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UNRAVELING YOUR LEGAL ISSUES

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February 14, 2020

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

Re: Terron Gerhard Dizzley, #359480 v. The State of South Carolina
2011-CP-46-1841

Dear Mr. Shearouse:

Enclosed is the original and copy of the Notice of Appeal in the above captioned case.

I was retained for the PCR trial but I have not been retained to represent petitioner on appeal. I request to be relieved as counsel.

Please let me know if you have any questions.

Sincerely,

Eleanor Duffy Cleary

EDC

Enclosure
Notice of Appeal
Proof of Service
Order Denying Motion for Reconsideration
Order of Dismissal

cc: Johnny E. James, Jr., Attorney for Respondent
The Alva Y. White, Georgetown County Clerk of Court
Terron Gerhard Dizzley

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Kristi F. Curtis, Circuit Court Judge

Case No. 2015-CP-22-00845

TERRON GERHARD DIZZLEY, #359480

PETITIONER,

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Terron Gerhard Dizzley, by and through his counsel, hereby appeals the Honorable Kristi F. Curtis's Order Denying Motion for Reconsideration dated February 7, 2020 and filed February 11, 2020, and received by counsel on February 14, 2020.

February 14, 2020

Eleanor Duffy Cleary
Cleary Law LLC
Post Office Box 40086
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ellen@clearylawllc.com

Attorney for Petitioner

Other Counsel of Record:

Johnny E. James, Jr.
Assistant Attorney General
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Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Kristi F. Curtis, Circuit Court Judge

RECEIVED
FEB 19 2020
S.C. SUPREME COURT

Case No. 2015-CP-22-00845

TERRON GERHARD DIZZLEY, #359480

PETITIONER,

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal by depositing a copy of it in the United States Mail, postage prepaid, on February 14, 2020 addressed to opposing counsel, Johnny E. James, Jr. Assistant Attorney General, PO Box 11549, Columbia, SC 29211 and The Honorable Alma Y. White, Georgetown County Clerk of Court, PO Box 479, Georgetown, SC 29442.

Eleanor Duffy Cleary

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February 14, 2020

The Honorable Alma White, Clerk of Court
Georgetown County
P.O. Box 479
Georgetown, SC 29442-0479

Re: Terron Gerhard Dizzley#359480 v. State of South Carolina
2015-CP-22-0845
PCR Case

Dear Madame Clerk:

Please see the enclosed notice of appeal for filing with your office.

Thank you so much for your assistance with this matter.

Sincerely,

Eleanor D Cleary

Eleanor Duffy Cleary
Bar #7068
ellen@clearylawllc.com

cc: Terron Dizzley #359480
4460 Broad River Road
Columbia, SC 29210
Johnny E. James, Jr.
Assistant Attorney General

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Terron Gerhard Dizzley, S.C.D.C. No. 359480, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2015-CP-22-00845 **ORDER DENYING MOTION FOR RECONSIDERATION**

Attorney for Applicant timely filed a Rule 59(e) Motion for Reconsideration of the court's order denying Applicant's Petition for Post Conviction Relief. After reviewing the post-trial motion, the motion for reconsideration is denied.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) 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, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

AND IT IS SO ORDERED this 7th **day of** Feb **, 2020.**

Kristi Curtis

KRISTI F. CURTIS
Presiding Judge
Fifteenth Judicial Circuit

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	) IN THE COURT OF COMMON PLEAS) FOR THE FIFTEENTH JUDICIAL CIRCUIT)
Terron Gerhard Dizzley, S.C.D.C. No. 359480, Applicant, v. State of South Carolina, Respondent.	) Case No.: 2015-CP-22-00845 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed by Terron Gerhard Dizzley ("Applicant") on September 9, 2015, ultimately amended on or about November 5, 2018. Respondent made its return on or about December 5, 2016, thereafter amended by filing made on or about November 9, 2018. The Court convened an evidentiary hearing into the matter on Wednesday, November 27, 2018, at the Horry County Government & Justice Center in Conway, South Carolina. Applicant was present at the hearing and represented by Eleanor D. Cleary, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, undersigned, represented Respondent. At the close of the hearing both parties requested to submit post-hearing memoranda addressing each of the allegations in light of the testimony submitted, in lieu of closing arguments, and both parties submitted their memoranda.

The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcripts for both of Applicant's trials, the records of the Georgetown County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, the pleadings, and ultimately the memoranda submitted by the parties. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. Applicant was indicted at the July 2009 term of the Georgetown County Grand Jury for murder (2009-GS-22-00778). Charles Barr, Esq. represented Applicant, and Erin Bailey, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On March 31, 2014, Applicant proceeded to trial before the Honorable Roger L. Couch and a jury. The jury found Applicant guilty as indicted on April 3, 2011. Judge Couch sentenced Applicant to imprisonment for a term of 35 years.

Applicant filed a timely notice of appeal. However, by motion dated July 13, 2015, by and through Appellate Counsel Jeremy A. Thompson, Esq., Applicant moved to withdraw his appeal in order to pursue an application for post-conviction relief. By order filed July 16, 2015, the South Carolina Court of Appeals accepted Applicant's motion and dismissed the appeal. The Remittitur was issued on August 4, 2015.

Present Application

In his post-conviction relief application, by and through then-PCR counsel Thompson, Applicant alleges he is being held unlawfully for the following reasons:

1. "Ineffective Assistance of Trial Counsel"
    a. "Defense counsel failed to conduct an adequate investigation into the Applicant's case."
    b. "Defense counsel failed to adequately prepare for trial and failed to make appropriate objections and motions at trial."
    c. "Defense counsel failed to interview and to call favorable witnesses at trial."

Applicant thereafter moved to relieve counsel Thompson, who was relieved by order filed September 23, 2016. Counsel James K. Falk, Esq., was appointed to represent Applicant that

same day. By and through counsel Falk, Applicant amended the following additional allegations by filing on May 4, 2017:

1. Ineffective assistance of trial counsel, in that:
    a. "Trial counsel failed to fully investigate the case and failed to interview the State's witnesses before trial."
2. Ineffective assistance of appellate counsel, in that:
    a. "Mr. Thompson was retained to represent Applicant on his appeal from his criminal conviction. Mr. Thompson failed to fully investigate the case and provided ineffective assistance in advising Applicant of the merits of his appeal."
3. Prosecutorial misconduct, in that:
    a. "The State failed to provide trial counsel with copies of prior recorded statements by the State's witnesses which contradicted the witness's trial testimony, and such failure to disclose was in violation of its obligations under Brady v. Maryland."
4. After-discovered evidence, in that;
    a. "Applicant is in possession of newly acquired evidence that trial counsel should have used in preparing his defense namely transcripts of statements from Willie Stanley, Larry Cooper, Douglas Morris, Sonia Jones, and Toni Jones. The information in these statements should have been used to impeach the State's witnesses."

Applicant thereafter retained counsel Leah B. Moody, Esq., on or about October 19, 2017, and relieved counsel Falk. Applicant thereafter sought to relieve counsel Moody and retain counsel Eleanor D. Cleary, Esq.; the Honorable William H. Seals, Jr. granted Applicant's request after a telephone conference, reflected by order dated October 30, 2018. By and through Counsel Cleary, Applicant substituted all prior allegations with the following grounds for relief by amendment dated November 5, 2018 (excerpted verbatim, save where {indicated}):

1. Ineffective assistance of trial counsel, due to:
    a. "Failing to present evidence, including that of an expert witness, of the unreliability of earwitness identification where the only evidence that applicant was the shooter was came from witnesses who testified the deceased victim stated that 'Little D' shot him and he recognized him from his voice."

b. "Failing to present evidence that the state's main witness, Naomi Alston, attempted to commit insurance fraud by filing a claim with the deceased's auto insurance company shortly after the murder. Counsel attacked the victim's credibility with this evidence at Applicant's first trial, which resulted in a hung jury."

c. "Failing to object to Alston's testimony that the victim told her three days prior to not let Applicant in the club, where this evidence was inadmissible hearsay, which violated the defendant's constitutional right to confront witness against him, and was more prejudicial than probative."

d. "Failing to object to the admission of a 911 call from three days prior to the crime, which was inadmissible hearsay, improper bolstering evidence of Alston's testimony, and which was more prejudicial than probative."

e. "Eliciting harmful testimony on cross-examination from the State's witness Marvin riley that he had heard that Applicant was called 'Little D' and failing to clarify for the jury that he had heard that after the crime was committed. Riley had not testified to knowing Applicant by that nickname during examination. Based on this, the assistant solicitor was able to state in closing, that Marvin Riley argued to the jury that Riley identified Applicant as 'Little D.'"

f. "Failing to object to Jerliether Jones's testimony that the victim stayed at her house for two days prior to the murder because he did not want to run into Applicant. This was inadmissible hearsay, which violated Applicant's constitutional right to confront witnesses, and was more prejudicial than probative. Using that inadmissible testimony, the assistant solicitor argued in closing that 'the day, the first time [the victim] came out of hiding at his girlfriend's house is when he was murdered.' (Tr. p. 716)."

g. "Failing to establish either with Jerliether Jones or Naomi Alston that the victim stayed at Jerliether's house because he was trying to evade service of pending warrants."

h. "Failing to object to the solicitor's prejudicial and inaccurate characterization with witness Dogugas Morris that he had only heard the victim call Terron [Applicant] Little D or D, when Morris had not identified Applicant by any such nickname."

i. "Inaccurately characterizing the testimony of the State's witness, Maurice Giles, that he said what he heard Mr. Dizzley [Applicant] say before the shooting, when Giles had testified that could not identify the shooter, who was wearing a mask, and did not know Applicant. Trial counsel also stated in his cross examination that Giles had testified that he did not

know anyone other than Applicant to go by the name 'Little D,' when Giles had not testified to that on direct examination."

j. "Failing to object to investigator Melvin Garrett's testimony as to the prior consistent statements of Naomi Alson and Jerliether Jones, which was inadmissible hearsay and improperly bolstered the testimony of the State's main witnesses."

k. "Failing to object to Investigator Garrett's prejudicial hearsay statement that 'he had a {name} from a person I interviewed before I met with [Alston and Jones]. That's where I got the initial lineup. (Tr. p. 545)"

l. "Failing to properly impeach the State's witness Willie Stanley with his prior inconsistent statements on the night of the incident that he had not observed the events."

m. "Failing to establish the location at which Applicant's alibi witnesses were with Applicant and the distance to the crime scene, which would have shown that his alibi witnesses did provide an alibi, contrary to the assistant solicitor's statements in closing arguments and the investigator's statement in his testimony."

n. "Failing to call alibi witnesses Stephon Jamison and Clarcese Jamison."

o. "Failing to object to the assistant solicitor's statement in closing that the victim looked into the shooter's eyes, implying he identified him by his eyes, where there was no evidence presented that the victim identified the shooter by anything other than his voice. (Tr. p. 725)."

p. "Failing to object to the assistant solicitor's statements in closing improperly vouching for the truthfulness of the State's witnesses' testimony."

q. "Stating in his closing argument that the 'one witness that's got Terron Dizzley sitting where he is sitting today didn't even show up for court, and he couldn't show up for court because he's deceased. (Tr. p. 698). By making this highly prejudicial statement, trial counsel eviscerated the defense claim that the victim did not identify Dizzley as the shooter."

r. "Failing to call witnesses, who were known to him, that Applicant was not called 'Little D.' These include Georgetown Deputy James Elmore, the alibi witnesses, and friends of Applicant from Georgetown."

s. "Failing to ask the judge to inquire whether juror 332 had already discussed with fellow jurors her conversation with the investigator about her concern that Applicant was not incarcerated during trial and the investigator's questioning of her if she felt threatened by Applicant. Applicant is informed and believes that Juror 189 will offer testimony that juror 332 did raise her concerns with the jury."

t. "Failing to ask the judge to replay testimony for the jurors when the foreman asked a question during deliberations that demonstrated they had not heard the testimony correctly and had thought one of the eyewitnesses had said that the victim said 'Diz' shot him, when that was contrary to the evidence and cut to the heart of the defense case."

