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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT
APPEAL FROM SALUDA COUNTY
Court of Common Pleas
The Honorable J. Cordell Maddox, PCR Action Judge
2022-CP-41-00075

ABIN LOWMAN, #248506,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Abin Lowman appeals the denial of his post-conviction relief application. The post-conviction relief action was heard and denied by the Honorable J. Cordell Maddox, circuit court judge, on March 19, 2024, and was denied by written order issued filed on October 8, 2024. Applicant received notice of the judgement on October 11, 2024.

/s Chelsey F. Marto
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STATE OF SOUTH CAROLINA COUNTY OF SALUDA	)	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT
Abin Lowman, #248506, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2022-CP-41-057 **ORDER OF DISMISSAL**

This matter comes before this Court by a *pro se* application for post-conviction relief dated March 9, 2022. In his application, he challenges his convictions for burglary in the first degree, armed robbery, 2 counts of kidnapping and criminal conspiracy. The Respondent filed a Return in the matter on March 15, 2024. The Applicant, through counsel Chelsey Marto, filed an amended application on March 15, 2024. He alleges allegations of ineffective assistance of counsel and prosecutorial misconduct.

On March 19, 2024. An evidentiary hearing was convened before this Court. The Applicant was present and represented by his appointed counsel, Chelsey Marto. The Respondent was represented by Deputy Attorney General Donald J. Zelenka. Testimony was received by the Applicant, his trial counsel Robert "Theo" Williams, Solicitor Rick Hubbard, and Assistant Solicitor Sutania Fuller. This Court makes the following findings and conclusions:

Procedural History

Applicant, Abin Lowman, is presently confined in the South Carolina Department of Corrections, pursuant to orders of commitment from the Saluda County Clerk of Court. Applicant was indicted at the June, 2018 term of the Saluda County Grand Jury for the offenses of burglary in the first degree, armed robbery, two counts of kidnapping, and criminal conspiracy. R. 1065 -

1074. His case was called to trial on June 18, 2018, before the Honorable Eugene C. Griffith, Jr., and a jury. Robert Theodore Williams, Sr., represented Applicant. Solicitor Richard Samuel Hubbard and assistant solicitor Sutania Fuller represented the state. R.1.

On June 22, 2018, the jury found Applicant guilty on all counts. R. 1057, 11. 13-20. Judge Griffith sentenced Applicant, based upon his prior record and the service of the life without parole notice, to life imprisonment concurrent on all of the convictions with the exception of criminal conspiracy. On the criminal conspiracy conviction, Judge Griffith sentenced Applicant to five years imprisonment, concurrent. R. 1062, 11. 14-19.

Direct Appeal

The Applicant appealed to the South Carolina Court of Appeal. He was represented in the appeal by Chief Appellate Defender Robert M. Dudek. On July 29, 2019, counsel made an Anders Brief Of Appellant and petition to be relieved as counsel pursuant to *Anders v. California*. 386 U.S. 738, 87 S.Ct. 1396 (1967) raising the following arguable issue:

> Whether the court abused its discretion by refusing to declare a mistrial where codefendant James Wilson testified on direct examination for the state that appellant allegedly chose him as an accomplice in the crime because Wilson had "looked out for him" when appellant got out of prison, since evidence appellant had been in prison was an impermissible comment on his character, it was extraordinarily prejudicial, it denied appellant a fair trial, and a mistrial was the only cure for the prejudice.

Anders Brief of Appellant, p. 1. On May 18, 2021, the South Carolina Court of Appeals dismissed the appeal after Anders review. *State v. Lowman* , Unpublished Op. No. 2021-UP-172 (S.C. Ct. App. May 18, 2021). The remittitur was issued on June 28, 2021.

Attachments

Respondent attaches, and incorporates by reference, the following:

1. Direct Appeal Materials:

a. Anders Brief of Appellant.
b. Record on Appeal - 32 volumes –
c. State v. Lowman , Unpublished Op. No. 2021-UP-172 (S.C. Ct. App. May 18, 2021)

2. Other materials.
   a. Saluda Clerk of Court Records related to the materials.
   b. SCDC records related to the conviction.

Allegations

In his original applications, Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel.
2. Prosecutorial Misconduct

(PCR App. at 3).

Amended Application

In the Amended application dated March 11, 2024, the Applicant, through counsel Chelsey Marto, alleges:

1. Ineffective assistance of counsel for:

a. Proceeding forward with the wrong trial strategy. Specifically, counsel should have argued to the jury that Applicant was not involved with the other defendants in the case, nor was within the vicinity of the crime at the time of the home invasion.

b. Failure to obtain a favorable plea offer.

c. Failure to present a zealous defense at trial.

d. Failure to preserve important issues on appeal.

e. Failure to effectively cross-examine witnesses, especially Wilson and Darien concerning their prior inconsistent statements.

f. Failure to object to Wilson's tangent about why Applicant selected him to commit the crime as being non-responsive. (Tr. 782).

g. Failure to successfully move for a mistrial based upon Wilson's statement about Applicant recently being released from prison.

h. Failure to request a curative instruction when counsel's motion for a mistrial was denied. (Tr. 785).

i. Failure to investigate potential plea resolutions Applicant's co-defendants had.

j. Failure to cross-examine Wilson concerning the federal plea resolution he had entered several months before the trial.

k. Failure to argue pre-trial that there was no reasonable suspicion backing the traffic stop.

l. Failure to argue pre-trial that there was no probable cause to believe an offense was committed because of the tinted windows.

m. Failure to challenge Applicant's arrest based upon a lack of exigent circumstance.

n. Failure to challenge the chain of custody regarding the bullets. (Tr. 517).

o. Failure to object to jury instructions being given before closing arguments.

p. Failure to object to Applicant's statements to the police on hearsay grounds. (Tr. 991-93).

2. Prosecutorial Misconduct:

a. Applicant believes prosecutorial misconduct occurred because of alleged falsehoods the investigators and Applicant's co-defendants stated at trial.

b. For not disclosing that Wilson had entered a plea agreement months before Applicant's trial.

c. For obtaining the wrong gas station surveillance footage when, had the right footage been obtained, Applicant believes he would have been exonerated.

d. For arguing that the tinted windows was the basis for the stop.

e. For stating that Applicant made statements to the police when Applicant's position is that the statements were never made.

f. For threatening Steven Brown with jail time if he did not testify.

g. For fabricating a fourth person being on location after Applicant's charges had been pending for some time.

h. For submitting that calls were made involving a phone that was broken and could not be extracted from.

FACTUAL BASIS OF CASE

Danny Tidwell and his wife, Lynda, were the owners of Tidwell's Jewelry Store in Johnston, South Carolina. They had owned and operated that jewelry store for forty-two years. R. 162, l. 12 - 163, l. 3. They owned three jewelry stores, although the main store was in

Johnston. R. 163, 11. 7-20.

The Tidwells lived in a large house on the Persimmon Hill golf course subdivision in Saluda, South Carolina. R. 164, 1. 14 - 165, 1. 13. Mr. Tidwell remembered on March 8, 2017, he and Lynda, followed their usual routine of driving home from Johnston to Saluda after the jewelry store closed for the evening at six o'clock. However, on this particular night, Mr. Tidwell stopped at a Mexican restaurant near their home to purchase a take-out dinner. R. 167, 1. 11 - 172, 1. 24.

At around seven o'clock that night, they went by his daughter's house in the same golf course subdivision, and then Tidwell drove the extra block or so home. "I noticed a car that was not familiar to me at all. It's only seven neighbors that live back in that part and I know all of them and I know what they drive and it just was different. I didn't really think about it other than that's odd. I wonder who they are visiting or it was just strange. I had never seen that car before." R. 172, 120-173, l. 25. The strange car was a Mercury Marquis owned by Applicant's mother. R. 174, ll. 1-5.

As usual, Tidwell went to sleep at about 8:30 that night, and he testified that his wife usually was "not too far behind me. Tidwell remembered awakening to a noise that he thought was their under-the-counter ice machine in his kitchen. R. 175, 11. 9-23. However, Tidwell said the next thing that happened was "I hear men in my house hollering, 'ATF. ATF. Come out with your hands up.' I rolled over and wake [awakened] my wife. She might have already been awakened. I don't know. But I asked her, I said, we need to cooperate thinking that it was law enforcement." R. 182, 11. 1-15. Tidwell thought it was law enforcement but that they had "the wrong address." Tidwell and his wife were placed on the carpet, and they had their hands tied behind their backs with zip ties. R. 182, 11. 16-24.

Tidwell said he quickly realized the men were not law enforcement based on their vulgar language, and from them demanding to know "Where's your valuables? Where's your belongings? Don't lie to me. I'll blow your F'ing head off." R. 182, l. 25 - 183, l. 11. Tidwell told one of the three inquiring men that he did not have a safe in his house. One of the men then asked Tidwell how he could own a jewelry store, and not have a safe in his house. R. 183, l. 12- 190, l. 23. Tidwell gave one of the men the alarm codes, the safe combinations for the jewelry store safe, as well as the store keys. R. 191, 1. 7 - 197, 1. 14. Tidwell said the men assured him that they would not hurt his wife or him as long as they cooperated.

At one point, Tidwell said he asked one of the men, "If I could pray. I didn't want to offend anybody. And then he said, 'What are you, a Jew?' And I said no. I'm Christian. And he said, 'Yeah. You can pray.'" R. 197, 1. 21 - 198, 1. 11.

Tidwell remembered it became quiet, and he saw headlights from a car leaving the area on his ceiling. Mrs. Tidwell go free, untied Danny Tidwell, and they searched for a phone to call the police but all of the phones were gone. Tidwell and his wife then came up with a plan where they would run out of different doors in the house to different neighbor's houses to ensure one of them could safely call the police. No one was injured, and Saluda police officer Dale Hallman was the first police officer on the scene that morning. R. 199, 1. 2 - 203, 1. 18.

Other police officers soon arrived. The robbers had taken Tidwell's car, a .380 caliber pistol, a silver money clip with about $3,000 in it, and another $1,000 from the house. An additional .45 caliber pistol, a pocketknife, and their cell phones were also all stolen. R. 205, 1. 17-214, 1. 12.

Neither Tidwell nor his wife could identify any of the burglars. They did, however, remember that there were only three men inside the house. One black man was said to be wearing dark glasses, and another man apparently wore "military" like boots. R. 215, l. 10 - 236, l. 19.

Tidwell also remembered that about $100,000 in jewelry was stolen from their bedroom drawers, as well as his wife's diamond ring. R. 247, 11. 5-24. However, the jewelry store was not burglarized and robbed that night or in the early morning as allegedly was planned. R. 236, 11. 3-10.

The state's theory of the case was that one of the accomplices gave Applicant the key to the jewelry store, the alarm code, and the safe combination given to him by Mr. Tidwell during the burglary. Applicant was driving his Grand Marquis to the jewelry store in Johnston to burglarize and rob it when he was stopped by the police There was a lengthy pre-trial motion to suppress the fruits of the traffic stop of Applicant's Grand Marquis on the basis that the traffic stop was a pretext to assist a repossession agent, James Rutland, in repossessing the Grand Marquis, and not for any legitimate law enforcement reason. This, the defense argued, rendered the traffic stop illegal. The trial judge ruled the traffic stop was legal because the repossession agent, Rutland, told the Johnston police that Lowman was driving without insurance, a legitimate reason to stop Lowman. In addition, the judge accepted the state's claim that law enforcement also had the right to stop Lowman because of the very dark tint on the Grand Marquis, which appeared to be illegal. R. 93 - 141. [1]

[1] There was no contemporaneous objection by the defense when the ammunition found in Lowman's trunk, or a shell casing found on the passenger side of the vehicle, or other incriminating items were entered into evidence. R. 515, 1. 1-517, 1. 23.

Tidwell's wife, Lynda Tidwell, remembered the burglary lasted approximately two hours. Her necklace, bracelet, three rings, and a watch were among the items stolen during the burglary. R. 278, 1. 4. - 279, 1. 25. Mrs. Tidwell also remembered after the men left and the car lights disappeared that they went to the neighbor's house and were able to get the neighbors to call the police. R. 296, 1. 20 - 298, 1. 24.

The Tidwells' car had an OnStar tracking device on it. Consequently, the police were able to trace the stolen car to "Old Camp Log Road in Aiken County," where they found the car abandoned. The car was abandoned not far from a Waffle House. R. 307, 1. 12 - 308, 1. 1 1; R. 321,11. 8-18.

When law enforcement went to the nearby Waffle House in Aiken County, they went through the trash can in the men's room. They found Mr. Tidwell's apparent silver money clip and a white glove there. 2 R. 328, 1. 22 - 329, 1. 25. Mr. Tidwell never identified the money clip as being his clip.

As a result of surveillance tapes at the Waffle House and one of the Wal Marts in Aiken County where the ammunition was purchased, the suspects, in addition to Applicant, became Joshua Darian, James Christopher Wilson, and Robert Goodwin. R. 386, 11. 3-7.

Lowman's mother purchased the Grand Marquis for Lowman from Jiggie's Truck and Auto Sales in October 2016. R. 407, 1. 11 - 409, 1. 24. The car came with a GPS contract which allowed the car lot to disable the vehicle if there was no insurance on the vehicle, or if the purchaser was behind on the payments. R. 411, 1. 9 - 418, 1. 22. The owner of the car lot was Sheila Rutland. Her husband, James Rutland, was the repossession agent for Hook and Book Recovery Services.

James Rutland remembered that the Grand Marquis was traced on the night of March 7, 2019, to the golf course near the Tidwell home. R. 427, l. 12 - 431, l. 22. Rutland found the vehicle there but was unable to repossess it because of the narrow dirt road it was on. Rutland actually had to drive on the golf course to turn around. He was worried about "tearing up the golf course or getting stuck." R. 441, ll. 6-25; r. 470, l. 20 - 471, l. 8.

In the interim, Applicant returned to the car and drove away in it. Rutland followed Applicant in the vehicle from the golf course to Johnston. Rutland informed a female police officer in Johnston that there was no insurance on the Grand Marquis Lowman was driving, and that he intended to repossess the vehicle that night. R. 441, ll. 6-25; r. 470, l. 20 - 471, l. 8.

Both Rutland and the Johnston police officers claimed that Lowman was not stopped that evening so that Rutland could repossess the car. When Lowman was stopped, he did not have a driver's license. He was arrested for driving under suspension. R. 481, l. 24-489, l. 20. He was arrested on the night of the robbery, March 8, 2017 No ticket was apparently issued for the tint on the car windows being illegal. R. 652, ll. 10-16.

A box of nine millimeter ammunition was found in the trunk of the vehicle. R. 494, l. 1 - 495, l. 3; r. 515, l. 1 - 516, l. 11. In addition, a nine millimeter shell casing was found inside the front passenger seat of the car, along with multiple cell phones and identification cards for Robert Goodwin and Lowman. In addition, walkie talkie handheld radios were found inside the car. R. 556, l. 2 - 557, l. 18.

James Wilson was arrested in Maryland on March 11, 2017. R. 652, ll. 17-23. Joshua Darian was also arrested in Maryland on March 24, 2017. R. 653, ll. 4-14. Robert Goodwin was

arrested in Maryland on July 10, 2017. R. 653, 11. 16-21. James Wilson and Joshua Darian testified for the state against Lowman.

