NOTICE OF APPEAL FROM COMMON PLEAS REGARDING A

POST CONVICTION RELIEF

RECEIVED

May 14 2025

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM LANCASTER COUNTY

Court of Common Pleas

Patrick C. Fant, III., Circuit Court Judge

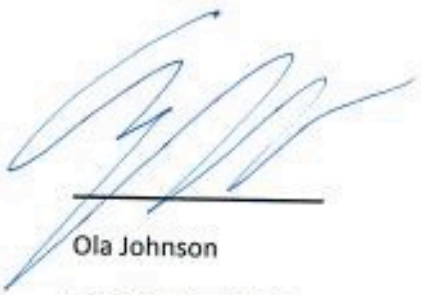
Case No. 2020-CP-29-00722

The State,.....Respondent,

John M. Ghent, Jr.,.....Appellant,

Notice of Appeal

John M. Ghent, Jr. appeals the order of the Honorable Patrick C. Fant, III, dated April 23, 2025, which denied his application for Post-Conviction Relief with prejudice. Appellant received written notice of the order on April 23, 2025.



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STATE OF SOUTH CAROLINA COUNTY OF LANCASTER	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT
John M. Ghent, Jr., #367453, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2020–CP–29–00722 **ORDER OF DISMISSAL WITH PREJUDICE**

Presiding Judge:	Hon. Patrick Cleburne Fant, III
Applicant's Attorney:	Ola A. Johnson, Esq.
Respondent's Attorney:	D. Russell Barlow, II, Esq.
Trial Counsel:	Michael H. Lifsey, Esq.
Date of Hearing:	February 23, 2024
Court Reporter:	Cynthia D. Weaver

This matter comes before the Court by way of John M. Ghent, Jr's (Applicant) application for post-conviction relief (PCR) filed on May 8, 2020. Respondent, the State of South Carolina, filed its Return on November 19, 2020, requesting an evidentiary hearing on the claims of ineffective assistance of counsel. On August 21, 2023, Applicant filed an amended application for PCR.

On February 23, 2024, an evidentiary hearing was convened at the Lancaster County Courthouse before the Honorable Patrick Cleburne Fant, III. Applicant was present and represented by Ola A. Johnson, Esquire (PCR Counsel). Senior Assistant Deputy Attorney General D. Russell Barlow, II, represented Respondent. Applicant proceeded on the claims set forth in his original and amended applications. In support of these claims, Applicant testified on his own behalf. Respondent presented the testimony of Michael H. Lifsey, Esquire (Trial Counsel).

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice.

PROCEDURAL HISTORY

The records before this Court establish 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 January 2013 term of the Lancaster County Grand Jury for Murder (2014-GS-29-47). Subsequently, Applicant was indicted at the January 2014 term of the Lancaster County Grand Jury for Possession of a Weapon During the Commission of a Violent Crime (2014-GS-29-48). Applicant was represented by Trial Counsel. Deputy Solicitor Lisa Collins prosecuted the case.

Applicant proceeded to a jury trial beginning March 14, 2016, with the Honorable Brian M. Gibbons presiding. After four days of trial, the jury returned a guilty verdict on each charge. On March 17, 2016, Judge Gibbons sentenced Applicant to fifty-four years for murder and a consecutive five years for possession of a weapon during the commission of a violent crime.

Applicant filed a timely Notice of Appeal. On appeal, Applicant was represented by Chief Appellate Defender Robert M. Dudek, who briefed the following issue:

> Whether the court erred by instructing the jury that "evidence of a suicide attempt is probative of a defendant's consciousness of guilt" since this was an improper jury instruction, it was a charge on the facts, and it was highly prejudicial?

The case was submitted on briefs, and the South Carolina Court of Appeals affirmed. State v. Ghent, Op. No. 2019-UP-272 (S.C. Ct. App. filed July 24, 2019). Thereafter, on August 8, 2019, Applicant petitioned for rehearing; however, the Court of Appeals denied Applicant's petition.

State v. Ghent, S.C. Ct. App. Order filed September 19, 2019. Applicant then petitioned for a writ of certiorari to the Supreme Court; however, the Supreme Court denied certiorari. State v. Ghent, S.C. Sup. Ct. Order filed March 12, 2020. The Remittitur was returned to the circuit court on March 13, 2020.

FACTS GIVING RISE TO THE CONVICTION

Applicant stabbed his wife, Elaine, in the chest with a fourteen-and-a-half-inch-long filet knife at approximately 4:00 AM on October 28, 2017. (Trial Tr. pp. 76–77; 92; 168). The knife entered her lung slightly left of center. (Trial Tr. p. 22). The wound was nine-tenths of an inch long with a slight twist and was made by a single-edged knife. (Trial Tr. p. 23). Other signs of injury included two surface scratches to the back of her right hand, two bruises to the left forearm, and one bruise near the stab wound on her chest. (Trial Tr. p. 23). She bled out within minutes. (Trial Tr. p. 28).

