Judicial Merit Selection Commission

Elizabeth H. Brogdon, Chief Counsel
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Columbia, South Carolina 29202
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M E D I A R E L E A S E

February 5, 2016

The Judicial Merit Selection Commission is accepting applications for the judicial offices listed below:

A vacancy will exist in the office currently held by the Honorable Costa M. Pleicones, Chief Justice of the Supreme Court, upon his retirement on or before December 31, 2016. The successor will fill the unexpired term, which expires on July 31, 2024.

The term of office currently held by the Honorable John C. Few, Justice of the Supreme Court, Seat 2, will expire July 31, 2016.

A vacancy will exist in the office held by the Honorable John C. Few, Chief Judge of the Court of Appeals, Seat 5, upon his election to the Supreme Court, Seat 2, on February 3, 2016. The successor will fill the unexpired term, which expires on June 30, 2021.

A vacancy exists in the office formerly held by the late Honorable Harry L. "Don" Phillips, Judge of the Family Court, Thirteenth Judicial Circuit, Seat 3. The current term of that office ends on June 30, 2016, and the successor will serve a new term of that office, which expires on June 30, 2022.

A vacancy will exist in the office currently held by the Honorable Alvin D. Johnson, Judge of the Family Court, Thirteenth Judicial Circuit, Seat 4, upon his retirement on or before June 30, 2016, which is the end of the term for that office. The successor will serve a new term of that office, which expires on June 30, 2022.

In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions should be directed to the Judicial Merit Selection Commission as follows:

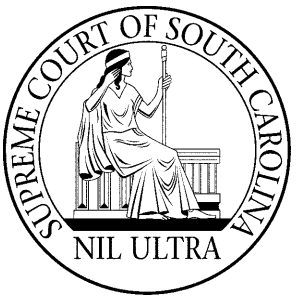
Elizabeth H. Brogdon, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6629

or

Lindi Legare, JMSC Administrative Assistant at (803) 212-6623.

The Commission will not accept applications after 12:00 noon on Monday, March 7, 2016.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at http://www.scstatehouse.gov/JudicialMeritPage/JMSCMainPage.php.



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 6
February 10, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Williamsburg County. Effective February 8, 2016, all filings in all common pleas cases commenced or pending in Williamsburg County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Clarendon	Lee
Sumter	Williamsburg - Effective February 8, 2016

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal.

s/Costa M. Pleicones
Costa M. Pleicones
Chief Justice of South Carolina

Columbia, South Carolina
February 4, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stephen Smalls, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212553

ON WRIT OF CERTIORARI

Appeal From Richland County
Henry Floyd, Trial Judge
J. Ernest Kinard, Jr., Post-Conviction Relief Judge

Opinion No. 5378
Heard October 20, 2015 – Filed February 10, 2016

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Daniel Francis Gourley, II, both of Columbia, for Respondent.

MCDONALD, J.: In this post-conviction relief (PCR) action, Stephen Smalls (Petitioner) argues the PCR court erred in finding trial counsel was not ineffective for failing to (1) object and request a mistrial when an investigator testified Petitioner burglarized someone's house and stole the gun used in the robbery, (2) object when the State erroneously told the jury during its opening statement that police saw Petitioner leaving the scene of the robbery, and (3) preserve an issue concerning the trial court's refusal to allow witness Eugene Green to be cross-examined about his dismissed carjacking charge. We affirm.

FACTS/PROCEDURAL BACKGROUND

In 2000, a grand jury indicted Petitioner for armed robbery resulting from the robbery of a Bojangles restaurant in Columbia.

At trial, Eugene Green testified that on the night of the robbery, he was helping his manager, Jim Lightner, close the restaurant when Petitioner ran through the door with a shotgun. Green stated Petitioner did not wear a mask. Petitioner ordered Lightner to open the safe, and when Petitioner turned his back, Green fled the restaurant and ran across the street. While on the phone with police at a nearby gas station, Green saw Petitioner leave the restaurant with the gun in his right hand and a white trash bag full of money in his left hand. Green stated that Petitioner approached a dumpster behind the restaurant and a wooden gate connected to a fence with a hole in it. Four days after the robbery, Green identified Petitioner as the robber by selecting Petitioner's photograph from a six-person lineup. Green also identified Petitioner in court and identified the shotgun. Green acknowledged that he had prior convictions for distribution of crack, use of a motor vehicle without consent, and possession of a stolen vehicle. On cross-examination, Green reiterated he was a convicted felon who had been in possession of a stolen car in the past.

Lightner testified that on the night of the incident, the robber grabbed a carryout bag and ordered Lightner to take him to the safe. Lightner testified he could not open the safe in the dark, but when the robber allowed him to turn on the lights, he opened the safe and removed its contents. After the robber put the money in the bag, he ordered Lightner to lie down and then walked away. Several days later, Lightner was able to narrow a photographic lineup down to two individuals, one of whom was Petitioner.

Officers responding to the scene discovered the bag of money and the shotgun approximately ten feet from one another near a fence behind the restaurant–in the direction in which Green indicated Petitioner fled. A fingerprint found on the shotgun matched Petitioner's right-hand middle finger.

When a plain clothes officer in an unmarked car went to Petitioner's home to arrest him, the officer found Petitioner walking along a road holding a small child in his arms. As the officer identified himself and asked Petitioner to stop because he was the subject of a robbery investigation, Petitioner dropped the child and fled. However, police arrested Petitioner later that night hiding in some bushes a few blocks away.

The jury deliberated less than an hour and convicted Petitioner of armed robbery. The trial court sentenced him to twenty-five years' imprisonment.

In 2005, Petitioner filed a PCR application, and the PCR court subsequently held an evidentiary hearing. At the PCR hearing, trial counsel testified that she had only practiced law for a year and a half at the time of Petitioner's trial and had only tried two or three serious felony cases. Trial counsel admitted she failed to make some "very important" objections because of her inexperience, but she acknowledged that the State had evidence to support its case. According to trial counsel, during that time period, her public defender's office lost all of its senior attorneys and the office "didn't have enough experience at that time . . . to combat . . . these big trials that [they] had in front of [them]." Another attorney who served as second chair during the trial testified she had only six months of criminal practice experience at the time of Petitioner's armed robbery trial.

During this hearing, an issue arose concerning an alleged deal the State made to dismiss a pending carjacking charge against Green. The PCR court ordered the former solicitor who prosecuted Green to obtain Petitioner's case file and Green's case file and review them for information about the deal. When the solicitor's office refused to produce the files because the attorney had left the office for private practice, the PCR court ordered the solicitor's office to provide the files.

In 2011, Petitioner moved for a *de novo* PCR hearing because Petitioner had expended "all reasonable efforts" to review the files. According to the motion, the

solicitor's office claimed it did not have a separate file related to Green. Later in 2011, Petitioner entered into a consent order with the State to conduct a second evidentiary hearing. After the second PCR hearing, the PCR court denied Petitioner's application. This court granted Petitioner's petition for certiorari on August 20, 2014.

