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January 15, 2020

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Quoteas Nesbitt (353945) v State, 2016-CP-15-1433

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, in the above Colleton County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc:
Benjamin Limbaugh, Esq
Quoteas Nesbitt 361169
Colleton County Circuit Court Clerk

THE STATE OF SOUTH CAROLINA

In The Supreme Court

RECEIVED

JAN 21 2020

S.C. SUPREME COURT

APPEAL FROM COLLETON COUNTY

Court of Common Pleas

Honorable Jennifer McCoy, Circuit Judge

Case No.: 2016-CP-15-1433

Quoteas Nesbitt 361169.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Quoteas Nesbitt appeals the Honorable Jennifer McCoy's January 7, 2020 Order of Dismissal. Undersigned counsel received notice of entry of the order on January 15, 2020. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

January 15, 2020

Benjamin Limbaugh, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

Clerk of Court- Colleton CP
PO Box 620
Walterboro, SC 29488

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CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Benjamin Limbaugh Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549 and the Colleton County Clerk of Court. I further certify that all parties required by Rule to be served have been served this January 15, 2020.

James K Falk
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STATE OF SOUTH CAROLINA COUNTY OF COLLETON	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Quoteas Nesbitt, #361169, Applicant, v. State of South Carolina, Respondent.	Case No.: 2016-CP-15-1433 **ORDER OF DISMISSAL**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Colleton County Clerk of Court. In March 2013, the Colleton County Grand Jury indicted Applicant for murder (2012-GS-15-0663) and possession of a weapon during a violent crime (2012-GS-15-0664). The charges resulted from a September 2012 incident in which Applicant fatally shot the victim multiple times in the back at the Chase Lounge in Colleton County. ROA p. 115, ll. 12-17; p. 507, l. 3. Matthew L. Walker, Esquire, of the Fourteenth Circuit Public Defender's Office, represented Applicant at trial. Assistant Solicitor Tameaka A. Legette prosecuted the case. On August 25, 2014, Applicant proceeded to a jury trial before the Honorable Perry M. Buckner, III. The jury found Applicant guilty as indicted. On August 28, 2014, Judge Buckner sentenced Applicant to imprisonment of forty-five years for murder and five years for possession of a weapon during a violent crime, to be served consecutively.

Applicant filed a timely notice of appeal. Susan B. Hackett, Esquire, of the Office of Appellate Defense, perfected the appeal pursuant to Anders v. California, 386 U.S. 738 (1967). Applicant subsequently filed a pro se brief. The South Carolina Court of Appeals affirmed Applicant's conviction and granted counsel's motion to be relieved on March 2, 2016. State v. Nesbitt, Op. No. 2016-UP-098 (Ct. App. 2016). The remittitur was returned to the circuit court

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on May 18, 2016.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
   a. "For not properly investigating evidence before trial."
   b. "Not objecting at several critical stages at trial."
   c. "Not properly preparing a defense strategy."

2. "Prosecutorial Misconduct"
   a. "Prosecutor misconduct on behalf of solicitor at trial."

3. "Judge abused his discretion."
   a. "Trial judge abused his discretion at trial by allowing errors to occur."

Applicant amended his application on August 21, 2019 to include the following allegations:

1. Trial counsel failed to object when State's witness Dorothea Gathers-Grant testified that: I've known Quoteas for some years, working at the jail (Transcript page 160 line 21). Trial counsel should have objected under SCRE 403. The witness testified that she had worked at the Colleton County jail for 11 years in several capacities. Her statement that she knew Applicant from jail was prejudicial because it allowed the jury to infer that Applicant had a long criminal record.

2. Trial counsel failed to object when State's witness Detective James Dusty testified that Kelvin Mitchell stated that he did not want to give the police any more information because he feared for his safety. (Transcript page 3 1 1, lines 20-23). Detective Dusty's statement was hearsay and highly prejudicial to Applicant because it allowed the jury to infer that Applicant had a reputation for violence in the community.

3. Trial counsel failed to object when State's witness Detective James Dusty testified that Donald Odom stated that he did not want to come forward with information because he feared retaliation and feared for his safety. (Transcript page 313, lines 11-13). Detective Dusty's statement was hearsay and highly prejudicial to client because it allowed the jury to infer that Applicant had a reputation for violence in the community.

4. Trial counsel failed to move for a mistrial when State's witness Detective James Davey testified that one of the witnesses picked Applicant out from a photo lineup. The State offered no proof that any of the State's identification witnesses identified Applicant through a line up. The identity of the individual who shot Moray Holmes was the central issue in Applicant's trial. Therefore any testimony regarding a positive identification through a phot line up was highly prejudicial. Further, trial counsel

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provided ineffective assistance by not objecting to the adequacy of the curative instruction offered by the court. (Transcript page 314 line 2 - page 315 line 3).

