

VOLUME II OF II

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County

Brooks P. Goldsmith, Circuit Court Judge

TRAVIS ABE POLITE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000241

APPENDIX

SUSAN B. HACKETT
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

SAMANTHA J. WEIDAUER
Assistant Attorney General
1000 Assembly Street, Room 519
Columbia, SC 29201
(803) 734-7437

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
TRIAL TRANSCRIPT DATED JANUARY 20 – 22, 2015	1
FINAL BRIEF OF APPELLANT	464
FINAL BRIEF OF RESPONDENT	480
FINAL REPLY BRIEF OF APPELLANT	501
<u>STATE V. POLITE</u> , OP. NO. 2016-UP-480 (S.C. CT. APP. FILED NOV. 16, 2016)	515
REMITTITUR	517
APPLICATION FOR POST-CONVICTION RELIEF	519
RETURN	536
AMENDED APPLICATION FOR POST-CONVICTION RELIEF	543
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED NOV. 4, 2019	545
ORDER OF DISMISSAL	575
INDICTMENTS AND SENTENCE SHEETS	588

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TRAVIS ABE POLITE,

APPELLANT

APPELLATE CASE NO. 2015-000182

FINAL REPLY BRIEF OF APPELLANT

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
ARGUMENT IN REPLY	3
I. The motion for mistrial is preserved for appellate review	3
II. The trial court's error in denying the motion for mistrial was not harmless	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases

<u>Atl. Coast Builders & Contractors, LLC v. Lewis</u> , 398 S.C. 323, 730 S.E.2d 282 (2012)	8
<u>Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.</u> , 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006).....	8
<u>State v. Brooks</u> , 341 S.C. 57, 533 S.E.2d 325 (2000).....	10
<u>State v. Byers</u> , 392 S.C. 438, 710 S.E.2d 55 (2011).....	9
<u>State v. Chavis</u> , 421 S.C. 101, 711 S.E.2d 336 (2015).....	9
<u>State v. Heller</u> , 399 S.C. 157, 731 S.E.2d 312 (Ct. App. 2012).....	7
<u>State v. Henson</u> , 407 S.C. 154, 754 S.E.2d 508 (2014).....	9
<u>State v. Johnson</u> , 291 S.C. 127, 352 S.E.2d 480 (1987)	10
<u>State v. Liberte</u> , 336 S.C. 648, 521 S.E.2d 744 (Ct. App. 1999).....	7
<u>State v. Nelson</u> , 331 S.C. 1, 501 S.E.2d 716 (1998)	3
<u>State v. Reeves</u> , 301 S.C. 191, 391 S.E.2d 241 (1990).....	9
<u>State v. Simmons</u> , 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009).....	7

Rules

Rule 18, SCRCrimP	7
Rule 404, SCRE.....	3

ARGUMENT IN REPLY

I. The motion for mistrial is preserved for appellate review.

The Brief of Appellant raised the following issue:

Whether the trial court erred in denying defense counsel's motion for mistrial where Sergeant Gobel testified that he was "familiar" with the defendant's "street name or nickname" of "Travi" and the trial court's order striking the testimony was insufficient to cure the prejudice from the admission of improper character evidence?

Brief of Appellant, p. 3. As argued in the Brief of Appellant, Sergeant Gobel's testimony implied that Appellant Polite had a criminal record, or at the very least was under suspicion by the police outside of the present incident. This attack on Polite's character was improper where he presented no testimony or witnesses to put his character at issue. R. 266, l. 18 – 267, l. 5 (Polite did not testify and did not present any evidence in his defense); see State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998) ("In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue."); Rule 404, SCRE. A reasonable juror could not put Sergeant's Gobel's testimony out of its mind, such that the motion for mistrial should have been granted.

Respondent argues that this issue is not preserved for appellate review, alleging that defense counsel accepted the ruling, that a motion for mistrial was never made, and that to the extent one was made, it was not contemporaneous. Respondent's Brief, pp. 8-11. The objection to Sergeant Gobel's testimony was timely and an off-the-record bench conference immediately took place. R. 207, ll. 9-19. Defense counsel abided by the trial court's apparent ruling that he would strike the testimony, give a curative instruction, and allow defense counsel to put his motion for mistrial on the record at a later time when the jury was out of the courtroom:

MR. HOOD: **There was one other thing we were going to put on the record concerning the testimony of Detective Sergeant Gobel. Do you remember when he made the comment about --.**

THE COURT: **We were. Thank you.**

MR. HOOD: And --

THE COURT: We had a side bar.

MR. HOOD: That's correct. And you admonished the jury and ordered the court reporter to strike that portion of his testimony and for the jury, told the jury to disregard that. I sort of still object to that, because **I think that there is no curative instruction that can be given to a jury when the item is already before them. The cat is out of the bag and there's no way to successfully put it back in the bag to keep the jury from using that in their own minds as some type of evidence.** That's all I have to say about that.

THE COURT: Just for the record, why don't you refresh our memories as to the specific objection you had, the language, excuse me. It was a response, voluntary response, I think, on the part of the witness.

MR. HOOD: That's correct. He -- the question was asked by the State, and then during the course of the answer, there was a change, if I recall correctly, and he went off on this other tangent, if I remember correctly.

MR. THORNTON:

We were talking about the process of putting together and how many photos there were. And what you indicated, and I believe what he said -- obviously, the court reporter would have it verbatim -- but I believe what Detective Gobel said was he indicated Travi, and I think he said something to the effect of, and we are familiar with him. And then he said something about from being in the area about the time that Mr. Hood objected. And that's when we went to the side bar. I believe that is what he said. He said something to the effect that he was familiar with who Travi was.

MR. HOOD: That they were familiar with him.

MR. THORNTON: They were, yes, sir.

THE COURT: They were, right. And that was the reason we had the side bar.

MR. HOOD: Correct.

THE COURT: You objected to it.

MR. HOOD: You sustained it.

THE COURT: I sustained the objection and went further.

MR. HOOD: Correct.

R. 257, l. 21 – 259, l. 15 (emphasis added). Thus, the issue raised is preserved for appellate review.

Respondent argues that defense counsel “acknowledge[d] his acceptance of the judge’s ruling sustaining his objection.” Respondent’s Brief, p. 11 (citing to page 345 of the trial transcript). Defense counsel’s agreement with the trial judge that he “sustained the objection and went further” was not an agreement that the remedy provided was sufficient. R. 259, ll. 6-15. Because defense counsel’s objection was sustained, there would have been no need to place anything further on the record unless defense counsel argued at the bench conference that the striking of the testimony and curative instruction were not sufficient and that the testimony warranted a mistrial.

Respondent alleges that defense counsel’s statements were not a motion for mistrial. Respondent’s Brief, pp. 9 and 11 (alleging that the only motion for mistrial was made following the jury instruction and did not relate to Sergeant Gobel’s testimony). Defense counsel argued: “[T]here is no curative instruction that can be given to a jury when the item is already before them. The cat is out of the bag and there’s no way to successfully put it

back in the bag to keep the jury from using that in their own minds as some type of evidence.” R. 258, ll. 7-11. The only logical remedy when no curative instruction can be sufficient is a mistrial, which is what defense counsel was requesting in his argument.

Respondent further asserts that even if defense counsel’s argument was a motion for mistrial, it was not contemporaneous to the striking of the testimony and curative instruction. Respondent’s Brief, p. 11 (“Counsel did not make an additional objection to the sufficiency of the curative charge and, despite appellant’s contention, the record *clearly* shows counsel did not move for a mistrial at that time.” (emphasis added)). The record reflects that immediately following defense counsel’s objection an off-the-record bench conference took place. R. 207, ll. 9-19. When they came back on the record the trial judge said: “All right. I will sustain your objection, order the last statement of the witness stricken on the record. And, ladies and gentlemen, you are to disregard the last statement of the witness. You may proceed.” R. 207, ll. 20-24. Following defense counsel’s motion for directed verdict, when the jury was out of the courtroom, counsel said “There was one other thing we were going to put on the record concerning the testimony of Detective Sergeant Gobel. Do you remember when he made the comment about --.” R. 257, ll. 21-24. The trial judge responded “We were. Thank you.” R. 257, l. 25. Defense counsel then made his motion for mistrial and put the basis for his objection and motion on the record. R. 258, l. 1 – 259, l. 6.

It is reasonable to believe that in the interest of courtroom efficiency, rather than send the jury out of the courtroom mid-testimony, the trial judge allowed defense counsel to place his objection and motion on the record at a later time when the jury exited the courtroom. That opportunity arose after the State rested and defense counsel made his

motion for directed verdict.¹ It would have been improper for defense counsel to ignore the trial court's instructions and make a motion for mistrial on the record in front of the jury after the trial judge's curative instruction. See Rule 18(a), SCRCrimP ("Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced."); State v. Liberte, 336 S.C. 648, 652 n. 1, 521 S.E.2d 744, 746 n. 1 (Ct. App. 1999) (finding counsel for defendant's actions "more than sufficient" to preserve motion for mistrial where trial court refused defendants' requests to excuse the jury and defendants sought mistrial at their first opportunity, when the court later excused the jury).

The present case is distinguishable from other cases where the motion for mistrial failed the contemporaneous objection requirement. In State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009), this Court found the motion for mistrial unpreserved because Simmons' attorney did not object to the officer's testimony until after the officer finished testifying. 384 S.C. at 171-72, 682 S.E.2d at 32-33. In the present case, the objection and bench conference took place when Sergeant Gobel gave the improper testimony. In State v. Heller, 399 S.C. 157, 172-73, 731 S.E.2d 312, 320-21 (Ct. App. 2012), this Court again found the motion for mistrial unpreserved. Though Heller's attorney objected and moved to strike at the time of the testimony regarding the defendant's parole, it was not until after the examination was finished that defense counsel asked to put a matter on the record and requested a mistrial. 399 S.C. 157, 172-73, 731 S.E.2d 312, 320-21. Heller also differs

¹ The only other time the jury left the courtroom between the objection and motion for mistrial was for a short break during the playing of the DVD of the interview with Polite, at which time the solicitor worked to improve the audio. R. 244, l. 5 – 245, l. 9.

from the present case in that it lacked the bench conference where the trial judge indicated that the motion for mistrial should be put on the record later.

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (quoting Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). “[T]his is not a ‘gotcha’ game aimed at embarrassing attorneys or harming litigants, but rather is an adherence to settled principles that serve an important function.” Id. at 329–30, 730 S.E.2d at 285. Though our appellate courts should follow longstanding precedent and resolve an issue on preservation grounds when it “clearly is unpreserved,” it is “good practice for [the appellate courts] to reach the merits of an issue when error preservation is doubtful.” Id. at 330, 730 S.E.2d at 285. Here, the objection and motion for mistrial were properly made in compliance with the trial court’s apparent instruction that defense counsel could put the matter on the record at a later time. Thus, this Court should rule on the merits of the issue raised.

II. The trial court’s error in denying the motion for mistrial was not harmless.

Respondent argues that any error in the failure to deny the motion for mistrial was harmless. Contrary to Respondent’s assertion, the evidence presented against Polite was not overwhelming. Further, the failure to grant a mistrial, where Sergeant Gobel’s testimony could not be removed from the minds of the jurors in evaluating Polite’s credibility, contributed to the conviction in this case.