James Wilson

James Wilson was charged with burglary in the first degree, two counts of kidnapping, armed robbery, and criminal conspiracy in this case, the same charges for which Lowman was also indicted. R. 689, 11. 14-24. Wilson claimed the solicitor had not promised him anything in return for his testimony against Lowman. Wilson then maintained that Lowman, Robert Goodwin, and Joshua Darian were the other participants in this crime. R. 689, 1. 14-690, 1. 12.

Wilson was from Guyana, South America. He lived in Maryland. Before March, 2017, he had never been to South Carolina. He was twenty-two years old at the time of the burglary. Joshua Darian was eighteen years old. R. 691, 1. 17 - 692, 1. 5.

Wilson claimed that Lowman told him he could come to South Carolina and participate in the robbery of some drug dealers who ran a jewelry store. There was going to be at least $300,000 involved in the robbery. R. 694, 1. 1 - 695, 1. 1.

Wilson said he was told that Lowman would provide a rental car, the guns, and that they would be given money for hotels, food, and any extra expenses. "Pretty much all we had to do would be to go in there and pretty much rob them, tie them up, lay them down. I was to get the codes." R. 695,1. 11 - 696,1.25.

Wilson said on the day of the robbery, Joshua Darian was driving because Lowman's driver's license had been suspended. Wilson said Lowman went in the Tidwell Jewelry Store that afternoon to buy a ring.3 R. 710, 1. 3 - 711, 1. 22. Wilson said the purpose of this purchase was so Applicant would know the layout of the jewelry store he was to burglarize later that evening. R.

711, 11. 19-22; r. 738, 11. 7-11. Lowman was supposed to rob the jewelry store while the other three men held Mr. and Mrs. Tidwell as prisoners in their golf course home. R. 738, 11. 4-11.

Wilson explained that that night, he went into the Tidwell home with Darian and Goodwin while Lowman remained on the back porch. R. 751, 11. 7-10. Wilson said he was led to believe that the Tidwell Jewelry Store was a front for a drug operation. "People come in there and they look to buy, act like they're buying jewelry . . .but they're buying drugs. He said it was an old bank, had a bank vault in the business and he was going to clean the bank vault out." R. 752, 1.9-753, 1. 12.

Wilson said the men entered the house, they beamed their flashlights into their eyes, and screamed: "ATF." R. 753, 1. 13 - 754, 1. 7. They then tied up Mr. and Mrs. Tidwell with the zip ties, obtained the security codes, the combination to the safe, and the store keys for Lowman. They then held the Tidwells as prisoners. R. 754, 1. 17 - 757, 1. 20.

A short time later, Lowman sent a text message to Wilson informing him that he had been "pulled over" by the police. "I really thought he was lying. I didn't believe him to be honest with you because I kind of figured once I realized there was nothing in the house, I kind of figured it was, he kind of used us to go and rob the jewelry store so I'm thinking that he just robbed the jewelry store and just left us. I didn't believe him at all but just to be on the safe side I left. I left the house." R. 766, 1. 23 - 767, 1. 8.

Wilson, Darian, and Goodwin then traveled in the Tidwells' stolen car to Aiken, South Carolina. Wilson explained: "I knew it had OnStar on it so I knew we had a limited time in the car. So once we got back to Aiken, I figured it was time to get rid of the car so I parked it in this like in the woods or whatever." R. 769, 11. 15-22. Wilson saw police officers swarming in the area,

and he threw his gun into a bush by the Waffle House. Wilson would later lead the police to find the gun he threw into the bushes there. R. 772, l. 4 - 773, l. 19.

Wilson related that the men were chased through the woods by the police from the Waffle House area for about two hours. They then called a cab and got a ride back to the Econo Lodge in Aiken. From there, Wilson caught a cab to Columbia, and he took a Greyhound bus back to Maryland. R. 774, l. 15 - 776, l. 6. Wilson said he only received about $700 for his part in the crime. R. 823, ll. 19-23.[2]

Joshua Darian

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[2] Mistrial Motion

Wilson testified on direct examination that "I always had my doubts about this whole situation." He said he did not trust Lowman, and he wondered why Lowman chose him to be a participant in the crime. "[H]e knew a lot of people, so why did he pick me? And his best answer was I looked out for him rather than some of his home boys when he first got of, I guess, prison. Something about the whole situation didn't sit right with me so I took a picture of his ID just in case anything foul happened." Defense counsel told the judge he had a matter of law at this point. R. 782, ll. 6-21.

Defense counsel then moved for a mistrial, noting there had been no evidence of Applicant's prior criminal record before the jury, and that the jury now knew Lowman had been in prison. R. 782, l. 25 - 783, l. 6.

The solicitor argued that she did not intentionally elicit this testimony that Lowman had been in prison. The solicitor also urged there was not enough prejudice from the mention of Lowman having been in prison to justify a mistrial. Further, the solicitor reasoned the jury was later going to hear a stipulation that Lowman had two prior burglary convictions. "I think we can minimize this and not cause any prejudice to the defendant at this stage in the trial." R. 783, ll. 8-23.

The judge also noted the indictments placed the jury on notice of Lowman's two prior burglary convictions. The judge also reasoned that Lowman's character had already been placed at issue through testimony about Lowman planning the robbery. Defense counsel countered, "That's his [the witness's] opinion [of the plan]." R. 784, ll. 8-19. The judge agreed with defense counsel's statement, and he said he could give a curative instruction, but that he was not granting a mistrial. Defense counsel agreed that a curative instruction in this situation would only make the matter worse. The judge then denied the mistrial motion and warned the solicitor to tell his witnesses not to mention Lowman's prior criminal record or prison again. R. 784, l. 20-785, l. 24.

Joshua Darian also claimed there was "no deal" in return for his testimony against Lowman. Darian, like Wilson, was facing the same charges. R. 892, 1. 5 - 893, 1. 2. Darian testified that "Wilson let him in on the plan" to rob drug dealers located in South Carolina. The burglary and jewelry store robbery were expected to result in about $250,000 in stolen money. R. 896, 1.2-897, 1. 23.

On the night of the robbery at the Tidwell home on the golf course, Darian said Lowman remained outside while he went inside the Tidwell home with Wilson and Goodwin. R. 925, 11. 15-22. The men inside were going to provide Lowman with the keys to the jewelry store, the alarm code, and the safe code. R. 926, 11. 16-20.

Darian said his role was "like to be a scavenger over the house, look around in the house trying to find the drugs." R. 928, 11. 15-17. Darian testified once they had the keys and code that Lowman left to go to the jewelry store. Darian said they repeatedly assured the Tidwells that they were not going to harm them. Darian said he got a blanket and a pillow for Mrs. Tidwell while she laid on the floor. R. 929, 1. 13 - 931, 1. 24.

The solicitor again had Darian repeat that he had no deal with him for his testimony against Lowman. Darian also said he had no promises from the federal government for his testimony against Lowman. The federal authorities had apparently charged the men with firearms violations and impersonating federal officials. R. 945, 11. 5-25.

However, the solicitor later asked to recall Darian so Darian could admit that he was making a proffer with federal authorities that would cause a decrease in his federal sentence. Darian still claimed the deal with the federal authorities would have no effect on his state court

charges, although this Court can take judicial notice of the fact Darien's state court sentence ran ultimately was ordered to run concurrent to his federal sentence. R. 980, l. 5 - 981 , l. 4.

At the end of the state's case, the judge read the jury a stipulation that Lowman had two prior convictions for burglary in Edgefield County on March 17, 1998, and March 20, 2000. R. 995,11. 13-23.

DISCUSSION

Strickland v. Washington Standard

To establish that Sixth Amendment counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington,* 466 U.S. 668, 694 (1984); *Simpson v. Moore,* 367 S.C. 587, 595-96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland,* at 694. Relief will not be granted on a showing of mere error—prejudice must also be shown. *Id.* Moreover, it is presumed that counsel made all decisions in exercise of reasonable judgment. *Strickland,* at 689. It is an applicant's burden to prove, by a preponderance of the evidence, an entitlement to relief. Rule 71.1 (e), SCRCP. See also *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("the burden of proof is on the applicant to prove the allegations in his application").

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.*

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance." Butler, 286 S.C. at 445, 334 S.E.2d at 816; *see* White v. Singletary, 972 F.2d 1218, 1220 (11th Cir. 1992) (instructing reviewing courts evaluating a claim of ineffective assistance of counsel to "at the start presume effectiveness" and "always avoid second guessing with benefit of hindsight"). "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).

"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 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). "[E]ven 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. Strickland, 466 U.S. at 688–89; *see 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 106–107). "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. The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland*'s deferential standard.

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; *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").

In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695. 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.*" *Id.* at 687 (emphasis added). "An 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." *Id.* 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. 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"); *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.").

FINDINGS OF FACT AND CONLUSIONS OF LAW

This Court will make the findings and conclusions in the order as set out in the amended application for post-conviction relief. Bases upon its review of the entire record and exhibits presented, this Court finds that the entire application must be dismissed. The Court finds as follows:

1. Ineffective assistance of counsel for:

a. **Proceeding forward with the wrong trial strategy. Specifically, counsel should have argued to the jury that Applicant was not involved with the other defendants in the case, nor was within the vicinity of the crime at the time of the home invasion.**

In his first specification, Lowman contends that his counsel used the wrong strategy and argued that he was not involved with the other defendants and was located in a different area at the time of the home invasion. Lowman testified that he felt counsel could have done a better job and felt more investigation should have been done. Lowman stated the strategy was that they had bad people around him who were committing crime. He claimed he had no knowledge of the crime and was convicted of hand of one hand of all. He felt in his mind it was criminal conspiracy. Lowman stated he was in Edgefield and Johnston. He felt that there was an alibi there, but it was not used.

During cross-examination, the Applicant claimed that he said nothing to law enforcement, and not that he was fishing nearby. Lowman asserted that all he said was if he found out something he would let them know. However, he claimed the officers put words in his mouth. Lowman stated that he told counsel Williams that he did not give a statement, and that he had an alibi. Lowman claimed that he said to Williams that he was at his house at the time of the crime, that his vehicle was not in the area at the time of the crime per GPS.

Lowman confirmed that his prior record was extensive at the time. The record included drug crimes, burglary, petty and grand larceny. The Applicant claimed he did not speak to codefendants after the arrest.

Lowman learned that they had a plea deal while he was in in county jail. Lowman stated he did not share this with counsel. Lowman claimed that he thought counsel knew and it was discussed in court. Lowman attempted to clarify that he did not know who the deal was with. Lowman stated he shared the information with Counsel at the end of the trial.

Counsel Theo Williams testified that he took his case about a year before trial. He stated that he had no idea how many times they met. He testified that he met with the Applicant more than twice which was what the Applicant suggested. He estimated it was less than ten times. He stated that they went over discovery they received from the State and he gave Lowman a copy of the discovery, as is his normal practice. He stated that he had meeting with Lowman and also his partner Ben Stitely also met with him in Anderson. In addition, he stated that his associate Jason Young also was involved in the representation, but did not participate in the trial.

Williams testified that he spoke with Applicant about defense strategy. Williams stated that it was an easy strategy. He stated that the theory of defense was that none of the three people that went into the victims' house was Lowman and that the victim testimony did not identify Applicant

as having been there. Counsel further stated that it was only circumstantial evidence brought Lowman into the crime because he knew the people involved. Their strategy was that he was not involved at all in the incident.

Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies. Harrington v. Richter, 562 U.S. 86, 107, 131 S. Ct. 770, 789, 178 L. Ed. 2d 624 (2011). Under the first prong of Strickland, we apply a "strong presumption" that a trial counsel's strategy and tactics fall "within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689, 104 S.Ct. 2052. For a lawyer's trial performance to be deficient, his errors must have been so serious that he was not "functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687, 104 S.Ct. 2052. And the reasonableness of a lawyer's trial performance must be "evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of reasonableness *405 is highly deferential." Kimmelman v. Morrison, 477 U.S. 365, 381, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); see also Strickland, 466 U.S. at 689, 104 S.Ct. 2052.

"[C]ounsel's strategic decisions will not be found to be deficient performance if he articulates a valid reason for employing the strategy." Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017). "Under certain circumstances, [ ] counsel may employ a strategy of not objecting—even when counsel has a good argument for exclusion—if counsel reasonably perceives the benefits of doing so are outweighed by some other consideration." Id. at 383, 798 S.E.2d at 568. "The necessary converse of this principle is that counsel's decision to employ a certain strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound." Id. at 384, 798 S.E.2d at 569.

The Applicant has failed in his burden of proof to show deficient performance. Consistent with counsel's credible testimony, the record shows that during the opening statement his argument was the Lowman did not commit the crime, only three people went inside the house, the Tidwells did not identify him, no stolen items were located on him, and guilt by association is inadequate to convict Lowman. Tr.p. 156-162. In his closing statement, counsel Williams urged the jury not to jump to conclusions, the possibility that Lowman is being set up, that only three people were involved, not four according to the victims, why were there two searches of the vehicle, and why was other evidence not put in to support the state's conclusions. Tr.p. 1038-1054.

This Court finds that the theme of the defense throughout the trial was to attack the codefendants credibility and testimony and rely upon the fact that only three were in the house and that none of the three were the Applicant. This Court finds that it was sound strategy reasonably based upon counsel's understanding of the state's discovery and evidence in the case. Counsel also had sufficient meetings with the Applicant to develop the strategy based upon counsel's credible testimony. The Applicant has failed to any present credible evidence to support a strategy different than the one counsel actually presented to the jury. This specification must be dismissed.

b. **Failure to obtain a favorable plea offer.**

In this allegation, he contends that counsel was ineffective in failing to secure a favorable plea offer. He claimed he wanted a plea offer, but asserted his counsel never spoke with the solicitor about it.

On cross-examination, Lowman stated that if one was offered, he would have taken one. Lowman stated that he did not want to deal with a trial in Saluda. He stated that he was uncomfortable on the stand. Lowman felt that in a trial he would have to beat them at their own profession. However, he would have considered a deal that made sense. When asked, he stated he

would have pled guilty to criminal conspiracy in hindsight with what he knows now. He felt that he had to deal with technicalities and felt he was scapegoat. Lowman stated he was aware of two strike three strike. Lowman confirmed that he would have taken anything under consideration due to his record. He felt he would be in the same situation if he pled guilty to burglary. He noted an open plea would have to be considered. He would have had opportunity to take a plea to have some time left instead of worrying about dying in prison.

Counsel Williams testified that he approached the Solicitor to engage in plea negotiations but was advised that there was no way that the State was going to offer anything in this case. Williams testified that he was told by the Solicitor that the Tidwells were the most respected individuals in Saluda County. He was told that there was no way he would make an offer on this case.

A defendant in a criminal case, however, has "no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial." Weatherford v. Bursey, 429 U.S. 545, 561, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). "[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." State v. Armstrong, 263 S.C. 594, 597, 211 S.E.2d 889, 890 (1975). However, a defendant has no constitutional right to plea bargain. State v. Easler, 322 S.C. 333, 471 S.E.2d 745 (Ct.App.1996), aff'd as modified, 327 S.C. 121, 489 S.E.2d 617 (1997). Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999).