STANDARD OF REVIEW

"In a PCR proceeding, the burden is on the applicant to prove the allegations in his application." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). "Any evidence of probative value to support the PCR court's factual findings is sufficient to uphold those findings on appeal." *Lee v. State*, 396 S.C. 314, 320, 721 S.E.2d 442, 446 (Ct. App. 2011). Thus, an appellate court "gives great deference to the PCR court's findings of fact and conclusions of law." *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). "If matters of credibility are involved, then this court gives deference to the PCR court's findings because this court lacks the opportunity to directly observe the witnesses." *Lee*, 396 S.C. at 319, 721 S.E.2d at 445.

LAW/ANALYSIS

"In order to receive relief for ineffective assistance of counsel, a defendant must make two showings." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). "First, he must show that his trial counsel's performance was deficient, meaning that 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "Second, he must demonstrate that this deficiency prejudiced him to the point that he was deprived of a fair trial whose result is reliable." *Id.*

I. Deficient Performance

A. Failure to object to prior burglary testimony

Petitioner argues that the solicitor's intentional improper reference to a prior burglary was irrelevant, prejudicial, and unsubstantiated, and that trial counsel should have objected and moved for a mistrial.

The prior burglary reference occurred during the testimony of lead investigator Paul Mead. During Mead's cross-examination by trial counsel, he was asked about the shotgun's history. Mead stated he discovered the gun was stolen from its registered owner's residence during a burglary in August 1999, and the burglary, to his knowledge, had never been solved. On redirect, the following exchange occurred:

> The State: Investigator Mead, first with regards to the shotgun, you were asked where it originally came from?
>
> Mead: Yes, sir.
>
> The State: To make it perfectly clear, [the shotgun] wasn't stolen from [Petitioner's] house in 1999?
>
> Mead: No, it was not.
>
> The State: He burglarized somebody else's house?
>
> Mead: That's correct.
>
> The State: So is there any reason why his fingerprint would be on this weapon —
>
> Mead: None that I know of, sir.
>
> The State: — other than he robbed the Bojangles?
>
> Mead: That's correct.

At the first PCR hearing, trial counsel admitted that it was a "huge problem" when the State mentioned Petitioner burglarized someone else's house, and she had "no idea" why she did not object and move for a mistrial. Later, trial counsel testified that there was no indication who originally stole the shotgun or how many hands it had passed through during the time between its theft and the Bojangles robbery.

We hold trial counsel was deficient for failing to object to Mead's testimony on redirect concerning the prior burglary. *See State v. Wallace*, 384 S.C. 428, 432,

683 S.E.2d 275, 277 (2009) ("Evidence of other bad acts is not admissible to prove the defendant's guilt except to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent." (citing Rule 404(b), SCRE; *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923))). Here, the State asked the obviously improper question, "He burglarized someone else's house?" and Mead responded, "That's correct."[1] No other evidence in the record supports the contention that Petitioner committed the prior burglary, and no arguments were made demonstrating why this inquiry would have been proper under South Carolina's Rules of Evidence. Accordingly, we find trial counsel was deficient for failing to object to this testimony, which impermissibly suggested Petitioner was responsible for a prior burglary involving the shotgun.

B. Failure to object during opening statements

Petitioner asserts trial counsel was ineffective for failing to object during the State's opening statement when the solicitor falsely told the jury that police saw him at the scene of the robbery.

The comment in question occurred when the State told the jury, "[Petitioner] ultimately took off out of the store with over $1,900 in a plastic bag with the shotgun. The police saw [Petitioner] as he was leaving the store." During the first PCR hearing, trial counsel stated she did not recall the comment itself and she also did not recall any discovery materials indicating police saw Petitioner at the scene of the robbery. Trial counsel continued, "I don't even recall that, but I don't remember any officer seeing him, and if I didn't object, I should've at that point." Trial counsel testified that because Green had credibility issues, it would have been damaging for the State to tell the jury that police saw Petitioner at the scene of the crime. Trial counsel stated this was "obviously something [she] missed." Additionally, trial counsel stated that had she heard the comment, she would have

[1] Although the PCR court suggested the "flow" of Mead's examination made it clear the burglary was unsolved, the State was asked during oral argument whether the idea that Petitioner obtained the gun from a house he burglarized was implied or expressly stated. The State candidly responded, "I would have to state it was express, I don't think it was implied, I don't believe there's any other way that you can really take that statement."

pointed out the State's failure to produce the referenced evidence during her closing argument.

"The opening statement serves to inform the jury of the general nature of the action and the issues involved so they can better understand the evidence presented." *State v. Kornahrens*, 290 S.C. 281, 284, 350 S.E.2d 180, 183 (1986). "The solicitor is permitted in opening statement to outline the facts the [S]tate intends to prove." *Id.* "As long as the State introduces evidence to reasonably support the stated facts, there is no error." *Id.* "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." *Brown v. State*, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009) (quoting *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002)). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (quoting *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166).

We hold trial counsel was deficient for failing to challenge the State's comments either by objecting or by pointing out during the closing arguments that the State failed to prove this assertion. Trial counsel's testimony at the PCR hearing indicated she did not recall any discovery materials indicating that police saw Petitioner at the scene of the robbery. Additionally, during the State's case-in-chief, none of the State's police witnesses testified that they observed Petitioner leaving the restaurant after the robbery. Accordingly, the State failed to introduce evidence during the trial to "reasonably support" this assertion from its opening statement. *Kornahrens*, 290 S.C. at 284, 350 S.E.2d at 183. Even if trial counsel had chosen not to object when the comments were initially made during opening statements, there is no reason she should not have pointed out the State's failure to prove its assertion during her summation. Notably, trial counsel testified during the PCR hearing that she "absolutely" would have pointed out the comments during her closing argument had she noticed them.

C. Carjacking Charge

Petitioner argues trial counsel was either ineffective for failing to question Green about his dismissed carjacking charge or ineffective for failing to preserve the

matter of the trial court's refusal to allow such questioning when the charge was dismissed the same day Petitioner's case was called for trial.

At the first PCR hearing, trial counsel testified that on the morning of Petitioner's trial, she learned the State had dismissed Green's carjacking charge.[2] Trial counsel testified about the in camera discussion with the trial court about whether she could impeach Green or question him concerning the dismissal. Ultimately, the trial court disallowed such questioning. Trial counsel explained that she did not put this discussion on the record due to inexperience. Trial counsel stated that had she known the charge was dismissed on the day of trial, she would have insisted that the trial court determine whether Green was aware of it before he testified. Trial counsel testified, "That's huge. We were already hanging our hat on . . . Green . . . so that information would've been vital. We were just completely deflated."

Green testified at the second PCR hearing under subpoena and stated that at the time of Petitioner's trial, the State asked him to cooperate as a witness but he "didn't want anything to do with it."[3] Green testified that a solicitor told him that if he did not participate in the trial, his "charge wasn't going to go anywhere." Green stated he thought the charge was still pending when he testified against Petitioner. Later, Green stated he would not have testified against Petitioner were it not for the carjacking charge. However, the PCR court found Green's testimony was "somewhat evasive" and noted its observation that Green was speaking with Petitioner prior to and during the hearing.

