FORM 4

CERTIFIED COPY

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

2023 JUN 16 PM 12:27

CLERK OF SOUTH DORCHESTER COUNTY

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2017CP1801249

Martin D Floyd		**South Carolina State Of**	
PLAINTIFF(S)		**DEFENDANT(S)**	
Submitted by:		**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Kristi F. Curtis	2762	6/16/2023
Circuit Court Judge	**Judge Code**	**Date**

RECEIVED
Jun 26 2023
S.C. SUPREME COURT

For Clerk of Court Office Use Only

This judgment was entered on **6/16/2023**, and a copy mailed first class or placed in the appropriate attorney's box on **6/16/2023**, to attorneys of record or to parties (when appearing pro se) as follows:

Martin D Floyd#290265
Ridgeland Correctional Inst.
5 Correctional Rd
GB-0011-A
Ridgeland, SC 29936

Danielle Dixon
PO Box 11549
Columbia, SC 29211

Leslie Therese Sarji
171 Church Street Suite 360
Charleston, SC 29401

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham

Court Reporter

Cheryl Graham - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

CERTIFIED COPY

STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER	)	IN THE COURT OF COMMON PLEAS FOR THE FIRST JUDICIAL CIRCUIT
	)	
Martin D. Floyd, SCDC #290265,	)	Case No.: 2017-CP-18-01249
Applicant,	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

2023 JUN 16 PM 12:37

Cheryl Graham
CLERK OF COURT
DORCHESTER COUNTY

This matter is before this Court by way of Applicant Martin D. Floyd's application for post-conviction relief challenging his conviction following a jury trial for first-degree burglary based on claims of ineffective assistance of counsel and prosecutorial misconduct. Respondent the State of South Carolina made its return to the application and requested an evidentiary hearing to resolve the claims as set forth in the application. On May 13, 2021, Applicant (through appointed post-conviction relief counsel Leslie T. Sarji) served an amended application asserting additional claims of ineffective assistance of counsel.

An evidentiary hearing was convened before this Court on May 21, 2021. Applicant was present and represented by appointed counsel Sarji. Assistant Attorney General Samantha J. Weidauer of the South Carolina Office of the Attorney General represented Respondent. At the hearing, Applicant proceeded forward on the claims as set forth is his original application and his amended application. In support of these claims, Applicant testified on his own behalf and presented testimony from his friend Brian Cole, his friend Jessica Koon, and his friend Jason Tony. Respondent presented Applicant's prior counsels Ash Chisholm and Mary LeMatty.

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish

any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice. Specific findings of fact and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 are set forth below:

PROCEDURAL HISTORY

The records before this Court[1] establish that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dorchester County Clerk of Court. On the evening of January 17, 2013, Applicant and several co-defendants were apprehended at the home of Charles Rearick while they were in the process of taking various personal property from the residence. Applicant had formerly resided with Rearick and was currently assisting with a home remodel. Rearick had died earlier that day. Thereafter, during its November 2013 term, the Dorchester County Grand Jury indicted Applicant for first-degree burglary (2103-GS-18-0364). Applicant was represented by Mary P. LeMatty, Esquire, and Michelle R. Suggs, Esquire. Assistant Solicitors Glenn P. Justis and Mandy W. Kimmons of the First Circuit Solicitor's Office prosecuted the case. Prior to trial, the State served Applicant with notice of its intention to seek a life without parole sentence as a recidivist offender pursuant to S.C. Code Ann. § 17-25-45 based on his prior convictions.[2]

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[1] The records before this Court include the application for post-conviction relief, the amended application for post-conviction relief, the return to the application, the Dorchester County Clerk of Court general sessions records from the underlying conviction, the trial transcript, the complete appellate record (including the record on appeal, all pleadings before the South Carolina Court of Appeals and South Carolina Supreme Court), and Applicant's records from the South Carolina Department of Correction. This Court has reviewed the record in its entirety.

[2] The trial transcript reveals Applicant previously pled guilty to two counts of first-degree burglary, one count of second-degree burglary (violent), one count of second-degree burglary (non-violent). (Trial Tr. 287-88).

On December 17, 2013, Applicant proceeded to a jury trial before the Honorable Maité Murphy, circuit court judge, where he was convicted as indicted. Judge Murphy sentenced Applicant to life without parole pursuant to Section 17-25-45.

Applicant filed a timely notice of appeal and an appeal was perfected on his behalf. Appellate Defender Laura R. Baer of South Carolina Commission on Indigent Defense – Office of Appellate Defense represented Applicant on appeal. On appeal, Applicant argued the following issues:

> I. [Applicant] is entitled to a direct verdict on the charge of first-degree burglary where the State did not present any evidence that [Applicant] had any intent to commit a crime within the trailer when he entered the trailer.
>
> II. [Applicant] is entitled to a direct verdict on the charge of first-degree burglary because the State did not prove that the property entered qualified as a dwelling where the sole owner of the property was deceased at the time of entry.

Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion without oral argument. State v. Martin Dameon Floyd, Op. No. 2015-UP-362 (Ct. App. filed July 15, 2015). Thereafter, Applicant filed a petition for rehearing on July 29, 2015. The Court of Appeals issued an order denying the petition for rehearing on August 20, 2015.

On September 28, 2015, Applicant filed an Amended Petition to Extend the Petition for Writ of Certiorari and Accompanying Appendix to the Court of Appeals Out of Time. On September 29, 2015, the South Carolina Supreme Court granted Applicant's request to file his Petition for Writ of Certiorari and accompanying Appendix out of time. On October 12, 2015, Applicant filed his Petition for Writ of Certiorari with the Supreme Court. In the Petition for Writ of Certiorari, Applicant raised the following issues:

I. The Court of Appeals erred in affirming [Applicant's] conviction for first degree burglary where [Applicant] was entitled to a directed verdict because the State failed to present any direct or substantial circumstance evidence that [Applicant] had any intent to commit a crime within the trailer when he entered the trailer.

II. The Court of Appeals erred in affirming [Applicant's] conviction for first degree burglary where [Applicant] was entitled to a directed verdict because the State did not prove that the property entered by [Applicant] qualified as a dwelling where the sole owner of the property was deceased at the time of entry.

