THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

The Honorable Grace Gilchrist Knie

Case No. 2018-CP-14-00233

Jonathan Cody Newman #362601,

Petitioner,

v.

State of South Carolina,

Respondent.

**NOTICE OF APPEAL**

Petitioner Jonathan Cody Newman appeals the Honorable Grace Gilchrist Knie's Order Denying his Application for Post-Conviction Relief filed on **October 7, 2024**, and the Court's Order Denying Applicant's Motion to Alter or Amend Judgment (Rule 59(e), SCRCP) filed on **February 14, 2025 (received February 21, 2025)**.

Dayne C. Phillips, Esq.
1614 Taylor Street, Suite D.
Columbia, SC 29201

**ATTORNEY FOR PETITIONER**

**March 3, 2025**

**Other Counsel of Record:**
T. Cruise Mitchell, Assistant Attorney General
South Carolina Attorney General's Office
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Columbia, SC 29201
**cc:** Shanita Brangman, Clarendon County Clerk of Court

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Shanita Brangman, CLK-Clarendon SC

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| STATE OF SOUTH CAROLINA<br>COUNTY OF CLARENDON | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE THIRD JUDICIAL CIRCUIT |
| Jonathan Cody Newman,<br>SCDC #362601<br>Plaintiff(s), | ) | |
| -vs- | ) | ORDER REGARDING MOTION<br>FOR RECONSIDERATION |
| State of South Carolina,<br>Defendant(s). | ) | Case No.: 2018-CP-14-00233 |

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| Hearing Date: | January 31st, 2025 |
| Hearing Judge: | Grace Gilchrist Knie |
| Counsel for Plaintiff: | Dayne C. Phillips |
| Counsel for Defendant: | T. Cruise Mitchell |
| Court Reporter: | Pamela Green |

A Rule 59 (e), SCRCP motion to reconsider and to alter or amend has been received from the Defendant, filed with the Court on October 18th, 2024, and served on the Court on October 18th, 2024. The Motion to Reconsider was properly served on the Court per Rule 59(g), SCRCP. The Court, held a hearing on this matter on January 31st, 2025. Present representing the Plaintiff was Dayne C. Phillips, Esq. Present representing the Defendant was T. Cruise Mitchell, Esq. The Plaintiff was present via WebEx.

After careful consideration of the oral arguments of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered.

Accordingly, the Plaintiff's Motion for Reconsideration made pursuant to Rule 59, SCRCP, is respectfully DENIED.

AND IT IS SO ORDERED.

February 10, 2025

Grace Gilchrist Knie, Judge
Circuit Court, Seventh Judicial Circuit

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| STATE OF SOUTH CAROLINA<br>COUNTY OF CLARENDON | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE THIRD JUDICIAL CIRCUIT |
| Jonathan Cody Newman, SCDC #362601,<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | ) | Case No. 2018-CP-14-00233<br><br>**ORDER OF DISMISSAL** |

## I. INTRODUCTION

The matter before this Court is an action for post-conviction relief (PCR) commenced by Jonathan Cody Newman ("Applicant") on June 12, 2018. On July 25, 2024, a hearing into the matter was convened before the Honorable Grace Gilchrist Knie at the Sumter County Courthouse. Applicant was present and represented by Dayne C. Phillips, Esquire. Assistant Attorney General T. Cruise Mitchell represented the State.

After hearing the testimony at the PCR hearing and upon full review of the record, this Court finds Applicant's allegations regarding ineffective assistance of counsel are without merit. For the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

## II. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. Applicant was indicted at the February 2014 term of the Clarendon County Grand Jury for murder and first-degree burglary (2013-GS-14-0293). Applicant was represented by Eleazer R. Carter, Esquire. On January 9, 2015, Applicant proceeded to a jury trial before the Honorable W. Jeffrey Young. The jury found

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Applicant guilty as indicted. Judge Young sentenced Applicant to thirty years imprisonment for burglary and thirty-five years for murder, to run concurrently.

A timely Notice of Appeal was filed on January 20, 2015. Chief Appellate Defender Robert M. Dudek (Appellate Counsel) of the South Carolina Office of Appellate Defense perfected the appeal in the form of an *Anders*[1] brief and a motion to be relieved as counsel. The South Carolina Court of Appeals dismissed the appeal and granted Appellate Counsel's motion to be relieved. *State v. Newman*, Op. No. 2015-UP-140 (S.C. Ct. App. filed April 5, 2017). The Remittitur was sent April 28, 2017.

## III. Statement of Facts

On May 25, 2013, Applicant and his two co-defendants were hanging out at a duplex that shared a common porch. (R. p.58). One of the duplex's was owned by Kevin Slater and the other by the victim. (R. p.151). That evening, Mr. Slater had friends come over to hang out and drink. (R. p.58; p.152). During the early morning hours of May 26, 2013, Applicant and his co-defendant, Montag Webb, devised a plan to rob the victim. (R. p.45). Applicant then hit victim on the shared porch. (R. p.225; p.378). Montag Webb and Applicant robbed the victim of a firearm after ransacking his home. (R. p.69; p.74–76; p.130).

Dr. Mark Jones testified that the victim had evidence of blunt force trauma to his head and face and he was unconscious while being supported by a ventilator following the incident. (R. p.289). Dr. Jones explained that the victim eventually died from those injuries on July 29, 2013. (R. p.291). Applicant, Montag Webb, and Letroy Samuels were all subsequently charged with his murder.

[1] *Anders v. California*, 386 U.S. 738 (1967).

## IV. CURRENT APPLICATION

Applicant commenced this PCR application on June 12, 2018. In his application Applicant alleged he was entitled to relief based on the following grounds:

