FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2018CP1800047

Tyrone D Ellison		**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.

Robert Bonds	2770	10/6/2022
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **10/6/2022**, and a copy mailed first class or placed in the appropriate attorney's box on **10/6/2022**, to attorneys of record or to parties (when appearing pro se) as follows:

Tricia A. Blanchette PO Box 2147 Leesville, SC 29070
Tyrone D Ellison 990 Wisacky Highway #324947 Bishopville, SC 29010

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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.

STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER	)	IN THE COURT OF COMMON PLEAS FOR THE FIRST JUDICIAL CIRCUIT
Tyrone D. Ellison, SCDC #324947, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2018-CP-18-00047 **ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief (PCR) action commenced by Tyrone D. Ellison (Applicant) on January 11, 2018, alleging he is entitled to post-conviction relief based on constitutionally ineffective assistance of trial counsel. The State requested an evidentiary hearing through its return on April 23, 2018. A hearing into the matter convened before the undersigned on May 20, 2022[1], at the Orangeburg County Courthouse. Applicant was present and represented by Tricia A. Blanchette, Esquire. Assistant Attorney General Samantha J. Weidauer represented the State. Applicant testified on his own behalf at the hearing, as did his trial counsel, James K. Falk, Esquire.

In addition to the pleadings in this action, this Court had before it a copy of the Dorchester County Clerk of Court records regarding the subject convictions; Applicant's records from the

[1] This PCR actions stems from Applicant's 2014 trial. The evidentiary hearings for this PCR action and for Applicant's PCR action stemming from his 2015 guilty plea were consolidated in the interest of judicial economy. At Applicant's PCR hearing on the two separate PCR actions, this Court clarified the consolidation of the hearing was solely for purpose of the record and denied to merge the cases – finding two separate orders and two separate findings were appropriate. This Court notes Applicant has requested the two applications be considered together pursuant to *United States v. Cronic*, 466 U.S. 648, 658 (1984). However, this Court denies Applicant's request and considers them as two separate and distinct actions.

South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal, including the trial transcript; and the records of the current PCR action.

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 post-conviction relief. For the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Dorchester County Clerk of Court. In July of 2013, Applicant was arrested following an investigation into the armed robbery of a Sun Trust Bank in North Charleston. In December of 2013, the Dorchester County Grand Jury indicted Applicant for entering a bank, depository, or building and loan association with the intent to steal (2013-GS-18-1271). The Dorchester County Grand Jury additionally indicted Applicant for armed robbery in April of 2014. (2014-GS-18-0325).

On May 13, 2014, the First Circuit Solicitor's Office timely served Applicant with its notice of intent to seek life without parole (LWOP) pursuant to section 17-25-45 of the South Carolina Code based on a 2007 conviction for assault and battery with intent to kill (ABWIK).[2] On October 20, 2014, Applicant proceeded to a jury trial before the Honorable D. Craig Brown. James K. Falk,

[2] ABWIK and armed robbery are both classified as a "most serious offense" under section 17-25-45(C)(1). Section 17-25-45(A)(1)(a) requires a person with one or more convictions of a most serious offense be sentenced to LWOP.

Esquire, represented Applicant on these charges. Assistant Solicitors Don Sorenson and Phil Giese prosecuted the case.

At the conclusion of the multi-day trial, the jury convicted Applicant as indicted. Following the verdict, Judge Brown sentenced Applicant to life without parole pursuant to S.C. Code Ann. § 17-25-45 for armed robbery along with a concurrent term of imprisonment of thirty years for entering a bank, depository, or building and loan association with the intent to steal. Applicant subsequently filed a timely filed a notice of appeal.

Appellate Defender David Alexander perfected Applicant's appeal by filing a brief with the Court of Appeals on the following issues:

> I. During an overnight recess, a juror was approached by a man he believed was related to [Applicant] and asked to vote for [Applicant]. The juror told the rest of the jury about the attempted influence and told them to be careful. Did the trial court err in refusing to grant [Applicant]'s motion for a mistrial because the [Applicant]'s right to a fair and impartial jury was violated after the communication to the entire jury about the attempted influence and that they needed to be careful?
>
> II. When determining whether to declare a mistrial because of outside influences on the jury, does the Sixth Amendment allow a trial judge to consider the weight of the evidence against a criminal defendant as a factor in his decision?

Following briefing and oral argument, the Court of Appeals affirmed Applicant's convictions. *State v. Ellison*, Op. No. 2017-UP-014 (S.C. Ct. App. filed Jan. 11, 2017). The case was remitted back to the circuit court on February 7, 2017.

II. Summary of the Facts

Around 10:30 a.m. on the morning of Monday, April 1, 2013, a man wearing a long black wig, a black visor, and sunglasses entered the SunTrust Bank located on Dorchester Road in North Charleston, South Carolina, and quickly pulled a gun out of his pocket while holding it with a

white latex glove. (R. pp. 42-44; pp. 55-57; pp. 63-65; p. 68; pp. 76-77; p. 79; pp. 90-91; p. 170). The man then demanded the bank's money at gunpoint and forced the tellers to give him the cash contained in the bank drawers. (R. pp. 44-45; pp. 57-58). After that, the robber rapidly fled from the bank with over $6,000 in stolen funds before running into a nearby wooded area. (R. pp. 45-46; p. 58; p. 71; p. 83; p. 85).

Once the robber fled, David Lewis, a customer inside the bank during the robbery, quickly ran outside, got into his truck, and pursued the robber. (R. p. 72; p. 75; pp. 90-92). During his pursuit, Lewis noticed an older, green Honda vehicle that was in poor condition and "didn't fit the spot" driving in close proximity to the scene of the robbery. (R. pp. 93-94). Suspicious, Lewis followed the car to a nearby apartment complex and watched as the robber ran out of the wooded area he had fled into and jumped into the waiting Honda without his disguise. (R. pp. 92-95). After that, the suspicious car sped off, and Lewis chased after it until it began to weave in and out of traffic at speeds of nearly one-hundred miles per hour. (R. p. 93; pp. 97-98). At that point, Lewis decided to cease his pursuit and returned to the bank. (R. pp. 97-98).