2. "Applicant is entitled to a new trial based on after-discovered evidence that conduct which affected the jury's impartiality was fundamentally unfair; to wit:"
   a. "Juror 332's discussion of her concerns about whether Applicant was free pending trial brought outside influence to the jury when she discussed this with the jury;"
   b. "The investigator's prejudicial suggestion that she might need protection, which was relayed to the jury, and juror 189 final decision to convict was improperly influenced by these factors. Applicant is informed and believes that juror 189 will offer testimony on these issues."
3. "Applicant is entitled to a new trial based on the cumulation of the errors listed above, as well as trial counsel's inattentiveness, failure to investigate, sleeping during trial, and ineffective presentation of the case. Applicant is informed and believed that several witnesses, including juror 189, will testify to these issues."

At the evidentiary hearing, Applicant proceeded forward on those allegations set forth in PCR counsel Cleary's amendment of November 2018. During and subsequent to the hearing, Applicant has sought to relieve PCR counsel Cleary and amend his application for relief by way of voluminous testimony and voluminous filings with the Court. Respondent addresses these efforts collectively in Section II of this memo.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler, 286 S.C. at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97.

1. Failure to Present Earwitness Identification Expert

Applicant has failed to meet his burden of showing Counsel was ineffective in failing to call an expert witness in earwitness identification at trial.

First, an expert witness in misidentification is unnecessary as a matter of law. The Court can find no instance in South Carolina caselaw in which a counsel was found ineffective for failing to call such an expert witness. To the contrary, any weaknesses in eyewitness identification can be adequately probed through effective cross-examination and arguments by counsel, without the assistance of such an expert, and typically involves principles that are plainly obvious to any lay juror. See, e.g. People v. Cooper, 601 N.W.2d 409, 418 (Mich. Ct. App. 1999) (Finding no ineffectiveness where trial counsel elicited weaknesses in the identification of the defendant through cross-examination, and noted the expert would have only

stated the obvious: "memories and perceptions are sometimes inaccurate."); Peterson v. State, 154 So.3d 275 (Fla. 2014) (Finding no ineffectiveness of counsel for failing to call an eyewitness identification expert where any such expert testimony would have been merely cumulative to the experience and training of Counsel, and the substance of his cross-examination); United States v. Langan, 263 F.3d 613, 624 (6th Cir. 2001) ("[T]he hazards of eyewitness identification are within the ordinary knowledge of most lay jurors."); but see State v. Heywood, 357 P.3d 565 (Utah Ct. App. 2015) ("Because there is little doubt that juries are generally unaware of these deficiencies in human perception and memory and thus give great weight to eyewitness identifications, juries benefit from assistance as they sort reliable testimony from unreliable testimony."). These cases do not provide for the categorical exclusion of such experts where offered at trial, but rather provide to show that they are not necessary either.

An eyewitness misidentification expert could not testify as to the credibility or reliability of specific witnesses, lest he or she invade the jury's exclusive province of judging witness credibility, and so such a witness could only speak to general principles. See Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 476-77 (2016) ("The assessment of witness credibility is within the exclusive province of the jury."); State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013) ("[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others.").

In any event, the key point of evidence in the State's prosecution of Applicant was Audry Evans' dying declaration that "D" or "Lil' D" shot him. (Tr. 184, ll. 5-12; Tr. 276-77; Tr. 292, ll. 15-17; Tr. 293, ll. 13-19; Tr. 317-18; Tr. 326, 19-13-18). The perpetrator of the shooting was an African-American person described as wearing "a black bandanna, black hoody, blue jeans on," masked with only his eyes visible to onlookers. (Tr. 267, ll. 5-11; Tr. 290, ll. 1-7; Tr. 302-

03; Tr. 313-14; Tr. 357-58; Tr. 359-60; Tr. 400, ll. 10-11; Tr. 417, ll. 16-22). Witnesses testified that the perpetrator said to Evans immediately prior to the shooting something to the effect of "I told you I would get you; right" or "I told you that it wasn't over with" or "You think it's a game? I ain't forgot about my money[.]" (Tr. 269, ll. 9-11; Tr. 275, ll. 6-13; Tr. 290, ll. 11-17; Tr. 314, ll. 20-23; Tr. 329-30; Tr. 333, ll. 1-4; Tr. 353, ll. 1-21; Tr. 400-01). Every witness who saw the shooting testified the perpetrator was in close physical proximity to Evans.

At the evidentiary hearing, Applicant presented the testimony of Dr. Lori Van Wallendael, an associate chair of psychiatric science at the University of North Carolina in Charlotte. Dr. Van Wallendael explained her research interest was in memory, as well as eyewitness and earwitness identification. Dr. Van Wallendael was qualified as an expert in earwitness identification without objection by Respondent. Dr. Van Wallendael testified that, as a general principle, earwitness identification is less reliable than eyewitness identification, and that people overestimate their confidence in identifying voices. Dr. Van Wallendael explained a variety of aspects of earwitness identification which tend to diminish its reliability, including how identifications made based upon short utterances are more likely to be erroneous, how a high level of background noise might muffle or distort a voice, and that people are prone to misrecognize the voices of strangers as those of persons familiar to them.

On cross-examination, Respondent questioned Dr. Van Wallendael at length about her research findings as she presented them in the Encyclopedia of Psychology and Law, with particular emphasis on those factors which influence voice recognition accuracy. Dr. Van Wallendael testified that a person who is tested for recognition immediately after hearing the voice is more likely to accurately identify it, and conversely, a long delay between exposure and testing increases the chance of error. Dr. Van Wallendael also testified that closer proximity

between a speaker and a listener is associated with greater accuracy in identification; conversely, one is less likely to accurately identify a voice speaking or shouting from some distance. Interestingly, and contrary to arguments made by Counsel at trial, Dr. Van Wallendael explained the idea of "face overshadowing," which is that a person is more likely to accurately identify a voice when the face of the speaker is concealed, and less likely to accurately identify a voice when the face of the speaker is visible, as a person's attention is drawn to the face when it is visible, reducing the attention they pay to the voice. Voice identifications are more likely to be accurate when the speaker and the audience are of the same race, and where they both primarily speak the same language and dialect. Dr. Van Wallendael testified that voice identifications are more likely to be accurate where the speaker and audience are both adults. At some length, Dr. Van Wallendael explained how high stress situations reduce the accuracy of voice identifications, but that prior to a stressor, the identification of a voice might be more accurate. Research was less certain, however, regarding the accuracy of identifying familiar voices; Dr. Van Wallendael noted some studies found a strong positive correlation between familiarity and accuracy, while others found a variety of other discordant results. Finally, Dr. Van Wallendael confirmed she was compensated for her testimony by Applicant's family.

On re-direct, Dr. Van Wallendael explained that studies established that voice identifications made a significant impact on juries. Dr. Van Wallendael noted that the sight of a gun could be a distracting stressor for a person attempting a voice identification. Finally, Dr. Van Wallendael jovially noted that the research into the subject revealed information potentially helpful to both the defense and the prosecution. On re-cross, the doctor opined that the turn of phrase "believe none of what you hear and half of what you see" was not necessarily a common one.

Counsel testified that hiring an expert did cross his mind, but noted that hindsight was twenty-twenty. On cross-examination, Counsel testified he did not believe earwitness unreliability was a necessary approach to litigating the case.

Applicant fails to meet his burden of showing ineffectiveness by way of Dr. Van Wallendael's testimony. As noted by the doctor herself, the research into earwitness identification provides information potentially beneficial for both the prosecution and the defense, given the voice identification was made immediately after the shooting, and was based upon a statement made by an adult to another adult in close proximity, wearing a mask, prior to the stress of the shooting, by an African-American person speaking English with a southern dialect to another person of the same race and primary language. Arguably, the introduction of Dr. Van Wallendael's testimony at trial would have *strengthened* the State's case against Applicant, as so many of the factors served to affirm the accuracy of the Evans' identification of Little D's voice. As such, there is no evidence before the Court to show Counsel's decision against seeking a voice identification expert was unreasonable, and no evidence to show a reasonable probability that the presentation of such an expert would have resulted in a different outcome at trial. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

2. Failure to Impeach Witness Naomi Alston with Insurance Fraud Attempt

Applicant's allegation that Counsel was ineffective for failing to impeach Alston with evidence that she attempted to recover on an insurance claim does not entitle him to relief because Counsel articulated at the evidentiary hearing multiple reasons to not do so. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be

deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

The transcripts of the first trial were made part of the record at the evidentiary hearing. (Hereafter cited as "Mistrial ##" and "Mistrial 3d. ##").[1] During the first trial, Counsel questioned Alston regarding who the registered owner of a 2002 Mazda was, to which Alston asserted she was the owner, but that Evans was the *registered* owner. (Mistrial 174, ll. 18-25). Alston wrecked the Mazda shortly after Evans' murder. (Mistrial 175, ll. 1-9). Alston thereafter filed an insurance claim in Evans' name, despite his recent death. (Mistrial 175-76). Alston explained "the vehicle was my vehicle, but it was registered under Dre's name and I was down as a driver of the vehicle. So, yes, I did call the insurance claim in." (Mistrial 176, ll. 13-15). Alston further explained she called in the claim in Evans' name because he was the main person on the insurance policy. (Mistrial 176, ll. 16-18). In closing arguments, Counsel very simply asserted "you don't file an insurance claim in somebody's name after you die and you know you don't do that." (Mistrial 3d. 88, ll. 10-18). The State did not conduct any re-direct examination of Alston, and did not address the subject in its own closing argument.