We hold trial counsel was deficient for failing to preserve the issue of whether she could cross-examine Green about the dismissal of his carjacking charge. Green's testimony provided key evidence for the State's case, yet the State failed to inform trial counsel about the dismissal of his carjacking charge until the morning of Petitioner's trial. Trial counsel neither sought a ruling on the record concerning

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[2] The record reflects that there was a brief pre-trial discussion about which charges trial counsel planned to use for impeachment. When Green's pending carjacking charge was mentioned, the State responded, "[I]t's my understanding, and I talked to the prosecutor this morning and he told me . . . that it was dismissed. So it's not pending anymore."

[3] Green was also incarcerated at the time of the second PCR hearing.

whether she could cross-examine Green about the dismissal nor requested to proffer any questions about the circumstances surrounding the dismissal or Green's potential motivations. *See Foye v. State*, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) (holding trial counsel was deficient for failing to adequately preserve an issue when trial counsel asked the trial court to question jurors regarding whether they saw petitioner wearing chains but the request was not made on the record). Accordingly, trial counsel's performance was deficient.

II. Prejudice

Despite these errors, we hold there was no prejudice resulting from trial counsel's deficient performance because the State presented overwhelming evidence of Petitioner's guilt. *See Smith v. State*, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010) ("[N]o prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt."). First, four days after the armed robbery, Green specifically identified Petitioner as the perpetrator by choosing his photograph from a lineup.[4] Further, although Lightner was unable to select one photograph from a lineup, he narrowed his choices down to two photographs, one of which was Petitioner's. As to the defense's ability to cast doubt upon Green's credibility, Green's status as a convicted felon and testimony regarding several offenses on his criminal record were presented at trial.[5]

Also, police testified that the shotgun recovered near the restaurant had Petitioner's fingerprint on it. Finally, when police found Petitioner and told him he was the subject of a robbery investigation, Petitioner abandoned the child he was holding and fled. *See State v. Robinson*, 360 S.C. 187, 194–95, 600 S.E.2d 100, 104 (Ct. App. 2004) (stating flight from prosecution can be evidence of guilt when there is a nexus between the flight and the charged offense); *State v. Freely*, 105 S.C. 243, 250, 89 S.E. 643, 645 (1916) (recognizing that flight has long been considered

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[4] Police investigator Joe Gray's trial testimony confirmed that Green selected Petitioner's photograph from the lineup approximately four days after the robbery.

[5] As noted above, Green acknowledged during the trial that he had prior convictions for distribution of crack, use of a motor vehicle without consent, and possession of a stolen vehicle. He was also cross-examined as to his status as a convicted felon.

some evidence of guilt and referencing Solomon's proverbial wisdom that the "wicked flee when no man pursueth.").

CONCLUSION

Accordingly, the PCR court's dismissal of Petitioner's application for post-conviction relief is

AFFIRMED.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Francis Ackerman, et al., Appellants,

v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2012-210588

Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 5379
Heard October 20, 2015 – Filed February 10, 2016

REVERSED AND REMANDED

Douglas H. Westbrook, of Charleston, for Appellants.

Lake Eric Summers, of Malone Thompson Summers & Ott, LLC, of Columbia, for Respondent.

GEATHERS, J.: Appellants (Inmates), 196 current or former inmates participating in a Prison Industries service project operated by Respondent South Carolina Department of Corrections (SCDC), challenge an order of the South Carolina Administrative Law Court (ALC) upholding SCDC's denial of Inmates'

grievances. Inmates argue their grievances invoking the Prevailing Wage Statute[1] were not subject to SCDC's fifteen-day filing deadline because these grievances concerned SCDC policy rather than an "incident." We reverse and remand for consideration of Inmates' grievances on the merits.

FACTS/PROCEDURAL HISTORY

In 1995, our legislature enacted section 24-3-430 of the South Carolina Code (2007) to authorize the expansion of the Prison Industries program into the private sector. This expansion allowed qualified private entities to use inmate labor but required the wages for participating inmates to be no less than "the prevailing wage for work of [a] similar nature in the private sector." Act No. 7, 1995 S.C. Acts 78. Section 24-3-430 became effective on July 1, 1995. *Id.* at 102. Subsequently, on September 30, 1998, SCDC entered into a contract with Williams Technologies, Inc. (WTI) for the employment of SCDC inmates on the premises of Lieber Correctional Institution (Lieber) in WTI's business of "disassembly and/or remanufacturing of its product lines at [Lieber]." The cover page for the contract document is entitled "Williams Technology Transmissions Service Contract."

The contract's "Scope of Work" provision states, in pertinent part, "Prison Industry inmates under the general oversight of SCDC will disassemble and/or remanufacture [WTI's] product lines according to engineering design and manufacturing specifications developed and provided by [WTI] . . . ." The contract also provides, "For all purposes, inmates shall be considered to be employees of SCDC."

With regard to payment for services, the contract requires WTI to pay SCDC "$4.00 per hour per inmate for work performed[,] including training hours and hours in excess of the inmate's normal shift." The contract's cover page highlights the contract's "Requirements/Specifications," which include "Wage Rate: $4.00 per hour/per inmate; $.35/[hour] base for inmates."

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[1] S.C. Code Ann. § 24-3-430(D) (2007). Section 24-3-430(D) provides, "No inmate participating in the [Prison Industries] program may earn less than the prevailing wage for work of [a] similar nature in the private sector."

On January 11, 2001, Inmate Darrell Williams filed a "Step 1" Inmate Grievance Form requesting SCDC to pay him the prevailing wage for his labor. SCDC's Inmate Grievance System Policy, designated as Policy GA-01.12, provides for formal review of inmate complaints in two steps. A Step 1 grievance is evaluated by the prison's Warden, and any appeal from the Warden's decision to the "responsible official," is designated as "Step 2." The responsible official must render a decision on the appeal within sixty days, and this decision constitutes SCDC's final response in the matter.

Lieber's Warden denied Williams' Step 1 grievance without addressing the Prevailing Wage Statute, stating, in pertinent part: "Prison Industries does not fall under the minimum wage federal guidelines. Your inmate wages are determined by the Division of Budget & Finance[.] Therefore[,] your requested action cannot be honored at this time." Williams then filed a Step 2 Grievance Form on June 26, 2001, complaining about unsafe working conditions and seeking the prevailing wage for his labor as well as a correction of SCDC's deductions from his wages.

While Williams' Step 2 grievance was pending, the legislature enacted the first of a series of yearly budget provisos, effective for the fiscal year beginning July 1, 2001, permitting SCDC to pay participating inmates less than the prevailing wage for "service work":[2]

> The Director of [SCDC] may enter into contracts with private sector entities that would allow for inmate labor to be provided for prison industry service work. The use of such inmate labor may not result in the displacement of employed workers within the local region in which work is being performed. Service work is defined as any work such as repair, replacement of original manufactured items, packaging, sorting, labeling, or similar work that is not original equipment manufacturing. *The department may negotiate the wage to be paid for inmate labor provided under prison industry service work contracts, and such wages may be*

[2] The 2001-2002 budget was enacted on July 20, 2001, for the fiscal year beginning July 1, 2001.