Criminal defendants also have a Sixth Amendment right to effective assistance of competent legal counsel, including during the plea-bargaining process. Lafler v. Cooper, 566 U.S. 156, 162 (2012); Padilla v. Kentucky, 559 U.S. 356, 364 (2010). However, Applicant appears to argue that he wants "better legal representation" merely because he wants a more advantageous

plea bargain or at least a plea bargain offer. The prosecutor, not counsel, is responsible for any plea bargain offers.

This Court must find that counsel performed competently in his handling of plea bargains. He approached the Solicitor to see if the government of open to discussing pleas. The Solicitor, as is his right, indicated there would be no plea offers in Mr. Lowman's case. Lowman has failed in his burden in his showing either deficient performance or prejudice in light of both counsel Williams and Solicitor Hubbard's credible testimony that there would be no bargaining in this case. It must be denied.

c. **Failure to present a zealous defense at trial.**

Lowman contended his counsel did not present a zealous defense at trial. On cross-examination Lowman testified that he had two meetings total with counsel Williams and no calls before trial. Lowman claimed at the second meeting, he stayed "for a little while." Lowman complained that he got his status of his case before trial from someone in his office. However, as noted earlier, this Court found credible that counsel Williams alone met with the Applicant more than two but less than ten times, reviewed the discovery and discussed strategy. His complaint is not supported by credible evidence.

Lowman also claimed that he did not know about the "hand of one, hand of all" principle of culpability.[3] He also testified that he was confused about LWOP with criminal conspiracy.[4] Lowman stated that his lawyer never indicated to him that State thought he was the leader,[5] just that he was a part of it.[6]

Lowman was of the opinion that there was no way he could be charged with crime. He asserted that he did not purchase the weapon and never touched the gun. He confirmed that he bought the bullets, that they were using his vehicle, and therefore the shell casing was in the vehicle. Lowman acknowledged that when he was stopped by law enforcement in his car, the shell casing was found there at that time. (State Exhibit 79 He thinks the casing matched the weapon. Lowman admitted that he spent time with codefendants, including his uncle, Mr. Goodwin.

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[3] Under the doctrine we refer to in South Carolina as "the hand of one is the hand of all," the State proves the defendant guilty by proving he had a mutual plan or agreement with another person to commit one crime, and during the course of committing that initial crime, the other person committed a second crime they had not agreed to commit. State v. Harry, 420 S.C. 290, 299, 803 S.E.2d 272, 276 (2017); see also Butler v. State, 435 S.C. 96, 97-98, 866 S.E.2d 347, 348 (2021) ("Under the theory the 'hand of one is the hand of all,' when two people join together to commit a crime, and during the commission of that crime one of the two commits another crime, both may be criminally liable for the unplanned crime if it was a natural and probable consequence of their common plan to commit the initial crime."). State v. Sellers, 442 S.C. 140, 148, 898 S.E.2d 116, 120 (2024).

[4] The Applicant was served with life without parole notice by the Solicitor on May 14, 2018. Saluda Public Index. See Tr.p. 1061-62.

[5] This assertion by the Applicant is also not credible. The Solicitor indicated that he was not doing any negotiation on the case. As reflected in his closing statement, the state's theory was that Lowman was the person who made the plan, chose the people who would help carry out the plan, and that he was in charge. Tr.p. 1026-1027.

[6] This Court finds that his claimed lack of knowledge about "hand of one, hand of all" doctrine is not credible. The State's facts were that Lowman was involved in the creation of the crime, provided the transportation, provided the gun yet never entered the Tidwell's home when he dropped the perpetrators. The defense strategy was to question the link that tied him in as to the burglary, even though he did not enter. This Court finds that he failed to credibly show he was not advised of the principle of the law applicable to his culpability.

Lowman admitted that he spoke Goodwin on the day of the PCR hearing, but he did not talk about the case. Lowman confirmed that Goodwin had pled guilty. Lowman also admitted that he was with the codefendants earlier in the day. Lowman stated that he picked them up from the motel and let them use his car. He stated his residence was a block away from where he was stopped.

Counsel Williams testified that there was information in a statement that described the various roles of the conspirators. Counsel did not recall precisely who provided the information that the others would bring drugs down to S.C. and does not recall that the codefendants were described as strangers to S.C. Williams stated that if the evidence showed that the perpetrators were familiar, it was more likely that they knew Applicant.[7] Williams stated he wanted to avoid that being suggested to the jury as much as possible. Williams indicated that he thought the codefendants theory of the facts was a hard sell. In hindsight, he did not think Sutania Fuller, one of the prosecutors, would say he was kind to her. Williams stated he objected to a great deal of things during the trial.

This Court finds that the Applicant has failed to show that counsel was deficient under Strickland on this specification. As noted herein, counsel was zealous in that he challenged the stop of the vehicle, challenged the inconsistencies in the statements given the codefendants Wilson

[7] The record showed that Robert Goodwin was the Applicant's uncle from Maryland. Goodwin was connected with James Wilson who Wilson stated he had known for about a month before the incident. Wilson met Lowman through Goodwin. Tr.p. 692-693. Wilson asserted that Lowman approached him to see if he wanted to commit a robbery in S.C. Tr.p. 694. Joshua Darien was originally from S.C. (not Saluda or Edgefield areas) and had lived in Maryland for four years at the time of the incident. Tr.p. 892-893. Darien claimed the first time he met Lowman was two weeks before the incident in Maryland and had known Wilson for about one year and had lived with Wilson. Tr.p. 895. He claimed he did not know Robert Goodwin at that time. Tr.p. Darien claimed that Wilson let him in on a plan to rob drug dealers in S.C. Tr.p. 896. Darien claimed that he thought Wilson was unfamiliar with S.C. At the initial stages, Darien just thought the plan consisted of Lowman, Wilson and himself and not Goodwin. Tr.p. 899. It was only after they arrived in S.C. did he meet Goodwin who was with Lowman. Tr.p. 903-904.

and Darien, questions that lack of recording of the inculpatory statement the Applicant gave to Padgett, and sought to urge reasonable doubt as to the charge in the closing statement. Counsel strategy was a reasonable strategy based upon the circumstantial evidence tying him to the codefendants.

d. Failure to preserve important issues on appeal.

In this specification, it appears to be based upon the July 25, 2019 letter from appellate counsel Robert Dudek in his response to why he filed a no merit Anders Brief and did not raise certain issues in the appeal. In the pertinent portion of the letter, appellate counsel Dudek indicated the following:

> In your case, the number of issues were limited. This mistrial issue was the best preserved issue for you particularly since it was preserved. There was not a contemporaneous objection when the fruits of the arguably illegal stop were admitted into evidence. The only other issues were your statement to the police (p. 91 of the transcript); the Waffle House photographs (Tr. p. 334); the objection to a chain of custody on the bullet (Tr. p. 517); and a directed verdict motion (Tr. p. 996). While there was evidence you did not enter the house, there was an abundance of evidence that you planned and aided and abetted in the burglary, making a serious directed verdict argument impossible.

Dudek Letter to Lowman, July 24, 2019.

The record shows that the mistrial issue concerning the related to the response about prison that was actually raised by Mr. Dudek in the Anders brief. The appellate court, after reviewing the matter, granted the appellate counsel's request to be relieved under Anders v. California, 386 U.S. 738 (1967).

Appellate counsel Dudek asserted that there was a failure on trial counsel's part to object when the fruits of the seizure were introduced into evidence at trial as precluding the argument about their introduction from being presented in the appeal. However, the Terry Stop was litigated pretrial as noted below. Tr.p. 92-142. It will be addressed below in that specific allegation.

As set forth below, on this issue, the Applicant has failed to show deficient performance and prejudice under Strickland.

e. **Failure to effectively cross-examine witnesses, especially Wilson and Darien concerning their prior inconsistent statements.**

In this allegation he claims his counsel should have more effectively cross-examined witnesses. He felt counsel did not have adequate information. Counsel was aware that the state's theory was that nothing would have happened without Lowman's involvement. Lowman testified that with the evidence he has now, the state's theory does not match the evidence because his co-defendants lied.

Counsel Williams testified that he was aware that Wilson had been giving proffer statements. It did not surprise him that the codefendants claimed they had not been promised anything and that there was nothing tempting them to lie.

A review of the examination of Wilson and Darien show that counsel did examine Wilson and Darien about the inconsistent statements they made. He inquired about what he told law enforcement as to why he came to S.C. on whether it was to buy a car or commit a robbery. Tr.p. 802-803. He inquired about whether he was straight with law enforcement when he told them about what went on originally and where the jewelry was left and when it was sold in Maryland. Tr.p. 805-807. Counsel challenged Wilson on whether he had been accurate in his statements to law enforcement on where the gun was purchased and when he purchased the items. Tr.p. 808-810. He also challenged him on what he told law enforcement that when he bought the bullets on whether they were in there looking at video games and at which Walmart. Tr.p. 811-812. Counsel inquired about his statement to law enforcement that he did not want to give them the names of who he sold the jewelry to in Maryland because he did not want them to get into trouble. Tr.p. 824.

Similarly counsel Williams sought to impeach Joshua Darien with his prior statements. He inquired about the first interview with law enforcement after the arrest while he was in the hospital due to a head injury. Tr.p. 952. He sought to impeach him on whether he told law enforcement that he went to Summerville rather than Spartanburg to pick up the gun. Tr.p. 955. Counsel Williams also inquired about the number of times Darien went over his testimony with the Solicitor or law enforcement. Tr.p. 967.In particular, Williams question him about the reason to be riding around was to buy a car for Lowman's mother. Tr.p. 968-969.

"Trial counsel's decisions regarding the selection of the best defense plan... involved tactics well within professionally reasonable conduct that should not be second-guessed by this Court under Strickland." Hunt v. Nuth, 57 F.3d 1327, 1332 (4th Cir. 1995); see DeLozier v. Sirmons, 531 F.3d 1306, 1326 (10th Cir. 2008) ("[C]ounsel's decisions regarding how best to cross-examine witnesses presumptively arise from sound trial strategy"); U.S. v Nersesian, 824 F.2d 1294, at 1321 (2d. Cir. 1987) ("Decisions whether to engage in cross-examination, and if so to what extent and in what manner, are similarly strategic in nature.").

"Impeachment strategy is a matter of trial tactics, and tactical decisions are not ineffective assistance of counsel simply because in retrospect better tactics may have been available." Henderson v. Norris, 118 F.3d 1283, 1287 (8th Cir. 1997). Where trial counsel conducts a thorough and meaningful cross-examination of a witness, counsel's failure to employ a trial strategy that, in hindsight, might have been more effective does not constitute unreasonable performance for purposes of an ineffective assistance of counsel claim. Cardwell v. Netherland, 971 F. Supp. 997, 1019 (E.D. Va. 1997). As such, counsel's cross-examination was reasonable, and Lowman fails to satisfy the first prong of Strickland.

This Court must find that the Applicant failed in his burden of proof in showing that counsel was deficient. The record shows that counsel attempted to impeach with the statements given law enforcement to develop credibility issues. Absent a showing that there were other specific areas of impeachment that should have been used, he has failed in his burden of proof.

f. **Failure to object to Wilson's tangent about why Applicant selected him to commit the crime as being non-responsive. (Tr. 782).**

The Applicant next complains about the "tangent" that occurred during Wilson's testimony. In particular, he cites to Tr. 782. In that portion of Wilson's testimony, counsel William inquired about the statements he gave law enforcement.

In pertinent part, the following occurred:

> Q. Now, I'm going to show you State Exhibit 76 and ask you to hold it and tell me if you recognize it?
>
> A. I do .
>
> Q. How do you recognize it?
>
> A. It's Mr. Lowman's ID. I took a picture of it when we first got to South Carolina.
>
> Q. **Why did you take a picture of his ID when you first got to South Carolina?**
>
> A. Because I always had my doubts about this whole situation. Uhm, I kind of didn't really trust Mr. Lowman. I was asking him the whole way, why, why pick me? Because he knows a lot of people so why did you pick me? And his best answer was I looked out for him rather than some of his home boys when he first got out of, I guess, prison. Something about the whole situation didn't sit right with me so I took a picture of his ID just in case anything foul happened.
>
> Q. And about the ID, is there anything significant about it that –
>
> MR. WILLIAMS: Your Honor, I have a matter of law to take up outside the presence of the jury.
>
> THE COURT: Okay. Step back in the jury room. Have you right back out here.
> (Whereupon, the jury entered the jury room at 12:30 p.m.)

THE COURT: All right. Mr. Williams.

MR. WILLIAMS: Your Honor, I would move for a mistrial.

Tr.p. 781, l. 25- p. 783, l.1.[8]

The Applicant complained that this evidence caused Lowman to be in fear of taking the witness stand. He felt counsel should have done more. Lowman felt the comment about prison should have been objected more strongly by his counsel. He also felt in hindsight that counsel should have moved for a curative instruction after counsel's request for a mistral was denied. (See allegation (h) below).

Counsel Williams testified that he moved for mistrial. He felt this was a better strategy than to simple argue than objecting on the basis of nonresponsive to the question.

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[8] In response to the motion Assistant Solicitor Fuller declared:

MS. FULLER: Thank you, Your Honor. The standard for mistrial, of course, is prejudice to the defendant that would be cause. In this case one of the charges is burglary in the first degree and it is gonna come out that he has two prior burglaries, Of course, it was never the State's intention — The State definitely intends to give the defendant a fair trial and never intentionally elicit that he had gone to prison and I don't think the witness intended to suggest anything in that nature. At this point, Your Honor, I don't think there's enough prejudice I have tried to move on from the issue so it's not highlighted as much. Later in trial the jury will learn about the two priors and take from that whatever they may. I think we can minimize this and not cause any prejudice to the defendant at this stage in the trial.

Tr.p. 783, l. 8-23. Later in the trial, a stipulation was presented concerning the prior offenses to support burglary in the first degree: as State Exhibit 115.

THE COURT: Ladies and gentlemen, there's some question of fact that y'all will not get the answer to because they're in dispute, but then when the parties agree, it's called stipulating. We agree to these facts, okay? The Prosecutors and Mr. Williams and Lowman have agreed to tell you that this fact is an agreed upon fact. Mr. Abin Lee Lowman has two prior convictions for burglary. He was convicted in Edgefield County of burglary on March 17th of 1998 and on March 20th of the year 2000. So he has two prior burglary convictions. That's the stipulation and it's in the record.

Tr.p. 995, l. 13-23.

