice of Appeal and Proof of Service with the Richland County Clerk of Court).

I am turning this matter over to the Office of Appellate Defense for any further proceedings.

Sincerely yours,



Don A. Thompson

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUN 06 2019

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Paul Burch, Circuit Court Judge

Case No. 2013-CP-40-6702

Andre T. Boone, #328364,

Appellant,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Andre T. Boone appeals the order of the Honorable Paul Burch dated May 7, 2019.
Appellant received written notice of entry of this order on May 17, 2019.

June 3, 2019



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Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Paul Burch, Circuit Court Judge

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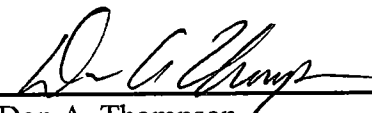
State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina (respondent) by depositing a copy of it in the United States Mail, postage prepaid, on June 3, 2019, addressed to the State's attorney of record, Lindsey Ann McCallister, Assistant Attorney General, S.C. Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211.

June 3, 2019



Don A. Thompson
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUN 06 2019

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Paul Burch, Circuit Court Judge

Case No. 2013-CP-40-6702

Andre T. Boone, #328364,

Appellant,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF FILING
WITH RICHLAND COUNTY CLERK OF COURT

I certify that I have forwarded the Notice of Appeal and Proof of Service to the Richland County Clerk of Court, for filing, by depositing a copy of it in the United States Mail, postage prepaid, on June 4, 2019, addressed to The Honorable Jeanette W. McBride, Richland County Clerk of Court, P.O. Box 2766, Columbia, South Carolina 29202-2766.

June 4, 2019



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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Andre T. Boone, #328364,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

2013-CP-40-06702

ORDER OF DISMISSAL

RECEIVED
JUN 06 2019
S.C. SUPREME COURT
11:20 AM
CLERK OF COURT

This matter is before this Court by way of an application for post-conviction relief (PCR) filed November 1, 2013 by Applicant, Andre T. Boone (hereinafter "Applicant"). The State filed a return to the application denying the allegations and requesting an evidentiary hearing. On August 28, 2017, a PCR evidentiary merits hearing was held before this Court at the Richland County Courthouse. Applicant was present along with his PCR counsel, Leah (PMB) Lisa Moody, Esquire. Respondent was represented at the hearing by Jessica Kinard, Assistant Attorney General. Applicant testified at the hearing in his own behalf. Applicant's trial counsel, Camille Everhart Guthrie, Esquire, testified on behalf of Respondent. At the evidentiary hearing, this Court had the opportunity to observe the witnesses, observe their demeanor, listen to their testimony, and judge their credibility accordingly. This Court also had the opportunity to review the transcript of Applicant's trial and the evidence introduced at trial. As a result of this Court's review of the entire record and evidence, its credibility determinations, and application of the law, this Court finds and concludes Applicant is not entitled to post-conviction relief and denies and dismisses this application with prejudice.

ANNE

PMB

emailed

PROCEDURAL HISTORY

Applicant is presently confined in the Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the April 2007 term of the Richland County grand jury for the crimes of murder (Indictment # 2007-GS-40-2324), breach of peace of a high and aggravated nature (Ind. # 2007-GS-40-2325), and unlawful carrying of a pistol (Ind. # 2007-GS-40-2327). Applicant was represented by three (3) attorneys, Camille Everhart Guthrie, Danielle Payne, and Ashley Thomas, Esquires. The charges arose out of the murder of 15 year old Brian Wright, which occurred on the night of February 18th / the early morning hours of February 19th, 2007, in the parking lot of the Waffle House and adjacent ABC Packaging store / Exxon/Mobile gas station located near the intersection of Two Notch Road and I-20 in Richland County.

Facts

In the closing minutes of February 18th, the first few minutes of February 19th, 2007, a shootout occurred in the parking lot of a Waffle House in Richland County. Just after midnight, on February 19, 2007, an officer from the Richland County Sheriff's Department responded to the scene and found victim's body on the ground. The victim, Brian Wright (hereinafter "the victim"), was located on the asphalt or pavement in front of the adjacent ABC Packaging store / Exxon/Mobile station. The victim's feet were in the direction of the Waffle House parking lot. The front of the Waffle House faces the adjacent ABC Packaging / Exxon/Mobile station which itself directly faces Two Notch Road.¹ As he approached the victim, the officer saw blood on the

¹ If one exits the Waffle House from its interior, to the left is Two Notch Road and to the right is the back of the Waffle House parking lot. The front door of the Waffle House is located on the side of the Waffle House which faces the adjacent ABC Packaging store / Exxon/Mobil station, which are in the same building. The ABC Packaging store is closer to the Waffle House than the Exxon/Mobile station.

ground and the victim's fatal head wound. Knowing there was nothing to be done for the victim, the officer began to secure the scene and ask what had happened. Though numerous people were milling about, the only response received was "nobody saw anything." (R. 334, ln. 17 - 336, ln. 23).

Other officers arrived to investigate the scene. A forensics officer recovered fired shell casings from "two general areas," in the parking lot near the front door of the Waffle House and a separate area to the right of the Waffle House as one exits the Waffle House. Specifically, there was a live bullet and two (2) fired shell casings from a .380 found in the parking lot in front of the front door of the Waffle House, and two (2) fired 9mm casings recovered from the area to the right of the Waffle House if one exits its interior. (R. 387, ln. 3- 388, ln. 20).

A search during daylight hours turned up an entrance mark in the ABC Packaging/Exxon/Mobil station adjacent to the Waffle House. Investigation of that mark also led to the recovery of three (3) additional fired 9mm casings in the grass near the right back of the Waffle House parking lot if one is exiting the interior of the Waffle House. (R. 392, ln. 19 - 394, ln. 12). This grass separates the Waffle House parking lot from the ABC packaging / Exxon Mobile Station parking lot. The reverse trajectory of the bullet mark in the ABC Packaging / Exxon/Mobil station pointed directly to the area where the fired 9mm shells were recovered in the grass. (R. 400, ln. 12 - 401, ln. 18).² The investigator noted that while the shell casings could give a general area where the shooter was standing, location of the casings were not tied to where the shooter pointed his gun, "[i]t could be anywhere around that circle of the shell casings when he fired it. (R. 421, ll. 12-20). The victim's body was "directly across" from the front door area

² This bullet mark actually struck the outside wall of the ABC Packaging store which is closer to the Waffle House than the front door of the Exxon/Mobile station. The trajectory of this bullet was from the back of the Waffle House parking lot into the side of the ABC Packaging store at an angle with the bullet traveling toward Two Notch Road.

of the Waffle House and in front of the adjacent ABC Packaging / Exxon/Mobile station. (R. 448, ll. 2-11). Either of the two (2) weapons that the fired shell casings came from [the .380 or the 9mm] had the range to strike the victim if fired from the general location of the recovered shells. (R. 449, ln. 20 - 450, ln. 4).

The bullet that struck the victim was not recovered. (R. 450, ll. 9-12; 496, ll. 11-17). Pathologist Dr. Clay Nichols testified the gunshot wound to the back of the victim's head was a "through and through" wound. (R. 1023, ll. 4-14; 1029, ll. 2-4). The wound indicated the victim's head was "ducked down forward" when he was shot. (R. 1028, ll. 1-8). He may have fallen immediately after being shot, or "his momentum could have carried him several feet after he was shot." His wound was consistent with his fleeing the gun battle that occurred in the Waffle House parking lot when shot. (R. 1029, ll. 5-10).

Karleisa Brabham ("Karleisa") testified that she was with friends on the night of the shooting and the group went to the Waffle House to attempt to stop a planned fight they had heard one friend's boyfriend, Cedric Ruff, was going to be involved in. The group stayed in the car after arriving at the Waffle House. After Cedric Ruff arrived, a fight began. Applicant [Andre Boone] walked in front of the car Karleisa and her friends were in. Karleisa saw Applicant fire a gun into the air. She also saw a "brown-skinned guy in a black shirt" fire a gun from the front of the Waffle House parking lot [closer to Two Notch Road] back toward them in the back of the same lot. (R. 499, ln. 7 - 503, ln. 23).

Jerome Christopher Thompson ("Jerome") testified that on the night of the shooting, he, with friends Derrick Guilyard, "Bernard," Demon "Little Duke" Griffin, and Applicant, were informed a fight was to occur between Corey Sanders and his "homeboys." They went in search of the fight, apparently to give assistance. Applicant was driving his SUV and the other men

were passengers in the vehicle. (R. 512, ln. 13 - 513, ln. 23; 520, ln. 7 - 523, ln 19). They went to several locations but the fight did not occur at any of them. They eventually pulled into the Waffle House where the shooting would later occur. Jerome was a member of a gang - a "Tree Top Piru" ("TTP") Blood. (R. 519, ll. 13-18). He saw members of the rival Crips gang drive into the parking lot, wearing their blue colors, and members of the Folk gang (who are aligned with the Crips) arrive. (R. 532, ll. 11-15; 534, ll. 2-24). Corey began the fight. (R. 535, ll. 24-25). Applicant went to where Corey was fighting, near the front of the Waffle House, and "one dude say, if he jump in, he was going to shoot them." (R. 539, ll. 1-25). Applicant returned to his SUV and asked Jerome for Jerome's 9mm pistol, which was laying in Jerome's lap and had been before they arrived at the Waffle House; and, after obtaining the gun Applicant fired the pistol two (2) times into the air. (R. 526, ln. 17 - 527, ln. 10; 542, ll. 2-22). Jerome saw two (2) people, one light-skinned man wearing blue colors and one dark-skinned man, also open fire. (R. 544, ll. 2-4). Applicant fired back at these two (2) men. (R. 552, ll. 12-25). Applicant eventually got back in his vehicle. Jerome, Applicant, and the rest of their group then drove away in Applicant's vehicle. Jerome later heard the victim had been killed in the shootout. Jerome disposed of the gun Applicant fired at the Waffle House because Jerome "thought I had a body on it." (R. 555, ln. 2 - 556, ln. 11).

Robert Portee ("Robert"), also a TTP Blood, was also present at the Waffle House. He saw Corey fight with another person named Chad. Robert also recalled that Chad had several people come to the fight with him, and basically described two (2) groups coming together over the fight. Robert identified Applicant's co-defendant at trial, Eugene Patterson, as being one (1) of the individuals present in the front of the Waffle House' parking lot [nearest Two Notch Road]. Robert eventually joined the fist fight with Corey when he believed Chad was winning.

Shots were then fired from the front and the back of the parking lot, and Robert left the scene. (R. 585, ln. 20 - 589, ln. 19; 590, ln. 11 - 591, ln. 20). Prior to the beginning of the fight, and the shooting, Robert spoke to Applicant. Applicant told Robert that he "was going to chunk at these niggers," meaning he intended to shoot at them, and when Applicant said this Robert heard the "racking of a gun." (R. 592, ln. 4 - 593, ln. 4).

Quintez Clemons ("Quintez") testified he and Sylvester Boone were in the Waffle House parking lot that night speaking with Applicant when a maroon car and a green car with white writing came by. Quintez recognized his friend, Karmidae a/k/a "Bay," driving the maroon car. Quintez went up to the car to say hello. There were two (2) other men in the car - - "a light skinned" young man with braids, wearing blue colors [Oliver Feldman], and another man [Eugene Patterson]. The light-skinned man pulled a gun on Quintez. When the light skinned man was told that Quintez and Bay were cousins, he put the gun down. Quintez recalled the light-skinned man actually had two (2) guns, what Quintez thought was a .357 revolver that he pointed at Quintez, and another black semiautomatic in his lap. The group of men in the maroon car later drove to the front of the Waffle House parking lot. (R. 611, ln. 14 - 614, ln. 5; 618, ll. 5-16). After the shooting began, Quintez recalled only seeing one (1) "big black dude" in a black shirt shooting toward Applicant. (R. 614, ln. 22 - 615, ln. 15).

William Kee ("William"), also a TTP Blood, was at the Waffle House that night. He testified that he only saw the first two (2) shots that Applicant fired into the air, and he ran to his truck. (R. 623, ln. 14 - 624, ln. 16). William then heard multiple other gun shots, from both the front and the back of the Waffle House parking lot. (R. 626, ll. 1-16).

Corey Sanders ("Corey"), another TTP Blood, testified that he, along with Charles Williams and Byron Morant, drove to the Waffle House so he could fight Chad. (R. 631, ll. 3-7;

632, ln. 1- 25). He knew Chad to be a Folk gang member. (R. 633, ll. 3-4; 636, ll. 19-22). Corey testified he had an "ongoing beef" with Chad over "disrespect," and they set up the fight to resolve those issues. (R. 636, ll. 7-18). Corey saw a burgundy Malibu with "Bay," co-defendant Eugene Patterson, and a "light skinned" guy [Oliver Feldman] inside, come into the Waffle House parking lot. Patterson, who was in the back of the car, made a "gun signal," which Corey described as he pointed an actual, high caliber, gun as if he was going to shoot, directly at him. Corey described other people coming together for his fight with Chad, and testified "once we met up with each other, we squared off and fought." (R. 633, ln. 11 - 635, ln. 21; 650, ll. 18-22). When about to begin this fight, Corey noted "the light-skinned guy was already standing outside with a gun in his hand. He wasn't trying to hide it or anything." The light-skinned man was wearing "all blue with a blue bandana around his face" and held a revolver. Corey also noticed another group at the back of the parking lot, a group that included Applicant and Jerome. Corey testified Applicant was a Blood, but from a different sect, a "Six Deuce Brim." (R. 637, ll. 2-8; 638, ln. 16 - 639, ln. 15; 640, ll. 6-15). Corey acknowledged the "only beef" he had with Patterson was, "I'm Blood, he's a Folk." (R. 642, ln. 25 - 643, ln. 1). Though he did not see who was shooting, Corey heard shots from what he believed to be three (3) areas, from the nearby Exxon/Mobil station and from the more immediate parking lot areas. (R. 648, ln. 3 - 649, ln. 13).

Chad Robinson ("Chad") testified similarly, that he and Corey were fighting, another person intervened, and "the [n]ext thing you know, pow, pow, we heard shots." (R. 964, ll. 2-9). Though he could not identify any of the shooters, testifying only that he ran when shots were fired, Chad did recall seeing Eugene Patterson at the Waffle House in a burgundy car. (R. 969, ln. 14 - 970, ln. 2).