> *less than the prevailing wage for work of a similar nature in the private sector*.

H. 3687, Appropriation Bill 2001-2002, Part IB § 37.31 (Act No. 66, 2001 S.C. Acts 738) (emphasis added). The legislature enacted identical, or nearly identical, provisos for each following fiscal year until the 2007-2008 fiscal year. On August 1, 2007, section 24-1-295 of the South Carolina Code, which codified the language in the provisos, became effective.[3]

On August 3, 2001, SCDC denied Williams' Step 2 grievance. Williams' appeal to the ALC was dismissed for lack of subject matter jurisdiction. Williams later filed a Summons and Complaint against SCDC and WTI in circuit court, seeking the prevailing wage and other related relief and complaining about unsafe working conditions. On July 1, 2002, Williams filed an amended Summons and Complaint adding numerous plaintiffs and defendants and invoking the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 to -220 (2005 and Supp. 2015). On February 12, 2003, Williams filed a second amended complaint in the form of a class action pursuant to Rule 23, SCRCP.

While Williams' class action was pending in circuit court, Inmates filed their respective Step 1 Inmate Grievance Forms with SCDC on various dates in late September 2004, requesting the prevailing wage for their labor from 1999 through June 30, 2001, and the negotiated wage of $4.00 per hour beginning on July 1, 2001, the effective date of the first budget proviso permitting SCDC to pay

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[3] H. 4878, Appropriation Bill 2002-2003, Part IB § 37.25 (Act No. 289, 2002 S.C. Acts 3145); H. 3749, Appropriation Bill 2003-2004, Part IB § 37.23 (Act No. 91, 2003 S.C. Acts 1437); H. 4925, Appropriation Bill 2004-2005, Part IB § 37.23 (Act No. 248, 2004 S.C. Acts 2574); H. 3716, Appropriation Bill 2005-2006, Part IB § 37.22 (Act No. 115, 2005 S.C. Acts 1324); H. 4810, Appropriation Bill 2006-2007, Part IB § 37.22 (2006 Act No. 397); Act No. 68, 2007 S.C. Acts 288. The legislature sustained the Governor's veto of H. 3620, Appropriation Bill 2007-2008, Part IB § 37.21, the stated reason for the veto being, "the language is no longer necessary after I signed S. 182, the Prison Industries legislation. This proviso conflicts with the statutory changes and is unneeded." Therefore, from July 1, 2007 to August 1, 2007, there existed no authorization for SCDC to pay participating inmates below the prevailing wage.

participating inmates less than the prevailing wage. On October 28, 2004, Lieber's Warden denied several of these Step 1 grievances on the merits. On November 3, 2004, several Inmates filed their Step 2 Inmate Grievance Forms, challenging SCDC's denial of the requested relief. According to the parties, on this same date, the circuit court judge presiding over Williams' class action stayed SCDC's processing of Inmates' grievances.

On July 1, 2005, the circuit court filed an order dismissing Williams' class action and lifting the stay it had imposed on SCDC's processing of Inmates' grievances. However, Williams appealed the circuit court's order, and SCDC invoked the automatic stay set forth in Rule 225(a), SCACR to withhold further processing of Inmates' grievances. On February 25, 2007, our supreme court affirmed the circuit court's order, and the remittitur was filed with the Dorchester County Clerk of Court on March 22, 2007. *Williams v. S.C. Dep't of Corr.*, 372 S.C. 255, 257, 641 S.E.2d 885, 886 (2007).

On May 14, 2007, SCDC issued final decisions on Inmates' Step 2 Forms, basing its denial of relief on both the merits and the fifteen-day filing deadline set forth in paragraph 13.1 of Policy GA-01.12. Paragraph 13.1 states, in pertinent part: "If informal resolution is not possible, the grievant will complete Form 10-5, Step 1 . . . and will submit the Form to *an employee designated by the Warden* . . . within 15 days of the alleged incident. *An inmate will submit a grievance within the time frames established in the policy*."[4] On appeal, the ALC upheld SCDC's denial of Inmates' grievances on the ground that Inmates did not timely file their Step 1 grievances. This appeal followed.

ISSUE ON APPEAL

[4] SCDC applied the November 1, 2004 version of Policy GA-01.12 to Inmates' grievances, although presumably the August 1, 2002 version was in effect when Inmates filed their Step 1 grievances in September 2004 and when Lieber's Warden denied these Step 1 grievances on October 28, 2004. Nonetheless, the provisions concerning the filing deadline for Step 1 grievances are substantially the same in both versions. Therefore, to avoid confusion, we will reference the 2004 version of Policy GA-01.12 throughout this opinion.

Did SCDC's fifteen-day filing deadline apply to Inmates' grievances?[5]

STANDARD OF REVIEW

Section 1-23-610(B) of the South Carolina Code (Supp. 2015) sets forth the standard of review when this court is sitting in review of a decision by the ALC on an appeal from an administrative agency. Here, there are no factual disputes. Rather, the issue on review involves a question of law. Therefore, our review of the ALC's decision is governed by item (d) of section 1-23-610(B), which allows this court to reverse the ALC's decision if it is affected by an error of law.

LAW/ANALYSIS

Inmates argue the fifteen-day filing deadline did not apply to them because their grievances did not concern an "incident" but rather concerned SCDC "policies/procedures," which are exempt from the filing deadline pursuant to paragraph 13.9 of Policy GA-01.12. We agree.

Paragraph 13.1 of Policy GA-01.12 requires an inmate to file a Step 1 Inmate Grievance Form within fifteen days of the alleged "incident." Policy GA-01.12 does not define the term "incident," but paragraph 13.9 provides for exceptions to the filing deadline:

> 13.9 Exceptions to the [fifteen] day time limit requirement *will* be made for grievances concerning *policies/procedures*. Exceptions *may* also be made for *incident grievances* by the Chief/designee, Inmate Grievance Branch, provided that documented reasonable cause can be demonstrated as to why the original time frame was not met, e.g., inmate physically unable to initiate grievance due to hospitalization, court

[5] Because we reverse the ALC's order on this ground alone, we need not reach the merits of Inmates' remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address the remaining issues on appeal when resolution of a prior issue is dispositive).

> appearance, etc. The waiver must be requested by the grievant.