The Court must conclude that the mistrial choice was consistent with his theory on not requesting a cautionary instruction. If he was successful in having Judge Griffith grant a mistrial, the matter would start anew with a new trial. If the objection was limited to "nonresponsive" to the question, the objection may have been sustained, but the result would resulted in a possible cautionary instruction which Williams was seeking to avoid. This Court cannot find counsel deficient in his choice of objection strategy. Further, even if the objection as nonresponsive would have been made and sustained, this Court finds for reasons set out by the trial court that it was limited and not unduly prejudicial, he has failed to show a reasonable probability that the result of the proceeding would have been different under Strickland.

g. **Failure to successfully move for a mistrial based upon Wilson's statement about Applicant recently being released from prison.**

This claim is without factual merit. The record shows that counsel did move for a mistrial on this basis. Tr.p. 781- 785, l. 15. The trial court denied the motion. Tr.p. 785, l. 5-21. He has failed to show that counsel was deficient. This specification must be denied.

h. **Failure to request a curative instruction when counsel's motion for a mistrial was denied. (Tr. 785).**

The Applicant contended that counsel was ineffective in failing to request the curative instruction. He speculated that the jury needed to be told what consider and that certain matters should be disregarded by them.

On cross-examination, Lowman confirmed counsel immediately objected to the "prison" statement. Further he acknowledged that following argument about that statement with the solicitor, Judge stated he would have allowed curative instruction, if requested. Lowman also confirmed that counsel, with this knowledge, knowing Applicant likely would not testify, chose

not to ask for the curative instruction. Lowman stated that he had already made the decision that was not going to testify at the time when the prison statement occurred. Lowman confirmed that his lawyer would not have wanted to emphasize that he was previously in prison, where the judge would have talked more about Applicant's imprisonment and to not consider it. In hindsight, Applicant now says he would have wanted that instruction because it would have been able to be explained and the jury would understand. Lowman confirmed that at that time they had been in trial for four days. Lowman also acknowledged that the Judge denied mistrial motion.

Counsel Williams testified that he did not want the curative instruction because it would bring the prison comment back up again. This was what he wanted to avoid as a matter of strategy. He wanted the jury to forget about prison.

The record before this court shows that the trial court raised the issue about a curative instruction:

> THE COURT: Right. The proper testimony has been presented . I don't want to comment on the facts in front of the jury but enough has been presented that the jury is going to have questions about that, know his character has not been placed in issue by Mr. Lowman but I think either we move on or I will entertain a curative instruction that they strike that comment and disregard it. I'll do either one.
>
> MR. WILLIAMS: I think I would be silly to ask you to give a curative instruction.
>
> THE COURT: So respectfully considering the totality of the testimony presented thus far I don't find that the comment made by Mr. Wilson was unduly prejudicial. Certainly it contains some prejudice but its not unduly prejudicial considering the whole picture that has been painted in the three days of trial so respectfully your request for mistrial is noted. ...

Tr.p. 784, l. 20 – p. 785, l. 11.

This Court finds that counsel was not deficient in making the strategic decision to not request the cautionary or curative instruction. The defense counsel was trying to limit its impact

about not focusing the jury on the prior prison experience of Lowman. The Court finds persuasive the following that this choice is a matter if strategy:

> As Judge Easterbrook has explained: "You can't instruct 'Do not draw inference X' without informing the jurors that X is one possible conclusion from the evidence. To tell jurors not to do something is to ensure they will do it, at least for a while.... [R]easonable persons may differ about whether the good such an instruction does with a thoughtful juror will outweigh the harm it can do by fastening attention on a link that may have been overlooked or forgotten." United States v. Myers, 917 F.2d 1008, 1010–11 (7th Cir.1990).

see also United States v. Gregory, 74 F.3d 819, 823 (7th Cir. 1996)("Indeed, the decision not to request a limiting instruction is solidly within the accepted range of strategic tactics employed by trial lawyers in the mitigation of damning evidence. If the lawyer cannot stop the evidence from being admitted, it is perfectly rational to decide not to draw further attention to it by requesting a motion for limiting instruction."); Williams v. Armontrout, 912 F.2d 924, 934 (8th Cir. 1990)("the decision not to request [a limiting instruction on the other crimes evidence] was a reasonable, strategic choice designed to avoid highlighting [defendant's] other undesirable activities").

This Court further finds Sixth Amendment prejudice has not been shown by counsel failure to request the curative instruction. As noted previously, the comment was limited and brief. The jury would hear in the stipulation about the prior record. This Court finds that since the brief comment was not unduly prejudicial the Applicant has failed to show a reasonable probability that the result of the proceeding would have been different. Confidence in the outcome has not been undermined by counsel Williams strategic decision.

i. **Failure to investigate potential plea resolutions Applicant's co-defendants had.**

a. **Joshua Darien**

Counsel Williams testified that he knew of the proffer to Wilson, but he did not know of specific amounts of time or any reductions in an agreement to Wilson and he was not

aware of any agreement with Darien. He knew that the state time Wilson and Darien faced was more than federal time they faced. Williams stated the only thing known by him was the federally issued proffer agreement to Wilson, but not an agreement on time. Williams had received from the federal public defender information on the two proffers about a week or two before the trial.[9] At this trial, the existence of an agreement related to downward departure with Darien was entered right before the redirect with Mr. Darien. Williams already knew that Wilson had a proffer but was not aware of anything more related to an agreement. Williams stated that he did not want to go back into it with Darien.

Solicitor Hubbard stated at the PCR hearing that he was not aware of any proffer agreement or proffers by Darien with the federal government prior to the trial.

How the Darien matter was presented at trial

During the trial, Solicitor Hubbard inquired of Joshua Darien about being interviewed by both the State and Federal Government. Darien acknowledged that he was cooperating on those charges. Tr. 945, l. 12-13. The following then occurred in the direct examination:

Q. Are there any promises by the Federal Government on what we're doing here today?

A. No Sir.

Q. And you know I'm the one in charge of your charges here?

[9] The Court notes that the federal plea agreement with Wilson was dated April 26, 2018. There is no evidence of the date of the proffer agreement or the actual proffer agreement with Darien was presented to this Court or the trial court. It is unclear if Williams is referring to the same matters that were presented to him two weeks prior was about the proffered statements made pursuant to the agreement or the proffered agreement. This Court notes that in the PACER online Federal Court Public Index in Mr. Darien's case the signed plea agreement was dated July 19, 2018, subsequent to the testimony in Mr. Lowman's trial in June 2018. The federal record shows that Daren entered a guilty plea in federal court on the same date. It is not clear whether there was an earlier plea agreement or if Solicitor Hubbard was misstating that it was actually a proffer agreement as Darien corrected him in the later questioning as to it being a proffer.

A. Yes Sir.

Q. What deals do you have with me?

A. None

Tr. 945, l. 7-21.

On cross-examination by counsel Williams, Darien stated that the federal charges pending against him were possession of a firearm and brandishing a firearm during a robbery under 18 U.S.C. §924(c), and impersonating law enforcement. Tr. 976, l. 21-25. Darien stated on the state side, he was charged with burglary first degree, armed robbery, two counts of kidnapping, grand larceny, possession of a firearm during a violent crime and impersonating a law enforcement officer. Tr. 977, l. 1-3. Darien also asserted that had not had any discussion with "them" about "downward departure" on the federal cases and asserted he had not heard that before. Tr. 977, l. 4-8.

After a brief redirect by Solicitor Hubbard there was a brief break. An issue related to federal charges was presented to the trial court. Solicitor Hubbard reported that he had just learned that Darien had entered into a "plea agreement" with the federal government with a downward departure and wanted the information known to the jury. Tr. 978.[10] The solicitor declared he had not been aware of it, although he knew they were entering discussion to talk about pleading. Solicitor Hubbard indicated that with the federal dispositions he wanted to stay out of it, indicating he had no involvement in the discussions or agreement by the federal government because he does not have any business (in the federal charges). Judge Griffith with this information decided to recall Darien to the stand since his lawyer was present. Tr. p.979, l.11-13.

[10] This may have been a misstatement as to it being a "plea agreement" rather than a "proffer agreement" with an expectation of a downward departure. As noted above, Darien referred to it was a proffer. See footnote 12 and 13 below.

In front of the jury, Solicitor Hubbard stated that the lawyer who represents Darien on the state and federal charges was present in the courtroom. Darien confirmed that he had a "proffer" with the federal government which indicated the possibility of a downward departure.[11] Darien further confirmed that with the state charges, the federal proffer has no effect on what the Solicitor does with the state charges. Tr. 980, l.5-17.[12]

On cross-examination by Williams, Darien stated the understood that the downward departure was based upon his testimony and will decrease the amount of time he will serve on the federal charges in the federal system. Tr. 981.

This Court finds that with respect to Joshua Darien, the Applicant has failed in his burden of proof to show Sixth Amendment prejudice – whether had Williams investigated the federal resolution of Darien federal matter, there was a reasonable probability the result of the proceeding would have been different. It is clear that the status of Darien plea negotiations with the federal government were presented to the jury.[13] It is also clear that there were no plea offers or

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[11] "A 'proffer agreement' is generally understood to be an agreement between a defendant and the government in a criminal case that sets forth the terms under which the defendant will provide information to the government during an interview, commonly referred to as a 'proffer session.'" State v. Wills, 409 S.C. 183, 186 n.4, 762 S.E.2d 3, 4 n.4 (2014) (Beatty, J., dissenting) (quoting United States v. Lopez, 219 F.3d 343, 345 n.1 (4th Circ. 2000)). Wills v. State, 437 S.C. 385, 389, 878 S.E.2d 330, 332 (Ct. App. 2022), reh'g denied (Oct. 20, 2022), cert. denied (May 24, 2023). It can also be referred to as a "cooperation agreement.

[12] The actual agreement with Darien was not made part of the record in the trial court or in this proceeding. The only agreement in the federal court public index PACER is the July 19, 2018 plea agreement between Darien and the U.S. Attorney's Office, signed and entered subsequent to Lowman's trial.

[13] This Court can take judicial notice of information in online government public court indexes. SCRE Rule 1005. see also Philips v. Pitt Cnty. Mem. Hosp., 572 F.3d 176, 180 (4th Cir. 2009) (courts "may properly take judicial notice of matters of public record"); Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989) ("We note that 'the most frequent use of judicial notice is in noticing the content of court records.'"). A review of the PACER Public index for the Federal Courts related to U.S. v. Darien, 8:18-00030 reveals that Darien entered a plea agreement dated and on July 19, 2018 after his testimony in the Lowman state court case. He pled guilty on

negotiations with the State or Eleventh Circuit at the time of Darien's testimony based upon the credible testimony of Solicitors Hubbard and Fuller. Since the jury became aware the status of the federal negotiations prior to its decision, the Court must conclude that Applicant has failed to show prejudice under the Sixth Amendment.[14]

b. James Wilson

This Court finds that counsel did not further investigate the negotiations between the federal government and state witness and codefendant Wilson beyond what he learned about the proffer and existence of the knowledge that Wilson was speaking with the federal government. This Court also finds that had he investigated further by seeking out the witness's federal counsel or Lowman's defense counsel he would have learned of the existence of the April 26, 2018 plea agreement which would allow the Federal Government to move for a downward departure if he complies with the terms which includes testifying truthfully in any court proceeding. From a review of the federal court's online court system PACER related to Darien's federal case, U.S. v. Wilson, 8:18-00030 – TMC, defense counsel could have learned the existence of the federal plea agreement as docket no. 80 on April 26, 2018, before the Lowman trial. The agreement would also require the federal government to request that any state charges not be prosecuted or that any state

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the day he signed the plea agreement on July 19, 2018 before U.S. District Court Judge Timothy Cain, with sentencing deferred. On January 17, 2019, the defendant is sentenced on both charges he pled to a total term of 135 months imprisonment and 5 years supervised release. $200.00 special assessment; $108,320.00 restitution. Defendant remanded to the custody of the United States Marshal.

[14] This Court does not address whether counsel was deficient in failing to investigate the federal court index or further inquire the federal defense team about the status of his federal case. This contact was implicitly with Lowman, not Darien's defense team who advised Williams about the proffers that Darien or Wilson had made to federal authorities, including the information about the Wilson proffered statement that the State had also provided in discovery to Williams. What is clear is the actual agreements for either Darien or Wilson were not provided to either the State or the defense by the federal prosecutor or federal defense counsel for any party.

sentence run concurrent with the federal sentence. However, the agreement made with the federal government was not binding on the State or 11th Circuit Solicitor's office.

As to Wilson, as set more fully below in ineffective assistance allegations (j) and prosecutorial misconduct allegation (b), the Applicant's counsel, as well as the State, were aware of the fact that the witness Wilson had made a statement to the federal government pursuant to a proffer agreement with the federal government. However, neither Williams or Hubbard were aware that there had been a plea agreement between federal government and Wilson prior to or during the trial. The record shows that counsel with the knowledge of the Wilson proffer statement did not inquire about the Wilson's proffer agreement when that he had knowledge of the statement's existence at the trial with Wilson.[15]

This Court must find that Sixth Amendment prejudice has not been shown. In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U.S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The

[15] A review of the PACER Public index for the Federal Courts related to U.S. v. Wilson, 8:18-00030 reveals that Wilson entered a guilty on the day he signed the plea agreement on April 26, 2028 before U.S. District Court Judge Timothy Cain. On January 17, 2019 , the defendant is sentenced on both charges he pled to a total term of 135 months imprisonment and 5 years supervised release. $200.00 special assessment; $108,320.00 restitution. Defendant remanded to the custody of the United States Marshal.

likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86. Importantly, Strickland stated the following:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. *If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.*

Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674 (1984) (emphasis added).

Although the information about the federal plea agreement could have been used to impeach the witness had the Applicant's counsel discovered it from the federal sources, this Court must find the failure to do did not undermine confidence in the outcome. Importantly, the federal plea agreement was not with the State and Solicitor's office related to the State charges on Wilson. This would have been clarified by Wilson as it was with Darien in his later testimony. The same potential situation that Wilson had was the same situation Darien had for a downward departure if he testified truthfully in any court proceeding, including state court proceedings.

This Court has determined that the only difference to the information was that Wilson had already pled guilty already according the federal court public index whereas Darien had not and that neither had been sentenced. Nevertheless, even the federal offer related to the requirement of truthful testimony in state court could result in a downward departure in the pending federal charges and sentence, this Court finds that after the jury received similar information in Darien's testimony, the jury still convicted Lowman. The evidence from Darien and Wilson at trial was

similar as to their roles and the roles of Lowman and Goodwin. As noted in the earlier factual summary there was additional corroborating evidence tying Lowman to the crime including the GPS tracking of Lowman in the area of the crime, the evidence showing the conspirators being together in the area at stores when matters were being purchased, and the connection between the phone used by Applicant and Wilson during the crime for communication. Simply put, there was independent corroborating evidence which made further credibility issues with Wilson mitigated. Wilson was already impeached during his testimony by the defense counsel related to his inconsistent statements that he had given to law enforcement earlier as compared with his trial testimony. This Court finds that the Applicant has failed to prove ineffective assistance of counsel because he has failed to prove Sixth Amendment prejudice.

j. **Failure to cross-examine Wilson concerning the federal plea resolution he had entered several months before the trial.**

The Applicant complained that counsel cross-examination of Wilson was error. Lowman asserted that Wilson testified freely that there was no deal. However, Lowman stated he learned after his conviction that there was a deal with Wilson months before his testimony. Lowman claimed that there was a deal by Wilson with the federal government and the 11th Circuit. Lowman claimed that trial counsel did not investigate this and he felt that it was key to his case. Lowman stated that if counsel had proper evidence he would have cross-examined him and impeached Wilson's testimony on the existence of a deal which he denied. Lowman stated the prosecution had denied knowledge of any deal at trial.