At the evidentiary hearing, Counsel testified Applicant was tried twice, and that Counsel obtained a copy of the transcript of Applicant's first trial, which ended in a hung jury. Counsel initially could not remember why he did not bring up Alston's insurance claim in the second trial when he had impeached her with it in the first, but thereafter explained that (1) the jury was predominately composed of women, (2) the impeachment value of the insurance claim was very low, and (3) the State "did good" with the impeachment effort in the first trial. All of those elements considered, Counsel concluded the insurance claim was not worth much and declined

[1] The third day of the mistrial, August 29, 2012, was transcribed separately from the rest of the trial.

to use it to attempt to impeach Alston. On cross-examination, Counsel conceded that Alston was an important witness to the State's case.

Counsel articulated a *series* of valid strategic considerations for not proceeding with this particular means of impeachment.[2] Counsel utilized his skill and considerable experience in thirty-eight years of criminal litigation to make the professional judgment that the insurance claim was not an effective means of impeachment. In light of the articulated reasoning and affirmative use of professional judgment, Counsel's conduct cannot be deemed ineffective, and Applicant's demand for relief by way of this allegation is **DENIED**.

3. Failure to Object to Witness Naomi Alston's Testimony of the Victim's Directive

Applicant's allegation that Counsel was ineffective for failing to object to Alston's testimony that Evans instructed her not to let Applicant into the club is without merit as a matter of law. "Hearsay is not admissible except as provided by" the rules of evidence, other rules prescribed by the Supreme Court, or by statutes. Rule 802, SCRE. Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. A statement is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Rule 801(a), SCRE.

Questions, commands, and requests are not "assertions," and therefore do not constitute hearsay. See, e.g. United States v. Thomas, 453 F.3d 838, 845 (7th Cir. 2006) (describing a remark as a question, and therefore not hearsay); United States v. Jackson, 88 F.3d 845, 848 (10th Cir. 1996) (finding the question "Is this Kenny?" could not reasonably be construed to be

[2] One might contend the third point of Counsel's explanation is an inaccurate recollection given the State's silence on the subject in its examination of Alston and closing argument. Sometimes silent disregard produces a more compelling argument than any number of words ever could. Such was the case in Applicant's first trial, and Counsel was not inaccurate to state that the State "did good" with the subject.

an intended assertion, express or implied, and thus was not hearsay); United States v. Oguns, 921 F.2d 442, 449 (2d Cir. 1990) ("An inquiry is not an 'assertion,' and accordingly is not and cannot be a hearsay statement."); United States v. Lewis, 902 F.2d 1176, 1179 (5th Cir. 1990) (explaining most questions and inquiries are not hearsay, and rejecting the defendant's argument that there were assertions implicit in the question "did you get the stuff?"); State v. Carillo, 750 P.2d 878, 882-83 (Ariz. Ct. App. 1987), aff'd in part, vacated in part on other grounds, 750 P.2d 883 (Ariz. 1988) (finding out-of-court remarks directed to the defendant instructing him "don't do that now," and "we will do that later," did not assert anything and thus did not constitute hearsay); People v. Jones, 579 N.W.2d 82, 87-88 (Mich. Ct. App. 1998), modified in part on other grounds, 587 N.W.2d 637 (Mich. 1998) (ruling the command "[b]itch, come out" contained no assertion and was incapable of being true or false, such that it was not a statement and could not be hearsay); cf. Rule 801, SCRE, advisory committee's note ("With the exception of subsection (d)(1), this rule is identical to the federal rule").

At trial, Alston testified during direct examination about events occurring on November 29, 2008, prior to the date of the shooting. (Tr. 179-81). Alston testified that while she was at the club waiting in her car for the DJ, Applicant pulled up and pulled on the club's door. (Tr. 179-80). Alston testified Evans called her and instructed her "Whatever you do, do not let him in the club." (Tr. 180, ll. 1-3). When Applicant knocked on Alston's car door asking to be let into the club to retrieve something, Alston refused. (Tr. 180, ll. 7-11). Alston further testified that Evans told her that "if he don't leave, you tell him to leave, and if he doesn't leave, then you're going to call the police[.]" (Tr. 180, ll. 11-16). Applicant replied with hostility. (Tr. 180, ll. 20-24). Applicant left, then returned, at which time Alston called the police. (Tr. 181, ll. 3-4).

Alston's testimony as to Evans' instructions to her on November 29, 2008, does not constitute hearsay. Evans' instructions were commands, and contained no information which could be tested as true or false. Counsel thus could not have objected to the testimony on the basis of hearsay. Applicant cannot show deficiency of Counsel by way of this allegation, and accordingly Applicant's request for relief by way of this allegation is **DENIED**.

4. Failure to Object to Admission of Alston's 911 Call

Applicant's allegation that Counsel was ineffective in failing to object to the admission of Alston's 911 call is without merit as a matter of law. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "All relevant evidence is admissible," except when otherwise prohibited. Rule 402, SCRE.

As noted in the prior section, however, "[h]earsay is not admissible except as provided by" the rules of evidence, other rules prescribed by the Supreme Court, or by statutes. Rule 802, SCRE. However, "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is excluded from the hearsay rule, even where the declarant is available as a witness. Rule 803(1), SCRE; see, e.g. State v. Thompson, 420 S.C. 386, 401-02, 803 S.E.2d 44, 51-52 (Ct. App. 2017) (finding no hearsay or confrontation problem where the statements on a 911 call were made to obtain police assistance, and to elicit more information to enable police assistance). "There are three elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the

event." State v. Hendricks, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014) (citing United States v. Mitchell, 145 F.3d 572, 567 (3d Cir. 1998)).

Additionally, "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" falls within a hearsay exception. Rule 803(2), SCRE. "A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception." State v. Davis, 371 S.C. 170, 178-79, 638 S.E.2d 57, 62 (2006). To be admitted as an excited utterance, "(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition." Hendricks, 408 S.C. at 532, 759 S.E.2d at 437-38 (quoting State v. Washington, 379 S.C.120, 124, 665 S.E.2d 602, 604 (2008)).

After Applicant appeared at the club a second time on November 29, 2008, Alston called 9-1-1. (Tr. 181, ll. 5-18). Presented with a disc, Alston confirmed it was a recording of her call to 9-1-1; the recording was introduced into evidence without objection. (Tr. 181-82). The disc was thereafter published to the jury. (Tr. 182, ll. 16-25). On cross-examination, Counsel confronted Alston that while during trial she consistently referred to Applicant as "D," she identified him as "Terron Dizzley" on the 9-1-1 call. (Tr. 226-27).

At the evidentiary hearing, Counsel testified to his belief that the 9-1-1 call was relevant to how law enforcement originally got involved in the case, and thus he did not object.

Counsel was correct in his judgment of the admissibility of the 9-1-1 call. The 9-1-1 call, in tandem with Alston's testimony and Evans' dying declaration, provide the context and basis for law enforcement's determination of Applicant as a suspect in Evans' killing. As such, there was no basis for Counsel to object on grounds of relevance. Any objection on hearsay grounds

would have also failed, as the statements in the 9-1-1 call were not made for testimonial purposes, but to obtain the assistance of law enforcement, and were comprised of both present sense impressions and excited utterances from Alston. Further, to whatever extent Counsel arguably could have objected, there is no reasonable probability that exclusion of the 9-1-1 call would have changed the outcome at trial, as substantially the same facts were properly submitted to the record through Alston's testimony, and did not immediately pertain to the events of the night of Evans' murder but rather related to the State's effort to establish the *res gestae* of the killing. Applicant can show neither deficiency on the part of Counsel, nor any prejudice from the deficiency alleged in this allegation, and as such the request for relief is **DENIED.**

5. Erroneous Elicitation of Harmful Testimony from Witness Marvin Riley

Applicant has failed to meet his burden of proof as to either prong of Strickland through the allegation Counsel was ineffective for eliciting harmful testimony from witness Marvin Riley. At trial, Counsel briefly cross-examined Riley on whether Applicant ever told him that his name was "Little D." (Tr. 241, ll. 15-16). Riley replied that he'd "heard that, but not from him I don't, I don't remember." (Tr. 241, ll. 17-18). Upon further inquiry by Counsel, Riley confirmed he'd heard the name. (Tr. 241, ll. 19-23). The cross-examination prompted redirect from the State on the same subject, where Riley explained he had heard the name "Little D" in the "this area,"[3] but had never heard it in Orangeburg where he was from. (Tr. 242, ll. 5-10). Riley assumed "Little D" referred to Applicant. (Tr. 242, ll. 11-18).

At the evidentiary hearing, Counsel simply replied that he had not expected Riley to give the answer he provided.

[3] Presumably Georgetown, where the trial was conducted.

As Applicant himself notes, Riley never referred to Applicant as "Little D" during his direct examination, and so Counsel was reasonable in crafting a question to seize upon that observation, and was reasonably surprised when his cross-examination backfired. In fact, Riley confirmed Counsel's question—Applicant had not referred to himself as "Little D"—while at the same time noting he had heard it elsewhere. Further, a very substantial portion of the evidentiary hearing was dedicated to a multitude of witnesses whose only purpose was to testify that they had not heard Applicant referred to as "Little D." (See Section II.A.18, below). Applicant strains credulity by simultaneously arguing (1) that Counsel was deficient for failing to call witnesses to assert that Applicant was not "Little D" and (2) that Counsel was deficient for attempting to draw out testimony to assert that Applicant was not "Little D." As to the prejudice prong of Strickland, Riley's testimony on the issue was that he assumed people were referring to Applicant as "Little D," which is so weak a link between the two that no reasonable person could conclude that there is a reasonable probability the outcome at trial would have been different if only Riley's testimony on the subject had not occurred. Finally, the testimony was merely cumulative to other testimony identifying Applicant as "Little D." Applicant has failed to establish either deficiency or prejudice under Strickland, and his request for relief by way of this allegation is **DENIED**.

6. Failure to Object to Witness Jerliether Jones' Testimony as to Victim's Overnight Stay

Applicant fails to meet his burden of proof of showing ineffectiveness from Counsel's lack of objection to Jerliether Jones' testimony explaining why Evans stayed with her for two days shortly before his murder. At trial, Jones testified that Evans stayed with her for two days at her parents house. (Tr. 250, ll. 5-16). The State asked what her understanding was of why Evans was staying there, to which Jones replied "[b]ecause he didn't just want to go to the club

or either have to deal with the whole Dizzley situation or having to run into him." (Tr. 250, ll. 17-21).

