STATE OF LOUISIANA

VERSUS

GILBERT ONEIL, III

NO. 25-KH-107

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

May 23, 2025

Linda Tran
First Deputy Clerk

IN RE GILBERT ONEIL, III

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE FRANK A. BRINDISI, DIVISION "E", NUMBER 22-1212

Panel composed of Judges Jude G. Gravois,
Marc E. Johnson, and Stephen J. Windhorst

WRIT DENIED

Relator, Oneil Gilbert, III,[1] seeks from this Court an extension of his return date in order that he might seek supervisory review of the trial court's ruling of February 13, 2025, which denied his application for post-conviction relief ("APCR"). Relator also attaches, in full, his writ application seeking the above-noted relief.

Relator represents herein that on February 21, 2025, he received the trial court's order dated February 13, 2025 denying his APCR. On February 27, 2025, relator represents that he mailed a notice of Intent to Apply for Writs and Request for Return Date pursuant to Uniform Rules of Court, Rule 4-2 and 4-3

[1] Throughout the writ application and official record, relator's name appears alternatively as "Oneil Gilbert, III" and "Gilbert Oneil, III." However, relator's correct name appears to be "Oneil Gilbert, III."

to the district court, and that as of the date he mailed this application to this Court (March 10, 2025), the trial court had failed to respond to his request.

Under the circumstances, we find relator's writ application to this Court timely. Relator seeks review of a trial court ruling dated February 13, 2025; his writ application, accompanying his request for an extension of the return date, was postmarked March 10, 2025 and received by this Court on March 14, 2025. Accordingly, relator's request for an extension is denied as moot, and this Court will proceed to review the merits of relator's writ application.

REVIEW OF WRIT APPLICATION

Relator, Oneil Gilbert, III,[2] seeks this Court's supervisory review of the trial court's February 13, 2025 ruling which denied his application for post-conviction relief ("APCR"), asserting that the trial court erred in denying his two claims: a *Batson* claim, and an ineffective assistance of counsel claim. For the following reasons, we conclude that the trial court did not err in denying relator's APCR, and thus deny the writ application.

FACTS AND PROCEDURAL HISTORY

On October 19, 2022, relator was found guilty by a jury of possession of a firearm by a convicted felon (count one) and possession with intent to distribute cocaine weighing less than two grams (count two). The trial court sentenced relator to twenty years imprisonment at hard labor on count one, without the benefit of parole, probation, or suspension of sentence, and two years imprisonment at hard labor on count two. The State subsequently filed a habitual offender bill of information on November 10, 2022, as to count one, alleging that relator was a second-felony offender. On January 20, 2023, the

[2] Throughout the writ application and official record, relator's name appears alternatively as "Oneil Gilbert, III" and "Gilbert Oneil, III." However, relator's correct name appears to be "Oneil Gilbert, III."

trial court found relator to be a second-felony offender as to count one, vacated the original sentence as to count one, and sentenced relator to forty years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. On November 8, 2023, this Court affirmed relator's convictions and relator's sentence on count one, but vacated relator's sentence on count two and remanded for resentencing.[3] *State v. Gilbert*, 23-121 (La. App. 5 Cir. 11/8/23), 377 So.3d 378. On May 29, 2024, the Louisiana Supreme Court denied relator's writ application. *State v. Gilbert*, 23-1640 (La. 5/29/24), 385 So.3d 704.

Relator filed his APCR with the district court on October 1, 2024. In it, relator claimed that the State excluded Black jurors in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Relator also claimed that counsel rendered ineffective assistance. On December 2, 2024, the State filed its response.

On February 13, 2025, the district court denied relief, first finding that relator's claim of a *Batson* violation was procedurally barred from review pursuant to La. C.Cr.P. art. 930.4(C), which provides: "If the application alleges a claim which the petitioner raised in the trial court and inexcusably failed to pursue on appeal, the court shall deny relief." With respect to relator's claim of trial counsel's ineffectiveness, the district court found that relator failed to "prove any deficiency in counsel's performance, or prejudice resulting."

[3] Specifically, this Court vacated relator's sentence on count two and remanded for resentencing because the sentencing transcript did not reflect that the trial court ordered the sentence to be with or without hard labor in accordance with La. R.S. 40:967(C)(1). *See State v. Gilbert*, 23-121 (La. App. 5 Cir. 11/8/23), 377 So.3d 378, 387. According to relator's official record, on December 11, 2023, the trial court resentenced relator on count two to a term of two years imprisonment at hard labor, to run concurrently with his sentence on count one.