On cross-examination in this hearing, Lowman confirmed that before trial he did not know of any plea deal between South Carolina and the codefendants. However, Lowman stated that counsel informed him that there was a statement given to federal authorities by Wilson. Lowman

learned of the proffer statement given to him by the government before the trial. He and counsel had that information of the proffer by at least Wilson prior to the trial. Lowman knew there was contact between co-defendants and federal government. Lowman knew that they were not prosecuting Wilson for the burglaries.

Counsel Williams stated that his strategy was to cross up the witnesses and get the codefendant witnesses to say inconsistent things. Williams claimed that he was essentially trying to dispute what the law enforcement officer said. His strategy was to show the lack of footprints, DNA and casings in the car. Counsel stated that he was aware of the proffer agreement but was not aware of any plea agreement with the federal government.

Solicitor Hubbard as set more fully below on the prosecutorial misconduct claim was unaware of the federal plea agreement at the time of trial. More importantly, Hubbard had made no deals with anyone related to the case concerning charges or sentences. Simply put, the agreement was only with the federal government.

This Court finds that at the time of the June 2018 trial, Solicitor Hubbard had made no agreement with James Wilson or any of the codefendants related to charging decisions or sentencing consideration. Solicitor Hubbard as well as counsel Williams and Applicant were aware of the existence of a proffer agreement between the federal government and Wilson by the fact that they were aware that he had given a proffer statement to the federal government. This Court also finds that neither the 11th Circuit Solicitor's Office nor defense counsel Williams were aware of the existence of the April 26, 2018 federal government plea agreement (or guilty plea) related to the federal charges.

In viewing counsel's conduct at the time of the trial as required under Strickland, counsel had no knowledge about the existence of federal plea agreement.[16] As noted above, without the knowledge of the existence of the plea agreement, counsel did not err in inquiring about the plea agreement in speculation about its existence. Counsel was not deficient in failing to do so. See Moss v. Hofbauer, 286 F.3d 851, 864–65 (6th Cir.2002) (holding that speculation as to possible lines of cross-examination is insufficient for ineffective assistance of counsel where no evidence was presented on how witness would have testified had the cross-examination been pursued). Matylinsky v. Budge, 577 F.3d 1083, 1093 (9th Cir. 2009) (counsel cross-examined jail inmate sufficiently to put inmate's credibility thoroughly at issue and extra impeaching would not have changed result of trial). See also Woods v. Sinclair, 655 F.3d 886, 910 (9th Cir. 2011) (ample impeachment existed which overcame alleged deficiencies in an overwhelming evidence case); Hayes v. Ayers, 632 F.3d 500, 519 (9th Cir. 2011)(actual cross-examination conducted gave ample opportunity for the jury to evaluate the witness); Little v. Johnson, 162 F.3d 835, 861 (5th Cir. 1998) (record showed vigorous cross). The Ninth Circuit also said that the defendant had failed to show that the result would be different with further cross-examination (U.S. v. Claiborne, 870 F.2d 1463, 1469 (9th Cir. 1989)); Richie v. Mullin, 417 F.3d 1117 (10th Cir. 2005)

If the Court assumes, despite counsel's lack of knowledge about the April 26, 2018 plea agreement, that witness Wilson would have revealed it, for the reasons set forth above in the earlier

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[16] See also Matthews v. Workman, 577 F.3d 1175, 1191 (10th Cir. 2009) recognizing a strategic reason not to open up unfavorable evidence, a strategy also recognized by the Supreme Court in Wong v. Belmontes, 558 U.S. 15, __, 130 S.Ct. 383, 388-89, 175 L.Ed.2d 338 (2009), reh. den. __ U.S. __, 130 S.Ct. 1122, 175 L.Ed.2d 931 (2010). The classic cross-examination error – if you don't know the answer don't ask – did not lead to ineffectiveness in Campbell v. U.S., 364 F.3d 727, 734-35 (6th Cir. 2004) where the question was isolated and part of an overall challenge to credibility. Ineffective cross-examination allegedly eliciting damaging information was rejected in Janosky v. St. Amand, 594 F.3d 39, 46 (1st Cir. 2010) where the court found a plausible strategy to elicit the information.

section, the Applicant had failed to show prejudice under Strickland. Independent of Wilson's testimony, there was corroboration of many of the information he revealed, as well as Darien's testimony that the jury had accepted. Wilson was also impeached based upon his inconsistent statements. The failure to question Wilson about the potential existence of the plea agreement does not undermine confidence in the verdict. Further for the additional reasons set forth in the preceding allegation, prejudice has not been shown. The allegation must be dismissed.

k. Failure to argue pre-trial that there was no reasonable suspicion backing the traffic stop.

This Court finds that the trial court found that reasonable suspicion to stop the vehicle existed because the officer had knowledge that the vehicle was uninsured as required by South Carolina law (S. C. Code § 56-10-220,225)[17] and had tinted windows that precluded his viewing

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[17] § 56-10-225. Proof of insurance and financial responsibility in vehicle; penalties.

(A) A person whose application for registration and licensing of a motor vehicle has been approved by the Department of Motor Vehicles must maintain in the motor vehicle at all times proof that the motor vehicle is an insured vehicle in conformity with the laws of this State and Section 56-10-510.

(B) The owner of a motor vehicle must maintain proof of financial responsibility in the motor vehicle at all times, and it must be displayed upon demand of a police officer or any other person duly authorized by law. Evidence of financial responsibility may be provided by use of a mobile electronic device in a format issued by an automobile insurer. This section does not require that an automobile insurer issue verification concerning the existence of coverage it provides an insured in an electronic format. Information contained or stored in a mobile electronic device presented pursuant to this subsection is not subject to a search by a law enforcement officer except pursuant to the provisions of Section 17-13-140 providing for the issuance, execution, and return of a search warrant or pursuant to the express written consent of the lawful owner of the device.

(C) A person who fails to maintain the proof of insurance in his motor vehicle as required by subsection (A) is guilty of a misdemeanor and, upon conviction, is subject to the same punishment as provided by law for failure of the person driving or in control of a motor vehicle to carry the vehicle registration card and to display the registration card upon demand. However, a charge of failing to maintain proof that a motor vehicle is insured must be dismissed if the person provides proof to the court that the motor vehicle was insured on the date of the violation. Upon notice of conviction, the department shall suspend the owner's driver's license until

in the vehicle in violation of state law (56-5-5015). The record supports that counsel did not act deficiently in making his unsuccessful objection at trial in the pretrial hearing.

In pretrial proceedings, the trial judge addressed the stop of the Applicant's Mercury Marquis prior to his arrest. Tr. 141-142.

The State asserted that the stop was a valid stop. The solicitor urged that the law enforcement had sufficient information to determine that there was reasonable suspicion to stop the vehicle and once the vehicle is stopped it determined that he was driving upon suspension (DUS) which lead to the arrest of and ultimately the inventory search. The State asserted reasonable suspicion developed from a series of facts. Tr. p.130-132, 136-138.

The evidence at the pretrial hearing before Judge Griffith on the Terry stop was that James Rutland of Hook and Book, a repossession company, had a GPS tracker on the Mercury Grand Marquis that Lowman was driving that night. The reason to repossess was because there was no insurance on the vehicle. Tr. 100. Rucker located the vehicle that he was tracking that night between 10:30 and 11:00 p.m. between a golf course and the airport in Saluda. Tr. 96. Rucker stated he went up to the parked vehicle around midnight and knocked on vehicle without a response and attempted to see into the vehicle with a flashlight but was unable to see anything because the tint on the window was so dark. Tr. 99. He could not see that there was anyone in the vehicle. Tr. 99. He did not attempt to move the vehicle from that location because he feared he would tear up the golf course or get stuck. Tr. 100. As Rucker was talking in his wife, the vehicle left the area toward Johnston. Tr. 100-101. After it appeared to Rucker that Lowman was on to him, he saw a

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satisfactory proof of insurance is provided. If at any time the department determines that the vehicle was without insurance coverage, the owner's registration and driving privileges will be suspended pursuant to Section 56-10-520.

law enforcement officer parked and went and talked to her. Tr. 102. The officer called others to the scene. Rucker told the officer that the car had no insurance, and it became a law enforcement issue. Tr. 103. He noted on his GPS tracker that the car was headed toward Ward. Tr. 103. While he continued tracking the route of the vehicle Rucker let the officers know its location. Tr. 105. He saw the vehicle stopped by blue lights, but did not go up to the vehicle. After a while, law enforcement came up to him and told him he was able to pick up the vehicle and haul it to his property. Tr. 106. He did and locked it up.

Deputy Austin Harding testified at the Terry stop hearing that he had a conversation that evening with a repo man about a car with a lack of insurance. Tr. p. 114-114. After being advised of it travel route by the repo man, he saw the vehicle as it passed by. Tr. 115. When the deputy passed the vehicle, he noticed when he turned his bright lights on, he could not see inside the vehicle. Tr. p.116, l. 6-9. At that point, Deputy Harding activated his blue lights. Tr. 116, l.8-25. After traveling a short way, the vehicle finally came to a complete stop across from some railroad tracks. Tr. 117.

Deputy Harding indicated before he could say anything on his radio, the driver had exited his vehicle and the deputy exited his and asked Lowman to show his hands. He approved Lowman to get a driver's license, personal information, vehicle registration, and an insurance card. At that point, Lowman produced a State ID and indicated he did not have a driver's license. Tr. 119, l. 1-12. The deputy returned to his vehicle and learned his license had been suspended from failing to pay traffic tickets. Tr. 119. At that point, Lowman was arrested for driving under suspension. Tr. 119, l. 16-23. Dispatch also advised the deputy that Lowman was a violent offender for his own safety and the others. Tr. 120.

Deputy Harding stated after Lowman was placed in custody, pursuant to Johnston written policy they inventoried the vehicle. Tr. 120-121. In the vehicle, he found marijuana, an open liquor bottle, and a black box with 13 rounds of nine-millimeter ammo. Tr. 121, l. 8-17. The deputy also issued a warrant for the window tint to show the reason for attempting to stop the vehicle. Tr. 121, l. 19-25. Deputy Harding confirmed he saw the windows were extremely dark and he could not see in them. Deputy Harding indicated that he would have still made the stop due to the tint even if he had not talked to the repo man about the tint. Tr. 122. Deputy Harding also took into account for the stop that driving without insurance is illegal which was a reason why he acted in making the stop. Tr. 122-123.

The Applicant argues that counsel was ineffective in failing to argue that the evidence of the traffic stop was inadmissible due to a lack of reasonable suspicion. He contends that the officer's assertion that there was reasonable suspicion to stop based upon the tinted windows. See S.C. Code Ann. §56-5-5015. [18] He asserts that counsel did not follow-up to preserve the issue.

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[18] In its pertinent part, Section 56-5-5015 states:

§ 56-5-5015. Sunscreen devices.

(A) No person may operate a motor vehicle that is **required to be registered in this State on any public highway**, road, or street that has a sunscreen device on the windshield, the front side wings, and side windows adjacent to the right and left of the driver and windows to the rear of the driver that do not meet the requirements of this section. If no after-factory installed sunscreen device has been added to the window surface, the provisions of this section regarding light transmittance do not apply.

(B) **A sunscreening device must be nonreflective** and may not be red, yellow, or amber in color. A sunscreening device may be used only along the top of the windshield and may not extend downward beyond the AS1 line. If the AS1 line is not visible, no sunscreening device may be applied to the windshield.

(C) A single sunscreening device may be installed on the side wings or side windows, or both, located at the immediate right and left of the driver and the side windows behind the driver. The sunscreening device must be nonreflective and the combined light transmission of the sunscreening device with the factory or manufacturer installed sunscreening material must **not be less than twenty-seven percent**.

Applicant claimed it was a good presentation but he did not preserve it for appeal. Lowman learned in a letter he received from appellate counsel Dudek that it was not appealable because counsel failed to object when the fruits of the search were introduced.

On cross-examination, the Applicant admitted that Counsel did object to traffic stop. The record showed that there was a Terry hearing occurred with two witnesses. Lowman admitted that that after the hearing, Solicitor Hubbard argued that traffic stop was consistent with the law, and the tinted widow was a factor in asserting reasonable suspicion. It was not disputed that his vehicle had tinted windows and that his license was suspended at the time. Lowman acknowledged that they were authorized to arrest him at the time for those offenses. Further, Lowman admitted he was not the owner of the vehicle at the time. However, Lowman asserted that law enforcement was not permitted to take the vehicle because it was on private property and his mother could not have driven it. Lowman further acknowledged that it was an authorized inventory search. During the search, they found the bullets in trunk in Wilson's bag. Further, Lowman admitted that shell casings were inside the car. At trial, the judge found that there was reasonable suspicion under state law. Lowman noted that the officer testified at the hearing that he was going to pull the vehicle over regardless, so his testimony would speak for itself.

Lowman also acknowledged that counsel Williams objected to chain of custody. Tr.p. 517. Counsel Williams testified that his strategy was that there was no real basis for the Terry stop. However, his motion was unsuccessful. The reporting officer could not see who was in the vehicle

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(D)(1) A sunscreening device to be applied to the rear-most window must be nonreflective and have a light transmission of not less than twenty percent. If a sunscreening device is used on the rear-most window, one right and one left outside rearview mirror is required. . . .

S.C. Code Ann. § 56-5-5015.

and had information that someone was attempting to tow the vehicle because of an insurance issue. In addition, the Applicant did not have a driver's license so he could not be driving the vehicle, therefore the vehicle had to be towed away which resulted in the inventory issue. Williams stated he did not know if issue was adequately preserved for appeal. He stated he did not work on appeal.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The stopping of a vehicle and the detention of its occupants constitute a seizure and implicate the Fourth Amendment's prohibition against unreasonable searches and seizures. State v. Butler, 353 S.C. 383, 389, 577 S.E.2d 498, 501 (Ct. App. 2003) (citing Delaware v. Prouse, 440 U.S. 648, 653-54, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)).

Our courts have held that in South Carolina, an officer may stop and briefly detain the occupants of a car without treading on Fourth Amendment rights, even without probable cause to arrest, if he has a reasonable suspicion that the occupants are involved in criminal activity. Id.[19] (citing State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001)). "[A] policeman who lacks probable cause but whose observations lead him reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke that suspicion." State v. Nelson, 336 S.C. 186, 192, 519 S.E.2d 786, 789 (1999) (citing Berkemer v. McCarty, 468 U.S.

[19] See § 23-6-145. (Traffic stop by commissioned officer or uniformed officer; requirement of reasonable belief of violation of law: A commissioned officer or a uniformed officer of the department may, upon reasonable belief that any vehicle is being operated in violation of any provision of statutory law, require the driver thereof to stop and exhibit the registration card issued for the vehicle, the individual's driver's license, and submit to an inspection of such vehicle and license.)

