THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE COUNTY OF HORRY

Court of Common Pleas

The Honorable Circuit Court Judge Debra R. McCaslin

Case No. 2022-CP-26-0180

Edward Washington #311014..... Petitioner,

v.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Judge Debra R. McCaslin Order filed denying post conviction relief to the Petitioner.

The Order was received by the undersigned counsel on May 1, 2023. A copy of the said Order on appeal is attached to this Notice.

This is the 1st day of May, 2023

Steven W. Fowler
Fowler Law Firm
730 Main Street, Unit 237
North Myrtle Beach, SC 29582
Telephone: 843-663-0006
Fax: 843-280-0003
myfowlerlaw@gmail.com
SC Bar #69683

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Edward Washington, #311014, Applicant, v. State of South Carolina, Respondent.	Case No.: 2022-CP-26-0180 **ORDER OF DISMISSAL**

This matter comes before this Court by way of Applicant's post-conviction relief application filed January 10, 2022. Respondent made its return on August 19, 2022, requesting an evidentiary hearing be convened. An evidentiary hearing was held on January 3, 2023, at Horry County Courthouse. Steven W. Fowler, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsels James D. Stanko and Clay W. Pinkerton, Esquires, and Senior Assistant Solicitor Joshua D. Holford, Esquire, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. During its February 2017 term, the Horry County Grand Jury indicted Applicant for leaving the scene of an accident (2017-GS-26-01069) and felony driving under the influence with death (2017-GS-26-01070). Applicant was represented by James D. Stanko and Clay W. Pinkerton, Esquires. Joshua D. Holford and Cara J.

Walker, Esquires, of the Fifteenth Circuit Solicitor's Office prosecuted the case. On June 3-5, 2019, Applicant proceeded to trial before the Honorable Steven H. John, circuit court judge. Applicant was found guilty of felony DUI but not of leaving the scene of an accident. Judge John sentenced Applicant to twenty years' imprisonment to be served concurrent.

Applicant filed a timely notice of appeal on June 12, 2019, that was perfected by Adam Ruffin, Esquire, through filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Washington*, 2021-UP-387 (S.C. Ct. App. filed Nov. 3, 2021). The remittitur was issued on November 22, 2021.

Summary of Relevant Facts

On October 28, 2016, Ryan Bielawa was struck and killed by Applicant's vehicle while he was walking across a highway. Olivia Malle testified that she was hanging out with Bielawa and some other friends when they decided to walk to the campus dining hall. (R. 175-77).

Bielawa began walking across the highway not within a crosswalk. (R. 177, 180-81). Malle recalled: "I heard him get hit, so I looked and I see a shoe fly and a shadow, which I think it was his body. And I turned and I say, '[Bielawa] was just hit,' and my friends started to scream." (R. 177). Kelcee Cramer also witnessed the accident, and she testified that the vehicle that struck Bielawa did not stop initially but returned "five to seven" minutes later. (R. 189-90).

Daniel Baker, a DNR officer, was driving by the Circle K where Bielawa was hit shortly after the accident when he witnessed Applicant fighting a group of people. (R. 163-65). Baker approached the group of people who were fighting and detained Applicant. (R. 167). Baker stated that he did not know anything about the collision at that time. (R. 167). After realizing that a fatal car accident had occurred, Baker turned Applicant over to Glen Guyett with the Horry County

Police Department. (R. 169).

Guyett testified that he initially placed Applicant under arrest for "the leaving of the scene" until he got more information and charged Applicant with felony DUI. (R.240). Guyett claimed that he could smell alcohol on Applicant's breath and that his eyes were "red and glossy." (R. 240-41). Guyett placed Applicant in his patrol vehicle, read Applicant his Miranda rights, and then took Applicant to the hospital for a possible ankle injury. (R. 241). Guyett further stated that he did not conduct any standard field sobriety tests on Applicant because of Applicant's apparent ankle injury. (R. 242). While at the hospital, law enforcement obtained a search warrant for Applicant's blood and two blood samples were collected. (R. 248-51). Applicant was found to have an average blood alcohol content of .239. R. 400).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of:

1. Ineffective assistance of counsel for failing to properly object to the State's introduction of several traumatic photographs of car crash victim, while the State's police officer witness detailed the sight of "fat [contents] coming out of his stomach" and only a piece of skin holding his foot to his leg, clearly calculated to improperly arouse sympathy and/or was irrelevant to the determination of whether defendant was guilty of driving under the influence.