The State filed its Return to the Petition for a Writ of Certiorari on November 6, 2015, and an Amended Return to the Petition for a Writ of Certiorari on November 17, 2015. On July 18, 2016, the Supreme Court denied certiorari. The Remittitur was issued on August 1, 2016. Applicant timely commenced this PCR action on July 25, 2017.

SUMMARY OF EVIDENCE PRESENTED AT TRIAL[3]

On the morning of January 17, 2013, Charles Rearick (Rearick) was in a fatal car accident and passed away. (Tr. p. 183 lns. 1-17). His only child, Jennifer Rearick Felkel, and her husband Richard Felkel left their home in Lexington, South Carolina and travelled to Rearick's home in Knightsville, South Carolina along with her mother and a family friend. (Tr. pp. 184-85). Once they arrived at Rearick's residence at 4 p.m., the group entered the home using a key and gathered sentimental items, including Rearick's war metals, pictures, and gun collection, and important documents, such as bank records. (Tr. pp. 185-86; p. 193). At 9 p.m., the group secured the house, locked the front door, and left with the intent to return in the immediate future. (Tr. p. 186; p. 205; p. 207). No one had permission to enter the home, including Applicant and his friends. (Tr. p. 205).

[3] This factual summary is the same as set forth in the return to the post-conviction relief application.

That evening, Applicant was at the home of his then-girlfriend, Angela Fleeman (Fleeman) when he received a call from his mother informing him that Rearick had passed away several hours earlier. (Tr. pp. 105-06). Applicant had previously lived with Rearick but had moved out of the home more than six months prior. (Tr. p. 107; pp. 197-98; p. 222; p. 226). Although he no longer resided with Rearick, Applicant continued to renovate Rearick's home as he had while residing there. (Tr. p. 226-27). According to Fleeman, Applicant was very upset by the information and expressed concern about his property located at Rearick's residence. (Tr. pp. 106-07). Specifically, Applicant was concerned that his property would "end up in probate" and that he would not be able to get it "for a year and all his stuff would be missing." (Tr. p. 107 lns. 8-10). Applicant did not state exactly what property was at Rearick's house that he needed to retrieve. (Tr. p. 107 lns. 15-17).

Having neither a car nor a driver's license, Applicant called his friend Rusty Norris (Norris) to see if he could get a ride to Rearick's home at approximately 10 p.m. (Tr. p. 107; pp. 128-29). Norris also had no car or driver's license, so he asked his then girlfriend Candace to drive him and Applicant to Rearick's house. (Tr. p. 129). Norris and Candace had never met Rearick or been to his home but agreed to accompany Applicant to his residence to retrieve property. (Tr. p. 128-130). Both went to Fleeman's home, where they met Fleeman, and talked for approximately an hour before all four went to Rearick's residence in Candace's truck. (Tr. p. 129-130). Norris was armed with gloves, a flashlight, a screwdriver, and bolt cutters. (Tr. p. 143; p. 157).

When the group arrived at Rearick's residence, the lights were off and the front door was locked. (Tr. p. 108). The four then went to the rear of the trailer in hopes of gaining entry into Rearick's secured residence. (Tr. p. 108). Upon finding a chair propped against the rear of the

trailer below a window, Norris pushed open the window and Candace gained entry to the residence by crawling inside. (Tr. p. 108; p. 131). Once inside, Candace unlocked and opened the front door and the remaining three entered Rearick's home. (Tr. p. 108; p. 131).

Once inside, Applicant proceeded to Rearick's master bedroom first. (Tr. p. 108). Norris and Fleeman were unsure what Applicant was searching for in particular, but both had been told by Applicant that Rearick was a gun collector and reported that Applicant was upset that he could not find any weapons. (Tr. pp. 113-14; pp. 131-32). Only after searching Rearick's master bedroom and bathroom did Applicant go to the bedroom where he had lived with his child and his mother months prior. (Tr. pp. 108-09). In this room, Applicant located some of his clothing and his daughter's bottle, but left these items. (Tr. p. 108; p. 114). While in the home, Norris, who had never met Rearick, took various items belonging to the deceased, including a blood pressure monitor, scissors, a belt, pills, and a Navy boatswain whistle. (Tr. pp. 143-48; p. 203). According to Fleeman, the group then sat in the living room and reminisced about Rearick, although Fleeman had only met him once and Norris and Candace had never met him. (Tr. p. 109; p. 114-15). After approximately an hour, Applicant and the group exited the trailer. (Tr. p. 115).

Fleeman and Candace proceeded to Candace's truck while Applicant and Norris went to a two-story shed behind the residence. (Tr. p. 115; p. 133; pp. 136-37). The structure was covered with plywood nailed in place and secured by a lock. (Tr. p. 133; p. 155). According to Norris, Applicant looked through cracks in the fortified shed and identified various tools that were his property. (Tr. p. 133). Norris used bolt cutters to remove the lock, which he placed in his pocket. (Tr. pp. 133-34; p. 142). He then entered the shed, where he took wood stain, an air grinder, and other items belonging to Rearick. (Tr. pp. 143-44). He was still inside the shed when

Applicant came from the front of the house and warned him and Candace that law enforcement had arrived. (Tr. p. 134). Norris and Candace both took off running; Norris eventually crouched behind bushes on the periphery of the property while Candace kept going. (Tr. p. 134). Meanwhile, Applicant was at the truck speaking with Fleeman when the Dorchester County Sheriff's Deputies arrived. (Tr. pp. 116-17; pp. 153-54). According to Fleeman, Applicant was considering spending the night at the property when law enforcement arrived. (Tr. p. 116).

Corporal Shawn Angelo (Angelo) of the Dorchester County Sheriff's Office was the first officer to arrive at Rearick's residence. (Tr. pp. 152-53). He pulled up to the home with his lights on and his camera activated. (Tr. p. 153). He reported that Applicant and Fleeman were located in or near Candace's truck and the property was dark. (Tr. pp. 153-55). Applicant and Fleeman were both handcuffed and placed in different police cruisers. (Tr. p. 117). Angelo and fellow Dorchester County Sheriff's Office Deputy Silas Carter (Carter) did a protective sweep of the property, using flashlights when entering the unlocked residence. (Tr. pp. 154-55; p. 160; pp. 167-68). At the shed, officers found the plywood covering to the shed with nails sticking out lying on the ground alongside bolt cutters. (Tr. pp. 155-56). After clearing the shed, Angelo and Carter heard rustling in the woods and found Norris hiding behind a brush pile. (Tr. p. 156; pp. 167-68). Norris was detained and searched, yielding several items that were taken from the residence and shed. (Tr. pp. 156-57; pp. 167-68). Law enforcement was able to determine that Candace was the fourth suspect based on registration of the truck and her driver's license located on the vehicle's floorboard. (Tr. p. 159). Applicant, Fleeman, and Norris were all arrested that evening and charged with first-degree burglary. (Tr. p. 117; pp. 149-50).