At the evidentiary hearing, Counsel testified he did not object because Jones could have known why Evans was staying in her home.

Counsel's answer at the evidentiary hearing touches on the practicality of not objecting and why the lack of objection was neither deficient nor prejudicial: the State simply would have reframed its question to ask Jones why she permitted Applicant to stay there, and she would have provided the same answer. Applicant cannot meet his burden as to either prong of Strickland by way of this allegation, and as such it is **DENIED.**

7. Failure to Elicit Testimony as to Victim's Overnight Stay

Applicant fails to present any probative evidence to support his claim that Counsel was ineffective in failing to elicit testimony from Alston or Jones that Evans stayed with Jones in order to evade warrants. The Supreme Court of South Carolina has repeatedly held "a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis original). An Applicant's mere speculation as to what a witness' testimony would have been or could have been cannot, by itself, satisfy the burden of showing prejudice. Id. Whether the State objects to hearsay speculation of what a witness' testimony would have or could have been is irrelevant, and the absence of an objection does not relieve an Applicant of the burden of producing the witness' testimony in accord with the rules of evidence. Id.

Very little testimony relating to this allegation was presented at the evidentiary hearing. Counsel testified that he was not aware Evans was the subject of any pending arrest warrants. In

reply, private investigator Benny Webb asserted that Alston told investigators that Evans was staying with Jones in order to hide from law enforcement seeking to serve him with arrest warrants.

Intending no disrespect to the investigator, Webb's multi-layered hearsay testimony is of absolutely zero probative value, is no better than if the Applicant himself asserted the same, and does nothing to help Applicant in meeting his burden. As such, Applicant has failed to show prejudice. Furthermore, Applicant's allegation is, at its core, a complaint that Counsel was ineffective because witnesses did not testify in a fashion favorable to him. Counsel cannot control the testimony of the witnesses. Applicant has failed to show any deficiency on the part of Counsel, or any prejudice from the deficiency alleged, and accordingly his request for relief by way of this allegation is **DENIED**.

*8. **Failure to Object to the State's Characterization of Witness Douglas Morris***

Applicant's allegation that Counsel was ineffective for failing to object to the State's questioning of witness Douglas Morris is without merit on its face. At trial, Morris affirmed he never heard Evans refer to "anybody else as Little D or D," and testified his belief that when Evans referred to "Little D or D," he was referring to Applicant. (Tr. 278, ll. 6-11). This Court is unable to ascertain the form of what objection Counsel was even supposed to have raised. In a case where identity is at issue, the State was well within its rights to ask a witness if he had ever heard Evans refer to anybody other than Applicant as "Little D." It is a relevant question testing the personal knowledge of the witness. Applicant cannot meet his burden under either prong of Strickland and his request for relief by way of this allegation is **DENIED**.

9. Erroneous Characterization of Witness Maurice Giles' Testimony

Applicant cannot show any ineffectiveness through his allegation that Counsel failed to object to the State's "erroneous characterization" of Maurice Giles' testimony. "It is undisputed that closing argument is not merely a time for recitation of uncontroverted facts, but rather the prosecution may make fair inferences from the evidence." United States v. Francisco, 35 F.3d 116, 120 (4th Cir. 1994); see also State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) ("Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony."). "If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs." New, 338 S.C. at 319, 526 S.E.2d at 240. "On the other hand, a closing argument may be held improper where it appeals to personal bias or arouses the jury's passions or prejudice." Id.

At trial, Giles testified that the gunman told Evans "I told you that it wasn't over with" before shooting him with a small gun. (Tr. 290, ll. 8-21). The State shortly thereafter asked Giles if he had known Applicant to be at Club Paradise, to which Giles replied that he had heard of Applicant's presence, but had never seen him there himself. (Tr. 296, ll. 5-7). Giles testified he had heard Evans mention the name "Little D or D," that he would only be referring to a single individual by that name, not multiple. (Tr. 296, ll. 12-18). On cross-examination, Counsel characterized Giles' preceding testimony as: "you said Aundry Evans did not know anybody by the name of Little D other than Terron Dizzley[;]" Giles confirmed the characterization. (Tr. 297, ll. 1-3). Upon prodding from Counsel, Giles admitted he didn't really know if Evans knew anybody else by the same name. (Tr. 297, ll. 6-13). In closing arguments, while reviewing the

testimony of every person who repeated Evans' dying declaration, the State noted that Giles heard Evans assert that "Little D shot me." (Tr. 718, ll. 11-13).

The "anyone else" question during the State's direct examination of Giles contextually linked back to the near-immediate preceding question referring to Applicant. The phrase "anyone else" is in and of itself syntactically incomplete without some subject to which the "else" compares. The "else" in the State's question at Tr. 296, line 12, refers to "Terron Dizzley" at Tr. 296, line 5. The attorneys at trial, as well as witness Giles, all clearly recognized as much as evidenced by Giles' response to Counsel's first question on cross-examination. As such, it is fair to assert that Giles testimony established that he never heard Evans identify anybody other than Applicant as Little D. Furthermore, the State was well within its right to argue the inference that Giles heard Applicant speak to Evans where other witnesses testified that Applicant was the Little D to whom Evans referred before he died. For these reasons, there was no basis for Counsel to object; and Applicant cannot show he was deficient in failing to object. As to prejudice, even if there was some basis for objection, the argument went to a fact well enough established by other evidence, such that there is no reasonable probability the outcome at trial would have been different if only Counsel had objected during the State's closing argument. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

10. Failure to Object to Inv. Melvin Garrett's Testimony as to Prior Consistent Statements

Applicant's allegation that Counsel was ineffective for failing to object to alleged hearsay testimony of Investigator Melvin Garrett during trial regarding prior consistent statements from witnesses Naomi Alston and Jerliether Jones is without merit as a matter of law and, even if it was not, is of no consequence to the outcome of the trial. A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the

statement, and the statement is one of identification of a person made after perceiving the person. Rule 801(d)(1)(C), SCRE. The State rule is identical to the federal rule. Rule 801 n. 1, SCRE; see also Fed. R. Evid. 801(d)(1)(C). If under the totality of the circumstances the identification was reliable, prior, out-of-court identifications are generally admissible, if not preferable to in-court identifications. See State v. Stewart, 275 S.C. 447, 450-51, 272 S.E.2d 628, 629-30 (1980) ("The central question is whether under the totality of the circumstances the identification was reliable[,]" and that "such evidence is for the jury to weigh."); State v. Gambrell, 274 S.C. 587, 590, 266 S.E.2d 78, 80 (1980) ("The standard for determining the admissibility of both types of identifications is whether the identification procedure 'was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'"); Samuels v. Mann, 13 F.3d 522, 527 (2d Cir. 1993) ("In-court identifications inherently lack credibility; . . . Contemporaneous identifications, on the other hand, generally are given much more credence; indeed such identifications are considered reliable enough to justify their exclusion from the hearsay rule, . . . even when the witness is unable to repeat the identification in the courtroom[.]"); United States v. Brink, 39 F.3d 419, 425 (3d Cir. 1994) ("Statements of prior identification are admitted as substantive evidence because of the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions.").

At trial, Naomi Alston testified that law enforcement presented her a photo lineup where she was asked to identify the person she knew as "D, Diz, Little D." (Tr. 191, ll. 13-22). Alston told law enforcement that she did in fact see "D, Diz, Little D," and circled "Number five." (Tr. 192-93). Jerliether Jones also testified to being presented a photo lineup where she was asked to

identify the person she knew as "Little D." (Tr. 251-52). Jones circled "number five," and identified Applicant as "D, Little D." (Tr. 252-53).

Investigator Melvyn Garrett, Jr., of the Georgetown County Sheriff's Office, testified to interviewing at least nine witnesses during his follow-up investigation of Evans' murder. (Tr. 538-41). Inv. Garrett presented Jones a photo lineup, and Jones identified Applicant in the lineup. (Tr. 541-42). After an objection from Counsel, Garrett explained that he presented Jones a photo lineup to identify who "D, Little D, or Diz or and Diz" was. (Tr. 542-43). The lineup was thereafter introduced without objection. (Tr. 543-44). Inv. Garrett also presented Alston a photo lineup for the purpose of identifying "Little D or Diz," and Alston identified Applicant. (Tr. 544-45). The lineup was introduced without objection. (Tr. 545, ll. 6-11).

At the evidentiary hearing, Counsel simply testified that a photo lineup is not objectionable if it is not suggestive.

Counsel correctly judges the issue. Absent some reason to believe the lineups presented to Alston and Jones were unduly suggestive, they are admissible. Contrary to Applicant's assertion, they do not constitute hearsay—prior identifications are specifically excluded from the definition of hearsay under the rules of evidence. Photo lineups are introduced in trials as a matter of regular course. Even if the photo lineup identifications of Applicant as "Little D" were somehow objectionable, there was no prejudice from the introduction of the lineups as they were merely cumulative to the same testimony provided earlier in the trial by Alston and Jones, and other witnesses, to that same point. Applicant cannot meet his burden under either prong of Strickland, and the request for relief by way of this allegation is **DENIED**.

11. Failure to Object to Inv. Melvin Garrett's Hearsay Identifying Applicant

Applicant's claim that Counsel was ineffective for failing to object to "I had a name" and thereafter (Tr. 545, ll. 17-21) is plainly without merit, and the Court will not belabor this allegation. Inv. Garrett never substantially offered the contents of the prior remarks to which he was referring, and the testimony was not offered to prove the truth of the matter asserted. Rather, Inv. Garrett was simply explaining why Applicant was included in the lineup at all. Applicant cannot meet his burden under Strickland by way of this allegation, and his request for relief is **DENIED**.

12. Failure to Impeach Witness Willie Stanley with Prior Inconsistent Statement

Applicant's allegation that Counsel was ineffective for failing to impeach witness Willie Stanley with a prior statement that he had not seen the events the night of Evans' murder is without merit as a matter of law. A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony. Rule 801(d)(1)(A), SCRE.

At trial, Counsel repeatedly confronted Stanley with his prior statements made to law enforcement on December 11, 2008, namely that Stanley made no mention of "money" when recalling the perpetrator's remarks to Evans in his interview with police. (Tr. 321-22; Tr. 326, ll. 3-18; Tr. 329-30; Tr. 348-50). When Counsel first confronted Stanley about whether or not he saw Evans get shot, Stanley replied that he "didn't see when [Evans] got shot. I heard shots. I didn't know he was shot." (Tr. 321, ll. 10-12). Counsel additionally confronted Stanley about whether or not he had cut a deal with the Solicitor's Office in exchange for his testimony. (Tr. 326-29).