In this writ application, relator re-urges his claim that his counsel rendered ineffective assistance. Relator further argues that the district court erred by procedurally defaulting his claim of a *Batson* violation.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his first claim, relator contends that trial counsel rendered ineffective assistance by failing to obtain the recording of the 9-1-1 call that led to his arrest and further by failing to conduct an investigation to identify the caller. Relator also faults counsel for failing to object or move for a mistrial based on Judge Brindisi's remarks during *voir dire*, suggesting that the trial judge was biased in favor of the State.

Under the Sixth Amendment to the United States Constitution, and Article I, § 13 of the Louisiana Constitution, a defendant is entitled to effective assistance of counsel. *State v. Casimer*, 12-678 (La. App. 5 Cir. 3/13/13), 113 So.3d 1129, 1141. To prove ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Casimer*, 113 So.3d at 1141. Under the *Strickland* test, the defendant must show: (1) that counsel's performance was deficient, that is, that the performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that the deficient performance prejudiced the defense. *Id*. An error is considered prejudicial if it was so serious as to deprive the defendant of a fair trial, or "a trial whose result is reliable." *Id*. To prove prejudice, the defendant must demonstrate that, but for counsel's unprofessional conduct, the outcome of the trial would have been different. *Id*. (citing *Strickland v. Washington*).

In the instant case, the State provided the defense with open-file discovery, including the 9-1-1 call, "available for inspection by appointment by

request." In addition, the State's discovery receipt indicates that the defense downloaded or previewed a computer-aided dispatch report of the 9-1-1 call. The excerpted transcript from the motion to suppress hearing included in relator's application also shows that counsel questioned Deputy Morrison regarding the 9-1-1 call. Specifically, on cross-examination, Deputy Morrison testified that he did not personally speak to the caller and that he was unable to "find the person." Thus, despite relator's claim to the contrary, it appears that counsel was fully aware of the contents of the 9-1-1 call. Although relator complains that counsel failed to subpoena the caller, known only as "Brian," to testify at the motion to suppress hearing, relator's assertion that the caller would have provided helpful information to the defense appears speculative at best, particularly when the 9-1-1 call was inculpatory in nature. In any event, even assuming the caller could be located, the Louisiana Supreme Court has specifically held that the right to confrontation contained in the United States and Louisiana Constitutions is not implicated in a pre-trial matter. *See State v. Mackey*, 21-252, 2021 WL 2926118 (La. App. 5 Cir. 7/12/21) (citing *State v. Harris*, 08-2117 (La. 12/19/08), 998 So.2d 55. Finally, to the extent that relator appears to re-litigate his motion to suppress, this Court found on appeal that "the deputies had reasonable suspicion to stop defendant based upon the tip, corroborating evidence and independent observations of the deputies." *Gilbert*, 377 So.3d at 386. As such, we find that relator's re-purposing of the claim as one of ineffective assistance of counsel is also without merit. *See State v. Williams*, 613 So.2d 252, 256-57 (La. 1992) ("When the substantive issue that an attorney has not raised has no merit, then the claim that the attorney was ineffective for failing to raise the issue also has no merit.").

Relator also complains that Judge Brindisi's explanation of the "one-witness rule" during *voir dire* included an example in which the trial judge, casting himself as a hypothetical eyewitness, referred to the prosecutor by her first name and portrayed her as a victim who was his "friend."[4] In relator's view, the trial judge's personal references to the prosecutor constituted a failure on Judge Brindisi's part to "avoid impropriety and the appearance of impropriety," thereby warranting an objection by counsel or a motion for a mistrial. However, "[t]he time and manner of making objections is part of the trial strategy decision-making of the trial attorney." *State v. Moore*, 16-644 (La. App. 5 Cir. 3/15/17), 215 So.3d 951, 968. On the showing made, relator fails to demonstrate counsel erred. *See* La. C.Cr.P. art. 930.2.[5]

Consequently, relator has not "overcome the presumption that, under the circumstances, [counsel's decisions] 'might be considered strong trial strategy.'" *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed.2d 83 (1955)). Against this backdrop, relator has not demonstrated that the claimed errors rendered his trial "fundamentally unfair." *Strickland*, 466 U.S. at 700, 104 S.Ct. at 2071. We find no merit to this claim.

***BATSON* CLAIM**

Next, relator challenges the district court's ruling procedurally defaulting his claim raising a *Batson* violation. Specifically, in reviewing relator's post-conviction claim, the district court found that "[t]he record reflects that defense

[4] The one-witness rule refers to the legal standard that in the absence of internal contradiction or irreconcilable conflict with physical evidence, the testimony of one witness, if believed by the trier of fact, is sufficient to convict. *State v. Riley*, 11-673 (La. App. 5 Cir. 3/13/12), 90 So.3d 1144, 1149-50, *writ denied*, 12-855 (La. 9/28/12), 98 So.3d 828. Relator does not challenge the legal accuracy of Judge Brindisi's explanation of the one-witness rule in his claim.

