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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Jocelyn Newman, Circuit Court Judge

Case No.: 2018-CP-29-0338

Terry Catoe, 216913, Petitioner,

vs.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Terry Catoe, Petitioner, appeals the Order of Dismissal issued by the Honorable Jocelyn Newman on January 15, 2025, which was filed on January 23, 2025. Petitioner, through counsel received notice of the entry of the Order on February 21, 2025.

Respectfully submitted,

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March 21, 2025

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT

Terry Catoe, #216913,
Applicant,

v.

State of South Carolina,
Respondent.

Case No.: 2018-CP-29-0338

ORDER OF DISMISSAL

This matter came before the Court by way of Terry Catoe's (Applicant) action for post-conviction relief (PCR) commenced March 27, 2018. The State made its return on July 31, 2019. Applicant, through PCR Counsel, amended his application on July 7, 2021. The Court convened an evidentiary hearing into the matter on August 3, 2021, at the Lancaster County Courthouse. Applicant was present at the hearing and represented by Tricia Blanchette, Esquire. Michael D. Davidson, Esquire, of the South Carolina Attorney General's Office, appeared on behalf of the State.

Applicant testified on his own behalf at the evidentiary hearing. Applicant also presented testimony from Doctor John Wren, and Applicant's trial counsel, Tyre Lee, Esquire. The State presented testimony from ~~Applicant~~ Lee's co-counsel, Justin W. Jones, Esquire, and Deputy Solicitor Lisa Collins, Esquire. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original ~~plea~~ trial transcript, a copy of the PCR transcript, the records of the Clerk of Court regarding the subject convictions, the pleadings, and the exhibits introduced at the evidentiary hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment of the Lancaster County Clerk of Court. Applicant was indicted at the

June 2012 term of the Lancaster County Grand Jury for murder (2012-GS-23-612). Applicant was represented by Assistant Public Defenders Tyre Lee and Justin W. Jones. Solicitor Randy Newman and Deputy Solicitor Lisa Collins prosecuted the case. Applicant's case proceeded to a jury trial January 4–6, 2015, before the Honorable Brian M. Gibbons. The jury convicted Applicant as indicted. Judge Gibbons sentenced Applicant to serve life imprisonment. Applicant appealed.

Appellate Defender David Alexander perfected Applicant's appeal by filing an *Anders*[1] brief to the Court of Appeals arguing the following:

> 1. The trial court erred in admitting [Applicant's] statements into evidence because the police violated [Applicant's] Fifth and Sixth Amenment rights by using the "question first" strategy condemned in *Missouri v. Seibert*, 542 U.S. 600 (2004).

The Court of Appeals dismissed the appeal in an unpublished decision. *State v. Catoe*, Op. No. 2017-UP-256 (S.C. Ct. App. filed June 28, 2017). The case was remitted back to the circuit court on August 8, 2017.

Current Application

Applicant timely commenced this PCR action on March 27, 2018. In his application, Applicant alleged ineffective assistance of counsel for:

1. Failure to properly prepare and investigate;
2. Failure to make motions and objections; and
3. Failure to utilize Applicant as a witness at trial.

On July 7, 2021, Applicant filed an amended application adding the following allegations:

> In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were

[1] *Anders v. California*, 386 U.S. 738 (1976).

violated prior to and during his trial. Applicant would further amend his Application for Post-Conviction Relief to contain the following specific allegations of ineffective assistance of counsel:

1. Ineffective assistance of trial counsel for failure to properly prepare and present a viable defense. Specifically, but not limited to the following:
    a. Failure to ensure that Applicant understood the defense strategy prior to the rejection of the plea offer and prior to trial.
    b. Failure to prepare and utilize Applicant as a witness
    c. Failure to effectively address Applicant's statements and the summary of his interaction with law enforcement admitted by the State at trial.
    d. Failure to further question the State's expert witnesses (i.e. Dr. Janice Ross) and/or utilize an expert pathologist.
    e. Failure to provide the jury a basis for finding Applicant guilty of a lesser included offense and/or not guilty.
2. Ineffective assistance of trial counsel for failure to request an accident charge.
3. Ineffective assistance of trial counsel for failure to request proper instructions on murder and manslaughter and enter objections and/or exceptions when such instructions were not given. Specifically, but not limited to the following:
    a. The inference of malice instruction when evidence was presented that could reduce, excuse, justify or mitigate the homicide;
    b. The improper and incomplete inference of malice instruction, which lacked the general permissive inference instruction;
    c. The inference of malice instruction amounting to a comment on the facts; and
    d. The absence of an instruction that malice is not an element of voluntary manslaughter.

    See State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016), *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), *State v. Jackson*, 377 S.C. 523, 377 S.E.2d 570 (1989), *State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985), *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983).

As relief, Applicant requests a new trial. At the evidentiary hearing, Applicant proceeded forward on the allegations as set forth in the July 7, 2021, amendment.

II. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing Court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must ~~to~~ prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "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."). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced 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. "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.'" *Harrington*, 562 U.S. at 111-12 (quoting *Strickland*, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to section 17-27-80 of the South Carolina Code, this Court makes the following findings based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

This Court finds Applicant has failed to meet his burden of proving he is entitled to post-conviction relief on any of the allegations of ineffective assistance of counsel. Applicant has failed to prove both deficiency and any prejudice therefrom.

A. Ineffective assistance of trial counsel for failure to properly prepare and present a viable defense. Specifically but not limited to the following: 1) Failure to ensure that Applicant understood the defense strategy prior to the rejection of the plea offer and prior to trial; 2) Failure to prepare and utilize Applicant as a witness; 3) Failure to effectively address Applicant's statements and the summary of his interaction with law enforcement admitted by the State at trial; 4) Failure to further question the State's expert witnesses (i.e. Dr. Janice Ross) and/or utilize an expert pathologist; and 5) Failure to provide the jury a basis for finding Applicant guilty of a lesser included offense and/or not guilty.