Meanwhile, the bank's stunned employees alerted the authorities of the robbery, and officers from the North Charleston Police Department quickly responded to the bank, secured the scene, and spoke with the witnesses at that location. (R. p. 46; p. 59; p. 70; p. 84; pp. 100-103; p. 265). Through those actions, the officers obtained a description of the suspect and learned he fled in an older, green Honda vehicle with a South Carolina license plate partially containing the numbers 1-5-3 or 1-9-3. (R. p. 98; p. 266). Furthermore, the officers ascertained the direction in which the robber fled on foot and deployed a police tracking dog to follow his scent. (R. p. 103; p. 108). While tracking the scent, the police dog led the officers away from the bank into a wooded area. (R. pp. 103-105; pp. 108-111). In the wooded area, the police dog tracked the suspect's scent

to a location where a black visor, a black wig, a latex glove, and a .380-caliber handgun had been abandoned, and that evidence was secured in light of the fact it was consistent with the items the robber had used during the bank robbery. (R. p. 111; p. 173; p. 177). The police dog then continued on the suspect's trail until it reached a location next to the apartment complex where the suspicious car had been observed by Lewis. (R. pp. 92-95; pp. 104-105; pp. 111-112).

As the investigation into the bank robbery continued, officers reviewed the bank's surveillance footage, observed the vehicle in which the robber had fled in that footage, and determined the vehicle was a 1999 to 2001 Honda Civic. (R. pp. 271-272). However, during a subsequent search, they were unable to locate a vehicle that fit the description of the robber's getaway car. (R. pp. 271-272). From that point on, the identity of the bank robber remained unknown until Applicant Tyrone Darius Ellison was apprehended in July of 2013 after he participated in another robbery of the same bank, led law enforcement officers on a high speed chase, and crashed his vehicle during that chase. (R. pp. 272-273; pp. 560-561).

After Applicant was captured, officers discovered his skin tone, physical build, and facial hair were wholly consistent with the skin tone, physical build, and facial hair of the robber who committed the armed robbery at the SunTrust Bank a few months earlier. (R. pp. 274-275). As a result, the officers contacted Applicant's mother, Annette McKinney, and spoke with her about the earlier bank robbery. (R. p. 333). During the ensuing conversation, McKinney indicated she believed Applicant had owned a green Honda Civic for a few weeks, and she stated she was 75% certain Applicant was the robber depicted in footage from the April bank robbery. (R. pp. 335-337; p. 350).

Thereafter, a buccal swab was collected from Applicant and submitted for analysis along with the evidence recovered during the investigation into the robbery. (R. pp. 158-159; pp. 171-

172; pp. 178-183; p. 185). Agent Catherine Leisy, a forensic scientist at S.L.E.D. and an expert in the field of D.N.A. analysis, then developed a D.N.A. profile for Applicant and compared it to D.N.A. profiles developed from the black wig, the black visor, the latex glove, and the gun. (R. pp. 219-220; pp. 227-228; p. 230; p. 232; pp. 234-235). Upon analysis, she conclusively determined Applicant was the major contributor of the D.N.A. located on the wig, visor, and glove but was not a contributor of the D.N.A. located on the gun. (R. p. 230; pp. 232-236).

Subsequently, Applicant was indicted for armed robbery and entering a bank, depository, or building and loan association with the intent to steal, and he proceeded to trial. (R. pp. 9-10; pp. 565-569). At the outset of trial, the trial judge presented preliminary instructions to the jurors and explained to them they were required to decide Applicant's case based on "the testimony [they] hear and the other evidence introduced in court." (R. pp. 26-34).

Thereafter, during trial, numerous witnesses testified for the State in regard to the evidence linking Applicant to the April bank robbery of the SunTrust Bank. (R. pp. 42-46; pp. 55-59; pp. 64-72; pp. 76-85; pp. 89-98; pp. 100-118; pp. 122-135; pp. 153-154; pp. 193-194; pp. 230-236; pp. 265-275; pp. 292-294). Specifically, the witnesses present during the robbery discussed the physical characteristics of the bank robber, and those details were fully consistent with the physical characteristics of Applicant. (R. pp. 43-44; p. 57; p. 72; p. 92; pp. 274-275). Additionally, the investigating officers testified about their discovery of the items used by the robber during the bank robbery, and Agent Leisy confirmed she conclusively determined Applicant's D.N.A. was on the robber's wig, visor, and latex glove.[3] (R. p. 111; p. 173; p. 177; pp. 228-236). Furthermore, Lewis testified about his pursuit of the robber's getaway vehicle, which was an older, green Honda

[3] During her testimony, Agent Leisy further explained the odds of randomly selecting an unrelated individual with a matching D.N.A. profile was one in over two quintillion. (R. p. 230; p. 232; p. 235).

Civic with a South Carolina license plate partially containing the numbers 1-5-3 or 1-9-3, and testimony was presented establishing Applicant purchased and insured an older, green Honda Civic roughly a week before the robbery, also possessed a South Carolina license plate containing the numbers 1-5-3 at that time, and did not surrender the license plate or cancel his insurance on the Honda Civic until a few weeks after the robbery. (R. pp. 93-95; p. 98; pp. 153-154; pp. 193-194; p. 197; pp. 292-295). Notably, Terrance Bryant, an acquaintance of Applicant, also stated Applicant was in possession of a green Honda Civic on the day of the robbery, sold it to him on the evening of April 1, 2013, and subsequently provided him with an incorrect bill of sale that wholly omitted Applicant's name from the vehicle's purchase history. (R. pp. 122-135).