“Before an error can be held harmless, a court must find the error harmless beyond a reasonable doubt.” State v. Henson, 407 S.C. 154, 166, 754 S.E.2d 508, 515 (2014). “A harmless error analysis is contextual and specific to the circumstances of the case: ‘No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.’” State v. Byers, 392 S.C. 438, 447-48, 710 S.E.2d 55, 60 (2011) (quoting State v. Reeves, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990)). Our Supreme Court recently noted in State v. Chavis:

We disagree with the dissent that the “contributing to the verdict” standard and the “overwhelming evidence” standard are used interchangeably, and that one is less stringent than the other. In this case, where there is error in admitting certain testimony, we find that the error can be deemed harmless because there is other overwhelming evidence of guilt. However, we readily acknowledge that there are some errors, particularly errors of law, which cannot be rendered harmless by overwhelming evidence. *See, e.g., State v. Middleton*, 407 S.C. 312, 755 S.E.2d 432 (2014) (Pleicones J, dissenting) (noting that a failure to charge a lesser included cannot be rendered harmless by overwhelming evidence).

421 S.C. 101, 110 n. 7, 711 S.E.2d 336, 340 n. 7 (2015). Here, the issue was whether the trial court’s curative instruction was sufficient to cure the prejudice from Sergeant Gobel’s testimony.

Respondent’s brief overstates the evidence against Polite, who was identified by only one witness, Antonio Brewer. Respondent’s Brief, pp. 14-15. Brewer’s identification of Polite came only after a month of badgering by police and their admitted threat to charge Brewer with murder if he did not give them a name for the shooter. Brewer knew Polite from “around town.” R. 132, l. 14 – 138, l. 14; R. 218, l. 5 – 226, l. 9; R. 248, l. 13

– 249, l. 21. Respondent alleges that Polite gave an inculpatory statement to police wherein he “admitted to participating in the armed robbery.” Respondent’s Brief, p. 15. While Polite admitted that he was involved in the sale of marijuana with his co-defendants, he characterized himself as the “babysitter” of the “weed.” He remained in the vehicle during the robbery and his defense at trial was mere presence. R. 310, ll. 8-13; State’s Exhibit 43, audio of Appellant’s second interview (on file with this Court). Notably, the only DNA evidence from the scene matched the victim and co-defendant, Walter Tucker. R. 116, ll. 2-18; R. 176, ll. 9-12; R. 177, l. 24 – 178, l. 3; R. 200, l. 21 – 201, l. 7. Thus, the jury here could have rationally concluded based on the evidence presented that Polite’s statements to police were truthful – that he remained in the car during the robbery and murder and that he was not a part of the scheme to rob the victim. See State v. Brooks, 341 S.C. 57, 63, 533 S.E.2d 325, 328 (2000) (“Based upon the conflicting evidence introduced at trial, we cannot say that no other rational conclusion other than Brooks’s guilt could be reached.”).

Further, the perception in the juror’s minds, that Polite either had a prior criminal record or was involved in some sort of unsavory activity that made him known to the police, contributed to the verdict. Polite’s defense of mere presence, was undoubtedly impacted by an insinuation of his bad character. See State v. Johnson, 291 S.C. 127, 352 S.E.2d 480 (1987) (“Mere presence at the scene of a crime is insufficient to convict one as a principal on the theory of aiding and abetting.”).

Therefore, there was not overwhelming evidence of guilt and the error contributed to the verdict such that the failure to grant a mistrial was not harmless beyond a reasonable doubt.

CONCLUSION

For the reasons set forth herein and in Appellant's Brief, Appellant Travis Abe Polite requests this Court to reverse his convictions and grant him a new trial.

Respectfully submitted,



Laura R. Baer
Appellate Defender

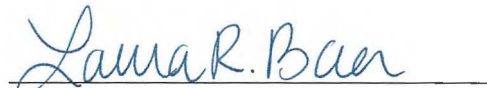
ATTORNEY FOR APPELLANT

This 19th day of April, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 19, 2016



Laura R. Baer
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TRAVIS ABE POLITE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Sherrie Butterbaugh, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19th day of April, 2016.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 19th day of April, 2016.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Travis Abe Polite, Appellant.

Appellate Case No. 2015-000182

Appeal From Beaufort County
Brooks P. Goldsmith, Circuit Court Judge

Unpublished Opinion No. 2016-UP-480
Submitted October 1, 2016 – Filed November 16, 2016

AFFIRMED

Appellate Defender Laura Ruth Baer, of Columbia, for
Appellant.

Attorney General Alan McCroy Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, and
Assistant Attorney General Sherrie Ann Butterbaugh, all
of Columbia; and Solicitor Issac McDuffie Stone, III, of
Beaufort, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) ("If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured."); *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct. App. 2005) ("A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission."); *George*, 323 S.C. at 510, 476 S.E.2d at 912 ("No issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial.").

AFFIRMED.¹

WILLIAMS, THOMAS, and GEATHERS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

December 02, 2016

The Honorable Jerri Ann Roseneau
PO Box 1128
Beaufort SC 29901-1128

REMITTITUR

Re: The State v. Travis A. Polite
Lower Court Case No. 2012GS0702233, 2012GS0702234
Appellate Case No. 2015-000182

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Returned are the following exhibits:

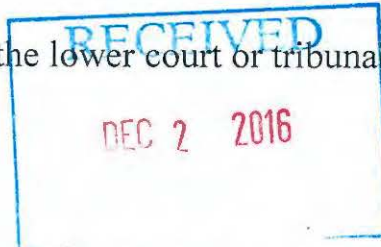
State's Exhibit #42 (Audio of Appellant's First Statement to Police, and State's Exhibit #43 (Audio of Appellant's Second Statement to Police)

Please sign below acknowledging receipt of these exhibits and return the acknowledgement to this office.

Very truly yours,

V. Claire Allen, Deputy

CLERK



Enclosure

cc: Alan McCrory Wilson, Esquire
Laura Ruth Baer, Esquire
Donald J. Zelenka, Esquire
Sherrie Butterbaugh, Esquire
John W. McIntosh, Esquire
Isaac McDuffie Stone, III, Esquire
The Honorable Brooks P. Goldsmith

FORM 5

STATE OF SOUTH CAROLINA)

) IN THE COURT OF COMMON PLEAS

County of Beaufort)

2017-CP-07-963

Travis Polite #362894)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR
POST-CONVICTION RELIEF2017 MAY 15 PM 12:54
CLERK OF COURT
BEAUFORT COUNTY, S.C.**INSTRUCTIONS B READ CAREFULLY**

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Institution, 4460 Broad River Road, Columbia, S.C. 29210
2. Name and location of Court which imposed sentence General Sessions Court
Beaufort County, South Carolina
3. Name(s) of co-defendant(s) (if any) Walker Tucker & Brandon Singletary
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) # 2012-GS-07-02233 (For Murder)

(b) # 2012-GS-07-02234 (For Armed Robbery)

(c)

5. The date upon which sentence was imposed and the terms of the sentence:

(a) January 22, 2015

(b) January 22, 2015

(c)

6. Check whether a finding of guilty was made:

(a) after a plea of guilty

(b) after a plea of not guilty xx

(c) after a plea of nolo contendere

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes!

8. If you answered Ayes@ to (7), list:

(a) the name of each Court to which you appealed:

i. S.C. Court of Appeals, Columbia,

ii.

iii.

(b) the result in each such Court to which you appealed:

i. Affirmed

ii.

iii.

(c) the date of each such result:

i. November 16, 2016

ii.

iii.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Unpublished Opinion No. 2016-UP-480

ii.

iii.

9. If you answered Ano@ to (7), state your reasons for not so appealing:

(a) N/A

- (b) _____
 (c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistance of Counsel, in violation of Applicant's
 (b) Sixth and Fourteenth Amendment rights.
 (c) "See Attached Sheets" supporting the instant application.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) "Due Process Violations, contrary to Applicant's Fifth and
 (b) Fourteenth Amendment rights". See attached Sheets.
 (c) _____

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? _____
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
 (d) any other petitions, motions or applications in this or any other Court? No

13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 i. N/A
 ii. _____
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. N/A
 ii. _____
 iii. _____

iv. _____
 (c) the disposition thereof: N/A

i. _____
 ii. _____
 iii. _____
 iv. _____

(d) the date of each such disposition:

i. N/A
 ii. _____
 iii. _____
 iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A
 ii. _____
 iii. _____
 iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No.

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. None.
 ii. _____
 iii. _____

(b) the proceedings in which each ground was raised:

i. N/A
 ii. _____
 iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Because ineffective assistance not cognizable on direct appeal.

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes.

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No

18. If you answered Ayes@ to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Gene G. Hood

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Pre-trial and trial

ii. sentencing

iii. _____

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Travis Polite #362894, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Travis Polite
Applicant

SWORN or affirmed to and subscribed before me this
8 day of May, 2017.

[Signature]
Notary Public

My Commission Expires: 9/16/2020

19. State clearly the relief you seek in filing this application:

Find that trial counsel provided ineffective assistance, and on that
bases, reverse and remand for a new trial.

20. Are you now under sentence from any other court that you have not challenged?

No

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of _____)

VERIFICATION

I, Travis Polite, #362894, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Travis Polite

SWORN to and subscribed before me this 9
 day of May, 2017.

[Signature] (L.S.)
 Notary Public

My Commission Expires: 9/16/2020

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

COURT OF COMMON PLEAS

Travis Abe Polite, #362894,
Applicant,

Vs.

Case No.: _____

State of South Carolina,

Respondent. /

ATTACHMENTS SUPPORTING PCR APPLICATION

This matter is being brought to the attention of this Honorable Court, by way of a pro-se applicant claiming an entitlement to relief under the Uniform Post-Conviction Act, of South Carolina. See §17-27-10 through 140. (As amended)

Accompanying this attachment, is the original PCR Application, being notarized and signed by the Applicant conforming to the statutory rules.

STANDING TO BRING A PCR ACTION

In raising cognizable claims under the "ACT" the applicant can raise almost any allegation relevant to any phase of the previous court proceedings. Specifically, an applicant case raise virtually every alleged denial of a federal constitutional right, with the exception of sufficiency of the evidence. S.C. Code §17-27-20 (a)(6). but see Jackson v. Virginia, 443 S.C. 307, 313 (1979).

The PCR Act also recognizes almost any abridgment of a state created right. §17-27-20(a)(1). Specifically, the statute permits the following six categories of claims: (1) the conviction or sentence was in violation of the Constitution of the United States, the South CARolina constitution, or South Carolina state law; (2) the Court was without jurisdiction to impose the sentence; (3) the sentence exceeds the maximum authorized by law; (4) there is evidence of material facts, not previously presented or heard, that requires vacation of the conviction or sentence in the interest of justice; (5) the sentence has expired; probation, parole or conditional release has been unlawfully revoked; or that the applicant is otherwise unlawfully held in custody or other restraint; and (6) the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error previously available under any common law, statute or other writ, motion, procedure or remedy. See §17-27-20(a)(1)-(6).

BACKGROUND OF CASE

On December 13, 2012, the Beaufort County grand jury indicted Applicant Travis Abe Polite for the offenses of murder, armed robbery, and kidnapping.