Karmindae Legget ("Karmindae"), a/k/a "Bay," testified he went to the Waffle House with friends Eugene "Big Gene" Patterson, a Folk, and Oliver Feldman, a Crip, to see the fight. (R. 703, ln. 15 - 705, ln. 17; 721, ln. 8-13). After the fight began, Karmindae heard gunshots fired from the back of the Waffle House parking lot. (R. 710, ll. 5-19). Oliver Feldman and Eugene Patterson retrieved their guns from the car. Oliver had a .32 and Eugene had a .380. They fired several shots toward the back of the parking lot. More shots were fired toward them. Karmindae, Oliver Feldman, and Eugene Patterson then got into their car and left the crime scene. (R. 711, ln. 15 - 713, ln. 20).

Samuel Clemons ("Samuel"), who was with Applicant at the Waffle House, recalled seeking Bay, Oliver Feldman, and Eugene Patterson pull up. He recalled Oliver Feldman was wearing blue, and holding what he thought was a .357 revolver. (R. 739, ln. 7 - 740, ln. 24; 761, ll. 2-9). He recalled that Applicant "shot in the air twice and then that's when Eugene returned fire." (R. 743, ll. 2-3).

Derrick Guilyard ("Derrick") testified he went to the Waffle House with Applicant. Derrick had been a Blood since the sixth grade. (R. 755, ll. 19-25). Derrick explained that the Bloods do not "get along" with Folks or Crips, but that Folks and Crips could peacefully coexist. (R. 756, ln. 20 - 757, ln. 4). That night, he saw Applicant approach the fight in the parking lot, then return to the car and ask Jerome for his gun. He saw Applicant fire the gun into the air. Derrick testified he knew what was going to happen, "I mean, after one person shoots, another person begin to shoot." (R. 766, ln. 1 - 767, ln. 18). Derrick dove for cover, but could still hear multiple gunshots being fired including around the car he was hiding in. (R. 770, ll. 2-25).

Demon Griffin ("Demon"), who was in the car with Derrick, did not see the shooting, but estimated there were eleven (11) to twelve (12) shots fired in the shootout. Demon heard the shots as he was hiding in Applicant's vehicle during the shootout. (R. 788, ll. 2-24).

Oliver Feldman ("Oliver"), a member of the "Rolling 20's Crip Gang," testified he knew Eugene Patterson through a mutual friend. (R. 793, ll. 1-25). He also knew Patterson to be a member of the Folk Nation gang. (R. 793, ln. 1 - 794, ln. 17). The night of the shooting, Oliver was wearing blue with a blue bandana, "[b]ecause it represents [his] gang colors." (R. 796, ll. 5-12). Eugene Patterson wore black. (R. 796, ll. 13-18). Eugene Patterson received a call to go to the Waffle House, and he, Oliver and Bay left, with Bay driving and Eugene in the back. Oliver had a .32 H&R Magnum revolver, and Eugene had a .380 semiautomatic handgun. (R. 796, ln. 21 - 798, ln. 3; 799, ll. 19-22). Oliver testified that, at first, only two (2) people were involved in the fight, "then a third party got hisself [sic] involved." (R. 801, ll. 12-15). Oliver could tell that gangs were involved, "because one came to the aid of the other one." (R. 802, ll. 24 - 803, ln. 2). The fight was beginning to become "a fight between gang members." (R. 803, ll. 13-15). Oliver then saw someone from the back of the parking lot shoot into the air [Applicant]. (R. 803, ll. 17-22). The shooter then began to fire directly at Oliver. Oliver and Eugene retrieved their weapons from their car and returned fire. (R. 804, ln. 11 - 805, ln. 17). Oliver testified that neither he nor Eugene Patterson would have fired but for the fact that they were fired upon first. (R. 840, ll. 3-12). In cooperating with the investigation, Oliver advised that his handgun, a .32 H&R magnum caliber handgun, was in a coat in his bedroom. The gun was recovered. The gun could easily be mistaken for a .357 revolver. (R. 954, ln. 7 - 956, ln. 7; 1171, ln. 22 - 1172, ln. 25).

Sgt. William McRoberts of the Richland County Sheriff's Department took Eugene Patterson's initial statement. In his initial statement, Patterson admitted being at the Waffle House and seeing the fight, but claimed he left when the fight started. He further claimed he heard gunshots as he was backing out to leave, and drove "straight home..." (R. 880, ln. 20 - 881, ln. 5). Patterson was later arrested as the investigation revealed more facts of his involvement. In his second statement, Patterson still denied involvement but stated he saw Oliver Feldman shoot at the crowd and toward the gas station. (R. 892, ln. 9 - 895, ln. 21). Patterson would later admit, in a third statement, that he did not drive himself to the Waffle House, but was with Karmindeae and Oliver Feldman in Oliver's burgundy Malibu. Patterson saw a fellow from the back of the lot fire into the air once and into the crowd twice.³ Patterson then stated he and Oliver ran to the car, and Oliver began to return fire. (R. 920, ll. 25 - 922, ln. 14).

Forensic testing confirmed that all five (5) fired 9mm casings recovered from the Waffle House parking lot or nearby grass were fired by the same gun, a 9mm semiautomatic pistol [Applicant's gun]. Further, the two (2) fired .380 casings recovered from the Waffle House parking lot were fired by the same gun, a .380 semiautomatic pistol, and the one (1) unfired .380 bullet, recovered near the two (2) fired .380 casings, had been loaded into the same gun that fired the .380 shell casings [Patterson's gun]. (R. 1051, ln. 23 - 1052, ln. 4; 1053, ln. 14 - 1054, ln. 8).

Applicant, in his statement to investigating officers, admitted he was a "TTP Blood" and was at the Waffle House to fight a "Folk," Dameon. As people began to arrive, Corey "yelled over" that "the people in the cars were the Folks who we had been supposed to fight earlier in the night.... We later figured out that they were leading us around just so they could get enough

³ The statement was redacted pursuant to Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968), to avoid any error. (See R. 1448, ln. 16 - 1449, ln. 11).

people to outnumber us. We figured out that they were wasting time so that they could get their group up." (R. 1255, ln. 2 - 1258, ln. 2). According to his statement, when Applicant approached the fight between Chad and Corey, a light-skinned man he thought to be a Crip [Oliver Feldman] told him to back up or he would be shot. Applicant saw a gun in the man's waistband. Applicant then went back and got the 9mm pistol from Jerome. Applicant fired it twice in the air. He saw "the Crip" dude and another person⁴ point their guns in his direction. Applicant took cover behind his car and fired five (5) more times directly at the Crip, then drove off. (R. 1258, ln. 3 - 1259, ln. 1). He opined that none of his shots could have hit the victim because he fired directly at the Crip, in fact, over his head, and no one was in the line of fire. However, Applicant admitted the first shot that he fired as he fled behind his SUV was fired wildly and as a result, could possibly have struck the victim or the ABC Packaging / Exxon/Mobil station. (R. 1260, ln. 10 - 1261, ln. 15).

Further investigation resolved that the victim had arrived at the scene with individuals associated with the Folks, though there was no evidence of the victim's membership. (R. 1295, ln. 24 - 1296, ln. 9).

Applicant presented a defense in the case. He called Donald Girndt, a forensic consultant, who testified the victim did not move very far after being shot, "just a few feet," before collapsing, and, according to the shell casing groups from the far left [actually the far right] of the Waffle House, the victim would not have been in the line of fire from that area. (R. 1363).

⁴ This statement was also redacted pursuant to Bruton to avoid any error. This Court notes that Applicant later testified in his own defense; however, even though he testified, only the redacted version of his statement went to the jury, which omitted the reference to Eugene Patterson. (R. 1432, ln. 6 - 1433, ln. 20).

Applicant also testified in his own defense. He essentially restated the facts of his prior statement to police, i.e. that he shot twice in the air, the light-skinned man [Oliver Feldman] and a dark-skinned man [Eugene Patterson] fired toward him, and he fired back, over their heads. He reiterated that no one was in the cross-fire. He claimed, however, that he did not know who the people were pulling up to the Waffle House before the fight, and he was not a gang member. He also claimed that he believed he needed to "stop this" or "somebody [is] going to end up getting hurt," and the only way he knew to do so was to fire in the air so everyone would disperse and go home. (R. 1380, ln. 1 - 1384, ln. 8; 1386, ln. 11 - 1387, ln. 7; 1392, ll. 8-15; 1394, ll. 5-9). Applicant also admitted he initially misled police by telling them he fired a .22 revolver up into the air, not Jerome's 9mm pistol. Applicant admitted he actually showed police where this .22 pistol was located. Applicant admitted when confronted with evidence by the police, that he had misled police and the real weapon he fired at the scene was the 9mm pistol he obtained from Jerome. Applicant admitted they got rid of the 9mm pistol because they thought it had a body on it.

The Trial

On May 5, 2008, Applicant proceeded to a jury trial on the indictment for murder before the Honorable William P. Keesley, Circuit Court Judge. Applicant was tried with co-defendant Eugene Patterson.⁵ At the conclusion of the trial, the jury found Applicant guilty of murder. The jury also found Patterson guilty of murder. Judge Keesley sentenced Applicant to forty-five (45) year's imprisonment for murder. The other charges against Applicant for breach of the peace

⁵ Oliver Feldman was also a co-defendant charged with murder and was to be tried with Applicant and Patterson; however, approximately two (2) weeks before trial, Feldman decided to cooperate and testify truthfully against Applicant and Patterson.

and unlawful carrying of a pistol were nolle prossed. Judge Keesley also sentenced Patterson to forty-five (45) year's imprisonment for murder.

The Direct Appeal

A timely notice of appeal was filed on applicant's behalf and an appeal was perfected by Robert Dudek of the S.C. Commission of Indigent Defense, Office of Appellate Defense. In the direct appeal, Applicant raised the following issue to the Court of Appeals:

Whether the court erred by instructing the jury on "mutual combat" since that charge was burden shifting and inappropriate given the facts of this case since the prior agreement to fight on equal terms must be plain and not merely arise out of "fist fight or a scuffle," and defense counsel correctly cited State v. Taylor when objecting to this proposed jury instruction?

(Brief of Appellant, p. 3). The State filed a responsive brief. (Brief of Respondent). The Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion filed April 17, 2013. State v. Boone, Opinion No. 2013-UP-155 (Ct. App. filed April 17, 2013). Because of one of the issues raised by Applicant it is necessary to recite the Court of Appeals Opinion. The Opinion read as follows:

PER CURIAM: Andre Boone appeals his conviction for murder, arguing the trial judge erred in instructing the jury on mutual combat because it shifted the burden and was inappropriate given the facts of the case. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue is, not preserved for appeal where one ground is raised below and another ground is raised on appeal); State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002) (stating the trial court's duty is to give a requested instruction that correctly states the law applicable to the issues and is supported by the evidence); Jackson v. State, 355 S.C. 568, 571, 586 S.E.2d 562, 563 (2003) ("Mutual combat exists when there is 'mutual intent and willingness to fight.'" (quoting State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973))); id. ("Mutual intent is 'manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat.'"); State v. Taylor, 356 S.C. 227, 235, 589 S.E.2d 1, 5 (2003) ("The mutual combat doctrine is triggered when both parties contribute to the resulting fight."); id. at 232, 589 S.E.2d at 3 ("Whether or not mutual combat exists is significant because 'the plea of self-defense is not available to one who kills another in mutual combat.'" (quoting Graham, 260 S.C. at 450, 196 S.E.2d at

495)); Graham, 260 S.C. at 451, 196 S.E.2d at 496 (finding a mutual combat charge was proper where appellant and deceased had quarreled prior to the killing, each knew that the other was armed with a pistol, and each fired his gun at the other); State v. Mathis, 174 S.C. 344, 348, 111 S.E. 318, 3.19 (1934) (holding there was no error in charging and arguing the law of mutual combat because there was testimony the appellant and the deceased were on the lookout for each other; were armed in anticipation of a combat; each drew his pistol; and each fired upon the other); State v. Porter, 269 S.C. 618, 622-23, 239 S.E.2d 641, 643 (1977) (finding a mutual combat charge was proper when there was evidence the defendant had returned with a gun to one victim's property at least twice in spite of prior verbal abuse, threats, and gunshots); State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) (providing the court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant to warrant reversal); State v. Buckner, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000) ("[I]n determining whether the error was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict."); State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) ("A person is justified in using deadly force in self-defense when: (1) [t]he defendant was without fault in bringing on the difficulty; (2) [t]he defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) [i]f the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief . . . ; and (4) [t]he defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.").

AFFIRMED.

SHORT, THOMAS, and PIEPER, JJ., concur.

The Remittitur was issued September 13, 2013.⁶

The PCR Action

Applicant then filed this application for post-conviction relief (PCR) on November 1, 2013. The State filed a responsive Return to the PCR Application, denying the claims and requesting an evidentiary hearing. On August 28, 2017, a PCR evidentiary merits hearing was convened before this Court.

⁶ Applicant's co-defendant Eugene Patterson also appealed his conviction and sentence and it was also affirmed by the Court of Appeals in an unpublished opinion. State v. Eugene Patterson, 2013 W.L. 8507862 (Ct. App. filed April 17, 2013).

At the PCR hearing and thereafter, this Court had before it the records of the Richland County Clerk of Court regarding the subject conviction and sentence, the transcript from Applicant's trial and sentencing proceeding, Applicant's records from the Department of Corrections, Applicant's appellate records, and the Court of Appeals' Opinion affirming Applicant's conviction and sentence. At the PCR hearing, this Court had the opportunity to view each witness' testimony, judge their credibility, and weigh their testimony accordingly.

II. PCR ALLEGATIONS

In his Application, the Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel;
2. Ineffective Assistance of Appellate Counsel;
3. Prosecutorial Misconduct.

At the PCR hearing, Applicant proceeded on the following grounds:

1. Ineffective assistance of counsel for failing to move for a severance from his co-defendant;
2. Ineffective assistance of counsel for failing to properly object to the jury charge on mutual combat and preserve the issue for direct appeal;
3. Ineffective assistance of counsel for failing to object to a photograph that was prejudicial and inadmissible;
4. Ineffective assistance of counsel for failing to object to the admission into evidence of a handgun that was recovered from applicant's house.
5. Ineffective assistance of counsel for failing to object to a firearm demonstration in the courtroom;
6. Ineffective assistance of counsel for failing to conduct a proper pre-trial investigation of what the co-defendant was going to testify to and removing the motion to prohibit the co-defendant from testifying;
7. Counsel was ineffective in failing to move for a change of venue;

8. Counsel was ineffective in failing to challenge Juror 280's ability to be fair and impartial;
9. Counsel was ineffective in failing to request a competency hearing;
10. Counsel was ineffective in failing to object to the Solicitor vouching for the credibility of State's witness Oliver Feldman.