Between 4:00 and 4:15 AM, Applicant left apologetic voicemail messages for his daughter Tabitha and his sister Betsy. (Trial Tr. pp. 56; 261–263). Waking up around 7:00 that morning, Tabitha listened to the message and immediately sent her husband to her parents' house to check on them. (Trial Tr. pp. 53–54; 58). After a minute of knocking, Applicant and Elaine's son, Johnathan, and his wife came to the door. (Trial Tr. pp. 59; 82). They lived with Applicant and Elaine, along with two children of their own. (Trial Tr. p. 60). Elaine's father, Roddy, and sister, Tressa, also arrived at the house. (Trial Tr. pp. 65; 71). Johnathan rammed open the door to Applicant and Elaine's locked bedroom and found Applicant lying on the bed facing his bloodied, deceased wife. (Trial Tr. pp. 82–84). Immediately, "Johnathan grabbed [Applicant] and took him out to the kitchen" and began beating him. (Trial Tr. p. 84). Other family members became sick from the gore. (Trial Tr. pp. 65; 126; 168; 184–186). "After about the 20th punch [Applicant]

said, 'I f---- stabbed her.'" (Trial Tr. p. 84).

Over the next few days, Applicant volunteered confessions to nearly everyone he encountered. Law enforcement arrived on the scene and found him lying on his back on the kitchen floor, nonresponsive, largely uninjured, and covered in what appeared to be flour. (Trial Tr. pp. 125–126; 137). He had at least one laceration to a wrist, but it did not require medical treatment. (Trial Tr. pp. 137–138). On a non-emergency ride to the hospital, Applicant volunteered to EMS that his "son hit [him] in the face because [he had] killed [his] wife." (Trial Tr. pp. 147–149; 158; 162; 163; 417). Applicant's vitals were stable, and his blood pressure was near perfect, but his blood sugar was high. (Trial Tr. pp. 139–142). He showed no signs of overdose despite stating he had taken a copious amount of unknown pills. (Trial Tr. p. 417). At all times, he was conscious, oriented, speaking clearly, and alert to person, place, and time. (Trial Tr. pp. 143; 144).

Not only did Applicant repeatedly claim responsibility for his wife's murder, but he also volunteered why. At the hospital, Applicant told the deputy standing watch that he "killed her because she was going to leave [him]. She loved [him] but was not in love with [him]. She was staying out until 3:00 or 4:00 in the morning with her girlfriends and not coming home." (Trial Tr. p. 269). Applicant expounded, saying:

> He tried to slit his wrists but it didn't work so he took pills and he thought he would die but that didn't work. So he said his son drug him out of the bed and beat him. Son asked why did he do it, to kill his mama and Ghent stated because she was going to leave him.

(Trial Tr. p. 270). The deputy typed Applicant's confession onto his cell phone. (Trial Tr. p. 270). They were the only two people in the hospital room. (Trial Tr. p. 269). The deputy did not ask questions to elicit this information; Applicant just volunteered it. (Trial Tr. p. 270).

Later that evening, the deputy standing guard allowed the Applicant to call his sister, Betsy. (Trial Tr. p. 278). This is what this deputy heard Applicant volunteer to his sister during the

chaperoned phone call:

> Shortly after the conversation started Mr. Ghent began to sob and stated that he had killed his wife. He said he had been drinking for the both of them and taking pills. When his wife got home they had a confrontation that began and he at that point began to stab her. His wife begged him to stop. Ghent made the statement he had been thinking about it for three weeks. Mr. Ghent then stated he cut his own wrists and got on the bed next to his wife – next to his wife's body, told her that he would die with her. And then the next thing he realized was that his son had found them in the bed and his son began kicking him in the head and body. When he calmed down that was pretty much the extent of that conversation.

(Trial Tr. pp. 280–281). Applicant was alert, aware, and speaking plainly on both occasions. (Trial Tr. pp. 271; 277).

At the hospital, Applicant required no medical treatment for the superficial abrasions on his wrists. (Trial Tr. pp. 38–39). Applicant's treating physician noted that Applicant reported experiencing pain at a "zero" on a zero-to-ten scale. (Trial Tr. p. 41). He did state that he had taken two blood pressure medications and an antidepressant, presented with low blood pressure, and was treated accordingly. (Trial Tr. p. 42). Applicant usually took high blood pressure medicine. (Trial Tr. p. 42). He was ushered from the emergency room into general admission at 11:46 AM on October 28 and discharged into the custody of law enforcement on the 30th. (Trial Tr. pp. 40–41). At all times, Applicant presented as alert and oriented. (Trial Tr. pp. 39–40; 43).

Aside from Applicant's own confessions, direct evidence linked Applicant to the murder. The forensic pathologist opined that the knife recovered from the bedroom floor and brought to the autopsy likely caused the wound. (Trial Tr. pp. 24–25). A DNA analysis conducted with samples from Applicant, the victim, and that bloody knife determined that Elaine's DNA profile matched that found on the knife with a probability of 1 in 2.2 quintillion. (Trial Tr. pp. 253–254). With a probability of 1 in 4500, Applicant was a minor contributor to the DNA on the knife based upon a Y-chromosome analysis. (Trial Tr. p. 254). This analysis could not exclude Applicant's

fraternal male relatives due to their sharing the same Y-chromosome DNA profile. (Trial Tr. pp. 254–260).

Still, other evidence indicated that Applicant contemplated the murder. Johnathan and Tressa's daughter, Raylee, usually slept with Applicant and Elaine, but that night, Applicant said she had to sleep with her own parents and slammed the door shut before going to bed. (Trial Tr. p. 79). When Applicant and Elaine were discovered, there was a note taped to the outside of the bedroom door that said, "DON'T LET RAYLEE COME IN. HOPE YOU ARE HAPPY NOW!! SORRY!! SELL HOUSE AND SPLIT WITH SISTER!" (Trial Tr. pp. 133–134; 416). A handwriting analyst opined that Applicant wrote the note. (Trial Tr. p. 238). Applicant consented to producing twenty-five handwriting samples used for the comparative analysis. (Trial Tr. pp. 216–217).