Rearick's family was contacted by law enforcement that evening regarding the activity at Rearick's home. (Tr. p. 161; pp. 188-90). Richard and Jennifer Felkel informed Dorchester

County Sheriff's Deputies that no one had permission to be at Rearick's residence, including Applicant. (Tr. p. 189; p. 205). Felkel and his wife returned to Rearick's residence the next morning to re-secure the property. (Tr. p. 190; pp. 203-04). Upon entering the residence, Rearick's family noted a marked difference in the property, which appeared to have been ransacked. (Tr. p. 190; pp. 203-04). They reported that a large quantity of items, including military clothing of Rearick's and other various household items, were piled on the kitchen table in bags. (Tr. p. 190; pp. 203-04). Richard Felkel also noted that the large gun case where Rearick stored his weapons was no longer standing upright as it had been when he left the previous day but rather was lying on the floor of the master bedroom. (Tr. p. 187). The Felkels also reported finding a jacket and cellular phone at the residence that were not present when they left the previous evening. (Tr. p. 191; p. 204). They contacted law enforcement, who collected the items. (Tr. pp. 179-80; pp. 190-91).

As part of their investigation, the Dorchester County Sheriff's Office obtained a search warrant to search Candace's truck, where a shop vac, pillows, a painting, and a computer program box were located. (Tr. pp. 170-71). Law enforcement also took photographs of the crime scene and dusted for fingerprints, although no usable prints were found. (Tr. pp. 169- 78).

Applicant proceeded to trial on December 17, 2013. Both Fleeman and Norris testified for the State, along with various members of the Dorchester County Sheriff's Office involved in the investigation, an employee from the Dorchester County Clerk's Office, and Rearick's family. At the close of the State's case, Applicant moved for a directed verdict, asserting the State had failed to prove that Rearick's residence was a dwelling in light of his death and failed to prove that Applicant had the intent to commit a crime when entering the property. (Tr. pp. 208-12).

After hearing the State's reply, the trial court denied Applicant's motion as to both grounds. (Tr. pp. 212-16).

Applicant called his mother as his sole witness in his defense. (Tr. p. 220-35). She testified that Rearick was a family friend and that her husband previously lived next door to Rearick. (Tr. p. 221). She testified Applicant, his former girlfriend, and their child had previously lived with Rearick, but that Applicant had moved out approximately six months prior because Rearick did not want Applicant's girlfriend and child living in the home. (Tr. pp. 222-23; p. 226; p. 230). She testified Applicant was renovating Rearick's house and continued to do so after moving out. (Tr. p. 222; pp. 226-27). She testified she could identify various tools and other personal property as belonging to Applicant. (Tr. pp. 223-28). She testified she provided Applicant transportation to Rearick's house to work on renovations and that she took him there "at least two, three, four times a week." (Tr. p. 231). Following the testimony of his mother, Applicant renewed his motion for a directed verdict, which was again denied by the trial court. (Tr. pp. 238-40).

ISSUES BEFORE THIS COURT

In his *pro se* application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on:

-Ineffective Assistance of Counsel for:

1) failure to investigate, including:
   -how Applicant entered the trailer,
   -whether Applicant gave a written confession,
   -what Detective Carson testified to at a preliminary hearing,
   -whether the fingerprint lifts taken were valid,
   -discrepancies in photographs taken at the crime scene

2) failure to challenge the use of Applicant's prior record for enhancement

3) failure to interview requested witnesses and call them as defense witnesses at trial

4) failure to retain an expert code enforcement officer to establish the outbuilding was not habitable

5) failure to move to quash the indictment because the property owner on the indictment was deceased

6) failure to object to the State's opening statement calling Applicant a "burglar" and a wolf in sheep's clothing

7) failure to move for a directed verdict based on the argument of consent

8) failure to request proper jury instructions on first-degree burglary, the definition of a dwelling, consent, the use of Applicant's prior convictions

9) failure to object to the State's deliberate misrepresentation of facts and evidence during its response to his directed verdict motion

10) an actual conflict of interest because Public Defender Ash Chisholm also represented the victim's stepdaughter

-Prosecutorial Misconduct for vindictive prosecution, deliberately misrepresenting evidence during trial, failure to turn over exculpatory evidence, including *Brady* material[4]

In response to the application, Respondent served a return and requested an evidentiary hearing to resolve Applicant's claims of ineffective assistance of counsel and prosecutorial misconduct. Attached to this return and before this Court are the application for post-conviction relief, the Dorchester County Clerk of Court general sessions records from the underlying conviction, the trial transcript, the complete appellate record (including the record on appeal, all pleadings before the South Carolina Court of Appeals and South Carolina Supreme Court), and Applicant's records from the South Carolina Department of Correction.

[4] Applicant failed to present any evidence or argument as to this allegation, and, accordingly, he has failed to meet his requisite burden of proof as a matter of law as to this claim, which this Court denies and dismisses with prejudice.

After the substitution of the counsel originally appointed to represent Applicant, Leslie T. Sarji, Esquire, was appointed to represent Applicant in this proceeding pursuant to Re: Appointment of Counsel in Post-Conviction Relief Cases before the Circuit Court (S.C. Sup. Ct. Order filed Oct. 6, 2008) and Rule 71.1(d), SCRCP (providing for appointment of counsel only where there is a question of law or fact which necessitates a hearing). Thereafter, counsel served an amended application adding the additional claims for relief:

- Ineffective assistance of counsel for:

> 11) Trial counsel provided ineffective assistance of counsel by failing to adequately investigate the case prior to trial;
>
> 12) Trial counsel provided ineffective assistance of counsel by failing to request a jury charge for a lesser included offense where the evidence presented would have supported conviction for the lesser offense;
>
> 13) Trial counsel was ineffective for failing to challenge the sufficiency of the indictment in the case;
>
> 14) Trial counsel was ineffective for failing to challenge the sufficiency of Applicant's prior convictions for enhancement of his charge of conviction to Burglary, First Degree; and
>
> 15) Trial counsel was ineffective for failing to object during the State's closing argument to the Solicitor's argument that Applicant was a "wolf in sheep's clothing."