2. Ineffective assistance of counsel for failing to supplement the directed verdict motion with the key testimonial evidence of witness Olivia Mallee, who was present with the car crash victim immediately prior to the collision, that as they walked towards a crosswalk the victim spontaneously decided not to use the crosswalk acknowledging he "decided to go across the traffic" where he was struck.

3. Ineffective assistance of trial counsel for failing to request a continuance when the State presented evidence – in violation of Rule 5 – not turned over to the defense in time to incorporate exculpatory evidence in proper preparation of defense.

4. Ineffective assistance of trial counsel for failure to call witness Mike Marshall of progressive insurance – despite Petitioner's plea that they do so – who could have testified to Petitioner's plea that they do so – who could have testified to the findings

of their independent investigation that car crash victim was contributory negligent for the crash. Alternatively, failure of counsel to introduce the Investigative Report into evidence at trial which was highly probative to key element of felony DUI and to the defense theory that victim's decision to violate traffic law (foregoing the crosswalks) and spontaneously run across highway into path of Petitioner's vehicle initiated/ proximately caused the crash.

5. Ineffective assistance of counsel for failure to move for full disclosure of exculpatory information in the possession of the State and/or it's expert witnesses.

6. Denial of due process of law during the jury trial because of prosecutorial misconduct.

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective assistance of counsel:
   a. Failure to present contributary negligence argument.
   b. Failure to object to photos of the deceased victim.
   c. Failure to argue that the State had no evidence that Applicant was speeding when he struck the victim.
   d. Failure to call Olivia Mallee.
   e. Failure to secure a continuance for failure to timely disclose speed coordinates.
   f. Failure to object to officer stating he was not arrested for leaving the scene.
   g. Failure to move to suppress *Miranda* statements.
   h. Failure to cross-examine witnesses.
   i. Inadequate trial preparation.
   j. Failure to develop a trial strategy.
   k. Failure to use case law in *Jackson v. Denno* hearing.
   l. Failure to use Olivia Mallee testimony in directed verdict motion.
2. Prosecutorial Misconduct:
   a. Failure to timely disclose speed, coordinates, and toxicology report.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant's testimony was primarily focused on trial counsels' ineffective assistance and the prosecutorial misconduct which he alleges. To that end, his testimony consisted of the following statements. Applicant met with his PCR attorney multiple times in preparation for this hearing. He felt that his trial attorneys were deficient in numerous ways including failing to present

a contributory negligence defense, failing to call witnesses from Progressive Insurance, failing to object to photographs of the victim, failing to call Mallee as a witness, failing to present the proper caselaw on a directed verdict motion, failing to present additional caselaw during the *Jackson v. Denno* hearing, failing to adequately prepare, and effectively giving up after counsels' pretrial motions were denied. Additionally, Applicant felt that his counsel should have objected when an officer claimed that Applicant was arrested for something other than leaving the scene of an accident and that counsel should have spent more time discussing the victim's autopsy report. Lastly, Applicant believed that there should have been a recording of his *Miranda* rights being read to him.

Applicant also felt that his trial was impacted by prosecutorial misconduct as shown by the State's alleged failure to produce speed coordinates data and a toxicology report. Applicant wanted a continuance once this evidence was introduced. He had not talked to counsel about this evidence and was, effectively, blindsided. He felt that this was a violation of his due process rights. Applicant emphasized that, prior to trial, he did not think the State had any evidence to show he was speeding.

On cross examination, Applicant summed up his qualms as follows: (1) during the course of trial, he felt that the accident was partially or ultimately the victim's fault; (2) he believes the photographs improperly enflamed the passions of the jurors; (3) the State made many improper or false statements including that he was speeding; being reckless, that he left the scene, came back, and got in a fight; and that he was not the victim; (4) and that his attorneys did not have a trial strategy.

Stanko Testimony

Counsel Stanko testified credibly regarding many of the same events leading up to and during trial, indicating the following. Counsel met with Applicant over five times in preparation for trial. During those meetings, he discussed the charges and potential sentences with the Applicant. Applicant indicated that he did not want to plead to any charges. Essentially, Applicant believed that he should not be liable since the victim was in the middle of the road. Counsel advised him that such an argument was not likely to be a viable trial strategy, nor would arguments regarding contributory negligence. In light of the Applicant's BAC of .239, the strategy counsel discussed with Applicant, instead, was to emphasize that he returned to the scene and had not initially realized that he'd hit anyone. Additionally, he prepared a list of mitigating factors including that the victim had a .187 BAC, that the victim ran across the street in dark clothes in the middle of the night, and that the victim was not in a crosswalk. All of these factors were then brought up during the trial.