Elaine's family and friends corroborated Applicant's confessed reasoning. It seemed that everybody knew that she wanted to leave him. (Trial Tr. pp. 48–49; 103; 108;113). Elaine had financially supported Applicant, who had been out of work for ten years. (Trial Tr. p. 48). When Elaine could not afford their mortgage and her car, Elaine's father assisted. (Trial Tr. pp. 48; 64–65). Applicant would charge odds and ends against Elaine's credit account at work. (Trial Tr. p. 107). Tired of paying his way, she had asked him to leave, but he refused. (Trial Tr. p. 71). When Elaine got into a car accident a few months before her death, she began caring more for herself, changed her hairstyle, began an affair, and was described as being "happy for the first time in a long time." (Trial Tr. pp. 69–70; 115). Elaine's co-workers and friends knew Elaine was actively looking for a new place to live. (Trial Tr. pp. 110; 113). It was her paramour who saw her last: they met up when Elaine got off work around midnight and stayed together until about 2:00 or 3:00 in the morning. (Trial Tr. pp. 114; 116–117). Elaine went home and texted her lover that she

had made it there safely. (Trial Tr. p. 119). She texted him that night at about 2:45 or 3:00 AM. (Trial Tr. p. 223). No one but Applicant heard from her afterward. (Trial Tr. pp. 81; 100).

According to Applicant, who testified at trial, Elaine fell victim during a struggle over the knife Applicant was going to use to kill himself. He had been thinking about the prospect of suicide for three or four weeks as a response to the prospect of Elaine planning to leave him. (Trial Tr. pp. 295–296; 331–332). He had previously spoken to his daughter Tabitha about killing himself. (Trial Tr. p. 56). The day before the early morning incident, October 27, was Applicant's birthday. (Trial Tr. p. 295). When Elaine came home from work in the early morning hours, Applicant initiated a conversation with Elaine to see if "she was really serious about leaving." (Trial Tr. p. 297). He could not "remember whether she even answered [him] or not" (Trial Tr., p. 298), but he "picked up the knife [he] had beside the bed because [he] was already planning on cutting [his] wrists and all and . . . [she must have] seen the knife in [his hand.]" (Trial Tr. p. 297).

A struggle ensued over the knife wherein, according to Applicant, Elaine grabbed his arm, trying to get him to let it go. (Trial Tr. p. 298). By Applicant's own demonstration, he held the knife in his fist in a threatening way and not in a manner demonstrative of drawing the knife across his wrist in a suicide attempt. (Trial Tr. pp. 315; 383). By Applicant's own admission, he "was standing at the foot of the bed," blocking the door to the bedroom. (Trial Tr. pp. 298; 345). During this interaction, according to Applicant, "she grabbed ahold of [his] wrist," and his "hand just slipped – arm just slipped out of her hand and went straight into her chest." (Trial Tr. p. 299). Panicking, he guessed he pulled the knife out "and throwed it down or ripped it out." (Trial Tr. p. 299). Then, Applicant testified,

> I just let her lay down and I put her to bed. I just let her lay the way she fell. I got up and went in and washed the blood off my hands and stuff and I went and sat on the bed, that's when I got the pills, I tried to cut my wrists first. . . . [B]ut something wouldn't let me cut my wrists. . . . Then I got up and went and looking around trying

> to see what kind of pills I could take to see what I had. I know she had blood pressure pills and stuff . . . I just swallowed all of them. And then I went back to the bed and I thought about my granddaughter, I didn't want her to come and see us so I wrote the note to not let her come in. I called my sister and my daughter, told them I was sorry . . . I was planning on being dead when they found us and I just wanted to let them know I was sorry.

(Trial Tr. pp. 299–300).

CURRENT ACTION BEFORE THIS COURT

Applicant timely commenced this PCR action on May 8, 2020. Applicant alleges he is being held unlawfully for the following reasons:

(1) Ineffective assistance of counsel
  (a) Mental incapacity and instability
  (b) Counsel failed to bring to the courts attention my years of having mental health problems, the present treatments I was partaking of, the medications that was prescribed for this abnormal condition, and most importantly by him not subpoenaing my mental health counselor to verify my present mental health conditions.
  (c) Mr. Lifsey failed to bring to the courts attention the long term effect of my drug abuse in being able to make decisive and rational decisions.
  (d) Mr. Lifsey failed to bring to the courts attention that the incident was an accident that happened during a very heartbreaking time in my life and the possibility of me losing everything that I ever wanted
  (e) Mr. Lifsey failed to bring to the courts attention that this incident was a crime of passion
(2) Trial Judge improper jury instructions

Respondent made its return to this application on November 19, 2020.

On March 26, 2015, Applicant filed his first amended application for post-conviction relief, in which Applicant alleges he is being held in custody unlawfully based on the following:

(3) Ineffective Assistance of Counsel:
  (a) Failed to properly review the evidence with Applicant.
  (b) Failed to provide a copy of discovery to Applicant.
  (c) Failed to meet with Applicant a sufficient number of times to properly review the evidence.
  (d) Failed to properly investigate the State's case or hire a private investigator.
  (e) Failed to retain an expert to evaluate Applicant to determine criminal responsibility, competence to stand trial, or for mitigation at sentencing.