(emphases added). In the present case, SCDC has indicated that the terms "policy" and "procedure" are not defined in any of its policies or relevant publications. However, a review of paragraph 7, entitled "**GRIEVABLE ISSUES**," is instructive:

> The following issues will be considered **grievable**:
>
> **7.1** Department policies/procedures, directives, or conditions [that] directly affect an inmate;
>
> **7.2** Actions of a staff member toward an inmate;
>
> **7.3** Actions of an inmate against another inmate;
>
> **7.4** Inmate property complaints;
>
> **7.5 Disciplinary Hearing actions to appeal a conviction following an innocent plea, or to appeal any guilty verdict due to alleged technicalities or misinterpretation of evidence, or to appeal a sentence when the sanction imposed was allegedly not proportionate to the rules violation;** . . .
>
> **7.6 Any classification decision that directly affects an inmate's custody level; and** . . .
>
> **7.7** ***Calculation of sentence-related credits.***

Paragraph 7.1 (quoted above) includes the same reference to "policies/procedures" found in paragraph 13.9 as an exception to the fifteen-day deadline, i.e., "Exceptions to the [fifteen] day time limit requirement will be made for grievances concerning *policies/procedures*." (emphasis added). Therefore, the words "policies/procedures" in paragraph 13.9 was meant to serve as shorthand for

the language in paragraph 7.1, i.e., "Department policies/procedures, directives, or conditions [that] directly affect an inmate." *Cf. Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 100, 705 S.E.2d 28, 34 (2011) ("As a general rule, 'identical words and phrases within the same statute should normally be given the same meaning.'" (quoting *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007)); *id.* at 101, 705 S.E.2d at 34 ("[W]ords in a statute must be construed in context, and their meaning may be ascertained by reference to words associated with them in the statute."); *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012) (holding regulations are interpreted using the rules of statutory construction).[6]

It logically follows that the remaining items in paragraph 7, i.e., 7.2 through 7.7, were meant to serve as "incidents" for purposes of paragraphs 13.1 and 13.9. This is consistent with SCDC's proposed definition of "policies/procedures," which was adopted by the ALC:

> [T]he terms "policies" and "procedures" constitute approved guidelines for handling the agency's day-to-day operations as well as statements expressing the basic expectations of conduct for agency staff and inmates. More formally stated, the terms "policies" and "procedures" constitute agency directives deemed by the responsible agency officials as "necessary to preserve internal order and discipline, and to maintain institutional security in the prison."

Inmates' grievances naturally fall within this definition because SCDC has operated the prison industries service project as one of its day-to-day operations

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[6] Although SCDC's statements concerning the inmate grievance system are within a document entitled "SCDC Policy/Procedure," they are "binding norms" and, thus, more like rules or regulations that may be interpreted using statutory construction rules than they are true policy statements. *See Home Health Serv., Inc. v. S.C. Tax Comm'n*, 312 S.C. 324, 328, 440 S.E.2d 375, 378 (1994) ("Whether a particular agency proceeding announces a rule or a general policy statement depends upon whether the agency action establishes a binding norm.").

pursuant to guidelines and statements expressed in its contracts with prison industries sponsors, such as those in the WTI contract that (1) set the pay rate at $4.00 per hour per inmate, to be paid directly to SCDC and from which SCDC is to make certain deductions, (2) prohibit WTI from exposing inmates to environmental hazards, (3) establish the duties of the parties regarding screening, training, supervision, scheduling, removal and replacement of inmate workers, (4) require WTI to provide adequate security, (5) provide for future renegotiation of the pay rate to reflect SCDC's increased overhead costs, (6) allow for the parties to create a bonus plan for inmates based on productivity and quality control, and (7) prohibit discrimination.

Further, the substance of Inmates' grievances challenges the specific pay rate in the WTI contract, rather than SCDC's act of giving notice of this rate to inmates, on the ground that the pay rate is less than the prevailing wage, a topic governed by statute and, thus, an expression of the legislature's policy on inmate pay.[7] *See* S.C. Code Ann. § 24-3-315 (2007) ("The director [of SCDC] must determine prior to using inmate labor in a prison industry project that it will not displace employed workers, that the locality does not have a surplus of available labor for the skills, crafts, or trades that would utilize inmate labor, and that the rates of pay and other conditions of employment are not less than those paid and provided for work of [a] similar nature in the locality in which the work is performed."); § 24-3-430(D) ("No inmate participating in the [Prison Industries P]rogram may earn less than the prevailing wage for work of [a] similar nature in the private sector."); *see also* S.C. Code Ann. § 24-1-295 (Supp. 2015) ("[SCDC] may negotiate the wage to be paid for inmate labor provided under prison industry *service work* contracts and *export work* contracts, and these wages may be less than the prevailing wage for work of a similar nature in the private sector." (emphases added)). As SCDC is mandated to carry out these legislative policies, SCDC, in turn, expresses its own, more specific policies regarding pay rates and other working conditions for inmates in its contracts with prison industries sponsors pursuant to § 24-3-430(B) or § 24-1-295.

[7] Approximately ninety-two of Inmates' grievances involve periods of work beginning prior to July 1, 2001, the effective date of the first budget proviso permitting SCDC to pay participating inmates less than the prevailing wage for "service work."

Moreover, the provisions of these contracts are enduring and have the same effect on numerous inmates. Therefore, they cannot realistically be characterized as "incidents," which are temporally limited and rarely affect more than a few inmates. *Cf. Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 383, 537 S.E.2d 543, 548 (2000) ("In construing a statute, its words must be given their plain and ordinary meaning without resort to subtle or *forced* construction to limit or expand the statute's operation." (emphasis added)).

Based on the foregoing, the wage set forth in the WTI contract logically falls within "policies/procedures" as contemplated in paragraphs 7.1 and 13.9 of Policy GA-01.12. Therefore, SCDC's attempt to characterize Inmates' wage grievances as incident grievances was arbitrary and capricious. *Cf. Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34-35, 766 S.E.2d 707, 718 (2014) ("We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

CONCLUSION

Accordingly, we reverse the ALC's decision and remand for the ALC's consideration of Inmates' grievances on the merits.

REVERSED AND REMANDED.

SHORT and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jomer Hill, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212398

ON WRIT OF CERTIORARI

Appeal From Greenville County
G. Edward Welmaker, Trial Court Judge
D. Garrison Hill, Post-Conviction Relief Judge

Opinion No. 5380
Heard October 13, 2015 – Filed February 10, 2016

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Karen Christine Ratigan, both of Columbia, for Respondent.

GEATHERS, J.: Jomer Hill (Petitioner) appeals the denial of post-conviction relief (PCR), arguing the PCR court erred in declining to find appellate counsel ineffective for failing to raise a directed verdict issue on appeal. We affirm.

FACTS/PROCEDURAL HISTORY

In December of 2000, Kenneth Goldsmith and Clifton "Trey" Brown (Trey) were shot at a "liquor house" where locals regularly visited to buy drugs, drink alcohol, gamble, and socialize. Goldsmith died at the scene and Trey was transported to a hospital where he later died. The case became a cold case when investigators were unable to identify a suspect. Officers sought to reopen the case by seeking additional evidence and interviewing new witnesses. The officers observed some hesitancy in the community members' willingness to give information, stemming from their fear of Lamont "Mont" Brown (Brown),[1] a known drug dealer and leader of a large drug enterprise. Of his own volition, Timothy Paden[2] contacted investigators and alleged Petitioner confessed to the crimes. Paden offered to wear a wire and subsequently recorded Petitioner's confession. Thereafter, in 2005, a grand jury indicted Petitioner for the murders, and he proceeded to trial.