420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)). "The term 'reasonable suspicion' requires a particularized and objective basis that would lead one to suspect another of criminal activity." Woodruff, 344 S.C. at 546, 544 S.E.2d at 295 (citations omitted). In analyzing reasonable suspicion, "it is entirely appropriate for courts to credit the practical experience of officers who observe on a daily basis what transpires on the street." State v. Wallace, 392 S.C. 47, 52, 707 S.E.2d 451, 453 (Ct. App. 2011) (citing United States v. Branch, 537 F.3d 328, 336-37 (4th Cir. 2008)).

"In determining whether reasonable suspicion exists, the whole picture must be considered." Woodruff, 344 S.C. at 546, 544 S.E.2d at 295 (citations omitted). "Factors that are alone consistent with 'innocent travel' can, when 'taken together' produce a reasonable suspicion of criminal activity." Wallace, 392 S.C. at 52, 707 S.E.2d at 453 (quoting United States v. Sokolow, 490 U.S. 1, 9, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989)). "In applying the concept of reasonable suspicion to the various facts of a case, '[i]t is the entire mosaic that counts, not single tiles.' " Id. (quoting United States v. Whitehead, 849 F.2d 849, 858 (4th Cir. 1988)). See State v. Rowland, No. 2021-000822, 2024 WL 3882109, at *3–4 (S.C. Ct. App. Aug. 21, 2024).

This Court must find that defense counsel performed within the standards of competence for defense counsel in the manner he handled the objections to the stop. Evidence was presented to the Court that there existed reasonable suspicion based upon the knowledge that the vehicle did not have insurance and there were tinted windows that restricted viewing. Neither deficient performance nor prejudice under Strickland was shown. Evidence from the stop and its fruits was admissible into evidence. The allegation must be dismissed.[20]

[20] The Court also finds that counsel was not deficient related to the inventory search. "For an inventory search to be valid, the vehicle searched should first be in the valid custody of the law enforcement officers conducting the inventory." United States v. Brown, 787 F.2d 929, 931-32

l. **Failure to argue pre-trial that there was no probable cause to believe an offense was committed because of the tinted windows.**

The Applicant claims that counsel failed to argue that there was no probable cause to believe a crime had occurred because of the tinted windows. As stated above, the lawful stop was made based upon "reasonable suspicion" based upon the information the officer had received about the vehicle being uninsured – violation of state law and his viewing of the presence of heavily tinted windows that did not allow his viewing. The test for a Terry stop as noted above is not "probable cause," but "reasonable suspicion. Counsel was not deficient in making an improper argument.

m. Failure to challenge Applicant's arrest based upon a lack of exigent circumstance.

The Applicant's arrest was based upon the knowledge that Applicant was driving without a license due to a suspension pursuant to S.C. Code §56-1-460. The presence or absence of exigent circumstances is not the legal standard for the arrest. The Applicant failed to show how counsel was deficient or prejudicial under Strickland.

n. Failure to challenge the chain of custody regarding the bullets. (Tr. 517).

Applicant asserted that counsel should have objected to the chain of custody of the bullets and from the stop. The Applicant has failed in his burden of proof to show ineffective assistance of counsel on this specification.

(4th Cir. 1986) (citing Opperman, 428 U.S. at 374, 96 S.Ct. at 3099, 49 L.Ed.2d at 1008). "The question ... is ... whether the police officer's decision to impound was reasonable under the circumstances." Brown, 787 F.2d at 932; see also United States v. Bullette, 854 F.3d 261, 265 (4th Cir. 2017) ("An inventory search of an automobile is lawful (1) where the circumstances reasonably justified seizure or impoundment, and (2) law enforcement conducts the inventory search according to routine and standard procedures designed to secure the vehicle or its contents.") (citing Bertine, 479 U.S. at 371-76, 107 S.Ct. at 741-43, 93 L.Ed.2d at 745-48). State v. Miller, 423 S.C. 95, 814 S.E.2d 166 (2018) (inventory procedures approved).

On cross-examination, Lowman admitted that Williams objected to chain of custody. Although he admits an objection had been made at the time which was denied by judge, he thinks that appellate counsel Dudek told him it was not preserved on appeal in addition to the lack of merit. Counsel testified that he did challenge the chain of custody but was unsuccessful.

The record shows that objections were made by the defense counsel to the chain of custody at Tr.p. 517 and Tr.p. 565-571. The box of 9 millimeter ammo was introduced at Tr.p. 517. The items recovered from the Mercury Grand Marquis were introduced as state Exhibit 76 (Lowman's S.C. identification card); Robert Goodwin's ID (State's Exhibit 75; Abin Lee Lowman's ID (State's Exhibit 76); James Christopher Wilson's ID (State's Exhibit 78; the walkie-talkie (State's Exhibit 77); the nine millimeter shell casing (State's Exhibit 79); the cell phone (State's Exhibit 80); the white box recovered (State's Exhibit 81); several sets of gloves (State's Exhibit 82); another pair of gloves (State's Exhibit 83); and the jacket and the black T-shirt (State's Exhibit 84). At the time of the ultimate introduction, these items were admitted without objection. Tr.p. 575,l. 15-17; Tr.p. 576, l. 2-18.

The record reveals that the bag of bullets, State Exhibit 72 were recovered in an inventory search of the 2003 Mercury Marquis that the Applicant had been driving when he was arrested with driving under suspension. The record reveals that that under policy a search was done under the liability policy. The search was done by then Corporal James Mosley and Patrolman Dublin of Johnston Police Department. Tr.p. 513. Mosley testified at trial that when he searched the truck, they found a box of bullets with 13 bullets in the box that held 50 bullets in the truck that he took possession. Tr.p. 515. Mosley testified that he put the box in the bag that it is the box is current in. Mosley testified that his writing was on the bag which also mention Dublin because he was the one who found the box. Tr.p. 516. Mosley stated that since she found the box, the chain of custody

shows it goes from subject to Dublin to evidence, even though Mosley stated he was the one who put it in the bag.

At that point, the State offered to introduce the box of bullets as State Exhibit 72. Defense counsel Williams objected asserting that the chain had not been established, implicitly because Patrolman Dublin who found the bullets had not testified. Tr.p. 517. The Court overruled the objection citing State v. Valentine, 386 S.C. 499, 502, 689 S.E.2d 608, 609 (2010). The Court found that the small gaps in the chain can be filled in, noting the short step between Dublin and Mosley. Id.

This Court finds that the Applicant has failed to show deficient performance because he did object to the chain of custody. Alternately, even if the Applicant asserts there was some deficiency in the objection, Sixth Amendment prejudice cannot be shown because there is no reasonable probability that the result of the proceeding would be different. The box was admissible as the chain was properly presented. The reliance on Valentine addressing the correctness of the decision was proper. In Valentine, the Supreme Court addressed this similar issue as follows: "As we explained in Sweet, [374 S.C.1, 647 S.E.2d. 202 (2007)] "Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." 374 S.C. at 7, 647 S.E.2d at 206 (internal citation omitted). State v. Valentine, 386 S.C. 499, 502, 689 S.E.2d 608, 609 (2010). The allegation is denied.

o. Failure to object to jury instructions being given before closing arguments.

The applicant contends that counsel should have objected to the jury instructions being given before closing arguments. The Applicant contends that the jury should have received proper instructions after the argument. Lowman felt that the jury may have taken things out of context.

Lowman felt that the trial judge should have given instructions a different way. Lowman did not understand why instructions were given when they were (before closing arguments) and felt the jury did not either. Lowman contended to a normal person, it seemed he was doing what counsel was supposed to do as counsel.

On cross-examination, Lowman confirmed that the Judge decided that he was going to charge the jury in advance of closing arguments. Lowman also admitted that there was no objection to this. Lowman also confirmed that there were no requests by defense or prosecution to supplement the instructions. He confirmed that his counsel could have objected based on need, but that apparently his lawyer felt there was no need to object to the instructions.

Counsel Williams stated that he did not elect to do this. He testified several judges have a practice of doing this. He felt it cuts into closing arguments, but counsel can tailor arguments around the instructions. Personally, Williams stated he does not like it and it was a new practice at the time. However, he opined that it was not legally wrong.

This Court finds that counsel was not deficient in failing to object to the trial court's decision to make its jury instructions prior to the parties' closing arguments. The trial judge advised that parties the he was doing it differently than his usual practice. Tr.p. 1001. The trial judge indicated that he had advised both lawyers concerning this. Tr.p. 1001-1002. The trial court proceeded to make his instructions. Tr.p. 1002-1023. At that point, the court had side bar communications with the lawyers. The trial court then indicated that the lawyers thought the instructions as given were sufficient. The trial court further confirmed that they had discussed the instruction earlier in a pre-instruction conference, printed them out, had the lawyers read them over. The trial court further indicated that it was providing a written copy of the instructions to the jurors as well. Tr.p. 1024, l. 13-24. This Court finds that the timing of the jury instructions and

closing arguments did not violate state law or procedure. The Applicant has failed in his burden of proof to show deficient performance. Alternately, the Applicant failed to prove prejudice under Strickland. The jury was fully instructed on the law after a pre-instruction conference and counsel were given the opportunity to request appropriate instructions prior and subsequent to the instructions. He has failed to show that there is a reasonable probability the result would have been an acquittal had the timing of the instructions been different. It must be dismissed.

p. **Failure to object to Applicant's statements to the police on hearsay grounds. (Tr. 991-93).**

Lowman also contends that counsel should have objected to the statement he made to the police on hearsay grounds. He complained that the statements made him appear that he did it.

On cross-examination, it was clarified that the reference is to the Applicant's statement on Tr.p. 991-993.[21] Lowman confirmed that he mentioned having gone fishing, that he left car running, repo man appeared, Applicant left and was arrested. Importantly, after SLED Agent Padgett mentioned the there was a GPS tracker of his car, Lowman dropped his head and said he would get "1000 years for this." Tr.p. 991, l. 19-20. Lowman asserted that he wanted to have these statements objected to as hearsay. However, the Applicant then recanted at the hearing and stated

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[21] SLED Agent Padgett testified as follows about Lowman's response to a question about the night or early morning hours of March 8, 2017 after being given his Miranda warnings after his arrest:

> A. He admitted to being at Persimmon Hill Golf Course or near Persimmon Hill Golf Course shortly after midnight. He advised us he was fishing in a pond. He advised that a repo man showed up at the golf course. He had left his car running because he was having issues with it. While he was fishing he had left his car running. The repo man showed up and left. He then ran back to his car and left. He was followed to Johnston by the repo man. Then he went to Ridge Spring and then back to Johnston where he was stopped and arrested on an unrelated charge to this.

Tr.p. 991, 6-15.

that he never made the statements and that it was only the police saying he said it. It was pointed out to Lowman that his statement was not hearsay as a matter of law, it was pointed out he could have testified to say he did not give the statement. However, he waived his right to testify after the statement had come in. Lowman stated that he trusted his lawyer and that he would do what he was supposed to do. Lowman stated he would have testified to prove these issues but was never told by counsel to do so. Lowman stated he did not know that he could only disprove the statements were his was by testifying at trial. He stated as a matter of fact, he was the only one who could dispute it, but it was also possible that jury could not trust the officer, but they believed the officer in the end.

Counsel Williams testified that there was no reason to object. The statement by Lowman was admissible as an admission. See SCRE, Rule 801 (d)(2) (admission by a party opponent). Counsel Williams stated that the Applicant acknowledged to him that he was at the pond fishing. If he had the Applicant testify, the jury would know he is at the pond fishing. Counsel Williams stated he would not have to put Applicant on the stand while also establishing he was in the area of the pond. Counsel stated that there were different ponds, and it was up to jury as to which one they thought he was at, proximity to scene differs. Counsel Williams testified that he used to play golf on that course every Saturday but has not in a while. Counsel noted that Applicant only said he was "at the pond", which could have been one of three. Counsel Williams noted he was ethically bound as to how to deal with the admission to him by his client and did not know exactly which pond.

This Court finds that counsel was not deficient in failing to object to the Applicant's inculpatory statement after Miranda warnings were give that he would get "1000 years for this" and acknowledged being in the area near the victims home that night fishing. This evidence was

admissible as a non-hearsay admission of a party-opponent under SCRE Rule 801(d)(2)(A). The rule related to statements which are not hearsay states in pertinent part that a statement is not hearsay if - : "2) Admission by Party-Opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity." Lowman statement to Padgett, which he now claims never occurred, was admissible against the Applicant. Counsel had no basis to object and was not deficient. He failed in his burden of proof to show deficient performance because the statement were not hearsay and prejudice under Strickland has not been shown.[22]

2. Prosecutorial Misconduct:

a. **Applicant believes prosecutorial misconduct occurred because of alleged falsehoods the investigators and Applicant's co-defendants stated at trial.**

Codefendant's knowledge of the area.

The Applicant complained that the prosecution committed misconduct based upon various alleged falsehoods the State presented at trial. In his testimony at the hearing, he suggested that evidence that he was the only person in the alleged conspiracy to commit burglary from "here" was error when there was also evidence presented though the State had evidence from a taxi driver that the others came into the area to buy drugs regularly.[23] He claims this contradicted the State's theory. However, it was presented through the testimony of Wilson and Darien at trial that a taxi

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[22] Although the statements were admissible as not hearsay, counsel Williams acted zealously in cross-examination by questioning why there was no written statement by the Applicant, nor an audio or video record of the statement made at the Edgefield County Sheriff's Department. Tr.p. 994-995.

[23] The Applicant presented at the hearing Applicant's Exhibit 5, a statement by an Aiken taxi driver Travis Legonz (sp) who claimed he had picked up two individuals on March 9, 2017 and took them to a Columbia bus station and said that they bring drugs to down to South Carolina every month. However, this did not specifically relate to the Edgefield or Saluda areas.

driver in Aiken got them a room at the Econo-Lodge during the cross-examination by Williams. Tr.p. 820-822(Wilson), Tr.p. 942- 943 (Darien)(direct by Hubbard), Tr.p. 962 (cross by Williams) (testimony concerning the fact that they were pick up by the taxi driver who bought the room at the motel). The State presented the testimony, as noted herein that Wilson and Darien had limited prior contact in Edgefield and Saluda areas. Wilson testified that he had never lived in South Carolina and before March 2017 had never been to South Carolina or Saluda. Tr.p. 691-692. Evidence was also presented that Darien had lived in a different part of South Carolina in Jasper County, but not been in the Edgefield or Saluda area. Tr.p. 691-692, 893-894. Evidence was also that Robert Goodwin was a family member of Lowman, but from Maryland. Tr.p. 692.

To the extent that the State's theory was that Lowman was from the area and knew the Tidwells, whereas the others were not from the area, this assertion by the Applicant does not show evidence of prosecutorial misconduct. A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's judgment. U.S. v. Bagley, 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). The knowing use of perjured testimony is subject to the materiality standard of review: "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 682, 105 S.Ct. 3375. Simpson v. Moore, 367 S.C. 587, 601, 627 S.E.2d 701, 708 (2006).

This Court must find that the Applicant has failed to show that the testimony related to the codefendant's limited or lack of knowledge of the Edgefield and Saluda areas was "knowingly false" by the State. The Applicant has presented no credible and admissible evidence to support this assertion. The allegation must be denied as to this specification.

Who armed the perpetrators.