While he knew Applicant wanted a continuance, Counsel never felt that he was given a good reason to ask for a continuance. It seemed that Applicant's request would only serve to delay the trial. Counsel could not base a continuance request on a need to process discovery because all the relevant discovery, including the items Applicant complained of, had been turned over before trial.

Regarding Applicant's complaints of his performance, Counsel testified that he discussed the pictures with co-counsel and they collectively determined there was no objection to make. Even if they had objected, Counsel does not believe the photographs impacted the outcome of the trial. Additionally, Counsel has never seen an attorney present additional caselaw during a *Jackson v. Denno* hearing. Counsel did not speak with Mallee but did read her statement and recalls that

she was called during the State's case-in-chief. Lastly, although there was no recording, the State produced an affidavit of *Miranda*. Based on that, Counsel's pre-trial motion regarding *Miranda* was denied.

Pinkerton Testimony

Counsel Pinkerton testified that he only became involved in the case in the final two or three months before trial as second chair. He recalled that all testimony was produced before trial. He felt that the photographs were admissible. Additionally, he felt that an argument regarding contributory negligence would not work in a criminal case. Moreover, he was concerned that such an argument would be prohibited if it was calculated to encourage jury nullification. Although Counsel could not speak to the *Denno* complaints since he did not handle that aspect of the trial, he did recall conducting Mallee's cross-examination. He felt that her testimony was not favorable to the defense, however.

Holford Testimony

Holford was the primary prosecutor handling the case. He credibly testified that he produced all discovery to the defense, including all documents which the Applicant complains of. Furthermore, he claims that such production is evidenced by a letter from the Applicant. While Holford does not recall objections to the photographs, he felt that they were important to corroborate speed, coordinates, the elements of the crime, and the testimony of other witnesses. To that end, he did not believe the photographs were cumulative.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are the Horry County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial

transcript, direct appeal records, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant

decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

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

Failure to Present Contributory Negligence Argument

Applicant claims Counsel was ineffective for failure to present a contributory negligence argument. Whether failure to assert a defense constitutes deficient performance ultimately hinges on whether failure to explore the decision was a strategic decision. *Strickland*, 466 U.S. at 680. If

there is only one line of defense, counsel must conduct a "reasonably substantial investigation" into that line of defense. *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1252). However, if there are several lines of defense, counsel may still be effective even if every single line is not explored. *Id.* "[W]hen counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." *Id.* at 681 *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1255). Further, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690).

Regarding failure to alert the Applicant of a defense specifically, Counsel will not be found ineffective if there was inadequate evidence to support the defense, if the defense did not exist at the time of trial, or another avenue of defense existed. *See McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995) (stating that failure to state an entrapment defense was not ineffective when the applicant denied any wrongdoing); *Arnette v. State*, 306 S.C. 556, 413 S.E.2d 803 (1992) (stating that failing to inform of a defense was not ineffective when there was no evidence at trial that supported the defense); *Robinson v. State*, 308 S.C. 361, 417 S.E.2d 361, 417 S.E.2d 88 (1992) (stating that Counsel was not ineffective when failing to state a defense that was not recognized by the Court until six years later and was just recently acknowledged by the scientific community).

Applicant alleges ineffective assistance of counsel based upon failure to assert a defense when the defense notated is not available in a criminal trial. Both Counsels acknowledged this on the stand. Further, the implication that this defense could be used to reach a result of jury nullification is entirely inappropriate. Counsel is not deficient for failure to assert a defense not

available in a criminal trial and no prejudice can be found flowing therefrom. Accordingly, relief is denied on this ground.

Failure to Object to Pictures

Applicant claims Counsel was ineffective for failure to object to pictures of the deceased victim. Whether failure to object constitutes deficient performance generally hinges on whether a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. "[A] court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." *State v. Gray*, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014). "Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are not . . . not necessary to substantiate material facts or conditions." *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010). "The evaluation of probative value cannot be made be made in the abstract, but should be made in the practical context of the issues at stake in the trial of each case." *Gray*, 408 S.C. at 610, 759 S.E.2d at 165.