Trial testimony revealed that the liquor house was actually Goldsmith's residence and he received a portion of gambling proceeds generated at the home. Goldsmith gave Trey a key to the home and allowed him to operate the liquor house because of their friendship. Trey and Petitioner were reputed drug dealers and sold drugs for Brown from the liquor house; moreover, it was Petitioner who introduced Trey to Brown and the organization. One former member of the organization testified that the individual who introduces a new potential drug dealer to Brown becomes responsible for the actions of the person whom he brought into the organization. This former member further explained Brown ordered him to kill the former member's own cousin because the cousin "snitched" and Brown "don't like no snitches."

Witnesses testified that just prior to his death, Trey mentioned he had "to pay some bills" to Brown and Brown was "sweating" him for money. Also,

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[1] Trey Brown and Lamont Brown are not related.

[2] Paden, Trey, and Petitioner were members of Brown's drug organization and the group held regular business meetings regarding the organization.

Brown testified that a few days prior to the murders, Brown warned Petitioner that he "was getting tired of him, you know, not making his payments on time" and that he "was going to be kicked out of the [drug organization] . . . if he didn't get his stuff together and start coming to bring his money in on time like Trey was." Further, Brown testified that prior to his death, Trey was "moving up" in the organization because he began to do "extra stuff" for Brown such as transporting drugs. In contrast, Petitioner was "on his way down, way down by then."

On the night before the crimes, several individuals were gambling and socializing at the liquor house, including Trey, Petitioner, and Goldsmith. At some point, Brown arrived and stood outside looking for Trey and Petitioner, expecting payment from both of them for drugs. According to Brown, both men informed him they would give him the money later that evening; however, neither returned with the money. Several witnesses testified they observed Brown and Trey argue about money because Brown wanted the money Trey owed him. One witness observed Trey and Brown have a conversation that was "probably serious because they didn't want anybody to hear their discussion." Another witness observed Trey go outside of the liquor house to give Brown money and Brown responded "that ain't right . . . I want it all." During the argument, Trey cursed at Brown, stated "that's my half," and ran back into the liquor house. Once back inside, Trey spoke with Petitioner; Petitioner then went outside to speak with Brown.

Trey's girlfriend testified that on the morning of the crimes, Trey's pager went off at around 9:50 a.m. and he went upstairs to return the call. Phone records indicate that on that morning, Petitioner paged Trey at 9:39 a.m. and Trey placed a call to Petitioner five minutes later—the last recorded outgoing call on Trey's phone. After the call, Trey hurriedly grabbed a large sum of money and left the home. Trey's girlfriend testified Trey left to go to the liquor house. On cross-examination, however, she admitted she "didn't know for sure" if Trey went to the liquor house, "but that was his usual hangout."

According to the mother of Petitioner's child, sometime before noon on the morning of the crimes, while she was at Petitioner's home, Petitioner ran into the home, sweating and out of breath. He changed clothes, and as she was leaving, asked her to throw away a black trash bag for him. He cautioned her to make sure she did not throw the bag away at her house. She followed his directions without looking inside the bag.

At around 5:00 or 6:00 p.m. on the evening of the murders, investigators arrived at the crime scene and did not find any evidence of forced entry. Both Goldsmith and Trey were discovered in the same bedroom of the home. Goldsmith suffered two gunshot wounds to the chest, one being a rapidly fatal wound. Trey suffered a gunshot wound to the back of the skull. An expert opined both Goldsmith and Trey remained in the liquor house for approximately seven or eight hours before they were discovered. Accordingly, the pathologist opined they were shot between 9:00 a.m. and 12:00 p.m. An officer testified ballistic fingerprints from the bullet projectiles discovered at the crime scene showed all the bullets were fired from the same gun and both Goldsmith and Trey were shot with a .38 caliber gun.

Although no witness placed Petitioner at the crime scene at the time of the crimes, individuals saw Petitioner in the general vicinity of the liquor house between 9:00 a.m. and 12:00 p.m. on the day of the crimes. Along with the mother of Petitioner's child, other witnesses testified they noticed Petitioner changed outfits that morning and he never again wore the same outfit he wore between 9:00 a.m. and 12:00 p.m. that morning.

I. Confessions or Admissions of Essential Facts

Paden testified he and Petitioner were incarcerated together[3] when Petitioner confessed to committing the murders. He stated he and Petitioner discussed a double homicide, and given the nature of the conversation, Paden concluded Petitioner murdered Goldsmith and Trey. After his release, Paden contacted law enforcement and reported Petitioner's confession. Thereafter, Paden sought "concrete evidence" of the confession by audio-recording a conversation with Petitioner. The audio recording was played for the jury while the jury reviewed a transcript of the recording. The record provided for this appeal does not include a copy of the transcript. However, in Petitioner's direct appeal, Petitioner included a transcript of the taped recording in the record. The opinion disposing of the direct

[3] Although the record suggests Paden was incarcerated for an unrelated matter, the record is not clear that the reason for Petitioner's incarceration was related to the instant murders. Both were subsequently released from incarceration prior to trial of the instant matter.

appeal noted "[i]n the transcript, [Petitioner] purportedly answers in the affirmative several times when Paden asks if [Petitioner] was alone when he shot Trey and [Goldsmith.]" *State v. Hill*, 382 S.C. 360, 365 n.3, 675 S.E.2d 764, 767 n.3 (Ct. App. 2009).

According to Brown, on the morning of the crimes, Petitioner arrived at Brown's house between 9:30 and 10:00 a.m. and Brown asked why Trey did not come with Petitioner. Petitioner responded "he was gone" and "kind of made the sign of a gun." Brown asked, "What?" and Petitioner responded, "man, it was just over with." According to Brown, Petitioner elaborated that Trey had "used him" and "made him look bad" in front of Brown. Petitioner also stated "it was crunch time and [he] did what [he] had to do." Brown understood their conversation to mean Petitioner shot Trey. Brown opined Petitioner shot Trey because: he was jealous of Trey; Petitioner was using some of the drugs they were supposed to sell; and he felt Trey betrayed him. Brown also testified that while at the hospital visiting Trey before Trey died, Petitioner told Brown he shot Trey because Trey "didn't help him when he was in a bind with" Brown and Trey had already paid off his debts to Brown.

At trial, Maxie Wright, the longtime boyfriend of Petitioner's grandmother,[4] denied telling investigators Petitioner confided in him that Brown directed Petitioner to murder Trey. Wright also stated Petitioner denied killing Trey and Goldsmith. However, an officer testified Wright had previously stated Petitioner told Wright that Brown "made him do it; that [Brown] had told him if he didn't do it, he would kill his whole family."

After the State rested, Petitioner moved to dismiss the indictments and for a directed verdict, arguing the only evidence connecting him to the two murders was an alleged confession and South Carolina law requires more than a confession to convict him of the crimes. Petitioner argued the State did not present sufficient evidence corroborating Petitioner's confession to establish the *corpus delicti* of the two murders. The trial court denied the directed verdict motion, finding there was evidence in addition to Petitioner's confession to establish the *corpus delicti*. The jury convicted Petitioner as indicted. Petitioner moved for a judgment

[4] Petitioner's grandmother raised him and their relationship was that of mother and son.

notwithstanding the verdict, arguing the record did not include any evidence proving Petitioner committed the crimes aside from his alleged confession. The trial court construed the motion as a motion for a new trial, which it denied. The trial court sentenced Petitioner to concurrent sentences of fifty years' imprisonment for each crime.