Findings of Facts and Conclusions of Law

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented, which allowed the Court to scrutinize the credibility presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985). The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

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

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

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In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced 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.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins v. Smith, 539 U.S. 510, 526–527 (2003), neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's

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performance, not counsel's subjective state of mind. Strickland, 466 U.S. at 688; Harrington v. Richter, 562 U.S. 86 (2011)

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687; Harrington, 562 U.S. 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt

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might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations. Applicant's allegation is addressed fully below:

Failure to Object to Dorothea Gathers-Grant's Testimony

Applicant alleges trial counsel was ineffective for failing to object to State's witness Dorothea Gathers-Gant testifying that "I've known Quoteas for some years, working at the jail" after testifying that she had worked at the jail for eleven years. Applicant has failed to show any deficiency by trial counsel in failing to object to the testimony and any prejudice resulting from the alleged deficiency.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Strickland*, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. *Gentry*, 540 U.S. at 8 (quoting *Massaro*, 538 U.S. at 505). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith*, 386 S.C. at 567, 689 S.E.2d at 632. *See also*

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Ingle, 348 S.C. at 470, 560 S.E.2d at 402 (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead, 308 S.C. at 122, 417 S.E.2d at 531.

Here, trial counsel testified at the evidentiary hearing that he believes his strategy for not objecting was to not bring further attention to the testimony, but that he could not recall if that was specifically why he did not object. Counsel enumerated a strategy for not objecting to the testimony that is valid, he did not want to put in the jury's minds that this information was more important than it actually was to the case. Further, per *Gentry*, this court is to strongly presume that counsel's decisions were based in strategy rather than in neglect. Counsel's slight uncertainty can certainly be attributed to the trial having taken place five years prior to the evidentiary hearing, however, counsel was still able to enumerate the strategy he believes he utilized for not objecting to the testimony. Further, Ms. Gather's testimony that she knew Applicant from her years working at the jail was immediately corrected by the Solicitor with the very next question.

> Solicitor: Now, Ms. Gathers, you said you know him. How long would you say you've know him?
>
> Gathers: I've known Quoteas for some years, working at the jail.
>
> Solicitor: You just know him from the community?
>
> Gathers: I just know him from the community, yes.

Any potential improper inference or prejudicial testimony from Ms. Gathers was immediately cured by her testifying that she did not in fact know Applicant from the jail, but rather that she just knew him from the community. Counsel enumerated a valid trial strategy for not objecting to

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the testimony and Applicant was not prejudiced because the testimony was immediately corrected to the fact that Ms. Gathers actually knew Applicant from the community. Applicant has failed to meet his burden in showing deficiency on the part of counsel or any resulting prejudice from the alleged deficiency. Therefore, this allegation is dismissed with prejudice.

Failure to Object to Testimony Concerning Witnesses Fearing for Their Safety

Petitioner alleges trial counsel was deficient for failing to object when State's witness Detective James Dusty testified that Kelvin Mitchell stated that he did not want to give the police any more information because he feared for his safety. (Transcript page 3 1 1, lines 20-23). Applicant argues Detective Dusty's statement was hearsay and highly prejudicial to Applicant because it allowed the jury to infer that Applicant had a reputation for violence in the community. Applicant , however, has failed to show deficiency on the part of counsel for failing to object to the testimony and any prejudice resulting from the alleged deficiency.

As stated above, this Court must strongly presume counsel's decisions were made using reasonable professional judgement and were based on trial strategy. If counsel articulates a valid trial strategy, as counsel did in this case for not objecting to the testimony, this Court must hold that such conduct was not ineffective assistance of counsel. Here, trial counsel testified at the evidentiary that he did not object because it did not fit within their defense strategy that Applicant was not the shooter. Counsel testified that he agreed that the testimony from the law enforcement officer about witnesses of the incident telling him they were scared to cooperate was hearsay and that he did not consider objecting on that ground. Counsel further testified that the testimony was not applicable to Applicant, per their defense theory, because Applicant was not the shooter as well as the fear more pertaining to cooperating with law enforcement generally. Counsel further elaborated that the fear was related to the community at large being

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afraid of cooperating with law enforcement, as he had just been on a case where someone was alleged shot for calling the police. This Court finds counsel's testimony concerning his strategy for not objecting and the inferences drawn from the testimony about fear are credible. Applicant has failed to meet his burden in regards to showing any deficiency on the part of counsel for failing to object to the testimony or any prejudice resulting from the alleged deficiency. Counsel enumerated a valid trial strategy for not objecting, namely that the testimony did not apply to Applicant per their defense theory. Therefore, this allegation is dismissed with prejudice.