At the evidentiary hearing, Counsel testified that he could not recall Stanley's prior statements, but clearly recalled grilling Stanley on his deal with the prosecution. Counsel opined that jurors dislike thieves, and expressed his belief that the deal for Stanley's testimony was the strongest impeachment available to him.

Once Stanley admitted he did not see the shooting, Counsel could not then turn around and grill him with prior statements to show that he did not see the shooting. Stanley's admission on that point in cross-examination ended that means of impeachment. Applicant cannot show ineffectiveness by way of this allegation, and his request for relief is **DENIED.**

13. Failure to Establish Location and Distance of Alibi Witnesses

Applicant's contention that Counsel was ineffective for inadequately demonstrating the distance between Orangeburg and Georgetown is without merit, as the distance of the locations was not a meaningful component of the alibi defense that Applicant advanced.

At trial, Daniel Robinson testified he lived in Orangeburg and had known Applicant for more than a decade, and that he had known Evans for "maybe a couple of months, wasn't long at all." (Tr. 666-67). Robinson testified that on December 1, 2008, Applicant had been at his house in the morning between 10 A.M. and noon, and then again later that night. (Tr. 667-68). Robinson testified Applicant lived in a small town near Orangeburg, but could not remember the name of the place. (Tr. 668-69). Robinson continued and testified Applicant came by his house that evening around 8:45 to 9:00 P.M. because his brother Devon was in town. (Tr. 669-70). They stayed at the house for "at least 30 miuutes, 45 minutes[,]" and then left. (Tr. 670, ll. 2-5). Robinson didn't know where they went and did not see them again that night; the next time Robinson saw Applicant was after Applicant's arrest. (Tr. 670-71). On cross-examination, the State noted Robinson's prior drug convictions from 2005 and 2008. (Tr. 671-72).

Leon "Devon" Dizzley, Jr. also testified to seeing Applicant in Orangeburg on December 1, 2008, while there visiting family. (Tr. 673-75). Devon testified he visited his brother at around 8:30 P.M. at the home of Stephon Jamison, who lived on Jamison Avenue in Orangeburg. (Tr. 675, ll. 9-22). The two thereafter visited Robinson and stayed there for thirty to forty-five minutes before returning to Jamison Avenue. (Tr. 676, ll. 2-12). Devon testified he left Applicant at Jamison Avenue around 10:00 P.M.; Applicant remained with his girlfriend, Laquesha Felder. (Tr. 676-77). Devon did not know where they went afterward. (Tr. 676, ll. 22-23). On cross-examination, Devon admitted a prior drug conviction and that while he recalled Applicant was with him that night ever since he was charged, he never spoke with law enforcement despite the efforts of the Solicitor's Office to contact him. (Tr. 678-79; Tr. 680-81).

Laquesha Felder testified she lived in Greeleyville, South Carolina with Applicant and her three children, one of which was fathered by Applicant. (Tr. 682-83). Felder testified that Applicant was home with her the morning of December 1, 2008, and that they went to visit Felder's best friend on Jamison Avenue in Orangeburg. (Tr. 684, ll. 16-22). There, Applicant met with his brother Devon and, later that night, visited Robinson's home for a while. (Tr. 684-85). When Applicant returned from Robinson's house, Applicant, Felder, and the children returned home. (Tr. 685, ll. 2-5). Felder testified Applicant stayed home that night, never left home, and was with her for the entire night. (Tr. 685, ll. 6-14). On cross-examination, Felder testified they left her friend's house around 10 P.M. and returned home around 10:30 P.M. (Tr. 685-86). Felder admitted she did not speak with law enforcement regarding Applicant's whereabouts the night of December 1, 2008, until 2012. (Tr. 686-87). Felder denied discussing her testimony with Applicant. (Tr. 688-89).

At the evidentiary hearing, Devon testified to substantially the same alibi. Devon further testified that the drive from Orangeburg to Oatland Road takes about two hours. Devon additionally noted that Applicant lived "further away from Georgetown." Through Devon, Applicant introduced maps of directions indicating a travel time of 2 hours and 18 minutes. Felder also substantially testified to the same alibi as she did at trial. Robinson also testified to substantially the same alibi as he did at trial, and additionally testified that it took between 2 and 2 ½ hours to get from his home to Club Paradise.

Counsel testified that he advanced the alibi in both the first and second trials, and asserted he felt he did a good job in both trials. Counsel opined that the jurors in the second trial were less willing to accept family and friends as legitimate alibi witnesses. Counsel further expressed his belief that Applicant should not have been convicted, but that he had to live with it. On cross-examination, Counsel testified he felt he sufficiently established the distance from Orangeburg to Oatland Road.

Applicant fails to establish any deficiency or prejudice. First, the distance from Orangeburg to Club Paradise is irrelevant where the alibi advanced provides no possible opportunity for Applicant to have gone to Club Paradise. If the testimony of the alibi witnesses is accepted as credible, Applicant was in Orangeburg until around 10 P.M., and then went home with Felder, with whom he remained for the rest of the night. Second, there is no evidence to show and no reasonable probability that any of the jurors were of the misunderstanding that one could drive from Orangeburg to Oatland Road outside of Georgetown in the thirty minutes between when Applicant purportedly left Richardson's house and when Evans was shot and killed around 10:30 P.M. Third, any effort to establish distances would have likely only served to have undermined Applicant's alibi defense; Felder testified they made it home from

Orangeburg in thirty minutes, despite the practical implausibility of traveling from Orangeburg to Greeleyville in thirty minutes. Counsel adequately advanced an alibi case that, if accepted by the jury, would have foreclosed Applicant's ability to commit the crime, and the additional evidence Counsel purportedly should have introduced would not have meaningfully bolstered that alibi. Applicant has failed to meet his burden of proof for either prong of Strickland, and the application for relief is **DENIED**.

14. Failure to Call Alibi Witnesses Stephon Jamison and Clareese Jamison

Applicant failed to meet his burden of showing prejudice from Counsel's failure to call Stephone Jamison and Clareese Jamison at trial. Again, the Supreme Court of South Carolina has repeatedly held "a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis original). Neither witness was presented at the evidentiary hearing, such that we are left with mere speculation as to what, if anything, they would have or could have testified to. Applicant's claim for relief by way of this allegation is **DENIED**.

15. Failure to Object to the State's Closing Describing Victim's Identification of Eyes

Applicant's allegation that Counsel was ineffective in failing to object to the prosecution's closing argument that Evans "looked into his shooter's eyes" is without merit because the State was within its rights to argue that inference and employ that persuasive license from the facts presented at trial, and because Counsel articulated valid strategic reasons not to object. The law pertaining to the propriety of the prosecution's closing argument is already set forth in Section II.A.9, above.

At trial, Douglas Morris testified that when he went to Evans after the shooting, Evans was holding his stomach after being shot. (Tr. 276, ll. 5-12). Maurice Giles testified that the shooter was masked, but that he could see "the eyes area" that the assailant was black. (Tr. 290, ll. 1-7; Tr. 303, ll. 4-6). Willie Stanley also testified to the incomplete coverage of the mask, and that he could tell the shooter was a black individual of "medium complexion." (Tr. 314, ll. 2-8). The forensic pathologist who conducted the autopsy, Dr. Cynthia Schandl, testified to at least one bullet wound to Evans' belly. (Tr. 440, ll. 16-17).

Counsel testified at the evidentiary hearing that he believed the description was "over the top" and offered his retrospective belief that he should have objected. However, Counsel also testified that he attempted to measure the jury's reaction to remark and, based upon his observations, decided to not object. Counsel testified that he did not want to draw the jury's attention to the State's argument and was concerned an objection would harm Applicant.

Gunshots to Evans' front midsection, described as his belly or his stomach, would provide for the inference that at some point he was facing his assailant. Because Evans was facing his assailant, the State was within its rights to argue the inference that he was looking at his assailant, and to employ the persuasive phrasing that Evans "looked into his shooter's eyes as he fell to the floor[.]" Furthermore, Applicant mischaracterizes the record in arguing that the only evidence was that Evans identified Applicant by his voice. The record is only that Evans identified his assailant as "Little D." There is no evidence that Evans explained how he identified his attacker. Rather, the record presents limitations on what was and was not available to Evans to make the identification. Evans could not see most of his assailant's face, but the shooter's eyes were visible, as reported by Giles and Stanley, and the shooter's statement to Evans presented an opportunity for voice identification. The likeliest explanation is that Evans

identified Applicant as his shooter in light of the totality of the circumstances and details available to him—the shooter's eyes, build, voice, and the events relating to Applicant over the prior days leading to Evans' murder. In any event, the description that Evans "looked into his shooter's eyes" does not *per se* imply Evans identified his assailant by his eyes; the description simply asserts he looked into his shooter's eyes. The State's closing argument was justified by the record.

Even if the State went too far in closing, Counsel articulated a valid strategic reason to not object. Neither the Respondent, nor PCR counsel, nor the undersigned had the opportunity to observe the original trial jury, judge their reactions, and weigh how to proceed accordingly. Counsel did. Counsel observed the jury during the closing arguments, and during the State's assertion that Evans "looked into his shooter's eyes" and determined an objection would be more harmful to his client than helpful. Counsel's judgment in that regard constitutes a valid tactical decision such that there can be no finding of ineffectiveness. See Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)) ("Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

Finally, Applicant cannot show a reasonable probability that the outcome at trial would have been different had Counsel objected to the State's description. The description was a single line built to lead into Evans' dying declaration. For all of these reasons, Applicant has failed to meet his burden of showing either deficiency on the part of Counsel, or any prejudice from the deficiency alleged, and his request for relief by way of this allegation is **DENIED**.

16. Failure to Object to the State's Improper Vouching in Closing Argument

Applicant vaguely alleges Counsel failed to object to improper vouching during the State's closing argument, but no testimony on this allegation was elicited during the evidentiary hearing. As such, Applicant has presented no evidence to rebut the presumption of effectiveness, and this allegation is **DENIED**.

17. Erroneous Statement in Closing

Applicant fails to meet his burden as to either prong of Strickland through his allegation Counsel was ineffective due to a remark he made in the course of his closing argument. During his closing argument at trial, Counsel argued in part:

> His Honor will instruct you that with respect to testimony, when a person takes the witness stand, they place into issue their credibility, that is their believability, and ladies and gentlemen, you've lived a long time. How do you determine whether or not a person's credible? Do you look at their demeanor? Do you look at their appearance on the witness stand, their ability to recall things, the opportunity that they have to observe things that they claim that they saw how well they can see, how well they can hear, because, see in this case that the one witness, the one witness that's got Terron Dizzley sitting where he's sitting today didn't even show up for court, and he couldn't show up for court because he's deceased.