1. Ineffective Assistance of counsel
   a. Counsel failed to conduct adequate investigation and prepare for trial
   b. Counsel was ineffective for failing to properly investigate, interview witnesses, review discovery, and adequately prepare for trial.
   c. Counsel was ineffective for failing to request severance from Applicant and Co-Defendant Samuels.
   d. Counsel was ineffective for failing to convey plea negotiation information and failed to properly pursue plea negotiations as requested by Applicant.
   e. Counsel was ineffective for failing to remove for cause potential juror #101 Eddie G. Myers, or use preemptive strike to remove juror.
   f. Counsel was ineffective for not properly objecting or otherwise preserving for appellate review the prosecution's objection to defense Counsel's questioning of key witnesses Leon Coleman about Applicant having an affair with Coleman's wife.
   g. Counsel was ineffective for failing to object to prosecutor asking State witness Lt. Daniels to bolster credibility of prosecution witnesses, and Samuel's statements.
   h. Counsel was ineffective for not properly cross-examining state witness Montag Webb about prior inconsistent statements. Additionally, Counsel failed to properly cross-examine Samuels about inconsistent statements.
   i. Counsel was ineffective for not objecting to, moving for mistrial and/or requesting curative instruction regarding Applicant's assertion of right to counsel when questioned by police.
   j. Counsel was ineffective for not making a Bruton objection or moving for severance when Lt. Daniels and Investigator Bosdall relayed to the jury Applicant's codefendant's statements to the jury that incriminated applicant.
   k. Counsel was ineffective for failing to properly advise Applicant with respect to Applicant's decision to testify.
   l. Counsel was ineffective for failing to handle, prepare for and object to co-defendant Samuel's testimony which incriminated Applicant substantially.
   m. Counsel was ineffective for failing to object or move for mistrial when co-defendant Samuels testified that the Applicant had assaulted him (Samuels) and others, was a violent person, "was a fighter" and that Samuels was afraid of him (Applicant).
   n. Counsel was ineffective for failing to properly object and prepare for Co-Defendant's testimony and present rebuttal case and response to such testimony incriminating the Applicant.
   o. Counsel was ineffective for failing to object or preserve for appellate review prosecutions pitting [Applicant's] testimony and credibility against other witnesses.

p. Counsel was ineffective for failing to object to the court's "inferred malice" instruction. The Court instructed the jury that it would infer malice based on use or brutal force on victim.

q. Counsel was ineffective for failing to request "mere presence" instruction be charged to the jury.

r. [Appellate] Counsel was ineffective for failing to brief and argue on appeal the following issues:
   i. Court erred by restricting cross-examination of witness Leon Coleman related to bias Coleman had against Applicant due to Applicant having an affair with Coleman's wife.
   ii. Court erred restricting cross-examination of cooperating witness Montag Webb related to the witness's tattoos.
   iii. Court erred by denying attorney for Applicant request to do recross cooperating witness Montag Webb about prior inconsistent statements. (Trial pg. 147).
   iv. Court erred by refusing to allow the Applicant to present rebuttal testimony/evidence in response to co-defendant Samuel's testimony and the prosecutions rebuttal case. (Trial pg. 422-25).
   v. Court erred in denying Applicants request for "self-defense" instruction (Trial. pg. 425). There was evidence that victim had a firearm and threatened applicant and others prior to incident.

s. Rule 5 / Brady violation

On June 26, 2019, Applicant, through his retained PCR attorney, Dayne Phillips, filed an amended application raising the following allegations:

1. Ineffective Assistance of Counsel
   a. Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense.

   b. Trial Counsel failed to interview critical witnesses who could have challenged the credibility of the State's witness and could have undermined the State's evidence when it was reasonable and necessary to do so in preparation for trial.
   c. Trial Counsel failed to convey a plea offer to Applicant and failed to pursue a plea negotiations as requested by Applicant.
   d. Trial Counsel failed to move for severance pursuant to Bruton v. United States, 391 U.S. 123 (1968) because admission of Applicant's co-defendant's statements violated the Confrontation Clause.
   e. Trial Counsel failed to move to strike potential juror #101 Eddie G. Myers for cause or use a preemptory strike to remove juror when it was reasonable and necessary.
   f. Trial Counsel failed to object to inadmissible and unduly prejudicial evidence during Applicant's trial, thereby failing to preserve these issues for appellate review and denying Applicant a fair trial.

g. Trial Counsel failed to object [to] the Prosecution's bolstering of the State's witnesses.
h. Trial Counsel failed to properly cross-examine the State's witness, including but not limited to Montag Webb and Letroy Samuels, regarding inconsistent statements and impeachment evidence.
i. Trial Counsel failed to properly cross-examine the State's witness, Montag Webb, regarding possible bias and motives for testifying against Applicant, specifically, questioning Montag Webb about promises in exchange for his testimony.
j. Trial Counsel failed to object and move for a mistrial and/or request for a curative instruction regarding Applicant's assertion of his right to counsel when interrogated by law enforcement.
k. Trial Counsel failed to properly argue against and preserve for appellate review the Prosecutor's objection for relevance during Trial Counsel's cross-examination of witness Leon Coleman related to the witness's possible bias against Applicant for having an affair with his wife.
l. Trial Counsel failed to properly argue against and preserve for appellate review the Prosecutor's objection for asked and answered during Trial Counsel's cross-examination of witness Montag Webb related to the meaning of his tear-drop tattoos.
m. Trial Counsel failed to properly advise Applicant regarding his right/decision to testify at trial.
n. Trial Counsel failed to move for a mistrial and/or curative instruction when Applicant's co-defendant testified that Applicant was violent, had assaulted him and other people, and that he was afraid of Applicant.
o. Trial Counsel failed to object to and move to strike the Prosecutor's pitting of Applicant's testimony and credibility of other witnesses.
p. Trial Counsel failed to properly object to the Trial Court's improper "inferred malice" instruction to the jury.
q. Trial Counsel failed to request a jury instruction for mere presence.
r. Trial Counsel failed to adequately prepare for trial by not interviewing witness(es) who could have testified regarding Applicant's good character and reputation when it was reasonable and necessary to present this evidence at trial and request a jury instruction on good character and reputation.

2. Ineffective Assistance of Appellate Counsel
   a. Appellate Counsel failed to raise the issue of whether the Trial Court erred in refusing Trial Counsel to call and present rebuttal testimony in response to the Prosecution's rebuttal testimony and his co-defendant's testimony.
   b. If found preserved for appellate review, Appellate Counsel failed to raise the issue of whether the Trial Court erred in instructing the jury that "excessive brutal force" is an inference of malice.

On October 20, 2023, Applicant, through his retained PCR attorney, Dayne Phillips, filed a second amended application raising the following additional allegations:

1. Ineffective Assistance of Counsel

a. Trial Counsel failed to adequately prepare for trial. Specifically, Trial Counsel failed to meet with or review the State's evidence with Applicant prior to the trial. Counsel also failed to inform Applicant of his scheduled trial.
b. Trial Counsel failed to inform Applicant of his rights, charges, and sentencing ranges prior to trial. Specifically, Trial Counsel failed to advise Applicant that murder carries a mandatory minimum sentence of thirty (30) years to life imprisonment upon conviction.
c. Trial Counsel failed to object when the Clerk of Court told the jury that they "have the charge with a true verdict" while being sworn under oath.
d. Trial Counsel failed to object when the Trial Court improperly told the jury that a trial is a "search for the truth" and that the jury is seeking to "reach a fair and just verdict" during the Court's opening remarks. *See State v. Alexsky*, 343 S.C. 20, 538 S.E.2d 248 (2000); *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012); *State v. Beaty*, 423 S.C. 26, 813, S.E.2d 502 (2018).
e. Trial Counsel failed to object when the Prosecutor referenced the Trial Court's statement that "this was a search for the truth".
f. Trial Counsel failed to object when the Prosecutor improperly stated, "my job as an Assistant Solicitor is to represent the interest of this community to represent your interest."
g. Trial Counsel failed to cross-examine Co-Defendant Montag Webb about him facing a mandatory minimum sentence of thirty (30) years to life imprisonment upon conviction for Murder and a mandatory minimum sentence of fifteen (15) years to life imprisonment upon conviction for Burglary, First Degree.
h. Trial Counsel failed to properly cross-examine the Pathologist Dr. Amy Durso regarding the cause and manner of death being a homicide. Specifically, Counsel failed to question the Pathologist about homicide being a medical determination and not a legal determination of homicide/murder.
i. Trial Counsel failed to object when the Prosecutor and Co-Defendant's lawyer referenced Co-Defendant's Samuel's statements to police. Additionally, Counsel was ineffective in inquiring and referencing the Co-Defendant Samuels.
j. Trial Counsel failed to object when the Prosecutor improperly referenced the Applicant's invocation of his right to an attorney when questioned by the police.
k. Trial Counsel failed to properly cross-examine Co-Defendant Samuels.
l. Trial Counsel failed to object when the Prosecutor misstated the law regarding the inference of malice during his closing argument.
m. Trial Counsel was ineffective for improperly referencing items of deadly weapons as an inference of malice.
n. Trial Counsel failed to object when the Prosecutor improperly referenced Assault with Intent to Kill.
o. Trial Counsel failed to object to the Trial Court's instruction that the jury could infer malice based on use of a deadly weapon.
p. Trial Counsel failed to object to the Trial Court's instruction that the jury could infer malice based on excessive brutal force.

2. Ineffective Assistance of Appellate Counsel

a. If found preserved for appellate review, Appellate Counsel failed to raise the issue of whether the Trial Court erred in instructing the jury that "excessive brutal force" is an inference of malice.

## V. Ineffective Assistance of Counsel, Generally

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

The reviewing court applies the two-part test outlined in *Strickland v. Washington* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; *accord. Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The applicant has the burden of establishing both deficiency and prejudice in order to be entitled to relief. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRCP. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of "were outside the wide range of competence"

demanded of attorneys in criminal cases. *Strickland*, 466 U.S. at 688. To prove prejudice, the applicant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.* Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696.

## VI. FINDINGS OF FACT & CONCLUSIONS OF LAW

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

### *Failure to Strike for Cause Juror #101*

Applicant contends Counsel was ineffective for failing to move to strike potential jury #101 Eddie G. Myers for cause or use a preemptory strike to remove juror when it was reasonable and necessary. This Court finds this allegation is without merit.

This Court finds Applicant has failed to prove Counsel was ineffective in this regard. Applicant alleges Counsel should have struck Juror #101 because he admitted during the voir dire to knowing Montag Webb's (co-defendant) sister. During voir dire, the juror in question asserted he could make his decision based upon the evidence. (R. p.520–521). Counsel was not deficient for failing to use a peremptory strike against Juror #101 based on the mere fact Juror #101 knew the co-defendant's sister in this case, especially when the juror affirmed, under oath, that he could make

a decision based solely on the evidence presented. Counsel testified, at the evidentiary hearing, he believed a family member of Applicant's co-defendant may be positively disposed to Applicant—this is a valid reason for not striking juror #101. Therefore, since this Court finds Counsel articulated a valid reason for not striking the juror, Counsel was not deficient.

Furthermore, to prevail upon a claim of ineffective assistance of counsel for failing to use a peremptory strike against a potential juror, Applicant "must provide credible evidence that the trial attorney's refusal to strike a juror prejudiced the defense." *Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). Here, Applicant has presented no credible evidence that Counsel's failure to strike Juror #101 prejudiced Applicant's defense at trial.

Accordingly, this allegation is DENIED.

***Failure to Properly Cross-Examine Montag Webb Regarding Possible Bias***

Applicant next contends Counsel was ineffective for failing to properly cross-examine the State's witness, Montag Webb, regarding possible bias and motives for testifying against Applicant, specifically, questioning Montag Webb about promises in exchange for his testimony. This Court finds this allegation to be without merit.

Applicant alleges Counsel was ineffective for failing to properly cross-examine the State's witness Montag Webb about promises in exchange for his testimony. During the cross-examination of Montag Webb, the following exchange occurred:

> Q. In deciding to come clean and pleading to this incident you had an agreement with the solicitor and the police?
>
> A. Yeah.
>
> Q. That agreement allowed you to get a plea for a lesser time?
>
> A. Yeah.
>
> Q. So that you would not have to spend the rest of your life in jail?

A. Yeah.

Q. In the process of doing that. That is why you here testifying so you can fulfill your part of the obligation?

A. I do not mean none of it so yeah. Yeah.

(R. p.120–121).

Clearly, Counsel was attempting to elicit testimony regarding Montag Webb's bias and motivation for testifying against Applicant. Although Applicant asserts Counsel should have elicited testimony regarding the precise number of years Montag Webb received as part of his plea, it is unclear from the record whether Montag Webb was promised a specific sentence in exchange for testifying. Solicitor testified, at the evidentiary hearing, he does not recall specifics surrounding the plea agreement, but it was not his standard practice to make a specific promise to a cooperating witness. This Court finds Applicant has failed to show that a specific promise to Montag Webb was made prior to Applicant's trial. Regardless, Counsel did cross-examine Montag Webb on his bias and motivation for testifying, i.e. to receive lesser time. Therefore, Counsel was not deficient in his cross-examination of Montag Webb in this regard.

Furthermore, Applicant has failed to prove he was prejudiced by any alleged deficiency in the cross-examination of Montag Webb regarding his bias. Montag Webb testified he did not know who hit the victim and did not see Applicant hit victim. (R. p.67; p.82). Even Solicitor expressed, at the evidentiary hearing, that he was frustrated by the testimony of Montag Webb. Therefore, Applicant has failed to show how further cross-examination of Montag Webb regarding his bias would have resulted in a different outcome at trial.

Accordingly, this allegation is **DENIED**.

### *Failure to Object to "Searching for the Truth" Language*

Applicant makes several allegations Counsel was ineffective for failing to object to allegedly inappropriate comments made by the trial court.

Applicant alleges Counsel failed to object when the Trial Court improperly told the jury that a trial is a "search for the truth" and that the jury is seeking to "reach a fair and just verdict" during the Court's opening remarks. *See State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000); *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012); *State v. Beaty*, 423 S.C. 26, 813, S.E.2d 502 (2018).