Applicant proceeded forward on these claims at his evidentiary hearing. [5]

SUMMARY OF EVIDENCE PRESENTED AT EVIDENTIARY HEARING

At the start of the hearing, Applicant's PCR counsel stated Applicant's primary claims centered around his counsel's failure to properly investigate and present evidence to establish Applicant was a resident of the home. PCR counsel also stated trial counsel failed to take

[5] Because many of the claims overlap, this Court has addressed many of them together below.

photographs of the entry point into the home to show that the window was the common entry point into the home. PCR counsel next asserted that trial counsel failed to request proper jury instructions, including an instruction on the lesser-included offense of second-degree burglary and consent. PCR counsel also stated that trial counsel failed to challenge the indictment including the charge being enhanced to a first-degree burglary based on his prior convictions. Finally, PCR counsel stated trial counsel failed to object to improper argument by the State characterizing Applicant as "wolf in sheep's clothing."

Applicant testified on his own behalf at the hearing. He testified that he was represented by Ash Chisholm, Esquire, at the preliminary hearing because his counsel, Mary LeMatty, could not make it to the hearing, but that Chisholm informed him he had a conflict of interest because he represented Danielle Flowers, who was the victim's stepdaughter. He stated that he informed Chisholm he wanted to proceed forward with the preliminary hearing with Chisholm representing him despite his representation of Flowers. He testified that at the preliminary hearing, Detective Carson from the Dorchester County Sheriff's Office said that Applicant and his co-defendants had given confessions, but he had not recorded these due to a lack of recording capabilities. Applicant testified that counsel should have challenged this, but he failed to make any objections. He testified he feels that Chisholm did not vigorously represent him at the preliminary hearing. However, he stated that he is not sure that it is related to Chisholm's representation of Flowers, which he believes amounted to a conflict of interest.

Applicant testified that he met with LeMatty after the preliminary hearing and he was on notice of the charge as set forth in the indictment and what he was defending himself against. He testified he understood the State was seeking a life without parole sentence if he was convicted based on his prior record, but he was also aware that first-degree burglary carries a possible life

without parole sentence on its own. He testified a possible life sentence was not a concern for him because he believed he would be acquitted at trial. He testified that this belief that he would be acquitted is why he turned down plea offers to lesser-included offenses. He testified that he reviewed Section 17-25-45 with LeMatty. He testified that he questioned LeMatty about how the State could enhance this charge to first-degree burglary because he only had one prior housebreaking conviction rather than the two required for enhancement. He also believes the trial court for those prior convictions lacked subject matter jurisdiction because he received suspended sentences in violation of the statute. He testified he discussed these things with LeMatty and she responded that those issues and arguments were not meritorious. However, he feels that LeMatty should have done an investigation on the underlying offenses to see if they were proper predicate offenses to give rise to Section 17-25-45.

Applicant testified he believed that LeMatty should have challenged the indictment because it improperly listed Rearick as the homeowner of the dwelling, but, upon his death, ownership transferred to his daughter, and, therefore, he believes his daughter should have been listed as the homeowner in the indictment. He later acknowledged the indictment listed the estate of Rearick as the homeowner. He testified that had he known he needed the permission of Rearick's daughter to enter the home, he would have pled guilty. He reiterated that he had Rearick's permission to be in the home and the State did not present any evidence to dispute this consent. Applicant testified that he had lived in Rearick's home for approximately a year before the incident. However, he then testified that he was "kind of staying" with his girlfriend at the time of the incident and was only returning to the home to assist with remodeling two to three times a week, although his property was still at the home and he had not been evicted. He testified that he and his father had researched landlord-tenant laws and he attempted to explain to

LeMatty that he was a tenant-at-will at Rearick's house based on an oral agreement. He believed that this was a valid defense strategy, but LeMatty did not want to pursue this defense. He testified that LeMatty made a motion for a directed verdict based on Rearick's death, but that LeMatty should have challenged the indictment based on Rearick's death because he did not have adequate notice of who he was defending himself against.

Applicant testified he asked LeMatty to speak with several witnesses before trial, including: Aaron Lowry, who was helping him with the remodel; Rearick's stepdaughter Ms. Flowers, who could testify that Rearick had previously lived at the home; Brian Cole, Jason Tony, and Charlie Cohen, who all could have testified that Applicant had permission to be in the home. He testified that Cole and Tony were at the trial but were not called to testify. He testified they should have been called to establish that he had permission to be in the home. Applicant testified he discussed this with LeMatty during trial, but she determined that the witnesses were not necessary because both co-defendants who testified as State's witnesses had clearly testified that they and Applicant did not have any intention to commit a crime upon entry to the home. He testified that she also said he did not need to testify based on this. Applicant testified that LeMatty told him she attempted to talk to Ms. Flowers, but she refused to speak with the defense.

Applicant testified he has no independent knowledge as to whether LeMatty went to the house to investigate. He believes she should have done so to show that it was an active construction site and that he and others used the window to enter and exit the home, especially when Rearick was not present.

Applicant testified that LeMatty should have requested additional jury instructions on the "dwelling" element of the offense, including that the sole occupant had passed away. He testified

that he was entitled to instructions on the lesser-included offenses of second and third degree burglary because it was not a dwelling due to Rearick's death. He testified this was the crux of LeMatty's defense strategy and she had prepared a brief on this issue and argued for a directed verdict based on this, but failed to request instructions on lesser-included offenses. He also believed LeMatty should have requested a jury instruction on lawful consent because Rearick had given him this consent and it was never revoked prior to his death.

Applicant testified that LeMatty should have objected to an argument made by the solicitor that he was a "wolf in sheep's clothing" because it was an improper use of religious language in an attempt to scare the jury and inflame passions. He acknowledged that LeMatty did object at the end of the closing but did not do so contemporaneously.

Applicant also testified that LeMatty should have objected when the State argued both that Rearick's family had removed property from the home and then later argued that they had not removed property from the home, as it was factually inconsistent.