Following the presentation of that testimony and evidence, the State rested its case, and defense counsel offered the testimony of several witnesses in Applicant's defense. (R. pp. 306-364; pp. 370-400; pp. 404-410; pp. 412-419). Through that testimony, Applicant's mother, McKinney, indicated she purchased a Honda Civic for Applicant on March 23, 2013, but claimed he told her he sold it shortly thereafter and no longer had the vehicle on March 25, 2013.[4] (R. pp. 306-309; p. 331; p. 333). However, she conceded she told a detective investigating the robbery Applicant had the Honda Civic for a few weeks after he purchased it and she personally took the vehicle to get its windows tinted a few days after it was bought.[5] (R. pp. 335-337; pp. 341-343). Additionally, Dr. Robert Bennett, an expert in forensic science, testified he analyzed the items

[4] Subsequently, Applicant's stepfather, Dennis McKinney, offered similar testimony, stating Applicant's mother purchased a car for Applicant at some point in March of 2013, and indicted he no longer saw Applicant with that car a few days later. (R. pp. 423-424).

[5] As part of her testimony, McKinney also stated she had deposited $20,000 into Applicant's bank account several months before the bank robbery while claiming Applicant was still in possession of that money at the time of the robbery. (R. pp. 313-315; p. 323). However, she also acknowledged Applicant was not initially aware the money had been transferred into his account and admitted she told him about it for the first time after he had been arrested and incarcerated for the bank robbery. (R. pp. 323-235; pp. 327-329).

discovered after the robbery but was unable to obtain a sufficient D.N.A. profile to make a comparison because the S.L.E.D. analyst had done an "overly thorough" job in analyzing the items. (R. pp. 371-379; p. 393). However, he conceded the S.L.E.D. analyst did nothing wrong or improper in conducting her analysis. (R. pp. 399-400). Furthermore, Chunte Green, a shift manager at the Burger King restaurant where Applicant worked, claimed Applicant had to have been working on April 1, 2013, and stated he was the only male that worked at the restaurant at the time. (R. pp. 404-407). However, Green acknowledged she was not personally present at work on April 1, 2013, conceded she had no firsthand knowledge in regard to whether Applicant actually worked that day, and indicated her testimony was based on the fact Applicant typically handled the restaurant's deliveries, which were made every Monday at some time between 6:00 a.m. and midnight, coupled with the fact a delivery was received on April 1, 2013.[6] (R. pp. 405-407; p. 409). Similarly, Candida Payne, another Burger King employee, stated she worked at the restaurant from 11:43 a.m. to 4:30 p.m. on April 1, 2013, and claimed she remembered Applicant working there that day.[7] (R. pp. 412-413; p. 416). However, she could not remember the names of the other employees who worked on that date, and she alleged Applicant took her home from work in a vehicle he did not purchase or insure until several weeks later.[8] (R. p. 195; p. 295; p. 413; pp. 416-417; p. 419).

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[6] On cross-examination, Chunte further conceded several other male employees actually did work at the restaurant, including individuals named Tyrone Bailey and Christopher Coburn. (R. pp. 409-410).

[7] Subsequently, Samuel Powers, an employee of the company that owned the Burger King franchise for which Applicant worked, offered rebuttal testimony and indicated the company had no record of Applicant working on April 1, 2013. (R. pp. 426-427; pp. 455-456).

[8] During her testimony, Payne also acknowledged she had previously been convicted of numerous crimes, including defrauding a hotel or restaurant, financial transaction card fraud, making a false statement to obtain a license, and six counts of shoplifting. (R. pp. 414-416).

Thereafter, at the conclusion of the evidentiary phase of trial, the trial judge adjourned court for the day, canceled the trial for the following day due to a prior engagement, and ordered the jurors to return for duty on the upcoming Friday. (R. pp. 460-461; p. 463). Subsequently, when the trial resumed on Friday morning, the trial judge cleared the courtroom and asked for Juror # 151, William White, to be brought out to discuss a matter that had been called to the trial judge's attention. (R. pp. 464-465). The trial judge then questioned White, and White revealed under oath he had been approached at his home on the preceding day by an individual he believed was related to Applicant who asked him to vote in a certain way during the trial. (R. pp. 464-465). White further revealed he quickly told the person to leave his property, and he indicated he did not believe he could remain impartial in light on that encounter. (R. pp. 464-467). The trial judge then inquired if White had mentioned the encounter to the other jurors, and White responded he simply let all the other jurors know he was approached while advising them to be careful. (R. pp. 466-467; p. 469).

In response to White's statements, the trial judge excused White from further service in Applicant's case. (R. p. 467). Thereafter, he asked for the remaining jurors to be brought into the courtroom before asking them if White had advised them he had been approached about the case on the preceding day, and the jurors all responded affirmatively. (R. pp. 470-471). The trial judge then asked the jurors if any of them did not believe they could be fair and impartial or decide the case based solely upon the evidence presented during trial, and no juror responded. (R. p. 471). After that, the trial judge inquired if any of the remaining jurors had been approached or contacted in any way in regard to the case, and, again, no jurors responded. (R. pp. 471-472). The trial judge then asked the jurors for a second time if any of them could not be fair and impartial or decide the

case based solely upon the evidence and testimony presented during trial, and, once again, none of the jurors responded. (R. p. 472).

Following the questioning of the jury panel, the jurors retired to the jury room, and defense counsel moved for a mistrial. (R. pp. 472-473). In support of that motion, defense counsel argued the remaining jurors might "in the back[s] of their mind[s] somewhere" believe Applicant was guilty based on the actions of one of his apparent agents despite the fact those jurors all responded they could remain fair and impartial under the circumstances. (R. p. 473). In response, the solicitor asserted the grant of a mistrial would simply reward Applicant's improper behavior while noting Applicant was recorded calling someone from the jail on the preceding day and asking them to "tak[e] care of something" on the street upon which the juror who was subsequently contacted on Applicant's behalf lived. (R. pp. 473-474). At that point, neither defense counsel nor Applicant disputed or challenged the solicitor's representations. (R. pp. 474-475). Instead, defense counsel simply asserted he did not personally believed Applicant "had the wherewithal" to know his actions could have resulted in a mistrial if they were discovered while further contending the grant of mistrial would not actually be beneficial to Applicant. (R. p. 474).