(f) Failed to object to Tressa Howle testifying that Applicant said, "he killed her and he said if you don't quit kicking me I'm going to kill you too." (p. 177, ll. 3-5).
(g) Failed to object to Jonathan Ghent testifying to the hearsay statement that "I heard him (Mike) say he hurt your mother." (p. 185, l. 21).
(h) Failed to object to Jonathan Ghent testifying that "after about the 20th punch he (the applicant) said I fucking stabbed her." (p. 187, ll. 13-15).
(i) Failed to object to EMS worker Terri Faulkenberry testifying that Applicant stated "his son had beat him up because he had just killed his mother." (p. 247, l. 24 – p. 248, l. 1).
(j) Failed to object to Deputy Richard Weiss testifying that Applicant stated he had killed his wife. (p. 385, ll. 12-15).

This Court has before it the Lancaster County Clerk of Court records regarding the subject convictions and sentences, Applicant's records from the South Carolina Department of Corrections, the trial transcript, the records from Applicant's direct appeal, and the records of this PCR action.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[1] (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based on the following types of allegations:

(1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
(2) That the court was without jurisdiction to impose sentence;
(3) That the sentence exceeds the maximum authorized by law;
(4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
(5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
(6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

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

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this 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).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; accord. Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (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)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of

performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

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

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a

reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625; see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S.at 112.

Finally, the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel and appellate counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at both evidentiary hearings and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility. See, e.g., State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment."); Clemons v. Mississippi, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.").

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRCP (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code:

INITIAL FINDINGS

As a matter of general impression, this Court further finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant they rendered adequate assistance and exercised reasonable professional judgment in their representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS

Allegation 1a: **Mental incapacity and instability.**

Allegation 1b: **Trial Counsel failed to bring to the courts attention my years of having mental health problems, the present treatments I was partaking of the medications that was prescribed for this abnormal condition, and most importantly by him not subpoenaing my mental health counselor to verify my present mental health conditions.**

Allegation 1c: **Trial Counsel failed to bring to the court's attention the long-term effect of my drug abuse in being able to make decisive and rational decisions.**

Allegation 3e: **Trial Counsel failed to retain an expert to evaluate Applicant to determine criminal responsibility, competence to stand trial, or for mitigation at sentencing.**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to retain an expert to evaluate Applicant to determine criminal responsibility, competence to stand trial, or for mitigation at sentencing. Additionally, Applicant contends Trial Counsel failed to subpoena his mental health counselor and his mental health records and failed to inform the trial court of his inability to make rational decisions based on his history of drug abuse. This Court finds these

allegations to be without merit.

"Due process of law prohibits the conviction of a person who is mentally incompetent." Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595 (1992). An accused is competent to stand trial if he or she has sufficient capability to consult with his or her lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings. Id., 308 S.C. at 232, 417 S.E.2d at 596. "The focus of a competency inquiry is the defendant's mental capacity; the question is whether he [or she] has the *ability* to understand the proceedings." Garren v. State, 423 S.C. 1, 14, 813 S.E.2d 704, 711 (2018) (quoting Godinez v. Moran, 509 U.S. 389 (1993)).

As to the deficiency prong under Strickland, an attorney may reasonably rely upon his or her own perceptions of a defendant in determining whether or not their client should be mentally evaluated. Jeter, 308 S.C. at 233, 417 S.E.2d at 596. When establishing Strickland prejudice in the context of counsel's failure to request a mental competency evaluation, the applicant need only show a reasonable probability that he was incompetent at the time of the original proceeding. Garren, 423 S.C. at 12, 813 S.E.2d at 710 (citing Ramirez v. State, 419 S.C. 14, 21, 795 S.E.2d 841, 845 (2017)). As is the case with any other allegation that a defense attorney failed to adequately investigate some matter, an applicant must present some proof of identifiable mental health issues which undermine his or her competency; mere speculation and conjecture by the applicant is insufficient to establish prejudice. Id., 423 S.C. at 13-14, 813 S.E.2d at 711.

An applicant alleging incompetence *in fact* must show by a preponderance of the evidence that he was incompetent at the time of his original proceedings. Id., 423 S.C. at 16, 813 S.E.2d 704, 713; Hall v. Catoe, 360 S.C. 353, 358, 601 S.E.2d 335, 338 (2004).

PCR Evidentiary Hearing

On direct examination, Applicant testified that he had "been seeing mental health for like probably five or ten years or something before all of this happened." (PCR Tr. p. 8). Applicant affirmed that he had a history of substance abuse that should have been addressed. (PCR Tr. p. 8).

On direct-examination, Trial Counsel testified that based on his perception, Applicant was competent and understood the proceedings. (PCR Tr. p. 31). Trial Counsel testified that he did not see "any evidence of mental illness that would affect [Applicant's] competency to stand trial or criminal responsibility." (PCR Tr. p. 32).

On cross-examination, Trial Counsel testified that he did not hire an expert. (PCR Tr. p. 46).

On redirect examination, Trial Counsel testified that he did not feel that an expert was necessary based on the facts in the case. (PCR Tr. p. 51).

Findings

This Court finds the combination of the record and Trial Counsel's **credible** testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds that Applicant failed to provide any credible evidence demonstrating incompetence at the time of his trial. Furthermore, this Court finds Applicant did not bring forth any expert witness to substantiate his claims, nor did he present his mental health counselor or relevant mental health records to this Court. See Garren, *supra*.

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

Allegation 1d: Trial Counsel failed to bring to the court's attention that the incident was an accident that happened during a very heartbreaking time in my life, and the possibility of me losing everything that I ever wanted.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to present to the jury that this was an accident and for failing to present that the murder was a crime of passion. This Court finds this allegation to be without merit.