On January 20-22, 2015, the Applicant appeared before the Honorable Brooks P. Goldsmith and jury for a trial on the above offenses. Applicant was represented by Chief Public Defender, Gene G. Hood and assistant public defender Lauren Carroway. The State was represented by assistant solicitor Sean Thornton and Hunter Swanson.

The jury found Polite (Applicant) guilty of murder and armed robbery, but acquitted Applicant of kidnapping. Tr. tr. p. 449. Judge Goldsmith sentenced Applicant to concurrent terms of thirty nine years for murder and twenty-two years for armed robbery. Tr. tr. p. 461, II 18-23. See also Sentencing Sheet.

Applicant timely filed a notice of appeal, and a appeal followed to the South Carolina Court of Appeals. Applicant was represented by Ms. Laura R. Baer, of the Appellate Defense. (See 2015-000182). In a unpublished Opinion, the Court of Appeals affirmed the trial judgment on November 16, 2016. To which this application for post-conviction relief stems.

APPLICANT'S GROUNDS FOR RELIEF

1. As an initial ground for relief, the Applicant claims "he was denied the effective assistance of counsel, Strickland v. Washington, 466 U.S. 684 (1984), in violation of his Sixth and Fourteenth

Amendment rights, during all critical stages of the criminal proceedings, and that this deficient performance 'prejudiced' the Applicant's ability to demonstrate his innocence during the course of trial.

Within the initial ground supporting ineffective assistance of trial counsel. Applicant argues that counsel failed to fully impeach witness Antonio Brewer's false and misleading testimony concerning Applicant's participation in the crime (as the shooter), or as a minor participant. Whereas, "it came out that "Brandon and Tucker", actually intimidated Brewer when his police statements initially indicated them in the crime. But later, Brewer changed his statements to police, now implicating the Applicant. See Tr. tr, pgs 239, lines 24-25; 240, lines 1-3.

AS a matter of fact, Brewer testified that "the Applicant arrived with Brandon and Tucker in the same vehicle". (Tr.tr. p. 226, lines 6-12) Then on page (Tr. tr. p. 239, lines 24-25; 240, lines 1-3).

- A. The guy who I cannot describe was the driver, the one with the gray cap. That's the only description that I could give of that guy. He was driving. He was driving. Brandon was in the back passenger. Tucker jumped out the back driver, I'm pretty sure. And then it was Mr. Polite in the front passenger. (Tr. tr. p. 226, lines 6-12).
- B. Okay. Okay. You saw him [Polite] coming off the road and coming around and getting to the door?
A: Yes. (Tr. tr. p. 239, 24-24; 240, 1-2)

C. Q: No. Prior to yesterday, prior to yesterday did you ever tell Officer Gobel or any other investigator that Travis Polite was in your house sitting on a chair with a T-Shirt over his head? Yes or no? (Tr. tr. p. 240, 14-17)

The above could may have been disregarded as a simple error or mistake however, "where this Applicant is claiming 'actual factual' innocence". A higher level of scrutiny should have been applied. Especially "where Brewer benefited (not being charged) by not having to suffer any criminal liability for allowing the incident to take place at his residence".

Under the standards of Strickland, the failure to effectively cross examine a witness can constitute ineffective assistance of counsel. See U.S. v. Cronin, 466 U.S. 648, 658 (1984)(where counsel failed to put the state's case to any meaningful adversarial test).

Here, Brewer's uncertainty of (1) whether Applicant was inside the house; (2) whether Applicant arrived with Brandon and Tucker; or (3) whether Applicant 'walked up from the roadway', is all critical instances in determing guilt or innocence of the defendant. Where such also plays upon the credibility of the witness testimony. Especially where here; "Brewer is claiming to have been an eye-witness to the killing".

Moreover, there is and was explained during trial; "that Brewer was 'afraid of Brandon and Tucker', as they were described as major drug dealers with the (Black Mofia Family) a.k.a. BMF, out of Atlanta Georgia.

An objective review of the testimony also reveals Brewer's motive for testifying falsely. Brewer exchanged the identity from the actual shooter (that arrived with the weapon in hand), Tucker and Brandon. In exchange for the inclusion of Applicant, based on his admission "he was afraid of Tucker and Brandon". The State assisted in conveying this untruth through the use of other testifying witnesses. Which is a Due Process violation, whenever the prosecution puts forth "false testimony knowing such to be false". See Gibson v. State, 514 S.E.2d 320 (S. Ct. 1999)

In Gibson, similar to this case, the key evidence was the testimony of two eye-witnesses. However, the insurance company, prior to paying out funds, did their own independent investigation into the facts. And discovered different accounts of what happened to the deceased.

The detrimental circumstances here lies with counsel's performance being deficient by failing to effectively impeach Brewer concerning his alleged identity of who actually shot the victim. When Brewer "could not ever remember exactly how Applicant came to be at his residence.

Had counsel effectively cross-examined Brewer, based on the prior inconsistencies, then absolutely, "the outcome of the proceeding would not could have been different". As there was anything except overwhelming and uncontroverted evidence of Applicant's guilt of any murder in this case.

2. Next, under our constitution, Federal and State. A defendant

has the right to be tried by a formal criminal complaint deemed an "INDICTMENT". Which outlines "every essential element of the crime in which he is being accused of".

"No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia". (In relevant part U.S.C.A. 5th Amendment)

On Tr. tr. p. 421, lines 17-25, the court begins by instructing jurors on the elements of what Applicant is charged with involving the murder. Here, the Applicant according to the court, is "the principle shooter in this murder crime". That charge ends on Tr. tr. p. 422, lines 1-16.

The Court then engages "yet another crime under the theory of accomplice liability". Facts "which failed to place the Applicant on notice of what, or how to defend himself in court". When the accomplice liability is not included within the indictment. See (Tr. tr. p. 422, lines 17-25; p. 423, line 1) Where it reads as follows:

I tell you that if a crime is committed by two or more people who are acting together and committing a crime, the act of one is the act of all. A person who joins with another to accomplish an illegal purpose is criminally responsible for everything done by the other person which occurs as a natural consequence of the acts done in carrying out the common plan and purpose. If two or more people are together acting together, assisting each other in committing the offense, the act of one is the act of all, or as it is sometimes said, the hands of one is the hands of all.

This issue involves "a deprivation of Applicant's Fifth And Sixth Amendment rights". Where counsel "failed to object" contemporaneously under South Carolina Court rules, to such a erroneous jury instruction. Without "those facts" in which a jury could rely on in determining guilt, to be squarely placed within the indictment.

In U.S. v. Fogel, 901 F.2d 23, (4th Cir. 1990), this Court held: "the purpose of the presentation clause of the Fifth Amendment is twofold; it entitles defendants to be injeopardy only for the offenses charged by a group of his fellow citizens acting independent "of either the prosecutor of the judge"; and second, it entitles the defendant to be appraised of the charges against him so that he knows what he must meet at trial. See U.S. v. Field, 875 F.2d 130 (7th Cir. 1989).

First we turn to the constitutional error. It begins as early as Stirone v. United States, 361 U.S. 212 (196), mandating all necessary and essential 'facts' in which an accused conviction may rest. "Must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt".

In the next turn of the decade into the 1970's In re Winship, 397 U.S. 358 (1970) finds support under the same standard of requiring (1) the charge to be made by a group of his fellow citizens acting independent of the prosecutor or judge; (2) that the facts alleged within the indictment be submitted to petit jurors for determining 'proof beyond a reasonable doubt; and (3) only then could a constitutional conviction be announced.

Going even further with the turn of the century. Cases such as Apprendi v. New Jersey, 530 U.S. 466 (2000), was decided to reaffirm these historical landmark decisions. (i.e. charge by indictment, submission to petit jurors, and proof beyond a reasonable doubt). In Blakely v. Washington, 542 U.S. 296 (S. Ct. 2004), this Court held; "when a defendant is sentenced based on facts the jury has not found", such becomes a determination by the judge rather than jury, and a direct violation of any defendant's right to a trial by jury.

Whereas, "there is no significant constitutional difference where a judge rather than the grand jury 'charges facts' that the grand jury never passed upon". For such a invalid procedure permits a conviction on facts "the law does not allow". Thus, hands of one under South Carolina Law, finds no supporting refudge because it's a theory as opposed to elements of a offense. Where such 'theory is omitted from the charging instrument'. It then under the invalid procedure, "becomes a trial by judge" rather than by jury. Because the judge gave the jury a basis upon which the jury could find guilt. Thus, this ground irrefutably compels reversal of the conviction, "as we cannot tell whether the jury relied on murder or "accomplice liability before or after the fact of a murder". Resulting in a impermissible general verdict.

Third, Applicant argues that counsel was ineffective for failing to adequately investigate the case from the onset, "which would

have proved his innocence. The State fabricated (by witness testimony) evidence about Applicant being in the residence with a White T-Shirt around his head. As something for jurors to identify with.

Again, Applicant was supposedly sitting in the living room, while Brewer testified Applicant arrived with Brandon and Tucker, members of a dangerous gang. But Brandon and Tucker forced Brewer into the back bedroom, and while there; "Applicant was seen coming up to the residence from the road". And walked up to the window of the victims car, and shot him in the chest from outside the car.

Counsel should have had independent forensic testing done in order to determine "how exactly could a driver sitting in the driver's seat be straight-forwardly 'shot in the chest from the driver's side window". These issues bring about plausibility in the State's theory of the case. And counsel was ineffective for his failure to place the State's case to any meaningful adversarial testing. See U.S. v. Cronin, 466 U.S. 646, 658 (1984)

Wherefore, based on the claims herein, not limited to the required amendments by appointed counsel, Applicant under the circumstances of this case is entitled to be released from the custody care and control of the South Carolina Department of Corrections. And Applicant respectfully prays for such results.

Respectfully Submitted,

/s/ Travis A. Polite
 Travis Abe Polite #362894
 BRCI-Wateree Unit
 4460 Broad River Road
 Columbia, S.C. 29210

cc: filed

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE FOURTEENTH JUDICIAL
COUNTY OF BEAUFORT	)	CIRCUIT
	)	
Travis Polite, #362894,	)	Case No.: 2017-CP-07-0963
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Respondent, making its Return to the Application for Post-Conviction Relief ("PCR") filed on March 15, 2017, would respectfully show this Court:

I. FACT SUMMARY

The facts supporting the underlying charges are as follows: On September 6, 2012, the victim and a friend attempted to purchase marijuana at a mobile home park. Other people arrived subsequently at the residence. Applicant was also present with Brandon Tucker, who were orchestrating the drug deal. When one individual, by the name of Jessica Power, hesitated before handing over the money, Tucker pushed her to the floor and Applicant grabbed her arm. After she eventually gave Tucker the money, she testified that she witnessed Applicant look out the window of the home and then exchange "words" with Tucker. Applicant then demanded a gun from Tucker and ran outside where gunshots were fired. Witnesses across the street testified they heard shots, as well as dark-colored car racing out of the mobile home park. One woman proceeded to call 911. Later, another witness was able identify Applicant in a photo lineup as the man who shot the victim. Applicant was arrested and afterwards gave two conflicting statements. First, he denied any involvement but later admitted that he was there at the time of murder and knew about the plan to

rob the victim; however, he claimed he did not shoot the victim. He was subsequently charged murder, armed robbery, and kidnapping.

II. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. In December 2012, the Beaufort County Grand Jury indicted Applicant for murder (2012-GS-07-2233), armed robbery (2012-GS-07-2234), and kidnapping (2012-GS-07-2377). Gene G. Hood, Esquire, and Lauren Carroway, Esquire, represented Applicant. Assistant Solicitors Sean Thornton, Esquire, and Hunter Swanson, Esquire, prosecuted the case. On January 20-22, 2015, Applicant proceeded to trial before the Honorable Brooks P. Goldsmith. The jury found Applicant guilty as indicted for murder and armed robbery. The jury found Applicant not guilty for kidnapping. Judge Goldsmith sentenced Applicant to imprisonment for concurrent terms of thirty-nine years for murder and twenty years for armed robbery.

Applicant filed a timely notice of appeal. Laura Ruth Baer, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on November 16, 2016. State v. Polite, Op. No. 2016-UP-480 (S.C. Ct. App. filed November 16, 2016). The remittitur was returned to the circuit court on December 2, 2016.

Attached to this Return and incorporated by reference are the records of the Beaufort County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II. ALLEGATIONS

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

1. “Ineffective Assistance of Counsel, in violation of Applicant’s Sixth and Fourteenth Amendment rights.”
 - a. “Due Process Violations, contrary to Applicant’s Fifth and Fourteenth Amendment rights.”
 - b. “...Counsel failed to fully impeach witness Antonio Brewer’s false and misleading testimony concerning Applicant’s participation in the crime (as the shooter) or as a minor participant...”
 - c. “The detrimental circumstances here lies with counsel’s performance being deficient by failing to effectively impeach Brewer concerning his alleged identity of who actually shot the victim when Brewer “could not ever remember exactly how Applicant came to be at his residence. Had counsel effectively cross-examined Brewer, based on the prior inconsistencies, then absolutely, “the outcome of the proceeding could have been different.”
 - d. “Where counsel “failed to object” contemporaneously under South Carolina Court rules, to such a erroneous jury instruction. Without “those facts” in which a jury could rely on in determining guilt, to be squarely placed within the indictment.”
 - e. “...Counsel was ineffective for failing to adequately investigate the case from the onset, “which would have proved his innocence...Counsel should have had independent forensic testing done in order to determine “how exactly could a driver sitting in the driver’s seat be straight-forwardly shot in the chest from the driver’s side window.” These issues bring about plausibility in the State’s theory of the case. And counsel was ineffective for his failure to place the State’s case to any meaningful adversarial testing...”

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent submits Applicant’s allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that “counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having

produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV. AMENDMENTS

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments received prior to 10 days

before an evidentiary hearing will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCPP. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCPP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCPP.

[Signature block on following page]

V. CONCLUSION

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of trial counsel.

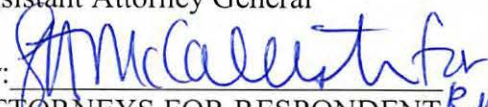
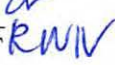
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

RUSTON W. NEELY
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT 

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

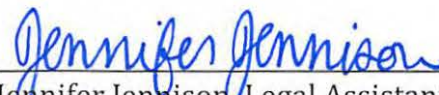
, 2017

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	
	)	2017-CP-07-0963
	)	
TRAVIS POLITE, #362894	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent,	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

James Kristian Falk, Esquire
 Falk Law Firm, LLC
 PO Box 1058
 Charleston, SC 29402

DATED this the 8th day of August, 2017.


 Jennifer Jennison, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOR THE 14th JUDICIAL CIRCUIT
	)	
Travis Polite 362894	)	
Applicant	)	2017-CP-07-0963
Vs.	)	
State of South Carolina	)	AMENDED PCR APPLICATION
Respondent,	)	
_____	)	

Applicant Travis Polite by and through undersigned counsel hereby amends his PCR application to include the following facts supporting his allegation of ineffective assistance of counsel.

During his direct testimony John Gobel, a detective sergeant with the Beaufort County Sheriff's Office, the following exchange took place:

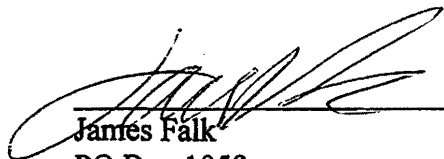
Solicitor: And when you were doing this, and let's not talk in generalities, when you did this lineup, did you infer to Mr. Brewer that he should pick out a particular person or not?

Detective Gobel: No, sir. When -- during this interview, Mr. Brewer identified the defendant that he saw as the shooter in this case and he called him by the name, Travi. He didn't use the name Travis Polite; he used Travi. We are familiar with that street name or nickname, as -- and we commonly know folks by their street names.

Trial Counsel's objection to Detective Gobel's testimony was sustained and the Court gave the following instruction to the jury: *All right. I will sustain your objection, order the last statement of the witness stricken on the record. And, ladies and gentlemen, you are to disregard the last statement of the witness.* (Transcript page 293 lines 5-23). Detective Gobel's testimony was prejudicial to Applicant because it allowed the jury to infer that the reason the sheriff's office was so familiar with applicant was because they had extensive dealings with Applicant. After this instruction, trial counsel failed to object to the court's curative instruction and failed to make a contemporaneous motion for a mistrial. As a result of trial counsel's failures with regard to Detective Gobel's testimony, the issue of the sufficiency of the Court's curative instruction was not preserved for appeal. Moreover as a result of the prejudice to applicant caused by Detective Gobel's testimony, trial counsel provided ineffective assistance of counsel by not moving for a mistrial. The Court of Appeals affirmed Applicant's conviction

and in a *per curiam* decision noted: *No issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative instruction or move for a mistrial.* State v Polite, Unpublished Opinion No. 2016-UP-480.

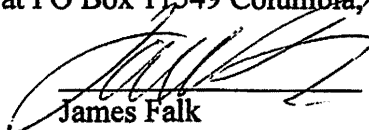
Respectfully Submitted,



James Falk
PO Box 1058
Charleston, SC 29402
(843) 606 6007
jfalklaw@gmail.com

CERTIFICATE OF SERVICE

Undersigned certifies that on August 19, 2019 a copy of the above was both mailed and emailed to Benjamin Limbaugh. at PO Box 11549 Columbia, SC 29211; blimbaugh@scag.gov



James Falk
Counsel for Applicant

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF BEAUFORT) CASE NO.: 2017-CP-07-00963

TRAVIS POLITE,)
)
 APPLICANT,)
)
 v.) TRANSCRIPT OF RECORD
)
 STATE OF SOUTH CAROLINA,)
)
 RESPONDENT.)
 _____)

NOVEMBER 4TH, 2019
 COMMENCING AT
 BEAUFORT, SOUTH CAROLINA
 BEFORE THE HONORABLE JUDGE BROOKS P. GOLDSMITH

APPEARANCES:

MR. JAMES K. FALK, ESQUIRE
 THE FALK LAW FIRM
 38 BROAD STREET
 CHARLESTON, SOUTH CAROLINA 29401
 Attorney for the Applicant

MR. BENJAMIN LIMBAUGH, ESQUIRE
 SOUTH CAROLINA ATTORNEY GENERAL'S OFFICE
 POST OFFICE BOX 11549
 COLUMBIA, SOUTH CAROLINA 29211
 Attorney for the State of South Carolina

Rebecca H. Hill
 Official Court Reporter

INDEX

APPLICANT'S POST-CONVICTION RELIEF APPEAL 3

 OPENING BY ASST. ATTORNEY GENERAL LIMBAUGH 3

 OPENING BY MR. FALK 5

WITNESS: APPLICANT TRAVIS POLITE

DIRECT EXAMINATION BY MR. FALK. 8

CROSS EXAMINATION BY MR. LIMBAUGH 15

APPLICANT RESTS 18

WITNESS: MS. LAUREN CARROWAY, ESQUIRE

DIRECT EXAMINATION BY MR. LIMBAUGH 18

CROSS EXAMINATION BY MR. FALK 22

STATE RESTS 23

ARGUMENT BY MR. FALK 23

ARGUMENT BY MR. LIMBAUGH 26

REPLY ARGUMENT BY MR. FALK 27

RULING BY THE COURT 29

CERTIFICATE OF REPORTER 30

EXHIBITS

NONE.

1 MR. LIMBAUGH: May it please the Court, Your Honor,
2 Benjamin Limbaugh for the State of South Carolina.

3 THE COURT: Yes, sir.

4 MR. LIMBAUGH: This is the case of Travis Polite. Case
5 number 2017-CP-07-0963. Applicant filed this Post-
6 Conviction Relief Application on March 15th, 2017. The
7 Applicant is presently confined to the South Carolina
8 Department of Corrections pursuant to Orders of Commitment
9 by the Beaufort County Clerk of Court.

10 In December of 2012, the Beaufort County Grand Jury
11 indicted the Applicant for murder, robbery, and kidnapping.
12 Gene Hood, Esquire, and Lauren Carroway, Esquire,
13 represented the Applicant. Assistant Solicitors Sean
14 Thornton and Hunter Swanson, Esquire, prosecuted the case.

15 On January 20th - 22nd of 2015, the Applicant proceeded
16 to trial before the Honorable Brooks P. Goldsmith. The jury
17 found the Applicant guilty as indicted for murder and armed
18 robbery. The jury found the Applicant not guilty of
19 kidnapping. Judge Goldsmith sentenced the Applicant to
20 imprisonment for concurrent terms of 39 years for murder and
21 20 years for armed robbery. Applicant filed a timely notice
22 of Appeal. The Office of Appellate Defense perfected the
23 Appeal.

24 The South Carolina Court of Appeals confirmed
25 Applicant's conviction on November 16th, 2016. The

1 remittitur was returned to the Circuit Court on December
2 2nd, 2016.

3 In his original Application for Post-Conviction Relief,
4 the Applicant alleged the following allegations: One, that
5 the due process violations are contrary to Applicant's Fifth
6 and Fourteenth Amendment rights.

7 Two, that Counsel failed to fully impeach witness,
8 Antonio Brewer's false and misleading testimony concerning
9 Applicant's participation in the crime as the shooter
10 whereas a minor participant. Detrimental circumstances here
11 lies with counsel's performance being deficient by failing
12 to effectively impeach Brewer concerning his alleged
13 identity of who actually shot the victim and Brewer "could
14 not ever remember exactly how Applicant came to be at his
15 residence." Had counsel effectively cross-examined Brewer,
16 based on the prior inconsistencies, then absolutely the
17 outcome of the proceeding could have been different.

18 Where counsel failed to object contemporaneously under
19 South Carolina Court rules, to such an erroneous jury
20 instruction without "those facts" in which a jury could rely
21 on determining guilt to be squarely placed within the
22 indictment.

23 And finally, counsel was ineffective for failing to
24 adequately investigate the case from the outset which would
25 have proved his innocence. Counsel should have had

1 independent, forensic testing done in order to determine how
2 exactly could a driver sitting in the driver's seat be
3 straightforwardly shot in the chest on the driver's side
4 window? These issues bring about the possibility and
5 State's theory of the case and counsel was ineffective for
6 his failure to place the State's case to any meaningful
7 adversarial testing.