On cross-examination, Applicant testified he met with LeMatty "two or three" times and corresponded with her by mail a few times. He testified they discussed that he did not have any intent to commit a crime, that the home was not a dwelling, and that no one was in danger. He testified that they discussed the landlord-tenant issues and that he believed it was a viable defense strategy, but that LeMatty explained why she did not think it was a viable strategy, including that Rearick was not available to confirm any sort of tenancy. He testified he reviewed discovery with LeMatty. He testified that they did "not really" discuss the defense strategy and LeMatty essentially told him he should accept the plea offer to the lesser-included offense of second-degree burglary or he would likely get a life sentence. He testified he did not want to accept any plea offers and that he discussed the offers with LeMatty.

Applicant testified that he wanted LeMatty to investigate and present witnesses to show that he was working on Rearick's property and had lived there. However, he acknowledged that his mother was called for that purpose, and she testified that she routinely dropped him off at Rearick's home several times a week. Applicant also testified that he had been living with his girlfriend since he started dating her. He clarified that he had not moved furniture into her house and was not paying rent but acknowledged that he was staying there every night prior to Rearick's death. He discussed his living situation with LeMatty, including that his lack of a key was not dispositive of his living situation. He testified that the front door to the house was locked, but that he had been gaining entry to the home through the rear window for two to three months. He testified he wanted Cole to testify he had been living and working at Rearick's property.

Next, Applicant presented Brian Cole as a witness. Cole grew up with Applicant and they had previously lived together. He testified that he knew Applicant had lived with Rearick because he assisted Applicant with moving into Rearick's house. He testified he talked to LeMatty about moving Applicant's things into Rearick's home and specific tools of Applicant's that he could identify from Rearick's home. He testified he was subpoenaed for Applicant's trial and could have testified about specific tools that Applicant was accused of stealing. He testified he was never called as a witness at trial despite being at the courthouse for three days of the trial. On cross-examination, he testified that he does not recall when he helped Applicant move into Rearick's home. He testified he was friends with Applicant and had been to the home two times when Rearick was present. He testified that he moved more than just tools into Rearick's home.

Applicant next presented Jessica Koon, who said she was a friend of Applicant and she stayed at her boyfriend's home next door to Rearick's home. She testified she would talk to

Rearick, and he mentioned that Applicant was staying at his home and assisting with the work being done on the home. He told her this within a couple of weeks of Rearick's death. She testified she eventually moved back to Dorchester when she and her boyfriend broke up. She testified she never spoke with anyone after Applicant's arrest. She testified on cross-examination that she was not staying at her then-boyfriend's house every day so, it is possible someone could have come by to speak to her when she was not present. She testified Rearick told her Applicant was "staying" with him but never indicated a duration.

Applicant also presented Jason Troy, who has known Applicant since middle school. He testified he has also known Rearick since middle school. He testified he was told that Applicant was living at and working on Rearick's house. He testified he saw Applicant's personal belongings, including baby toys, at Rearick's house. He testified he also brought Applicant a bulk quantity of meat when he was living at Rearick's house, approximately two months before Rearick's death. He testified that he spoke with LeMatty prior to trial and was subpoenaed as a witness for trial. He testified he was present for trial but was never called to testify. He testified LeMatty spoke with him during trial and explained that he was not going to be called as a witness at trial because the time frame presented by the prosecution was off.

The State presented Ash Chisholm as a witness at the PCR hearing. He testified he is an attorney at the First Circuit Public Defender's Office and has been employed there for approximately thirteen years. He testified that his only involvement in the case was handling Applicant's preliminary hearing. He cannot recall why he handled Applicant's preliminary hearing but, explained it was not uncommon for one attorney from the public defender's office to handle multiple preliminary hearings on behalf of other attorneys from the office to avoid multiple attorneys having to come for the preliminary hearings. He testified that he represented

Ms. Flowers on numerous charges and probation revocations related to methamphetamine use, but unrelated to Applicant's charges. He cannot recall if he was aware that Ms. Flowers was Rearick's stepdaughter, noting that preliminary hearings are scheduled relatively quickly. He does not recall if he and Applicant discussed Ms. Flowers's connection to Applicant's case and he does not believe that it would have impacted his limited representation of Applicant at the preliminary hearing in any way. On cross-examination, he testified that he has no specific recollection of Applicant's case, he has not reviewed a transcript of the preliminary hearing, and he only has notes of the hearing that he reviewed.

The State then presented trial counsel, Mary LeMatty, as a witness. LeMatty testified that she has been practicing law since 1993. She has been with the public defender's office since 2005. She testified that she was appointed to represent Applicant and she met with Applicant at least six or seven times. She testified she reviewed discovery with Applicant. She testified that Applicant's level of involvement in his case varied, describing his interest level as very high at times and as "not want[ing] to hear anything [she] had to say" at other times. She also described Applicant as a prolific writer and said she received "a good bit" of correspondence from him. She described the State's evidence and testified that Applicant informed her that he and the codefendants had gone to Rearick's home the night of his passing to secure the property. She testified there were available defenses relating to Applicant previously living at the home, but that this defense was complicated because Applicant was living with his girlfriend at the time of Rearick's death. She testified Applicant's burglary charge was first-degree because the State alleged it was committed at nighttime, and he had two or more prior burglaries. She testified that Applicant gave her the name of several possible witnesses to testify at trial and she spoke with both Cole and Troy, who were present at trial. She also testified that Applicant's mother testified

on Applicant's behalf at trial. She testified that she elected not to call Cole or Troy as witnesses at trial because Applicant's mother "did a wonderful job of setting things out very clearly" and she believed the two men would have been cumulative and not added anything to the defense. She testified that she found notes in her file that Ms. Flowers would not testify that Applicant had permission to be at the property. LeMatty testified she had ample time to prepare for trial.

LeMatty testified she had no specific recollection about Applicant's prior burglary convictions either for enhancement to a first-degree burglary or for sentencing enhancement but did recall that the State produced certified copies of his prior convictions. She had no recollection regarding the charge conference or jury instructions. She testified that her trial strategy involved an argument that the building was no longer a dwelling, which she acknowledged was a necessary element of first-degree burglary and without satisfying this element, the State would not be able to meet its burden of proof as to first-degree burglary.

Counsel testified she did not challenge the indictment because she did not see any reason to do so. She similarly testified she did not see any reason to object to the prosecutor's closing argument.