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On direct examination, Applicant testified that Trial Counsel could have done a better job at presenting that it was an accidental death because he was "just planning on killing himself." (PCR Tr. p. 9). Applicant testified that there are five or ten minutes from the night of the murder that he just cannot remember. (PCR Tr. p. 9).

On cross-examination, Applicant testified that he tried telling everyone it was an accident, but everyone kept saying it was not. (PCR Tr. p. 23). Applicant testified that he never said anything about it being a crime of passion. (PCR Tr. pp. 23–24). Applicant testified that he could not remember about ten minutes of that night, and he may have "flipped," but he could not recall. (PCR Tr. p. 24).

On direct examination, Trial Counsel testified that Applicant's story was that it was an accident. (PCR Tr. p. 29). Trial Counsel testified that it was difficult to overcome the "self-implicating notes and messages." (PCR Tr. p. 29). Trial Counsel testified that their defense at trial was that it was an accident and not a malicious murder. (PCR Tr. p. 30). Trial Counsel testified that he was able to have the jury charged with accident and involuntary manslaughter. (PCR Tr. p. 43).

Findings

As an initial matter, this Court finds Trial Counsel's testimony **credible** and Applicant's testimony on this matter **not credible**. This Court finds the combination of the record and Trial Counsel's **credible** testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds the record provides the jury was charged on accident and involuntary manslaughter, which wholly refutes Applicant's allegation 1d.

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

Allegation 1e: Trial Counsel failed to bring to the court's attention that this incident was a crime of passion.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to bring to the court's attention that the incident was a crime of passion. This Court finds these allegations to be without merit.

PCR Evidentiary Hearing

On cross-examination, the following colloquy occurred with Applicant:

Q. So in one allegation you say it's an accident, but in your next allegation you say, Failure to bring to the Court's attention that it was a crime of passion. So was it a crime of passion or was it an accident?
A. I never said anything about it being a crime of passion. But I always said it was an accident, because, I mean, we was just talking and she was trying to take the knife away from me and it ended up slipping and stabbing her one time in the chest. She grabbed the knife with her hand one time and I guess her hand was bloody and that's when my wrist slipped out of her hand.

. . . .

Q. I'm going to show you something. Do you recognize that?
A. Yeah.
Q. Is that your handwriting?
A. No.
Q. It's not your handwriting?
A. Uh-uh.
Q. Who's handwriting is it?
A. Another guy in prison I had write it for me.
Q. Okay. Did you direct him to write that?
A. Yeah.
Q. And did he write out what you told him to say or what you -- did he write out what you were saying to him?
A. I'm not sure.
Q. So you filed the application without looking at what he wrote?
A. Yeah, I read it. I mean, I looked at it, but I didn't like -- I don't remember, like I say, this has been 10 years ago. I mean, my memory is...

Q. If I may, here, that it was a crime of passion. Do you see that?
A. Uh- huh .
Q. Okay. Is that still one of your allegations?
A. I mean, I don't know. I mean, like I said, there was a few -- five or 10 minutes in between when all of this happened, I don't remember what happened, what was said, what was going on. And then after that -- that day I found out that day she was seeing somebody else. So she may have said something about seeing somebody to me, I don't remember. I don't know if she told me she was seeing somebody else at the time and I flipped or whatever I don't know.
Q. So you - -
A. Like I said, I've been trying for 10 years to remember this 10 minutes that I lost and I can't remember. I can't recall what happened, what was said, what went on, I don't know.

(PCR Tr. pp. 23–25).

On direct examination, Trial Counsel testified that Applicant's story was that it was an accident. (PCR Tr. p. 29).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. The record before this Court provides that the jury was charged on voluntary manslaughter. Thus, Applicant cannot show any resulting prejudice from Trial Counsel's alleged deficiency. See Strickland, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to

present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

Allegation 2: Trial Counsel failed to effectively argue against the jury charge regarding the attempted suicide as evidence of guilt.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to effectively argue against the jury charge regarding attempted suicide as evidence of guilt. This Court finds this allegation to be without merit.

"In reviewing jury charges for error, [the reviewing court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (quoting State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)). "[A] charge is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Burton, 302 S.C. 494, 498, 397 S.E.2d 90, 92 (1990) (citing State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980)). If the charge "is substantially correct and covers the law [it] does not require reversal." State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (citing State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996)). "Moreover, '[t]o warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.'" State v. Marin, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting State v. Brandt, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011)). An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583–84 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)).

Trial

At trial, during the charge conference, the following colloquy occurred:

MR. NEWMAN:	It's not that. It says, "Evidence of a suicide attempt is probative of the defendant's consciousness of guilt is generally admissible --
THE COURT:	Consciousness of guilt is what you're trying to get at. What number is it?
MR. NEWMAN:	Number 28.
THE COURT:	Do you have any problem with that, Mr. Lifsey?
MR. LIFSEY:	I think that ' s the law but I don't think you should charge that. I know it's in the I don't know who puts together whatever is on the court's website but I believe that's an impermissible comment on the facts. I think the solicitor can argue that, but I would ask the Court to not charge that comment on the facts to the jury.

. . . .