1. Failure to ensure that Applicant understood the defense strategy prior to the rejection of the plea offer and prior to trial.

At the evidentiary hearing, Applicant called Tyre Douglas Lee, Jr., Esquire, ("Counsel") to the stand. When Counsel took the stand, he explained his years of experience and work in the public defender's office. PCR pp. 89-92. He recalled being appointed to Applicant's case and requesting full discovery. PCR pp. 92-94. He also recalled receiving discovery piecemeal as it came from the Solicitor's Office and reviewing it with Applicant. PCR pp. 92-95.

After being shown the transcript, he recalled ~~the~~ formal rejection of the plea offer of ten to twenty-six years for voluntary manslaughter in front of Judge Gibbons on November 20, 2015. PCR pp. 101-102. He could not specifically recall the advice he gave Applicant prior to the rejection of the plea offer, but he could recall Applicant not wanting to take the plea.~~PCR p. 102~~-103.

When asked if Applicant was fully advised regarding the trial strategy prior to the rejection of the plea offer, trial counsel provided a lengthy response recounting what he could remember discussing with Applicant, specifically how he prepared him to testify at trial. PCR pp. 117-119.

During direct examination, Applicant testified that he rejected the plea offer based upon counsel's advice that the court would likely sentence him to twenty-five years. PCR p. 149, lns. 6-19. He testified that counsel did not advise him of the trial strategy or strength of the State's case prior to rejection of the plea offer and that he had requested time to hire a private lawyer, but the court informed him, as is reflected in the transcript, that the case would not be continued. PCR pp. 149-150. When asked why he proceeded to a trial, Applicant responded: "I wasn't going to take a plea. I didn't kill her. They were trying to give me time for something I didn't do intentionally." PCR p. 151, lns. 11-14.

In *Judge v. State*, 321 S.C. 554, 471 S.E.2d 146 (1996) (overruled on other grounds by *Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926 (2000)), the South Carolina Supreme Court held: "The Sixth Amendment protects criminal defendants against ineffective assistance of counsel during the plea-bargaining process, even if the plea offered ultimately is rejected." *See also Davie v. State*, 381 S.C. 601, 675 S.E.2d 416 (2009).

This Court has reviewed the records, to include the transcript of the formal rejection of the plea offer, and this Court has heard and reviewed the evidentiary hearing testimony summarized above. This Court finds no deficiency in counsel's handling of the plea bargaining process, to include the rejection of the plea offer. Additionally, this Court finds Applicant has failed to show any resulting prejudice from Counsel's alleged deficiency. Notably, Applicant testified that he did not accept the plea offer due to the amount of time that counsel advised he may receive and his own decision to pursue a trial to prove his innocence. Therefore, the record does not support a finding of deficiency nor a finding of prejudice. Accordingly, the allegation is denied and dismissed with prejudice.

2. ***Failure to prepare and utilize Applicant as a witness. Failure to effectively address Applicant's statement and summary of his interaction with law enforcement.***

As addressed above, Counsel acknowledged receiving discovery, to include the investigative reports and statements of Applicant. PCR pp. 92-95. Specifically, he recalled Applicant's version of events being very similar to his final statement. PCR pp. 94-96, 122. He explained how he prepared Applicant to take the stand to testify. PCR pp. 117-119, 128-129.

He recalled advising Applicant every time they met that his testimony was "crucial." PCR p. 97, lns. 3-4, p. 137. He further recalled advising Applicant regarding his right under the Fifth Amendment to not testify, but he told Applicant that the jury would not know Applicant's side of the story if he did not tell it. PCR pp. 98-99. When asked why Applicant did not provide the testimony he deemed crucial, he responded that Applicant was concerned about the solicitor tearing him up on the stand. PCR pp. 99-100, 128-130. He explained how Applicant's decision to not testify was made just before the defense started their case. PCR pp. 100-101, 130.

When Applicant took the stand, he recalled discussing his statements with trial counsel. PCR p. 146. He recalled providing counsel additional information that was not in his statements, to include that he did not intend to kill the victim and that her death was accidental. PCR pp. 146-147. He further recalled counsel advising him to not testify because the State "could open up more doors," but counsel did not tell him what those doors were. PCR p. 147, lns. 19-24. He agreed that if he would have understood that his entire case hinged on his testimony, he would have taken the stand. PCR p. 148. He also explained the additional information he would have wanted to testify about in front of the jury. PCR pp. 148-149.

On cross-examination, Applicant testified that trial counsel did not prepare him to take the stand. PCR p. 153. Yet, he testified that counsel discussed with him what happened that night and

provided him "paperwork" on the possible questions he could be asked on the stand. PCR pp. 153-154.

The State called Justin Jones, Esquire, to the stand, and he explained how he came into the case to assist Counsel. PCR pp. 154-155. He recalled Counsel informing him of the trial strategy and his understanding that Applicant was going to testify. PCR p. 155. He further recalled meeting with Applicant during trial, Applicant deciding not to testify and informing Counsel of the same. PCR pp. 155-157. Mr. Jones described "scrambling" at that point to "rework the strategy." PCR p. 156, lns. 9-20.

When the State called Lisa Collins, Esquire, to the stand, she testified that she is currently the Deputy Solicitor for Lancaster County and that she prosecuted Applicant's case. PCR pp. 157-158. She was asked about the strength of the State's case and her understanding of the defense. PCR pp. 158-159. When asked about Applicant's decision to not testify, she responded: "It's hard to predict at the end of the day that they are willing to go ahead through to testify or that they are going to suddenly decide, I don't want to testify." PCR p. 163, ln. 23 – p. 164, ln. 1.

