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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS  
) FIFTH JUDICIAL CIRCUIT

Mimi J. Marshall, #231397,

) CASE NO. 2022-CP-40-02201

) Applicant,

) v.

**ORDER OF DISMISSAL  
WITH PREJUDICE**

) State of South Carolina,

) Respondent.

Presiding Judge:  
Applicant's Attorney:  
Respondent's Attorney:  
Trial Counsel:

Hon. Maité Murphy  
Timothy L. Griffith, Esq.  
D. Russell Barlow, II, Esq.  
Alicia D. Goode, Esq.  
Steven F. Krzyston, Esq.  
Lucas D. Hawks, Esq.

Date of Hearing:  
Court Reporter:

January 11, 2024  
Lisa Carter

FILED  
JAN 25 11:20 AM  
JANETTE M. McGRIVER  
CLERK OF COURT  
RICHLAND COUNTY

This matter comes before the Court by way of Mimi Joe Marshall's (Applicant) application for post-conviction relief (PCR) filed on April 28, 2022, challenging his trial for Murder and Possession of a Firearm by a Felon. Respondent, the State of South Carolina, submitted its Return on December 31, 2021, requesting an evidentiary hearing to resolve the claims as set forth in the application. On April 24, 2023, Applicant filed amendments to his PCR application.

On January 11, 2024, an evidentiary hearing was held at the Richland County Courthouse before the Honorable Maité Murphy. Timothy Lee Griffith, Esquire, represented Applicant. Assistant Attorney General D. Russell Barlow, II, represented Respondent. Applicant proceeded forward on the claims set forth in his amended application. In support of these claims, Applicant testified on his own behalf and presented the testimony of Andrew Marshall. Respondent presented testimony from Alicia D. Goode (Counsel Goode), Steven F. Krzyston (Counsel

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Krzyton), and Lucas D. Hawks (Counsel Hawks), collectively referred to as Trial Counsel. Additionally, Respondent presented testimony from April W. Sampson (Solicitor Sampson).

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 dismissed this action with prejudice.

#### PROCEDURAL HISTORY

Applicant is presently confined with the South Carolina Department of Corrections (SCDC) pursuant to the Richland County Clerk of Court's orders of commitment. During the December 2015 term, the Richland County Grand Jury indicted Applicant for Murder (2015-GS-40-06133) and Possession of a Firearm by Felon (2015-GS-40-06134). Fifth Circuit Public Defenders Alicia D. Goode, Stephen F. Krzyston and Lucas D. Hawks, Esquires, represented Applicant. Fifth Circuit Assistant Solicitors April W. Sampson, Sandra V. Moser, and Samuel C. McGlothlin, Esquires, prosecuted the case.

From October 30 to November 2, 2017, Applicant proceeded to a jury trial before the Honorable Robert E. Hood. On November 2, 2017, Applicant was found guilty as indicted. Judge Hood sentenced Applicant to concurrent sentences of life without parole for Murder and five (5) years' imprisonment for Possession of a Weapon by a Felon.

Applicant timely filed a Notice of Appeal. Stephen F. Krzyston, Esquire, perfected Applicant's appeal, raising the following issues:

- I. The trial court erred in refusing to charge the jury on the law of involuntary manslaughter when there was evidence in the record to support the charge.
- II. The trial court erred in admitting the testimony of Timothy Lee on crucial blood spatter evidence because the witness was not qualified as an expert in blood spatter evidence or crime scene

- reconstruction, because the evidence failed to satisfy three or the four factors proffered in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), and because the evidence was not reliable.
- III. The trial court erred in admitting the testimony of Stan Richards on crucial blood spatter evidence because evidence was not reliable and could not satisfy three of the four factors proffered in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999).

On August 12, 2020, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion. *State v. Marshall*, Unpub. Op. No. 2020-UP-241 (Ct. App. filed Aug. 25, 2020). On August 25, 2020, Applicant petitioned the South Carolina Court of Appeals for a rehearing. Applicant's petition for rehearing was denied by Order filed October 28, 2020. On December 14, 2020, Applicant filed a Petition for Writ of Certiorari. Applicant's Petition for Writ of Certiorari was denied by Order filed August 6, 2021. The Remittitur was returned to the circuit court on August 6, 2021.

#### SUMMARY OF FACTS ADDUCED AT TRIAL

Doris Marshall clocked out of her dining facility attendant shift at Fort Jackson at 10:15 PM on August 14, 2015. R. 159:9–13, 163:10–33. Early that next morning, her nephew was awoken by Applicant knocking at his father's door. R. 41:22–25. Applicant had come over to tell them he had "messed up" while he was arguing with Auntie Doris, she tried to grab the gun, and the gun went off. R. 142:5-8. Applicant had already left his brother a voicemail indicating the same. R. 368:1–9, 374:4–22. Applicant had driven a gray van to their home. R. 142:22. Applicant showed his nephew the double-barrel shotgun. R. 143:23–144:7. Then Applicant left, and the family members called 911 and their extended family to fill them in. R. 144:14–24.