This Court finds that Counsels were not deficient because the probative value outweighed the prejudice, which undermines any chance of success the defense would have had with an objection. Specifically, Prosecutor testified that these photographs were a crucial piece of evidence used to substantiate claims of speeding, the elements of the crime, and the witnesses' narratives of

what happened. This Court agrees. Specifically, the photographs showed exactly how hard of an impact Applicant had on the victim in causing his death and the photographs were the only visual available to the jury in assessing impact and consequent culpability. Both Counsels substantiated the Prosecutor's claim that there was not a reason to object to the photographs. Accordingly, Counsels were not deficient because there was not a legitimate basis to object and any objection would have been overruled.

This Court finds that any alleged deficiency on Counsels' part for failure to object did not prejudice Applicant. There was overwhelming evidence of Applicant's guilt presented at trial. Surveillance footage was presented at trial. (R. 172). Multiple eyewitnesses testified at trial. (R. 175-223). Applicant was subject to a blood draw, which revealed a BAC of .239. (R. 400). GPS monitoring clocked Applicant speeding as fast as 80 MPH. (R. 317-24). Applicant returned to the scene, where he was apprehended by police. (R. 237-41). Thus, because the admission of the pictures could not have undermined the overwhelming evidence of guilt, no prejudice is established by any alleged deficiency and relief is denied as a result.

Failure to Argue State had No Evidence of Speeding

Applicant claims Counsel was ineffective for failure to object to the lack of evidence that Applicant was speeding. This is patently untrue. Richard Loskill testified at trial that Applicant was wearing a GPS monitor at the time and that monitor clocked him speeding at the time of the accident. (R. 318-20). Applicant was clocked driving as fast as 80 MPH around the time of the incident. (R. 323-24). A report was entered at trial addressing the speed. (R. 320). Thus, evidence of speed was shown at trial, Counsel is not unreasonable for failing to make a dishonest argument to the contrary, and no prejudice flows as a result. Accordingly, relief is denied on this ground.

Failure to Call Witness Mallee

Applicant claims Counsel was ineffective for failure to call Olivia Mallee at trial. However, this witness was called in the State's case-in-chief. (R. 175-82). Counsel is not ineffective for failure to call a witness already called and who the defense had the opportunity to cross-examine. Additionally, this Court fails to find anything that Counsel could have questioned her about but did not that would have impacted the trial proceedings. Accordingly, relief is denied.

Failure to Secure a Continuance

Applicant claims Counsel was ineffective for failure to secure a continuance. Counsel Stanko credibly testified that Applicant never provided him with a reason for a continuance, beyond a desire to avoid the inevitable. Counsel is not deficient for failure to make a frivolous continuance request. Additionally, even if requested, this Court finds the continuance request would not have been granted on account of there being no reason for one. Accordingly, relief is denied.

Failure to Use Mallee Testimony in Directed Verdict Motion

Applicant claims Counsel was ineffective for failure to utilize Mallee's testimony in a directed verdict motion. Mallee's testimony consisted of the fact that she was with the victim at the time, he had a bit to drink, she heard the victim get hit, she saw a shoe fly, and heard her friend scream. (R. 175-83). Nothing about that testimony would have led to a different outcome on the directed verdict motion, as it was more favorable to the State than the defense. Accordingly, Counsel did not act unreasonably in concluding that a State's witness would not be helpful in securing a directed verdict and, even if Counsel could have raised this, a different outcome would not have been reached. Thus, relief is denied.

***Failure to use Case Law in Jackson v. Denno* Hearing**

Applicant claims Counsel was ineffective for failure to use case law in the *Jackson v. Denno.* Applicant failed to state what case law should have been cited, how Counsel acted unreasonably in asserting it, or how it would have impacted the results of the proceedings. Further, Counsel Stanko credibly testified that he did not think case law was needed in the hearing because the hearing was held pursuant to a case itself and he never witnessed any attorney citing additional case law when pursuing this motion. This Court finds Counsel was not unreasonable in failing to cite additional case law, no prejudice is found flowing therefrom, and Applicant has failed to meet his burden of proof as a result. Accordingly, relief is denied.

Failure to Object to Officer Saying he was not Arrested for Leaving the Scene

Applicant claims Counsel was ineffective for failure to object to an officer stating he was not arrested for leaving the scene. This Court fails to find how this was objectionable, how Counsel was deficient for failure to object, or how an objection would have been both successful and led to a different outcome. Accordingly, relief is denied.