MR. NEWMAN:	Your Honor, it's "Evidence of suicide attempt is probative on the defendant's consciousness of guilt and is generally admissible for whatever value"
THE COURT:	And the defense objects to that. Your objection is noted on the record but I think that's a reasonable statement and that that is a statement of the law as well.
MR. LIFSEY:	And I acknowledge it's a statement on the law, my objection is that it's a comment on the facts, but I understand the Court's ruling.
THE COURT:	Sure. Well, so is accident, that's a comment on the facts as well. But I think under the fundamental fairness standard if I'm going to charge accident I'm going to charge suicide, and that's the purpose as my friends read this why I did that.

(Trial Tr. pp. 463–464; 465).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel could have done a better job at arguing the jury charge, presenting that it was an accidental death because he was "just planning on killing himself." (PCR Tr. p. 9). Applicant testified that there are five or ten minutes from the night of the murder that he just cannot remember. (PCR Tr. p. 9).

On cross-examination, Trial Counsel testified that he objected to the prosecution arguing suicide as evidence of guilt because he thought it was improper. (PCR Tr. pp. 46–47).

Findings

This Court finds the combination of the record and Trial Counsel's **credible** testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds that the record demonstrates Trial Counsel's objection to the suicide being presented as evidence of guilt, effectively preserving this issue for appeal. The South Carolina Court of Appeals reviewed this issue and determined that any potential error in the jury instruction was harmless, thereby affirming Applicant's conviction and sentence. Furthermore, the South Carolina Supreme Court declined to grant certiorari on this specific matter. It is clear that Trial Counsel cannot be deemed deficient for preserving an issue for appeal that ultimately proved unsuccessful, nor can the Applicant claim to have suffered any prejudice from the alleged deficiency.

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

Allegation 3a: Trial Counsel failed to properly review the evidence with Applicant.
Allegation 3b: Trial Counsel failed to provide a copy of discovery to Applicant.
Allegation 3d: Trial Counsel failed to properly investigate the State's case or hire a private investigator.

Applicant alleges Trial Counsel was constitutionally ineffective for failing properly review the evidence with Applicant, failing to provide a copy of discovery, failing to properly investigate the State's case, and for failing to hire a private investigator. This Court finds these allegations to be without merit.

A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "[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) (internal quotation marks omitted) (emphasis omitted). However, counsel need only interview potential witnesses "when it is reasonable to do so." Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691.

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)), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). The applicant must further present evidence demonstrating how the discoverable matters or defenses would have resulted in a different outcome. Id. Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel's duty to investigate. Ard, 372 S.C. at 331, 642 S.E.2d at 597 ("this duty is limited to [a] reasonable investigation"). The United States Supreme Court also instructed reviewing courts to "keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690. Thus, in applying the Strickland standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation must be evaluated with heavy deference to counsel's judgment. Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633 (Ct. App. 2014).

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On direct examination, Applicant testified that Trial Counsel only reviewed the evidence with him "[m]aybe once." (PCR Tr. p. 10). Applicant testified that Trial Counsel "maybe" should have hired a private investigator. (PCR Tr. p. 11).

On cross-examination, Applicant testified that Trial Counsel gave him a half-inch-thick binder with his discovery before trial, and after trial, he received a three-inch binder. (PCR Tr. pp.

20–21). Applicant testified that they reviewed none of the discovery. (PCR Tr. p. 21). Applicant testified that Trial Counsel never brought any discovery for review. (PCR Tr. p. 22).

On direct examination, Trial Counsel testified that he reviewed discovery with Applicant, but due to the nature of the crime, Applicant was reserved in what he wanted to review. (PCR Tr. p. 28). Trial Counsel testified that he reviewed the State's evidence with Applicant. (PCR Tr. p. 34).

On redirect examination, Trial Counsel testified that based on the State's evidence, he did not need an investigator for this case. (PCR Tr. p. 51).

Findings

As an initial matter, this Court finds Trial Counsel's testimony **credible** and Applicant's testimony on these matters **not credible**. This Court finds the combination of the record and Trial Counsel's **credible** testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds that Trial Counsel **credibly** testified that he reviewed the discovery with Applicant and that, based on the State's evidence, he did not need an investigator. Furthermore, Applicant failed to present any credible evidence of what Trial Counsel could have discovered or what other defenses Applicant could have requested Trial Counsel develop and present had counsel been more prepared or had they reviewed discovery further. Instead, Applicant presented only vague speculation, and mere speculation is not enough. See Harris, Glover, *supra*.

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

Allegation 3c: Trial Counsel failed to meet with Applicant a sufficient number of times to properly review the evidence.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to meet with Applicant a sufficient number of times. This Court finds this allegation to be without merit.

Federal case law holds that there is no constitutional minimum number of meetings between attorneys and their clients to satisfy competency. Campbell v. Polk, 447 F.3d 270, 279 fn.2 (4th Cir. 2006) (no constitutional minimum number of meetings to satisfy competency); United States v. Olson, 846 F.2d 1103, 1108 (7th Cir. 1988) (reciting that there is no constitutional minimum number of meetings between attorney and client and observing that an experienced attorney may get more out of a single meeting than a neophyte). "Brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) (holding it is not enough to merely show that counsel only met with his client twice before trial as long as counsel devoted sufficient time to ensure an adequate defense and to become thoroughly familiar with the facts of the case and the law applicable to the case, and holding the record revealed that counsel was so prepared.).

South Carolina case law has established that even if Trial Counsel only met with his client

very briefly, that alone does not establish that he was unprepared or ineffective at trial. See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter) ("First, there is no question that counsel met with [Applicant] on several occasions prior to the first trial. Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation."). An applicant must present evidence to show how additional time spent in consultation 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. Smith v. State, 404 S.C. 493, 500-01, 745 S.E.2d 378, 382 (Ct. App. 2012) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018); Skeen v. State, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997)).