Testimony at the PCR Hearing

Applicant's testimony

Applicant testified that trial counsel was ineffective for not objecting to the trial court's mutual combat charge for a different reason than the objection raised by his co-defendant Patterson. Applicant claimed his testimony was he did not bring a gun to the Waffle House; where Patterson admitted he did, therefore, since his version of events was different from Patterson's and he did not bring a gun to the altercation at the Waffle House a charge on mutual combat should not have been given. Applicant also stated it was his version that he did not agree to a gun fight with Patterson, and therefore mutual combat should not have been charged. Applicant alleged because this specific objection was not made the trial judge charged mutual combat and the issue was not preserved for appeal and the Court of Appeals did not address the issue. However, Applicant admitted on cross-examination that the Court of Appeals Opinion in his case does cite cases discussing mutual combat. (PCR Tr. / App. 12-16, 36-37, 40-41).

Applicant testified that trial counsel was ineffective for not objecting to the State asking two (2) witnesses about State's Ex. 14, a photograph of the victim's body at the crime scene. Applicant testified the witnesses were asked if the victim was found in the same position as reflected in State's Ex. 14. Applicant testified that at a pre-trial hearing State's Ex. 13 and 16 were allowed into evidence, but State's Ex. 14 and 15 were not allowed in evidence. Applicant testified that later during the trial the Solicitor asked two (2) different witnesses about State's Ex.

14 and showed the exhibit to the jury even though the exhibit was not in evidence. Applicant testified counsel should have objected the first time this occurred with the first witness, but counsel did not object until this occurred with the second witness and not until after this witness was shown the exhibit and testified about it. Applicant testified counsel objected again when it was shown to a third witness but the trial court overruled the objection. Applicant claimed the issue was not addressed by the Court of Appeals on appeal because it was not preserved for appeal by trial counsel. Applicant admitted that other photographs of the victim's body were admitted in evidence at his trial, but he alleged they were not taken from as close an angle. (PCR Tr. / App. 16-20, 38-39, 41-42).

Applicant testified that trial counsel was ineffective for not objecting to the admission into evidence of a hand gun [a revolver] found at Applicant's home. Applicant testified the gun was his, but it was a .22 handgun that was broke into two (2) pieces and did not work. Applicant claimed he had found the handgun. Applicant also testified no .22 caliber shell casings were found at the scene. Applicant claimed the gun had no relevance to the case. Applicant claimed he told counsel this, but counsel made no objection to the gun's admission. (PCR Tr. / App. 20-22)

Applicant testified that trial counsel was ineffective for not objecting to a demonstration in the courtroom by the State's firearms expert. Applicant testified that during the trial the State's firearms expert held a revolver, which did not belong to applicant, and demonstrated to the jury how a revolver works, including pulling the trigger on the unloaded revolver. Applicant alleged since he did not own the revolver, counsel should have objected to the courtroom demonstration but counsel did not object. (PCR Tr. / App. 22-23).

Applicant testified that trial counsel was ineffective for not further investigating what his co-defendant [Oliver Feldman] was going to testify to and as a result counsel believed his co-defendant's testimony was not going to change from his statement to police and counsel withdrew a motion to prohibit the co-defendant from testifying. Applicant admitted counsel inquired of the Solicitor, after the co-defendant talked to the Solicitor's Office, whether the co-defendant's testimony had changed from his initial statement to police and was told by the Solicitor the co-defendant's testimony would be the same as his original statement to police. According to Applicant, as a result, his trial counsel withdrew their motion to prohibit the co-defendant from testifying. Applicant testified the co-defendant testified in his trial and his testimony was different from his original statement to police, naming only one (1) shooter, Applicant, instead of multiple shooters as the co-defendant had told police. Applicant alleged if counsel had further investigated what his co-defendant was going to testify to, counsel would have known the co-defendant was going to change his statement, and counsel would not have withdrawn the motion to prohibit the co-defendant from testifying and maybe the trial court would have prohibited the co-defendant from testifying. (PCR Tr. / App. 23-27).

Applicant testified that his trial counsel was ineffective for not filing a change of venue motion. Applicant testified there was a lot of publicity surrounding the case and negative press about him, including his photograph in the paper. Applicant testified most of the jury had read or heard something about the case. Applicant alleged some jurors went to church with the victim's family or were involved in community programs named after the victim. Applicant testified he believed he could have gotten a more fair trial in another county. Applicant alleged he and counsel never discussed a change of venue motion before trial. Applicant testified he did discuss this with counsel during jury qualification and selection. (PCR Tr. / App. 27-29, 42).

Applicant alleged that his trial counsel were ineffective for not filing a motion for a severance for a separate trial from his co-defendant Eugene Patterson. Applicant testified he and Patterson were not friends, did not know each other, and were not real co-defendants, but on opposite sides of the shooting which resulted in the victim's death. Applicant testified while his counsel told the jury he and Patterson were not friends or associates, the name co-defendant kept coming up and this prejudiced him. Applicant testified it was never really clear to the jury that he and Patterson were on opposite sides of shooting. Applicant alleged counsel never discussed with him whether to move to sever his trial from his co-defendant. Applicant alleged he should have been given a severance because he and Patterson were "pointing the finger" at each other, i.e. blaming each other for the crime. (PCR Tr. / App. 29-31, 43).

Applicant alleged that his trial counsel were ineffective for not challenging the impartiality of Juror 280. Applicant alleged Juror 280 worked for a corporation that started an intervention program. Applicant alleged the Juror worked for the intervention program which was named after the victim in his case. Applicant alleged the juror was not impartial because of this fact and he left jury selection up to his trial counsel but they did not object to the Juror's impartiality. (PCR Tr. / App. 32-33).

Applicant alleged that his trial counsel were ineffective for not requesting a competency hearing. Applicant stated he was only sixteen (16) when arrested and he did not complete high school. He claimed he could not understand the law and related matters and assist counsel. Applicant also alleged he had mental issues at the time. Applicant stated his girlfriend was killed six (6) months after he was arrested and his niece was killed three (3) months after that. Applicant stated this all occurred while he was detained pre-trial. Applicant stated he was stressed and depressed and he informed his counsel of the losses within his family. Applicant

stated that he "moped" around, had no energy, had "no mood" to do anything and was barely living. However, on cross-examination, Applicant admitted that at the time of his trial he did not have any formal mental health diagnosis including depression, he just felt bad. Applicant also admitted he had not been treated for any mental health issues in high school except being in an anger management program. (PCR Tr. / App. 33-34, 43).

Finally, Applicant alleged counsel was ineffective for failing to object to the Solicitor's closing argument. Specifically, Applicant alleged counsel should have objected when the Solicitor allegedly "vouched" for the credibility of a witness, Oliver Feldman, during her closing argument. Applicant alleged the Solicitor "vouched" for Feldman when she argued that Feldman's testimony was credible because it was corroborated by other evidence in the case. (PCR Tr. / App. 34-36).

Trial counsel's testimony

Trial counsel testified that the defense team did object to the jury charge on mutual combat. Counsel testified they did not believe mutual combat was appropriate because there was no meeting of the minds between Applicant and Patterson and Feldman to engage in a gun battle. Though counsel did not expound on co-defendant Patterson's objection to the charge, counsel, on the record, joined in co-defendant Patterson's objection to the mutual combat charge. However, the trial judge overruled the objection and charged the jury on mutual combat. Trial counsel testified she did not believe the Court of Appeals addressed the issue on direct appeal because it was not properly preserved for appeal. (PCR Tr. / App. pp. 78-82).

Trial counsel testified that prior to the trial the defense team moved to exclude several graphic photographs of the victim's body at the crime scene and were able to keep out most of those photographs. With regard to State's Ex. 14, the photo of the victim's body referenced

above, counsel testified the Solicitor, Luck Campbell, accidentally showed to the jury that photograph which had been marked as State's 14 for I.D. but was not in evidence and counsel did not contemporaneously object. Counsel testified that she believed the failure to object was not intentional but an oversight caused by either not hearing the specific exhibit number referenced or some other confusion. Counsel testified an objection was lodged when it was realized State's Ex. 14 had not been admitted in evidence. However, counsel testified there were other photographs that were admitted into evidence including graphic photographs of the victim's body at the crime scene. As a result, the jury saw other photographs of the victim's body properly admitted into evidence other than State's Ex. 14. (PCR Tr. / App. pp. 55-56; 74-76).

Trial counsel testified as to Applicant's allegation that counsel should have objected to the .22 revolver that came from his home that allegedly was not related to the case or the crime scene. Because of the passage of time, and the lack of anything in her notes, counsel did not specifically remember this issue or why she did not object to the admission of the .22 revolver recovered from Applicant's home. Counsel did not remember this being an issue or discussing it with Applicant. However, at the time of the PCR hearing, she felt the admission of the gun would have been prejudicial if not related to the case. (PCR Tr. / App. pp. 63; 76).

Trial counsel testified as to Applicant's allegation that counsel should have objected to a courtroom demonstration of a firearm. Counsel testified she believed an objection was made to the demonstration. Counsel testified, although her memory was not clear on the issue, she believed the defense team did object to the demonstration. (PCR Tr. / App. 56-58).

Trial counsel testified she could not recall whether it was considered or discussed by the defense team or with Applicant filing a motion for a change of venue. Counsel testified there

was nothing in her notes regarding the same. Counsel testified they filed numerous pre-trial motions, and those were heard at a pre-trial motions hearing prior to trial, she simply had no memory of whether a change of venue motion was made. However, counsel testified in her opinion, even though there was press coverage regarding the case, after jury selection, they were able to get a fair and impartial jury. (PCR Tr. / App. 55. 59-60).

Trial counsel testified the issue of making a motion for a severance from Applicant's co-defendants was discussed extensively by Applicant's defense team and with other attorneys. Counsel testified their legal research indicated Applicant did not have a good legal basis for a severance and would probably lose such a motion. Counsel also testified that while they considered making a severance motion simply to preserve the issue for appeal, their discussions amongst themselves determined Applicant had a better chance of an acquittal if he were tried with other co-defendants and not by himself. Based on their discussions and the facts of the case, counsel believed if Applicant were tried alone, the jury would most likely find him guilty because they did not have anyone else to blame for the victim's murder. The victim was an innocent bystander who was not involved in the shootout. If Applicant were tried with another defendant or co-defendant, there was significant likelihood the jury would convict a co-defendant or co-defendants rather than Applicant. Counsel testified it was ultimately decided not to move for a severance. Counsel testified the defense team made clear to the jury throughout the trial that Applicant and Eugene Patterson were not true co-defendants, associates, or friends; and, they were on different sides of the incident at the Waffle House. This was done through opening statements, cross-examination and examination of witnesses, and during the closing argument to the jury. (PCR Tr. / App. 52-54, 70-74).

With regard to Applicant's allegation that counsel should have struck or challenged the impartiality of Juror 280, counsel testified that obviously it would not be great to have someone on the jury who worked at an organization or founded an organization involving the victim. Counsel testified she did not recall the specific juror raised here, but counsel felt like they were able to strike a fair and impartial jury. Counsel testified that while she would love to hand pick each juror in a criminal case that is not permitted or possible. Counsel testified that while she was not completely happy with everyone on the jury, counsel felt the jury that they selected was fine for what they had to pick from. (PCR Tr. / App. p. 55).

With regard to Applicant's allegation counsel should have requested a competency hearing, counsel testified she never had any concerns about Applicant's ability to communicate with her about his case. She was able to have clear communications with Applicant. Counsel testified Applicant understood her discussions with him. Counsel also testified she had Applicant's mother present during many of the meetings so Applicant and his mother understood what was going on with his case. Counsel testified that in hindsight she wishes she had sent Applicant for a competency evaluation, based on Applicant's age at the time of trial, and his claims while testifying at PCR which she overheard. However, counsel did not testify at the PCR hearing that Petitioner was not competent to stand trial at the time of his trial. (PCR Tr. / App. 60-61).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the records of the Richland County Clerk of Court regarding Applicant's conviction and sentence, the transcript from Applicant's trial and sentencing proceeding, the trial exhibits, Applicant's prison records, Applicant's appellate records, and the Court of Appeals' Opinion affirming Applicant's conviction and sentence. At

the PCR hearing, this Court also had the opportunity to view each witness' testimony, judge their credibility, and weigh their testimony accordingly. This Court has also carefully reviewed all the evidence in this case. As a result of all of the above, this Court makes the following findings of fact and conclusions of law as required by S.C. Code Ann. §17-27-80 (2003), based upon all of the probative evidence presented.

Standard of Review

Applicant alleges numerous grounds of ineffective assistance of trial counsel ("IAC"). Respondent contends that Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. *See Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985).

This Court notes that in a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. *Id.*; SCRCP, Rule 71.1. Where ineffective assistance of counsel (IAC) is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); *Butler*, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland, supra*. The PCR applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel (IAC). First, the applicant must prove that counsel's performance was deficient. Under this

prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing Strickland*. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Failure to prove either prong of the Strickland test results in failure of the claim. Strickland, 466 U.S. at 687; Fields v. Attorney Gen. of Md., 956 F.2d 1290, 1297 (4th Cir. 1992). "A court may always begin with the prejudice prong if it desires, and if a petitioner does not meet his burden of satisfying it, then the reviewing court need not consider the performance prong." Malcom v. United States, 2013 WL 3940775 (D.S.C. 2013)(Not Reported in F.Supp.2d)(*quoting Fields*, 956 F.2d at 1297).

Specific Grounds

Alleged IAC for failing to move for a severance

There is no merit to this ground. Counsel credibly testified at the PCR hearing that this issue was discussed in depth prior to the trial of the case. Applicant was originally to be tried with two (2) other co-defendants, one (1) of whom agreed to cooperate and testify before trial. Counsel credibly testified it was the opinion of the defense team that Applicant would have a better chance of acquittal if tried with one (1) or more co-defendants than if Applicant were tried alone. As a result, counsel made a reasoned professional judgment that it was strategically in Applicant's best interest that Applicant be tried with another co-defendant or co-defendants. As a result, counsel could not be ineffective for making a reasonable strategic decision after a complete and thorough investigation. Strickland v. Washington.