After considering the issue, the trial judge denied the mistrial motion. (R. p. 475). In support of that decision, the trial judge noted all the jurors were exposed by White to the misconduct but determined a mistrial was nonetheless inappropriate under the circumstances in light of the fact all the jurors unequivocally indicated they could remain fair and impartial when he questioned them coupled with the fact the evidence establishing Applicant's guilt was substantial. (R. pp. 476-478). The trial judge then inquired of the parties if they had any further arguments in regard to the mistrial motion, and both the solicitor and the defense counsel indicated they did not. (R. p. 478).

Subsequently, the trial proceeded forward, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (R. pp. 483-553). During his jury instructions, the trial judge again reminded the jurors they could only consider the testimony and evidence presented during trial when determining whether the State had met its burden of proof. (R. p. 541). Thereafter, at the conclusion of trial, the jury convicted Applicant as indicted. (R. p. 555). The trial judge then sentenced Applicant to an aggregate sentence of life imprisonment without the possibility of parole based on Applicant's prior conviction for a "most serious" offense. (R. p. 561; p. 563).

III. Issues Before This Court

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

1. Ineffective assistance of trial counsel
    a. Failure to properly communicate all plea offers
    b. Failure to properly prepare Applicant for trial
2. Ineffective assistance of appellate counsel
    a. Failure to raise all meritorious issues on appeal

The State requested an evidentiary hearing through its return on April 23, 2018.

On July 26, 2021, pursuant to Rule 71.1, counsel filed an amended application on Applicant's behalf to include both general and specific allegations of ineffective assistance of trial and appellate counsel.

At the start of the hearing before this Court, PCR counsel indicated Applicant would be proceeding only on the following claims:

1. Failure to properly prepare prior to trial and advise Applicant regarding strength of the State's evidence and the available defenses, which resulted in counsel's failure to effectively negotiate a guilty plea and the following matters that arose prior to and during trial:

a. Utilization of a defense strategy that had been fully discussed on recorded phone calls provided to the defense in discovery.
b. Utilization of Applicant's mother as a defense witness to support said defense, with knowledge that she was subject to questioning regarding her audio interview with law enforcement whereby she identified Applicant, in part, and her recorded phone calls regarding the defense offered.
c. Utilization of an expert that bolstered the State's case and failed to offer an opinion advantageous to Applicant.
d. Utilization of defense witnesses regarding Applicant's employment and/or alibi, when it was known that the State could refute said witnesses.
e. Failure to address with Applicant, make an argument and/or motion regarding double jeopardy.

2. Failure to address the following matters at trial:
   a. The Court's prohibited and burden shifting statements to "search for the truth in an effort to make sure that justice is done between the parties" and that both the State and Defendant get a fair and impartial trial. Transcript p. 90, lns. 21-23, p. 601, ln. 25 – p. 602, ln. 5.
   b. The Court's failure to question the jurors individually on the matters involving witness intimidation. Transcript pp. 534-536.

IV. Standard of Review

The Uniform Post-Conviction Procedure Act[9] (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based 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;

[9] S.C. Code Ann. §§ 17-27-10 to -160.

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). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. 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).

The reviewing court applies the two-part test outlined by the United States Supreme Court in *Strickland v. Washington* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing *Strickland*, 466 U.S. 668). The applicant bears the heavy burden of establishing both prongs of the *Strickland* standard, and failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRCP; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and

prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)). Significantly, "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.

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). 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." *Strickland*, 466 U.S. at 690 (emphasis added). 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" demanded of attorneys in criminal cases. *Id.*

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. 466 U.S. 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 v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see id.* at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

When evaluating this probability, the reviewing court must "consider the specific impact counsel's error had on the outcome of the trial" coupled with "the strength of the State's case in light of . . . the [totality of the] evidence presented to the jury." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018); *Strickland*, 466 U.S. at 695–96. It is not sufficient "to show [counsel's] 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*." *Strickland*, 466 U.S. at 687 (emphasis added). In general, "the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843 (citing *Strickland*, 466 U.S. at 696) (stating "a verdict . . . only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"). Accordingly, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

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 689–90. The applicant's burden of proving both *Strickland* components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. *Id.* at 690. 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. *Id.* at 686; *cf. United States v. Morrow*, 977 F.2d 222, 229

(6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.")

V. Findings of Fact & Conclusions of Law

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the record in this action incorporated by way of the State's return, this Court proceeds to the claims of ineffective assistance of counsel articulated at the start of the hearing and finds each to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

1. *Allegation Prejudice Must be Presumed under Chronic*[10]

Applicant alleges Counsel's failure to effectively represent Applicant at his trial resulted in a complete breakdown in the adversarial process and therefore prejudice must be presumed.

"[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has in the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658 (1984). Further, "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Id.* The burden of proof still remains on Applicant to demonstrate a constitutional violation, though there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* Among these are "if the accused is denied counsel at a critical stage of his trial", "if counsel entirely fails to subject the prosecution's case to meaningful

[10] *United States v. Cronic*, 466 U.S. 648, 658 (1984).

adversarial testing", and circumstances in which "although counsel is available to assist the accused during a trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 659-60.

In South Carolina, structural issues, as addressed in *Cronic*, have been found sparingly and typically in the most egregious of cases. *See Nance v. Ozmint*, 367 S.C. 547, 555, 626 S.E.2d 878, 882 (2006) (finding ineffective assistance of counsel under *Cronic* when lead counsel was ill and on heavy medication and co-counsel had only practiced law for eighteen months, for failure to communicate to the jail to stop anti-psychotic medication when claiming mental illness in court, for clearly communicating to the jury that the defense attorneys did not want to be at the trial, for failure to qualify the defense expert when asserting a defense of guilty but mentally ill, and for failure to present adaptability evidence at the sentencing hearing); *McKnight v. State*, 320 S.C. 356, 359-60, 465 S.E.2d 352, 354 (1995) (finding ineffectiveness under *Cronic* when trial counsel was absent during the testimony of a victim at trial).