8 Applicant did file an amended Application and I will
9 let counsel for the applicant, Mr. Jim Falk, go through that
10 last amended allegation with you, Your Honor.

11 THE COURT: Mr. Falk?

12 MR. FALK: Your Honor, I've followed the amendment to
13 the PCR Application and we're not abandoning the ones that
14 my client originally raised, but we just want to add this as
15 an additional one. It really concerns an issue that was
16 briefed on Appeal.

17 At one point, during the Officer Gobles' testimony
18 regarding the six-pack lineup that was given to the witness
19 in this case, his name was Anthony Brewer, there was a
20 reference made to "Travy" and the solicitor asked him -- so
21 this takes place on page 293.

22 So, Your Honor, a question was asked to him, John
23 Goble, and this is the solicitor, Mr. Thornton. Question:
24 "And when you were doing this, and let's not talk in
25 generalities, when you did this lineup, did you infer to Mr.

1 Brewer that he should pick someone out, a particular person
2 out or not?" And his answer was, "No, sir."

3 When during this interview Mr. Brewer identified the
4 defendant that he saw as the same shooter in this case and
5 he called him by his name "Travy". He didn't use the name
6 "Travis Polite", he used "Travy". We are familiar with that
7 street name or nickname as he was commonly known by folks by
8 the street name.

9 Our concern is the fact that this notion that the
10 police are aware of this person having a lot of contact with
11 Travis Polite in the past by using his street name "Travy".
12 Counsel objected to the reference and the Court sustained
13 the objection and gave a curative instruction, which is in
14 my -- it says, "So in my response to sustaining the
15 objection," -- the Court said, I believe line five to
16 twenty-three, "All right. I will sustain your objection. I
17 order the last statement of the witness stricken in the
18 record, and ladies and gentleman, you are to disregard that
19 last statement of the witness."

20 The issue was then raised on Appeal that that was
21 prejudicial, the use of the name "Travy". The problem was
22 that that objection really was not preserved. Well, trial
23 counsel accepted the curative instruction and then just went
24 forward. And then, after the closing arguments, he again
25 talked about and asked for a mistrial at the end of the case

1 about this reference to "Travy", and once the jury hears it,
2 and you can't let the horse back in the barn, and all of
3 those kind of references, he asked for a mistrial on those
4 grounds at the end.

5 However, in the Court of Appeals' Decision on the case,
6 they said the issue wasn't properly preserved for review, so
7 what we are asserting is that trial counsel was ineffective
8 for not asking for a better curative instruction and for not
9 moving for a mistrial at that time. Because in order to
10 object and ask you needed to make a contemporaneous
11 objection to a mistrial at that time. You couldn't ask for
12 the mistrial at the end of the trial. That's what the Court
13 of Appeals said.

14 So we think that in a case like this, it's very
15 prejudicial to my client that law enforcement gave the jury
16 the impression that my client was well known to law
17 enforcement and that he was known by his street name,
18 "Travy".

19 And I don't know if they handed you a copy of the Court
20 of Appeals' Opinion, but it's a *per curium* Decision -- do
21 you have a copy of the amended PCR Application? Your Honor,
22 do you have one up there?

23 THE COURT: I'm looking.

24 MR. FALK: May I approach?

25 THE COURT: I don't think I do. Yes, sir.

Direct Examination of Travis Polite by Mr. Falk

1 THE COURT: Let's see, I have the transcript, the
2 record on Appeal, and now this. Go ahead.

3 MR. FALK: Your Honor, the style is missing on this,
4 but this is the *per curium* part of the decision.

5 THE COURT: This is the second page of the decision.
6 Go ahead, Mr. Falk.

7 MR. FALK: So that's where we are. We are concerned
8 that there is this mention of the name, "Travy," and it's
9 prejudicial to my client. It was an issue that was briefed
10 on Appeal, and it's the reason why the Court of Appeals
11 didn't address it because they said it wasn't properly
12 preserved.

13 THE COURT: All right.

14 MR. FALK: If we could start, I would like to put my
15 client on the stand.

16 THE COURT: Sure.

17 MR. FALK: Mr. Polite, if you will take your stuff with
18 you to the witness stand.

19 (Whereupon, the witness, Mr. Travis Polite, is duly
20 sworn by the clerk and the following is held on the record.)

21 DIRECT EXAMINATION

22 BY MR. FALK:

23 Q Mr. Polite, I want to talk about some of the issues
24 that you raised -- that you originally raised in your PCR
25 Application. What was your concern about the pre-trial

Direct Examination of Travis Polite by Mr. Falk

1 investigation that was done in this case, especially with
2 the ballistics report? You had a comment in your PCR
3 Application that the forensics wouldn't make sense because
4 of the way the bullet wound was. Could you please explain
5 that point?

6 A If I can remember ---

7 Q Can you pull that microphone so it's a little closer to
8 you?

9 A (Applicant complies.) The way that the dude, Antonio,
10 described it, like, you know, the dude was in the car with
11 his chest out like that, and you know, when it was hard to
12 believe why -- how can a person be out with his chest like
13 that in a car, you know, and I just came up and just shoot
14 him? From what I know they say in the report, in the thing,
15 like, I guess he got shot in the back or something. If he
16 got shot in the back, how can his chest be straight out the
17 car window? I didn't understand that.

18 Q Because the testimony was that you came up, he rolled
19 down the window and he's facing forward, and you shot him
20 from the side, right?

21 A Yes.

22 Q He was in the passenger seat of the Buick and he was
23 shot. So your concern is from the testimony of the
24 forensics was that the path of the bullet does not seem to
25 reconcile with the testimony; is that correct?

Direct Examination of Travis Polite by Mr. Falk

1 A Yes, sir.

2 Q Because you would think if somebody was seated in the
3 passenger seat, the bullet is going to come in from the side
4 and not from the chest; is that correct?

5 A Yes, sir.

6 Q All right. What were your concerns about -- now, Mr.
7 Brewer, his testimony was certainly damaging for you; is
8 that correct?

9 A Yes, sir.

10 Q And his testimony was -- certainly changed over time;
11 is that fair to say?

12 A Yeah.

13 Q So what were your concerns about the cross examination
14 that Mr. Hood did of Mr. Brewer?

15 A (No reply.)

16 Q His story kept changing; isn't that correct?

17 A I mean, it kept changing over and over, you know. At
18 first, I didn't have anything to do with it at first. And
19 then, the police kept coming at him and threatening him
20 saying if he don't say who it was, he gonna get time. So
21 his story kept changing and changing and the last of it, it
22 was me. He said he saw when I did it.

23 Q Because the shooting took place in September of that
24 year; is that right? That's what they said at the trial; is
25 that right?

Direct Examination of Travis Polite by Mr. Falk

1 A (NO REPLY.)

2 Q He didn't identify you until a month later; isn't that
3 correct?

4 A Yes, sir.

5 Q But he also said that he knew you; isn't that correct?

6 A Yes, sir.

7 Q So and first he testified that what happened was some
8 people were breaking into his house and he wasn't there.

9 A That's right.

10 Q I mean, his first statement was that some people were
11 breaking into his house and he wasn't even there; isn't that
12 correct?

13 A Yes, sir.

14 Q And then the testimony kind of changed that he was in
15 the back room and he didn't see anything, and then,
16 ultimately, the testimony, finally, he comes out and says he
17 saw you walk out of the house and shoot the guy?

18 A Yes, sir.

19 Q Okay. What kind of conversation did you have with Mr.
20 Hood about getting prepared for trial here?

21 A I wanted him to, you know, question him more, because
22 at first, it was like he saw when I came from out the house,
23 but if you was in the back room, how you seen when I came
24 out the house? And the female who was involved, she said she
25 saw when I walked out, but she didn't even -- she said she

Direct Examination of Travis Polite by Mr. Falk

1 didn't even know me, and she don't but -- she said the
2 person walked out of the house, but then he said the person
3 came from around the trailer, so if I came from out the
4 house, how did I come from out the trailer? I don't
5 understand.

6 Q Right. Because he was saying he was in the back room
7 of the trailer, right?

8 A Yeah.

9 Q And he saw you -- and at one time, he said he saw you
10 seated in a chair in the living room; is that right?

11 A Yes.

12 Q And you had a white shirt on and maybe it was pulled up
13 or whatever? There was some kind of reference about a white
14 shirt; is that right?

15 A A white shirt and a towel and some kind of thing that
16 the Arabs wear around their head.

17 Q He was saying something like a turban or something ---

18 A Yeah, a turban, yeah.

19 Q Okay. And he never told his wife anything -- I mean,
20 there's no testimony that he told his wife it was you, and
21 somehow he saw you out the back window of his trailer; is
22 that correct?

23 A Yeah.

24 Q Because were you there that day?

25 A In the trailer?

Direct Examination of Travis Polite by Mr. Falk

1 Q Yes.

2 A No, I wasn't at all.

3 Q All right. You had some concerns with the way of the
4 indictment; is that correct?

5 A (No reply.)

6 Q Because -- let me get the wording out of your
7 Application. So as part of the charge, they were charging
8 that you were the principle shooter in the offense; is that
9 right? That's how the jury was charged?

10 A Yes, sir.

11 Q And then they also charged under a theory of the hand
12 of one is the hand of all; is that correct?

13 A Yes, sir.

14 Q And what were your concerns about that? You were never
15 really indicted as an accomplice; is that correct?

16 A Yes, sir.

17 Q But the jury was charged under the theory of accomplice
18 liability?

19 A Yes, sir.

20 Q And we don't really know why the jury convicted you, if
21 they thought it was because you were the accomplice or you
22 were the shooter; is that right?

23 A Yes, sir.

24 Q All right. Now, let's go to this. Antonio Brewer said
25 that his testimony was that he was shot in the chest; is

Direct Examination of Travis Polite by Mr. Falk

1 that right?

2 A Yes, sir.

3 Q But you're saying that couldn't make sense if somebody
4 was shooting from the side of the car; is that right?

5 A Yes, sir.

6 Q And that was your concern about the forensic
7 investigation that it was inconsistent with, you know, you
8 think that the injuries were inconsistent with Mr. Brewer's
9 testimony; is that right?

10 A Yes, sir.

11 Q Okay. And did Mr. Hood say anything to you when he
12 objected to the reference about "Travy"?

13 A No.

14 Q Okay. Was there any type of discussion about what they
15 were supposed to do about that or anything?

16 A As far as I know, I think he was talking to her, but he
17 never said nothing to me.

18 Q Okay.

19 MR. FALK: Your Honor, I don't think he has anything
20 more to add on that charge, so I have no further questions.

21 THE COURT: All right. Mr. Limbaugh.

22 MR. LIMBAUGH: May it please the Court, Your Honor?

23 CROSS-EXAMINATION

24 BY MR. LIMBAUGH:

25 Q So how many times do you recall meeting with Mr.

Cross-Examination of Joseph Polite by Mr. Limbaugh

1 Hood or Ms. Carroway in preparation for your trial?

2 A Mr. Hood, probably, I think -- well, when I was in
3 custody or?

4 Q Just generally, any times that you recall meeting with
5 him. It doesn't have to be exact.

6 A Well, when I was in custody it was probably like two
7 times with Mr. Hood and when I got bond I had to go to him
8 like every month, every other month, something like that.