Failure to Move to Suppress Miranda Statements

Applicant claims Counsel was ineffective for failure to move to suppress Applicant's police statement. However, Counsels did pursue a *Jackson v. Denno* hearing in this case. (R. 63-79). Thus, Counsels did pursue this motion and it was denied. Thus, there is no deficiency and can be no prejudice. Accordingly, relief is denied.

Failure to Cross-Examine Witnesses

Applicant claims Counsel was ineffective for failure to cross-examine all witnesses. "Where trial counsel articulates a valid reason for employing a certain trial strategy, counsel will not be deemed ineffective." *McKnight v. State*, 378 S.C. 33, 43, 661 S.E.2d 354, 359 (2008) (citing

Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)). Counsel can be deficient when examining witnesses if they fail to elicit testimony key to a petitioner's defense. *Miller v. State*, 379 S.C. 108, 116, 665 S.E.2d 596, 600 (2008), abrogated on other grounds by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (finding counsel was deficient in failing to elicit testimony about similarities between armed robberies from a witness who could corroborate where the applicant's key defense was third party guilt).

Applicant has failed to state what witnesses should have been cross-examined and on what grounds they should have been cross-examined on. Instead, Applicant is seemingly fixated on the idea that Counsels should have cross-examined every single witness, regardless of whether there was a ground to do so. Without more, Counsel cannot be found deficient for failure to cross-examine. Applicant has also failed to establish prejudice on this issue. Accordingly, relief is denied.

Inadequate Trial Preparation

Applicant claims Counsel was ineffective for failure to properly prepare for trial. However, Applicant failed to state with any specificity how this was the case. Thus, Applicant has failed to meet his burden of proof by failing to show any deficiency or how any deficiency could have led to prejudice. Accordingly, relief is denied on this ground.

Failure to Develop Trial Strategy

Applicant claims Counsel was ineffective for failure to develop a trial strategy. However, Counsel Stanko credibly testified that the strategy was to show that the victim was intoxicated, crossed the street outside the crosswalk in dark clothing at nighttime, and that Applicant returned to the scene immediately after he left. This Court finds a valid trial strategy was used and no alternative strategy could have been presented that would have led to a favorable outcome.

Accordingly, relief is denied on this ground.

***Brady* Violation**

Applicant claims various documents in discovery were not handed over by the State. *Brady*[1] violations occur if four conditions are met: "the evidence was favorable to the accused", "it was in the possession of or known to the prosecution", "it was suppressed by the prosecution", and "it was material to guilt or punishment." *Gibson v. State,* 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Whether a *Brady* violation is material and, thus, sufficient to warrant relief, is contingent on where there is a "reasonable probability that, but for the government's failure to disclose *Brady* evidence, the defendant would have refused to plead guilty and gone to trial." *Id.* at 325. Further, whether a mistrial is warranted remains contingent on "'(1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of the defendant's guilt; and (3) the curative actions taken by the court.'" *State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011) (quoting *United States v. Anwar,* 428 F.3d 1102, 1112 (8th Cir. 2005)).

This Court finds the claim is without merit. Specifically, this Court finds that Applicant knew about the discovery, as evidence by the letter he personally wrote the prosecutor discussing the documents he now claims he never knew about or received. Additionally, Counsel Pinkerton credibly testified that all discovery was handed over to the defense before trial. Counsel Stanko credibly testified that the discovery in question was handed over pursuant to a supplemental discovery request before trial. Accordingly, this Court finds Applicant received the discovery in question and no prosecutorial misconduct occurred.

Conclusion

Based on all the foregoing, this Court finds and concludes that Applicant has not

[1] *Brady v. Maryland,* 373 U.S. 83 (1963).

established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 12 day of April, 2023.

Debra McCaslin

DEBRA R. MCCASLIN
Presiding Judge
Fifteenth Judicial Circuit

Horry, South Carolina.