The Applicant also contended that his counsel should have used information that had been provided in Applicant's Exhibit 6 concerning text messages, that he contends would have contradicted the State's theory that Applicant armed the codefendants. This Court has reviewed the texts set forth in the exhibit which shows a text " tomorrow is the big day" on March 2, 2017 and another March 2, 2017text concerning a sense that they gonna fight back I seen what they got today they got some bigger and better sh*t.." suggesting a shootout on March 3,2017. However, it is unclear what that is referring to because the home invasion was on March 8, 2017. Further, the record supports evidence of the purchase of ammo on March 6th and an earlier purchase of the Zastava pistol by Lowman earlier that week.

As above, the Applicant has failed to show knowing use of perjured testimony related to this assertion. In addition, to the extent he is claiming ineffective assistance concerning the use of the texts, the Applicant has failed to show how counsel was deficient and how, if the jury was aware of this information, the result of the trail would have been different to a reasonable probability.

Interviews with witnesses near crime scene.

The Applicant also introduced a statement by 11th Circuit investigator Jesse Quattlebaum concerning interviews he had on May 21, 2018 with Fred Wideman and May 23, 2018 with Colby Strickland These interview notes suggest that the evening before the incident Wideman's brother while in the golf course parking lot saw a vehicle similar to a Mercury or Crown Victoria pass by the golf course are at a low rate of speed multiple times which caused suspicion on incident and caused concern among the three brothers. Wideman indicated that he could not see who was driving or how many passengers. Colby Strickland indicated that the evening before the incident

between 5 and 5:30 PM, she saw a vehicle silver or cream colored Grand Marquis or Crown Victoria with a blue rag top at the intersection of Persimmon Drive and Highway 121. She advised the window was down and she could see a black male in the driver's seat and a black male in the passenger seat. She did not see the driver's face. The vehicle turned right toward Saluda. When she later left to go back toward Saluda she observed the same vehicle off the side of the road pointed in the direction of Persimmon Hill.

The Applicant contends that this statement is inconsistent with the State's theory. However, this was generally consistent with the State's theory as to when the conspirators arrive at the scene. Testimony was that during the daylight hours, on March 7, Lowman dropped off Wilson and Darien at the Tidwell's house between 4:30 and 5:00 pm or in the daylight while people were still playing golf. Tr.p. 735, 918-925. This information does not show that there was knowing use of false testimony or misconduct by the State. Although the statements may be viewed as not entirely consistent with the testimony, it does not suggest the evidence from Wilson or Darien was known to be false The allegation must be denied.

The Applicant also claimed the statement suggested that Ms. Strickland identified the driver. The Applicant claims that he had 18 inch hair at the time and asserted she could not have seen his face if the head was turned. The statement suggests that she could not identify the driver except by his race. The suggestion of an assertion that there was knowing use of false testimony at trial is without factual support as it relates to the potential testimony of Ms. Strickland.

Informant information and Detective Bleggi report and phone identity.

The Applicant also contends that misconduct is shown by Applicant's Exhibit 4 a report from Detective Chad Bleggi of the Montgomery County Department of Police who indicated that he had received information that Robert Goodwin was an organizer of the home invasion from

and informant and had a telephone with a contact number 240-474-6655.[24] The Applicant has failed to show how the proves the existence of prosecutorial misconduct or knowing use of perjured testimony by the fact that the phone was identified with Goodwin. Evidence was presented that Goodwin was involved in the incident and connected with Lowman. The phone was also referred to as Goodwin's cellphone used by Lowman. (See above below conclusions related to State Exhibit 80 incorporated herein by reference). The Applicant has filed to show prosecutorial misconduct concerning its use and presentation of evidence and argument at trial based upon that evidence. His assertion to the contrary is without merit.

b. For not disclosing that Wilson had entered a plea agreement months before Applicant's trial.

The Applicant alleges that the State committed prosecutorial misconduct in failing to disclose James Wilson's agreement with the federal government on charges arising from the same incident. At the PCR hearing the Applicant presented an April 26, 2018 styled plea agreement between the United States government through Assistant U.S Attorney Justin Hollway and James Wilson. In the agreement, it states that Wilson has agreed to plead guilty to counts 1 and 2 which charge a Hobbs Act robbery and brandishing a firearm in furtherance of a crime of violence. One of the requirements in the agreement at Section 6, p. 5 was to "be fully truthful and forthright with federal, state, and local law enforcement agencies by providing full, complete, and truthful information about all criminal activities about which he has knowledge." The agreement also addressed that the federal government agreed "to recommend that the defendant not be prosecuted or alternately be sentence to concurrent time for any similar or related state crimes stemming from the incidents on or about March 8, 2017 as long as the defendant complied with the plea

[24] This is the number associated with the Coolpad phone introduced as State Exhibit 80.

agreement Further the agreement set out it was only a recommendation and is not binding upon the 11th Circuit Solicitor's Office..." Agreement, Section 12, Merger, p. 12. The agreement was signed by Wilson's counsel Richard Vieth[25] as well as Wilson and the Special Assistant U.S. Attorney Holloway. The agreement does not include any signature of the solicitor's office. The Applicant contends that either State erred in failing to disclose because it was inconsistent with the testimony and had impeachment value under Brady v. Maryland.

During the trial, James Wilson, the Applicant's co-defendant, testified about his role in the burglary and robbery scheme. In the beginning of his testimony, he acknowledged that he was charged with burglary in the first degree, two counts of kidnapping, and criminal conspiracy. When asked by Assistant Solicitor Fuller about promises he answered as follows:

Q. Are you being promised anything to be here today?

A. No Ma'am.

Q. Any promises of leniency?

A. No Ma'am.

Q. Any threats?

A. No Ma'am.

Tr. p. 689-690.

The Applicant contends that these answers were incorrect due to the existing agreement between Wilson and the federal government. Solicitor Hubbard and Assistant Solicitor Fuller testified that they were only aware of the existence of a proffer agreement between the federal government with Wilson but were not aware of a plea agreement with either Wilson or the proffer agreement nor any plea agreement by with the U.S. Attorney's Office with Derian prior to the

[25] The record is silent whether counsel Vieth was present during Wilson's testimony.

trial. Solicitor Hubbard was clear that the he felt this was an important case in Saluda and felt it should be handled by the State and not the federal government. He thought the federal government was only looking at gun charges whereas the State had the heavy charges in his opinion. He did not want to hand it to the federal government to handle. Solicitor Hubbard stated that the State was going first in the case. Solicitor Hubbard was firm that he had no deals with anyone and no offers were extended by the State to anyone involved in the incident. Particularly there was deal by the State with James Wilson. Solicitor Hubbard stated that they do not negotiate until after the testimony and trial once the victims can have input. Solicitor Hubbard indicated he was not aware of the plea agreement with Wilson until after the trial and had not ever seen the particular plea agreement entered with the federal government. Solicitor Hubbard further indicated that he was not present at any federal court proceedings involving the codefendants. He did state, as the record reflects that Darien's federal lawyer was present during Darien's testimony.

Assistant Solicitor Fuller was of the same opinion that they were not aware of any plea agreement with Wilson at the time of trial but were aware of the proffer agreement. [Counsel Williams indicated that he was also aware of the proffer agreement with Wilson prior to the trial].

This Court initially finds that the responses made by Wilson to the questions by the Assistant Solicitor were not false based upon the Solicitor's understanding of the case, since he was unaware of any promise of leniency in this case – the actual question that was asked. The state was unaware, like they were unaware that there was an expectation of a downward departure on the pending federal sentence if he cooperated and testified truthfully in any case as set out in the federal plea agreement. This Court finds that there were no deals, no promises of leniency, and no agreements with the State on the state charges or sentencing prior to or during Wilson's testimony. Wilson truthfully said he was not promised anything to be that day to testify, no promises of

leniency and no threats. Wilson's plea agreement with the federal government was unknown to the 11th Circuit Solicitor's office. Further, there was nothing in the plea agreement with Wilson by the federal government that was binding upon the State as to how the State was to treat Wilson on his pending state charges. All that the federal agreement declared was that if Wilson was convicted of the state charges that the U.S. Attorney's Office would appear and request concurrent sentences or would recommend prior to any disposition that Wilson not be prosecuted by the State. As noted by Solicitor Hubbard wanted to have the State charges go first. What the State was aware and had provided the defense in discovery was the existence of a proffer agreement with Wilson prior to trial.[26]

First, as to prosecutorial misconduct, this Court finds as a fact that no member of the prosecution team was aware of the existence of the April 26, 2018 plea agreement (or guilty plea) or had any knowledge of its terms. Second, the State had no part in the federal plea agreement. Third, the State had not negotiated with Wilson and had made no promises with Wilson about charging decisions, pleas or sentencing consideration. Fourth, Wilson testified truthfully in response to the direct questions asked by Solicitor Fuller about the state case. Fifth, this Court finds that the existence of the federal guilty plea and plea agreement were available to both parties on the Federal Court Public Index, PACER as noted previously.

[26] On judicial notice of the online record of the Saluda County Clerk of Court, James Wilson pled guilty to burglary in the first degree, armed robbery, conspiracy, kidnapping (2), on January 17, 2019 and was sentenced by Judge Leticia Verdin to an aggregate fifteen years concurrent with any federal sentence with credit for time served. State v Wilson, 2017-GS-41- 1058, 1059, 1060. 1068, 1069).

In his argument, he initially urges that the failure to disclose the federal plea agreement was a Brady v. Maryland discovery violation. The recent decision in State v. Brown, 441 S.C. 464, 470–72, 894 S.E.2d 525, 528–29 (2023), reh'g denied (Dec. 12, 2023), is useful in setting the stage for viewing some of the issues presented here:

> In Brady v. Maryland, the United States Supreme Court held, "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The Court rationalized its holding to ensure the accused has a fair trial. Id.
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> Almost a decade later, the United States Supreme Court included witness testimony under the reach of Brady's holding: "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [Brady's] general rule." Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (quoting Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). The Court reaffirmed the need to have a finding of materiality under Brady. Id. ("We do not, however, automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict." (internal quotation omitted)). The Giglio Court restated the standard of materiality as any reasonable likelihood the testimony could have affected the jury's judgment. Id. Moreover, the Court has defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).
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> In Giglio, the defense discovered that the prosecution did not disclose a promise made to a key witness in exchange for testimony. 405 U.S. at 150–51, 92 S.Ct. 763. There, the testifying witness was a co-conspirator and the only witness linking the defendant to the crime. Id. at 151, 92 S.Ct. 763. An affidavit filed by the prosecution as part of its opposition to a motion for a new trial confirmed a promise that, if he testified before a grand jury and at trial, he would not be prosecuted. Id. at 152, 92 S.Ct. 763. The United States Supreme Court reasoned, "[T]he Government's case depended almost entirely on [the witness's] testimony; without it there could have been no indictment and no evidence to carry the case to the jury." Id. at 154, 92 S.Ct. 763. Ultimately, the Court reversed Giglio's conviction on these grounds. Id. at 155, 92 S.Ct. 763.
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> The United States Supreme Court then made certain: "Impeachment evidence ... as well as exculpatory evidence, falls within the Brady rule." Bagley, 473 U.S. at 676, 105 S.Ct. 3375. There, the Court reversed the judgment of the United States Court of Appeals for the Ninth Circuit and remanded the case for a determination regarding materiality. Id. at 684, 105 S.Ct. 3375. The prosecution

> promised its witnesses the "possibility of reward" if the information they gave helped convict the defendant. Id. at 683, 105 S.Ct. 3375. The Court found this gave the witnesses a personal stake in the defendant's conviction and further increased the incentive to testify falsely. Id. Importantly, the witnesses were not given firm promises or deals; rather, a mere possibility of favorable treatment was sufficient.
>
> Turning to the elements of the Brady test, a claim succeeds when "the evidence at issue is: 1) favorable to the accused; 2) in the possession of or known to the prosecution; 3) suppressed by the prosecution; and 4) material to the defendant's guilt or punishment." State v. Durant, 430 S.C. 98, 107, 844 S.E.2d 49, 54 (2020).

State v. Brown (Correy), 441 S.C. 464, 470–72, 894 S.E.2d 525, 528–29 (2023), reh'g denied (Dec. 12, 2023). In regard to Brady and impeachment evidence, "there is never a real Brady violation unless the non-disclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Strickler v. Greene, 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

The duty to disclose is limited to information in the possession of the government bringing the prosecution, and the duty does extend to exculpatory evidence in the files of police agencies of the government bringing the prosecution as the prosecution team. Commonwealth v. Puksar, 597 Pa. 240, 951 A.2d 267, 283 (2008); Commonwealth v. Lesko, 609 Pa. 128, 15 A.3d 345, 370 (2011) (applying Kyles v. Whitley , supra at 438, 115 S.Ct. 1555). "Brady requires information to be revealed only when it is 'possessed by the prosecutor or anyone over whom the prosecutor has authority.'" Zant v. Moon, 264 Ga. 93, 100, 440 S.E.2d 657 (1994).

Brady is not violated when the defendant knew or, with reasonable diligence, could have uncovered the evidence in question, or when the evidence was available to the defense from other sources. Commonwealth v. Smith, 609 Pa. 605, 17 A.3d 873, 902–03 (2011). See also Moon v. Head, 285 F.3d 1301, 1310 (11th Cir.2002) (adopting case-by-case analysis and holding that a Georgia prosecutor did not have constructive knowledge of evidence known to Tennessee

agencies, notwithstanding the fact that a Tennessee investigator was a witness in the Georgia trial, because the two states shared neither resources nor labor, Tennessee investigators did not act as agents for Georgia investigators, and the Tennessee investigators were not under the supervision of Georgia officials); United States v. Beers, 189 F.3d 1297, 1304 (10th Cir. 1999) (where there is no indication of a joint effort between state and federal governments, state's knowledge of impeachment evidence may not be imputed to federal prosecutor); People v. Leo, 249 A.D.2d 251, 252, 673 N.Y.S.2d 70 [no evidence of joint investigation and the People were not in control of Federal file ; United States v. Bermudez, 526 F.2d 89, 100, n. 9 [Jencks Act], cert. denied 425 U.S. 970, 96 S.Ct. 2166, 48 L.Ed.2d 793; contrast, People v. Rutter, 202 A.D.2d 123, 131, 616 N.Y.S.2d 598 (prosecutor was "afforded unfettered access" to documents generated by out-of-State police investigation). See also Lovitt v. True, 403 F.3d 171, 185–86 (4th Cir. 2005) (noting that although the prosecutor has a duty to learn of favorable evidence known to others acting on its behalf, a county prosecutor did not have duty to learn of cases in surrounding jurisdictions where its witness, allegedly a "professional snitch," testified on behalf of or cooperated with the government).