As the family heard what happened, Applicant's daughter-in-law Amanda went to Applicant's home. R. 411:18–412:14. Amanda checked the front door, but it was locked, and the other door was too. She pushed in an A/C unit in the window until she caught sight of the victim

in the living room. R. 412:19–414:2. Amanda saw Doris sitting "like in the middle of the couch" and leaning to one side. R. 414:4–9. Amanda ran to the neighbor to ask for help breaking open the front door. R. 414:12–21. When they gained access, it was obvious that the victim was deceased. R. 415:22–23. The victim "had been sitting on a sofa with her lunch bag beside her foot and had been shot in the face at close range with a shotgun. That's where she was killed instantly." R. 557:7–10.

The Richland County Sheriff's Department and EMS arrived on the scene, and EMS noted the following about its arrival:

EMS was able to visualize the patient from the front door of the home without entering. Noted brain matter on the floor. The patient was sitting on a couch to the right of the front door, leaning to her right with her head down. Noted injury to the head inconsistent with life, skull fragment on the back of the couch, noted brain matter. Blood splatter around the patient. The patient had no respiratory effort, no signs of life, noted coagulation of blood on and around the patient, lividity and notified dispatch of D.O.A.

R. 150:6–23.

Law enforcement issued a BOLO for Applicant and a gray Chrysler Pacifica minivan. R. 174:4–6. The night before, neighbors witnessed Applicant banging on the window of a running vehicle as if he were trying to break in. R. 128:10–20, 345:17–346:9. That same night, one neighbor helped Applicant, who had locked himself out of his home, by crawling into one of Applicant's back windows and opening the side door so Applicant could get back in. That neighbor said that it "reeked" when he got inside the house but that he did not see the victim. R. 329:23–341:25. That neighbor also recalled seeing a flash coming from the direction of Applicant's home that night. R. 338:17–339:18.

A short time after the BOLO was issued, Applicant surrendered to law enforcement at Tony's Lounge, a spot near Eastover about ten miles away from his home. R. 174:8–175:7.

Somebody at the Lounge who had heard Applicant was suspected of murder noticed him there and called 911. R. 333:3–334:19. At the time of arrest, Applicant had noticeable reddish-brown spatters on his pants, socks, and shoes. R. 358:15–17. The Chrysler Pacifica was parked at the Lounge, and law enforcement located a double-barrel shotgun inside the van. R. 177:10–21. The van's back window was broken. R. 406:5–8.

At the Sheriff's Department, Applicant gave a signed question-and-answer type statement to Sergeant Joe Clark about what happened to his wife:

When she came home from work last night, I had my gun in the front room. I did this because the trailer park is an unstable place. She came at me. She grabbed the gun. It went up and it went off. I grabbed her. I had her head in my hands and I let her down on the chair. I knew she was dead then. I should have handled it a different way, the way I did not handle it, I should have killed myself.

R. 566:11–21.

The Sergeant asked where the gun was. R. 566:25–567:1. Applicant told him it was in a closet, but the Sergeant knew there was no closet in the living room. R. 567:1–4. Then Applicant said he shot her at the front door. R. 567:5. Moments later in the interview Applicant expounded:

I told her when she came in the house that I had just called her job. She was a little late and I was worried about her. I had just had the car's front-end alignment fixed with a new tire for her safety. She comes in with an attitude. I told her I was worried about her. She says, quote, you've got no reason to worry about me, unquote. She said it with an attitude. We were just talking at each other.

...

My gun was laying against the wall the whole time. When I decided to check out around my trailer with my shotgun, Doris was coming in the front door. We are right there at the same time. She comes in the door, that is when I told her I was worried about her. That is when the gun went off. She had touched the gun when it when off. She took the gun and threw it up.

...

She was standing on the side of the couch when the gun went off. I held her by the face and laid her on the couch.

R. 567:21–570:3.

Applicant defined "threw [the gun] up" by swiping his hand in front of his face. R. 569:4–7. The Sergeant asked, "So the barrel was obviously in her face?" R. 569:7–8. Applicant answered, "She pushed the gun away. And that's when he said it went off." R. 569:9–10. Applicant's statement, however, was unsupported by the forensic evidence presented by the State at trial. R. 567:5–10.

***TIMOTHY LEE: CRIME SCENE PROCESSER***

Investigator Lee, a ten-year veteran of the Richland County crime scene unit, photographed the scene at the Marshall's home. R. 188:14–19, 208:1–10. Lee documented that small birdshot pellets and "gelatinized blood" pooled on the center of the living room sofa where the victim was located. R. 212:9–20, 213:20–23. He documented the living room's ceiling, which was also stained with blood. R. 216:10–17. "There was a broken pair of glasses that were on the floor near the rug." R. 219:17–18. The investigator also denoted a piece of shotgun wadding found on the sofa. R. 218:10. He testified that the location of the wadding indicated "that the shot occurred within the parameter" of where they found the victim. R. 218:13–21. Lee testified about photographs depicting differing concentrations of blood at the scene in relation to the victim's location. R. 231:5–24, 233:2–11, 255:17–19. Lee photographed biological matter near the sofa, including the documentation of a portion of the brain near the victim's foot and "a chunk of skull and scalp that was up on top of the couch." R. 270:7–271:13.