This Court finds Applicant's case does not fit one of the structural errors or circumstances as delineated by the Court in *Cronic* and its progeny. Counsel was present for the entirety of the trial, was professional and otherwise adequately did his job, and subjected the State to the required adversarial testing. Thus, a structural error is not present, and prejudice cannot be presumed. Therefore, this Court finds *Cronic* is not appropriate in the instant matter and inquiry into the actual conduct of the trial and alleged deficiencies of trial counsel is necessary.

2. ***Defense Strategy***

Applicant also raises a series of claims alleging Counsel was ineffective based on his alleged failure to properly prepare prior to trial and advise Applicant regarding the strength of the State's

evidence and available defenses. Applicant contends Counsel failed to effectively negotiate a guilty plea and investigate and develop certain matters that arose prior to and during trial. Specifically, Applicant points to alleged deficiencies pertaining to Counsel's utilization of a defense strategy that had been discussed on recorded jail calls; utilization of Applicant's mother as a defense witness; utilization of a DNA expert that Applicant alleges bolstered the State's case; and utilization of defense witnesses regarding Applicant's employment and/or alibi.

This Court disagrees, and finds Applicant has failed to overcome the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment in his representation of Applicant at all stages of Applicant's trial. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.' " *Dunn v. Reeves*, 594 U.S. ___, ___, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013)). In fact, "even if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that *no competent lawyer would have chosen*." *Id.* (alteration in original) (emphasis added) (quoting *Titlow*, 571 U.S. at 23–24). 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; *see Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding").

"When 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 v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The reviewing

court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). Further, "even if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable.").

Review of counsel's actions is hallmarked by deference, 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. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Id.* at 688–89; *cf. id.* at 691 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). "Defense lawyers have 'limited' time and resources, and so must choose from among 'countless' strategic options." *Dunn*, 594 U.S. ___, 141 S. Ct. at 2410 (quoting *Harrington*, 562 U.S. at 106–07). "Such decisions are particularly difficult because certain tactics carry the risk of 'harm[ing] the defense' by undermining credibility with the jury or distracting from more important issues." *Id.* (quoting *Harrington*, 562 U.S. at 108).

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. *Strickland*, 466 U.S.

at 689; *see Mazzell v. Evatt*, 88 F.3d 263, 269 (4th Cir. 1996) (declining "to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial"). The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland*'s deferential standard.

Allegation Counsel was Ineffective for Utilizing a Defense Strategy that had been Fully Discussed on Recorded Phone Calls provided to the Defense in Discovery

This Court finds Counsel credibly testified he was retained to represent Applicant approximately five weeks prior to Applicant's trial. Counsel testified he has been licensed as an attorney since 1984 and has primarily practiced criminal law since 1996. Counsel testified he expressed concerns to Applicant and Applicant's mother regarding the limited preparation time prior to trial and Applicant was aware of the tight turnaround between the time Counsel was retained and the date trial was scheduled to begin. Counsel testified he discussed with both Applicant and Applicant's mother the pitfalls of trying to prepare for a trial in five weeks. Counsel testified in the five weeks leading up to trial, roughly 80% of his time was used to prepare Applicant's case for trial.

In preparation for trial, Counsel testified he obtained Applicant's file from Applicant's prior trial counsel, Tommy Bolus.[11] Counsel testified he reviewed the Rule 5 materials provided by the State, conceding he did not review all of the recorded jail calls. Specifically, Counsel conceded at the evidentiary hearing he did not review the phone call between Applicant's mother

[11] Applicant testified he retained Counsel after firing prior defense counsel, Tommy Bolus, Esquire.

and inmate Shawn Keitt[12] (Applicant's #4 – CD (Call from Mr. Keitt to Ms. McKinney)) prior to trial, citing his limited preparation time. Regarding whether Counsel would have called Applicant's mother as a witness if he would have listened to the jail calls prior to trial, Counsel testified he would have called her as a witness but would not have questioned her about Applicant's alleged lack of financial incentive in committing the crimes. Counsel claimed he did not foresee Applicant's mother lying to him.

This Court finds Counsel did not take an approach no competent lawyer would have taken. This Court further recognizes the distorting effect of hindsight, recognizes the circumstances of counsel's challenged conduct, and fails to find deficiency in Counsel's perspective and strategy at the time of trial. Though Counsel testified he had limited time to prepare for trial and conceded he did not review all of the recorded jail calls prior to trial, this Court finds Counsel credibly testified that even if he would have listened to all of the jail calls in discovery, he still would have called Applicant's mother as a defense witness as she was necessary to Applicant's defense for multiple other reasons including discussing the sale of Applicant's car on the same date as the incident.

Additionally, this Court finds Applicant was not prejudiced by Counsel's decision to ask Applicant's mother about his lack of financial incentive in committing the crimes. Though the State was able to cross-examine Applicant's mother regarding her prior recorded jail calls at trial, Applicant's mother maintained during cross-examination Applicant was aware of the bank account prior to date of the incident for which he was charged. (R. 323-331).

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[12] In summary, during the recorded jail call, Applicant's mother discusses her belief reasonable doubt exists in Applicant's case. Specifically, Applicant's mother posits during the call that Applicant can create reasonable doubt by way of lack of financial incentive as he has $20,000 in a savings account. Applicant's mother further states during the phone call Applicant is not aware of the savings account.