Petitioner appealed. During the appeal process, Petitioner wrote to appellate counsel, encouraging him to brief the *corpus delicti* directed verdict issue. Appellate counsel did not brief the issue.

II. PCR

Ultimately, this court affirmed the convictions and sentences. *See Hill*, 382 S.C. at 370, 675 S.E.2d at 769. Petitioner filed a pro se petition for certiorari to the South Carolina Supreme Court, which was dismissed. Petitioner filed a petition for PCR arguing, among other things, ineffective assistance of appellate counsel for failure to raise the directed verdict issue on appeal.

During the PCR hearing, Petitioner argued the only evidence the State had to convict him was his alleged wiretapped confession to Paden. He maintained appellate counsel erred in failing to brief the directed verdict issue on appeal as there was insufficient evidence to support a conviction. Trial counsel testified that he believed the State would not have proceeded to trial without Petitioner's wired conversation with Paden. He explained that he argued the directed verdict issue at trial; therefore, it was preserved.

The PCR court found Petitioner failed to meet his burden of proving appellate counsel was deficient. The court noted Petitioner did not present testimony from appellate counsel; therefore, it could not speculate as to why appellate counsel briefed the three issues outlined in the appeal but not the directed verdict issue. Further, the PCR court found Petitioner failed to prove prejudice because the State "presented overwhelming evidence of guilt—including three independent witnesses who testified [Petitioner] had admitted his guilt to them." Accordingly, the PCR court denied PCR. This appeal followed.

ISSUE ON APPEAL

Did the PCR court err in declining to find appellate counsel was ineffective for failing to appeal the denial of the motion for a directed verdict?

STANDARD OF REVIEW

"In [PCR] proceedings, the burden of proof is on the applicant to prove the allegations in his application." *Bennett v. State*, 383 S.C. 303, 307, 680 S.E.2d 273, 275 (2009). "If the PCR court's finding is supported by any evidence of probative value in the record, it should be upheld." *Id.*

LAW/ANALYSIS

Petitioner maintains the PCR court erred in declining to grant PCR. Specifically, Petitioner argues appellate counsel's failure to raise the directed verdict issue on appeal violated his Sixth Amendment right to effective assistance of appellate counsel. We disagree.

"A defendant is constitutionally entitled to the effective assistance of appellate counsel." *Southerland v. State*, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). "However, appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990).

> There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts—often to as little as [fifteen] minutes—and when page limits on briefs are widely imposed.

Jones v. Barnes, 463 U.S. 745, 752–53 (1983). "Notwithstanding *Barnes*, it is still possible to bring a *Strickland* [*v. Washington*, 466 U.S. 668 (1984)] claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent." *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

To prevail on an ineffective assistance of appellate counsel claim, "[f]irst, the burden of proof is upon petitioner to show that counsel's performance was

deficient as measured by the standard of reasonableness under prevailing professional norms." *Southerland*, 337 S.C. at 616, 524 S.E.2d at 836. "Second, the petitioner must prove that he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the **proceeding** would have been different." *Id*.

Here, the record supports the PCR court's finding that Petitioner failed to meet his burden of establishing appellate counsel was deficient for failing to raise the directed verdict issue. *See id.* (holding the burden of proof is upon the petitioner in PCR actions to show appellate counsel's performance was deficient). Although trial counsel testified the issue was preserved and he believed the State would not have proceeded to trial without Petitioner's wired conversation with Paden, appellate counsel did not testify as to his reasons for declining to raise the issue on appeal. *See Thrift*, 302 S.C. at 539, 397 S.E.2d at 526 ("[A]ppellate counsel is not required to raise every nonfrivolous issue that is presented by the record."); *id.* at 539–40, 397 S.E.2d at 526 (holding petitioner's appellate attorney's testimony that she reviewed the issue petitioner requested that she raise on appeal and consciously decided not to brief the issue clearly supported the PCR court's finding that appellate counsel was not ineffective). Further, the testimony from the PCR hearing does not show how the directed verdict issue was more promising or had any more merit than the issues appellate counsel chose to raise on appeal. *See Jones*, 463 U.S. at 752–53 (noting the importance of appellate counsel selecting the most promising issues for appellate review, especially when oral arguments are limited by time restrictions); *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) ("In a PCR proceeding, the burden is on the applicant to prove the allegations in his application.").

More importantly, even if Petitioner could show appellate counsel was deficient, Petitioner failed to prove prejudice as a result of the deficiency. *See Southerland*, 337 S.C. at 616, 524 S.E.2d at 836 (holding "the petitioner must prove that he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the **proceeding** would have been different").

An appellate court reviews the denial of a directed verdict by viewing the evidence and all reasonable inferences in the light most favorable to the State. *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "A case should be submitted to the jury if there is any substantial evidence, either direct or

circumstantial, which tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." *Brown v. State*, 307 S.C. 465, 468, 415 S.E.2d 811, 812 (1992). "[O]ur duty is not to weigh the plausibility of the parties' competing explanations. Rather, we must assess whether, in the light most favorable to the State, there was *any* evidence from which the jury could infer [the defendant's] guilt." *State v. Larmand*, Op. No. 27562 (S.C. Sup. Ct. refiled Dec. 23, 2015) (Shearouse Adv. Sh. No. 50 at 19); *see also State v. Bennett*, Op. No. 27600 (S.C. Sup. Ct. filed Jan. 6, 2016) (Shearouse Adv. Sh. No. 1 at 19) ("Therefore, although the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt. This objective test is founded upon reasonableness. Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt.").

Considering the evidence in the light most favorable to the State, we find that even if counsel had raised the directed verdict issue on direct appeal, a reasonable probability of a different outcome does not exist because Petitioner would not have been entitled to a reversal; that is, the State provided independent evidence to corroborate Petitioner's statements about the murders.

"It is well-settled law that a conviction cannot be had on the extra-judicial confessions of a defendant unless they are corroborated by proof *aliunde* of the *corpus delicti*." *State v. Abraham*, 408 S.C. 589, 592, 759 S.E.2d 440, 441 (Ct. App. 2014) (footnote omitted). Stated another way, the State must prove the *corpus delicti* of the murders with evidence from a source other than Petitioner's confessions. "In a murder trial, the *corpus delicti* consists of two elements: the death of a human being and the criminal act of another causing the death." *Brown*, 307 S.C. at 467, 415 S.E.2d at 812. "This Court has held that the *corpus delicti* of murder may be established by circumstantial evidence when it is the best evidence obtainable." *Id*. "Circumstantial evidence . . . gains its strength from its combination with other evidence, and all the circumstantial evidence presented in a case must be considered together to determine whether it is sufficient to submit to the jury." *State v. Rogers*, 405 S.C. 554, 567, 748 S.E.2d 265, 272 (Ct. App. 2013). "[T]he corroboration rule is satisfied if the State provides sufficient independent evidence which serves to corroborate the defendant's extra-judicial

statements and, together with such statements, permits a reasonable belief that the crime occurred." *State v. Osborne*, 335 S.C. 172, 180, 516 S.E.2d 201, 205 (1999).