[5] La. C.Cr.P. art. 930.2 states: "The petitioner in an application for post-conviction relief shall have the burden of proving that relief should be granted."

counsel raised *Batson* challenges at trial, which the Court denied." Therefore, the district court procedurally barred the claim from review on the merits, pursuant to La. C.Cr.P. art. 930.4(C), which provides: "If the application alleges a claim which the petitioner raised in the trial court and inexcusably failed to pursue on appeal, the court shall deny relief."[6]

In relator's view, the procedural default should be excused because appellate counsel failed to raise the *Batson* claim on appeal. Relator also points out that the State's response to his APCR addressed relator's *Batson* claim on the merits in the context of appellate counsel's ineffectiveness. Nevertheless, the State still maintained that relator's *Batson* claim was procedurally barred by La. C.Cr.P. art. 930.4(C). Furthermore, pursuant to La. C.Cr.P. art. 930.4(G), effective on August 1, 2024,[7] neither the district court, nor the State are permitted to waive or excuse the limitations set forth in La. C.Cr.P. art. 930.4.[8] As such, relator's *Batson* claim is now foreclosed from post-conviction review given the district court's application of La. C.Cr.P. art. 930.4(C)'s procedural bar to this claim.[9] However, in any event, to the extent that claims of ineffective assistance of counsel are normally relegated to collateral review, *see State v. Burkhalter*, 428 So.2d 449, 456 (La. 1983), we will analyze relator's *Batson* claim with regard to appellate counsel's alleged ineffectiveness.

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[6] *See* La. Prac. Crim. Trial Prac. § 28:6 (4th ed.) ("Effective August 1, 2014, Act 251 amended La. Code Crim. Proc. art. 930.4 (B) and (C) to *require* dismissal of petition if the issue raised was one which could have been raised earlier in the proceedings and the petitioner inexcusably failed to do so. Dismissal is no longer discretionary under those circumstances.").

[7] Relator's APCR was filed in the district court on October 1, 2024.

[8] La. C.Cr.P. art. 930.4(G) states: "All of the limitations set forth in this Article shall be jurisdictional and shall not be waived or excused by the court or the district attorney."

[9] The current version of La. C.Cr.P. art. 930.4(F) no longer contains the pre-August 31, 2024 requirement that the district court provide the petitioner the opportunity to state reasons for his failure to raise claims at an earlier stage (*i.e.*, before trial, or appeal, or in a prior APCR).

According to relator, the trial court erred in denying his *Batson* objection by finding that the State presented race-neutral reasons in exercising its peremptory challenges to remove four Black prospective jurors. Relator now faults appellate counsel for failing to challenge the trial court's ruling on appeal.

The *Batson* decision is codified in La. C.Cr.P. art. 795(C), which provides that no peremptory challenge made by the State or the defendant shall be based solely upon the race of the juror. La. C.Cr.P. art. 795(C) further provides that if an objection is made that the State or defense has excluded a juror solely on the basis of race, and a *prima facie* case supporting that objection is made by the objecting party, the court may demand a satisfactory race-neutral reason for the exercise of the challenge, unless the court is satisfied that such reason is apparent from the *voir dire* examination of the juror.

A review of the excerpted *voir dire* transcript in relator's application reveals that the defense raised a *Batson* objection after the State peremptorily challenged Alaina Brown, Michael Gabriel, Kerrion Porter, and Bertha Lacroix, all of whom were Black. In response, the State explained that Ms. Brown and Mr. Gabriel were removed based on their inattentiveness. As for Ms. Porter and Ms. Lacroix, the State asserted that the two women were removed because they were elementary school teachers, and in the prosecutor's experience, teachers "seem to want to forgive and forget." The prosecutor also pointed out that the State did not keep any elementary school teachers. The trial court then denied relator's *Batson* challenge upon finding that the State's reasons were race-neutral.

In *State ex rel. Cockerham v. Butler*, 515 So.2d 1134, 1138 (La. App. 5 Cir. 1987), this Court found that the Supreme Court in *Evitts v. Lucey*, 469 U.S.

387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), by implication, adopted the *Strickland* standard as a measure in determining effectiveness of appellate counsel when it concluded that the right to counsel on appeal is the right to effective assistance of counsel. Specifically, this Court found that the assignments that the defendant alleged should have been argued on appeal were without merit, and therefore, the result of his appeal would not have been different had counsel argued the assignments. Therefore, the relator had not made the requisite showing to support his claim of ineffective assistance of appellate counsel. *See Cockerham*.