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On direct examination, Applicant testified that Trial Counsel met with him four to five times. (PCR Tr. p. 11).

On cross-examination, Applicant testified that Trial Counsel met with him four to five times. (PCR Tr. p. 19).

On direct examination, Trial Counsel testified that some of his notes reflected that he met with Applicant four to five times, but he felt he met with him more than that. (PCR Tr. p. 33). Trial Counsel testified that it was his practice to meet with clients multiple times. (PCR Tr. p. 33).

On cross-examination, Trial Counsel testified that he could not argue Applicant's accounting for the number of times they met because he did not independently recall. (PCR Tr. p. 45).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds that the record before this Court provides that Trial Counsel was prepared for Applicant's trial, that he was familiar with the facts of the case, and he knew the applicable law in the case. Applicant presented no credible evidence to this Court to show how additional time spent in consultation would have resulted in a different outcome at trial.

Turning to the portion of the allegation regarding the review of evidence, this Court has made its findings on this matter in Allegations 3a, 3b, and 3d, *supra*.

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

Allegations of Failure to Object

"An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence

admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3d Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel's performance, the reviewing court will "strong[ly] presum[e]" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Yarborough, 540 U.S. at 8 (internal quotation marks omitted); cf. Higgs v. United States, 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess.") (citing Byram v. Ozmint, 339 F.3d

203, 209 (4th Cir. 2003)); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness").

Allegation 3f: Trial Counsel failed to object to Tressa Howle testifying that Applicant said, "he killed her, and he said if you don't quit kicking me, I'm going to kill you too." (p. 177, ll. 3-5).

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to Tressa Howle's testimony that Applicant said, "he killed her and he said if you don't quit kicking me, I'm going to kill you too." (Trial Tr. p. 177, ll. 3–5). This Court finds this allegation to be without merit.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. Hearsay is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. See State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (S.C. App. 2001). However, an admission by a party opponent is by definition not hearsay. Rule 801(d)(2), SCRE.

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On direct examination, Trial Counsel testified that he did not believe it was objectionable because it was a statement by a party opponent which is excluded from the definition of hearsay. (PCR Tr. p. 36). Trial Counsel testified that even if it fell within hearsay that it was "probably a statement against interest." (PCR Tr. p. 36).

On cross-examination, Trial Counsel testified that the testimony was not objectionable. (PCR Tr. p. 48).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds that any objection by Trial Counsel to this testimony would have been futile as it was admissible pursuant to Rule 801(d)(2)(A), SCRE. See State v. Beck, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000) ("As a general rule, statements or declarations made by one accused of a crime are admissible against him.") (quoting State v. Plyler, 275 S.C. 291, 295, 270 S.E.2d 126, 128 (1980); United States v. Benson, 957 F.3d 218 (4th Circ. 2020) ("Rule 801(d)(2)(A) provides that a statement is not hearsay if 'the statement is offered against an opposing party' and 'was made by [that] party in an individual or representative capacity.' Thus, a defendant's own statements constitute 'admissions by a party-opponent and [are] admissible pursuant to' this Rule.") (citing United States v. Wills, 346 F.3d 476, 489 (4th Cir. 2003); see also Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to

present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

Allegation 3g: Trial Counsel failed to object to Jonathan Ghent testifying to the hearsay statement that "I heard him (Mike) say he hurt your mother." (p. 185, l. 21).

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to Jonathan Ghent's testimony, "I heard him (Mike) say he hurt your mother." (Trial Tr. p. 185, l. 21).

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. Hearsay is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. See State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (S.C. App. 2001).

PCR Evidentiary Hearing

On direct examination, Trial Counsel testified that he should have objected to the statement. (PCR Tr. pp. 36–37). Trial Counsel testified that while it was cumulative to what others had testified to, he should have objected. (PCR Tr. p. 37).

On cross-examination, Trial Counsel testified that it was hearsay, and he should have objected. (PCR Tr. p. 48).

Findings

This Court finds that Trial Counsel has not articulated any strategic reason as to why he failed to object to the hearsay testimony. Instead, Trial Counsel testified that he missed the

testimony. As such, this Court finds Trial Counsel's failure to object to this hearsay testimony was deficient. Turning to prejudice, this Court finds that while Trial Counsel was deficient, Applicant can show no prejudice from the alleged deficiency. From the record, the elicited testimony was cumulative to other testimony at Applicant's trial. See State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("[T]he admission of improper evidence is harmless where it is merely cumulative to other evidence."). In PCR, the burden is placed on the Applicant to prove there is a reasonable probability, but for Counsel's unprofessional errors, the result of the proceeding would have been different. Butler, 286 S.C. at 334 S.E.2d at 818. Here, Applicant has failed to prove that this one-off hearsay statement, which was cumulative to the testimony of other witnesses, would have created a reasonable probability that the result of the proceeding would have been different.

Accordingly, this Court finds Applicant has failed to establish any prejudice flowing from Trial Counsel's deficiency. Thus, this allegation must be **DENIED** and **DISMISSED with PREJUDICE.**

Allegation 3h: Trial Counsel failed to object to Jonathan Ghent testifying that "after about the 20th punch, he (the applicant) said I fucking stabbed her." (p. 187, ll. 13-15).