On cross-examination, LeMatty testified that she has little recollection of the case because it was many years ago and she had since handled thousands of other cases. She testified that her notes only reflect six to seven meetings with Applicant, but it is not uncommon for her to also meet with clients at the courthouse when they are transported to court, without making any notations in her file. She testified she did not call any additional witnesses beyond Applicant's mother because she believed their testimony would have been cumulative and/or would not have comported with the timeline as presented by the State during trial. She testified she did not go out to the residence to take pictures or investigate. She agreed that it would not be

first-degree burglary had Applicant been at the trailer to retrieve his own property had he been lawfully residing there. However, she testified that Applicant "had, in essence, without taking all of his items, vacated that property for the most part, except for working there some months prior to Mr. Rearick's passing." When challenged, she again asserted that Rearick was living with his girlfriend at the time of Rearick's death. She testified that he would work on the residence during the day but was living with his girlfriend. She acknowledged there are several ways to establish residency, such as where one gets his mail or the address one has on file in official court documents. She does not recall doing any research regarding his residency or landlord-tenant law. She similarly did not recall doing any research into his prior record but did not recall Applicant bringing any issues regarding prior record to her attention.

LeMatty summarized her defense strategy as arguing that Applicant did not go to the residence to commit a crime but rather only to retrieve his property. She also acknowledged that another defense strategy was to argue that the building was no longer a dwelling at the time of entry.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged multiple instances of ineffective assistance of trial counsel and asserts that as a result of counsel's purported errors, he is entitled to have his conviction reversed and proceed back to the court of general sessions for a new disposition of his case.

Standard of Review

Under the Uniform Post-Conviction Procedures Act, an applicant may seek post-conviction relief upon the following types of allegations:

> 1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

2. That the court was without jurisdiction to impose sentence;

3. That the sentence exceeds the maximum authorized by law;

4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP.

The three grounds for relief upon which Applicant proceeded at the evidentiary hearing pertain to ineffective assistance of counsel. The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, post-conviction relief allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. See generally S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in post-conviction relief actions). The allegation of denial of such representation sets forth a prima facie violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. Id. at 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, "does not guarantee perfect representation[—]only a 'reasonably competent attorney.'" Harrington v. Richter, 562 U.S. 86, 110 (2011) (quoting Strickland, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Strickland, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." Harrington, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Butler, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." Strickland, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The

reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; see also Harrington, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Harrington, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," **not** whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690) (emphasis added).

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 687 (emphasis added).

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id. at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. Id.

Findings as to Specific Claims Raised

Applicant has alleged multiple claims of ineffective assistance of trial counsel and asserts that as a result of counsel's purported errors, he is entitled to a new trial. This Court finds has failed to meet his requisite burden of proof as to each allegation. Each allegation is addressed below:

Allegation Counsel was Ineffective for Failing to Adequately Investigate Applicant's Case Prior to Trial

Applicant claims that counsel LeMatty was ineffective for failing to adequately investigate the case prior to trial. Applicant specifically asserted that counsel failed to properly investigate the crime scene, including the common entry point for the trailer and whether he still had personal belongings at the trailer to buttress his claim that he was a lawful resident of the trailer and had consent to be present on the night of his arrest.[6] In support of this claim,

[6] In his *pro se* application, Applicant asserted that counsel was ineffective for failing to investigate whether he gave a written confession, what was presented at the preliminary hearing, whether fingerprint lifts were taken, and discrepancies in photographs from the crime scene.

Applicant only provided his own self-serving testimony; he did not present the results of any independent investigation, and did not present any documentary evidence to establish that any additional investigation would have yielded beneficial information that would have resulted in a different outcome at trial. For these reasons, this Court finds Applicant failed to meet his high burden of establishing that counsel was constitutionally ineffective in her investigation.

As an initial matter, this Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, 466 U.S. 668). "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Ard, 372 S.C. at 331–32, 642 S.E.2d at 597 (internal quotation marks omitted) (emphasis omitted).

However, our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel's duty to investigate. See, e.g., id. at 331, 642 S.E.2d at 597 ("Without a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation."). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable

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However, Applicant presented no evidence to sustain these allegations, and, accordingly, had failed to meet his burden of proof as to these claims.

professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690–91; see id. ("In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Thus, in applying the Strickland standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation must be evaluated with heavy deference to counsel's judgment. Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 63 (Ct. App. 2014).

To prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris, 377 S.C. at 75–76, 659 S.E.2d at 145–46 (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Harris, 377 S.C. at 75–76, 659 S.E.2d at 145–46.

As discussed above, Applicant failed to present any evidence to establish what benefit an additional investigation would have yielded, and, accordingly, his assertions are merely speculative and do not meet the burden of proof he must establish for relief. Accordingly, Applicant's claims pertaining to Counsel's failure to adequately investigate are **DENIED.**

Allegation Counsel was Ineffective for Failing to Challenge the Use of Applicant's Prior Record for Enhancement

Applicant claims that counsel LeMatty was ineffective for failing to challenge the use of his prior record for enhancement purposes. At the hearing, Applicant argued that his prior offenses should not have been qualifying offenses to both enhance the charge to first-degree burglary and for sentencing purposes as a recidivist offender pursuant to S.C. Code Ann. § 17-25-45. After a review of the record before this Court and the testimony presented, this Court

finds Applicant has failed to meet his burden of proof as to both claims.

Initially, the only evidence before this Court regarding Applicant's prior record comes from the trial transcript, which establishes that Applicant previously pled guilty to two counts of first-degree burglary, one count of second-degree burglary (violent), one count of second-degree burglary (non-violent). (Trial Tr. 287-88). Applicant failed to provide any evidence that these convictions were somehow invalid; the only evidence Applicant presented was his own testimony that somehow his *sentences* for these convictions were illegal because they were suspended below the mandatory minimum sentence. He has failed to meet his burden of establishing hat these prior convictions were not qualifying offenses pursuant to Section 17-25-45 as a recidivist offender or for enhancement purposes under Section 16-11-311(A)(2). Accordingly, Applicant's claims pertaining to Counsel's failure to adequately challenge his prior record are **DENIED.**

Allegation Counsel was Ineffective for Failing to Interview and Call Defense Witnesses at Trial

Applicant claims that counsel LeMatty was ineffective for failing to investigate and present various defense witnesses at trial to establish that Applicant was a resident of Rearick's property to support his defense that he lived at the property, thereby negating the "without consent" and with the "intent to commit a crime" elements of first-degree burglary as set forth in Section 16-11-311(A). At the hearing, Applicant presented three witnesses to support this claim: two childhood friends, Brian Cole and Jason Troy, and Jessica Koon, who previously dated Rearick's neighbor. All three testified that Applicant had lived at the property at some point before his arrest. Cole testified he moved Applicant's personal belongings into Rearick's home months prior to Rearick's death. Troy testified he brought Applicant a bulk supply of meat at Rearick's house approximately two months prior to Rearick's death. Koon, testified she recalled

seeing Applicant at the property in the weeks leading up to Rearick's death. However, and crucial to this Court's determination of this issue, none of these witnesses testified that Applicant was still a resident at the time of Rearick's untimely death and Applicant's arrest.