This Court finds Applicant has failed to show counsel was ineffective for his allegations that counsel failed to prepare and utilize Applicant as a witness or failed to effectively address Applicant's statement and summary of his interaction with law enforcement. The testimony establishes that counsel had prepared to utilize Applicant's statements in support of his defense and had prepared Applicant as the primary witness for the defense, but it was the decision of Applicant to not testify. Counsel testified that it was conveyed to Applicant that his testimony was crucial, but it was also conveyed to him that cross-examination could be brutal. As the Deputy Solicitor testified it is hard to predict if a defendant will testify or not. Here, the error, as will be discussed below, was in counsel not having a viable defense strategy without the testimony of

Applicant. Therefore, this Court finds that counsel was not deficient for failing to prepare and utilize Applicant as a witness at trial. Furthermore, this Court finds Applicant failed to show any resulting prejudice, as it was his decision to not follow the previously discussed trial strategy at the very last minute. Therefore, the record does not support a finding of deficiency nor a finding of prejudice and the allegations are denied and dismissed with prejudice.

3. *Failure to further question Dr. Janice Ross and utilize an expert pathologist.*

During the trial, the State called Dr. Janice Ross and qualified her as an expert pathologist. Trial pp. 224-225. She explained that she conducted the forensic autopsy of the victim and discussed her autopsy report. State's Trial Exhibit #13, Trial pp. 226, 228. After addressing her findings, she opined that the cause of death was asphyxia due to strangulation. Trial p. 236.

At the evidentiary hearing, Applicant called Dr. John David Wren and qualified him as an expert in forensic pathology. PCR pp. 25-26. While on the stand, Dr. Wren addressed the items he reviewed and testified regarding his findings that he could have shared with defense counsel and/or testified to at trial. PCR p. 72, ln. 19- p. 73, ln. 3.

First, he addressed the scene and referenced the pictures taken by law enforcement at the scene and autopsy. He explained his findings related to such to include: victim's forehead injuries were indicative of a fall, a contusion on her thigh was resolving, the right eye hemorrhage could be the result of asphyxia or an acute episode of heart failure, her positioning was indicative of those that die from anal intercourse, no defensive wounds, and the likelihood of sudden collapse. PCR pp. 29-38. When trial counsel was on the stand, he explained that he went to the scene, and he agreed with Dr. Wren's opinion that the scene was "a mess." PCR p. 120.

Secondly, Dr. Wren addressed the autopsy report and finding of Dr. Ross. PCR p. 41. He testified that he had "no real problems with the report." PCR p. 41, ln. 25 – p. 42, ln. 1. On cross-

examination when asked if he agreed with Dr. Ross's conclusions regarding the cause of death, he responded: "No, I said that was open to question as to whether there were contributing factors to it." PCR p. 75, lns. 12-13. On direct, he noted several findings of Dr. Ross that he could not comment on because of the lack of pictures or procedure done, to include her finding of a probable fracture of the thyroid cartilage indicative of strangulation. PCR pp. 42-45. When asked on cross-examination whether reviewing pictures or conducting an autopsy is a better way to diagnose a cause of death, he responded that doing the autopsy but added that he would have taken additional pictures while conducting the autopsy in this case. PCR p. 84, lns. 18 – p. 85, ln. 8.

During direct examination, Dr. Wren also noted the following issues in relation to the autopsy report: the fecal matter around the anus and vagina could add to accentuation or decomposition, the hyoid bone was intact which mitigates against manual strangulation, hypertrophic cardiomegaly – meaning that both ventricles of the heart were enlarged and thickened, hypertension was probable, a slight amount of frothy fluid was in the tracheobronchial tree indicative of a quick death, gallstones in the kidney which is typically an indication of hardening of the arteries or stenosis of the small vessels in the kidney, no contusion of the brain, the report did not indicate whether the cause of death was manual / soft ligature strangulation or just strangulation, and the report alternates between a possible fracture and a fracture. PCR pp. 42-45, 48-51. On direct and cross-examination, he explained in detail his concern with the reporting regarding the percent occlusion of the heart vessels. PCR pp. 45-48, 75. Further on direct, he also addressed additional photographs in conjunction with the autopsy report, and he addressed the absence and presence of hemorrhages. PCR pp. 51-55. Regarding the finding of strangulation, he responded on cross: "I don't know for sure she was strangled. ***There are signs that show she was strangled***, but there are signs that show that she could have been dead from something else." PCR

p. 78, lns. 1-4 (emphasis added). On cross-examination, the following testimony was elicited regarding the cause of death:

> Question: One more question. Can you say with medical certainty that her death was not from strangulation?
>
> Answer: ***No, I can't say within a reasonable medical certainty that one of those other three things could have happened too that I talked about; the toxicology contributing, the vasovagal response.*** That's – that's the risk people take with anal intercourse. Any time that happens, it can happen and it happens a good bit. People just don't know about it. People who won't admitted it for one reason now but it's documented. And the other one is the coronary artery disease. Any of those could have happened. I don't think it's without a doubt when – if you took a number of 10, 000 units of fluid going down this vessel, fully oxygenated and you reduce it to two and a half units going down, don't it stand to reason that they're not getting as much oxygen as they would in the other positions.