Moreover, this Court finds Applicant's testimony at the evidentiary hearing regarding this allegation uncredible. Specifically, Applicant testified at the evidentiary hearing that should Counsel have reviewed the recorded jail call with him prior to trial, he would not have wished to proceed to trial and instead, would have wished to discuss a plea deal. This Court finds Applicant's assertion uncredible as Counsel credibly testified he was hired to take Applicant's case to trial specifically because Applicant was not interested in pleading guilty. Therefore, this allegation is **DENIED.**

Allegation Counsel was Ineffective for Utilizing Applicant's Mother as a Defense Witness with the Knowledge She was Subject to Questioning Regarding her Audio Interview with Law Enforcement

This Court finds Counsel credibly testified he reviewed the audio interview between Applicant's mother and Detective Repman (Applicant's #5 – CD (Interview with Annette McKinney) in preparation for trial and discussed the subject audio interview in advance of the trial with both Applicant and Applicant's mother. At the evidentiary hearing, Counsel confirmed Applicant's mother stated during her audio interview with law enforcement she was 75 percent certain the photo she was shown by law enforcement during her interview was Applicant. Specifically, this Court finds the following testimony was adduced at trial during the State's cross-examination of Applicant's mother:

> A. The photograph that he showed me, the single photograph he showed me, sir, prior to him recording me, after – when he showed me the single photograph, my thing is that is 50 percent could be my son. And he said why do I say 50 percent? Because I said he's black. And that's before he recorded me, because he had showed me so many other pictures, and it's like, it was a young black guy, so 50 percent, you're black. If it was a white person, that's a 0 percent. 50 percent, I said, "Well, he's black."
>
> Q. Okay. Well, the fact of the matter is there's a little more to your description in your explanation to him; is that correct, Ms. McKinney?

A. This is prior to him recording me. We had a conversation. And once -- once I had told him things before he said, "Now I'm going to record you," because --

Q. Well, let's talk about the recording, because that's what I have a recording of.

A. Mm-hmm, yes, sir.

Q. The fact of the matter is when he was recording you, what did you tell him about the person in that photograph?

A. What I remember when he asked can he record me now, he pulled the photo out that he had at that time, and I looked. I said -- I don't remember exactly the words, but I -- something like, "I don't know." I was looking at it kind of hard, and I said, "Well," because all the hair and stuff. He said, "Well, just" -- I think he said something about just try to -- I think he told me, "Well, that's a wig," or something when I was saying about some dreads or something. I believe he told me that was -- that's a wig. And then he said, "Just look closely."
And I said, "I'm not sure."
And finally he was kind of like pointing around different things on the picture, like you know, "Look here and there."
And eventually I said, "It could be him."
And he said, "well, how sure are you?"
And I said 75 percent, the 50 percent being that he was black.

Q. And the fact of the matter is the way that conversation went is that he asked you, made the comment, "This is a photo from a bank robbery," and your response -- do you admit or deny that your response to that question was, "That resembles my son's mouth and nose. I don't know what he was wearing, but that resembles my son right there"? Do you admit telling him that?

A. If he has that recorded for that picture that he showed me, it wasn't these photos, but the picture that he showed me, if he had that recorded, we didn't -- there was one photo he showed me in particular, when I finally looked at it, I said it could be 75 percent, the 50 percent being it was a young black guy, the 25 percent there were some features, as there were with the other photos I was shown.

(R. 348-350).

This Court finds Applicant's assertion Counsel was ineffective for utilizing Applicant's mother as a defense witness with the knowledge she was subject to questioning regarding her audio interview with law enforcement without merit. Specifically, this Court finds Counsel credibly testified he attempted to address Applicant's mother's identification of Applicant to law

enforcement during his examination of her and explain why she may been flustered during her identification to law enforcement and made a bad identification. Counsel also testified he attempted to elicit testimony from Applicant's mother to show that at the time of her identification she believed her son had been in an automobile accident. Counsel recalled his strategy was to attempt to point out to the jury that mothers do not indicate they are only 75 percent sure a picture is their child; rather, Counsel posited mothers either know a picture is or is not their child.

Additionally, this Court finds Applicant's testimony at the evidentiary hearing contradictory and not credible. Specifically, on direct examination, Applicant alleged he was not aware of the recording taken by law enforcement of his mother prior to his mother's testimony at trial. In contradiction to that testimony, on cross-examination, Applicant testified he was aware law enforcement had interviewed his mother prior to trial.

Furthermore, as mentioned above, this Court finds Counsel credibly testified he required Applicants mother as a defense witness as she was necessary to Applicant's defense for multiple other reasons including discussing the sale of Applicant's car on the same date as the incident. Thus, because Counsel credibly testified he reviewed the audio interview with Applicant prior to trial, because Counsel strategically attempted to elicit testimony during his examination of Applicant's mother that would undermine the State's contention Applicant's mother made a positive identification of him, and for the other above-mentioned reasons, this Court fails to find Counsel's utilization of Applicant's mother as a defense witness deficient and finds Applicant was not prejudiced by Counsel's decision to call her. Therefore, this allegation is **DENIED**.

Allegation Counsel was Ineffective for Utilizing an Expert that Bolstered the State's Case and Failed to Offer an Opinion Advantageous to Applicant

Applicant additionally contends Counsel was ineffective for failing to utilize Dr. Bennett as an expert when Dr. Bennett bolstered the State's case and failed to offer an opinion that was

advantageous to Applicant. At the evidentiary hearing, Applicant testified he was not willing to plead guilty prior to the completion of Dr. Robert Bennett's DNA analysis. Applicant further testified he believed Dr. Bennett's testimony would help his defense. Applicant posited Dr. Bennett's results came back inconclusive, creating a different result than the DNA result found by SLED. Applicant testified that because SLED produced the only DNA results and no independent tests were able to be conducted, Counsel had the ability to shed doubt of the accuracy of SLED's results.

Counsel further testified at the evidentiary hearing that though he did not have a transcript of the pre-trial transcript (Applicant's Exhibit #1 – Motion for Bond Reduction) to review prior to Dr. Bennett testimony, he spoke with Dr. Bennett prior to trial. Counsel testified he utilized Dr. Bennett as a witness at trial to "put the state on trial" as Applicant did not have an opportunity to independently confirm the DNA results because all potential DNA evidence was consumed through SLED's testing. Counsel further contended that despite Dr. Bennett's testifying to SLED's thoroughness, he attempted to establish SLED could have used a smaller portion of the DNA for testing. Counsel testified that through Dr. Bennett's testimony he attempted to receive a spoilation charge. Counsel stated his strategy was to raise some kind of doubt regarding the accuracy of the DNA evidence. Counsel posited he believed the jury would convict Applicant on the DNA evidence alone unless he put up some type of response to the State's DNA evidence. Counsel testified he discussed Dr. Bennett's anticipated testimony thoroughly with him prior to calling him as a defense witness.