Further, counsel credibly testified at the PCR hearing that Applicant's defense team researched the issue of whether Applicant would be entitled to a severance and found the likelihood of prevailing on a severance motion was low. This is supported by the record and the case law. Richardson v. Marsh, 481 U.S. 2000, 107 S.Ct. 1702, 1708-09 (1987)(No matter what reason a defendant may advance for severance of his trial from that of a codefendant, the granting of a separate trial seldom outweighs those advantages to be found in the joint trial of defendants); State v. Miller, 342 S.C. 191, 535 S.E.2d 652 (Ct. App. 2000), *affirmed in result on cert.*, 351 S.C. 643, 572 S.E.2d 267 (2002)(a severance should only be granted where there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a codefendant's guilt.); Hughes v. State, 346 S.C. 554, 552 S.E.2d 315 (2001); State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999), *Cf. Nafiro v. United States*, 506 U.S. 534, 113 S.Ct. 933 (1993).

The granting or denial of a motion for severance is in the discretion of the trial judge. State v. Allen, 269 S.C. 233, 237 S.E.2d 64 (1976). His decision in this regard will be reversed only if he abused his discretion. *Id.* See also State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1976).

Further, Applicant was not entitled to a severance from his co-defendant or co-defendants as a matter of right. State v. Thompson, 279 S.C. 405, 308 S.E.2d 364 (1983); State v. Green, 269 S.C. 623, 239 S.E.2d 646 (1977); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972). See State v. Stuckey, 347 S.C. 484, 556 S.E.2d 403 (Ct. App. 2001); State v. Castineira, 341 S.C. 619, 535 S.E.2d 449 (Ct. App. 2000), 351 S.C. 635, 572 S.E.2d 263 (2003). Additionally, Applicant was not entitled to a severance as a matter of right to have the co-defendant testify in

his favor. United States v. Spooone, 741 F.2d 680 (4th Cir. 1984); United States v. Becker, 595 F.2d 783 (4th Cir. 1978); State v. Littlejohn and Berry, 1 SCL 127, (1 Bay 316 (1793).

Furthermore, severance is not required when defendants present mutually antagonistic defenses, e.g., when each defendant accuses the other of having committed the crime. Zafiro v. United States, 506 U.S. 534, 113 S.Ct. 933 (1993). Where co-defendants will present antagonistic or inconsistent defenses, the South Carolina Supreme Court has repeatedly affirmed a trial judge's discretion not to sever a joint trial. State v. Plath, 277 SC. 126, 284 S.E.2d 221 (1981); State v. Atkins, 205 S.C. 450, 32 S.E.2d 372 (1944); State v. Rook, 174 S.C. 225, 177 S.E.143 (1935); State v. Mathis, 174 S.C. 344, 177 S.E. 318 (1934); State v. Francis, 152 S.C. 17, 249 S.E. 348 (1929); State v. Joffords, 121 S.C. 443 11S.E. 415 (1922); State v. Brown, 108 S.C. 490, 95 S.E. 61 (1918). Specifically, the South Carolina Supreme Court has affirmed the exercise of a trial judge's discretion not to sever a joint trial, where defendants have accused each other of having committed the crime. State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959); State v. Allen, 266 S.C. 175, 222 S.E.2d 287 (1976). Thus in Britt and Allen, where a factual question existed as to which of the co-defendants was responsible for firing the fatal shot, the denial of a motion for severance was within the exercise of the trial judge's discretion. Even where the evidence is undisputed that only one (1) person could have struck the fatal blow, or fired the fatal shot, the denial of severance is not error. State v. Mathis, 174 S.C. 344, 177 S.E. 318 (1935). Accordingly, the mere allegation of antagonistic defenses does not per se require severance, even if the codefendants are hostile to each other, and seeking to cast blame on each other. United States v. Becker, 585 F.2d 703 (4th Cir. 1978).

As a result, Applicant has failed to meet his burden of proof to show counsel was deficient in not making a motion to sever his case from his co-defendant or resulting prejudice.

Strickland. As a result, this ground has no merit and must be denied and dismissed with prejudice. Id.

Additionally, Applicant has not shown that even if counsel had made a motion for a severance, and one had been granted, that there is a reasonable probability he would not have been convicted but would have been acquitted. Strickland v. Washington. See also State v. Halcomb, 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009). And the trial court gave proper cautionary instructions to the jury regarding the necessity that it consider separately the evidence against each defendant. (R. 283-84; 291; 1603-04; 1616-18). See State v. Holland, 261 S.C. 488, 494, 201 S.E.2d 118, 121 (1973)(holding trial court's cautionary instructions to the jury in a joint trial "protected the rights of each individual appellant); and State v. Stuckey, 347 S.C. 484, 498, 556 S.E.2d 403, 410 (Ct. App. 2001)(similar).

Further, as counsel credibly testified at the PCR hearing, it was made abundantly clear from opening statements by the State through closing arguments, that Applicant and Patterson were not true co-defendants but on opposite sides of a violent gun battle. (R. 305-29).⁷ The record and credible testimony simply does not support a finding of prejudice even if counsel had acted as Applicant alleges. As a result, Applicant has failed to prove prejudice from counsel's failure to move for a severance. Strickland v. Washington; Butler v. State. This ground must be denied and dismissed with prejudice.

⁷ The record also shows the statements of Applicant and his codefendant were redacted to prevent any Bruton issue. (R. 934-35; 992-99; 1008-19). The trial judge gave a limiting instruction to the jury that each defendant's statement could only be used against the defendant who gave the statement (R. 1449-51; 1603). Both Applicant and his co-defendant were also given a self-defense jury instruction, even though Applicant was arguably not entitled to one, but because of the lack of severance, Applicant benefited from a joint trial by receiving jury instruction on a defense he was not even entitled to. (See R. 1462-63).

Alleged IAC for failing to properly object to the jury charge on mutual combat and preserve the issue for direct appeal;

There is no merit to this ground. Applicant alleges counsel should have objected to the trial court's decision to charge mutual combat, because his version of events is different from that of his co-defendant, and if counsel would have objected on this basis, the issue would have been preserved for appeal and Applicant would have prevailed on appeal.

Applicant's contention is simply wrong and not supported by the evidence presented at trial. The law to be charged to the jury is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 682 S.E.2d 898 (2009). Applicant's contention at trial does not control what law the trial judge is required to charge the jury on. It is all the evidence presented at trial that controls what law the trial judge is required to charge the jury on. Id. Evidence was presented at Applicant's trial, including both direct and circumstantial evidence, from which the jury could find or infer that Applicant and his co-defendant Eugene Patterson [and co-defendant Oliver Feldman] engaged in mutual combat; therefore, the trial judge did not err in instructing the jury on the law of mutual combat. See State v. Young, 424 S.C. 424, 818 S.E.2d 486 (Ct. App. 2018)(discussing the history of and law of "mutual combat"); *see also* State v. Brown, 108 S.C. 490, 95 S.E. 61 (1918)(discussing law of "mutual combat"); State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003)(similar); State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973)(same or similar); State v. Andrews, 73 S.C. 257, 53 S.E. 423 (1906).⁸ Furthermore, the trial judge

⁸ *See also* People v. Sanchez, 29 P.3d 209 (Cal. 2001)(both rival gang members who engaged in mutual combat with firearms could be convicted of 1st degree murder of innocent bystander, where it could not be determined which gang member fired the fatal shot, as both were a proximate cause of victim's death); State v. Spates, 779 N.W.2d 770, 779 (Iowa 2010) ("Our cases support a conclusion that the acts of a defendant engaged in mutual combat can be the proximate cause of injury to an innocent bystander that directly results from the act of another combatant."); Roy v. United States, 871 A.2d 498, 509 (D.C. 2005), *cert. denied*, 547 U.S. 1162 (2006)("While the evidence was unclear as to whether Roy's or Settles' bullet was responsible

appropriately charged the jury the law of South Carolina that if the jury found mutual combat occurred, the defense of self-defense is not applicable. Young, 424 S.C. 424, 818 S.E.2d 486

Nor could counsel have been deficient in failing to object to the charge on mutual combat on the basis which Applicant now alleges. Young, 424 S.C. 424, 818 S.E.2d.486; State v. Hammond, 36 S.C.L. 91, 102 (S.C. App. L. 1850) ("Even in cases of mutual combat, if one begins the fight with a mortal weapon, it is murder..."); State v. Turner, 63 S.C. 548, 41 S.E. 778 (1902) ("Where there is evidence from which a jury may infer that there was mutual combat, on a trial for murder an instruction as to such combat is not error."); State v. Mathis, 174 S.C. 344, 177 S.E. 318, 319 (1934) ("There was evidence of threats which, if true, justified a verdict of premeditated murder. There was testimony that the appellant and the deceased were on the lookout for each other; that they were armed in anticipation of a combat; that each drew his pistol and each fired upon the other. There was no error in charging and arguing the law of mutual combat."). The jury could simply disbelieve or find not credible Applicant's testimony at trial, and find the other evidence of mutual combat was credible. Therefore, counsel was not deficient in this regard. Strickland v. Washington.

Further, Applicant has failed to meet his burden of proof to prove resulting prejudice. Strickland. This Court finds based on this record, including the testimony introduced at trial, that had counsel objected to the trial judge instructing the jury on the law of mutual combat *on the basis applicant now alleges*, the trial judge would have overruled the objection and still charged

for the fatal shot, such a determination is unnecessary if both men prepared for and undertook to participate in the gun battle where it was clearly foreseeable that others would be endangered."); Alston v. State, 662 A.2d 247, 254 (Md. 1995)("Though the groups were adversaries at one level of analysis, at the level of analysis relevant to depraved heart murder, each group aided, abetted, and encouraged the other to engage in urban warfare."); Reyes v. State, 783 So.2d 1129, 1133 - 1134 (Fla. App. 3 Dist. 2001)(noting Alston and adopting logic citing other jurisdictions with similar holdings)..

the jury on the law of mutual combat because the instruction was supported by other evidence presented in the case. Id. As previously stated, Applicant's version of events is not controlling. The jury could have found Applicant's testimony not credible or believable but found the other testimony of mutual combat introduced by the State was credible or believable. As a result, Applicant has failed to prove resulting prejudice. Id. Therefore, there is no merit to this ground and it must be dismissed.

Furthermore, the record shows counsel objected to the charge of mutual combat by the trial judge, joining in his co-defendant Patterson's specific objection. (R. 1469-73). Patterson's objection was essentially the same as that now argued by Applicant. (R. 1469-73). The trial judge overruled Patterson's objection which was joined in by trial counsel for Applicant, and instructed the jury based on mutual combat, because there was evidence in the record supporting the jury instruction. (R. 1469-73; 1621; 1612). As a result, Applicant cannot show deficient performance or resulting prejudice. Strickland.

Finally, the Court of Appeals addressed this issue in the alternative in its Opinion in the direct appeal, finding the trial judge did not err in charging the law of mutual combat under the facts of this case. State v. Andre Boone, *supra* (citing State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002) (stating the trial court's duty is to give a requested instruction that correctly states the law applicable to the issues and is supported by the evidence); Jackson v. State, 355 S.C. 568, 571, 586 S.E.2d 562, 563 (2003) ("Mutual combat exists when there is 'mutual intent and willingness to fight.'" (quoting State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973))); id. ("Mutual intent is 'manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat.'"); State v. Taylor, 356 S.C. 227, 235, 589 S.E.2d 1, 5 (2003) ("The mutual combat doctrine is triggered when both parties contribute to

the resulting fight."); *id.* at 232, 589 S.E.2d at 3 ("Whether or not mutual combat exists is significant because 'the plea of self-defense is not available to one who kills another in mutual combat.'" (quoting Graham, 260 S.C. at 450, 196 S.E.2d at 495)); Graham, 260 S.C. at 451, 196 S.E.2d at 496 (finding a mutual combat charge was proper where appellant and deceased had quarreled prior to the killing, each knew that the other was armed with a pistol, and each fired his gun at the other); State v. Mathis, 174 S.C. 344, 348, 111 S.E. 318, 3.19 (1934) (holding there was no error in charging and arguing the law of mutual combat because there was testimony the appellant and the deceased were on the lookout for each other; were armed in anticipation of a combat; each drew his pistol; and each fired upon the other); State v. Porter, 269 S.C. 618, 622-23, 239 S.E.2d 641, 643 (1977) (finding a mutual combat charge was proper when there was evidence the defendant had returned with a gun to one victim's property at least twice in spite of prior verbal abuse, threats, and gunshots). The Court of Appeals also found the charging of mutual combat on these facts was not prejudicial. Boone, *supra* (citing State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) (providing the court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant to warrant reversal); State v. Buckner, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000) ("[I]n determining whether the error was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict."); State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) ("A person is justified in using deadly force in self-defense when: (1) [t]he defendant was without fault in bringing on the difficulty; (2) [t]he defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) [i]f the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the

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same belief . . . ; and (4) [t]he defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.").

As a result, Applicant has failed to prove deficient performance of trial counsel or resulting prejudice under this ground. Strickland v. Washington; Butler v. State. Therefore, this ground must be denied and dismissed with prejudice.

Alleged IAC for failing to object to a photo that was prejudicial and inadmissible

There is no merit to this ground. The record reflects that after jury selection but prior to trial, Applicant's trial counsel objected *in limine* to the introduction of autopsy photographs and some of the photographs of the victim's body as it was found at the crime scene. (R. 281-83). Counsel argued that some of the photographs from the crime scene were cumulative and some showed pooling of blood which might arouse the jury's passion or appeal to jury sympathy. The State agreed not to offer any autopsy photographs except possibly photos of some abrasions to the victim's knee which were relevant to issues in the case. The parties agreed to review the crime scene photographs together and see if they could come to some agreement on what was admissible. Judge Keesley agreed and instructed the parties if they could not agree to raise the issue at the appropriate time when the photographs were offered or presented. (R. 281-83; See also R. 286-88 discussing crime scene photographs vis a vis need for jury to view crime scene).