***DAVID COLLINS: FIREARMS EXAMINER***

Collins, the firearm and tool mark examiner from SLED, testified about the 12-gauge double barrel shotgun located in Applicant's Chrysler Pacifica. R. 286:24–287:4. The butt stock

on the shotgun had been repaired with electrical tape, but the gun fired and the safety worked. R. 289:1–25. The gun was manufactured before 1968. R. 293:17–22. On the muzzle of the gun, Collins noted not blood but other biological material. R. 295:9–24. Collins did not test the trigger press weight but did not notice anything mechanically unsound about the trigger pull. R. 303:17–23. "It did not appear to be excessively light nor excessively heavy compared to other shotguns of the same make and model . . . ." R. 324:1–4.

Collins also received for examination three unfired shotgun shells, the wadding located on the victim's sofa, and three sets of birdshot pellets. R. 290:22–291:2, 292:1, 298:25–299:5. Like the shotgun muzzle, the wadding contained a coating of biological material which Collins cleaned off as part of his examination. R. 297:13–17. "The fired wadding was consistent with the wadding found in one of the fired shotgun shells" in brand, type, and gauge. R. 298:19–24. All three unfired shotgun shells "were capable of being fired in that gun." R. 299:13–18. Also consistent with the unfired shells received for comparison were the birdshot pellets received for examination, including those extracted from the victim. R. 300:3–301:23.

"Based on the nature of the injury to the victim in this case and the severity of it, [Collins] did not feel that there was sufficient information present" for him to test the distance from which the victim was shot with any degree of scientific reliability. R. p. 304:21–305:6. In addition to a precise diameter of the wound, which was unavailable, Collins needed more of the same ammunition to reliably test-fire and determine that distance. R. 305:8–14.

***JENNIFER MARTIN: DNA ANALYST***

Richland County Sheriff's Department DNA analyst Jennifer Martin received several items for DNA testing. R. 387:3–13. Two swabs from the double-barrel shotgun positively matched the victim's DNA, but the other biological matter tested was not blood. R. 389:4–390:24.

*AMANDA DURSO: FORENSIC PATHOLOGIST*

Doctor Durso performed the autopsy on the 58-year-old victim. R. 451:3-6. She recorded a shotgun wound to the head as the cause of death. R. 453:11-12. The large wound "entered the right front of her face, kind of centered around the area of the right eye" and exited through the top of the skull. R. 453:6-10. "Some of it did exit the kind of back right top of the skull and very slightly left [to] right." R. 454:17-18. Manipulating the edges of the wound, Durso pieced together a 2.8-inch by 3-inch entry wound. R. 454:1-9. Durso retrieved birdshot pellets from the victim. R. 454:11-13. She identified stippling on the left side of the victim's face, which she described as an indicator that the shotgun was within approximately 30 inches of the victim at the time the shot was fired. R. 456:1-457:8. Durso testified that soot would be present if the shotgun were 12 inches or closer to the victim at the time of the shot. R. 458:9-18.

No soot was present, allowing Durso to estimate that the shot occurred between 12 and 30 inches from the victim. R. 457:13, 458:14-15, 461:13-23. The victim's right eye was obliterated as was a portion of the brain such that "half of her brain actually fell out through this defect and was received separately in the body bag due to the force of the blast." R. 459:14-20. The victim sustained no other remarkable injuries to the remainder of her body. R. 462:2-9.

*JENNIFER NATES: GSR ANALYST*

Jennifer Nates from SLED testified that two gunshot residue (GSR) kits were collected and submitted for testing in conjunction with this case. R. 472:8-16. The kit collected from the victim tested positive for a single particle of GSR, which is not inconsistent with a shooting victim who has faced the muzzle of a loaded gun. R. 477:16-25. The result gave no information as to the distance from which the victim sustained the gunshot. R. 478:4-7. The second kit, collected from Applicant, was inconclusive as Applicant was swabbed for GSR beyond the 6-hour timeframe

during which any probative test for GSR can be collected from a living person. R. 478:14–23. Although testing on the kit was halted halfway through the analysis, it did return one particle of GSR. R. 479:12–15.

***STAN RICHARDS: BLOOD STAIN PATTERN ANALYST***

Stan Richards, a lieutenant in the forensics division of the Richland County Sheriff's Department, testified about the bloodletting evidence at the scene photographed by Investigator Lee. R. 484:21–24, 486:13–18. Richards attended the scene, identified the victim "slumped over on the sofa nearest the door" into the front of the mobile home, and observed the blood on the sofa cushions, extending up the sofa back, on the window shades, on the ceiling, and wrapping around the end of the sofa to the windows and blinds on the short side of the room. R. 487:13–25. He witnessed brain matter "at the doorway on the floor" unaccompanied by "major blood." R. 488:1–4. Richards could tell from the nature of the wound on the victim's face that blood had gone from the point of impact outward as a result of "a very significant impact and a dynamic impact" of the shotgun blast. R. 488:10–15.