9 Q And those meetings, did they go over with you what your
10 trial strategy and your defense strategy was?

11 A Really, they just tell me when I get in there, look the
12 jury in the eye and basically, he told me I was gonna get
13 convicted; he told me that.

14 Q How about those conversations with you? Was he going
15 over the evidence that the State had against you in this
16 case and how strong it may or may not have been?

17 A When I used to go to his office, all he used to tell me
18 is this, like, the same old thing, like, you know when I get
19 in there, look them in the eye, come casual dressed. It
20 wasn't really, you know, like nothing strong he could tell
21 me.

22 Q Okay. Did you have a problem with Mr. Brewer's various
23 statements, correct?

24 A Yes.

25 Q Okay. But Mr. Hood was able to point those differences

Cross-Examination of Joseph Polite by Mr. Limbaugh

1 in his statement out to the jury, right?

2 A I guess, some things.

3 Q I mean, he pointed out on his cross-examination ---

4 MR. LIMBAUGH: Page 222 of the transcript, Your Honor.

5 Q --- on his cross-examination of Mr. Brewer, he brings
6 out where, I think it was his first statement, where there
7 wasn't any involvement. He was in the back room looking at
8 lottery numbers. Then, there was his second statement the
9 one about you being involved and things like that. So, the
10 jury did hear that he was being inconsistent with law
11 enforcement, right?

12 A Yes.

13 Q Is there something else you wanted Mr. Hood or Ms.
14 Carroway to get out about Mr. Brewer's statements that
15 didn't?

16 A I can't think of any.

17 Q And so then to this point, I believe it was Goble that
18 called you "Travy" on the stand. Again, Mr. Hood did object
19 to that being able to be considered by the jury, right? As
20 far as you remember?

21 A Yeah.

22 Q Do you remember the judge giving that instruction to
23 the jury that they shouldn't consider the detective calling
24 you Travy or any of the implications from that?

25 A I remember.

Cross-Examination of Joseph Polite by Mr. Limbaugh

1 Q Okay. Can you just briefly walk me through your issue
2 with the forensic evidence again?

3 A He said that he saw me shoot the dude in the chest,
4 which meant that the dude had to been with his chest out to
5 me or something. I kind of find it hard to believe -- well,
6 not kind of, but it's hard to believe a person's chest be
7 sticking out just like that from the whole other side of the
8 car or something.

9 Q And that was Brewer testifying about seeing you shoot a
10 person, the victim, in this case?

11 A Yes.

12 Q And he did ultimately identify you both in court and in
13 a photo lineup in this case, right?

14 A I know in court he pointed at me, but a photo lineup, I
15 don't know about that.

16 Q Well, he did identify you in court at the very least to
17 your knowledge?

18 A Yes.

19 Q And he would have seen you around town or had some
20 reason to know who you are; is that correct?

21 A I mean, if you saw me, I probably -- I don't know when
22 he saw me, but he said he saw me.

23 MR. LIMBAUGH: That's all I have for this witness, Your
24 Honor.

25 THE COURT: Any redirect?

Direct Examination of Lauren Carroway by Mr. Limbaugh

1 MR. FALK: No, Your Honor.

2 THE COURT: Thank you. You may step down. Call your
3 next witness.

4 MR. FALK: Your Honor, we have a problem; we can't call
5 Mr. Hood to the stand, so no further witnesses. I guess we
6 are going to rest.

7 THE COURT: All right. Mr. Limbaugh, you may call your
8 witness.

9 MR. LIMBAUGH: May it please the Court, Your Honor. We
10 would call Ms. Carroway briefly.

11 (Whereupon, Ms. Lauren Carroway is duly sworn.)

12 DIRECT EXAMINATION

13 BY MR. LIMBAUGH:

14 Q Good morning, Ms. Carroway. I'm aware from Mr. Falk
15 that Mr. Hood has passed away, but you did sit as second
16 chair in this trial, correct?

17 A Correct.

18 Q I'm here to briefly ask you some questions about the
19 background of this case. Do you recall how strong the
20 State's evidence was against Mr. Polite in this case?

21 A I didn't believe it to be that strong in this case.

22 Q Okay. What were some of your reasoning for thinking
23 that?

24 A The main witness involved in this case, I believe his
25 name was Mr. Brewer, never identified Mr. Polite until -- I

Direct Examination of Lauren Carroway by Mr. Limbaugh

1 don't remember how long it was. Mr. Hood represented Mr.
2 Polite for a number of years. They had a good relationship.
3 I don't believe Mr. Brewer identified Mr. Polite until after
4 the fact, because he said at one point that he never saw Mr.
5 Polite. He said he was in his bedroom, I believe, and then
6 he kind of changed his testimony that he saw him shooting.
7 There were just problems with the case.

8 Q Okay.

9 MR. FALK: Your Honor, may I have a moment?

10 THE COURT: Sure.

11 MR. FALK: Judge, my concern is, I think I just -- I
12 believe you were the trial judge.

13 MS. CARROWAY: He was the trial judge.

14 THE COURT: That's what we said at the beginning.

15 MR. FALK: Yeah, you're right. I just wasn't sure. I
16 have no problem going forward with this, I just wasn't sure.
17 Maybe when he introduced the case he did say that and I just
18 may have missed it when I was looking at something else; so
19 I apologize. We don't have an objection to you presiding
20 over this hearing.

21 MR. LIMBAUGH: Briefly, Your Honor, in light of this
22 coming up, can you do a brief colloquy of Mr. Polite
23 advising him that you were the trial judge and asking him if
24 he has any concerns proceeding. I thought we had resolved
25 the issue prior to coming today, but it looks like you're

Direct Examination of Lauren Carroway by Mr. Limbaugh

1 going to have to go on the record saying he is fine
2 proceeding with you as his PCR judge, Your Honor.

3 MR. FALK: Yeah, I think that's probably appropriate.

4 THE COURT: All right.

5 Q Mr. Polite, do you understand what the attorneys have
6 been telling me for the past couple of minutes.

7 A Yes, sir.

8 Q They weren't sure that each of them knew that I was the
9 judge who presided over your trial. Do you remember me
10 being the judge?

11 A Yeah.

12 Q I thought I was, too.

13 A Yeah, I remember it.

14 Q The transcript says it. The question they wish for me
15 to put to you is do you have any objection to me presiding
16 over this hearing?

17 A I've got a question.

18 Q You can talk to your attorney, certainly.

19 (Sotto voice discussion between Mr. Polite and Mr.
20 Falk, briefly.)

21 MR. FALK: We discussed it and I believe he has told me
22 he's fine to go forward.

23 THE COURT: Is that correct, Mr. Polite?

24 MR. POLITE: Yes, sir.

25 THE COURT: Have you had enough time to discuss this

Direct Examination of Lauren Carroway by Mr. Limbaugh

1 with your attorney?

2 MR. POLITE: Yes, sir.

3 THE COURT: Have you had enough time to discuss the
4 issue or question about whether you are okay with me
5 continuing with this proceeding?

6 MR. POLITE: Yes.

7 THE COURT: And you have no objection?

8 MR. POLITE: No, sir.

9 THE COURT: Okay.

10 MR. FALK: Thank you, Your Honor.

11 THE COURT: Okay. You may proceed then.

12 DIRECT EXAMINATION CONTINUED

13 BY MR. LIMBAUGH:

14 Q And one of the key witnesses for the State was Mr.
15 Brewer, correct?

16 A Yes.

17 Q And do you recall Mr. Hood being able to bring out to
18 the jury his statements at all?

19 A I can't remember specifically; I'm sorry.

20 Q Do you recall anything about Detective Goble saying,
21 "Do you know him as "Travy", and the objection, and how that
22 went?

23 A I don't remember that objection specifically. This was
24 when we realized that Mr. Hood was having a problem with his
25 hearing, was during this trial. There were a lot of times

Cross-Examination of Lauren Carroway by Mr. Falk

1 that I was telling Gene -- I was telling Mr. Hood to object,
2 because I was yelling at the trial, so I'm sure he
3 remembers. I would say, "Gene, Gene!" But I don't remember
4 that case specifically. I would say Mr. Hood was my mentor
5 and he trained me to try cases. I don't know what was in
6 his head, but I know that he taught me inadmissible
7 character evidence equals a mistrial and that's what I've
8 been taught to do by Mr. Hood. I don't know why he didn't
9 do it that day.

10 MR. LIMBAUGH: That's all I have for this witness, Your
11 Honor.

12 THE COURT: Cross-examination.

13 CROSS-EXAMINATION

14 BY MR. FALK:

15 Q This is just, I guess, related to Mr. Brewer's
16 identification of Mr. Polite. There was a Biggers' hearing
17 at the beginning of this; do you recall that?

18 A Let me look at my notes, and I see that I took notes of
19 the Biggers' hearing, but I don't specifically remember, I'm
20 sorry.

21 Q Well, would some of the changes in his testimony, how
22 it kept evolving, would that have been issues that you could
23 have raised at the Biggers' hearing as to somehow show the
24 unreliability of the in-court identification?

25 A Sure.

Cross-Examination of Lauren Carroway by Mr. Falk

1 Q And when Mr. Brewer made the in-court identification,
2 there was no contemporaneous objection, was there?

3 A No, sir.

4 Q So if there was a concern, it could have been raised
5 through Mr. Brewer's identification that came up through the
6 Biggers' hearing, that again is an issue that wasn't
7 preserved for review?

8 A Correct.

9 Q I don't have any more questions for you.

10 THE COURT: Redirect?

11 MR. LIMBAUGH: None, Your Honor.

12 THE COURT: Thank you. You may step down. Mr.
13 Limbaugh?

14 MR. LIMBAUGH: The State rests, Your Honor.

15 THE COURT: Mr. Falk, anything in reply?

16 MR. FALK: No, Your Honor.

17 THE COURT: I'll be glad to hear argument.

18 MR. FALK: Your Honor, do you have a copy of the
19 Appellate Briefs in your package? I just wanted to clarify
20 that that was the issue that was raised on Appeal. The
21 mention of "Travy" made by the police officer and how that
22 should have been inadmissible under 403 as character
23 evidence.

24 THE COURT: I see the Applicant's Final Brief and
25 Respondent's.

1 MR. FALK: I just wanted to make sure you see that was
2 the argument that was issued on Appeal. That is the issue,
3 unfortunately, when you get a per curium decision, you can't
4 always tell exactly what the Court was ruling on, but it's
5 clear to me that the Court was ruling on the fact that we
6 can't address this issue on this potential 403 evidence
7 because there the trial counsel accepted the curative
8 instruction as opposed to asking for -- our position is that
9 he should have asked for a mistrial at that time.

10 THE COURT: All right.

11 MR. FALK: And I think if you look at the Respondent's
12 Brief, they certainly hammered Ms. Behr (SIC) on the issue
13 preservation argument.