During the testimony of Officer Micheal Beeler, the State then offered certain photographs of the victim's body as it was found at the crime scene to show the location of the victim's body in reference to the following: the Waffle House, the place or location of the various shooters, the bullet hole to the ABC Packaging Store, and the Exxon/Mobile station itself. The location of the victim's body was relevant to not only who likely fired the fatal shot,

even though that could not be definitively determined, but also that the victim died as a result of [fleeing from] the mutual combat engaged in between Applicant and Patterson. (R. 332-47).

The record shows the State initially offered certain photographs of the crime scene because the State thought there was an agreement with the defense, but upon being informed there was not an agreement, withdrew certain photographs. As defense counsel further objected, the State re-offered certain photographs believing the defense was changing its argument or position from what it had informed the Solicitor of earlier. Eventually, after hearing argument on the matter, the trial court admitted certain photographs of the victim's body at the crime scene, State's 12, 13, & 16, but excluded State's Ex. 14 and 15, which were marked for identification. (R. 281-83; 286-88; 339-47 [admission of photographs and exclusion of 14 and 15]).

At this point in the trial, apparently because of the number of exhibits admitted at one time or because exhibits were offered, withdrawn, and then reoffered or re-submitted, it appears State's 14 [for I.D.] was mistakenly shown to witness Officer Micheal Beeler by the Solicitor, and Officer Beeler testified to the location of the victim's body from State's Ex. 14 in reference to the ABC Packaging Store / Exxon/Mobile station. (R. 339-52).⁹ Officer Beeler also authenticated State's Ex. 12, 13, and 16; these photographs were admitted in evidence through him; and, Officer Beeler testified to the location of the victim's body by use of State's Ex. 12 and 13 which were properly admitted in evidence. (R. 339-52).

Thereafter, other witnesses were called to testify by the State. Several of these witnesses referred to or testified to the location of the victim's body through either State's Ex. 13. (See

⁹ It is also possible the Solicitor merely misstated the exhibit number ["14"] and actually showed Officer Beeler State's Ex. 12, 13, or 16; however, for the purposes of this ground, since the record states it was State's Ex. 14, this Court is assuming the Solicitor actually showed the witness State's Ex. 14 for I.D.

State's Ex. 13 & 16; R. 378-79; 432; 435; 441-42; 447-48; 451-52; 454). State's Ex. 12, 13, and 16 also went with the jury to the jury room during deliberations since they had properly been admitted in evidence.

When the pathologist, Dr. Clay Nichols testified, the Solicitor inadvertently showed Dr. Nichols State's Ex. 14 instead of State's 13 or 16 in asking Dr. Nichols how far the victim could have moved after being shot. (R. 1029 [State's Ex. 14 referenced]). Trial counsel credibly testified at the PCR hearing she did not object through oversight or confusion or did not hear the exhibit number referenced by the Solicitor.

Later, during the trial, Solicitor Campbell actually brought it to the attention of the Court that she had mistakenly shown Dr. Nichols State's 14 instead of State's 13 or 16 when she was questioning him. (R. 1067-71 [discussion by Solicitor of showing State's Ex. 14 to witness Dr. Nichols]). Trial counsel immediately objected, informed the court it had occurred with another witness earlier, and trial counsel moved for a mistrial. Judge Keesley sustained the objection but denied the motion for a mistrial. Judge Keesley immediately gave the jury a curative instruction to disregard any testimony by Dr. Nichols about State's Ex. 14, telling the jury State's Ex. 14 was not in evidence, but denied the defense' motion for a mistrial because when the photograph was mistakenly shown to Dr. Nichols by the Solicitor, Dr. Nichols was approximately six (6) feet from the jury. Judge Keesley found that under these circumstances the jury would not have been able to distinguish State's Ex. 14 from the other photographs of the victim's body properly admitted into evidence. From that distance Judge Keesley could not tell the difference between State's Ex. 14 or State's Ex. 13 or 16, i.e. there was nothing distinguishable from that distance in State's 14 as compared to State's Ex. 13 or 16. (R. 1067-71).

State's Ex. 15, which was excluded by Judge Keelsey, is the most graphic of the photographs initially offered by the State, but excluded. It was never shown to the jury mistakenly or otherwise.

This Court finds counsel was deficient in failing to object when the Solicitor showed witnesses Beeler and Nichols State's Ex. 14, which was not in evidence and had been excluded, and had the witnesses testify from the photograph before the jury while the jury viewed the photograph. Strickland v. Washington.¹⁰ While there were over one hundred (100) exhibits in this case, and exhibits had been offered, withdrawn, and then re-offered, and it is understandable that by omission counsel may have failed to object, counsel is still obligated to know what exhibits are admitted in evidence and which have been excluded by the trial judge and to object when those exhibits that have been excluded are mistakenly shown to the jury or attempted to be shown to the jury. Strickland. Therefore, this Court finds that even though counsel moved for a mistrial when they realized the Solicitor had mistakenly shown State's Ex. 14 to two (2) witnesses, instead of State's Ex. 13 or 16, counsel was deficient in failing to object when the Solicitor actually showed the excluded exhibit to each witness, had them refer or testify to what the picture portrayed or showed **and** actually displayed it to the jury. Id. Therefore, Applicant has proved the 1st prong of the Strickland test, i.e. that counsel's conduct was deficient and fell below reasonable professional norms. Strickland.

However, based on this Court's review of the entire record, including the other photographs of the victim's body properly admitted in evidence, the other testimony regarding the victim's injuries and location of his body, and the evidence of Applicant's guilt, Applicant

¹⁰ This Court would note that it is not necessarily objectionable for an attorney to show a witness a photograph marked for identification and have the witness testify what it depicts or have the witness orient himself using the photo, as long as the proper foundation for the photo is laid, what it depicts is relevant to the case, and the photo is not shown to the jury.

has failed to prove resulting prejudice, i.e. but for counsel's deficient performance there is a reasonable probability the result of the proceeding would have been different had counsel objected and the jury not seen State's Ex. 14. Strickland v. Washington; see State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008)(error in the admission of evidence is harmless when it is cumulative to other evidence that was properly admitted); State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003)(same): State v. Kirton, 381 S.C. 7, 37, 671 S.C. 107, 122 (Ct. App. 2008)("The admission of improper evidence is harmless where the evidence is cumulative to other evidence."(citation omitted)); Campbell v. Jordan, 382 S.C. 445, 453, 675 S.E.2d 801, 805 (Ct. App. 2009)("When improperly admitted evidence is merely cumulative, no prejudice exists; and, therefore the admission is not reversible error.")

There was other testimony in the trial of the victim's location, his head wound, and blood pooling around the victim's body by the officers arriving at the scene. The EMT who initially attempted to treat the victim testified to the head wound, bone and brain matter protruding from the victim's head wound, and blood pooling around the body and running down the pavement of the gas station. (R. 456-57). Defense expert Donald Girndt also testified to the bloodletting and blood stain pattern of the victim based on photographs he reviewed from the crime scene and autopsy. (R. 1363, 1368-1377). The pathologist also testified extensively to the through and through gunshot wound to the victim's head, the damage it caused to the victim's brain, and the bloodletting from the entrance and exit wound. (R. 1016-1034).

Further, and even more importantly, other photographs were properly admitted in evidence and before the jury showing the victim's body as it was found at the crime scene, with the pooling of blood, and they were discussed extensively by witnesses. (See State's Ex. 13 & 16; R. 351-52; 378-79; 432; 435; 441-42; 447-48; 451-52; 454; 1369; 1371). As Judge Keesley

found, these photographs were relevant and admissible because they depicted where the victim's body was found in relation to the Waffle House, the ABC Packaging / Exxon/Mobile Station, the fired shell casings, and the shooters, and were not unduly or unfairly prejudicial. This Court has considered those photographs, as Judge Keesley did at trial in denying the motion for mistrial, and finds that those photographs admitted portray basically the same thing as is portrayed in State's Ex. 14. In fact, State's Ex. 16 and State's Ex. 14 are very similar. And, State's Ex. 13 and State's Ex. 14 are similar in color contrast; they simply show the victim's body from a different angle. As a result, State's Ex. 14 was relevant to the issues in the case and not unduly or unfairly prejudicial. As trial counsel credibly testified at the PCR hearing, there were other photographs that were admitted into evidence including graphic photographs of the victim's body at the crime scene. See State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978) (admission of improper evidence is harmless if it is merely cumulative of other evidence); State v. Brockmeyer, 406 S.C. 324, 356, 751 S.E.2d 645 (2013) (improper admission of photograph with caption was harmless beyond a reasonable doubt where it was cumulative to other evidence and testimony); Ramos v. Hawley, 316 S.C. 534, 536-37, 451 S.E.2d 27 (1994) (even if alleged improper admission of photographs with writing on the back had been preserved, the error was harmless where the evidence was cumulative other evidence in the case), (citing as e.g. Long v. Conroy, 246 S.C. 225, 143 S.E.2d 459 (1965) (admission of improper evidence is harmless where cumulative to other evidence); State v. Green, 412 S.C. 65, 83, 770 S.E.2d 424 (Ct. App. 2014) (admission of booking photograph of defendant was not prejudicial as it was cumulative to other evidence given photo line-up photo admitted without objection was the same photograph). As a result, the jury in the present case saw other photographs of the victim's body properly admitted into evidence [State's Ex. 13 & 16] other than State's Ex. 14. (PCR Tr. / App. pp. 55-

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56; 74-76). And, State's Ex. 15, the most graphic photograph, was never shown to the jury. Therefore there was no unfair prejudice from the jury seeing State's Ex. 14. Therefore, this Court finds Applicant has failed to prove the 2nd prong of the Strickland test, resulting prejudice from counsel's failure to object. Strickland v. Washington.

Furthermore, given all of the other evidence in the case of Applicant's guilt, this Court finds Applicant has failed to establish the 2nd prong of Strickland, resulting prejudice. Applicant has failed to show had trial counsel objected when State's 14 was shown to the witnesses, and the objection been sustained, that there is a reasonable probability the result of his trial would have been different. Strickland v. Washington. See State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991)(holding any error in the admission of evidence was harmless given the overwhelming evidence of guilt); State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)(similar); State v. Green, 397 S.C. 268, 287, 724 S.E.2d 664, 673 (2012)("Prejudice occurs when there is a reasonable probability the wrongly admitted evidence influenced the jury's verdict."); State v. Byers, 392 S.C. 438, 447-48, 710 S.E.2d 55, 60 (2011) quoting State v. Reeves, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990)(alteration in original)("A harmless error analysis is contextual and specific to the circumstances of the case: 'No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.'"); Pagan, 369 S.C. at 212, 631 S.E.2d at 267 ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result."); State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006)("When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be

reached, [the appellate court] will not set aside a conviction for an insubstantial errors not affecting the result.”).¹¹

As a result, this Court finds Applicant has failed to prove the second required prong of the Strickland test, resulting prejudice. As a result, this ground has no merit and must be denied and dismissed with prejudice. Strickland.¹²

Alleged IAC for failing to object to admission of a handgun recovered from applicant's house

Applicant alleges counsel should have objected to the admission into evidence of a handgun recovered from Applicant's house by police. There is no merit to this ground.

This Court finds based on its review of the record that Applicant's testimony and allegations in this regard are not credible. This Court also finds trial counsel's testimony at the PCR hearing that the admission of this gun was prejudicial is not credible.¹³

¹¹ This Court also finds there is no reasonable likelihood of a different result had counsel objected and *moved for a mistrial* when the photograph was initially shown to one (1) or both witnesses. Strickland. The record reflects the trial court denied the motion for mistrial even after having been notified State's Ex. 14 for I.D. had been mistakenly shown to two (2) witnesses and this occurred after the witnesses had testified. Based on the cumulative nature of State's Ex. 14 for I.D. as compared to State's Ex. 13 and 16, which were properly admitted in evidence, there is also no reasonable probability the trial court would have granted a mistrial had counsel objected earlier. Id.

¹² Furthermore, this Court would also note that Judge Keesley specifically instructed the jury at the time of Dr. Nichols' testimony that the jury was to disregard any testimony by Dr. Nichols regarding State's Ex. 14. And, Judge Keelsley re-instructed the jury in his closing jury instructions, that if he had instructed the jury during the trial to disregard some testimony or evidence, the jury must do so and could not consider that in reaching its verdict in this case. (R. 1067-71; 1593). Jurors are presumed to follow a trial court's instructions. CSX Transp., Inc. v. Hensley, 129 S.Ct. 2139, 2141 (2009); United States v. Olano, 507 U.S. 725, 740 (1993); Penry v. Johnson, 532 U.S. 782, 789 (2001); Greer v. Miller, 483 U.S. 756, 766 n. 8 (1987); Foye v. State, 335 S.C. 586, 590 n. 1, 518 S.E.2d 265, 267 n. 1 (1999); State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975). And, a curative instruction is deemed to have cured any error in the admission of improper evidence. State v. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009)(noting a curative instruction to disregard the testimony is usually deemed to have cured any alleged error). As a result, for this reason as well, Applicant has failed to prove resulting prejudice from any deficient performance of trial counsel. Strickland v. Washington.

The victim died as a result of a through and through gunshot wound to the head. The bullet that killed the victim was never recovered. The victim was an innocent bystander who was struck by a bullet fired while Applicant and his co-defendants were shooting at each other in a Waffle House parking lot crowded with people and an adjacent ABC Packaging / Exxon/Mobile station parking lot crowded with people.

According to Applicant's initial statement to police, at the time of the murder, at the crime scene, Applicant fired a .22 revolver into the air, and this was the only gun Applicant alleged he was in possession of. (Trial Tr. pp. 573-74, 626, 773-80; 924-33; 939-44; 948). In his final statement to police, Applicant admitted this was a false statement to police, concocted by Applicant and his associates, to limit Applicant's involvement in the murder of Brian Wright because Applicant actually fired a 9mm pistol at the scene up into the air and then into a crowd of people and at the two (2) codefendants. Because Applicant "threw police off" with this false statement, police executed a search warrant and recovered the .22 revolver Applicant said he used at the crime scene, from Applicant's home. (Trial Tr. pp. 954-57; 958-59). The State's firearms examiner and the State's pathologist testified this weapon could not have been used to kill the victim or left the shell casings found at the scene of the crime. (Trial Tr. pp. 1037-1108). Trial counsel kept out, by objection, anything else from the Applicant's home, including clothing with possible gang related colors. (Trial Tr. pp. 1135). The .22 revolver was relevant and admissible because it was this gun which Applicant and a friend initially intentionally told and misled police was the gun used at the crime scene by Applicant. (Trial Tr. pp. 1165-70; 1242-46; 1249-50; 1256-57; 1266-67; 1280-81). Applicant even showed police where the .22 was located in an attempt to mislead police. (Trial Tr. pp. 1314). The gun was broken and in two (2) pieces.