He identified the several stains, small and large, as "individual stains of an overall pattern called impact spatter," which occurs as a result of a high-velocity impact. R. 488:18–24. Impact spatter created stains that radiate outward from the point of impact, up to the ceiling, and out towards the end of the room. R. 490:11–18. Richards "saw no indication of any major bloodletting going through the door in that area." R. 495:5–6. Blood was significantly present on the pillows, sofa, and blinds away from the front door. R. 498:10–25. Richards described the spatter stains as creating a V-shaped cone beginning at the window and radiating out to the sofa and ceiling and stopping at or near the other furniture in the room. R. 499:17–502:10.

Richards also attached significance to the lack of bloodletting in the area where the victim

would have been sitting when the impact occurred. R. 506:22–507:15. Because blood on the victim's leg was soaked into the area rather than dripping downward, it indicated that the victim was sitting during the duration of the bloodletting event. R. 514:12–21. He called the area without blood the void in which the victim sat during the impact. R. 514:22–515:1. Richards also classified the stains and biological matter appearing nearest the front door as outliers because the bloodletting was otherwise contained to the center and side of the sofa farthest from the door and because the area from the front door straight back contained no major bloodletting. R. 515:2–9. Richards also described that in order for the portion of the victim's scalp to land on the back of the sofa where it was found, the victim had to be on the sofa in the sitting position. R. 515:11–17. Applicant countered the State's case with his own blood spatter analyst.

***CHRISTOPHER ROBINSON: PRIVATE FORENSIC ANALYST***

Applicant put forward Robinson, who testified as an expert in crime scene reconstruction, blood spatter analysis, and firearms analysis. R. 617:5–9. Robinson addressed the double barrel shotgun and assessed its front trigger pull at seven (7) pounds and the rear trigger pull as averaging six and three-quarters ( $6\frac{3}{4}$ ) pounds of pressure. R. 618:9–17. He opined that the safety on the gun was not acting as intended and that the gun was unsafe. R. 620:1–7. He measured the overall length of the weapon as 44.5 inches. R. 618:19–20.

As for the victim's injury, Robinson opined, "The shot occurred from a distance of approximately three to four inches or less" from the victim's face, with gas pressure from the chamber causing the expansive injury to the skull. R. 620:16–25, 622:21–25, 624:22–625:5. Based on the pattern of blood dispersion, he described the shot as an "upward shot through the head". R. 621:20–25. He testified, "Reportedly, she's standing at the end of the couch when the shot occurs, driving her over onto the couch," and Applicant was "going out the door." R. 625:8–11. He

clarified for the record that he assessed the positioning of the parties at the time of the shot based upon Applicant's statement to law enforcement. R. 640:14-641:6.

#### CURRENT ACTION BEFORE THIS COURT

In his application for post-conviction relief, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. "Court Lacked Jurisdiction"
2. "Actual Innocence"
3. Ineffective Assistance of Counsel
  - a. Failure to Investigate

Applicant requested relief in the form of a "vacation of conviction and sentencing."

At the beginning of the evidentiary hearing, Applicant indicated he intended to move forward on the following allegations:

1. Ineffective Assistance of Counsel
  - a. Trial Counsel failed to advise Applicant what a plea was and failed to advise Applicant to accept a thirty (30) years plea offer prior to trial.
  - b. Trial Counsel did not allow Applicant to tell his version of events at trial.
  - c. Trial Counsel failed to present evidence of a t-shirt a trial that was crucial to his defense because it would have shown where the victim was standing when she was shot.
  - d. Trial Counsel failed to properly investigate Applicant's case.

During the evidentiary hearing, Applicant raised an additional allegation of Juror Misconduct through the testimony of Andrew Marshall.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged various claims of ineffective assistance of counsel and Juror Misconduct through the PCR action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its

entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility.

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for PCR. *See* Rule 71.1(e), SCRPC ("The [PCR] applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code.

#### STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act (the Act), S.C. Code Ann. §§ 17-27-10 to -160, provides that a person may seek PCR based on 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).

#### *INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, GENERALLY*

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant 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, 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 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 PCR 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), SCRPC; *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 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) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; *accord Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) ("Without 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.'" (quoting *Strickland*, 466 U.S. at 687)).

Regarding the deficiency prong of the *Strickland* analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate

assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986); *see also Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. *Strickland*, 466 U.S. at 689. To establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[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. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625; *see Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial

counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Richter*, 562 U.S. at 112.

Finally, 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. Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). 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. 466 U.S. 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; *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"); *see also 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.").

#### *INITIAL FINDINGS*

This Court finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant they rendered adequate assistance and exercised reasonable professional judgment in their representation. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland, supra*). The United States Supreme Court has cautioned that "every

effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. *Strickland*, 466 U.S. at 689; *see also Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

***INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS ON THE MERITS***

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

**Allegation 1a: Trial Counsel failed to advise Applicant what a plea was and failed to advise Applicant to accept a thirty-year plea offer prior to trial.**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to advise Applicant to accept a thirty-year plea offer prior to trial. This Court find this allegation is without merit.