14 THE COURT: The only thing you handed me was the ---

15 MR. FALK: I can show you a digital copy of it.

16 MR. LIMBAUGH: Your Honor, I have copies of the Briefs,
17 Your Honor, if you would like ---

18 MR. FALK: No, the Order, the per curium Order.

19 THE COURT: Tell me again, Mr. Falk, you're saying that
20 this Order said what?

21 MR. FALK: This Order says that you can't discuss the
22 issue that was raised on Appeal because it wasn't properly
23 preserved. That if you have an objection -- if trial
24 counsel had an objection to the use of the character
25 evidence, the negative character evidence which is inferred

1 from the fact that the police officers all knew him by his
2 street name, that was the issue that was raised. The Court
3 said that that issue was not preserved for Appeal. That if
4 you accepted curative instruction, because the judge
5 sustained the objection and accepted the curative
6 instruction, the Court -- you sustained the objection and
7 gave a curative instruction, trial counsel, if he had a
8 concern that that was inefficient or improper that that
9 curative instruction didn't go far enough, he should have
10 either tendered another one or his other alternative would
11 have been to move for a mistrial. He didn't do that. So
12 the issue that was raised on Appeal wasn't preserved for
13 review.

14 THE COURT: All right. Does that conclude your
15 argument?

16 MR. FALK: Yes, and I guess we kind of came in a little
17 bit on the back door if there were issues that could have
18 been addressed as far as Mr. Brewer's in-court
19 identification, there was a Neil v. Biggers hearing on that.
20 However, that you needed to review that with the
21 contemporaneous instruction. Also if I could draw the
22 Court's attention to the fact that Officer Goble was going
23 to talk about "Travy", should not have been a big surprise,
24 because during the Neil v. Biggers' testimony, if you look
25 at page 293, the part that we're complaining about is

1 Officer Goble's testimony. But if you look at page 88 of
2 the transcript, which is in the middle of the Neil v.
3 Biggers' Hearing, on line 17, Officer Goble referred to my
4 client as "Travy" also. He said, "Travy, I mean Travis
5 Polite." So it's not even like it was something that would
6 have caught Mr. Hood off guard, because there was already
7 in-camera testimony with the police officer using his street
8 name.

9 THE COURT: Okay. Mr. Limbaugh?

10 MR. LIMBAUGH: May it please the Court, Your Honor?

11 THE COURT: Yes, sir.

12 MR. LIMBAUGH: In terms of Applicant's allegations of
13 not effectively impeaching Mr. Brewer, he brought out from
14 the record his ability to bring out to the jury the
15 inconsistent statements to law enforcement and the overall
16 weak nature of Mr. Brewer's testimony. He did ultimately
17 get the identification in, which is not helpful to
18 Applicant, but Mr. Hood was able to bring out to the jury
19 the inconsistent statements and impeach his testimony that
20 way. In terms of this instance of mentioning him as "Travy"
21 to the jury, Mr. Hood did make a timely objection to that
22 testimony being admitted. The Court, Your Honor, did
23 sustain that objection and did give a curative instruction
24 to the jury telling them explicitly not to consider that
25 testimony from Det. Goble. Then, the State believes that

1 even if a mistrial had been asked for in this case, and Your
2 Honor had denied that and it was preserved for Appeal, the
3 Court of Appeals would not have overturned the case on that
4 issue anyway.

5 One instance of the mention of "Travy", which is a
6 derivative of Travis, it's not like some outside street
7 nickname about Mr. Polite. It's not prejudicial enough in
8 this case for it to be overturned. As Your Honor very well
9 knows that grounds for granting a mistrial is manifest
10 necessity and prejudice cannot be overcome with any other
11 means. The Court, Your Honor, gave a curative instruction
12 to the jury, told them to wipe that testimony, however
13 miniscule, from their deliberation processes, and only
14 consider the competent evidence that came in from the trial.
15 The State believes that it was addressed during the trial as
16 best it could be. There might have been deficiency on the
17 part of Mr. Hood for not asking for a mistrial, but the
18 Applicant is certainly not prejudiced by the curative
19 instruction that had it out for the jury's deliberation
20 process. And the State would rest with that argument, Your
21 Honor.

22 THE COURT: Thank you. Mr. Falk?

23 MR. FALK: Nothing in reply, Your Honor.

24 THE COURT: Okay.

25 MR. FALK: Well, if I could, Your Honor, just as my

1 reply. It's not just the mention of the name -- but that
2 one mention of the name spoke volumes because it wasn't a
3 situation where it was a mention of a street name that may
4 have had some kind of connotation of the guy is a thug. It
5 wasn't like, you know, "Big G" or something like that where
6 the name alone is a problem. It's not the fact that the
7 street name was used. It's the fact that the police officer
8 is so familiar with my client that he's calling him by his
9 street name and that's where we think the concern is.
10 Having the knowledge of the person I think that leads the
11 jury to believe this person is a frequent flyer through the
12 police department down there and that's why they knew his
13 name and that's why they knew his street name. That was the
14 concern.

15 It's not that he's, you know -- this is not a drug case
16 where somebody said, oh, they call this guy the Snowman or
17 something like that which has some obvious drug connotation.
18 It's not the connotation of the street name. It's that the
19 street name is indicative of the fact that the police
20 officers were saying that they knew him. And that is where
21 our concern is.

22 THE COURT: Do you want to say something in response?

23 MR. LIMBAUGH: No, Your Honor.

24 THE COURT: I am going to read the hearings that you
25 handed up a minute ago.

1 (Off the record, briefly.)

2 THE COURT: All right. The Court agrees with the
3 position of the Attorney General, the argument set forth by
4 the Attorney General as to the issue by the Court of
5 Appeals. I'm not sure that I read it the same way as you
6 do, Mr. Falk. I'm not sure that I read it as saying that in
7 this case it wasn't preserved. I read it as saying that
8 trial counsel did the appropriate thing. But for all those
9 reasons, and in addition, there really isn't any evidence
10 that had such a motion been made that it would have been
11 granted. But having said all of that, I find that the
12 Applicant has failed to meet the burden of proof and the
13 Application for Post-Conviction Relief is denied. Mr.
14 Limbaugh, would you please prepare an Order within 20 days?

15 MR. LIMBAUGH: Absolutely, Your Honor.

16 THE COURT: Thank you.

17
18
19
20
21
22
23
24
25

Rebecca H. Hill,
Official Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
THE FOURTEENTH JUDICIAL CIRCUIT

2021 FEB 24 PM 3:18

Travis Polite, #362894,

Case No.: 2017-CP-07-0963

Applicant,

Order of Dismissal

v.

State of South Carolina,

Respondent.

I. FACT SUMMARY

The facts supporting the underlying charges are as follows: On September 6, 2012, the victim and a friend attempted to purchase marijuana at a mobile home park. Other people arrived subsequently at the residence. Applicant was also present with Brandon Tucker, who were orchestrating the drug deal. When one individual, by the name of Jessica Power, hesitated before handing over the money, Tucker pushed her to the floor and Applicant grabbed her arm. After she eventually gave Tucker the money, she testified that she witnessed Applicant look out the window of the home and then exchange "words" with Tucker. Applicant then demanded a gun from Tucker and ran outside where gunshots were fired. Witnesses across the street testified they heard shots, as well as dark-colored car racing out of the mobile home park. One woman proceeded to call 911. Later, another witness was able identify Applicant in a photo lineup as the man who shot the victim. Applicant was arrested and afterwards gave two conflicting statements. First, he denied any involvement but later admitted that he was there at the time of murder and knew about the plan to rob the victim; however, he claimed he did not shoot the victim. He was subsequently charged murder, armed robbery, and kidnapping.

II. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. In December 2012, the Beaufort County Grand Jury indicted Applicant for murder (2012-GS-07-2233), armed robbery (2012-GS-07-2234), and kidnapping (2012-GS-07-2377). Gene G. Hood, Esquire, and Lauren Carroway, Esquire, represented Applicant. Assistant Solicitors Sean Thornton, Esquire, and Hunter Swanson, Esquire, prosecuted the case. On January 20-22, 2015, Applicant proceeded to trial before the Honorable Brooks P. Goldsmith. The jury found Applicant guilty as indicted for murder and armed robbery. The jury found Applicant not guilty for kidnapping. Judge Goldsmith sentenced Applicant to imprisonment for concurrent terms of thirty-nine years for murder and twenty years for armed robbery.

Applicant filed a timely notice of appeal. Laura Ruth Baer, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on November 16, 2016. State v. Polite, Op. No. 2016-UP-480 (S.C. Ct. App. filed November 16, 2016). The remittitur was returned to the circuit court on December 2, 2016.

II. CURRENT APPLICATION

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

1. "Ineffective Assistance of Counsel, in violation of Applicant's Sixth and Fourteenth Amendment rights."
 - a. "Due Process Violations, contrary to Applicant's Fifth and Fourteenth Amendment rights."
 - b. "...Counsel failed to fully impeach witness Antonio Brewer's false and misleading testimony concerning Applicant's participation in the crime (as the shooter) or as a minor participant..."

#2 

- c. "The detrimental circumstances here lies with counsel's performance being deficient by failing to effectively impeach Brewer concerning his alleged identity of who actually shot the victim when Brewer "could not ever remember exactly how Applicant came to be at his residence. Had counsel effectively cross-examined Brewer, based on the prior inconsistencies, then absolutely, "the outcome of the proceeding could have been different."
- d. "Where counsel "failed to object" contemporaneously under South Carolina Court rules, to such a erroneous jury instruction. Without "those facts" in which a jury could rely on in determining guilt, to be squarely placed within the indictment."
- e. "...Counsel was ineffective for failing to adequately investigate the case from the onset, "which would have proved his innocence... Counsel should have had independent forensic testing done in order to determine "how exactly could a driver sitting in the driver's seat be straight-forwardly shot in the chest from the driver's side window." These issues bring about plausibility in the State's theory of the case. And counsel was ineffective for his failure to place the State's case to any meaningful adversarial testing..."

Applicant amended his application on August 22, 2019 to include the allegation that counsel was ineffective for failing to move for a mistrial when a witness mentioned being familiar with Applicant's street name.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented, which allowed the Court to scrutinize the credibility presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it]

#3 

cannot be relied upon as having produced a just result.” Strickland, 466 U.S. 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

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

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

#4

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526-527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Id. at 688; Harrington v. Richter, 562 U.S. 86 (2011)

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

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689-690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings knew of materials

#5 

outside the record and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S. at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

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

Failure to impeach Antonio Brewer's testimony

Applicant alleges trial counsel was ineffective for failing to fully impeach witness Antonio Brewer's false and misleading testimony concerning Applicant's participation in the crime (as the shooter) or as a minor participant. However, trial counsel properly cross-examine the witness, bringing out his inconsistent statements and overall weak nature of his testimony.

#6 

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include 'which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.' What motions to file and 'whether to put on evidence so as to preserve the final word in closing argument' are also strategic and tactical decisions to be made by trial counsel." Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (internal citations omitted). Trial counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

Applicant testified at the hearing that he was concerned that Brewer's statements kept changing over time. Applicant testified that Brewer's first statement was that he didn't have

anything to do with it, then it changed to him saying it was Applicant after the police kept threatening him. Applicant testified that Brewer did not identify him until a month after the shooting. Applicant testified that he wanted trial counsel to question Brewer more about his varying statements. Applicant admitted on cross-examination that trial counsel was able to get in the record that Brewer was being inconsistent with law enforcement. Most importantly, Applicant could not think of anything else he wished trial counsel could have gotten out of Brewer on cross-examination in relation to his inconsistent statements. PCR Tr. 16, l. 17. Unfortunately, Applicant's trial counsel is now deceased and was clearly unavailable to testify at the evidentiary hearing. However, this Court has reviewed the Record on Appeal and the trial transcript contained within. The trial transcript is dispositive, along with Applicant's admission on the issue, that trial counsel was not deficient in his cross-examination of Brewer nor has Applicant proven any resulting prejudice. The trial transcript reveals that trial counsel performed a thorough cross-examination of the witness, presenting the jury with a complete picture of the inconsistent statements he provided throughout the life of the case. Trial counsel's cross-examination on the issue is extensive and covered in various degrees across nearly forty pages of the trial transcript. Therefore, this Court finds that Applicant has wholly failed to meet his burden in proving deficiency on the part of trial counsel or any resulting prejudice, thus, this issue is dismissed with prejudice.