PCR p. 87, lns. 7–25. (emphasis added)

Thirdly, he addressed the toxicology reports he reviewed and his concerns regarding toxicology. PCR pp. 56-57. He explained that it appeared that the toxicology was done in duplicate, one report by SLED and one by National Medical Services Lab. PCR p. 56. He explained the slight differences in the reports and the overall findings. PCR pp. 56-59. He addressed the reports in light of Dr. Ross's findings. He detailed that victim's blood cocaine concentration was a concern and was in the range for cocaine related fatalities. PCR pp. 60-62. He further detailed that she was in the range for toxic effects and lethal effects, which can cause sudden arrythmia. PCR pp. 61-63. He also addressed the reported benzoylecgonine levels and the effects that could result. PCR pp. 61-63. On cross-examination, he explained that he could not issue an opinion in Spartanburg County until toxicology was back. PCR pp. 75-76.

Next, Dr. Wren addressed the DNA analysis and findings. PCR p. 63. He noted that some of the findings were "confusing" and noted the findings in relation to Applicant. PCR pp. 63-65.

Then, Dr. Wren addressed the pictures and alleged injuries on Applicant. PCR p. 65. While referencing trial exhibits and additional pictures, he addressed several areas of discoloration, injury, and scarring. He also addressed the absence of any scratch marks on Applicant's body. PCR pp. 65-70.

Finally, Dr. Wren addressed the likelihood of cardiac arrest resulting from pressure on the vagus nerve during anal intercourse. PCR pp. 70-72. He explained a scenario involving pressure on the vagus nerve that could be another possibility that could result in a sudden death. PCR pp. 70-72.

When trial counsel took the stand, he was asked if he had consulted with an expert pathologist prior to trial and/or investigated any of the matters testified to by Dr. Wren. PCR p. 104, lns. 1-6. He responded that he recalled reaching out to Dr. Ross and asking her about "sexual asphyxiation" and discovering she was aware of it.[2] PCR pp. 104, 132. Specifically, he explained: "I think she basically came to the conclusion, she wouldn't have – she wouldn't say that that didn't happen. That it could have happened. You know, she didn't know. I thought her testimony was pretty good. I was going to get that from her and I didn't see the need to hire anybody else." PCR p. 104, ln. 22 – p. 105, ln. 2. When asked about the State's objection to his line of questioning with Dr. Ross and not further questioning her, he responded that he got the "main thing" from her testimony. PCR p. 105, lns. 9-15.

Regarding Dr. Ross's testimony about the victim's toxicology and the testimony offered by Dr. Wren, counsel responded that he did not recall there being two toxicology reports. PCR pp.

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[2] During his continued direct examination, trial counsel was asked about his preparation with Applicant, and he stated: "I don't know if I told him or not, about that I talked to Dr. Ross and that Dr. Ross mentioned that this sort of stuff did go on. I just – I can't recall on that." PCR p. 118, lns. 16-19.

106-107. In response to whether he obtained the Coroner's file, he responded that he had what the State had given him. PCR p. 107. Again, he confirmed that Dr. Ross was the only person he consulted, but he did not provide a clear answer as to whether he discussed other alternate causes of death such as heart disease or vasovagal susceptibility with her. PCR pp. 107-108. He recalled Dr. Ross not having "a definite opinion on that." PCR p. 108, lns. 6-7. In conclusion, counsel was asked if it would have been helpful to raise and/or argue possible causes or alternative contributing factors to the victim's death. In a lengthy response, he agreed it could have been helpful and "it might have been better to have done something," but he explained that they were "sort of rushing it" and that he was planning on Applicant testifying. PCR p. 108, lns. 8-23.

After referencing the trial court's charge on proximate cause, counsel was asked if he tried to argue or show that Applicant was not the proximate cause of the victim's death. PCR p. 109. He responded: "I would have to look again. I don't recall it." PCR p. 109, ln. 16. He explained his trial strategy was to show that Applicant was instructed by victim in how to engage in "hard core sex" and Applicant was following her instructions. PCR pp. 109-110.

Deputy Solicitor Collins was called to the stand, and she testified that she prosecuted Applicant's case. PCR pp. 157-158. She was asked about the strength of the State's case and her understanding of the defense. PCR pp. 158-159. In response, she provided her high opinion of the defense counsel involved and her understanding of the defense. PCR pp. 158-164. She recalled objecting to the line of questioning about a sexually erotic act of suffocation during the cross-examination of Dr. Ross. PCR pp. 160-161. Specifically, she testified as follows: "I objected vehemently to that. I felt strongly and I still feel that it was wildly outside of the scope of the expertise of Dr. Ross." PCR p. 161, lns. 2-4.

During Applicant's direct examination, he recalled counsel talking with him about sexual asphyxiation, but he could not remember counsel's exact words. PCR p. 151. He also testified as follows:

> Question: Did he ever speak with you about getting an expert to address other potential causes of death or other ways or things that could have contributed to the victim dying in this case.
>
> Answer: No, ma'am.

PCR p. 150, ln. 23 – p. 151, ln. 2.

Applicant alleges Counsel was ineffective for his failure to further question Dr. Janice Ross and utilize an expert pathologist. However, this Court disagrees. *Strickland* requires trial counsel must be given leeway to make reasonable strategic decisions. 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. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). In making a fair assessment of attorney performance, a court must make every effort 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. Accordingly, 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).

"[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007). This duty includes the duty to investigate the prosecution's medical evidence and present expert testimony refuting the State's expert. *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008). However, when counsel vigorously cross-examines the State's witnesses and attacked the accuracy of the evidence, his representation is not rendered deficient. *Lorenzen v. State*, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) (citing *Frasier v. State*, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991)).

Based upon the record and testimony before this Court, this Court finds that counsel was not ineffective for his failure to utilize an expert and to rely upon a strategy to cross-examine the State's expert pathologist to establish a defense. Counsel testified his strategy from the outset was to have Applicant take the stand to give his side of the story and show that he put his arm over the Victim's throat at her own request and that her death from being choked was an accident. At the time that Dr. Ross testified, Counsel was not aware that Applicant would chose not to testify.