¹³ This Court would note that counsel could not remember at the PCR hearing why she did not object to the admission of the .22 revolver.

At trial, Applicant testified he was arrested for possession of a weapon under 21, breach of peace of a high and aggravated nature, and possession of a stolen pistol after giving the false statement about the .22 pistol in his house, and he later admitted it was a lie when confronted by police that he used a 9mm pistol at murder scene. Applicant testified on the stand he told police about the .22 and led them to it, but it was a lie concocted by Applicant and his associates to cover up the use of the 9mm pistol in the murder. (Trial Tr. pp. 1388-89, 1395; 1424-25; 211-23; 224-30). Five (5) fired 9mm shell casings were found at the crime scene near where Applicant fired his 9mm pistol. In his final statement to police, after admitting the .22 pistol was not used in the murder, Applicant took police to a location near his residence where he test fired the 9mm pistol actually used in the murder long before the murder even occurred. Shell casings from this location were forensically matched to those found at the crime scene. All were fired by the same 9mm pistol.

The gun recovered from Applicant's home was relevant and admissible as it established Applicant initially deceived and misled police in his initial statement regarding which gun was used in the shooting by him, which was evidence of an attempt to hide and conceal evidence and evidence of consciousness of guilt. See State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999)(attempts to hide or destroy evidence are relevant and admissible as incriminating evidence of guilt); State v. Epes, 209 S.C. 246, 39 S.E.2d 769 (1946)(similar). Its probative value outweighed any prejudicial effect. Rule 403, SCRE. And its admission, if prejudicial at all, was not unfairly prejudicial.

Furthermore, the .22 revolver was relevant and admissible because it corroborated Applicant's final confession in which he admitted to misleading police about the .22 pistol and that it was in fact the 9mm pistol he used in the murder. Simply because a jury has found a

statement of a defendant was voluntary and therefore can be considered by it, the jury is not required to accept as true all of the statement, but may find none of it credible or believable, only part of it credible, or all of it believable. State v. Young, 238 S.C. 115, 119 S.E.2d 504 (1961)(after a jury has found a statement admissible, it may nevertheless accept as fact all of the statement, a part of the statement, or none of the statement at all, the same as if they were judging the credibility of a witness's testimony); State v. Clinkscales, 231 S.C. 650, 653, 99 S.E.2d 663, 664 (1957)(even though a jury accepts a written confession as having been voluntarily made, it is not thereby bound to accept every statement contained in it as true; for it is the sole judge of its credibility, and may believe it all, or in part, or not at all; and, it is unreasonable to assume that these matters are within the knowledge of the average juror; he should be informed of them by the Court); State v. Brown, 212 S.C. 237, 47 S.E.2d 521 (1948)(same or similar); State v. Miller, 211 S.C. 306, 45 S.E.2d 23 (1947)(same); State v. Baker, 58 S.C. 111, 36 S.E. 501 (1900).

Therefore, the State may prove to the jury that the statement of the defendant is in fact true and accurate by showing that the statement itself is corroborated by other evidence. State v. Bullock, 235 S.C. 356, 111 S.E.2d 657 (1959)(pocket book found in cemetery was admissible because it corroborated the defendant's confession), *reversed on other grounds* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); United States v. Waller, 326 F.2d 314 (4th Cir. 1963)(confession was sufficiently corroborated with evidence of its trustworthiness), *citing* Opfer v. United States, 348 U.S. 84 (1954); *see also* State v. Osborne, 335 S.C. 172, 516 S.E.2d 201 (1999). As a result, the .22 revolver was admissible for this reason as well. Its probative value outweighed any prejudicial effect. Further, prejudicial, its admission was not unfairly prejudicial.

Although it was not forensically matched to any bullets or shell casings recovered from the scene, the pistol was relevant and admissible for the reasons stated above. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991)(evidence is relevant and admissible if it tends to establish and make more or less probable some matter in issue upon which it directly or indirectly bears); State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991)(evidence which assists a jury at arriving at the truth of an issue is relevant and admissible, unless otherwise incompetent); State v. Finley, 300 S.C. 196, 387 S.E.2d 88 (1989)(the evidence in question need not be sufficient in itself to establish the whole or any definite portion of a parties contention). See State v. McWee, 433 S.C. 307, 472 S.E.2d 235 (1996)(whether evidence is relevant and admissible is in the sound discretion of the trial judge): State v. Babb, 299 S.C. 451, 385 S.E.2d 827 (1989)(a trial judge's determination of admissibility of evidence will not be disturbed on appeal absent a showing of abuse of discretion that has resulted in prejudice to the complaining party); State v. Douglas, 359 S.C. 187, 597 S.E.2d 1 (Ct. App. 2004)(great deference is given to a trial judge's decision regarding the comparative probative value and prejudicial effect of evidence with the judgment of the trial judge only being reversed in exceptional circumstances)., *affirmed in part, reversed in part* 369 S.C. 424, 632 S.E.2d 845 (2006); State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004)(same or similar); State v. Horton, 359 S.C. 555, 598 S.E.2d 279 (Ct. App. 2004)(similar); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003).

As a result, any objection by counsel to the admission of the .22 firearm into evidence would have been overruled. Applicant cannot show and has not shown deficient performance or resulting prejudice. Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001)(IAC claims based on a failure to object to the admission of evidence are tied to the underlying admissibility of the evidence; if the evidence was admissible in any event even if an objection had been made, then

the applicant has failed to prove either prong of the Strickland test as counsel was neither deficient nor was the applicant prejudiced by the failure to object).

Furthermore, Applicant cannot show any resulting prejudice from the admission of the .22 pistol. Strickland. It was conceded at trial that the weapon did not match any weapon used at the crime scene and was not the murder weapon. An officer testified to the recovery of the .22 at Applicant's home at the direction of Applicant. Applicant admitted at trial he lied to police and misrepresented the .22 as the gun he used on the night of the murder, knowing it was the 9mm he actually used. Applicant admitted at trial he led police to the .22 pistol. Its' admission was therefore cumulative and harmless beyond a reasonable doubt. See State v. Whitner, 380 S.C. 513, 670 S.E.2d 655 (Ct. App. 2008)(admission of statement taken in violation of Miranda was harmless where statement was cumulative defendant testified to same matter, as did a co-defendant, and a police officer); State v. Henderson, 334 S.E.2d 519 (Ct. App. 1985)(error in admitting statement of defendant was harmless beyond a reasonable doubt where defendant's testimony was cumulative to his statement, and where the state had other evidence). As a result, Applicant has failed to prove resulting prejudice from counsel's alleged failure to object. Strickland. The weapon's relevance and the reason for its admission was it established Applicant's misleading police in his initial statement which was evidence of consciousness of guilt and it corroborated his final confession to police.

Furthermore, given the entire record, and the evidence of mutual combat between Applicant and his co-defendant, Applicant has failed to show had counsel objected to the admission of the .22 pistol and the objection been sustained, that there is a reasonable probability the result of the trial would have been different. Strickland. Therefore, for this reason as well,

Applicant has failed to establish Strickland prejudice; and, as a result, this ground has no merit and must be denied and dismissed with prejudice.

Alleged IAC for failing to object to a firearm demonstration in the courtroom

There is no merit to this ground. This Court finds counsel was not deficient in failing to object to a firearm demonstration in the courtroom nor was Applicant prejudiced by the failure to object. Strickland v. Washington.

Prior to trial, Judge Keesley explained to the jury the South Carolina Supreme Court's Order regarding the handling of firearms that are admitted in evidence. Other than when a witness was demonstrating something in the courtroom, the gun and ammunition were to remain separate, i.e. in the Clerk's possession. Judge Keesley further explained the jury could not have a gun and ammo in the jury room at the same time, even if both had been admitted in evidence. (R. 298).

The only firearm's demonstration that was conducted in the courtroom before the jury was conducted by the State's firearms expert who was simply demonstrating how a revolver [admitted in evidence] is fired and that a revolver does not eject shell casings when fired. (Trial R. 1047-49).¹⁴ The gun used in this demonstration was a .32 revolver that had been admitted in evidence [State's Ex. 82] because it was the gun used by a co-defendant/witness, Oliver Feldman, who admittedly fired the weapon several times at the crime scene at Applicant. (R. 1047-49; 1170-73. 1282-84).). Such demonstration by the expert was relevant and admissible and not objectionable as it explained why no fired .32 caliber shell casings were found at the

¹⁴ The 9mm fired by Applicant and the .380 fired by Patterson were never recovered. As a result, at trial the Solicitor sought to have the firearms examiner or expert conduct a demonstration regarding how a 9mm semiautomatic and a .380 semiautomatic function with firearms not related to this case. Trial counsel objected and the trial judge sustained the objection. (R. 1055-67). As a result, the only firearm demonstration conducted before the jury was that of the .32 pistol which had been admitted in evidence. (R. 1047-49)

crime scene when fired 9mm and fired .380 caliber shell casings were found at the crime scene and it also explained how fast the weapon could be fired. (R. 1047-49; 1035-1108). See State v. Brisbon, 323 S.C. 324, 474 S.E.2d 433 (1996)(allowing courtroom demonstration of murder weapon); State v. McIver, 238 S.C. 401, 120 S.E.2d 393 (1961)(similar); State v. Mishoe, 198 S.C. 215, 17 S.E.2d 142 (1941). The record also reflects the weapon was unloaded at the time of the demonstration and pointed at the floor and away from the jury or anyone on the courtroom. (R. 1055-1067). This Court finds based on this record, and the fact that this weapon was in evidence and admittedly fired at the crime scene at the time of the murder, any objection by counsel to the demonstration by the firearms expert would have been overruled by the trial judge. Brisbon; McIver; Mishoe. As a result, Applicant has failed to prove deficient performance or resulting prejudice. Strickland v. Washington; Butler v. State; Hough v. Anderson. Therefore, this ground has no merit and must be denied and dismissed with prejudice.

Furthermore, this Court finds Applicant has failed to show there is a reasonable probability had counsel objected to this firearm demonstration, and the objection been sustained and the demonstration not permitted, there is a reasonable probability of a different result at trial. Strickland. Based on the entire record, including the evidence of mutual combat between Applicant and his co-defendant, and the testimony of the firearms expert and others regarding how a revolver does not eject shell casings, the firearm demonstration itself had no impact on the jury's verdict. (R. 433-34; 1035-1108). Therefore, this Court finds for this reason as well, Applicant has failed to prove resulting prejudice. Strickland. As a result, this ground has no merit and must be denied and dismissed with prejudice.

Alleged IAC for failing to conduct a proper pre-trial investigation of what the co-defendant was going to testify to and removing the motion to prohibit the co-defendant from testifying

There is no merit to this ground. Applicant alleges that had counsel properly conducted a pre-trial investigation into what a co-defendant, Oliver Feldman ("Feldman"), was going to testify to, counsel would have known the witness was going to change his testimony from a previous written statement, and counsel would not have removed a motion to prohibit Feldman from testifying and could possibly have prevented Feldman from testifying in his trial.

The issue initially arose through a pre-trial motion filed by trial counsel. In a pre-trial motion hearing, trial counsel moved to suppress the testimony of co-defendant Oliver Feldman if he testified differently than his initial statement to police. (See R. 264-65; 284). Feldman was also charged with murder, but was not tried with Applicant and Patterson as he had agreed to cooperate with the State and testify truthfully in Applicant and Patterson's trial. After counsel was informed by the Solicitor, Luck Campbell, that to her knowledge, Feldman had not changed his statement, counsel withdrew the motion to suppress Feldman's testimony. (Id.)

Feldman was later called as a witness by the State during the trial and testified under oath. Feldman testified he was present at the crime scene at the time of the murder with co-defendant Patterson. Feldman testified he fired his .32 caliber revolver at a person at the back of the Waffle House parking lot [Applicant] who was shooting at him. Feldman admitted that in his statement to police he said or believed there were two (2) shooters, one (1) near a black vehicle and one (1) near the corner of the Waffle House, shooting at him. Feldman testified at trial that while he said this in his statement to police, he now believed he was or could have been mistaken because he never saw the shooter's face and the shooter near the black vehicle and the shooter near the corner of the Waffle House were both wearing the same black clothing. Feldman

testified he now believed there was only one (1) shooter. Outside the presence of the jury, Applicant's trial counsel objected and renewed its motion to suppress Feldman's testimony and moved for a mistrial. (R. 800-07; 808-826). Both motions were denied by Judge Keesley who found it was a proper matter for cross-examination and impeachment whether Feldman's sworn testimony was different from prior statements to police or law enforcement. (R. 800-07; 808-826). After testimony resumed, the Solicitor brought out that Feldman originally told police he believed there were two (2) shooters. Trial counsel also cross-examined Feldman and brought out his prior inconsistent statement to police that there were two (2) shooters shooting from the back area of the Waffle House parking lot. (R. 827-50).

First, there is no merit to this ground because counsel did investigate what Oliver Feldman would testify to by reviewing his statement to police given prior to trial. Further, at the pre-trial motion hearing, counsel was assured by the Solicitor, that based on her knowledge, Feldman would not testify differently than what was in his written statement. As a result, this Court finds that counsel was not deficient in investigating what Feldman would testify to at trial. Strickland. The fact that the witness testified to something new or different once on the stand and under oath does not mean counsel was deficient in their investigation. Id.

Second, there is no merit to this ground because counsel, whether they withdrew the motion to suppress Feldman's testimony pre-trial or not, could not prohibit or stop the co-defendant Feldman from testifying. Applicant could not prevent Oliver Feldman from testifying whether he changed his statement or not. Feldman was an eyewitness and participant in the crime. Whether Feldman's testimony differed from his prior statement or statements to the police went to the weight and credibility of Feldman's testimony, a matter for the jury, not its admissibility. As a result, counsel was simply not deficient nor could they be. Strickland.