This Court finds Counsel was not deficient. This Court finds should Counsel not have called Dr. Bennett to testify, the jury would have solely had SLED's results to consider and would not have learned further testing was performed that reached unsuccessful results. Additionally,

Counsel credibly testified Dr. Bennett was the most advantageous opinion regarding the DNA evidence he could find. Counsel testified he called Dr. Bennett to create doubt in the jurors' minds and "put as many balls in the air" for the jury as possible. This Court finds Counsel's decision to call Dr. Bennett was a reasonable strategic decision and did not prejudice Applicant as Dr. Bennett did not testify in agreement with the State's DNA findings. Therefore, this allegation is **DENIED.**

Allegation Counsel was Ineffective for Utilizing Defense Witnesses Regarding Applicant's Employment and/or Alibi as the State Could Refute Said Witnesses

Applicant further contends Counsel was ineffective for utilizing defense witnesses regarding Applicant's employment and alibi as the State could refute the witnesses' testimony. At the evidentiary hearing, Counsel credibly testified he was aware of the business records the State had prior to trial and knew the State would attempt to admit them to refute Applicant's alibi witnesses' testimony. Counsel posited he decided to put up the two eyewitnesses regardless as they were willing to testify Applicant was at work at the time of the incident. Counsel testified the incident occurred on April 1st – April Fools' Day, suggesting that the date made the witnesses' testimony more credible and explained why the witnesses could remember Applicant was at work that day.

Counsel testified he discussed the case with both witnesses prior to trial and stated both witnesses testified at trial as he expected them to. Counsel agreed these witnesses were called to create further doubt in the minds of the jurors. Counsel testified he did not believe Exhibit #49 or Exhibit #50 admitted by the State at trial were admissible as they were testimonial hearsay and argued such at trial. Counsel further testified at the evidentiary hearing he believed he had a strong argument to keep out the business records; however, the court admitted them over objection.

This Court finds Counsel's decision to call the two witnesses was a reasonable strategic decision and did not prejudice Applicant as both witnesses testimony placed Applicant at work

during the incident despite the business records suggesting otherwise. Therefore, this Court finds Applicant was not prejudiced as the jury could have reasonably found their testimony credible and shed doubt on the State's contention Applicant committed these crimes. Therefore, this allegation is **DENIED.**

3. ***Failure to Address with Applicant and Make an Argument and/or Motion Regarding Double Jeopardy***

Applicant next contends Counsel provided ineffective assistance of counsel for failing to discuss double jeopardy with him, and further for failing to make a double jeopardy argument. This Court disagrees.

The "Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense." *State v. Brandt*, 393 S.C. 526, 538, 713 S.E.2d 591, 597 (2011) (quoting *Stevenson v. State*, 335 S.C. 193, 198, 516 S.E.2d 434, 436 (1999)). In *Blockburger v. United States*, the United States Supreme Court clarified "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. 299, 304 (1932). In other words, "*a single act may be an offense against two statutes*; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *Id.* (emphasis added); *accord. State v. Moyd*, 321 S.C. 256, 258, 468 S.E.2d 7, 9 (Ct. App. 1996) ("A defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy *where a single act consists of two 'distinct' offenses.*") (emphasis added).

As an initial matter, this Court finds Applicant's claim regarding an alleged double jeopardy fails as a matter of law because entering a bank with the intent to steal and armed robbery are clearly involve distinct elements. *Compare* S.C. Code Ann. § 16-11-330 (A) (A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony . . ."), *with* S.C. Code Ann. § 16-11-380 (A) ("It is unlawful for a person to enter a building or part of a building occupied as a bank, depository, or building and loan association with intent to steal money, securities for money, or property, either by force, intimidation, or threats.").

At the PCR hearing, Applicant testified Counsel never discussed with whether the entering a bank with the intent to steal and armed robbery are considered two separate offenses. Applicant further stated that, by charging him with both entering a bank with the intent to steal and armed robbery, the State was "punishing [him] twice for the same crime." Applicant further stated Counsel "should have told the judge that they should be able to select one or the other instead of trying [him] for both of them."

Applicant cited *State v. Greene* in support of his contention that he was subjected to double jeopardy and Counsel was consequently ineffective for failing to raise the issue at or before trial. 423 S.C. 263, 814 S.E.2d 496 (2018). In *Greene*, the defendant was charged, convicted, and sentenced for both homicide by child abuse and involuntary manslaughter for the death of her infant daughter. Our Supreme Court ultimately affirmed the homicide by child abuse conviction and sentence but vacated the involuntary manslaughter conviction and sentence. Specifically, the Court noted the well-established principle that "[m]ultiple offenses, including multiple homicide

offenses, may be prosecuted in a single trial, but principles inherent in double jeopardy and due process preclude multiple punishments for the same offense." *Id.* at 279, 814 S.E.2d at 505. The Court found that, while the legislature "has manifestly authorized multiple homicide charges for a single homicide," it found "no expression of legislative intent authorizing multiple homicide *punishments* for a single homicide committed by a single defendant. *Id.* at 280, 814 S.E.2d at 505. Accordingly, the Court stated it would follow the prevailing rule that "one homicide is limited to one homicide punishment per defendant." *Id.*