This Court finds that Counsel's strategy was reasonable. Furthermore, this Court finds that counsel was able to vigorously cross-examine the State's expert and his success at having Dr. Ross testify to sexual asphyxiation was part of his reasonable trial strategy. Accordingly, this Court finds Counsel was not deficient. *See Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992) ("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."). Additionally, this Court finds that the utilization of an expert pathologist, such as Dr. Wren, to address the scene, report of Dr. Ross, statements of Applicant, possible scenarios, contributing

factors and alternative causes of death was also based upon the above discussed trial strategy, which this Court finds reasonable. Therefore, Counsel was not deficient.

Furthermore, Applicant has failed to show any resulting prejudice as the testimony provided by Dr. Wren would not have changed the outcome of trial. Notably, the evidence presented to the jury via Applicant's statements admitted as evidence, was that he choked the Victim at her own request, and that he did not mean to kill her. The fact that the Victim died as a result of Applicant choking her was never a contested fact in the case. Additionally, Dr. Wren testified he could not be medically certain that the Victim's cause of death was from choking. This Court finds Counsel was not ineffective for failing to call an expert like Dr. Wren because even had Counsel called him at trial, Dr. Wren's testimony would contradict or undermine Applicant's statement to law enforcement and Applicant's own testimony if he had chosen to testify, that she died from accidental strangulation after Applicant complied with her request. *See Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002) (finding ineffective assistance of counsel where defense counsel called a witness whose testimony contradicted the defense's theory of the case. Accordingly, the allegation is denied and dismissed with prejudice.

4. ***Failure to provide the jury a basis for finding Applicant guilty of a lesser included offense or not guilty.***

This Court finds this issue is fully addressed throughout this Order under the other issues addressed herein. Therefore, a separate discussion of this issue is not appropriate and would be redundant.

B. Ineffective assistance of trial counsel for failure to request an accident charge.

After Applicant's decision to not testify was put on the record, a discussion was held regarding the jury charges. Trial pp. 452-3. During that discussion, the State requested an inference of malice from a deadly weapon charge and argued that a hand or fist could be considered a deadly

weapon. Trial p. 454, ln. 6. In response, the trial judge provided the charge he intended to give, unless defense counsel convinced him otherwise. Trial p. 454, ln. 17 – 455, ln. 12. The trial court explained:

> Now, there's no evidence in the record, and the defendant has indicated he is not testifying, there's no evidence in the record that I know of which would show any self-defense or any mitigating circumstances and I therefore intend on charging the deadly weapon language.

Trial p. 454, ln. 23- p. 455, ln. 3.

Then, the court asked the parties about charging voluntary manslaughter. Trial p. 455. In response, the State requested a charge on voluntary manslaughter and provided an argument in support of the request. Trial pp. 455-461. During the State's argument, the trial court asked about an involuntary manslaughter charge. Trial p. 461, ln. 15. Following the State's argument, the trial court inquired about the defense's position. Trial p. 463. Trial counsel responded that the defense objected to a charge on voluntary manslaughter but requested an involuntary manslaughter charge. Trial p. 463. Thereafter, counsel responded to the court's question of how he could charge involuntary without charging voluntary. Trial pp. 463-465. In the middle of counsel's argument, the court stated: "I agree with you on that, I'll charge involuntary. Talk to me about voluntary." Trial p. 465, lns. 8-9. In response, trial counsel argued against a voluntary manslaughter charge. Trial pp. 465-466. As counsel was concluding his response, the court stated: "And then again, they could believe that it was an accident." Trial p. 466, lns. 18-19.

After hearing from both parties, the trial judge determined that he would charge murder, voluntary and involuntary manslaughter. Trial p. 466, lns. 23-25. Following closing arguments, the trial court instructed the jury on murder, voluntary and involuntary manslaughter. Trial pp. 503-506. In relevant part, the murder instruction was given as follows:

> Now, malice aforethought may be express or inferred. These terms expressed and inferred do not mean different types of malice, but merely the manner in which malice may be shown to have existed, that's either by direct evidence or by inference from the facts and circumstances which have been proved to you.
>
> [Portion relating to express malice omitted.]
>
> Now, malice can also be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. Now, a deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm. A hand or fist is not normally considered a deadly weapon, however under some circumstances depending on the manner and means of its use the wounds inflicted and other relevant facts, a hand or fist may be considered a deadly weapon. It's for you to decide in this case beyond a reasonable doubt whether or not a hand or fist is a deadly weapon. Voluntary manslaughter.

Trial p. 504, ln. 6-7, ln. 24 – p. 505, ln. 5. No request was made or instruction given on accident.

At the evidentiary hearing, trial counsel was asked if Applicant ever discussed the victim's death being accidental, and he responded that he could not remember. PCR p. 105, lns. 18-24. When asked about the State's argument in closing that victim's death was not an accident, counsel agreed that he did not fully argue nor ask for an accident charge. PCR p. 117.

Addressing counsel's argument made in objection to a voluntary manslaughter charge and the court's response that the jury could believe it was an accident, counsel was asked why he did not request an accident charge. Trial p. 466, PCR pp. 113-114. Initially, he responded that Applicant's statement was "she asked him to do it," but he also responded that before Applicant chose not to testify he was going to argue "maybe it's an accident, maybe nobody is responsible, but we didn't have – we didn't have a specific charge on that." PCR p. 114, lns. 13-22. On cross-examination, he agreed that he was familiar with elements of an accident defense and/or charge. PCR p. 134.