The United States Supreme Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (citations omitted); *see Hill v. Lockhart*, 474 U.S. 52 (1985) (extending the two-part *Strickland* test to challenge guilty pleas based on ineffective assistance of counsel). In the context of plea negotiations, an attorney's failure to communicate a formal plea offer to a criminal defendant falls below an objective standard of reasonableness under *Strickland*. *Missouri v. Frye*, 566 U.S. 134 (2012); *Lafler v. Cooper*, 566 U.S. 156 (2012); *see Strickland*, 466 U.S. at 688 (explaining that counsel has a duty "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution."). In *Lafler* and its companion case, *Frye*, the Court recognized

that "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." *Lafler*, 566 U.S. at 170 (citing *Frye*, 566 U.S. at 143–44).

Thus, the key question in *Lafler* was "how to apply *Strickland's* prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial." *Id.* at 163. Unlike *Hill*, the ineffective advice in *Lafler* "led not to an offer's acceptance but to its rejection." *Id.* In other words, "[h]aving to stand trial, not choosing to waive it, is the prejudice alleged." *Id.* at 163–64; *see id.* at 169 ("[T]he question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance.").

The Court ultimately held that, to show prejudice, the defendant must demonstrate a reasonable probability that (1) he would have accepted the plea offer; (2) the prosecution would not have withdrawn the offer in light of intervening circumstances; (3) the court would have accepted its terms; and (4) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. *Lafler*, 566 U.S. at 164; *accord Collins v. State*, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018).

Before being sworn in and while PCR Counsel was indicating to the Court the allegations they intended to move forward on, the following occurred:

Mr. Griffith: Your Honor, if it pleases, the Court? Mr. Marshall would like to proceed on ineffective assistance of counsel. And in that, Your Honor, during the proceedings the attorneys, according to Mr. Marshall, told him there was an offer of 30 years, but he didn't have time to think about it, he said he had less than a minute to think about that before they were to move on. And that if he had, if they had taken

time to explain to him is his, his right to a plea and what his, their recommendation was that he may have taken that.

Applicant: No! No! No! No! I would not have taken that 30 years.

Mr. Griffith: Okay.

Applicant: Period.

Mr. Griffith: Okay, I'm sorry.

Applicant: We can just leave that —

PCR Tr. 6.

On direct examination, Counsel Goode testified that Applicant was adamant from the beginning that the shooting was an accident and that he would never hurt his wife. PCR Tr. 25. Counsel Goode testified she had discussions with Solicitor Sampson about a plea, and Solicitor Sampson indicated to her in November of 2016 that she would not make "too much of an offer." *Id.* Counsel Goode testified she found emails wherein she asked Solicitor Sampson for a ten-year offer close to Applicant's trial, and Solicitor Sampson indicated a potential offer between twenty to thirty years, but she never officially made the offer. *Id.* Counsel Goode testified Applicant's inclination was always to go to trial. PCR Tr. 26.

This Court finds Applicant failed to establish he was offered a thirty-year plea offer and any resulting deficiency from Trial Counsel when there was no offer to extend to Applicant. Counsel Goode credibly testified she entered into plea negotiations with Solicitor Sampson, but Solicitor Sampson never made an offer. As such, Applicant cannot show prejudice from the alleged deficiency. While this Court recognizes that Applicant was not sworn before his spontaneous outburst at the beginning of the evidentiary hearing, it would be remiss if this Court did not highlight that Applicant exclaimed that he would have never taken a thirty (30) year deal. Therefore, Trial Counsel was not deficient in failing to advise Applicant to accept a non-existent offer, and thus, Applicant cannot show prejudice.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

**Allegation 1b: Trial Counsel failed to properly advise Applicant of his right to testify and the advantages thereof.**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to properly advise him of his right to testify and the advantages thereof. This Court finds this allegation is without merit.

"The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. [However], if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions." *Brown v. State*, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). "If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner during its deliberations." *Id.* "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." *Id.*

At the evidentiary hearing on direct examination, Applicant testified Counsel Goode advised him it was not in his best interest to testify, and Applicant believed the fact he did not testify made him look guilty. PCR Tr. 8–9. Applicant testified that he listened to Counsel Goode's advice because she was his lawyer and he did not know the law. PCR Tr. 9. Applicant testified to his version of events leading to the shooting of his wife, as follows:

I laid in the bed that night, she come home about ten, eleven, sometime, I don't even know she was in the yard really, she comes in.  
....

But me and my wife woked up one night, there was an argument, about couple of hours over when we looked out the window we seen this guy, he pulled his pistol and shot a guy about seven times. He killed him. I'm thinking and I made the wrong thing on that one, but I shouldn't have never gotten the gun. I'm thinking my wife come home late at night. Now, anything could have happened at her in that yard. Somebody could have grabbed her. It's for our protection. It was still wrong for me having the gun, but I'm thinking now. But when, listen—now, I'mma come back to this, when I was laying in that bed that night I heard something out back in my utility house. My wife just had bought me a brand you weedeater, a couple of months prior. And we had a guy around their break into houses so I figured it was. Now, I laid there a while and I'm thinking first it's probably an animal running around the outside so I, I just late on back down. But I hear him again. I got up. When I got to the door my wife was walking in. I'm telling you my, my wife loved me. She had thought that I was going outside and shoot somebody that's why she grabbed the gun. I, I, I had no—I had—I had it in my left hand straight in there, it, it just leaning—but if I had two hands on it, you know I'm saying it would've, I would've had a pretty good brace on it. But she gripped—looked, this gun was straight in the air and this was a graze shot. It was not—didn't make like this was some kind of a direct shot. If it was a direct shot it would've taken the whole head off. This was a glaze (sic) shot where she grabbed the gun as I was passing her. I was going—I spoke to her first and the door is right here by the couch. By the time I got there she grabbed it and the only way I believe this, she grabbed that gun, it was straight in the air. I'm thinking that she was thinking I was going outside to hurt somebody so she, she was gonna try to stop this. And before I know it, this old raggedy shotgun, tapped up, unsafe from the beginning, it went off and it glazed (sic) her right here. I reached up, I've dropped the gun, I reached up and grabbed her to try to stop the bleeding. Well, now that—she was still standing, but everybody was saying that she was shot on the chair.