(Tr. 698, ll. 8-20). Counsel then proceeded to challenge the veracity of Evans' identification of his killer and the testimony of those who claimed to have heard it.

At the evidentiary hearing, Counsel testified he was trying to lead the jury to conclude the identity of the shooter had not been established beyond a reasonable doubt. Counsel noted there was no first-hand identification of the shooter available at trial, and that he argued the witnesses to the shooting were not credible. Counsel recalled that Evans lived long enough to be transported to the hospital and have a conversation with his father. Counsel asserted his philosophy that a defense attorney has to think like a lay juror. On cross-examination, Counsel

rejected Applicant's contention that his closing argument conceded the question of the shooter's identity, and again emphasized that Evans wasn't at trial, and Evans did not clarify who shot him despite ample opportunity to do so.

Counsel adequately explained at the evidentiary hearing the intention behind his argument, which is reasonably discernable from the closing argument taken as a whole—whatever confusion the lines in isolation might cause are cleared up when considering the argument as a whole. Counsel did not concede that Applicant was the shooter or that Applicant was "Little D." Applicant's allegation is little more than an effort to extract a few lines out of an extensive closing argument made at the end of a four day trial in an effort to cast over it the pall of a negative interpretation. Deliberately contorting an argument into a negative interpretation is not a sufficient basis for finding a defense attorney deficient. There is no reasonable probability that the outcome of trial would have been different had Counsel advanced his thoughts in a different way, and it is not the purpose of post-conviction relief to begin with to hold defense attorneys ineffective because in retrospect an idea could have been phrased more effectively. Applicant has failed to demonstrate either deficiency of Counsel, or prejudice from the deficiency alleged, and the application for relief is **DENIED**.

18. Failure to Call Witnesses to Refute Applicant's Identification as "Little D"

Applicant has failed to meet his burden of showing Counsel was deficient in failing to call additional witnesses to contest that he was "Little D," or that he was prejudiced by the absence of said witnesses.

Testimony at Trial

Multiple witnesses testified at trial regarding Applicant's nicknames. Naomi Alston referred to Applicant as "Diz," and when pressed further explained he was called "D and Diz," as

well as "Little D when he's talking to his kids." (Tr. 177, ll. 3-11). Alston recalled telling investigators that she knew Applicant as "D, Diz, Little D." (Tr. 191, ll. 19-22). Marvin Riley testified on cross-examination by Counsel that he had heard the name "Little D," but that he did not recall Applicant ever indicating it was his nickname. (Tr. 241, ll. 15-22). Jerliether Jones testified that she recognized Applicant at trial and immediately referred to him as "D," and thereafter explained she knew him as "Little D and just D." (Tr. 246, ll. 7-24). Jones further testified the Victim called Applicant "D and Little D, also[,]" and that she never heard him call anybody else "Little D[.]" (Tr. 247, ll. 6-17). Jones communicated to law enforcement that she knew Applicant as "Little D and D," and pointed out Applicant in a photo lineup. (Tr. 251-53). Douglas Morris testified he never heard Evans refer to anybody other than Applicant as "Little D" or "D." (Tr. 278, ll. 6-11). Maurice Giles testified he had heard about Applicant being at Club Paradise, and that Evans had mentioned "Little D or D" in reference to nobody else but Applicant, but that Giles never saw the man. (Tr. 296-97).

Willie Stanley could not say how many people Evans referred to as "D" or "Little D." (Tr. 320, ll. 14-18). Counsel elicited testimony from witness Larry Cooper that he had never heard the name "Little D." (Tr. 367-68).

During closing arguments, Counsel focused on the accuracy of Evans' identification, the credibility of the dying declaration in light of Applicant's failure to make it to any law enforcement or paramedics, the credibility of the witnesses for the State, and Applicant's alibi. (Tr. 698-710).

Testimony at the Evidentiary Hearing

Applicant presented numerous witnesses at the evidentiary hearing to testify to this allegation. Corporal James Elmore, of the Georgetown County Sheriff's Office, testified that he

knew Applicant from working in the community, and that while Applicant was called "Diz," he had never heard anybody refer to him as "Little D" or "D."

Applicant's mother, Gwendolyn Frasier, testified that Applicant was called "Diz," "Shard," and "Cooter," but that she had not heard anybody refer to him as "Little D" or "D." Frasier noted she called her son by his middle name, "Gerhard."

Joyce Brown, Applicant's aunt, testified she never heard anybody call Applicant "D" or "Lil D." On cross-examination, she further testified that she did not know anybody called "D" or "Lil D."

Leon "Devon" Dizzley Jr., Applicant's brother, testified Applicant's nickname was "Shard." Devon testified he never heard anybody call Applicant "D" or "Lil D." On cross-examination, Devon further testified that he did not know anybody called "D" or "Lil D."

LaQuesha Felder, mother to one of Applicant's children, testified Applicant was called "Shard" and "Diz." Felder noted that Evans had stayed with she and Applicant on prior occasion. Felder testified she never heard Applicant called "D" or "Lil D." On cross-examination, Felder further testified that she did not know anybody called "D" or "Lil D."

Daniel Robinson, an acquaintance of Applicant for around ten years, testified he only ever heard Applicant called "Shard." On cross-examination, Robinson testified he did not know anybody named "D" or "Lil D."

Carlos Wineglass, a childhood friend of Applicant, testified that Applicant was called "Diz," and that nobody called him "D" or Lil D." Wineglass testified he knew Evans. Curiously, on cross-examination, Wineglass testified that he *did* know somebody called "D" or "Lil D," but firmly denied that individual had anything to do with Evans' murder. Upon repeated questioning, Wineglass refused to give up the name of the person he knew as "Lil D."

Grover Gasque, Jr., a barber in Georgetown who knew Applicant for two decades, testified Applicant was called "Diz" or "Shard." Gasque noted he was present at the trial, but did not testify or ever talk to Counsel. On cross-examination, Gasque clarified he made no effort to talk to Counsel. Gasque further testified that he did not know anybody called "D" or "Lil D."

Sacajawea Collins, a corrections officer who met Applicant and Evans in high school, testified she only knew Applicant as "Gerhard," his middle name. Collins testified she never heard any other nickname, and had never heard Applicant called "D" or "Lil D." On cross-examination, Collins further testified she did not know anybody called "D" or "Lil D."

Autaurus Dizzley, Applicant's brother and a pastor in Augusta, Georgia, testified Applicant was called "Gerhard," "Shard," and "Diz." On cross-examination, Autaurus further testified he did not know anybody called "D" or "Lil D."

Willie McCain, a childhood friend of Applicant's, testified Applicant was called "Shard." McCain testified that he went to school with Evans, and that he never heard Evans call Applicant "D" or "Lil D." On cross-examination, McCain further testified he did not know anybody called "D" or "Lil D."

Applicant testified that he never went by the name "Lil D," and that he wanted Counsel to put up witnesses to testify that he was not called "D" or "Lil D."

Counsel testified that he considered pursuing a strategy of third-party guilt, but felt he lacked any kind of motive to make such a strategy stick with the jury. Nonetheless, Counsel testified that he would have called any people Applicant wanted him to call. Counsel noted that Applicant did not testify, and explained that in two prior instances where Counsel's clients were convicted of murder, both instances involved the client testifying. Consequently, Counsel emphasized that he does not advise his clients to testify unless their back is against the wall.

On Applicant's cross-examination, Counsel testified his theory of the case was "reasonable doubt"—there was no physical evidence to connect Applicant to the crime and nobody was ever able to identify "Terron Dizzley" as the shooter. Counsel testified that he was not sure the jury hung its hat on connecting Applicant to the nickname "Lil D," and further testified that he did not want to play with the business of who "Lil D" was. Counsel firmly stood by his conviction in this regard during a heated exchange with Applicant's PCR counsel. Counsel recalled the first time he heard that Applicant was "Lil D" was the first time he went to Orangeburg to investigate the case. Counsel did not feel the need to ask Applicant's witnesses if Applicant was "Lil D." Counsel, expanding upon his theory of the case, explained he wanted the jury to believe Evans was killed in retaliation for robbing drug dealers.

Conclusion

The curious aspect of the parade of witnesses offered by Applicant to argue that he is not "Little D" or "D" is the differenees in the nicknames they *do* offer for Applicant. Some simply call him by his middle name "Gerhard." Some call him "Shard." Some called him "Diz." One called him "Cooter." Despite multiple witnesses claiming close relationships with both Applicant and Evans, nobody knew anybody named "Little D" or "D," with the exception of Wineglass, who refused to identify the supposed alternative-D. The inability of any of these witnesses to identify "Little D" despite assertions of familiarity with Evans and the evident import of the name to Evans as he lay on the floor of Club Paradise, shot and dying, serves to undercut the credibility of their testimony in the presence of this Court and the idea that they were so close to Applicant and Evans as to be authorities on who is nicknamed what. Though Applicant argues that the witnesses show he is not "Little D" or "D," the only clear conclusion

from their testimony at the evidentiary hearing is that Applicant evidently has a diverse array of nicknames, and goes by different nicknames in his different social circles.

Throughout the hearing various witnesses for Applicant attempted to advance testimony to apparently show Evans was an individual of ill-repute. Assuming *ad arguendo* that Evans was a man up to no good, Applicant, by his own testimony and the testimony of numerous others, was previously very close to Evans, despite Evans' supposed bad character. Given the evidently upstanding character of Applicant's family, it stands to reason that the nicknames Applicant would utilize in his shadier relationship with Evans would potentially not overlap with those known and utilized by his family, as they would clearly be different social circles.

Further, Robinson, Felder, and Devon all testified at trial to establish Applicant's alibi defense, which failed. The jury, given an opportunity to pass upon their weight and credibility in the context of the alibi, evidently did not find them credible. It cannot now be said the same witnesses would have been more compelling had they been questioned on the subject of Applicant's identity in addition to the alibi. Having enjoyed the opportunity to closely observe these three witnesses, the Court similarly finds their testimony to be not credible.

Absent some ability to affirmatively identify some third party as "Little D" or "D," the testimony of the witnesses presented simply does not rise to the level necessary to show a reasonable probability of a different outcome at trial. Only Wineglass hinted at the possibility, and given his unwillingness to testify to the third-party's identity at the evidentiary hearing, Applicant can hardly assert that he would have been willing to do so at trial. Applicant presents a voluminous but ultimately unconvincing, and potentially self-defeating effort at establishing Strickland prejudice.