State of South Carolina
The Circuit Court of the Eleventh Judicial Circuit

Debra R. McCaslin
Judge

Lexington County Judicial Center
205 East Main Street, Suite 463
Lexington, SC 29702
Phone: (803) 785-8495
Fax: (803) 785-8444
dmccaslinj@sccourts.org

April 18, 2023

Horry County Clerk of Court
Attention: CP Clerk
Post Office Box 677
Conway, South Carolina 29528-0677

FILED
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2023 APR 21 P 12:53
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

RE: Edward Washington #311014 v State of South Carolina
Case No.: 2022-CP-26-0180
Order of Dismissal

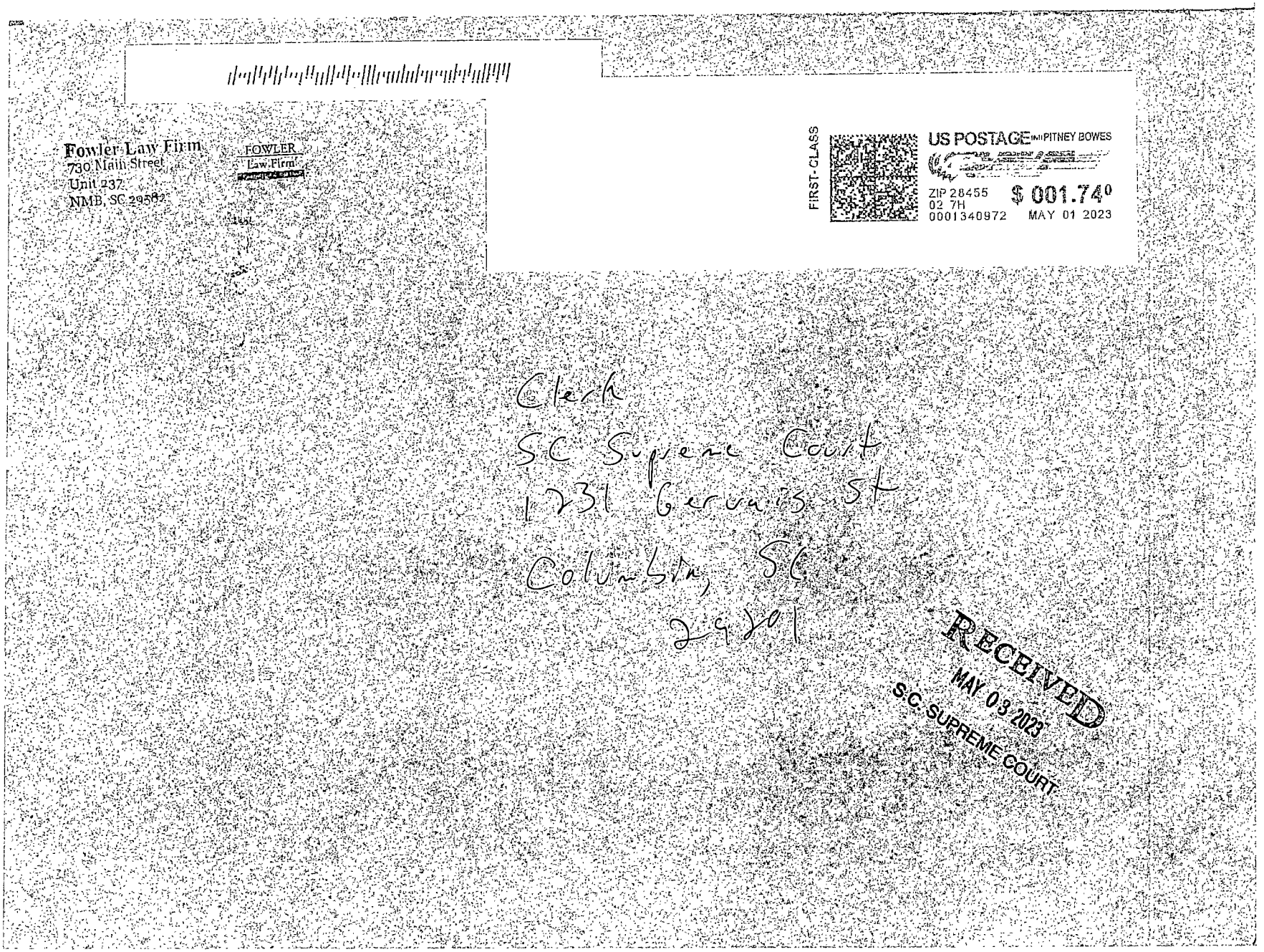
Dear Sir or Madam,

Attached please find the original copy of the above-mentioned order. Please file the original copy with in Common Pleas.

Should you have any questions or need further assistance, please do not hesitate to contact our office.

Sincerely,

Danita Martin
Administrative Assistant to
Judge Debra R. McCaslin



Fowler Law Firm
730 Main Street
Unit 237
NMB, SC 29582

FOWLER
Law Firm

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