Failure to Move for a Mistrial and Failure to Object to Curative Instruction

Applicant alleges counsel was deficient for failing to move for a mistrial when State's witness Detective James Davey testified that one of the witnesses picked Applicant out from a photo lineup. Applicant also alleges counsel was deficient for failing to object to the curative instruction given by the trial court. Applicant has failed to show deficiency on the part of counsel for failing to move for a mistrial or object to the curative instruction, as well has showing any prejudice resulting from the alleged deficiency.

"The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." State v. Wilson, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010) (citation and internal quotation marks omitted). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial." Id. at 585-86, 698 S.E.2d at 865. "Insubstantial errors that do not impact the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence." Id. at 586, 698 S.E.2d at 865 (citation and internal quotation marks omitted).

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Counsel testified at the evidentiary hearing that he immediately objected to the testimony concerning the photo-lineup. Counsel testified that he agreed that he could have moved for a mistrial at that point and that he could have objected to the sufficiency of the curative instruction. Counsel testified that the testimony was cumulative to the testimony of the other direct eyewitnesses, he did not want to call further attention to the testimony, and that the trial court was not going to grant a mistrial motion if made. Counsel testified further that he did not move for a mistrial because he got the curative instruction he wanted from his objection and the jury had time during the bench conference to let the testimony pass without further attention.

As well as counsel's testimony concerning his strategy for not moving for a mistrial, the trial court's curative instruction to the jury concerning the photo lineup cured any potential prejudice to Applicant. After the bench conference, the Solicitor asked the trial court that any "statements regarding any identification of Mr. Nesbitt in a photo lineup be stricken from the record." (Tr. P. 314, ln 18-21.) The trial court then instructed the jury to "disregard any comment made in this case concerning the photo lineup. That is not evidence in this case, and the parties agree that it should not be a part of your decision." (Tr. P. 314, ln 24-25; P. 315, ln 1-2.) The trial court's curative instruction properly informed the jury that they are not to consider the testimony concerning the photo-lineup. Applicant can show no deficiency by counsel in failing to move for a mistrial where counsel got the result he wanted by objecting and getting a curative instruction. Further, Applicant has failed to show that the trial court would have granted the mistrial motion where a mistrial was not absolutely necessary. Applicant has also failed to show how counsel was deficient for failing to object to the curative instruction or any resulting prejudice. This Court finds that Applicant has failed to meet his burden in showing counsel was deficient for failing to move for a mistrial, failing to object to the curative instruction, and showing any

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resulting prejudice from the alleged deficiencies. Therefore, this Court dismisses this allegation with prejudice.

Failure to Exclude Officer Chapman's Testimony

Applicant alleges trial counsel was deficient for failing to exclude Officer Chapman's identification of him at trial. Applicant has failed to show deficiency by counsel for failing to exclude the testimony and the allegation is precluded as being inappropriate for this forum.

Counsel attempted to exclude the testimony pre-trial hearing and made a proper contemporaneous objection to the testimony during the trial. The trial court denied counsel's objection on the record based on the arguments made previously on the record. This Court finds this allegation is a direct appeal issue and is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 420 (1993). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief, and the allegation is dismissed.

Conclusion

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief.

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Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant shall be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 7th day of January 2020.

JENNIFER MCCOY
Presiding Judge
Tenth Judicial Circuit

Charleston, South Carolina

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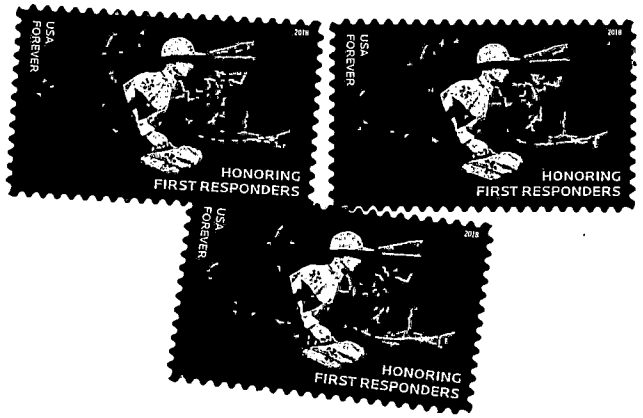

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