During its opening remarks, the Court made this statement:

> This is a real trial which is a fundamental part of our democracy and it is a search for the truth in a effort to make sure justice is done. In searching for the truth and ensuring justice is done is often slow, deliberate, and repetitive. The exact opposite of what you may have seen on television, seen in movies, or read in books…Ladies and gentlemen in determining what the true facts are in this case you must decide whether or not the testimony of a witness is believable. It will be my responsibility to rule as a matter of law whether certain testimony is admissible, but once testimony is admitted whether or not you decide to believe it is solely for you to determine…Ladies and gentlemen please do not let your thoughts wonder, but give strict attention to the testimony in this case so at the end of all the testimony, after the argument of council, and the charge on the law by me. You will then be in a position to determine what the true facts are and to apply the law to those facts and thus render a true and just verdict.

(R. pp.6–13).

Applicant cites to *Beaty* in support of his argument Counsel was ineffective; however, Applicant's trial occurred before the opinion in *Beaty* was published. Only law that existed at the time of Applicant's trial may be used to determine whether Counsel was deficient for failing to object. *See, e.g., Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law . . . ." (citing *Thornes v. State*, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993))), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *Thornes*, 310 S.C. at 309–10, 426 S.E.2d

at 765 ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

At the time of Applicant's trial, *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000) was the controlling precedent. The Court in *Aleksey* held that "instruction telling jury its 'one single objective' was 'to seek the truth' did not violate defendant's due process rights by shifting the burden of proof and diluting the reasonable doubt standard, as instruction was not part of the reasonable doubt or circumstantial evidence charges but was part of the instructions on witness credibility, and instruction was followed by additional exhortation to bear in mind the state's heavy burden of proof". *Id.*

In this case, trial court's alleged improper remarks occurred in its opening statement to the jury, not during jury instructions, and were not made in the context of reasonable doubt or circumstantial evidence; thus, were not improper at the time of trial. Counsel was not deficient in failing to object to these remarks as they were proper under case law that existed at the time of Applicant's trial.

Furthermore, the trial court gave an accurate definition of reasonable doubt in its opening statement and in its charge to the jury rendering any alleged error harmless. Therefore, Applicant has failed to prove he was prejudiced.

Accordingly, this allegation is DENIED.

***Failure to Object to Prosecutor's Opening Statement and Closing Argument***

Applicant contends Counsel was ineffective for failing to object to remarks made the solicitor during the State's opening statement. During the State's opening statement, Solicitor made the following remarks:

> I am Assistant Solicitor here in Clarendon County. It is my pleasure to present this case with the duly elected appointed Solicitor Chip Finney. I work here in

> Clarendon County and my job as an Assistant Solicitor is to represent the interest of this community to represent your interest, and is to represent the interest of the state of South Carolina. The Supreme Court has said that our job as prosecutors is not to just seek convictions but to ensure that justice is reached, to see justice, and make no mistake about it that is your goal. Justice is the goal in this case and that is what the Judge just told you a few minutes ago. He told that your job was to, was to render a verdict that speaks justice. That this was a search for the truth and that is what it is. The burden is on the State in this case to prove the evidence of the crimes charged beyond a reasonable doubt.

(R. p.14).

Applicant first contends Counsel should have objected when the solicitor referenced the trial court's statement that "this was a search for the truth." Again, these remarks were made by the prosecutor in his opening statement, and not by the trial court during his jury charge on reasonable doubt. Therefore, Counsel was not deficient in failing to object to these remarks.

Furthermore, any alleged error is harmless considering this statement occurred in the beginning of the trial when the prejudicial effect is lessened. Additionally, as noted above, the trial court gave an accurate definition of reasonable doubt during its jury charge emphasizing the State's burden of proof. (R. p.482). Thus, Applicant has failed to prove prejudice in this regard.

Applicant contends Counsel should have objected to Solicitor's remark during his closing when he requested the jury "reach a verdict that speaks the truth." (R. p.428). As stated above, this trial occurred before *Beaty* was published, so no objection was warranted. Additionally, the Solicitor informed the jury in his closing that beyond a reasonable doubt "means the State must submit it case so that you are firmly convince of the defendants guilty." (R. p. 428). This is an accurate definition of reasonable doubt. Furthermore, the trial court gave an accurate definition of reasonable doubt. (R. p.482). Therefore, any improper comment by the Solicitor was cured by the Trial Court's instruction to the jury.

Accordingly, this allegation is DENIED.

Next, Applicant contends Counsel should have objected to Solicitor's remarks that his job "is to represent the interest of this community to represent your interest, and is to represent the interest of the State of South Carolina." This allegation is without merit. The Solicitor emphasized that the jury must base its decision on whether the State has proven its case beyond a reasonable doubt by the evidence presented at trial. The Solicitor never informed the jury to base their decision on anything other than the evidence presented. Therefore, this Court finds the Solicitor's remarks in his opening statement proper and not objectionable. Thus, Counsel was not deficient in failing to object. Additionally, the Solicitor emphasized the requirement that the State must prove its case beyond a reasonable doubt using only the evidence presented at trial. Therefore, Applicant has failed to prove he was prejudiced by Counsel's alleged failure to object to the Solicitor's opening statement.

Accordingly, this allegation is DENIED.

***Failure to Properly Object to the Prosectutor's Objection to Defense Counsel's Questioning of Leon Coleman Regarding Applicant Having an Affair with Coleman's Wife***

Applicant contends Counsel was ineffective for not properly objecting or otherwise preserving for appellate review the prosecution's objection to defense Counsel's questioning of key witnesses Leon Coleman about Applicant having an affair with Coleman's wife.

During the cross-examination of Leon Coleman, Counsel elicited the following testimony:

Q. Let me finish the question. You have other reasons for saying J White said he was going to take a gun from somebody, right? You have other reasons right?

A. No sir because he said it.

Q. You mentioned earlier that you and Madeline had a period where you all broke up?

A. Yes sir.

Q. During that time Madeline had a boyfriend?

A. I mean I drove trucks. I mean it really did not matter to me that she was seeing someone else I drove trucks.

Q. I know but you know she had other boyfriends?

A. Yes sir. I had a friend on the side too.

Q. You know that J White was one of her friends right?

A. No sir because I heard J White was going with the daughter, you know her daughter.

Q. Ok well that is what you heard but you also learned that Madeline said that her seconds baby was J White, and we talked about.....

Mr. DuRant: I am objecting, relevance.

The Court: Sustain, sustain do now answer the question.

(R. p.49–50).

Here, it is clear Counsel was attempting to elicit testimony regarding a potential bias of witness, Leon Coleman. However, Solicitor objected, and the trial court sustained. Counsel continued his examination where Leon Coleman testified that he had no reason to believe Applicant was a bad guy, no reason to believe Montag Webb should not have been hanging around Applicant, and he did not see Applicant do anything wrong that night nor did he see Applicant commit a crime that night. (R. pp.50–51).