In the instant case, relator has failed to show that counsel's failure to raise the *Batson* issue on appeal constituted deficient performance. First, the State provided sufficient race-neutral reasons for removing two potential jurors who were inattentive; *see State v. Banks*, 96-652 (La. App. 5 Cir. 1/15/97), 694 So.2d 401, 409 ("This court has held that perceived hostility, lack of interest, and unresponsiveness are race-neutral reasons to exclude prospective jurors."), and two other potential jurors based on their employment as elementary school teachers. *See State v. Wilson*, 09-170 (La. App. 5 Cir. 11/10/09), 28 So.3d 394, 405 n.4, *writ denied*, 09-2699 (La. 6/4/10), 38 So.3d 299 ("Being a teacher has been held to be a racially-neutral reason to meet the State's burden at *Batson*'s second step."). Thus, relator fails to show prejudice under the second prong of *Strickland* by appellate counsel's failure to raise the *Batson* claim on appeal. *See State v. Francois*, 13-616 (La. App. 5 Cir. 1/31/14), 134 So.3d 42, 59, *writ denied*, 14-431 (La. 9/26/14), 149 So.3d 261 ("When the substantive issue that an attorney has not raised is without merit, then the claim that the attorney was ineffective for failing to raise the issue also has no merit.").

Furthermore, an attorney need not advance every argument, regardless of merit, urged by appellant. *State v. Castillo*, 13-552 (La. App. 5 Cir. 10/29/14), 167 So.3d 624, 653, *writ denied sub nom. State ex rel. Castillo v. State*, 14-587 (La. 11/7/14), 152 So.3d 172, and *writ denied*, 14-2567 (La. 9/18/15), 178 So.3d 145. Experienced advocates have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue, if possible, or at most, on a few key issues. *Castillo* (citing *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987 (1983)).

Here, appellate counsel moved to supplement the record on appeal with the transcript of the entire jury selection process, which this Court granted. On appeal, appellate counsel, an attorney with the Louisiana Appellate Project, filed a lengthy brief challenging the trial court's ruling which denied the motion to suppress.[10] It appears appellate counsel decided to pursue an arguably stronger claim and forgo the *Batson* claim following a review of the record. *See State v. Cuza*, 21-9 (La. App. 5 Cir. 2/8/21) *writ denied*, 21-377 (La. 5/3/22), 337 So.3d 150 (*per curiam*), in which the relator claimed that his appellate counsel was ineffective in failing to appeal his claim that he was denied a jury of his peers due to the absence of Hispanics. In concluding that the relator failed to show that counsel's failure to raise these issues on appeal constituted deficient performance, this Court found:

> The appellate record from relator's appeal reflects that his appellate counsel, who is with the Louisiana Appellate Project, filed a well-reasoned and thorough brief that challenged the sufficiency of the evidence, specifically pointing out the numerous inconsistencies in the State's case and the conflicting testimony presented at trial.
>
> The fact that appellate counsel did not raise these two issues in her brief in no way renders her representation of relator

[10] Relator's appellate record reflects that his Motion to File a Supplemental *Pro Se* Brief was granted by this Court and he was provided a copy of the record to review, but apparently, he chose not file a supplemental *pro se* brief.

> ineffective, especially considering that relator has failed to show that the appellate court would have granted relief had the issue been raised. With regard to relator's argument about the absence of Hispanics on the jury, he has provided this Court with only an excerpt of transcript that shows that no Hispanics were on the jury and that one potential Hispanic juror was removed because he was unable to understand the English language, which is a disqualifying factor.

Id. (Internal footnote omitted.) In the same way, we find appellate counsel did not render ineffective assistance in relator's case.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not err in denying relator's application for post-conviction relief. Thus, we deny the instant writ application.

Gretna, Louisiana, this 23rd day of May, 2025.

JGG
MEJ
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NOTICE OF DISPOSITION CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE DISPOSITION IN THE FOREGOING MATTER HAS BEEN TRANSMITTED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 4-6** THIS DAY **05/23/2025** TO THE TRIAL JUDGE, THE TRIAL COURT CLERK OF COURT, AND AT LEAST ONE OF THE COUNSEL OF RECORD FOR EACH PARTY, AND TO EACH PARTY NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

Curtis B. Pursell

CURTIS B. PURSELL
CLERK OF COURT

25-KH-107

E-NOTIFIED
24th Judicial District Court (Clerk)
Honorable Frank A. Brindisi (DISTRICT JUDGE)
Thomas J. Butler (Respondent)

MAILED
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