This Court finds *Greene* is inapplicable here because it's holding is expressly limited to homicide offenses and punishments.[13] *See also Basham v. United States*, 109 F. Supp. 3d 753, 776 (D.S.C. 2013) (noting that "[i]t is axiomatic that if the claim or claims that counsel failed to raise are devoid of legal merit, a defendant suffers no prejudice and cannot establish a claim of ineffective assistance of counsel" (citing *Strickland*, 466 U.S. at 687)), *aff'd*, 789 F.3d 358 (4th Cir. 2015). Further, even if *Greene* was comparable to Applicant's case, it was decided well after Applicant's trial. It is well-established that the *Strickland* standard does not require counsel to be clairvoyant or anticipate changes in the law. *See, e.g.*, *Thornes v. State*, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993) (noting that "[t]his Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial"); *Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (noting that "[t]his Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law"); *accord. Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995) ("[T]he case law is clear that an attorney's assistance is not rendered ineffective because he

[13] Notably, the Court specified that it was overruling *State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (1997) only "to the extent it authorizes multiple *homicide* punishments involving only one *homicide*." *Greene*, 423 S.C. at 283, 814 S.E.2d at 507 (emphasis added).

failed to anticipate a new rule of law."). Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

4. ***Failure to Challenge the Alleged Burden-Shifting Statements Made by the Trial Judge in His Preliminary and Closing Remarks to the Jury***

Applicant next contends Counsel was ineffective for failing to challenge or object to two statements made by the trial judge, which Applicant characterizes as prohibited and improperly burden-shifting. Specifically, Applicant claims the trial judge's opening remarks regarding a trial being a "search for the truth in an effort to make sure that justice is done between the parties" and the trial judge's comment in his closing remarks that "both the State and Defendant get a fair and impartial trial" both improperly diluted or shifted the burden of proving guilt beyond a reasonable doubt. This Court disagrees.

On this precise issue, our Supreme Court had cautioned by the time of Applicant's trial that "[j]ury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to the defendant.'" *State v. Aleksey*, 343 S.C. 20, 26–27, 538 S.E.2d 248, 251 (2000) (emphasis added). However, the *Aleksey* court went on to hold that because the "truth-seeking" instruction in that case was "given in the context of the jury's role in determining the credibility of witnesses" there was "not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt." *Id.* at 28–29, 538 S.E.2d at 252. That court cautioned the circuit courts to abandon the truth-seeking language in future charges, but held that the instruction as a whole in that case was a correct statement of law and found no basis for reversal on that ground. *Id.*

A more recent opinion, *State v. Beaty*, revisited the *Aleksey* decision and held that a preliminary instruction using the phrases "search for the truth," "true facts," and "just verdict"

were delivered in error but caused no prejudice warranting reversal where the instruction appeared in the preliminary remarks to the jury and, again, did not speak to the State's burden of proof. 423 S.C. 26, 33, 813 S.E.2d 502, 506 (2018). In that case—decided after Applicant's trial—the Court instructed trial judges to avoid these terms but agreed with the trial judge that "the disputed comments can be distinguished from *Aleksey* because they were a mere statement to the jury and not a charge on the law. Further, the remarks were not linked to either the reasonable doubt or the circumstantial evidence charges as was condemned in *Aleksey*." *Id.* at 34, 813 S.E.2d at 506. The Court found the comments were harmless error because, based on a review of the entire trial record and the full opening comments to the jury, there was no prejudice sufficient to warrant reversal. *Id.*

Here, the trial judge presented preliminary remarks at the outset of trial that were nearly identical to those given in *Beaty*. The "search for the truth" language was given in an effort to explain the trial process and its importance to the jury. (R. 90–98). As his remarks continued, the trial judge instructed the jurors the State had the burden of proving Applicant's guilt beyond a reasonable doubt and specifically informed the jurors it was their duty "to decide whether the State has met that burden." (R. 92). *See generally Moore v. State*, 283 Ga. 151, 155, 656 S.E.2d 796, 801 (Ga. 2008) ("[T]he pattern charge's mention of jurors 'seeking the truth' does not . . . dilute or cause confusion over the State's burden of proof and the role of the jury by suggesting that the jurors embark on 'their own intuitive search for the truth.' In criminal cases, the factfinder does have the task of seeking the truth. But, the jury is to determine the truth in view of the evidence, considered in light of the court's instructions. The court's instructions properly focused the jurors on their consideration of the evidence presented at trial." (citations omitted)). Thereafter, at the conclusion of trial several days later, the trial judge fully and accurately instructed the jury on the

applicable law through his jury charge; reiterated to the jury Applicant was "ways presumed innocent;" emphasized repeatedly that the burden is on the State to prove Applicant's guilty beyond a reasonable doubt; that Applicant had no burden to prove alibi; and thoroughly defined reasonable doubt for the jury. (R. 538, 539, 540, 541, 544, 546, 547, 548, 549, 550).

This Court therefore finds that the limited nature of the "search for truth" comment and remark regarding the State and Defendant both being entitled to a fair and impartial trial imparted no duty upon Counsel to object in light of the *Aleksey* decision, which existed at the time of trial, and the failure to object to this limited phrase did not render Counsel's performance deficient. Further, even if those two statements were considered improper such that Counsel was deficient for failing to object, our Supreme Court has refused to reverse a conviction where the instructions as a whole properly informed the fact-finders that a criminal defendant is presumed innocent unless the State is able to prove his guilt beyond a reasonable doubt. *Aleksey*, 343 S.C. at 26–27, 538 S.E.2d at 251; *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012). Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

5. ***Failure to Request the Trial Judge Question the Jurors Individually on Matters involving Witness Intimidation.***

Finally, Applicant contends Counsel was ineffective for failing to request the trial court question the jurors individually about witness intimidation rather than as a group. This Court disagrees, and finds Applicant failed to meet his burden in this regard. Counsel testified that he did not have a concern with the procedure utilized and Applicant has failed to show any resulting prejudice from the failure to question the jurors individually. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

VI. Conclusion

Based on all the foregoing, this Court finds Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief is **denied and dismissed 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. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has the right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, 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 be remanded to the custody of the State.

AND IT IS SO ORDERED this 3 day of Oct, 2022.

ROBERT J. BONDS
Presiding Circuit Court Judge
First Judicial Circuit

Walterboro, South Carolina