Although in Kyles v. Whitley, 514 U.S. 419, 436, 115 S.Ct. 1555, 1567, 131 L.Ed.2d 490, 508 (1995), the Supreme Court stated that "the individual prosecutor has a duty [under Brady] to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police," it is reasonable to surmise that persons "acting on the government's behalf in the case" refers to those over whom the prosecutor has authority. Whether a person is on the prosecution team and subject to the authority of the prosecutor depends in each case on the extent of interaction, cooperation, and dependence of the agents working on the case. Zant v. Moon, 440 S.E.2d 657 (Ga. 1994) (material in hands of foreign state official); Ferguson v. State, 226 Ga. App. 681, 684, 487 S.E.2d 467, 469 (1997) (Even though there was some degree of initial interaction

and cooperation between the FBI and the DeKalb County police, there was no evidence that the FBI or any of its agents worked for or was subject to the control or authority of the State prosecutor. Even assuming the FBI or any of its agents possessed information about Johnson's federal deal not possessed by the State, we decline to impute such knowledge to the State prosecutor in the absence of any evidence that the prosecutor had authority over the persons possessing such information. Moreover, Ferguson made no effort to obtain information about the federal deal from the FBI or other federal authorities, so he has not demonstrated that he was unable to obtain the information in the exercise of reasonable diligence). See United States v. Kern, 12 F.3d 122, 126 (8th Cir.1993) ("We do not accept the defendants' proposal that we impute the knowledge of the State of Nebraska to a federal prosecutor."); United States v. Aichele, 941 F.2d 761, 764 (9th Cir.1991) (finding no Brady violation because material sought was under control of state officials, not federal prosecutor); United States v. Walker, 720 F.2d 1527, 1535 (11th Cir.1983) (declining to impute knowledge of deal between witness and state officials to the federal prosecutor); cf. United States v. Avellino, 136 F.3d 249 (2d Cir.1998) ("[K]nowledge on the part of persons employed by a different office of the government does not in all instances warrant the imputation of knowledge to the prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require us to adopt a monolithic view of government that would condemn the prosecution of criminal cases to a state of paralysis." (internal quotation marks and citation omitted)).

As for the federal plea agreement with Wilson, this Court must find that there was no Brady violation because it did not custody or control of the information as a state prosecuting agency. The state prosecutors did not have the material in their possession, and defendant provides no evidence that the Solicitor's Office knew of its existence. Information possessed by other branches

of the state government, including investigating officers, is typically imputed to the state prosecutors of the case. However, this Court declines to extend this principle for state prosecutors to exculpatory materials in the possession of the federal government, a separate sovereign. It is unrealistic to expect state prosecutors to know all information possessed by federal officials affecting a state case, particularly when they may not have access to the information as Special Assistant U.S. Attorney in the federal prosecution. This Court holds hold that the federal government's knowledge and possession of potential impeachment evidence cannot be imputed to a state prosecutor for purposes of establishing a Brady violation. Therefore, the prosecution did not suppress the alleged Brady material. See United States v. Beers, 189 F.3d 1297, 1304 (10th Cir. 1999).

Alternately, this Court must find that the information was available on the Federal Court Pacer website as set forth under judicial notice in the earlier part of the Order. In Anderson v. Leeke, 271 S.C. 435, 248 S.E.2d 120 (1978), we held where exculpatory evidence is equally available to the accused, the State has no obligation to furnish such evidence. State v. Cox, S.C., 266 S.E.2d 784 (1980): State v. Penland, 275 S.C. 537, 540, 273 S.E.2d 765, 766–67 (1981); accord United States v. Meregildo, 920 F.Supp.2d 434, 445 (S.D.N.Y. 2013) (explaining that in the context of evidence the government failed to disclose during the criminal discovery process, "there is no remedy for a defendant who possesses or has access to the information he claims was withheld"). Cf. Earley v. State, 418 S.C. 255, 269, 792 S.E.2d 226, 233 (2016) (recognizing the Anderson precedent). But see Anderson v. State, 709 F.2d 887 (4th Cir. 1983) (no general public records exception to Brady). "[W]hen the information is readily available to the defense from another source, there simply is nothing for the government to 'disclose.' " Matthews v. Ishee, 486 F.3d 883, 891 (6th Cir.2007). People v. Snow, 2012 IL App (4th) 110415, ¶ 39, 964 N.E.2d 1139,

1152, as supplemented on denial of reh'g (Mar. 5, 2012) (unrelated to federal plea agreement). Brady is not violated when the defendant knew or, with reasonable diligence, could have uncovered the evidence in question, or when the evidence was available to the defense from other sources. Commonwealth v. Smith, 609 Pa. 605, 17 A.3d 873, 902–03 (2011). Since it was available to both, there was no Brady violation by the Solicitor not seeking out information beyond the state prosecuting authorities through the federal court system and providing it to the defense which had a similar ability to do so, particularly where Lowman had federal charges pending against him at the same time.

Finally, the Applicant asserts prosecutorial misconduct in failing to correct the testimony of Wilson related to his questions about promises and leniency. The failure to correct knowingly false evidence is as reprehensible as its presentation. Washington v. State, 324 S.C. 232, 478 S.E.2d 833 (1996); Riddle v. Ozmint, 369 S.C. 39, 47–48, 631 S.E.2d 70, 75 (2006). That was not the case here. The Applicant is correct when he asserts that it is equally well established that the aforementioned principles apply even where the witness' false testimony goes only to that witness' credibility. Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217, 1221 (1959). This is because "[the] jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Napue, 360 U.S. at 269, 79 S.Ct. at 1177, 3 L.Ed.2d at 1221.

However, this Court has found as a fact that the Solicitor's Office, including Assistant Solicitor Fuller and Solicitor Hubbard were not aware of the existence of the federal plea agreement. In fact, they declared that if they were aware of it, as a matter of their practice, they would have disclosed it. This Court finds with the Solicitor's lack of knowledge of the federal

agreement and their well-founded belief the responses by Wilson were truthful because of his belief, there was no duty to correct or clarify at the time Wilson's responses in the same manner that Darien's were corrected. See, People v. Wright, 2013 IL App (1st) 103232, ¶ 47, 986 N.E.2d 719, 729–30 (Ill. 2013) ("However, even under those circumstances, 'the State only has an obligation to correct the testimony of a witness when it has knowledge that the witness is mistaken in his testimony.' "). Because Applicant has failed to show that the State knowingly used perjured testimony, he cannot establish the prejudice element i.e. that the claim so infected the trial that the resulting conviction violated due process. The assertion must be denied.

Alternately, even assuming that the state improperly failed to disclose Wilson's plea agreement to Lowman, the Court must find, based upon the totality of the circumstances, that there is no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682, 105 S.Ct. at 3383. First, Wilson's testimony about the plans for the burglary were corroborated by Darien. Other parts of Wilson's testimony concerning the use of the phones, the vehicle with the implements, the photos at the Walmart, and other factors related to his testimony were confirmed by other witnesses.

Moreover, Wilson's credibility had been seriously questioned on cross-examination after he admitted he his involvement in the violent crimes and his admission that he was charged with the crimes in state court, including at least the eight warrants. Tr.p. 807-808. Wilson also declared that he was "guilty of everything I'm charged with." Tr.p. 833. As noted earlier, he was questioned about his inconsistent statement between what he told police and his trial testimony. "[W]here the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material."

Byrd v. Collins, 209 F.3d 486, 518 (6th Cir. 2000). This Court cannot conclude that the evidence of Wilson's plea agreement "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435, 115 S.Ct. 1555. The Court must deny this claim for relief.

c. For obtaining the wrong gas station surveillance footage when, had the right footage been obtained, Applicant believes he would have been exonerated.

In the Applicant's testimony, he contends that the wrong surveillance video was used in the investigation and the trial He claimed that the State (and defense) got the wrong video. He claimed that there was a video feed of the Applicant at a store which would have shown Darien there with Applicant. In the State's investigation, Lowman claimed got video of a wrong time. Counsel Williams did not recall this as being an issue at trial and was not sure what the Applicant was talking about. The prosecutors testified that that they had no idea what the Applicant was discussing.

The Applicant failed to present the surveillance video that he is contending suggests the State committed misconduct. This failure of proof by credible evidence requires that this allegation be dismissed.

d. For arguing that the tinted windows was the basis for the stop.

As stated more thoroughly within this Order, the evidence from Deputy Austin Harding, the reason for the stop was based upon the lack of insurance and the tinted window violation. Tr.p. 114-115, 121-123. Although the Applicant may disagree with the assertion, there was evidence in the record authorizing the Solicitor to argue it was the basis of the stop. He has failed in his burden of proof. The portion of the Order addressing the "reasonable suspicion" allegation is incorporated herein by reference. (Allegation (k)).

e. **For stating that Applicant made statements to the police when Applicant's position is that the statements were never made.**

The Applicant contends that the State offered false testimony and committed prosecutorial misconduct in admitting evidence of his post-arrest statement to law enforcement because he claims it never occurred. The substantive issue related to this issue was addressed in allegation (p) related to whether counsel erred in failing to object to the statement as hearsay. Further, there was a Jackson v. Denno hearing at the outset of the trial. Tr.p. 67-91. At the conclusion of the hearing, Judge Griffith found that his oral statement was admissible. Tr.p. 91. The trial court did note that cross-examination on why there were no written statements obviously would be allowed.

This Court finds that there was evidence to support the state's argument that the statement was made by the Applicant. The Applicant has failed to show credible evidence of knowing use of perjured testimony or misconduct by the prosecutors. The allegation is denied.

f. **For threatening Steven Brown with jail time if he did not testify.**

Steven Brown testified at trial that he initially saw some keys by the road on McQueen Street while stopped by the railroad on the weekend of March 11, 2017. He stated his daughter got out of the vehicle and got the keys at that time. Tr.p. 530. The keys were left in the vehicle until March 15th when they were back in the cousin's car and saw the keys and they went to the Johnston Police station to turn in the keys. Tr.p. 531. State Exhibit 40.

During cross-examination, Brown expressed how he was uncomfortable with the whole process. There was an extensive in camera discussion with him about his reluctance and not wanting to be involved in the case. Tr.p. 533-539.

The Applicant claimed that Brown was threatened by the State with jail time. The key in an area where Applicant was near when stopped by Deputy Harding. The key was to the jewelry store that was owned by the people being burglarized.

Counsel Williams testified that Brown was an unwilling witness and did not want to testify. Solicitor Hubbard testified that he was testifying under a subpoena. Hubbard stated that Brown was not threatened with jail time, subpoenas are significant though. Hubbard talked to Brown ahead of time, did not tell him what to say. Assistant Solicitor Sutania Fuller testified also that Brown was not threatened with jail and was not told what to say. He was called for a very limited purpose.

This Court finds credible the testimony that Brown was not threatened with jail at the time of his testimony. A review of the record reveals that he was a reluctant witness who did not want to participate. It further reveals that he was under subpoena and therefore required to appear. The Court finds that the Applicant failed in his burden of proof. Brown was a material witness in the case. There was a reason he was under a subpoena. There is no evidence of prosecutorial misconduct.

g. **For fabricating a fourth person being on location after Applicant's charges had been pending for some time.**

i. **Warrant says Applicant and two others were involved in the incident. At trial he was tried as a fourth person.**

The State's theory of the case at trial was that there were four individuals involved in the home invasion: the Applicant, Robert Goodwin, James Wilson and Joshua Darien. This claim by the Applicant is wholly frivolous.

Counsel Williams is unaware what this issue because three people were identified as being in the house. The defense was aware that Applicant was necessarily a fourth member given the state theory, which was that it could not have been done with three. Williams noted one person tied a woman up, another tied a man up (Mr. And Mrs. Tidwell). The third was looking around the house. The person outside could not be identified by the Tidwells.

Solicitor Hubbard was of the opinion that there was always four people involved. After the crime, the other three went back to Maryland where they were arrested.

There was probable cause to arrest all four individuals for the crimes involving the invasion of the Tidwells. The State theory of the case was the product of the evidence as it developed from the investigation, not the imagination of the prosecutor. The Applicant failed to proof prosecutorial misconduct. The allegation is dismissed.

h. **For submitting that calls were made involving a phone that was broken and could not be extracted from.**

In his PCR testimony, the Applicant contended that it was misconduct for the Solicitor to allow Captain Horne to state that the Coolpad cell phone, (State Exhibit 80) was a working device. The Applicant contended that the State knew on record that the HTC device (not State Exhibit 80), would not power on, even using the backup system. Applicant claimed that the phone number provided was not in any call center records. Applicant asserts that paperwork exists that suggests the phone did not work. However the expert witness, Toby Horne, said it worked and stated that only Applicant had access to it. Special Agent Hines' questioning identifies that the prosecution knew of this paperwork, but he was not asked about it. The Applicant questioned why if he wrote the number on the phone, why is the number not in the chain. He stated that counsel should have cross examined on this. He also referred to Montgomery County Detective Bleggi statement

indicated the number was used by co-defendant Goodwin, not by Applicant and the defense should have examined him on it.

Solicitor Hubbard stated that the testimony from Captain Toby Horne of the Saluda County Sheriff's Department was not about the HTC telephone, but the Coolpad telephone. Horn's testimony was about the Coolpad phone which was introduced as State Exhibit 80. The Coolpad phone was a code locked phone was code locked. However, it could call 911 to bypass safety feature and obtained the phone number alone. Hubbard state that Wilson's phone did not have the data but confirmed what telephone Wilson was talking and subject to extraction. Hubbard stated another disabled phone is the HTC. Hubbard did not presently know the significance of the HTC phone.

Assistant Solicitor Fuller testified that there were phones recovered from the vehicle and the pond. She stated that Maryland assisted to run a search on the phone. She stated that State Exhibit 80 , the Coolpad phone has 240 phone number and the 240 sticker was placed on that phone. Her understanding was that the HTC phone that Applicant refers was not accessible.

This Court must find that there was no prosecutorial misconduct in the presentation of the evidence of State Exhibit 80 and its relationship with the James Wilson phone. Initially, Joshua Pierce testified that State Exhibit 80, the Coolpad phone, was recovered in the search of the Applicant's vehicle. Tr.p. 576. Saluda Captain Horne was able to secure the telephone number from that device by dialing 911 which revealed number 240-474-6655 on the CAD. He then turned the telephone over to SLED. Tr.p. 667-669. James Wilson testified the that he received text messages on his phone from 240-474-6655 during the event. He stated that these messages were coming from Goodwin's phone, but that Lowman was using Goodwin's phone because Lowman's phone was off. Tr.p. 764-765.Wilson stated that Lowman had Goodwin's phone which was their

only way of communication. Tr.p. 766. SLED Agent George Hines testified that analyzed James Wilson's cellphone and was able to extract matters with Cellebrite extraction. Tr.p. 851-853. In particular Hines testified that it extracted call logs which indicated that there was a connected between Wilson's phone and State Exhibit 80 with multiple calls on March 8. Tr.p. 853-855. On cross-examination, he clarified that Wilson's phone could receive texts properly, but the extraction did not show the content between the two phones. Tr.p. 857. Further, consistent with the testimony, the recovered Apple IPAD mini, the iPhone 6, and the Coolpad all had passwords that Hines was not able to bypass and were code locked. However, he was able to extract from two phones, including Wilson's. Tr .p. 859-860.

The evidence presented by the State did not refer to the HTC which Applicant contends was broken. The evidence supports this presentation by the State. There is no evidence of prosecutorial misconduct related to this claim. The allegation must be 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 and vacate his conviction. Therefore, this application for post-conviction relief 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), Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. 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's

attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 24th **day of** Sept, 2021.

J. CORDELL MADDOX
Presiding Judge
Eleventh Judicial Circuit

Anderson, South Carolina