Third, there is no merit to this ground because Applicant could have impeached Feldman on any discrepancy between his trial testimony and any previous statement given to law enforcement, a matter permitted by and for cross-examination, and in fact did so. (R. 827-50 [witness cross-examined or impeached on his prior statement and timing of his alleged change of his testimony, all occurring before the jury]). As a result, Applicant has failed to prove deficient performance on the part of trial counsel or resulting prejudice under this ground. Strickland v. Washington. Applicant has failed to show (1) that counsel was deficient for not further investigating what the Feldman would have testified to and removing a motion to prohibit his testimony. And, (2) Applicant has failed to show had counsel further investigated what Feldman would testify to and not removed the motion to prohibit his testimony, that there is a reasonable probability that the trial court, Judge Keesley, would have granted the motion and prohibited the co-defendant from testifying and the result of the proceeding would have been different. Strickland.

The record shows when Feldman testified and allegedly changed his statement, counsel immediately objected, renewed their motion to prohibit his testimony, and moved for a mistrial. The objection was overruled and both motions were denied by Judge Keesley. (R. 800-07; 808-826 [motion to suppress witness' testimony renewed and denied, motion for mistrial denied]). As a result Applicant has failed to prove deficient performance or resulting prejudice because the motion to suppress and the motion for a mistrial were both made by counsel and denied by the trial judge. Strickland. Therefore, this ground has no merit and must be denied and dismissed with prejudice.

Finally, this Court finds even if counsel had been able to somehow successfully keep out Oliver Feldman's testimony, Petitioner has failed to prove resulting prejudice. Strickland.

Based on all of the other evidence admitted at trial, including the testimony of the eyewitnesses, Applicant's own statement to police, the physical evidence introduced at trial, and Applicant's own testimony, this Court finds there is no reasonable probability Applicant would have been found not guilty instead of guilty. Id. As a result, this ground has no merit and must be denied.

Alleged IAC in failing to move for a change of venue

Applicant alleges his counsel was ineffective in failing to move for a change of venue because there was pretrial publicity involving his case. There is no merit to this ground.

Applicant was not entitled to a change of venue as a matter of right. Motions for a change of venue are addressed to the sound discretion of the trial judge, and the decision of the trial judge shall not be reversed absent a showing of abuse of his discretion. State v. Neeley, 271 S.C. 33, 244 S.E.2d 522 (1978); State v. Thomas, 268 S.C. 343, 234 S.E.2d 16 (1977); State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959).

Even where there has been pre-trial publicity regarding a case, Applicant is not entitled to a change of venue as a matter of right. State v. Fowler, 266 S.C. 203, 222 S.E.2d 497 (1976); State v. Allen, 266 S.C. 175, 222 S.E.2d 287 (1976); State v. Swilling, 249 S.C. 541, 155 S.E.2d 607 (1967). Under South Carolina law, the relevant question in determining whether a change of venue is required "is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant." Sheppard v. State, 357 S.C. 646, 655, 594 S.E.2d 462, 467 (2004). The issue is whether if a juror has been exposed to pre-trial publicity, that juror can set aside what they heard or read and decide the case based solely on the evidence presented in the courtroom. State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013); State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007); State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999). It is the defendant's burden to demonstrate actual

juror prejudice resulted as a result of such publicity. Sheppard, 357 S.C. at 655, 594 S.E.2d at 467.

This Court has thoroughly reviewed the voir dire of the jury pool regarding this case and finds that the record does not support a finding that Applicant would have been entitled to a change of venue or that his jury was not fair and impartial. (R. 45-126; 13). Stanko, 402 S.C. 252, 741 S.E.2d 708; Evins, 373 S.C. 404, 645 S.E.2d 904; Tucker, 334 S.C. 1, 512 S.E.2d 99. Each of those jurors qualified to serve in this case testified under oath that they would disavow any outside information about the case and decide the case based solely on the evidence presented in the courtroom. Each juror also swore under oath that they were impartial and would remain impartial to both the State and the Applicant. (R. 45-126; 13). Applicant has not proved by any credible evidence that had counsel moved for a change of venue, he would have been legally entitled to one or one would have been granted. Strickland v. Washington; Butler v. State; Stanko, supra; Evins, supra; Sheppard, supra. As a result, Applicant has failed to prove deficient performance or resulting prejudice. Strickland; Butler; Stanko; Evins. Nor has Applicant proved by any credible evidence that had counsel moved for a change of venue and such had been granted, that there is a reasonable probability he would not have been found guilty but would have been acquitted. Strickland; Butler. Therefore, there is no merit to this ground and it must be denied and dismissed with prejudice.

Alleged IAC in failing to challenge Juror 280's impartiality

There is no merit to this ground. This Court has carefully reviewed the voir dire of Juror 280 and finds the Juror was fair and impartial. (R. 89, ln. 7 – 92, ln. 7).

This Court finds Applicant has failed to meet his burden with respect to this allegation. While the Sixth and Fourteenth Amendments to the United States Constitution provide a

defendant with the constitutional right to a fair and impartial jury of his peers, this right does not entitle a defendant to handpick a jury. State v. Stanko, 376 S.C. 571, 577, 658 S.E.2d 94, 96-97 (2008); *see also* State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 823 (2009) (a defendant is not entitled to the jury of his or her choice); Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 765 (“a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury”). The Constitution, after all, “does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury.” Stanko at 97, 658 S.E.2d at 576 (citing Morgan v. Illinois, 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992)).

The process of jury selection inherently falls within the expertise and experience of trial counsel. Magazine at 617, 606 S.E.2d at 764 (citing Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999)). In a PCR proceeding, an applicant must provide credible evidence that the trial attorney’s refusal to strike a juror prejudiced the defense.

This Court specifically finds that Applicant’s claims regarding this Juror are not credible. Specifically, when asked whether this Juror knew anything at all about the case, the Juror responded that he did and came forward to speak with the trial judge, Judge Keesley, privately. The Juror disclosed not only that he had heard or read something about the case in the news media, but that he also worked for the Midlands Community Development Corporation, and there was associated with the Midlands Community Development Corporation the BWright intervention program, for at risk teenagers, which was named after the victim in the present case. The Juror testified that he did not work for the BWright intervention program but the Midlands Community Development Corporation and there were a lot of other programs associated with the Midlands Community Development Corporation besides the BWright intervention program.

The Juror testified he specifically worked with young children, not at risk teenagers and the BWright program. The Juror also testified the only thing he knew about the case was that a young man, the victim, was shot and killed at a gas station. The Juror testified under oath he could set aside anything he had heard, seen, or read about the case and decide the case solely on the facts and evidence presented in the courtroom. He also testified the fact that he worked for the Midlands Community Development Corporation would have no effect on his ability to be fair and impartial. Judge Keesley, after questioning the Juror extensively under oath, found the Juror to be fair and impartial and qualified to serve in the case. (R. 89, ln. 7 – 92, ln. 7).

Applicant has failed to present any credible evidence that his right to a trial by a competent and impartial jury was violated. Applicant has not presented any evidence that counsel's failure to move to strike this juror "for cause" resulted in an unfair or impartial jury.

This Court agrees with Judge Keesley's determination. This Court finds that while the Juror was aware of the intervention program named after the victim, he did not work for that program but a completely different program under the Midlands Community Development Corporation. And, the Juror had only very limited knowledge of the case through outside sources. Furthermore, the Juror testified credibly under oath that he could set aside anything he had heard outside the courtroom and decide the case based solely on the evidence presented at trial. Finally, the Juror testified the fact that he worked for the Midlands Community Development Corporation, not the BWright intervention program, would have no effect on his ability to be fair and impartial in the case, and he would decide the case based solely on the evidence presented in the courtroom. (R. 89, ln. 7 – 92, ln. 7). Since, the juror was fair and impartial, Applicant has failed to prove counsel was deficient in not objecting to the Juror's alleged impartiality. Furthermore, this Court finds that had counsel raised such an objection to

the Juror, the objection would have been overruled by Judge Keesley who found on the record the Juror was fair and impartial after a thorough voir dire. (See R. 89, ln. 7 – 92, ln. 7). Therefore, Applicant has failed to show resulting prejudice. Strickland. Finally, Applicant has failed to prove there is a reasonable probability had this Juror been somehow removed, a jury of different composition would have found him not guilty based on this record. Strickland. As a result, Applicant has failed to prove resulting prejudice. Id. This allegation is therefore denied and dismissed.

Alleged IAC in failing to request a competency hearing

Applicant alleges counsel was ineffective for not requesting a competency hearing before his trial. Applicant alleged because of his age and things that occurred after his arrest but before trial, he was not competent to stand trial. There is no merit to this ground for the following reasons:

As previously set forth, in a PCR action, "[t]he burden of proof is on applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002)(citing Rule 71.1(e), SCRCP); Strickland, 466 U.S. 668; Butler, *supra*; Cherry, *supra*. The applicant must prove (1) counsel's performance was deficient and (2) resulting prejudice, i.e. "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. Failure to prove either prong of the Strickland test results in failure of the claim. Strickland, 466 U.S. at 687; Fields v. Attorney Gen. of Md., 956 F.2d 1290, 1297 (4th Cir. 1992). "A court may always begin with the prejudice prong if it desires, and if a petitioner does not meet his burden of satisfying it, then the reviewing court need not consider the performance prong." Malcom v. United States, 2013 WL 3940775 (D.S.C. 2013)(Not Reported in

F.Supp.2d)(quoting Fields, 956 F.2d at 1297).

As a beginning point, a criminal defendant is presumed to be sane and competent to stand trial, and it is presumed that a defendant has the requisite capacity to be held responsible for the commission of a crime. State v. Smith, 298 S.C. 205, 379 S.E.2d 287 (1989). The fact that a defendant has committed a heinous offense is not conclusive evidence that a defendant is incompetent or insane. State v. Lewis, 328 S.C. 273, 494 S.E.2d 115 (1997); State v. Gardner, 219 S.C. 97, 64 S.E.2d 130 (1951). Similarly, it is to be expected that a defendant facing serious charges and a potential lengthy sentence will be depressed or plagued with feelings of hopelessness, however, such depression or feelings will not render a defendant incompetent to stand trial or to assist in his defense. Patterson v. State, 253 S.C. 382, 171 S.E.2d 235 (1969).

Due process prohibits the conviction of a person who is mentally incompetent. Bishop v. United States, 350 U.S. 961 (1956); Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992); Matthews v. State, 358 S.C. at 458, 596 S.E.2d at 50. "The test for competency to stand trial or continue trial is whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him." McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003), citing State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). See Godinez v. Moran, 509 U.S. 389 (1992)(same); Carnes v. State, 275 S.C. 353, 271 S.E.2d 121 (1980). The mental competency of a defendant to stand trial is a baseline inquiry by the court. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000).¹⁵

¹⁵That a defendant may have some difficulty in understanding the procedures by himself will not preclude a finding of competency, where a defendant's counsel can explain any procedures or discuss any matters with the defendant. Sims v. State, 313 S.C. 420, 438 S.E.2d 253 (1993). Thus in Sims, where the defendant was medicated and had difficulty understanding the factual and legal proceedings by himself, it was sufficient for purposes of determining competency if

A PCR applicant must prove he was incompetent to stand trial by a "preponderance of the evidence." Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004), *quoting* State v. Reed, 332 S.C. 35, 39, 503 S.E.2d 747, 749 (1998); Lee v. State, 396 S.C. 314, 721 S.E.2d 442 (Ct. App. 2011).¹⁶ *See also* Ramirez v. State, 413 S.C. 351, 776 S.E.2d 101, 110 (Ct. App. 2017)(in order to show prejudice within the context of plea counsel's failure to fully investigate a PCR applicant's mental capacity, the applicant need only show a reasonable probability that he was either insane at the time the crime was committed¹⁷ or incompetent at the time of the plea), *affirmed in part, reversed in part*, Ramirez v. State, 419 S.C. 14, 795 S.E.2d 841 (2017). This is the correct legal standard for determining prejudice when the PCR applicant raises a claim such

these matters could be explained to the defendant one-on-one by his attorney. The Sims Court analogized this procedure to an attorney representing a person who does not speak or understand the English language and must have matters translated. Although time consuming, such a process does not render the defendant incompetent.

¹⁶The fact that a defendant bears the burden of proving his incompetence by a preponderance of the evidence does not violate due process. Medina v. California, 505 U.S. 437 (1992). Although a state may presume a defendant is competent to stand trial and require a defendant prove his incompetence by a preponderance of the evidence, it may not require a defendant prove his incompetence by clear and convincing evidence. Cooper v. Oklahoma, 517 U.S. 348 (1996).

¹⁷*See* S.C. Code Ann. Section 17-24-10 (defining insanity); Lewis, 328 S.C. 273, 494 S.E.2d 115; State v. Cannon, 260 S.C. 537, 197 S.E.2d 678 (1973); S.C. Code Ann. Section 17-24-20(A)(2003)(defining guilty but mentally ill [GBMI]); State v. Hornsby, 326 S.C. 121, 484 S.E.2d 869 (1997)(GBMI statute does not violate due process). Under South Carolina law insanity is defined as the inability to appreciate right from wrong in the act itself, not that one cannot form the *mens rea* necessary to commit the crime. S.C. Code Ann. Section 17-24-10 (2003); Lewis, *supra* ("[The key to insanity is 'the power of the defendant to distinguish right from wrong in the act itself-to recognize the act complained of is either morally or legally wrong'."], *quoting* State v. Wilson, 306 S.C. 498, 413 S.E.2d 19(1992); State v. Senter, 396 S.C. 547, 722 S.E.2d 233 (Ct. App. 2011)(same); Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001)(S.C. does not recognize the defense of diminished capacity, i.e. because of mental disease or defect the defendant could not form the *mens rea* necessary to commit the crime); State v. Santiago, 370 S.C. 153, 634 S.E.2d 23 (Ct. App. 2006)(rejecting diminished capacity relying on Gill). Applicant does not claim he was insane at the time of the crime and did not call any psychiatric expert at PCR to establish he was in fact insane at the time of the crime. Hall, 360 S.C. 353, 601 S.E.2d 335, *quoting* Reed, 332 S.C. at 39, 503 S.E.2d at 749; Lee, 396 S.C. 314, 721 S.E.2d 442; Mathews, 358 S.C. at 458-59, 596 S.E.2d at 51; Jeter, 308 S.C. at 232, 417 S.E.2d at 586.

as the one raised here. Garren v. State, 423 S.C. 1, 813 S.E.2d 704 (2018); Ramirez v. State, *supra*.