Counsel identified the problem in determining that without a clear identity and motive, he could not advance a third-party guilt strategy, and avoided directly tangling with the "Applicant = Little D" issue beyond those opportunities presented at trial. And Counsel *did* seize upon those opportunities as they occurred during trial, as evidenced by his questioning of Cooper. Counsel focused his attention on impeaching witnesses by other means, and did so thoroughly. Though Applicant was incredulous at Counsel's rejection of the "Applicant = Little D" issue as the crux of the case, Counsel was not unreasonable to focus instead on impeaching the witnesses who together testified to establish a motive in the form of Applicant and Evans' disputes. Counsel identified a broad strategy of "reasonable doubt," and executed thereupon by (1) working to diminish the value of the State's witnesses and (2) working to establish an alibi.

Applicant has failed to meet his burden of proving either prong of Strickland, and his request for relief by way of this allegation is **DENIED.**

19. Failure to Inquire as to Tanya Sisk, Juror 332

Applicant cannot show any ineffectiveness of Counsel in failing to inquire further regarding Tanya Sisk's discussions with other jurors about seeing Applicant out on bond because Counsel articulated a valid strategic reason for keeping the jury intact as it was then comprised and because there is no evidence any juror was tainted by Sisk's confusion and discussion.

At the start of the final day of trial on April 3, 2014, the State brought to the trial court's attention a "juror issue" to require the testimony of Investigator Dustin Morris. (Tr. 571, ll. 1-9). Inv. Morris testified:

> As I was coming in for court this morning, one of the jurors, a white lady with glasses, approached me about the Defendant. She asked me if – that I knew he was out, basically, that he was – he had driven to court. She was concerned about him not being in jail, and I indicated he was out on bond and that was a stipulation of the Court.

(Tr. 572, ll. 1-6). Inv. Morris denied discussing any substance of the case with the juror, but testified that he asked if Applicant had made any threats to her; the juror replied he had not. (Tr. 572, ll. 11-15). Inv. Morris affirmed he simply felt it was his duty to make sure she did not feel like she was in any danger, and he walked her to the courthouse from the parking lot while discussing the weather. (Tr. 572, ll. 16-20). On cross-examination by Counsel, Inv. Morris reiterated the substance of Sisk's question, and that he had affirmed Applicant's right to be out on bond. (Tr. 573, ll. 1-6). After Inv. Morris concluded his testimony, the jury as a whole was brought into the courtroom so that he could identify the juror with whom he had spoken. (Tr. 574, ll. 1-18).

The Court questioned Tanya Sisk, juror 332, who explained she had told Inv. Morris that she "was a little surprised to see the Defendant in the parking lot and, and was that normal, and he said yes, and he asked if I felt the least bit threatened or concerned and I said absolutely not." (Tr. 575, ll. 9-12). Sisk was merely surprised to see Applicant drive himself to court, and Inv. Morris indicated everything was fine. (Tr. 575, ll. 14-19). Sisk affirmed her ability to remain fair and impartial in judging the case, and denied feeling threatened in any way. (Tr. 575-76). After a follow up question by Counsel and Sisk's reaffirmation of her surprise that Applicant was driving to court despite serious charges, Judge John explained to Sisk the presumption of innocence, and the right to reasonable bond. (Tr. 576-77). Sisk indicated she agreed with those concepts and that she had no difficulty with the way the justice system operated. (Tr. 577-78).

At the evidentiary hearing, Gwendolyn Frasier, Applicant's mother, testified that during trial a juror indicated she did not understand why Applicant was driving himself to court, and that the issue was brought to the attention of the trial court. Frasier recalled Counsel expressed

that he preferred that juror over the alternate who would have taken her place if she were removed.

Dasjuana Johnson, juror #189 at trial and the alternate who ultimately joined in the conviction, testified that another juror expressed a concern about running into Applicant outside of court. Johnson explained there was a conversation among the jurors about Applicant's release during trial, but that "they"[4] made sure everybody felt safe. Johnson could not recall the bailiffs or the judge saying anything on the subject. On cross-examination, Johnson affirmed she still felt she judged Applicant's guilt in a fair and impartial manner.

Autaurus Dizzley, Applicant's brother, testified he spoke with Counsel outside of the courtroom during trial and expressed that he wanted the juror removed. Counsel disagreed and replied that he preferred the concerned juror over the alternate who would take her place.

Applicant testified that he spoke to Counsel regarding the concerned juror. Applicant recalled Counsel told him "I don't want to put that redneck cracker on," referring to the alternate. Applicant further testified Counsel expressed his belief the alternate was a "dominant white male" who would "run away with the jury."

Counsel denied calling the juror a redneck, but affirmed that he did not want the alternate juror to be seated. Counsel recalled feeling that Judge John's admonition to the jury tilted the juror to Applicant's favor, but speculated that the juror did have some bias. Counsel testified that some portion of the juror issue was handled at a sidebar during trial, and thus not reflected on the record.

As noted earlier, neither Respondent, PCR counsel, nor this Court were present at the original proceedings to gauge the conduct of the jurors and react accordingly, but Counsel was,

[4] Presumably law enforcement.

and in his observations and judgment determined that any course of action which would result in the alternate being placed on the jury would be detrimental to his client. Because Counsel articulated a valid strategic reason for keeping the jury intact as it was then comprised, this Court court cannot find him ineffective. See Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)) ("[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel."). Additionally, Applicant presents no testimony to show any improper influence, bias, or other taint in the jury. To the contrary, Sisk's testimony at trial and Johnson's testimony at the evidentiary hearing, along with the duration of the deliberations and the nature of the questions the jury asked, collectively show that the jury maintained its commitment to remain fair and impartial. Applicant fails to show any ineffectiveness, and his request for relief by way of this allegation is **DENIED.**

20. Failure to Request Testimony be Replayed to Jury

Applicant cannot show any ineffectiveness of Counsel in his decision to not request testimony be replayed for the jury. "The trial judge, in his discretion, may permit the jury *at their request* to review in the defendant's presence, testimony after the beginning of deliberations." State v. Carlson, 363 S.C. 586, 601, 611 S.E.2d 283, 291 (Ct. App. 2005) (quoting State v. Plyler, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980)) (emphasis added).

During jury deliberations, the jury sent out an inquiry asking "When did the witnesses, Mo, Naomi, D.J. and Willie Stanley report, 'I heard Dre say Little D, Diz, did it'?" (Tr. 748, ll. 9-20). The trial court remarked the jury was asking him to comment on the facts, then further explained that while he could not do that, he could replay testimony for them. (Tr. 748-49). The foreperson inquired if prior testimony could be read instead of reheard, to which the trial court

replied that it could not answer at that time, but that the jury absolutely could listen to portions of testimony. (Tr. 751, ll. 3-18). The trial transcript does not reflect the jury ever asked to listen to testimony again.

At the evidentiary hearing, Counsel testified he did *not* want to replay testimony after the jury sent out its question. Counsel's read of the jury's question was that it demonstrated they had doubt about Applicant's guilt, and he did not wish to do anything that would possibly cure that doubt. Counsel testified he wanted to "leave the door open." On cross-examination, Counsel challenged Applicant's assertion that the jury misheard, and contended that he saw no difference between "D" and "Diz."

Because the jury did not ask to again listen to portions of the testimony, Counsel had no basis on which to ask the trial court to force them to again review the testimony; the law only provides to replay testimony at the jury's request. For the trial court to impose upon the jury an obligation to rehear testimony without their request, based upon the indicia of the jury's understanding of the facts, would implicitly communicate from the trial court to the jury that they did not properly understand the facts, such that the court would be functionally commenting on the facts of the case. Additionally, because Counsel articulated a valid strategic reason at the evidentiary hearing, the PCR court cannot find him to be ineffective. Preservation of uncertainty, especially where the overarching strategy is simply "reasonable doubt," is a valid, if not crucial basis for making decisions on how to proceed during trial. Accordingly, Applicant cannot meet his burden under Strickland by way of this allegation, and his request for relief is **DENIED.**

21. Cumulative Error

Applicant's demand for relief by way of cumulative error analysis of the above twenty allegations calls for analysis not at this time recognized by South Carolina precedent, which runs contrary to the fundamental character of Strickland v. Washington, and which is not appropriate to even consider in the present case where no deficiencies have been established.

"Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina." Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 324-25 (2002); see also Lorenzen v. State, 376 S.C. 521, 535 n.3, 657 S.E.2d 771, 779 n.3 (2008) (recognizing the same and declining to answer the issue given the facts of the case). Notwithstanding the unsettled question, "the threshold to asking the cumulative prejudicial question is to first find multiple errors." Green, 351 S.C. at 197, 569 S.E.2d at 325; see also Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701,710 (2006) (finding no need to attempt a cumulative error analysis where several errors are not present); Walker v. State, 397 S.C. 226, 239, 723 S.E.2d 610, 617 (Ct. App. 2012) (reversed on other grounds 407 S.C. 400, 756 S.E.2d 144 (2014)) (reversing a grant of relief based upon cumulative error where the lower court erred in finding three instances of deficiency on the part of counsel).

The "cumulative error" analysis demanded by Applicant is not appropriate. In Fisher v. Angelone, 163 F.3d 835, 852-853 (4th Cir. 1998), cert denied 526 U.S. 1035 (1999), the Fourth Circuit Court of Appeals held that consideration of the cumulative effect of attorney error was inappropriate where the claims, taken individually, did not violate the defendant's constitutional rights. The Fisher court noted that a constitutional error in terms of the Sixth Amendment right to counsel occurs only upon a showing of *both* deficient performance *and* prejudice. If no individual claim on its own amounts to constitutional error, then the claims cannot collectively

amount to error. Put another way, "the fact that many claims of counsel error are pressed does not alter the fundamental math—a string of zeros still adds up to zero." Hunt v. Smith, 856 F.Supp. 251, 258 (D.Md. 1994). The Fourth Circuit dissolved any possible confusion: "[t]o the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now." Fisher at 852; see also Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996), cert denied, 519 U.S. 968 (1996) ("Errors that are not unconstitutional individually cannot be added together to create a constitutional violation.").

Additionally, a key point in the standards for measuring ineffective assistance of counsel under Strickland v. Washington is that the principles set forth in the case . . .

> . . . do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on the produce just results.