....

But I'm saying like this, she was still standing. I reached up and grab the wound, put pressure to it. She was still standing. As I taken that little bit of pressure, right here on my arm like this—I can't do it with this cuffs and stuff on me the way I want to—but I had my arm pressed against my body, my t-shirt.

PCR Tr. 9–12.

On direct examination, Counsel Goode testified that Applicant's defense strategy was to argue accident based on the information that Applicant had provided her and law enforcement.

PCR Tr. 22. Counsel Goode testified that she could not specifically recall—but—she would have advised Applicant against testifying because of the prior domestic violence charges on his record. PCR Tr. 23–24. Counsel Goode testified the trial judge ruled in pre-trial proceedings that testimony concerning the allegations would not be allowed, unless Applicant opened the door. PCR Tr. 23–24. Counsel Goode testified she believed there was a great likelihood that Applicant's testimony would have opened the door for testimony concerning the allegations of domestic violence to come in. PCR Tr. 24. Counsel Goode testified Applicant gave a statement to law enforcement with his version of the events, and that statement was read by the lead investigator and published to the jury. PCR Tr. 24.

On cross-examination, Counsel Goode testified she could not recall whether Applicant requested to testify but that she was able to present Applicant's version of the events without the need for Applicant to testify and potentially open the door to prejudicial testimony. PCR Tr. 26–27. Counsel Goode testified the transcript reflects that the trial judge gave them time to discuss Applicant's right to testify. PCR Tr. 27. Counsel Goode testified the trial judge advised Applicant of his right to testify and Applicant chose not to testify. *Id.* Counsel Goode testified Applicant likely chose not to testify based on their counsel, but had he desired to testify, no one would have been able to stop him. *Id.*

This Court finds Applicant's testimony not credible and Counsel Goode's testimony credible. The Court finds Applicant was fully aware of his right to testify and the advantages and disadvantages of doing so. The record reflects that Applicant knowingly waived his right to testify after a thorough colloquy with the trial court. Trial Tr. 583–84. Further, the record reflects that Trial Counsel argued the defense of accident, and evidence was submitted to the jury detailing Applicant's version of the events. Moreover, Counsel Goode credibly testified that she advised

Applicant not to testify, as she believed there was a high likelihood Applicant would have opened the door for prejudicial evidence to come in if he had testified. Additionally, Counsel Goode **credibly** testified that had Applicant desired to testify, no one would have been able to stop him as it was his decision. This Court finds Trial Counsel was not deficient in their representation of Applicant, and Applicant cannot demonstrate how he was prejudiced by Trial Counsel's performance in this matter.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

**Allegation 1c:** Trial Counsel failed to present evidence of a t-shirt at trial that was crucial to his defense because it would have shown where the victim was standing when she was shot.

**Allegation 1d:** Trial Counsel failed to properly investigate Applicant's case.

**Allegation:** Trial Counsel failed to investigate and present CD with voicemail.<sup>1</sup>

Applicant alleges Trial Counsel were constitutionally ineffective for failing to properly investigate Applicant's case. Specifically, Applicant alleges Trial Counsel failed to investigate and present evidence of the t-shirt he was wearing during the shooting and a CD with a voicemail he left on his brother's phone. This Court finds these allegations are without merit.

In order 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 v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing *Jackson v.*

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<sup>1</sup> Applicant raised this allegation during the evidentiary hearing, and is addressed with Allegations c and d.

*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. *Id.* (citing *Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); *Skeen v. State*, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.*, 377 S.C. at 75, 659 S.E.2d at 145 (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

#### T-Shirt

At the evidentiary hearing on direct examination, Applicant testified that he was wearing a t-shirt when he shot his wife. PCR Tr. 12. Applicant testified the t-shirt was really bloody because he used it on his wife's gunshot wound, and after, he put the t-shirt in a plastic bag and put on a new t-shirt. PCR Tr. 14. Applicant testified he put it in his vehicle with the shotgun. *Id.* Applicant testified Trial Counsel never had the t-shirt because when CSI went through the vehicle, they left the t-shirt in the vehicle, and his daughter discovered it. PCR Tr. 15. Applicant testified the t-shirt would have shown his wife was standing when he shot her. *Id.* Applicant testified that after his daughter discovered the t-shirt, she brought it to the sheriff's office. *Id.* Applicant testified Trial Counsel knew about the t-shirt. PCR Tr. 16. Applicant testified that his daughter testified at trial, and Trial Counsel could have questioned her about the t-shirt. *Id.* Applicant testified that Counsel Goode informed him at the courthouse she had questioned his daughter about the t-shirt. PCR Tr. 16-17.