From the records and testimony before this Court, this Court concludes that counsel failed to make a request for an accident charge despite the trial court's comment that counsel's argument could lead the jury to believe it was an accident. Counsel admitted that accident was part of his argument prior to Applicant's decision to not testify, but he did not "have a specific charge on that." PCR p. 114, lns. 13-22. Yet, this testimony is inconsistent with the arguments made by counsel to the court and the jury. Applicant testified that he told counsel that the victim's death was accidental. PCR pp. 146-147.

This Court finds that trial counsel was deficient for failing to request an accident charge. Recently, in *State v. Owens*, 427 S.C. 325, 831 S.E.2d 126 (Ct. App. 2019) affirmed by *State v. Owens*, Op. No. 28035 (S.C. Sup. Ct. filed June 16, 2021), the South Carolina Court of Appeals opined that that "the defense of accident is a recluse: it is seldom seen and often misunderstood." Thereafter, the Court of Appeals recommended the following charge for future cases:

> The defendant has raised the defense of accident. Harm to another, including death, is excusable on the ground of accident if the harm was caused by the unintentional and lawful act of a defendant exercising due care. For the defense of accident to apply, you must find: (1) the act of the defendant that caused the harm was accidental and not intentional; (2) the act was lawful; and (3) the act was not careless, negligent, or reckless.
>
> If you find the defense of accident applies, you must find the defendant not guilty. However, if the State has proven beyond a reasonable doubt that any of the three elements of the defense of accident do not apply, then the defendant is not entitled to the defense. A defendant engaged in unlawful conduct, including the unlawful possession of a weapon, is entitled to claim the defense of accident unless the State has proven beyond a reasonable doubt that the unlawful conduct was not merely incidental to but was the direct and foreseeable cause of the Victim's harm.

Owens, 427 S.C. at 334, 831 S.E.2d at 130.

As the record reflects, the trial court decided to charge the jury on murder, voluntary and involuntary manslaughter, so it could be deduced that the court would have considered giving a charge on accident. Nevertheless, this Court is not convinced of the prejudice that resulted from the failure to request an accident charge because counsel failed to put up a viable case under the defense of accident. The record before this Court demonstrates that Applicant did not testify nor was an expert utilized to establish the defense of accident. Therefore, this Court finds that there is a scant amount of evidence in the record to support an accident charge or a finding of not guilty under the defense of accident. Accordingly, the allegation is denied and dismissed with prejudice.

C. Ineffective assistance of trial counsel for failure to request proper instructions on murder and manslaughter and enter objections and/or exceptions when such instructions were not given. Specifically, but not limited to the following: 1) The inference of malice instruction when evidence was presented that could reduce, excuse, justify or mitigate the homicide; 2) The improper and incomplete inference of malice instruction, which lacked the general permissive inference instruction; 3) The inference of malice instruction amounting to a comment on the facts; and 4) The absence of an instruction that malice is not an element of voluntary manslaughter.

As addressed above, the trial court instructed the jury on murder, voluntary and involuntary manslaughter. Trial pp. 503-506. In relevant part, the murder instruction was given as follows:

> Now, malice aforethought may be express or inferred. These terms expressed and inferred do not mean different types of malice, but merely the manner in which malice may be shown to have existed, that's either by direct evidence or by inference from the facts and circumstances which have been proved to you.
>
> [Portion relating to express malice omitted.]
>
> Now, malice can also be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. Now, a deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm. A hand or fist is not normally considered a deadly weapon, however under some circumstances depending on the manner and means of its use the wounds inflicted and other relevant facts, a hand or fist may be considered a deadly weapon. It's for you

to decide in this case beyond a reasonable doubt whether or not a hand or fist is a deadly weapon. Voluntary manslaughter.

Trial p. 504, ln. 6-7, ln. 24 – p. 505, ln. 5.

As is also discussed above, the State requested an inference of malice from the use of a deadly weapon charge during the charging conference.[3] Trial p. 454, ln. 6. When asked at the evidentiary hearing if there was any reason he did not raise *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), or make argument against the charge, trial counsel responded that he was aware of *Belcher* and did not have a reason for not objecting or making an argument in response to the State's request. PCR pp. 110-111.

When asked about the charge stating that a hand or fist could be a deadly weapon, counsel could not recall if he had ever been involved in case where the hand or fist was considered a deadly weapon. He responded that he did not have a reason for not objecting to the State's request to give this charge. PCR p. 111. Regarding the malice charge given to the jury, counsel stated that he could not recall a reason for not objecting to the charge as being a comment on the facts. PCR pp. 115-116.

While testifying, counsel explained that the defense strategy was to get to some type of manslaughter, preferably involuntary manslaughter. PCR pp. 106, 125-126. On cross examination, he recalled that after hearing Applicant's version of events he remembered hearing about some cases involving erotic sexual asphyxiation and advising Applicant "we certainly ought to get it down lower that what you're charged with." PCR p. 125, lns. 2-3.

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[3] This Court hereby incorporates the complete discussion of the charging conference and charges given under the "accident" issue discussed above as part of the discussion of this issue.

When asked if he had a specific reason or strategy for not wanting a voluntary manslaughter charge, he responded that what he said in the transcript did not make sense since they certainly would have taken "it" (voluntary manslaughter) over murder.[4] PCR p. 112, lns. 17-23. Counsel was asked about the trial court's failure to instruct the jury that malice is not an element of voluntary manslaughter, and he could not recall a reason for not objecting or entering an exception to that charge. PCR p. 117.

Next, counsel was asked about the 1983 decision in *State v. Elmore,* 279 S.C. 417, 308 S.E.2d 781 (1983), regarding a permissive inference versus a mandatory inference, and the absence of the language set forth in *Elmore* in the instant case. PCR p. 116. He responded that he had probably read the case and was familiar with it, but he could not recall a reason for not requesting the language set forth in *Elmore*. PCR p. 116.