Applicant contends Counsel should have proffered the testimony of Leon Coleman to preserve the issue for appeal; however, Applicant presented no testimony from Leon Coleman at the evidentiary hearing as to what he would have testified to during a proffer. Additionally, Leon Coleman's testimony that he did not see Applicant commit any crime that night was favorable testimony elicited during Counsel's cross-examination. (R. p.51). Therefore, Applicant has failed to meet his burden establishing prejudice.

Accordingly, this allegation is DENIED.

*Failure to Cross-Examine Pathologist Regarding Cause and Manner of Death of Victim*

Applicant contends Trial Counsel failed to properly cross-examine the Pathologist Dr. Amy Durso regarding the cause and manner of death being a homicide. Specifically, Counsel failed to question the Pathologist about homicide being a medical determination and not a legal determination of homicide/murder.

This allegation is without merit. Applicant's defense at trial was that he was not the person who hit the victim. There was no justification defense presented; thus, the distinction between homicide being a medical determination and not a legal determination was not relevant to Applicant's defense. Therefore, Counsel was not deficient for failing to cross-examine the pathologist about homicide being a medical determination and not a legal determination of homicide/murder. Additionally, Applicant has failed to prove prejudice for the very same reason–there was no real dispute, at trial, about whether this was a homicide or not.

Accordingly, this allegation is DENIED.

***Failure to Properly Advise Applicant Regarding His Right to Testify***

Applicant contends Counsel failed to properly advise Applicant regarding his right/decision to testify at trial. This Court finds this allegation is without merit.

Counsel testified he always discusses with his clients their right to testify or not and the consequences of testifying. Counsel explained he discussed with Applicant the testimony that had already been given at trial to help inform his decision. Counsel prepared Applicant for testifying by discussing the questions he would be asking him. This Court finds Counsel's credible testimony demonstrates he properly advised Applicant of his right to testify and the consequences of his decision. Thus, Counsel was not deficient in this regard.

Furthermore, Applicant has failed to prove he was prejudiced by an alleged deficiency. "A

defendant's decision to testify or not must be made with knowledge of the consequences of either choice". *Brown v. State*, 340 S.C. 590, 533 S.E.2d 308 (2000). "On-the-record waiver of constitutional or statutory right is but one method of determining whether defendant knowingly and intelligently waived that right". *Brown v. State*, 317 S.C. 270, 453 S.E.2d 251 (1994). Here, the trial court engaged in a thorough colloquy with Applicant explaining his right to testify or not and the consequences of either choice. (R. p.297–298). Applicant affirmed, under oath, he understood his rights. (R. p.298). Therefore, even assuming Counsel had not properly advised Applicant of his right to testify, any misadvise was cured by the trial court during the explanation of rights colloquy.

Additionally, Applicant testified at his trial explaining his version of events while maintaining his innocence of the charges. Specifically, Applicant testified that his co-defendant Montag Webb hit the victim contradicting the testimony of both his co-defendants, Montag Webb and Letroy Samuels. Additionally, Applicant testified he never went into the victim's apartment. Furthermore, during cross-examination, Applicant insisted he did not hit the victim. (R. pp.313–371). Because Applicant's testimony was more helpful than harmful to his defense, Applicant has failed to prove he was prejudiced by Counsel's alleged failure to advise him or prepare him to testify. *See Brown v. State*, 340 S.C. 590, 596, 533 S.E.2d 308, 311 (2000) (finding that the respondent failed to prove prejudice because "on the whole, his testimony was more helpful to him than harmful" and "there is no reasonable probability the result of the trial would have been different had he chosen not to testify, because without his testimony, the jury would only have heard uncontroverted evidence of respondent's guilt."). Additionally, Applicant presented no testimony as to how his testimony at trial would have been different had Counsel further prepared him to testify.

Accordingly, this allegation is DENIED.

***Failure to Properly Argue Against the Prosecutor's Objection Regarding Witness's Teardrop Tattoo***

Applicant contends Trial Counsel failed to properly argue against and preserve for appellate review the Prosecutor's objection for asked and answered during Trial Counsel's cross-examination of witness Montag Webb related to the meaning of his tear-drop tattoos. This Court finds this allegation is without merit.

During the cross-examination of Montag Webb, the following exchange occurred:

Q. What is the "K" for a kill?

A. No it stand for my cousin.

Q. Okay the two tear drops are for kill or murder?

A. No they stand for my momma and daddy.

Q. The tear drops are for your momma and your daddy?

A. Yeah.

Q. They are not for having killed some....

Mr. Durant: Objection Your Honor he has asked the question.

The Court: Sustained

A. No

(R. pp.87–88).

The Trial Court sustained the prosecutor's objection after Counsel was about to ask, for the third time, if the teardrop tattoos represent murder. After the objection was sustained, the witness answered "no" anyway, so Counsel was entirely reasonable in not further opposing the court's ruling on the objection or requesting a proffer. Counsel testified he did not wish to push the judge

by further following up on the objection. This is a valid reason for not arguing against the trial court's ruling. Applicant has also failed to establish he was prejudiced because he offered no evidence or testimony that the witness would have answered any differently had he been proffered.

Accordingly, this allegation is DENIED.

***Failure to Object to Prior Bad Act Evidence***

Trial Counsel failed to move for a mistrial and/or curative instruction when Applicant's co-defendant testified that Applicant was violent, had assaulted him and other people, and that he was afraid of Applicant.

Applicant has failed to prove he was prejudiced by the allegedly inadmissible evidence of a prior bad act. At trial, the following exchange occurred during the cross examination of Letroy Samuels, Applicant's co-defendant:

Q. And is it not true that you are afraid of Jonathan Newman?

A. I will not say afraid. I would say more cautious.

Q. Ok why are you cautious?

A. Because I have seen him hit some people and I know he is a fighter.

Q. He has hit you before has he not?

A. Yes he has.

(R. p.383).

Applicant alleges he was prejudiced by Counsel's failure to object to this prior bad act testimony. However, the witness testified to the events following the murder:

Q. And is it not true even when you saw Jonathan Newman and Montag Webb after this incident that they told you they would kill you if you said anything?

A. Yes, well he pointed the gun at me and said I better not say anything.

Q. They did not say they would kill you?

A. He just said you better not say anything.

Q. Did you not tell the police that they told you they would kill you?

A. Because when he pointed the gun at me that is what I took it as, a threat of him saying I will kill you because I knew what it meant.

Q. Is it not true that you also told police that you were afraid of Jonathan Newman because he would do what he said?

A. Yes.

(R. pp.383–384).