Applicant alleges Trial Counsel was constitutionally ineffective for failing to to object to Jonathan Ghent testifying that "after about the 20th punch, he [Applicant] said I fucking stabbed her." (Trial Tr. p. 187, ll. 13–15). This Court finds this allegation to be without merit.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. Hearsay is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. See State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (S.C. App. 2001). However, an admission by a party

opponent is by definition not hearsay. Rule 801(d)(2), SCRE.

PCR Evidentiary Hearing

On direct examination, Trial Counsel testified that the statement was not objectionable because it was a statement of a party opponent and is excluded from the definition of hearsay. (PCR Tr. pp. 37–38).

On cross-examination, Trial Counsel testified that he did not think Jonathan Ghent was a credible witness and that his testimony was not that important. (PCR Tr. pp. 48–49).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds that any objection by Trial Counsel to this testimony would have been futile as it was admissible pursuant to pursuant to Rule 801(d)(2)(A), SCRE. See State v. Beck, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000) ("As a general rule, statements or declarations made by one accused of a crime are admissible against him.") (quoting State v. Plyler, 275 S.C. 291, 295, 270 S.E.2d 126, 128 (1980); United States v. Benson, 957 F.3d 218 (4th Circ. 2020) ("Rule 801(d)(2)(A) provides that a statement is not hearsay if 'the statement is offered against an opposing party' and 'was made by [that] party in an individual or representative capacity.' Thus, a defendant's own statements constitute 'admissions by a party-opponent and [are] admissible pursuant to' this Rule.") (citing United States v. Wills, 346 F.3d 476, 489 (4th Cir. 2003); see also Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails

both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

Allegation 3i: Trial Counsel failed to object to EMS worker Terri Faulkenberry testifying that Applicant stated, "his son had beat him up because he had just killed his mother." (p. 247, l. 24 – p. 248, l. 1).

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to EMS worker Terri Faulkenberry testifying that Applicant stated, "his son had beat him up because he had just killed his mother." (p. 247, l. 24 – p. 248, l. 1). This Court finds this allegation to be without merit.

PCR Evidentiary Hearing

On direct examination, Trial Counsel testified that he filed a motion *in limine* on this issue and argued it pretrial. (PCR Tr. pp. 38–39). Trial Counsel testified that he renewed his objection to the line of questioning by the EMS witness on page 244 of the trial transcript. (PCR Tr. p. 39). Trial Counsel testified that he thought the trial judge was correct in his ruling because the EMS worker was not acting in the direction of law enforcement.

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. The record before this Court provides that Trial Counsel did file a motion *in limine* and argued that the statement from Applicant to EMS should not be admitted into evidence. During trial, Trial Counsel renewed his pretrial objections at the start of questioning the EMS witness. This Court finds that any objection by Trial Counsel to this testimony would have been futile as it was admissible pursuant to Rule 801(d)(2)(A), SCRE. See State v. Beck, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000) ("As a general rule, statements or declarations made by one accused of a crime are admissible against him.") (quoting State v. Plyler, 275 S.C. 291, 295, 270 S.E.2d 126, 128 (1980); United States v. Benson, 957 F.3d 218 (4th Circ. 2020) ("Rule 801(d)(2)(A) provides that a statement is not hearsay if 'the statement is offered against an opposing party' and 'was made by [that] party in an individual or representative capacity.' Thus, a defendant's own statements constitute 'admissions by a party-opponent and [are] admissible pursuant to' this Rule.") (citing United States v. Wills, 346 F.3d 476, 489 (4th Cir. 2003); see also Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

Allegation 3j: Trial Counsel failed to object to Deputy Richard Weiss testifying that Applicant stated he had killed his wife. (p. 385, ll. 12-15).

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to Deputy Richard Weiss testifying that Applicant stated he had killed his wife. (Trial Tr. p. 385, ll. 12-15). This Court finds this allegation to be without merit.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. Hearsay is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. See State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (S.C. App. 2001). However, an admission by a party opponent is by definition not hearsay. Rule 801(d)(2), SCRE.

PCR Evidentiary Hearing

On direct examination, Trial Counsel testified that he did not believe it was objectionable because it was a statement by a party opponent which is excluded from the definition of hearsay. (PCR Tr. p. 36). Trial Counsel testified that even if it fell within hearsay that it was "probably a statement against interest." (PCR Tr. p. 36).

On cross-examination, Trial Counsel testified that the testimony was not objectionable. (PCR Tr. p. 48).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds that any objection by Trial Counsel to this testimony would have been futile as it was admissible pursuant to Rule 801(d)(2)(A), SCRE. See State v. Beck, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000) ("As a general rule, statements or declarations made by one accused of a crime are admissible against him.") (quoting State v. Plyler, 275 S.C. 291, 295, 270 S.E.2d 126, 128 (1980); United States v. Benson, 957 F.3d 218 (4th Circ. 2020) ("Rule 801(d)(2)(A) provides that a statement is not hearsay if 'the statement is offered against an opposing party' and 'was made by [that] party in an individual or representative capacity.' Thus, a defendant's own statements constitute 'admissions by a party-opponent and [are] admissible pursuant to' this Rule.") (citing United States v. Wills, 346 F.3d 476, 489 (4th Cir. 2003); see also Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably

effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

|CONCLUSION PAGE FOLLOWS|

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 PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

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

AND IT IS SO ORDERED this 23rd **day of** April **, 2025.**

PATRICK CLEBURNE FANT, III
Presiding Judge
Sixth Judicial Circuit

LANCASTER, South Carolina