During his direct examination, Applicant testified that he was relying on counsel to make all necessary arguments and requests for charging the jury. PCR pp. 151-152. He also testified that he was relying upon counsel to be familiar with cases applicable to his case. PCR p. 152.

When Deputy Solicitor Collins was on the stand, she testified that the prosecution knew the defense "would be – it was a consensual act between two consenting adults that went horribly wrong but that there was no malice." PCR p. 164, lns. 7-9.

This Court has reviewed the trial transcript and summarized the relevant portions of the charging conference and jury charge under the accident issue above. Simply put, this Court is confused by counsel's performance during the charging conference and lack of explanation at the

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[4] Despite counsel's objection, the court gave a voluntary manslaughter charge. Trial pp. 463-466, 505.

evidentiary hearing.[5] As discussed below, this Court agrees that counsel rendered ineffective assistance when he failed to request proper instructions and enter objections and/or exceptions when such instructions were not given.

Prior to Applicant's trial, in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), the South Carolina Supreme Court addressed the "half-truth" created by charging that malice could be inferred from the use of a deadly weapon when there was evidence in the record to reduce, mitigate, excuse or justify the killing. After a lengthy discussion, the Court overruled prior precedent and held:

> Under our policy-making role in the common law, we hold that the "use of the deadly weapon" implied malice instruction has no place in a murder (or assault and batter with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with the intent to kill).

Belcher, 685 S.E.2d at 809.

This Court finds that trial counsel erred in failing to argue that the lower court should not have given the inference of malice instruction involving a deadly weapon when evidence was presented that could reduce, excuse, justify or mitigate the homicide. Here, counsel testified that the strategy was to get something less than murder but he failed to argue for a limited malice instruction under *Belcher* based upon the premise that evidence existed to reduce, excuse or justify the homicide. In making his argument for involuntary manslaughter, which caused the trial court to question if the jury could believe it was an accident as discussed above, counsel addressed

[5] At the evidentiary hearing, counsel seemed confused by the questions regarding his objection to voluntary manslaughter despite making a lengthy argument to the trial court against it. He stated at the evidentiary hearing that the defense wanted a charge on voluntary manslaughter. PCR pp. 112-113.

evidence that would reduce, excuse or justify the homicide but he failed respond when the court inquired about the same. Trial pp. 454-455, 463-466.

This Court finds Counsel was also deficient for his failure to object to the hand or fist language being a comment on the facts. In relevant part, the court instructed the jury:

> Inferred malice may also arise when the deed is done with a deadly weapon. Now, a deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm. A hand or fist is not normally considered a deadly weapon, however under some circumstances depending on the manner and means of its use the wounds inflicted and other relevant facts, a hand or fist may be considered a deadly weapon. It's for you to decide in this case beyond a reasonable doubt whether or not a hand or fist is a deadly weapon.

Trial p. 504, ln. 20 – p. 505, ln. 4. By failing to object to this portion of the instruction, counsel missed another opportunity to limit the malice instruction given to the jury and to ensure that the instruction given to the jury did not result in prejudice to Applicant. As discussed above, this instruction, which explained that a hand or fist could be a deadly weapon, would no longer be allowed under *Burdette*. As discussed in *Burdette*, this Court finds that the court's instruction was improper court sponsored emphasis of a fact in evidence. 427 S.C. at 503, 832 S.E.2d at 582. In *State v. Jackson*, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989), the South Carolina Supreme Court explained:

> Under South Carolina law, it is a general rule that a trial judge should refrain from all comment which tends to indicate to the jury his opinion on the credibility of the witnesses, the weight of the evidence, or the guilt of the accused. *State v. Campbell*, 374 S.E.2d 668 (S.C.1988); *State v. Sosebee*, 284 S.C. 411, 326 S.E.2d 654, n. 1 (1985) (*citing State v. Pruitt*, 187 S.C. 58, 196 S.E. 371 (1938) and *State v. Kennedy*, 272 S.C. 231, 250 S.E.2d 338 (1978)); *State v. Smith*, 288 S.C. 329, 342 S.E.2d 600 (1986).

Here, the State requested and counsel did not object to the instruction where the court specifically emphasized facts in evidence. This Court finds that counsel's failure was deficient in regards to the fact specific inferred malice instruction given to the jury.

This Court also finds that counsel was deficient for failing to request a complete inference of malice instruction and/or enter an objection or exception when the court's instruction lacked the general permissive inference instruction set forth in *State v. Elmore*, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983). Trial p. 504, ln. 6-7 – p. 505, ln. 5.

An inferred malice charge has two components, the charge detailing the circumstances from which malice can be inferred and the general permissive malice instruction. The trial court's charge on murder lacks the general permissive inference instruction that is required when a judge charges the jury on inferred malice:

> If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810, fn. 9 (2009). While *Belcher* deals specifically with a charge that permits the inference of malice from the use of a deadly weapon, the Court has stated that all inferences should be accompanied by the general permissive inference instruction. *See State v. Mattison*, 276 S.C. 235, 238 277 S.E.2d 598, 600 (1981) ("[W]e strongly suggest to the Trial Bench that a more appropriate instruction on implied malice would deal with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it"), *overruled on other grounds by Belcher*.