This clearly admissible testimony, which is far more damaging to Applicant's defense than the alleged prior bad act testimony, was presented directly after the alleged inadmissible statement. Samuels lengthy testimony at trial severely implicated Applicant in the murder. Specifically, Samuels testified he witnessed Applicant hit the victim and, later that night, saw Applicant with the gun he stole from the victim. (R. p.378; p.383). Additionally, Samuels testified Applicant pointed the gun at him and told him not to say anything, implying that Applicant would kill him if he talked to law enforcement. (R. pp.383–384; p.386). Samules further testified he heard Applicant and Montag Webb discussing whether they should burn their clothing. (R. p.386). Samuels brief reference to the fact Applicant had "hit some people" and "know he is a fighter" was a comparatively insignificant portion of his testimony against Applicant. This Court finds, based on the totality of Samuels testimony, which was crippling for Applicant's defense, Applicant has failed to prove there was a reasonable probability the result of his trial would have been different had Counsel objected to the alleged inadmissible prior bad act evidence. *See Strickland* 466 U.S. at 694 (a reasonable probability is "a probability sufficient to undermine confidence in the outcome").

***Failure to Object to Testimony Regarding Applicant's Assertion of his Right to Counsel***

Applicant contends Trial Counsel was ineffective for failing to object and move for a mistrial and/or request for a curative instruction regarding Applicant's assertion of his right to counsel when interrogated by law enforcement.

First, there is no evidence in the record, nor any evidence offered at the evidentiary hearing, that Applicant was mirandized before refusing to give a second statement. *See Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) ("a state prosecutor may not seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story *after receiving* Miranda warnings at time of his arrest…") (emphasis added). In fact, there is evidence in the record that Applicant was not mirandized at the time he requested an attorney. (R. p.222, ll.17–19). Thus, Applicant has failed to meet his burden showing a *Doyle* violation occurred.

Second, at the evidentiary hearing it seems Applicant's counsel believed Letroy Samuel's counsel was cross-examining the witness when the alleged violation occurred, when in fact it was Counsel who was cross-examining the witness. (R. pp.247–248). Therefore, it would be improper for Counsel to object to testimony he elicited.

Third, Counsel was clearly attempting to intimate to the jury that Applicant initially gave one statement, before he was arrested, then did not give another statement because he requested an attorney *after he was arrested.* This was done to distinguish Applicant from his co-defendant's, who gave multiple statements without asking for a lawyer *before* they were arrested. This Court finds this was a reasonable trial strategy.

***Failure to Object to Inferred Malice Jury Instruction***

Applicant alleges Counsel should have objected to the trial court's jury instructions. Trial

Counsel failed to object to the Trial Court's instruction that the jury could infer malice based on excessive brutal force. This Court finds this allegation is without merit.

During the Jury Charge conference, Counsel objected to the inferred malice based on excessive force charge. (R. p.425–426). At the evidentiary hearing, Appellate Defender Robert M. Dudek testified he believed the issue was preserved for appeal, but did not see it as a winning issue. Therefore, the record conclusively refutes this allegation.

Furthermore, no case law existed at the time of trial that rejected an instruction on an inference of malice based on excessive force; therefore, Applicant was not prejudiced by any alleged deficiency in this regard.

Accordingly, this allegation is DENIED.

***Ineffective Assistance of Appellate Counsel Claims***

Applicant makes various allegations of ineffective assistance of appellate counsel claims. First, Applicant contends Appellate Defender Robert M. Dudek was ineffective for failing to raise the issue of whether the Trial Court erred in instructing the jury that "excessive brutal force" is an inference of malice. This allegation is without merit.

Appellate Defender Robert M. Dudek testified he filed an *Anders*[2] Brief of Appellant in Applicant's direct appeal. Dudek testified he did not believe this was a winning issue at the time, because it was before *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019) was published which established that an instruction on inference of malice based on the use of a deadly weapon is not proper. Dudek testified that at the time of trial an inference of malice charge was only improper when self-defense or manslaughter was argued by the defense. This was not the case at Applicant's trial. This Court finds this is a valid reason for not raising this issue on appeal; thus, appellate

[2] *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

counsel was not deficient in this regard.

Furthermore, Applicant has failed to prove prejudice. Dudek filed an *Anders* brief which requires the Court of Appeals to review the entire record to determine whether there is a meritorious issue. The Court of Appeals dismissed Applicant's appeal after review of the record.

Next, Applicant contends Appellate Counsel should have raised the issue of whether the Trial Court erred in refusing Trial Counsel to call and present rebuttal testimony in response to the Prosecution's rebuttal testimony and his co-defendant's testimony. After the conclusion of the presentation of testimony at Applicant's trial, Counsel made the following motion:

> Mr. Carter: Yes Judge, Your Honor we just approached the bench a second ago. Ordinarily rebuttal witnesses are reserved for the plaintiff or State in this case and I understand that that is the normal practice and procedure. What makes this matter different is we have two separate defendants who has separate positions we believe that we should have been allowed to present a rebuttal witness because there is another defendant whose position is quite different from ours. We wanted to present testimony from an additional witness with regards to something that the other defendant made reference to and I understand the Court is not going to allow us but I ask His Honor consider that.
>
> The Court: Would the State like to.
>
> Mr. Finney: Judge, we do not feel that it would be appropriate in light of the fact that there was sufficient discovery given to the defense prior to trial that there was an allegation that his client had a gun or had the deceased gun, showed it to other people. He was on notice to that and could have presented during this case.
>
> The Court: Mr. Carter you could have also cross examined him about that, but you did not do that. Therefore I will decline testimony from your client is disallowed. Any other motions.
>
> Mr. Carter: If you will recall I did cross examine him but he said he did not recall a gun.

(R. pp.422–423).

This Court finds this was a properly sustained objection; thus, Appellate Counsel was not ineffective for failing to raise this issue. Furthermore, as earlier noted, Counsel filed an

*Anders* brief, and the Court of Appeals dismissed Applicant's appeal after reviewing the entire record for meritorious issues. Thus, Applicant has failed to prove prejudice regarding any and all ineffective assistant of appellate counsel claims.

Additionally, to the extent Applicant is alleging Counsel was ineffective regarding this issue, Counsel properly requested and preserved for appeal the Trial Court's refusing to allow rebuttal testimony from Applicant; therefore, he was not deficient. At the evidentiary hearing, Counsel testified he does not recall which witness he wished to present rebuttal testimony from. Applicant has failed to present testimony from any potential rebuttal witness at the evidentiary hearing; thus, he has failed to prove he was prejudiced.

Accordingly, this allegation is DENIED.