Failure to object to the indictment

Applicant alleges trial counsel was ineffective for failing to object to the sufficiency of the indictment. However, there was no valid reason for trial counsel to object to the indictment and therefore was not defective for failing to do so.

Challenges to the sufficiency of an indictment must be made before the jury is sworn.

#8 

S.C. Code Ann. § 17-19-90 (2003). The sufficiency of the indictment is determined by whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon, and (2) whether it apprises defendant of elements of offense that is intended to be charged. State v. Gentry, 363 S.C. 93, 101-02, 610 S.E.2d 494, 499 (2005) *citing* State v. Wilkes, 353 S.C. 462, 465, 578 S.E.2d 717, 719 (2003).

An indictment that cites the applicable general criminal statute is sufficient to fulfill the required notice and jurisdictional functions, where the body of the indictment indicates the particular crime of which the defendant is accused. *See* Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998). When defendant timely objects to the sufficiency of the indictment, before the jury is sworn, a ruling that an indictment is not sufficient will result in the quashing of the indictment unless the defendant waives presentment to the grand jury and pleads guilty. State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006), *overruled on other grounds by* Gentry, 363 S.C. 93, 610 S.E.2d 494.

At the evidentiary hearing, there was very little testimony elicited on this issue. Applicant testified he took issue with the indictment because he was being charged as the principal shooter in the indictment, but he was also charged under the theory of the hand of one is the hand of all. Applicant testified that he was not really indicted as an accomplice, but the jury was charged under a theory of accomplice liability. Applicant did not testify what measures he wished trial counsel took to challenge the indictment or how he was actually prejudiced by any alleged failure. The original indictment was clearly sufficient as a notice document and there were no other issues raised by Applicant at the hearing. Therefore, this Court finds that Applicant has wholly failed to establish any deficiency on the part of trial counsel, nor any prejudice resulting

#9

from the alleged deficiency. This allegation is dismissed with prejudice.

Failure to present independent forensic expert

Applicant alleges trial counsel was ineffective for failing to have independent forensic testing done to determine how a driver sitting in the driver's seat could be shot straight forward in the chest from the driver's side window. However, Applicant presented no expert testimony at the evidentiary hearing or any other evidence in support of this claim.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the post-conviction relief hearing. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). In order to show prejudice from the failure to contact an allegedly favorable witness, a PCR applicant must present the testimony of that witness at the PCR hearing. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). The applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

An 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, 509 S.E.2d 807 (1998). Bannister also concluded that State's failure to object to applicant's testimony regarding what witness would say does not relieve applicant's burden of actually producing the witness at the PCR hearing. This also applies to expert witnesses. Furthermore, counsel's failure to call an expert witness at trial to rebut the State's expert testimony will not necessarily rise to the level of deficient performance where he undertakes a vigorous cross-examination of the State's witness. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991).

#10

At the evidentiary hearing, Applicant simply recounted his vague recollection of the testimony of Brewer at his trial. Applicant testified that he did not understand how the victim could be shot straight in the chest; the testimony was that he came up, the victim rolled the window down, he's facing forward, and Applicant shot him in the side. Importantly, Applicant's testimony exhibits a fundamental misunderstanding of the evidence presented in his case. The evidence presented through the forensic expert was that the shot entered the victim from the left rear of his torso, up toward the chest area. This describes the exact situation the Applicant describes and also matches with the testimony of Brewer at trial. Applicant's general confusion is also not enough to support a finding of deficiency nor prejudice. Therefore, this Court finds that Applicant has wholly failed to meet his burden and this allegation is dismissed with prejudice.

Failure to move for a mistrial when a witness expressed familiarity with Applicant's street name

Applicant alleges trial counsel was ineffective for failing to preserve an objection or move for a mistrial when a law enforcement officer testified he was aware of Applicant's street name and Applicant was prejudiced as a result. However, Applicant has wholly failed to meet his burden in proving both deficiency and prejudice resulting from the officer's testimony.

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

#11 

the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence." *Id.* at 586, 698 S.E.2d at 865 (citation and internal quotation marks omitted).

The trial court's curative instruction to the jury concerning the street name cured any potential prejudice to Applicant. After trial counsel objected and the objection was sustained, the trial court instructed the jury: "I order the last statement of the witness stricken in the record, and ladies and gentleman, you are to disregard that last statement of the witness." The trial court's curative instruction properly informed the jury that they are not to consider the testimony concerning Applicant's street name. Applicant can show no deficiency by counsel in failing to move for a mistrial where counsel got the result he wanted by objecting and getting a curative instruction. Further, Applicant has failed to show the trial court would have granted the mistrial motion where a mistrial was not absolutely necessary. Applicant has also failed to show how counsel was deficient for failing to object to the curative instruction or any resulting prejudice. This Court finds that Applicant has failed to meet his burden in showing counsel was deficient for failing to move for a mistrial, failing to object to the curative instruction, and showing any resulting prejudice from the alleged deficiencies. Therefore, this Court dismisses this allegation with prejudice.

Conclusion

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

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

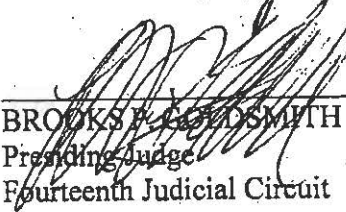
#12 

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

IT IS THEREFORE ORDERED:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 13 day of February, 2021.


BROOKS P. GOODSMITH
Presiding Judge
Fourteenth Judicial Circuit


_____, South Carolina

DOCKET NO. 2012GS0702233

The State of South Carolina

County of Beaufort

51
00
00

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

COURT OF GENERAL SESSIONS

December Term 2012

Hereby appear in my own proper person and plead guilty to the within indictment or to

THE STATE

vs.

Travis Abe Polite

Defendant

Witness:

Indictment for

Murder / Murder

SC Code: 16-03-0010; 16-03-0020
CDR Code: 0116

C.C.C. PLS. and G.S.

WITNESSES

Inv. J. Gobel-BCSO

ARREST WARRANT NUMBER

2012A0710400192

ACTION OF GRAND JURY

Melinda Bess
Foreperson of Grand Jury
Date: DEC 13 2012

VERDICT

emc

Guilty

Christine Cohen
Foreperson of Petit Jury
Date: 1-22-15

INDICT

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

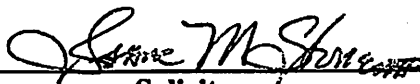
INDICTMENT
2012GS0702233

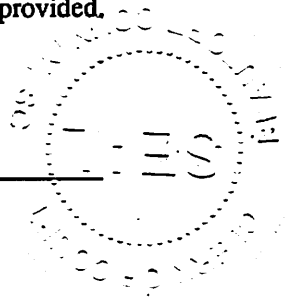
At a Court of General Sessions, convened on December 13, 2012, the Grand Jurors of Beaufort County present upon their oath:

Murder / Murder

That in Beaufort County on or about September 6, 2012, with malice aforethought, Travis Abe Polite did kill and murder Quantize Greer by means of shooting with a gun, and that Quantize Greer did die in Beaufort County as a proximate result thereof on September 6, 2012; in violation of Section 16-3-10 of the South Carolina Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


Solicitor



COUNTY OF Beaufort
 STATE VS.
Travis Abe Polite

AKA:

Race: AFRICAN AME Sex: M Age: 34DOB: [REDACTED] SS#: [REDACTED]

Address:

City, State, Zip:

DL#: SID#: *CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
 TO: Murder / MurderINDICTMENT/CASE#: 2012GS0702233A/W#: 2012A0710400192Date of Offense: 9/6/2012S.C. Code §: 16-03-0010; 16-03-0020CDR Code #: 0116

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-03-0010; 16-03-0020 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Swanson, HunterSC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 39 days/months/years or ☐ under the Youthful Offender Act not to exceed years
 and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
 of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPS Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)		\$ <u>3.90</u>
TOTAL		\$ <u>133.90</u>

PTUP days/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ beginning \$ paid to Public Defender FundOther:
☐ Appointed PD or appointed other counsel.
 § 47.12 requires \$500 be paid to Clerk
 during probation.
Clerk of Court/ Deputy Clerk: [Signature]Court Reporter: Karen Andersen

SCCA/217 (03/2011)

Presiding Judge [Signature]Judge Code: 2137Sentence Date: January 22, 2015

Certified - True Copy
 Jeri Ann Roseneau - Clerk of Court
 Beaufort County, SC - Pam Burries

WITNESSES

Inv. J. Gobel-BCSO

DOCKET NO. 2012GS0702234

The State of South Carolina

County of Beaufort

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

COURT OF GENERAL SESSIONS

December Term 2012

I
Hereby appear in my own proper person and plead guilty to the within indictment or to

ARREST WARRANT NUMBER

2012A0710400193

THE STATE

vs.

Travis Abe Polite

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date:

DEC 19 2012

VERDICT True Bill

Indictment for

Robbery / Armed Robbery, robbery while armed

SC Code: 16-11-0330(A)
CDR Code: 0139

Guilty

Christine Cohen

Foreperson of Petit Jury

Date: 1-22-15

INDICT

C.C.C. PLS. and G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

INDICTMENT
2012GS0702234

At a Court of General Sessions, convened on December 13, 2012, the Grand Jurors of Beaufort County present upon their oath:

Robbery / Armed Robbery, robbery while armed

That on or about September 6, 2012, in Beaufort County, South Carolina, the Defendant, Travis Abe Polite, at [REDACTED], Beaufort, SC, by use of force, threats or intimidation and while armed with a deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or other object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, did take and carry away goods and/or monies from the person or immediate presence of Quantize Greer and Jessica Power with the intent to permanently deprive the victim of possession thereof, in violation of Section 16-11-330(A) of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Gene M. [Signature]

COUNTY OF Beaufort
STATE VS.
Travis Abe Polite

AKA:

Race: AFRICAN AME Sex: M Age: 34DOB: [REDACTED] SS#: [REDACTED]

Address:

City, State, Zip:

DL#: [REDACTED] SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Robbery / Armed Robbery, robbery while armed or allegedly armed with a deadly weaponINDICTMENT/CASE#: 2012GS0702234A/W#: 2012A0710400193Date of Offense: 9/6/2012S.C. Code § : 16-11-0330(A)CDR Code #: 0139

SENTENCE SHEET

in violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Swanson, Hunter

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)		\$ <u>3.90</u>
TOTAL		\$ <u>133.90</u>

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2139Sentence Date: JANUARY 22, 2015

Verified - A True Copy
Jerrin Ann Roseneau - Clerk of Court
Beaufort County, SC - Pam Burries