"A confession in a legal sense is restricted to an acknowledgment of guilt made by a person after an offense has been committed and does not apply to a mere statement or declaration of an independent fact or facts from which such guilt might be inferred." *State v. Epes*, 209 S.C. 246, 261, 39 S.E.2d 769, 775 (1946). The corroboration rule applies whether a statement amounts to a confession or merely constitutes an admission of essential facts from which guilt might be inferred. *Osborne*, 335 S.C. at 178, 516 S.E.2d at 203–04.

> The need for corroboration extends beyond complete and conscious admission of guilt—a strict confession. Facts admitted that are immaterial as to guilt or innocence need no discussion. But statements of the accused out of court that show essential elements of the crime . . . stand differently. Such admissions have the same possibilities for error as confessions. They, too, must be corroborated.

Id. at 178, 516 S.E.2d at 204 (quoting *Opper v. United States*, 348 U.S. 84, 91 (1954).

We note that at trial and during the PCR hearing, the State maintained Petitioner's alleged statements to Brown and Wright were sufficient evidence to corroborate Petitioner's confession to Paden. However, the State concedes in its brief to this court, and we agree, that Petitioner's alleged statements to Brown and Wright were also confessions requiring corroboration. *See Osborne*, 335 S.C. at 178, 516 S.E.2d at 204 ("We think that an accused's admissions of essential facts or elements of the crime, subsequent to the crime, are of the same character as confessions and that corroboration should be required."); *State v. Saltz*, 346 S.C. 114, 137, 551 S.E.2d 240, 253 (2001) ("The State must produce proof of the *corpus delicti* from a source other than the out-of-court confession of a defendant.").

Nevertheless, the record includes sufficient independent evidence to support and corroborate the trustworthiness of Petitioner's statements to Paden, Brown, and Wright regarding the shootings. The record establishes that Petitioner and Trey

sold drugs in a sophisticated drug organization led by Brown. Petitioner introduced Trey to Brown and the organization; therefore, according to organizational mores, Petitioner became responsible for Trey's shortcomings within the organization. The record is replete with evidence that Trey owed Brown money and the two argued over Trey's failure to pay the debt. The disciplinary methods within the organization supplied Petitioner with a motive to kill Trey. Additionally, Brown testified regarding other potential motives for Petitioner to have killed Trey, including jealousy of Trey's success in the organization, feelings of betrayal, and drug usage of the drugs the group was supposed to sell. *See People v. Edmonds*, 637 N.Y.S.2d 71, 72 (1996) (holding evidence of participation in a drug organization provided motive, relevant background information, and completed the narrative of events leading up to the shooting); *State v. Sweat*, 362 S.C. 117, 124, 606 S.E.2d 508, 512 (Ct. App. 2004) ("Generally, motive is not an element of a crime that the prosecution must prove to establish the crime charged, but frequently motive is circumstantial evidence . . . of the intent to commit the crime . . . ."); *State v. Williams*, 321 S.C. 327, 339, 468 S.E.2d 626, 633 (1996) (upholding a defendant's conviction and death sentence when "circumstantial evidence existed from which the jury could conclude that [the defendant] had the motive, means, and opportunity to perform the homicides"); *State v. Thomas*, 159 S.C. 76, 80–81, 156 S.E. 169, 170–71 (1930) ("The rule[s] that evidence tending to show motive or absence of motive on the part of [the] accused is relevant and admissible[] and that a wide latitude in the admission of this kind of evidence is permissible[] are particularly applicable *** in cases of circumstantial evidence, motive being a circumstance bearing on the identity of the accused as the perpetrator of the crime." (fifth alteration in original)).

Further, phone records indicate that on the morning of the crimes, Petitioner paged Trey and Trey returned the call five minutes later—the last recorded outgoing call on Trey's phone. Subsequently, Trey hurriedly grabbed a large sum of money and left his home, heading to the liquor house. Witnesses placed Petitioner in close proximity to the liquor house around the time the crimes occurred between 9:00 a.m. and 12:00 p.m. Also, in that time frame, Petitioner ran into his home, sweating and out of breath, changed clothes, and asked his child's mother to throw away a black trash bag for him, warning her to make sure she did not throw the bag away at her house. Other witnesses also testified they noticed Petitioner changed outfits that morning and he never again wore the same outfit he wore between 9:00 a.m. and 12:00 p.m. that morning.

Moreover, a reasonable inference can be drawn that Petitioner asked Trey to meet him at the liquor house and he knew Goldsmith would be at the house, as it was Goldsmith's residence. Finally, forensic evidence provides additional evidence to corroborate Petitioner's confessions. Trey's body and Goldsmith's body were discovered in the same room of the liquor house. An expert opined both were shot between 9:00 a.m. and 12:00 p.m. and remained in the liquor house for seven or eight hours before they were discovered. An officer testified ballistic fingerprints from the bullet projectiles discovered at the crime scene showed all the bullets were fired from the same gun and both Goldsmith and Trey were shot with a .38 caliber gun. These acts, statements, and forensics combined create circumstantial evidence that Trey and Goldsmith died as the result of a criminal act of another—here, Petitioner. *See Rogers*, 405 S.C. at 567, 748 S.E.2d at 272 ("Circumstantial evidence . . . gains its strength from its combination with other evidence, and all the circumstantial evidence presented in a case must be considered together to determine whether it is sufficient to submit to the jury.").

Based on the foregoing, and given our appellate standard of review, we find the corroboration rule is satisfied as the State provided sufficient independent evidence which serves to corroborate Petitioner's extra-judicial statements and, together with such statements, permits a reasonable belief that he committed the crimes. *Osborne*, 335 S.C. at 180, 516 S.E.2d at 205. *See Larmand*, Op. No. 27562 (S.C. Sup. Ct. refiled Dec. 23, 2015) (Shearouse Adv. Sh. No. 50 at 19) ("[O]ur duty is not to weigh the plausibility of the parties' competing explanations. Rather, we must assess whether, in the light most favorable to the State, there was *any* evidence from which the jury could infer [the defendant's] guilt."); *see also State v. Bennett*, Op. No. 27600 (S.C. Sup. Ct. filed Jan. 6, 2016) (Shearouse Adv. Sh. No. 1 at 19) ("[I]n ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt.").

Accordingly, we affirm. *See Gilchrist v. State*, 364 S.C. 173, 179, 612 S.E.2d 702, 705 (2005) (holding appellate counsel was not ineffective for failing to argue an issue on appeal because the issue did not amount to reversible error); *Bennett*, 383 S.C. at 309–10, 680 S.E.2d at 276 (holding the PCR court erred in finding appellate counsel ineffective for failing to brief an issue because even if appellate counsel's performance was deficient, such performance did not prejudice the petitioner).

CONCLUSION

For the foregoing reasons, we hold the PCR court did not err in concluding appellate counsel was not ineffective, and we affirm the PCR court's order denying relief.

SHORT and MCDONALD, JJ., concur.