Applicant further contends Appellate Counsel should have raised the issue that Trial Court erred in denying Applicant's request for self-defense. This Court finds this allegation is without merit. This Court finds there was not sufficient evidence presented supporting a charge on self-defense. Applicant contends there was testimony that the victim had a gun and threatened Applicant. However, there was no evidence presented that Applicant was without fault in bringing on the difficulty, no evidence presented Applicant believed he was in imminent danger of losing his life or sustaining serious bodily injury, and no evidence presented Applicant had no probable means of avoiding danger. *See State v. Curry,* 406 S.C. 364, 752 S.E.2d 263 (2013) (setting forth the elements of self-defense). In fact, Applicant testified at trial and asserted he did not hit the victim. Applicant never testified he acted in self-defense. Thus, Applicant has failed to prove Appellate Counsel was ineffective for failing to raise this issue.

Accordingly, this allegation is DENIED.

***Failure to Object to Prosecutor's Pitting of Witnesses***

Applicant contends Trial Counsel failed to object to and move to strike the Prosecutor's pitting of Applicant's testimony and credibility of other witnesses. This Court finds this allegation is without merit.

During the cross-examination of Applicant, the following exchange occurred:

Q. You did not remember that Leon Coleman heard what you said to Taggy?

A. He did not hear me say what he said he heard me say.

Q. So Leon Coleman is a liar?

A. Yes he is.

Q. And Taggy is a liar?

A. Yes sir.

Q. And everybody who came up here and said that you hit that old man is a liar?

A. I do not believe anybody said that I hit him.

Q. I believe Taggy said it?

A. He said that he did not see it.

Q. Leon told Lieutenant Daniels that he saw you hit Mr. Wimberly?

A. No he did not.

Q. Then Leon Coleman is a liar.

A. Yes he is a liar.

(R. pp.354–355).

Applicant avers he was prejudiced by this allegedly improper line of questioning. However, Applicant's testimony contradicted the testimony of Leon Coleman and Montag

Webb to some extent. Although Montag Webb testified he did not see Applicant hit the victim, he did state that he heard the hit after walking past Applicant down the steps of the porch. (R. p.83). As previously noted, Applicant testified that Montag Webb was the one who punched the victim. (R. p.334). Leon Coleman testified that Applicant told him he was going to rush the victim and steal his gun. (R. p.45). Applicant testified he never made that comment to Leon Coleman. (R. p.354). Thus, Applicant's responses to this line of questioning were consistent with Applicant's defense at trial. The testimony Solicitor Finney elicited during the exchange in question was clearly not harmful to Applicant's defense. Furthermore, Counsel utilized this line of questioning by arguing in his closing that testimony was presented from "a whole bunch of liars." (R. p.461). Clearly, the responses to the Solicitor's line of questioning supported Applicant's theory that the other witnesses were liars, as evidenced by Counsel's closing argument. Since this testimony was not harmful to Applicants defense, Counsel was not deficient for objecting to this testimony and Applicant was not prejudiced for the same reasons.

Accordingly, this Court finds this allegation is DENIED.

***Failure to Convey Plea Offer***

Applicant contends Counsel was ineffective for failing to convey plea negotiation information and failed to properly pursue plea negotiations as requested by Applicant. This Court finds this allegation is without merit.

Counsel testified at the evidentiary hearing that Applicant was offered three different plea offers. The first offer was for 30 years, which Counsel advised Applicant against accepting. The second offer was for 20 years which Counsel noted he told Applicant to consider this offer. Applicant ultimately rejected this offer. The third offer was for 15 years which was conveyed

during trial. Counsel credibly testified he conveyed every one of the offers to Applicant. This Court finds Counsel's testimony credible. Counsel noted he believed Applicant concluded the jury may acquit him, so Applicant rejected the offer for 15 years. Counsel testified he relayed the offer of 15 years to Applicant's mother in addition to Applicant.

Although Applicant testified he never received the 15 year offer, this Court finds, based on Counsel's credible testimony, that Counsel conveyed this offer to Applicant who ultimately rejected it. Therefore, Applicant has failed to prove Counsel was ineffective in this regard.

***Failure to Review Discovery with Applicant and Adequately Prepare for Trial***

Applicant contends Trial Counsel failed to adequately prepare for trial. Specifically, Trial Counsel failed to meet with or review the State's evidence with Applicant prior to the trial. Counsel also failed to inform Applicant of his scheduled trial.

At the evidentiary hearing, Applicant testified Counsel met with him twice before trial. Applicant testified he did not recall reviewing discovery with Counsel, only that Counsel asked him his version of what happened. Counsel testified he met with Applicant twice times when the Applicant was facing the lesser charge and two or three times before the murder trial after the enhancement. Counsel credibly testified he reviewed the discovery and State's evidence with Applicant.

There is no established "minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel." *United States v. Olson*, 846 F.2d 1103, 1108 (7th Cir.1988) (there is no constitutional minimum number of meetings between attorney and client and observes that an experienced attorney may get more out of a single meeting than a neophyte); *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005); *Campbell v. Polk*, 447 F.3d 270, 279, n.2 (4th Cir. 2006) ("we cannot conclude that the fact that Campbell's counsel

only met with him five times before trial made them ineffective."). "'[B]revity of consultation time between a defendant and his counsel, alone,' 'cannot support a claim of ineffective assistance of counsel.'" *Davis v. State*, 44 So. 3d 1118, 1130 (Ala. Crim. App. 2009) (quoting *Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir. 1984)); *White v. Godinez*, 301 F.3d 796, 800 (7th Cir. 2002) ("A brief consultation does not by itself establish that counsel's performance was inadequate."); *Chavez v. Pulley*, 623 F. Supp. 672, 685 (E.D. Cal. 1985) ("brevity of consultation time between a defendant and his counsel alone cannot support a claim of ineffective assistance of counsel," especially where the defendant "fails to allege what purpose further consultation with his attorney would have served and fails to demonstrate how further consultation with his attorney would have produced a different result").This Court finds, based on Counsel's credible testimony, that he reviewed the discovery and the State's evidence with Applicant prior to trial.

Applicant further fails to specify what Counsel did not disclose to him from materials provided in discovery, or what, if anything, could have been achieved had Counsel spent more time with him in consultation regarding the contents of his discovery. *See Smith v. State*, 404 S.C. 493, 500–01, 745 S.E.2d 378, 382 (Ct. App. 2012) (noting that an applicant must present evidence to show how additional time spent in consultation regarding discovery would have resulted in a different outcome; mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief). Thus, Applicant has failed to meet his burden establishing prejudice as to this allegation.

Applicant also makes various vague allegations that Counsel was not adequately prepared for trial and did not conduct a reasonable investigation. However, Applicant presented no evidence or testimony as to what specifically Counsel should have investigated further or how additional preparation would have resulted in a different outcome at trial. In order to prevail upon a claim

that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. *Harris v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing *Jackson v. State,* 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. *Id.* (citing *Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); *Skeen v. State*, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief.