Additionally, this Court has reviewed the trial transcript and agrees with counsel LeMatty's assessment at the time of trial that these witnesses provided cumulative testimony to that of Applicant's mother, who also testified that Applicant had *previously* lived at the home but was now living with his girlfriend. Moreover, Applicant's own testimony supports the conclusion that he was not living at the property at the time of Rearick's death and his arrest, as he testified repeatedly that he was staying with his girlfriend. Ultimately, the record before this Court establishes that while Applicant had lived with Rearick prior to his death, he was living with his girlfriend at the time of the trial, and he has failed to provide any concrete evidence to establish otherwise. This Court finds that Applicant has failed to meet his burden of establishing any constitutional ineffectiveness. Accordingly, Applicant's claims pertaining to Counsel's failure to investigate and present witnesses on his behalf are **DENIED.**

Allegation Counsel was Ineffective for Failing to Retain a Code Enforcement Officer to Establish the Outbuilding was Not Habitable

Applicant next claims that counsel LeMatty was ineffective for failing to present a defense witness specializing in expert code enforcement to establish the outbuilding was not habitable. This Court finds that this allegation fails as a matter of law for several reasons. Initially, Applicant failed to present any such witness to support his claim, and, accordingly, he cannot meet his burden of proof. Next, the record establishes that Applicant was accused and convicted of entering both the trailer and the outbuilding and taking personal property belonging to Rearick from both. Any argument that the outbuilding is uninhabitable would still not defeat the evidence establishing he entered Rearick's trailer, which was habitable, based on his own

testimony and that of his witnesses in his attempts to establish residency. Applicant's claims pertaining to Counsel's failure to retain an expert in code enforcement are **DENIED.**

Allegation Counsel was Ineffective for Failing to Object to the Prosecution's Argument

Applicant further alleges counsel LeMatty was ineffective for failing to object to the following statement made by the solicitor: "Ladies and gentlemen, much like the old fable, Mr. Floyd is a wolf in sheep's clothing." (Tr. 254, lns. 18-19). Applicant argues these remarks by the prosecutor invoked religion to intentionally inflame the passions of the jury and prejudiced him in that he was denied a fair trial. This Court finds this claim must be denied and dismissed.

Opening and closing arguments are a basic and important element of the adversarial fact-finding process in a criminal trial, and such arguments serve "to sharpen and clarify the issues for resolution by the trier of fact in a criminal case" while also providing both the solicitor and defense counsel with an opportunity to advocate for their respective positions, argue for certain inferences to be drawn from the evidence presented, and identify the weaknesses in the other side's positions. Herring v. New York, 422 U.S. 853, 862 (1975). When presenting a closing argument, a solicitor generally possesses "wide latitude" as to the substance of his remarks to the jury and is fully permitted to prosecute with earnestness and vigor. Bates v. Lee, 308 F.3d 411, 422 (4th Cir. 2002); Berger v. United States, 295 U.S. 78, 88 (1935) ("[A prosecutor] may prosecute with earnestness and vigor—indeed, he should do so."); see also United States v. Isaacs, 493 F.2d 1124, 1164 (7th Cir. 1974) ("The closing argument of a prosecutor need not be confined to such detached exposition as would be appropriate in a lecture . . . because to shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice." (citations and quotations omitted)).

A solicitor—amongst other things—is allowed to state and discuss the State's version of the testimony, to comment on the weight to be given to such testimony, and to point out the matters the jury should and should not consider in arriving at a verdict. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); see State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) ("[The prosecuting attorney] may argue with reference to any matters which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider." (citation and internal quotations omitted)).

However, prosecutors must confine their arguments to the record and the reasonable inferences that may be drawn therefrom. Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 477 (2016) (quoting Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). When a court is reviewing a post-conviction relief claim that a prosecutor's argument violated an applicant's due process rights, the court "must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial." Id. (quoting Darden v. Wainwright, 477 U.S. 168, 181, (1986) (internal quotations and citations omitted). This Court has stated:

> Improper comments do not automatically require reversal if they are not prejudicial to the defendant. On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record . . . The appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. *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.*

Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166-67 (1998) (emphasis added and citations omitted); see also Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) ("The relevant question is whether the solicitor's comments [in closing argument] so infected the trial with unfairness as to make the resulting conviction a denial of due process.").

While "[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony[,]" prosecutors are "bound to rules of fairness in their closing arguments[.]" Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) (quoting Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Brown v. State, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009) (quoting Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004)). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Von Dohlen, 360 at 609–10, 602 S.E.2d at 744

Here, the argument from the prosecutor was rather innocuous and was not intended to stoke the passions of the jury. Moreover, from this Court's review of the record, it is clear that this passing comment did not deny Applicant a fair trial. Accordingly, Applicant's claims pertaining to Counsel's failure to object during closing arguments is **DENIED**.

Allegation that Counsel was Ineffective for Failing to Challenge Sufficiency of Indictment

Applicant contends counsel LeMatty was ineffective for failing to challenge the sufficiency of the indictment. Specifically, Applicant argued that because Rearick was deceased at the time of his entry into the home, the house was no longer a dwelling. He also argued the indictment must have specifically listed Rearick's daughter to be valid. However, as Applicant correctly testified, the indictment did clearly list "the Estate of Charles Alvin Rearick." This Court finds that the indictment is facially valid, and accordingly, there was no valid argument counsel could have made against the sufficiency of the indictment and any pre-trial motion to quash the indictment based on the sufficiency of the evidence would have been improper as set forth in State v. Massey, 430 SC 349, 844 S.E.2d 667 (2020) ("A motion to quash does not test

the sufficiency of the State's evidence; the sufficiency of the evidence can properly be challenged only by a motion for a directed verdict following the State's presentation of its case at trial."). Applicant's arguments and testimony at the evidentiary hearing did not raise an issue with the facial validity of the indictment, but rather appears to raise an issue with the sufficiency or type of proof offered by the State. Moreover, this Court has reviewed the language of the indictment and finds it was indeed facially valid, and Counsel had no viable objection to make. The Court therefore finds Counsel was not deficient, nor was Applicant prejudiced by Counsel's failure to challenge the indictment. Rather, to challenge the sufficiency of the indictment, counsel properly moved for a directed verdict at the close of the State's case. Accordingly, Applicant's claims pertaining to Counsel's failure to challenge the sufficiency of the indictment is **DENIED**.