This Court finds Applicant has failed to meet his burden of proof to show he was either insane at the time of the crime or incompetent to stand trial at the time of his trial. Hall v. Catoe. Applicant called no expert witness to testify at the PCR hearing that he was insane at the time of the crime or incompetent to stand trial at the time of his trial. Applicant introduced no medical records, reports, or other such evidence at the PCR hearing to establish he was insane at the time of the crime or that he was incompetent to stand trial at the time of trial. This Court finds Applicant's testimony that he was incompetent to stand trial at the time of the trial was not credible. As Applicant introduced no psychiatric, psychological, or pharmacological testimony, or medical records or reports at the PCR hearing to corroborate his non-credible claim that he was not competent to stand trial, Applicant failed to prove deficient performance or resulting prejudice. *See* Garren v. State, (reversing PCR judge's determination counsel was deficient and petitioner was prejudiced by failure to have competency evaluation done where no expert testimony was offered at the PCR hearing that Petitioner was in fact incompetent at the time of his plea); McLaughlin v. State, (PCR judge erred in granting relief on basis defendant was not competent to stand trial when (1) counsel testified at PCR he had no trouble communicating with defendant; (2) the trial transcript showed defendant clearly understood the questions asked and responded in an appropriate manner; and (3) a forensic psychiatrist evaluated defendant prior to trial and found the defendant's medical conditions did not affect his mental state), *cited in* Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335; Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008)(defendant's testimony expert would have helped his case was merely speculative where he called no expert to testify at PCR); Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815

(2005)(as applicant failed to have an expert testify at evidentiary hearing, "any finding of prejudice is merely speculative."); Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)(the Court will not speculate concerning what might have occurred if counsel had conducted further investigation); *See* State v. Colden, 372 S.C. 428, 641 S.E.2d 913 (Ct. App. 2007)(court did not err in refusing to grant motion for mental competency evaluation, where judge questioned defendant, and defendant conclusively revealed his ability to answer questions rationally, appropriately, and on point; defendant demonstrated a manifest understanding of the proceedings, the roles of the various participants, and the charges he was facing, and **defendant offered nothing to demonstrate his mental state was such as to render him unfit to stand trial**; additionally, there was no evidence of irrational behavior before or during trial, or medical opinion concerning competency as to require evaluation). *See also* Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990)(petitioner's allegation attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998)(state's failure to object to hearsay testimony as to what another witness's testimony might have been does not relieve applicant of burden of producing admissible testimony in accordance with the rules of evidence); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992)(prejudice from counsel's failure to investigate or call witnesses cannot be shown where the witnesses do not testify at PCR); ¹⁸ Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993)(Applicant's mere speculation as to what a witnesses' testimony would have been

¹⁸Federal authority is in agreement. *See* Beaver v. Thompson, 93 F.3d 1186, 1995 (4th Cir. 1996)(rejecting IAC claim for failing to present mitigation evidence, where there was no proffer of this testimony); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir. 1991)(applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense," rather, facts must be presented).

cannot, by itself, satisfy his burden of showing prejudice); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995)(same).

This Court had the opportunity to view and judge Applicant's testimony at the PCR hearing and finds Applicant's testimony that he was incompetent to stand trial at the time of trial was simply not credible. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993).¹⁹ In fact, based on this Court's review of the record, Applicant's claim in his PCR testimony that he was incompetent to stand trial is not credible given his colloquy with the trial court before testifying at trial (R. 1349-59) and his testimony before the jury (R. 1378-1427). It is also not credible given the testimony at the Jackson v. Denno hearing prior to Applicant's trial. (R. 193-235). And, Applicant's testimony at PCR under both direct and cross-examination also shows that he was in fact competent to stand trial at the time of trial. See Garren v. State, *supra*; Compare Ramirez v. State, *supra*.

This Court also had the opportunity to view and judge counsel's testimony at the PCR hearing as well. Drayton v. Evatt, *supra*. This Court finds credible counsel's testimony that she had no problem communicating with Applicant in preparing for trial or at the time of trial. See Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (counsel may reasonably rely on her own perceptions in deciding whether a client is competent to stand trial). Counsel's credible testimony in this regard is supported by Applicant's trial testimony before the jury (R. 1378-1427) and his colloquy with the trial court before testifying. (R. 1349-59). Counsel's testimony

¹⁹In determining whether a defendant is in fact competent to stand trial, a trial judge is not bound by the opinions or views of expert witnesses. State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987). See also Kelly, 331 S.C. 132, 502 S.E.2d 99 (where expert testified defendant was not competent to proceed with penalty phase, trial court did not err in finding defendant was competent where same expert testified defendant possessed rational understanding of courtroom proceedings, understood role of judge, prosecutor, defense counsel and jury, and followed advice of counsel not to testify, although ignored advice of counsel not to make closing statement to jury); State v. Hill, 361 S.C. 297, 604 S.E.2d 696 (2004).

at the PCR hearing that in hindsight she regrets she did not have Petitioner evaluated for competency because of his age and his claims at the PCR hearing, while understandable, given her sympathy for a client she believes should not have been convicted, is not controlling on this issue. See Strickland (reviewing court must remove from its analysis the distorting effects of hindsight, and judge counsel's conduct by what counsel knew and did at the time). There is simply no credible evidence in the record, that Applicant was incompetent to stand trial at the time of his trial.

Finally, this Court has carefully reviewed Applicant's testimony at trial in his own defense (R. 1378-1427), and his colloquy with the trial court prior to testifying (R. 1349-59), and it is clear that Applicant was not incompetent to stand trial but fully competent to stand trial. See State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2002)(if a question as to the defendant's competency arises during a criminal proceeding, it is the duty of the trial judge to determine the defendant's competency; and, deferring to trial judge who had the ability to view the defendant and his behavior). As a result, there is no merit to this ground as Applicant has failed to show either deficient performance on the part of counsel or resulting prejudice. Strickland v. Washington; Washington v. Johnson, 90 F.3d 945 (5th Cir. 1996)(counsel not ineffective for failing to pursue evidence of petitioner's incompetency where petitioner was in fact competent to stand trial).

As a result, this Court finds Applicant cannot satisfy the first (1st) prong of the Strickland analysis, which required Applicant prove that counsel provided representation falling below an objectively reasonable standard. Strickland. Because Applicant's testimony was not credible, counsel's PCR testimony regarding Petitioner's competency at the time of trial was credible, and Applicant introduced no credible evidence at PCR he was in fact insane at the time of the crime

or incompetent at the time of his trial, Applicant failed to prove deficient performance on the part of counsel. Id

Further, this Court finds Applicant failed to satisfy the second (2nd) prong of the Strickland analysis, which required Applicant prove he was prejudiced by counsel's ineffective representation. Although Applicant claimed a mental evaluation should have been conducted to determine whether he was competent, Applicant provided no expert testimony or report regarding his competence to stand trial. His testimony that he was not competent was not credible. And, the trial record reveals he was completely competent. Therefore, this Court finds Applicant has not shown how he was prejudiced by any of his attorney's alleged failings regarding his competency. Strickland. As such, this allegation is appropriately denied.

Alleged IAC in failing to object to the Solicitor vouching for the credibility of State's witness Oliver Feldman

Applicant contends the Solicitor was improperly vouching for a witness when she argued in closing argument that the witness' testimony was credible because the witness' testimony was corroborated by other evidence. There is no merit to this ground.

This Court has reviewed the entire record in this case, including the closing argument of the Solicitor (R. 1480-1513; 1563-90). This Court has carefully reviewed the portion of the Solicitor's closing argument to which Applicant alleges counsel should have objected. (R. 1485, 1510-13; 1565, 1569-75, See also R. 1576-90). The Solicitor did not improperly vouch for or bolster the credibility of the witness. The Solicitor was properly arguing the credibility of the witness based on the evidence admitted in the case.

In a closing argument, a prosecutor has the right to give her version of the testimony and to comment on the weight to be given to the testimony of the witnesses. State v. Raffaldt, 318

S.C. 110, 456 S.E.2d 390 (1995); State v. Allen, 266 S.C. 468 224 S.E.2d 881 (1976); State v. Pitts, 256 S.C. 420, 182 S.E.2d 738 (1971). So long as a prosecutor stays within the record and draws reasonable inferences from the record, any argument is appropriate. State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999). A prosecutor may argue reasonable inferences from the evidence, especially where the case is circumstantial in nature. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999); State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). A prosecutor may state the law to the jury, and argue its application to the facts of the case being tried. State v. Gathers, 295 S.C. 476, 369 S.E.2d 140 (1988). A prosecutor may argue to a jury to return a verdict that she conceives it is their duty to return based upon the evidence presented in the trial. State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976).

It is permissible for a prosecutor, or any attorney, to characterize the credibility of witnesses presented by either the State or the defense, provided the statements are not inflammatory or excessive. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990); State v. Rudd, 355 S.C. 543, 586 S.E.2d 153 (Ct. App. 2003); State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999). In a closing argument, the comparison of the credibility of witnesses presented by the prosecution and the defense does not constitute witness pitting. State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995). Although it is proper for a party to characterize the credibility of a witness, inflammatory characterizations, e.g. that a witness is a "liar" are deemed improper. State v. Blurton, 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000), *reversed on other grounds, on cert.*, 352 S.C. 203, 573 S.E.2d 802 (2002); State v. Davis, 88 S.C. 229 70 S.E. 811 (1911). It is permissible for the prosecutor to argue that the testimony of the state's witnesses was credible, even though they were of the defendant's "ilk" and not "sterling

citizens.” State v. Gather, 295 S.C. 476, 369 S.E.2d 140 (1988). *See also* State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999)(prosecutor’s argument that codefendant had received nothing in exchange for his testimony, and would return to prison as “a rat”, was not improper bolstering, although such testimony was not presented in trial that witness would be ill-treated as a rat, it is a matter of common knowledge and a reasonable inference drawn from the record, which reflected upon the witness’ credibility).

Although a party may argue the credibility of a witness, it is improper to make remarks that “bolster” or “vouch” for the credibility of a witness by the attorney giving his own personal opinion of the witness’ credibility, or referring to matters outside the record to support the witness’ credibility. Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002); Mathews v. State, 350 S.C. 272, 275, 565 S.E.2d 766, 767 (2002); Vaughn v. State, 362 S.C. 163, 607 S.E.2d 72 (2004). *See also* State v. Douglas, 380 S.C. 473, 7671 S.E.2d 600 (2009).

This Court finds the Solicitor was not improperly “vouching” for or bolstering the credibility of the State’s witness, which is prohibited. *See* Gilchrist. (a prosecutor may not “vouch” for a witness’ testimony, i.e. argue the witness is credible based on the prosecutor’s own personal opinion or information in the prosecutor’s knowledge but not before the jury). Instead, this Court finds the Solicitor was arguing the credibility of the State’s witness based on the fact his testimony was corroborated by other evidence in the case, which is entirely permissible. Caldwell (A prosecutor may argue that a witness is credible based on the witness’ testimony or other evidence in the case); Rudd (same or similar); New (same). This Court finds the Solicitor was properly arguing the credibility of the witness’ testimony based on other evidence introduced in the case which is permissible. Caldwell; Rudd; New.

This Court finds that had counsel objected to the Solicitor's closing argument as Applicant argues, the objection would have been overruled because the Solicitor's argument was proper and permissible. As a result, Applicant has failed to prove deficient performance. Strickland v. Washington; Butler v. State

Further, this Court finds that Applicant cannot show and has not shown that had counsel objected as he argues counsel should have, there is a reasonable probability the result of the proceeding would have been different. Strickland v. Washington; Butler v. State. First, as stated above, the objection would have been overruled as the Solicitor's argument was entirely permissible and proper. Second, given the evidence in the record, Applicant cannot show had an objection been made and for some reason the trial court had sustained the objection, there is a reasonable probability the result of the trial would have been different. Id. As a result, for each of these reasons, Applicant has failed to prove resulting prejudice. Id. Therefore, this ground has no merit and must be denied and dismissed with prejudice. Strickland.

ALL OTHER ALLEGATIONS

As to any other allegations raised in Applicant's application or amended applications, no evidence was offered by Applicant at the PCR hearing on those grounds nor did Applicant raise those grounds to this Court. As a result, for the reasons stated below, Applicant waived and abandoned those allegations and failed to meet his burden of proof regarding them.

Applicant had contended in his application that his appellate counsel was ineffective. Respondent contended that Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is

alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Applicant also alleged prosecutorial misconduct in his application. Prosecutorial misconduct is not an issue for post-conviction relief (PCR). Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief (PCR) is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The Applicant could have raised this issue on direct appeal but did not. The failure to do so waived this allegation as grounds for relief.

Regardless, it is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). This Court finds that Applicant has not carried his burden of proving actual prosecutorial misconduct; therefore, this allegation must be denied and dismissed with prejudice.

As a result of Applicant failing to offer evidence on any grounds other than Grounds 1 through 9 specifically discussed above and addressed by this Court, Applicant has failed to meet his burden of proof to show deficient performance or resulting prejudice on the part of trial counsel or appellate counsel, and applicant failed to meet his burden of proof to show prosecutorial misconduct by the State. Butler v. State; Rule 71.1, SCRCP; Strickland v. Washington; Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983); Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989).

Further, because Applicant offered absolutely no evidence in support of such grounds. Applicant specifically waived and abandoned such grounds and they must be denied and dismissed with prejudice. Applicant specifically waived and abandoned any other grounds of ineffective assistance of trial counsel than Grounds 1 through 9 previously addressed in this Order. Applicant also specifically waived and abandoned any grounds of ineffective assistance of appellate counsel or prosecutorial misconduct. As a result, those grounds are denied and dismissed as waived and abandoned.

CONCLUSION

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

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR, Rule 71.1(g) SCRCP; Bray v. State, 446 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice of intent to appeal has been filed.

IT IS THEREFORE ORDERED:

1. Applicant's application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant is remanded to the custody of Respondent for completion of his sentence.

AND IT IS SO ORDERED this 7th day of May, 2019.

Charlottesville, South Carolina


THE HONORABLE PAUL BURCH
Presiding Judge
Fifth Judicial Circuit



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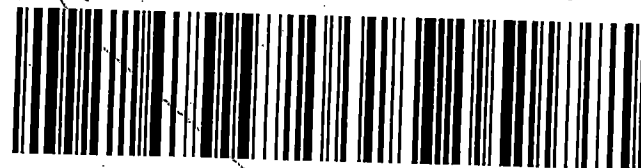
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