Applicant has also failed to present the testimony of any potential exculpatory witnesses at the post-conviction relief evidentiary hearing. Our courts have "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 from the witness' failure to testify at trial." *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). Thus, Applicant has failed to prove he suffered prejudice as to these allegations.

Accordingly, these allegations are DENIED.

***Failure to Object to the Trial Court's Instruction on Circumstantial Evidence***[3]

Applicant contends that Counsel should have objected to the Trial Court's jury instruction on circumstantial evidence. During its charge on the law, the trial court gave the following instruction:

> Now, Ladies and Gentlemen, there are two types of evidence that are generally presented during a trial. There's direct evidence and there is circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact such as a eye witness. It is evidence which immediately

[3] This allegation was raised for the first time at the evidentiary hearing. The State did not object to Applicant amending his application to include this allegation.

> establishes the main fact to be proved. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence may be based on inference and not on personal knowledge or observation. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence. Ladies and Gentlemen you should weigh all of the evidence in this case and after weighing all of the evidence if you are not convinced of the guilt of the defendants beyond a reasonable doubt you must find the defendants not guilty.

(R. p.484).

"In criminal case relying in whole or in part on circumstantial evidence, once proper reasonable doubt instruction is given, jury should be instructed that law makes absolutely no distinction between weight or value to be given to either direct or circumstantial evidence, nor is greater degree of certainty required of circumstantial evidence than of direct evidence, that jury should weigh all evidence in case, and after weighing all evidence, if jury is not convinced of guilt of defendant beyond a reasonable doubt, it must find defendant not guilty." *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997), *holding modified by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004). The Supreme Court ruled in *Logan* that "defendants should not be restricted from requesting a jury charge that reflects the requisite connection of collateral facts necessary for conviction." *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013). The Court noted "this holding does not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon* and *Cherry*. However, trial courts may not exclusively rely on that charge over a defendant's objection." *State v. Logan*, 405 S.C. 83, 100, 747 S.E.2d 444, 452–53 (2013).

Here, the Trial Court gave a proper reasonable doubt instruction immediately preceding its instruction on circumstantial evidence. Meaning, the circumstantial evidence charge was proper. Applicant asserts Counsel should have requested the optional language espoused in *Logan*. However, at Applicant's trial, the State did not exclusively rely on circumstantial evidence in its

theory of the case. Lt. Sonia Daniels testified that Montag Webb made a statement that he witnessed Applicant hit victim on the porch. (R. p.225). Letroy Samuels testified that he personally witnessed Applicant hit victim. (R. p.378). This Court finds Applicant has failed to show that Counsel's representation fell below an objective standard of reasonableness for failing to request the *Logan* charge. Because the trial court's instruction was proper and in light of the direct evidence presented against Applicant, this Court finds Applicant has not proven Counsel was ineffective for failing to request the *Logan* charge.

Accordingly, this allegation is DENIED.

### *Failure to Make a Bruton Objection or Move for Severance*

This allegation was abandoned by Applicant prior to the commencement of the evidentiary hearing. Furthermore, no *Bruton*[4] violation occurred since both Applicant and his co-defendant testified at trial, so there was no confrontation clause violation.

### *Failure to Request Mere Presence Jury Instruction*

Applicant contends Counsel was ineffective for failing to request a jury instruction on mere presence. This Court finds the record refutes this allegation. During Applicant's trial, the Trial Court gave the following instruction on accomplice liability:

> The State must prove beyond a reasonable doubt by competent evidence that the theory of hand of one is the hand of all. And a principal in the crime is not who actually commits the crime or who is present, aiding, abedding or assisting in committing the crime. When a person doesn't act in the presence of and with the assistance of another, the act is done by both where two or more acting with a common plan or intent are present at the commission of a crime it does not matter who actually commits the crime. All are guilty. The hand of one is the hand of all and present at the commission of the crime needs to be sufficiently near, aid, abet and assist in the commission of the crime. However, *mere presence at the scene of a crime is not sufficient to convict* at the principal in the theory of aiding and abetting and intent is also a necessary element for there to be a common design or

[4] *Bruton v. U.S.*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

> intent to commit the crime and the crime must have been committed pursuant thereto for the person aiding and abetting by some overt act.

(R. pp.492–493) (emphasis added).

Here, the Trial Court clearly instructed the jury on mere presence; thus, Counsel was not ineffective for failing to request a mere presence instruction.

Accordingly, this allegation is DENIED.

### *Failure to Cross-Examine Co-Defendant Letroy Samuels*

Applicant contends Counsel was ineffective for failing to properly cross-examine Co-Defendant Samuels. This Court finds this allegation is without merit. At the evidentiary hearing, Applicant presented no evidence or testimony of how further cross-examination of Samuels would have resulted in a different outcome at trial. At trial, Counsel cross-examined Samuels on his alcohol use the night of the murder, clearly to attack the credibility of the witness. (R. pp.405–406). Counsel further cross-examined Samuels regarding his multiple, inconsistent statements to law enforcement. (R. p.407–413). This Court finds Counsel properly cross-examined Co-Defendant Samuels; thus, was not deficient. Furthermore, Applicant presented no evidence or testimony of how further cross-examination of Samuels would have resulted in a different outcome at trial. Therefore, Applicant has failed to prove prejudice regarding this allegation.

Accordingly, this allegation is DENIED.

### *Failure to Advise Applicant of his Charges and Sentencing*

Applicant contends Counsel was ineffective for failing to advise Applicant of his charges and sentencing. This Court finds this allegation is without merit. At the evidentiary hearing, Applicant testified that Counsel discussed and explained his charges and sentencing ranges. By Applicant's own admission, Counsel was not deficient in advising him of his charges and sentencing range. Thus, Applicant has failed to prove Counsel was ineffective in this regard.

Accordingly, this allegation is DENIED.

## VII. CONCLUSION

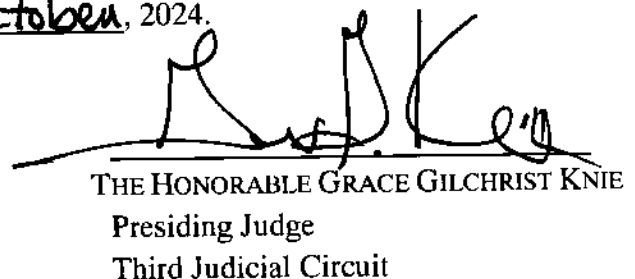
Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. This Court finds Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. Therefore, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

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

**IT IS THEREFORE ORDERED:**

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

**AND IT IS SO ORDERED** this 3rd day of October, 2024.



THE HONORABLE GRACE GILCHRIST KNIE
Presiding Judge
Third Judicial Circuit

Spartanburg, South Carolina