Allegation that Counsel was Ineffective for Failing to Move for a Directed Verdict

Applicant contends counsel LeMatty was ineffective for failing to move for a directed verdict based on Applicant's permission to be in the home. However, the record reveals that counsel did move for a directed verdict, arguing that Applicant and his co-defendants went to the residence to collect Applicant's own property. See Trial Tr. p. 211-12 ("Further, the State has got to prove that the entry into the premises was without consent and with the intent to commit a crime . . "). The only logical way to interpret counsel's argument is that it also was an argument against the "consent" element of first-degree burglary pursuant to Section 16-11-311(A). This Court finds that counsel properly made a motion for a directed verdict on several strong grounds, including that the home was not a dwelling, there was not intent to commit a crime, and consent. This Court finds counsel's performance was reasonable and Applicant cannot establish any constitutional ineffectiveness of counsel. Accordingly, Applicant's claims pertaining to Counsel's failure to challenge the sufficiency of the indictment is **DENIED**.

Allegation Counsel was Ineffective for Failing to Request Specific Jury Instructions

Applicant next contends counsel LeMatty was ineffective for failure to request numerous jury instructions, including the definition of dwelling, consent, the use of Applicant's prior convictions, and lesser-included offenses. This Court finds that Applicant cannot meet his burden as to any of these claims.

Initially, the record establishes that the trial court properly and fully charged the jury as to what constitutes a dwelling. See Trial T. 276-77. Any commentary regarding whether the home was a dwelling at the time of entry due to Rearick's death was proper for argument—not jury instructions—and counsel properly made such an argument to the jury. Accordingly, this claim is denied. Similarly, this Court has reviewed the jury instruction as a whole and finds that the "consent" element of first-degree burglary was properly charged to the jury. Again, any specific commentary regarding consent as it applied to this specific case was proper for argument.

Finally, this Court finds that Applicant cannot meet his burden of establishing that he was entitled to a jury instruction on the lesser-included offenses or that counsel was ineffective for failing to request such jury instructions. The trial court is required to charge a jury on a lesser included offense "if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). However, the trial court should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the lesser rather than the greater offense. Suber v. State, 371 S.C. 554, 559, 640 S.E.2d 884, 886 (2007). Here, the State alleged that Applicant entered the home of Rearick without his permission with the intent to steal personal property. Applicant argued the home was not a dwelling, he lacked any criminal intent, and he had Rearick's consent. Accordingly, the evidence only established either that Applicant was guilty of

first-degree burglary or not guilty and Applicant was not entitled to jury instructions of on the lesser-included offenses of second-degree or third-degree burglary. Accordingly, Applicant's claims pertaining to Counsel's failure to request specific jury charges are **DENIED.**

Allegation that Counsel Chisholm had an Actual Conflict of Interest

Applicant next contends counsel Chisholm, who represented him briefly at the preliminary hearing, was acting under an actual conflict of interested because he represented Rearick's stepdaughter, Danielle Flowers, on unrelated drug charges.

To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001) (citing Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998)). An actual conflict of interest occurs where counsel owes a duty to a party whose interests are adverse to the applicant's. Fuller v. State, 347 S.C. 630, 633-34, 557 S.E.2d 664, 665 (2001). Where an applicant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance, prejudice is presumed. Gonzales v. State, 419 S.C. 2, 10, 795 S.E.2d 835, 839 (2017) (citing Strickland, 466 U.S. at 692). However, "[t]he mere possibility of a conflict of interest is insufficient to impugn a criminal conviction." Fuller, 347 S.C. at 634, 557 S.E.2d at 665.

"The Sixth Amendment right to conflict-free representation, like the right to counsel itself, may be the subject of a waiver." United States v. Swartz, 975 F.2d 1042, 1048 (4th Cir.

1992). "The state can establish a waiver only by proving an intentional relinquishment or abandonment of the right." Hoffman v. Leeke, 903 F.2d 280, 288 (4th Cir. 1990). "To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently." Thomas v. State, 346 S.C. 140, 144, 551 S.E.2d 254, 256 (2001) (citing Swartz at 1048-49). "Whether there has been a waiver depends on the particular facts of each case and the court must make as thorough and long an inquiry as necessary to determine whether the accused is voluntarily, knowingly[,] and intelligently waiving his right." Hoffman, 903 F.2d at 288.

This Court finds that Applicant is not entitled to relief based upon his assertion that Chisholm was ineffective in his representation of Applicant at the preliminary hearing based on a conflict of interest. First, Applicant testified not only that he was aware that counsel Chisholm represented Ms. Flowers but that he waived any purported conflict of interest and wanted Chisholm to represent him for the limited purpose of the preliminary hearing.

Moreover, even if this potential conflict was not waived, Applicant has failed to show any prejudicial effect of the potential conflict. There has been no showing that the potential conflict impacted Counsel's performance at his preliminary hearing or had any impact on the remainder of his case. Applicant has merely acknowledged a possibility of a conflict existing, which does not warrant relief. Accordingly, Applicant's claims pertaining to a purported conflict of interest are **DENIED.**

CONCLUSION

Based on the evidence presented at the evidnetiary hearing and a thorough review of the record, this Court finds and concludes Applicant failed to meet his burden of proof pursuant to *Strickland* and Rule 71.1, SCRCP. This Court finds Counsel adequately conferred with Applicant; logically and realistically evaluated the circumstances of his case; provided effective

and competent representation. Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, based on the foregoing, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

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

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and

2. Applicant Martin D. Floyd remain remanded to the custody of the State of South Carolina.

AND IT IS SO ORDERED this 7th day of June, 2023.

Kristi F. Curtis

KRISTI F. CURTIS
Presiding Judge
First Judicial Circuit

Sumter, South Carolina