On direct examination, Counsel Goode testified she did not recall a t-shirt. PCR Tr. 24. On cross-examination, Counsel Goode testified that a T-shirt could have been involved, but she could not recall specifically anything about a T-shirt. PCR Tr. 26.

On direct examination, Counsel Krzyston testified he recalled a t-shirt and recounted his recollection as follows:

I do recall there being some relatively substantive discussion about a t-shirt. I believe that when they arrested [Applicant] he was at a third location, I think it was like some sort of bar and grill or private club. He was taken into custody there. The car was searched. I believe CSI actually overlooked the shirt. One of the family members returned the shirt to the sheriff's department. The sheriff's department seized it and if I recall correctly, it was never analyzed by the blood pattern section of their crime lab. But I believe it was disposed of prior to the trial such that no analysis could be conducted. I could be mistaken about that. But I believe that was the distribution of that evidence.

PCR Tr. 30:3–17.

On direct examination, Counsel Hawkins testified he recalled the t-shirt and echoed Krzyston's testimony that the t-shirt was never tested and was destroyed. PCR Tr. 32. On cross-examination, Counsel Hawkins testified he was aware of the t-shirt at trial but was not aware that Applicant believed the t-shirt would show Applicant's wife had been standing when he shot her and did not understand Applicant's argument. PCR Tr. 32.

On direct examination, Solicitor Sampson testified that all the forensic evidence established Applicant's wife was sitting when he shot her. PCR Tr. 34. Solicitor Sampson testified the shotgun was so close to Applicant's wife when she was shot that the bullet opened in Applicant's wife's head, and as a result, her entire face was missing. *Id.* Solicitor Sampson testified Applicant's wife's scalp was on the couch where she was sitting, and half of her brain was on the floor. *Id.* Based on this, Solicitor Sampson testified Applicant's contention his wife was standing by the door when she was shot was not plausible. *Id.* Solicitor Sampson testified the State presented an expert to testify concerning the blood spatter and how it showed Applicant's wife was sitting when she was shot, and Trial Counsel put up their own expert to testify she was standing when she

was shot. PCR Tr. 34–35. Solicitor Sampson testified there was no evidence to show the shotgun was pointed upward when he shot his wife. PCR Tr. 35.

Solicitor Sampson testified that there were a lot of things in Applicant's vehicle when CSI searched it, and after the search, they released the car to Applicant's daughter. PCR Tr. 37. Solicitor Sampson testified Applicant's daughter brought items she found in the car that had blood on them back to the sheriff's office, but at that point the chain of custody was broken, so the t-shirt was destroyed because it could not be used at trial. PCR Tr. 37.

This Court finds Applicant's testimony wrought with speculation and not credible. This Court finds Applicant has failed to show any deficiency on Trial Counsel's part and has failed to show any resulting prejudice from the alleged deficiency. Counsel Krzyston and Solicitor Sampson credibly testified that the t-shirt had been destroyed and could not be used at trial because the chain of custody had been broken, therefore, Trial Counsel cannot be deficient for failing to investigate or present destroyed evidence. Additionally, Applicant failed to show how further investigation, presentation, or testimony concerning the t-shirt would have affected the outcome of his case.

This Court further finds Applicant's argument that the t-shirt would have shown his wife had been standing when she was shot is pure conjecture. Applicant testified the t-shirt had blood all over it, and he used it against his wife's shotgun wound. This Court cannot surmise how this would show Applicant's wife had been standing when she was shot, especially considering Solicitor Sampson's testimony concerning the nature of Applicant's wife's wounds. Consequently, speculation cannot satisfy Applicant's burden of proving prejudice. *See Clark v. State*, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice).

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

#### Voicemail

At the evidentiary hearing on direct examination, Applicant testified that after he shot his wife, he called his brother and left a voicemail. PCR Tr. 14. Applicant testified that, on the voicemail he left his brother, he told his brother his wife had grabbed the gun and the gun went off, and he did not know what to do. PCR Tr. 14. Applicant testified the voicemail was on a CD and "They would not play the CD before the jury." PCR Tr. 14.

On direct examination, Counsel Goode testified she did not recall there being a voicemail. PCR Tr. 24. On direct examination, Counsel Krzyston testified that he reviewed the evidence of Applicant's case and he recalls the discovery containing a voicemail. PCR Tr. 29. Counsel Krzyston testified to the nature of the voicemail as follows:

Yeah. I believe it was a voice message that was left with his brother that was from a call that was made in the middle of the night or in the early morning on the day after the incident took place. I believe it was some sort of, kind of, I don't know how to relay this, it was something about—I don't know if it was an apology. It might have been an apology. There was, I think, an allusion to suicide if I'm recalling correctly. That may be a conversation he had with his brother the next morning. But I do remember there being something about that, that voicemail

PCR Tr. 29:15–30:1.