Strickland, 466 U.S. 668, 696 (1984). To the extent Applicant advances "cumulative error" as a means of analyzing Strickland prejudice by totaling some ephemeral quanta of prejudice across the numerous allegations, Applicant's demand runs contrary to the anti-mechanical tilt of Strickland. The Strickland court explicitly advises against such calculus when it tells lower courts to approach the problem in whatever order is quickest:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the

> defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland at 697. The cumulative summation of prejudice would require this Court, and indeed every court, to analyze both prongs in every case in mechanical, burdensome fashion. The cumulative summation of prejudice would also perversely incentivize applicants to raise not only their best grounds for relief (as is consistent with best practices for appellate advocacy), but raise as many allegations as possible in every case in the hopes of landing enough glancing blows to knock out their conviction. A plethora of post-conviction relief and appellate allegations cannot accumulate to an applicant's benefit; to the contrary, the multiplicity betrays the inadequacy of any single allegation. See, e.g. Fifth Third Mortgage Co. v. Chicago Title Ins. Co., 692 F.3d 507, 509 (6th Cir. 2010) ("When a party comes to us with nine grounds for reversing the district court, that usually means there are none."); Pierce v. Visteon Corp., 791 F.3d 782, 788 (7th Cir. 2015) (raising 13 issues on appeal violates principle that counsel must concentrate attention on best issues); but see Love v. State, Op. No. 27921 (S.C. Sup. Ct. filed Oct. 2, 2019) (Shearouse Adv.Sh. No. 39 at 19) ("Because applicants are traditionally entitled to only one 'bite at the apple,' it is imperative that applicants raise *all known issues* in their original, supplemental, or amended applications.") (emphasis added).

In any event, even if this Court were to apply a cumulative summation of prejudice analysis to this case, the sum would be "zero" because Applicant has failed to meet his burden of demonstrating any deficiencies of counsel, let alone more than one.

To the extent Applicant requests cumulative error analysis only insofar as the Court should look at the totality of the circumstances, independent of any particular allegation advanced, Applicant essentially calls not for cumulative error, but analysis under United States v. Cronic, 466 U.S. 648, 658 (1984). Generally speaking, attorneys are presumed competent to provide "the guiding hand that the defendant needs," such that "the burden rests on the accused to demonstrate" a violation of the Sixth Amendment. Id. However, there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Id. Prejudice may be presumed *per se* in three circumstances: (1) when a defendant is completely denied counsel at a critical stage of his trial; (2) when there has been a constructive denial of counsel from an attorney's complete failure to subject the prosecution's case to meaningful adversarial testing; and (3) when circumstances of trial are such that the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that the presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. Nance v. Ozmint, 367 S.C. 547, 551-52, 626 S.E.2d 878, 880 (2006); Cronic, 466 U.S. at 659-60. "A finding of *per se* prejudice under any of these three prongs is 'an extremely high showing for a criminal defendant to make.'" Nance, 367 S.C. at 552, 626 S.E.2d at 880 (quoting Brown v. French, 147 F.3d 307, 313 (4th Cir. 1998)). Presumption of prejudice as a standard is only used for those cases where counsel fails to "function in any meaningful sense as the Government's adversary." Id., 367 S.C. at 552, 626 S.E.2d at 881 (quoting Florida v. Nixon, 543 U.S. 175, 190 (2004)).

Any analysis under Cronic, of course, would be unavailing to Applicant. There is no evidence to even consider the first or third circumstances articulated in Nance. As to the second, the record demonstrates Counsel's active efforts in advocating for his client, demonstrates his

attentive modifications in strategy after the jury hung in the first trial, and Counsel's credible refutation of the claims he was sleeping through trial (only dozing during deliberations). Counsel impeached the witnesses against his client in the fashion he deemed most appropriate in light of his nearly *four decades* of experience. The duration of the deliberations and questions asked by the jury in the course of those deliberations reflect their thorough consideration of the evidence and the arguments advanced by Counsel in his efforts to establish reasonable doubt.

For all of these reasons, Applicant can no more prevail by way of "cumulative error" than he can by the individual merits of the errors he alleges; his demand for cumulative error analysis and his demand for relief thereby are both **DENIED.**

B. Newly-Discovered Evidence

Applicant's assertion that his discovery of Tanya Sisk's (Juror 332) discussion of concerns with other jurors constitutes newly-discovered evidence, such that he should be entitled to an evidentiary hearing, is without merit. The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

> (1) Is such as would probably change the result if a new trial was had;
> (2) Has been discovered since the trial;
> (3) Could not by the exercise of due diligence have been discovered before the trial;

(4) Is material to the issue of guilt or innocence; and,
(5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)).

The substantive facts pertinent to this claim are already set forth in Section II.A.19, above. First, the information discovered is not evidence, so it would have no impact on a subsequent proceeding if a new trial was had. Second, the information asserted as newly-discovered could have been discovered at the time of trial by way of further questioning of Sisk. Counsel declined to do so because he didn't wish to get stuck with the alternate, who he though would be affirmatively detrimental to his client. Third, the only evidence is that the jury remained fair and impartial, and that Sisk's surprise was merely that—innocent surprise of no detrimental impact to anybody. For these reasons, as well as those considered in the context of the claim as it related to Applicant's allegations of ineffective assistance of counsel, Applicant's request for a new trial based upon newly-discovered evidence is **DENIED.**

C. Applicant's *Pro Se* Claims Asserted at the Hearing, Post-Hearing Filings

This Court declines to consider Applicant's claims raised from the stand at the evidentiary hearing, where he proffered testimony as the *fourteenth* witness for his case, as they constitute (1) an attempt at impermissible hybrid representation and (2) were not properly pled before the hearing in the application or subsequent amendments.

"Since there is no right to 'hybrid representation' that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel." Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010); see also State v. Stuckey, 333 S.C. 56, 58, 508 S.E.2d 564 (1998) (refusing to consider *pro se* brief on appeal because there is no right to hybrid

representation); State v. Devore, 416 S.C. 115, 123, 784 S.E.2d 690, 694 (Ct.App. 2016) (*Pro se* filing a nullity where person was represented by counsel). Where an Applicant seeks to submit a filing through his or her attorney, counsel has an obligation to use professional judgment and review arguments offered by his or her client. Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517 (2002). "[C]ounsel may not serve as a mere conduit for *pro se* documents in an effort to avoid the prohibition against hybrid representation[.]" Id.

In the present matter, Applicant commandeered the witness stand (over State's objection) to assail PCR counsel Eleanor Cleary, Applicant's *fourth*[5] counsel to represent him in the course of this collateral attack, and proffer into the record allegations he wished to raise but which Cleary, in her professional judgment, had not included in her exhaustive amendment to the application. Though precedents relating to hybrid representation concern written filings, where Applicant attempts to circumvent the prohibition against hybrid filings by simply orally pronouncing their contents from the stand, the outcome *must* be the same.

Subsequent to the evidentiary hearing, Applicant submitted *voluminous* materials signed November 26, 2018, and received by the Lieber Correctional Institute mailroom on February 11, 2019, apparently intended to both function as a motion to amend his application after the evidentiary hearing and serve as a *pro se* post-hearing memorandum. Applicant's *pro se* motion to amend and arguments concurrently submitted, as well as the numerous other documents sent directly to this court's chambers are stricken from the record as impermissible hybrid representation squarely within the concern of Miller, Stuckey, and Devore.

[5] Applicant was originally represented by Jeremy Thompson, Esq. After he was relieved, Applicant was appointed James K. Falk, Esq. After an unexpected continuance in the case in May 2017 due to an ill court-reporter, Applicant retained Leah Moody, Esq. After the attorney-client relationship between Applicant and Moody soured, Applicant retained Eleanor Cleary, Esq..

Secondly, only rarely have the courts excused applicants from procedural failures such as Applicant's. Mangal v. State, 421 S.C. 85, 96, 805 S.E.2d 568, 573 (2017). "In most PCR cases, [the Court has] refused to excuse the pleading and issue-preservation requirements that apply in all civil cases." Id., 421 S.C. at 97, 805 S.E.2d at 574. This Court thus may rightfully decline to address an issue that is not properly raised to it. The Sixth Amendment guarantee of effective assistance of counsel is a bedrock principle in or justice system, and PCR courts should be flexible with procedural requirements *before* PCR applicants procedurally default substantial claims, Id., 421 S.C. at 99-100, 805 S.E.2d at 575-76, but this is *not* the case for such flexibility. Applicant has hired and fired three different PCR attorneys and seeks to have his current counsel relieved. His current Counsel amended his application to allege twenty-two grounds for relief. His PCR hearing was delayed on numerous occasions to accommodate his requests to substitute Counsel. He has had a full opportunity, through Counsel, to address any alleged errors.

For all of these reasons, this Court rejects Applicant's attempts to amend allegations *pro se* during and after the evidentiary hearing, the allegations thereby raised are not considered by this Court, and any related filings are stricken from the record.

D. Motions to Relieve PCR Counsel

Since the evidentiary hearing, Applicant has repeatedly endeavored to relieve PCR counsel Eleanor Cleary. The efforts of PCR applicants to relieve without sufficient cause their counsels is a recurring problem, and constitute an abuse of the judicial process, resulting in significant delays. Our state's Supreme Court has stated this conduct should not be tolerated, much less acquiesced in, by judges presiding over PCR matters. Richardson v. State, 377 S.C. 103, 105, 659 S.E.2d 493, 494 (2008). Mere disagreement between an applicant and his or her PCR counsel as to how to proceed with the application, including the allegations to be raised, is

not sufficient cause to require a PCR judge to replace or offer to replace counsel. Id., 377 S.C. at 106, 659 S.E.2d at 495. "Counsel should not be relieved, and the process delayed, because an applicant is dissatisfied with counsel's legitimate refusal to pursue allegations that are meritless and/or not proper in PCR." Id.

Since this Court issued its informal order denying relief, PCR counsel Cleary has herself filed a motion seeking to be relieved as counsel in light of a lawsuit brought against her by Applicant in the Richland County Court of Common Pleas on June 25, 2019. (2019-CP-40-03442).

The long road of this action nears its end in the circuit court, and PCR counsel Cleary's patient service to her client and the Court requires little more action on her part beyond a confirmation that the issues raised to the court are ruled upon in this order, and the ministerial act of filing a notice of appeal, which Applicant doubtlessly desires. The motions to relieve PCR counsel are **DENIED.**

III. CONCLUSION

Based on the foregoing, this Court finds and concludes that 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 notifies the Applicant that he must file and serve a notice of appeal within thirty (30) 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, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek

appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 21st **day of** November **, 2019.**

Kristi Curtis

KRISTI F. CURTIS
Presiding Judge
Fifteenth Judicial Circuit

November 21, 2019
Sumter, South Carolina

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