As discussed, dating back to 1983 in *State v. Elmore*, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983), the Court set forth a standard permissive inference charge to be used when instructing the jury on the inference of malice:

> The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

After promulgating the standard charge, the following warning was issued: "We caution the bench, that hereafter only slight deviations from this charge will be tolerated." *Id.*

In *Belcher*, 385 S.C. 597, 685 S.E.2d 802, the Court explained that *Elmore*'s first sentence constituted "[t]he standard implied malice charge" whereas the second sentence constituted "the general permissive inference instruction." 385 S.C. at 612, 685 S.E.2d at 811, fn. 9. Since *Elmore*, South Carolina's appellate courts have repeatedly instructed trial courts to give the general permissive inference charge when the standard implied malice instruction is given. *See State v. Lewellyn*, 281 S.C. 199, 201, 314 S.E.2d 326, 327 (1984) ("The trial bench is reminded that the proper charge on implied malice is that suggested in *Elmore.*"), *State v. Peterson*, 287 S.C. 244, 247, 335 S.E.2d 899, 802 (1985) ("The judge should make it clear to the jury that it is free to accept or reject these permissive inferences depending on its view of the evidence."); *Belcher*, 385 S.C. at 612, 685 S.E.2d at 811, fn. 9 (2009) (distinguishing the standard implied malice charge from the general permissive inference charge); *State v. Wilds*, 355 S.C. 269, 277, 584 S.E.2d 138, 142 (Ct. App. 2003) ("In a charge to the jury, the judge should make clear to the jury that it is free to accept or reject the permissive inferences depending on its view of the evidence.").

A trial attorney's failure to object to the lack of a general permissive inference instruction when it is warranted constitutes deficient performance by trial counsel. *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016). This Court finds that the trial court should have given the general permissive inference instruction provided in *Elmore*, and counsel admitted that he was familiar with *Elmore* and had no reason for not requesting the instruction set forth therein. Therefore, this Court finds that trial counsel was deficient when he did not request, object or enter an exception when the trial court proposed and gave an instruction that omitted a general permissive inference instruction.

However, despite Counsel's deficiencies regarding the jury charges, this Court finds that Applicant has failed to show how he was prejudiced by Counsel's deficiencies. The presence of significant, independent evidence of guilt negates any claim that counsel's performance could have reasonably affected the result of the trial. *Franklin v. Catoe*, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n.3 (2001), *cert denied*, 535 U.S. 1114 (2002); *see also Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is significant, independent evidence of guilt). When evaluating the question of prejudice pursuant to *Gibson*, the court "must decide whether the erroneous malice instruction contributed to the jury's verdict based on all the evidence presented to the jury." *Gibson* at 265, 786 S.E.2d at 265. "The Court must weigh the significance of the presumption to the jury against the other evidence of malice considered by the jury without the erroneous malice charge." *Id.* "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. In general,

the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." *Smalls* at 188, 810 S.C. at 844 (internal citations omitted).

Based upon a review of the evidence presented to the jury and the record made at the evidentiary hearing, this Court finds Applicant has failed to meet his burden of proving prejudice because the Court is not convinced that the erroneous malice instruction contributed to the jury's verdict. Specifically, after considering the strength of the State's case considering all the evidence presented to the jury, Counsel's failure to object did not amount to prejudice because there was significant, independent evidence of guilt. The State presented testimony of an eyewitness who observed Applicant and the Victim entering the home where the Victim was found murdered. That witness testified that prior to observing this, Applicant had solicited her for sex, which she denied. The State also presented the statements Applicant gave to police where he admitted to soliciting the Victim for sex, engaging in sexual intercourse with the Victim, choking the Victim while they were engaged in sexual intercourse, and leaving her to die while "she was already about to go out" because Applicant "got scared and left." Trial p. 209, ln. 7 – p. 412, ln. 14. Additionally, Applicant's DNA was found on the victim and inside the abandoned home where she was found murdered. Trial p. 328, lns. 5–11.

This Court further finds Applicant has failed to meet his burden of proving prejudice because there was significant, independent evidence of guilt which negates a conclusion that Counsel's failure to object would have a reasonable probability of a different outcome at Applicant's trial. *See Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is significant, independent evidence of guilt). Furthermore, this Court finds the evidence presented by the State presented an adequate showing of express malice that superseded inferred malice as instructed by the court. To

sum up the State's presentation of express malice, the following excerpt from the State's closing argument is representative of their showing of express malice in this case:

> Malice is define[d] as hatred, ill will or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse, or with intent to inflict injury or under circumstances that the law will infer evil intent. And I am telling you folks, he may not have had malice when he walked into that house, but when she started to put up a fight and she started to resist he had malice in his heart, and he had malice at the time and at the moment that he committed that murder and that's all it takes. Malice has to be there -- malice aforethought doesn't have to exist for any length of time, it only has to be there at that moment, and I'm telling you he had it. It's murder, folks. Dr. Ross told you it takes only seconds to go unconscious, and only four to five minutes to die when you're being strangled. Terry Catoe said in his own words he choked her for 20 to 25 minutes while engaging in brutal anal sex and when he left the damage was done, that's what he said. The damage was done.

Trial p.486, lns. 5–23. Accordingly, because Applicant has failed to show prejudice, the allegations shall be denied and dismissed with prejudice.

Finally, Applicant has alleged that that counsel was ineffective for failing to request a proper instruction on voluntary manslaughter and enter an objection or exception when the trial court failed to instruct the jury that malice is not an element of voluntary manslaughter. Trial pp. 505-506. However, this Court finds that prejudice cannot be established since the jury found Applicant guilty of murder, which requires malice. Accordingly, Applicant's claims shall be denied and dismissed with prejudice.

IV. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

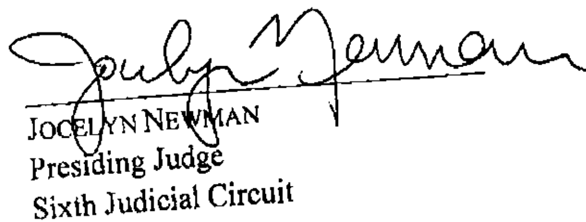
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an 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 the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 15th **day of** January, 2025



JOCELYN NEWMAN
Presiding Judge
Sixth Judicial Circuit

Columbia, South Carolina