On direct examination, Counsel Hawks testified that he recalled there being a voicemail but could not recall specifics. PCR Tr. 32.

On direct examination, Solicitor Sampson testified as follows concerning the voicemail:

So there was, and I know you're calling it a CD, that's probably how we gave it to them, but it was just a voicemail that had been left on

his brother's voicemail and that way that we gave it to the defense was in a CD. But it was a voicemail that he left for his brother as testified by Mr. Krzyston I think just said that he called his brother in the early morning hours after this had occurred and said something to the effect that something bad had happened. He was probably gonna end his life. Something to that effect. But the problem was that his brother did not have transportation. So when he called his brother, the brother knew something had happened, the brother ended up calling the daughter of the victim and she, unfortunately, went to the house and found her mother deceased with her face missing. Mr. Marshall had done some other things that we felt like showed indication of guilt. He *had tried to leave*. When he went to leave he had left his keys in the house. So he had locked, essentially, locked himself out of the house but also out of his car. He got a neighbor to crawl into the back window, I believe it was, of a bedroom, go in the bedroom, get the keys and go through the back door and leave and bring him the keys so that he could then leave. That is how he actually left the residence. He also, as Mr. Krzyston said, went to a bar and got arrested at the bar. But he had blood on his clothing that they took off of him at the time.

PCR Tr. 36–37.

This Court finds Trial Counsel was not deficient, and Applicant failed to show resulting prejudice from Trial Counsel's performance. Counsel Krzyston credibly testified to his knowledge of and contents of the voicemail, evidence it was investigated by Trial Counsel. Additionally, Counsel Krzyston and Solicitor Sampson credibly testified that the voicemail from Applicant stated something bad had happened and that he was going to commit suicide. This Court finds from the credible testimony presented, that the voicemail was likely more inculpatory and hardly exculpatory. Applicant failed to present the voicemail to the Court for review. Thus, his assertions as to the exculpatory nature of the voicemail is pure conjecture—and—conjecture is not enough. *See Clark v. State*, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice).

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

***ALLEGATIONS RAISED DURING THE EVIDENTIARY HEARING***

**Allegation: Juror Misconduct**

Applicant alleges that juror misconduct took place during his trial. Specifically, the jurors had begun deliberations before the trial court instructed them to do so. This Court finds this allegation is without merit.

All criminal defendants have the right to a trial by an impartial jury. U.S. Const. Amends. VI and XIV; S.C. Const. Art. I, § 14. Where an applicant alleges juror misconduct in the form of premature deliberations, the applicant will be procedurally barred from raising the issue where he failed to call the alleged juror misconduct to the trial court's attention at his first opportunity. *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999).

An applicant must demonstrate prejudice from the alleged premature deliberations to receive a new trial. *Aldert*, 333 S.C. 307, 314-15, 509 S.E.2d 811, 814-15 (1999) (citing *United States v. Resko*, 3 F.3d 684 (3d Cir.1993) (prejudice is touchstone of entitlement to a new trial when improper intra-jury influences are at issue)); *United States v. Carmona*, 858 F.2d 66, 69 (2d Cir.1988); *United States v. Klee*, 494 F.2d 394 (9th Cir.) cert. denied 419 U.S. 835, 95 S.Ct. 62, 42 L.Ed.2d 61 (1974) (not every instance of misconduct warrants a new trial; test is whether misconduct has prejudiced the defendant to the extent he did not receive a fair trial), *Stockton v. Va.*, 852 F.2d 740 (4th Cir.1988) cert. denied 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (unrealistic to think jurors will never comment to each other on any matters related to trial); *United States v. Piccarreto*, 718 F.Supp. 1088 (W.D.N.Y.1989)

(given length and nature of trial, it is not surprising a juror may make some comments as trial progresses; new trial is not warranted absent evidence showing such discussions shaped final deliberations or improperly influenced jurors or prejudiced defendants).

At the evidentiary hearing on direct examination, Andrew Marshall testified that Applicant was his uncle and that he was present at Applicant's trial every day. PCR Tr. 18–19. Andrew testified that, in his opinion, some of the jurors were deciding that Applicant was guilty before his trial had concluded. PCR Tr. 19.

On direct examination, Counsel Goode testified she did not recall an issue with juror misconduct at trial. PCR Tr. 27. On direct examination, Solicitor Sampson testified she did not recall any issue of juror misconduct. PCR Tr. 38.

This Court finds Andrew's testimony not credible or persuasive. As Andrew's testimony was the only evidence presented by Applicant on this issue, this Court finds Applicant has failed to meet his burden. *See Clark v. State*, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice).

Accordingly, Applicant's allegation of juror misconduct is **DENIED** and **DISMISSED**.

#### CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for PCR must be **DENIED and DISMISSED WITH PREJUDICE**.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453,

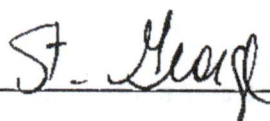
409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking a review of the denial of PCR. Rule 71.1(g), SCRPC, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 21 day of June, 2024.

  
THE HONORABLE MAITÉ MURPHY  
Presiding Judge  
Fifth Judicial Circuit

  
\_\_\_\_\_, South Carolina